newsletter on intellectual freedom

IFC ALA

Editor: Henry Reichman, California State University, East Bay
Founding Editor: Judith F. Krug (1940–2009)
Publisher: Barbara Jones
Office for Intellectual Freedom, American Library Association

ISSN 0028-9485

September 2010 ☐ Vol. LIX ☐ No. 5 ☐ www.ala.org/nif

IFC report to ALA Council

The following is the text of the Intellectual Freedom Committee's report to the ALA Council, delivered June 29 at the ALA Annual Conference in Washington, D.C. by IFC Chair Martin Garnar.

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities.

INFORMATION

Intellectual Freedom Manual, Eighth Edition

The newly revised and updated eighth edition of the *Intellectual Freedom Manual* made its debut at the ALA Store here in Washington, D.C. A convenient reference guide for librarians and library trustees addressing intellectual freedom and privacy issues in their libraries, the eighth edition of the *Manual* includes up-to-date legal information on censorship, minors' rights, and the USA PATRIOT Act; three new Interpretations of the *Library Bill of Rights*; revisions to ten existing Interpretations of the *Library Bill of Rights*; and major policy documents addressing privacy and professional ethics.

A website to supplement and update the print edition of the *Intellectual Freedom Manual* also debuted during Annual Conference. Online at www.ifmanual.org, the new site provides access to new policies and policy revisions as well as expanded online resources for academic and school librarians.

If you were unable to purchase the *Manual* in the ALA Store here in Washington, you may purchase it at the ALA Store Online at www.alastore.ala.org (search for *Intellectual Freedom Manual*).

Emerging Leaders and Libraries and the Internet Toolkit

During its Spring Meeting, the Intellectual Freedom Committee worked with 2010 Emerging Leaders Eileen Bosch, Toni Dean, Amanda Robillard, Mara Degnan-Rojeski, and Yen Tran to revise the "Libraries & the Internet Toolkit: Tips and Guidance for Managing and Communicating about the Internet." The Emerging Leaders presented an updated draft of the document during their poster session on Saturday, June 28. They will continue to work with the Committee to update and maintain this important document. The final version of the document can be seen online at *www.ifmanual.org/litoolkit.*

(continued on page 191)

Published by the ALA Intellectual Freedom Committee, Martin Garnar, Chair

in this issue

IFC report to ALA Council 189

prisoners' right to read 192

FTRF report to ALA Council 193

professors seek to defend speech protections 194

Jewish groups protest UC handling of anti-Semitism 195

an X-rated Internet domain? 195

why Russians back censorship 196

censorship dateline: libraries, schools, university, foreign 197

from the bench: U.S. Supreme Court, broadcasting, student press, colleges and universities, copyright 201

is it legal?: colleges and universities, copyright, privacy 209

success stories: libraries, college, Internet 217

targets of the censor

books

The Absolutely True Diary of a Part-Time Indian 198

The Curious Incident of the Dog in the Night-time 200

Revolutionary Voices: A Multicultural Queer Youth Anthology 199

Science Explorer: Cells and Heredity 200

We'll Be Here for the Rest of Our Lives 218

manga [genre] 197

periodicals

New Times [Russia] 225

film

Out in Silence 217

broadcasting

Fresh Air 219

READ BANNED BOOKS

(ISSN 0028-9485)

Newsletter on Intellectual Freedom is published bimonthly (Jan., Mar., May, July, Sept., Nov.) by the American Library Association, 50 E. Huron St., Chicago, IL 60611. The newsletter is also available online at www.ala.org/nif. Subscriptions: $70 per year (print), which includes annual index; $50 per year (electronic); and $85 per year (both print and electronic). For multiple subscriptions to the same address, and for back issues, please contact the Office for Intellectual Freedom at 800-545-2433, ext. 4223 or oif@ala.org. Editorial mail should be addressed to the Office of Intellectual Freedom, 50 E. Huron St., Chicago, Illinois 60611. Periodical postage paid at Chicago, IL and at additional mailing offices. POSTMASTER: send address changes to Newsletter on Intellectual Freedom, 50 E. Huron St., Chicago, IL 60611.

(IFC report . . . from page 189)

Protecting Cyberspace as a National Asset Act

Senator Lieberman and other members of Congress have introduced legislation that would make the Department of Homeland Security responsible for protecting civilian information and telecommunication networks in the government and private sector whenever the President declares a national cyber emergency. The bill, entitled the "Protecting Cyberspace as a National Asset Act," S. 3480, is intended to better define the President's authority in these matters and to update existing laws intended to protect critical network infrastructure during national emergencies. Contrary to some news reports, the bill does not authorize a "kill switch," nor does it put the National Security Agency or the Department of Defense in charge of cyber security operations applicable to civilian government or privately held critical infrastructure.

Changes are needed, however, to ensure that cyber security measures do not infringe on free speech, privacy, and other civil liberties interests. It is imperative that cyber security legislation not erode our rights.

The Washington Office and the Office for Intellectual Freedom have already begun to take action to ensure that free speech and privacy rights are preserved and that the government's activity concerning cyber security remains transparent to the public. They have joined a coalition of privacy, civil liberties, and civil rights groups to urge the necessary changes to this legislation. This coalition sent a letter expressing its concerns to Senator Lieberman on June 23.

As a result of our letter and the work of other concerned organizations and individuals, the Senate committee responsible for this bill met on June 24 and made significant changes to the legislation that represents the first steps to resolving the civil liberties issues posed by the "Protecting Cyberspace as a National Asset Act." Both offices will continue to work with the coalition to ensure that this bill conforms with established ALA policies concerning free speech, privacy, and government surveillance.

Alliance Defense Fund Letters on Meeting Room Policies

The Alliance Defense Fund (ADF), a Christian legal organization, has initiated a letter-writing campaign to libraries and schools around the country. The campaign targets libraries' meeting room policies that restrict the use of a library's meeting rooms for religious services. In its letter, ADF advises libraries receiving the letter that it believes the library's meeting room policy is unconstitutional and that ADF will initiate legal action if the library does not change its policy.

The Office for Intellectual Freedom (OIF) has been providing librarians and library trustees with answers to their questions about meeting room policies and the ADF's letter ,including copies of model meeting room policies, information about court opinions addressing library meeting room policies, and advice on reviewing and revising meeting room policies in light of recommended best practices.

Librarians and library trustees who wish to speak to OIF about their meeting room policies and/or the ADF letter should call or write Deborah Caldwell-Stone, OIF's Deputy Director. She can be reached at 800-545-2433 x4224, or dstone@ala.org.

For more information on religion and public libraries, please consult "Religion in American Libraries, a Q&A," a new document by the ALA Intellectual Freedom Committee. The Q&A can be found online at www.ifmanual.org/religionqa.

PROJECTS

Choose Privacy Week

A film featuring Neil Gaiman, Cory Doctorow, Geoffrey Stone, and ALA President Camila Alire discussing some of today's most interesting and complex privacy issues provided the cornerstone for the first-ever Choose Privacy Week, held May 2–8, 2010. Bloggers and others across the web promoted the video, which has been viewed over 14,000 times since its debut on May 2. Choose Privacy Week events took place in Florida, Indiana, Massachusetts, Maine, Missouri, New Hampshire, Ohio, Pennsylvania, Rhode Island, Vermont, and Virginia. Over 160 persons attended an Association of College and Research Libraries (ACRL) online Choose Privacy Week event, and 44 librarians participated in an online workshop on learning how to host community forums on privacy. Over 50 libraries blogged about Choose Privacy Week, and BoingBoing, Unshelved, LISNews, and CILIP were among the blogs and online news sites that highlighted Choose Privacy Week.

Organizing for Choose Privacy Week 2011 is now underway. Plans include the release of the Privacy Week video on DVD for schools and libraries, expanded programming for children and youth, and strengthened alliances with our privacy partners, including the Center for Democracy and Technology, the Electronic Frontier Foundation, the American Civil Liberties Union, and the Campaign for Reader Privacy.

The dates for next year's Choose Privacy Week will be May 1–7, 2011. For more information on ALA's privacy initiative and Choose Privacy Week, and to view the Privacy Week video, please visit www.privacyrevolution.org.

Banned Books Week

2010 marks the 29th annual celebration of Banned Books Week, which will be held September 25 through October 2. New this year is the 2010 edition of *Banned Books: Challenging Our Freedom to Read*, by Robert P. Doyle. The book has been revamped significantly and

provides a framework for understanding censorship and the protections guaranteed to us through the First Amendment. In addition to the lists of books banned or challenged throughout the ages, the book includes interpretations of the uniquely American notion of freedom of expression, supplemented by straightforward, easily accessible information that will inspire further exploration.

"Think for Yourself and Let Others Do the Same" is the slogan for this year's campaign. Banned Books Week promotional merchandise such as t-shirts, buttons, and bookmarks featuring this slogan is available for purchase through the ALA Store online at *www.alastore.ala.org.*

For the fourth year in a row, the Office for Intellectual Freedom and the McCormick Freedom Project will host a Read-Out! to kick off Banned Books Week on Saturday, September 25, 2010. This year's Read-Out! will feature authors of the top ten most frequently challenged books of 2009. Stephen Chbosky, author of *The Perks of Being a Wallflower*; Carolyn Macker, author of *The Earth, My Butt, and Other Big Round Things*; Lauren Myracle, author of *ttyl*, *ttyn*, and *l8r g8r* (Internet Girl Series); and Justin Richardson and Peter Parnell, authors of *And Tango Makes Three*, will talk about their experiences as targets of censorship and will read from their works. Chris Crutcher, author of *Whale Talk*, *Athletic Shorts*, *Staying Fat for Sarah Byrnes*, among other highly acclaimed novels, will emcee the event.

More information about Banned Books Week can be found at www.ala.org/bbooks.

Online Training

In February, 2010, OIF partnered with the Association of Library Trustees, Advocates, Friends and Foundations to present three, one-hour webinars entitled, "Controversial Materials in the Library: Supporting Intellectual Freedom in Your Community." Angela Maycock, OIF Assistant Director, led the webinar series and presented to 51 attendees. Feedback was very positive and OIF will be looking more closely at future webinars and online learning opportunities after Annual Conference. Our priorities include: Producing an archived version of the ALTAFF webinar, for those trustees interested in attending but unable to participate at the times offered; creating a webinar addressing meeting room policies, particularly in light of recent ADF letters sent to many libraries around the country; creating an online option for the Law for Librarians workshop; other topics and online opportunities as appropriate.

ACTION

Prisoners' Right to Read

Although ALA Editions recently published the eighth edition of the *Intellectual Freedom Manual*, the IFC has already begun work on the ninth edition. During its Spring Meeting, the Committee drafted "Prisoners' Right to Read: An Interpretation to the Library Bill of Rights."

The new Interpretation was e-mailed on March 31, 2010, to the ALA Executive Board, Council, Divisions, Council committees, Round Tables, and Chapter Relations requesting comments and feedback on the Interpretation. The IFC carefully considered all comments received both prior to and during the 2010 Annual Conference and now is moving adoption of this new policy.

In closing, the Intellectual Freedom Committee thanks the Division and Chapter Intellectual Freedom Committees, the Intellectual Freedom Round Table, the unit and affiliate liaisons, and the OIF staff for their commitment, assistance, and hard work. ☐

prisoners' right to read

an interpretation of the *Library Bill of Rights*

The American Library Association asserts a compelling public interest in the preservation of intellectual freedom for individuals of any age held in jails, prisons, detention facilities, juvenile facilities, immigration facilities, prison work camps and segregated units within any facility. As Supreme Court Justice Thurgood Marshall wrote in *Procunier* v *Martinez* [416 US 428 (1974)]:

"When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment."

Participation in a democratic society requires unfettered access to current social, political, economic, cultural, scientific, and religious information. Information and ideas available outside the prison are essential to prisoners for a successful transition to freedom. Learning to be free requires access to a wide range of knowledge, and suppression of ideas does not prepare the incarcerated of any age for life in a free society. Even those individuals that a lawful society chooses to imprison permanently deserve access to information, to literature, and to a window on the world. Censorship is a process of exclusion by which authority rejects specific points of view. That material contains unpopular views or even repugnant content does not provide justification for censorship. Unlike censorship, selection is a process of inclusion that involves the search for materials, regardless of format, that represent diversity and a broad spectrum of ideas. The correctional library collection should reflect the needs of its community.

Libraries and librarians serving individuals in correctional facilities may be required by federal, state, or local

laws; administrative rules of parent agencies; or court decisions, to prohibit material that instructs, incites, or advocates criminal action or bodily harm or is a violation of the law. Only those items that present an actual compelling and imminent risk to safety and security should be restricted. Although these limits restrict the range of material available, the extent of limitation should be minimized by adherence to the *Library Bill of Rights* and its Interpretations.

These principles should guide all library services provided to prisoners:

- Collection management should be governed by written policy, mutually agreed upon by librarians and correctional agency administrators, in accordance with the *Library Bill of Rights*, its Interpretations, and other ALA intellectual freedom documents.
- Correctional libraries should have written procedures for addressing challenges to library materials, including a policy-based description of the disqualifying features, in accordance with "Challenged Materials" and other relevant intellectual freedom documents.
- Correctional librarians should select materials that reflect the demographic composition, information needs, interests, and diverse cultural values of the confined communities they serve.
- Correctional librarians should be allowed to purchase materials that meet written selection criteria and provide for the multi-faceted needs of their populations without prior correctional agency review. They should be allowed to acquire materials from a wide range of sources in order to ensure a broad and diverse collection. Correctional librarians should not be limited to purchasing from a list of approved materials.
- Age is not a reason for censorship. Incarcerated children and youth should have access to a wide range of fiction and nonfiction, as stated in "Free Access to Libraries for Minors."
- Correctional librarians should make all reasonable efforts to provide sufficient materials to meet the information and recreational needs of prisoners who speak languages other than English.
- Equitable access to information should be provided for persons with disabilities as outlined in "Services to People with Disabilities."
- Media or materials with non-traditional bindings should not be prohibited unless they present an actual compelling and imminent risk to safety and security.
- Material with sexual content should not be banned unless it violates state and federal law.
- Correctional libraries should provide access to computers and the Internet.

When free people, through judicial procedure, segregate some of their own, they incur the responsibility to provide humane treatment and essential rights. Among these is the right to read. The right to choose what to read is deeply important, and the suppression of ideas is fatal to a democratic society. The denial of the right to read, to write, and to think—to intellectual freedom—diminishes the human spirit of those segregated from society. Those who cherish their full freedom and rights should work to guarantee that the right to intellectual freedom is extended to all incarcerated individuals.

Adopted June 29, 2010, by the ALA Council. □

FTRF report to ALA Council

Following is the text of the Freedom to Read Foundation's report to the ALA Council, delivered at the ALA Annual Conference in Washington, D.C. by FTRF President Kent Oliver.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2010 Midwinter Meeting:

BURTON JOSEPH

This past spring, we lost another First Amendment champion when Burton Joseph, Vice President of the Freedom to Read Foundation, passed away at the age of 79. Burt, an attorney, never passed up any opportunity to defend civil liberties and the First Amendment after he fought for a client's right to sell Henry Miller's *Tropic of Cancer* in Lake County, Illinois in the early 1960s. He defended the demonstrators at the 1968 Democratic Convention in Chicago; sought to preserve the National Socialist Party's right to march in Skokie; and took the lead in challenging unconstitutional ordinances that sought to limit our right to read, such as the antiviolence, anti-pornography ordinance struck down in the landmark *American Booksellers Association v. Hudnut* lawsuit.

Burt was a great believer in the power of libraries and librarians' power to defend civil liberties. He faithfully served the Freedom to Read Foundation for decades as a board member, officer, and supporter. Last year, he co-chaired the FTRF 40th Anniversary Gala. In 2008, the FTRF Board of Trustees named Burt the winner of the Roll of Honor Award, in recognition of his years of service and his work defending First Amendment rights.

FTRF was not the only organization to benefit from Burt's passion, leadership, and courage. He also helped establish Lawyers for the Creative Arts, was a leader of the ACLU of Illinois, and was a founding member and former chair of the Media Coalition. At his death, he served as lead counsel for the Comic Book Legal Defense Fund and was executive director of the Playboy Foundation from 1969 to 1978.

We grieve his loss with his wife, Babette, and his daughters Kathy, Amy, and Jody; we will miss his warmth, humor, and loyal friendship. Contributions in Burt's memory may

be directed to the Roger Baldwin Foundation of the ACLU of Illinois, 180 N. Michigan Ave., Suite 2300, Chicago, IL 60601.

DEFENDING AND PRESERVING FIRST AMENDMENT RIGHTS

Last summer, Judith Platt, my predecessor, announced our decision to participate as amicus curiae in a critical First Amendment lawsuit pending before the U.S. Supreme Court, *U.S. v. Stevens*. We received criticism for our decision, based on the suit's subject matter—a federal law that criminalized depictions of the killing, maiming, and torture of live animals. In defending the law, the government proposed that such depictions become another category of unprotected speech, with exceptions carved out only for those depictions that had serious religious, political, scientific, educational journalistic, historical, or artistic value, as determined by a judge and jury.

The FTRF Board firmly believed it needed to challenge the government's proposal that any speech could be denied First Amendment protection based on a balancing test that weighs the perceived "value" of the speech against a compelling government interest. Such a balancing test would allow the government to abridge broad categories of speech held to have "low value" and certainly would have a chilling effect on artists, writers, photographers, journalists, and filmmakers who would be unable to know what speech might be subject to prosecution.

I am pleased to report that the U.S. Supreme Court overturned the law on April 20, declining the government's invitation to establish a new test for identifying unprotected speech. In an 8–1 decision, the Court said the law "created a criminal prohibition of alarming breadth," that could be applied to a broad swath of constitutionally protected speech. It ruled that the exceptions for speech with "serious value" could not save the law, noting that "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value) but it is still sheltered from government regulation."

The court also declined to accept the government's assurance that it could be trusted to only prosecute depictions of "extreme animal cruelty," holding that "the First Amendment protects against the government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

In response to the decision in *U.S. v. Stevens*, Congressional representatives have introduced two new statutes to regulate the depiction of animal cruelty. FTRF will continue to monitor this legislation to assure that such regulations address the crime of animal cruelty without

(continued on page 220)

professors try to defend speech protections undermined by courts

Alarmed by a series of recent federal court decisions seen as endangering academic freedom at public colleges, faculty members at a growing number of public institutions are pushing their administrations to officially ensure their right to speak out on institutional governance and other matters related to their jobs.

Policies protecting the work-related speech of faculty members are under consideration in the University of California and the University of Illinois systems, as well as at individual colleges in other states, and have been adopted by the University of Michigan and the University of Minnesota. Collective-bargaining agreements offering such speech protections were approved by the University of Florida in February and by the University of Delaware in May.

Many more public colleges are expected to adopt such faculty speech protections in the coming year, largely as a result of a campaign by the American Association of University Professors urging its members to push for such changes. The AAUP has been joined in its effort by the Modern Language Association, which in February adopted a statement urging faculty senates at public colleges to make sure academic freedom is adequately protected in their institutions' faculty handbooks.

Driving such activity is a spate of recent federal court decisions calling into question how much the First Amendment protects academic freedom at public colleges—or, for that matter, whether faculty members at such institutions are any more free to speak out on job-related matters than employees of any other public agency.

Among the most recent such rulings, a U.S. District Court in May rejected claims by a University of South Alabama faculty member that the First Amendment protected her complaints about a lack of diversity in hiring decisions. A separate U.S. District Court held in March that two professors of nursing at Medgar Evers College, in New York, were not protected by the First Amendment when they complained about the management of their academic department to a union representative, a grievance officer, and administrators there.

In urging public colleges to adopt policies or contracts formally guaranteeing academic freedom, the AAUP and the MLA are trying to establish new, legally binding protections of faculty speech to replace the First Amendment protections that may no longer exist.

"You just assume that academic freedom gives you broad-stroke protection to speak freely, when, in fact, it doesn't," said Greg B. Pasternack, a professor of watershed hydrology at the University of California at Davis who

(continued on page 220)

Jewish groups protest UC handling of anti-Semitism

The president of the University of California and leaders of a dozen prominent American Jewish organizations are in an unusual public dispute about the extent of anti-Semitism on UC campuses and the university's response to it.

In a letter to UC President Mark G. Yudof, such groups as the Simon Wiesenthal Center and the national governing bodies of Conservative and Orthodox Judaism have criticized the university's reaction to anti-Semitic acts on UC campuses as too weak. The letter, sent June 28, cited what it said were increasing incidents of swastika graffiti and anti-Israel speakers who use anti-Semitic language, and alleged that many Jewish UC students feel "an environment of harassment and intimidation."

The Jewish leaders, with support from 700 UC students who signed an online petition, said that a new UC committee formed to study issues of racial and religious bias will not adequately address the Jewish students' concerns. They called for "an explicit focus on anti-Semitism" and for UC administrators to condemn more strongly actions and speakers who they said have demonized Jews and Israel.

In a response, Yudof said he was disturbed by any anti-Semitic acts at UC and promised to "do everything in my power to protect Jewish and all other students from threats or actions of intolerance." But he also criticized the Jewish groups' letter as "a dishearteningly ill-informed rush to judgment against our ongoing responses to troubling incidents that have taken place on some of our campuses."

Yudof, who is Jewish and whose wife, Judy, is the former lay president of Conservative Judaism in North America, also wrote that the Jewish groups may have based their concerns on an unreliable sampling of student opinion. Most Jewish UC students' "perspectives are more mixed than you suggest," he wrote.

The UC president said he was disappointed that the letter writers seemed to have dismissed the new UC Advisory Council on Campus Climate, Culture and Inclusion as destined to fail, and he urged them to support its work.

The panel, which met for the first time this summer was created after several controversial incidents over the last school year. Those included an off-campus "Compton Cookout" party by UC San Diego students that mocked Black History Month, and the spray-painting and carving of swastikas at several locations on the UC Davis campus, including the dorm room door of a Jewish student.

Some Jewish leaders have complained that UC administrators seemed to be more upset by the UC San Diego incident than the swastikas. UC officials have denied this.

The Jewish groups' letter to Yudof was sent two weeks after UC Irvine announced that it would suspend campus

(continued on page 224

an X-rated Internet domain?

The Internet Corporation for Assigned Names and Numbers on June 25 agreed to move forward on a long-standing proposal from a Florida company to create a specialized dot-xxx suffix for adult entertainment Web sites. But the plan upset much of the adult entertainment industry. It joined hands with religious groups in lobbying against it, arguing that the new domain would lead to regulation and marginalization.

The alliance "made for strange bedfellows, for sure," said Diane Duke, executive director of the Free Speech Coalition, a trade association representing more than 1,000 adult entertainment businesses. The company sponsoring the dot-xxx domain, the ICM Registry, said it had a vision of a red-light district in cyberspace that was a clean, well-lighted place, free of spam, viruses and credit card thieves. Content would be clearly labeled as adult and the whole neighborhood would be easy to block. Anyone offended by pornography could simply stay out.

"It is good for everybody," said Stuart Lawley, the chairman and chief executive of ICM. "It is a win for the consumer of adult content. They will know that the dot-xxx sites will operate by certain standards."

That did not satisfy religious groups that opposed the dot-xxx domains, fearing they would make pornography even more prevalent online. And Duke said that "there is no support from our community" for the plan.

Her organization's members, which include big industry names such as Hustler and Adam & Eve, were concerned that the board overseeing the dot-xxx domain could engage in censorship and that the entire industry could come under increased regulation. "If the board doesn't like what a producer creates, there is the possibility that they could censor it," Duke said. "This will ghettoize our industry and make us a target of regulation."

Duke said most of her members planned to continue operating out of their dot-com domains. But Lawley is not worried. Online sex is big business, and he expects his company will benefit. Each domain registration will cost $60 a year, with $10 going to a nonprofit organization promoting "responsible business practices" for the industry.

Lawley said more than 100,000 domains had preregistered. He said he expected that when the dot-xxx domains opened for business, within a year some 500,000 domains would register, or roughly ten percent of the five million to six million adult online sites.

But Duke said many of those were likely to be "defensive" registrations, from businesses that wanted to prevent their names from being hijacked. Lawley said businesses could ensure that their names were not misused in the dot-xxx world by paying a one-time fee, to be set from $50 to $250.

(continued on page 224)

why Russians back censorship, yet crave free speech

Speaking out against the government gets you into trouble. At least that is what the Russian public think, a recent survey by the Levada Centre shows. Not only is it dangerous, but the powers that be will not listen to you. Yet is has to be done, respondents said.

However, the same survey found that censorship a dirty word in the western media is seen as every bit as necessary as the freedom to criticize the authorities.

In a week when two museum curators were fined for hosting an exhibition, the whole issue of freedom of speech was back under discussion in Russia and while for many Russians censorship is a positive force which keeps their world free of pornography and extremism, others fear a paradoxical relationship between openness and state control is subtly shutting down opposition.

"The government is using different mechanisms, like extremism laws, to stifle civil society," Tanya Lokshina, a researcher for Human Rights Watch told *The Moscow News*. Her comments echo the United Nations 2009 Review of Russia, in which the Human Rights Committee voiced its concern about extremist legislation being used to target organizations and individuals who criticized the government, humanrightshouse.org reported.

This bleak picture has contributed, says Lokshina, to increased censorship. "Over the past few several years there has been a tightening and there are some warnings from Rosokhrankultura, which is supposed to monitor the compliance of media outlets. They issue warnings to papers and the likes." Several organizations have been shut down, she said by telephone, resulting in a rise in wary self censorship among those who remain.

"TV is next to completely state controlled and is very severely censored," said Lokshina, adding that the number of independent papers isn't great either. This should come as no surprise to the public; 63 percent of those Levada polled said that TV was completely censored.

Certainly, if you wish to ram a message home to the masses then TV is the way to go. "The information is put across so quickly and effectively. It's completely instant," said the editor of an independent regional news analysis show, asking not to be named.

This news program is independently financed, its editor told *The Moscow News*. "And that is why we are able to remain independent. Other TV channels which are owned by the state can't do this, they just won't get the money. There is a Russian saying, 'He who plays the music calls the tune.'"

And money is not the only cost of independence. The program faces a frequent barrage of attention from officials, requesting that their work be portrayed in a positive light. "We explain to them that we can't just be positive, that we have to be objective with the facts."

Which is not something that everyone takes lying down. While polite requests are met with polite responses, demands and threats are not unknown. "If we get calls from bureaucrats who aren't polite then I answer in a brusque manner too. And if there is someone who threatens to punish us, then we do our best to explain that they won't get away with it. Demands, rather than polite requests, come quite often."

The station's board gives bullies short shrift. "It's a well known channel and everyone knows its position and that it's not easy to coerce us," the editor said, with the result that they get less pressure than rivals.

Moscow-based English language news channel Russia Today follows a conspicuously different line to most other English media and often stands accused of peddling Kremlin propaganda. "We have a very conscious approach to our output. It's very focused," political commentator and presenter of 'CrossTalk' Peter Lavelle said. "If we were saying the same thing as western television then what reason would there be to watch RT?"

Censorship, Lavelle says, exists everywhere in the world and in every organization: "I would be lying to you if I said there wasn't a sense of self-awareness." But he nimbly deflects criticism of the station's output.

"If you watch RT you see a variety of media and views," he said. "I think that's what freedom of expression is all about. On certain stories we may be interested in one point of view over another. . . . Say the South Ossetian conflict. RT's mission was to tell the world Russia's side of the story, because the world was mostly getting [the story] from mainstream media."

Lokshina believes that most Russians are fairly unconcerned about freedom of expression. "If you ask someone about freedom of expression, about freedom of media, quite a lot of people will just shake their head and say they don't know what you're talking about."

Apart from anything else, people believe that when the freedom of expression is used to criticize, very often comes to little or naught: 55.8 percent of Levada's respondents thought so anyway.

This does seem unduly cynical, and at least extreme cases do get coverage. *Novaya Gazeta* editor-in-chief Dmitry Muratov charged that the authorities had tried to hush up stories like the death in jail of human rights lawyer Sergei Magnitsky.

In fact, the story enjoyed widespread coverage. "The story was so scandalous that it could not simply be hushed up," said Lokshina. Reported in: *Moscow News*, July 13. □

censorship dateline

libraries

Santa Rosa, California

The Sonoma County grand jury again has addressed what it sees as problems of access to pornography in public libraries, calling for filters to be installed on computers in the children's section while their effectiveness is gauged. Pornography filters are "still an important issue that needs to be dealt with. It is a fact that minors may be exposed to pornographic images of a shocking and offensive nature," the grand jury wrote in the report, released June 30.

The libraries' reluctance, however, has been that filters are not 100 percent effective, and some offensive material will still get through while legitimate material is blocked. "Someone who has breast cancer who wants to research treatment can't get it because the filter prevents it, and it may not filter out other things that may be offensive," said Melissa Kelley, vice chairwoman of the Sonoma County Library Commission.

There are also First Amendment issues, said Margaret Lynch, commission chairwoman."We do have people who are actively reviewing how we can do this. It is an issue of the American Library Association; we are not the only library to deal with it," Lynch said. "It is trying to strike that balance."

The grand jury last year recommended the Central Library move the public access computers to a side wall and install pornography filters.

This year's grand jury also believes that the filters may be more effective than the library commission believes, filtering 85 percent of the objectional material and blocking 15 percent of the legitimate material.

"With filters installed, any adult may, by simply asking a librarian, turn off the filters. No First Amendment rights are infringed upon and our children have been afforded a safer library experience," the grand jury wrote.

Rick Rascoe, a grand jury member who oversaw the library investigation, said the Central Library was singled out because that is where the complaints have been. It is also the Central Library staff that decided against the filters, said Cal Kimes, grand jury foreman.

Instead of putting filters on all computers, as previous grand juries have done, the 2010 grand jury recommended installing the filters on the computers in the children's section, appointing a committee to research the effectiveness and then reporting back to next year's grand jury.

"It is a big change and we thought it was prudent that we start small, put it on the children's department computers first to see if they can handle it," Rascoe said.

Kelley said one of the steps the Central Library has taken is the use of privacy screens that can placed over the computer monitor to shield the view of people walking by. "If there is problem, we have privacy screens and the librarians have the authority to ask them to use these screens," said Melissa Kelley, vice chairwoman of the commission. "Generally when we call it to the person's attention that it is not appropriate, for the most part they choose to stop the activity." Kelley said that complaints have dropped sharply since the new policy took effect. She also said that there has not been a complaint regarding the computers in the children's section of the library.

"I consider the Central Library my home library, I am there a lot," Kelley said. "I am sure it would have been brought to my attention."

"This has come up every year; it is not an easy thing to deal with," Lynch said. "There is a persistent dissatisfaction. It is not the library is cavalier, but there are some limitations on what we can do." Reported in: *Santa Rosa Press-Democrat*, June 30.

Crestview, Florida

A Japanese serial graphic novel genre popular with young teens has raised the ire of a Crestview mother whose teenage son got hold of an adult version of the genre from the Crestview Public Library. "Manga" depicts highly stylized adventure and, occasionally, violence in fantasy settings.

Margaret Barbaree, founder of a citizens' group called Protect Our Children, presented examples from a manga book to the Crestview City Council June 28 that she described as "graphic" and "shocking," taken from material she said is "available to children" at the Crestview Public Library.

"My son lost his mind when he found this," Barbaree said of the manga book from which her examples were taken. She said her son had removed the book unsupervised from the library's general stacks last summer and put it in his backpack. "Now he's in a home for extensive therapy."

Earlier this year, Barbaree had circulated a petition bearing 226 signatures of citizens protesting the availability of manga, which she mistakenly referred to as "anime," which is actually Japanese animation. However, the library said some patrons complained they were misled when they signed the petition.

"They told us she (Barbaree) approached them at the Christmas parade and asked them to sign a petition protesting pornography in the library," said Resource Librarian Sandra Dreaden. Barbaree said Library Director Jean Lewis explained to her that there is a demand for manga, and that the library strives to meet the needs of its patrons.

Council President Charles Baugh, Jr. assured Barbaree, "We have safeguards in place to protect our children and we have committees that review library purchases so they meet the standards of the [American] Library Association."

The books that concerned Barbaree "are in the library for those who wish to partake of them and they are in a section of the library" for adult patrons, said Baugh, who visited the library himself the day after the council meeting and said he found the manga available in the young adult section perfectly innocuous.

"We follow up with our citizens' concerns," Baugh said after meeting with library staff and viewing the young adult manga. Baugh also confirmed that the book Barbaree's son had accessed was in the general stacks, well away from the children's and young adult books.

"Our library is well managed and well staffed," Baugh told Barbaree while assuring her, "I am a family man and I understand what you are saying."

Lewis said the manga available in the young adult section of the library is oriented toward young teen readers and does not contain the adult themes of the book Barbaree's son took. That book had been in the general stacks, on a top shelf in a section with other graphic novels and comic books not geared toward young readers.

"We have policies and procedures in place to prevent underage children from accessing those materials," Baugh said. Reported in: *Crestview News-Bulletin*, July 2.

Stockton, Missouri

During the Stockton R-1 School Board meeting July 21, members unanimously voted to reconsider the board's prior motion, from the April 15 meeting, to remove the book *The Absolutely True Diary of a Part-Time Indian*, by Sherman Alexie, from the school.

The school board will decide the time and date for a special meeting at its August 18 regularly scheduled board meeting. Before the special meeting, the original book review committee will be asked to meet again to discuss the suitability of the book and answer in writing five questions posed by the school board. Citizens also will be able to express their opinions, whether for or against the book banning, at the special meeting. After listening to the comments and recommendations of the committee and citizens, the board will make an independent decision to affirm, modify or reverse its prior action.

Board member Rod Tucker made a motion for the special meeting. For each of the five questions posed to the committee, "the board requests the committee provide a report as to the number of votes cast for or against the specific questions or issues together with written explanations for the basis for the committee's recommendations," Tucker said. Snow said she's in the process of contacting the committee members and clarifying responsibilities. "If any person previously appointed to the committee is unable or unwilling to act, a replacement shall be appointed by the superintendent consistent with the board's regulation 6241," Tucker said.

The questions posed by the school board to the committee are: No. 1. Is the book educationally suitable for use in Stockton High School classrooms? Please explain the basis for the majority and minority opinions regarding this question. No. 2. Is there such vulgarity and sexual references in the book as to cause it to be pervasively vulgar or contain content that is sexually inappropriate for high school students in grades 9–12? No. 3. If yes, describe the factual basis for such determination. No. 4. If no, describe the factual basis for this determination. No. 5. If retention of the book in the school library is recommended by either a majority or minority of the committee with restrictions, explain the specific restrictions that are suggested.

The discussion started when Cheryl Marcum was given time to make a public comment. "I speak to you tonight on behalf of a group of concerned citizens—some of whom are present—citizens who care so much about our students' right to read and our teachers' professional judgment in selecting books and methods of instruction, that they are willing to bring their concerns to you and to the community at large. We care deeply that Stockton students receive the best education our community can provide."

Marcum hoped to receive an explanation for the board's rationale for banning the book. "We know from (former Superintendent) Dr. (Vicki) Sandberg that you did not consult our communications arts teachers before you voted to ban it. Your official meeting minutes record no discussion. We understand you did not consult legal counsel before you voted. Based on the information available to us . . . it appears to violate our students' constitutional rights. The decision goes beyond what the complaining parent asked for and beyond what the book review committee recommended. The extreme action of banning a book in our public school requires transparency. During the last two months, we asked questions of you in writing—in letters to the board and in

letters to the editor. We received no answers."

In search of answers, Marcum handed the board members a list of eight questions and four requests. While the board wanted some time to be able to respond, July 28 was selected as a target date to have answers submitted. The questions are: What are the names of the board members who read and did not read the book prior to voting to ban it? What steps did you take, including dates, to gather background information about both sides of the issue—including consultations with the school administration—to inform yourselves collectively about how to respond to such an unfamiliar and potentially controversial challenge? Why did you not consult the language arts teachers before voting to ban the book? What criteria did you consider in responding to the challenge? Exactly what was it about the book that made you take the most extreme measure and ban it? How did you consider the book's award-winning status? Did you consider the book is on several universities' reading lists for incoming freshmen and required summer reading for two Missouri high schools where students will be tested on the reading on the first day of school? How did you consider the Common Core State Standards for English Language and Literacy in history/social studies, science and technical subjects, which target the capacities of the literate individual to understand other cultures and perspectives?

The requests were as follows: Return the book to the curriculum with a procedure for a parent or student to request an alternative text, if desired. Return the book to the library labeled according to its content using the current practice. Revise District Policy 6241 with input from teachers and staff to more clearly reflect freedom of access to information. Ensure board members understand the legal framework of how schools operate.

Previously, Barbara Jones, Director of the ALA Office for Intellectual Freedom, wrote the school board to protest the decision to remove the Alexie book. "We strongly encourage the board to reconsider the removal of this book and to ensure the inclusion of diverse viewpoints in both the library collection and the curriculum," the letter said.

"*The Absolutely True Diary of a Part-Time Indian* is an award-winning and well-reviewed young adult novel that does not flinch from dealing with difficult issues. Adolescents will readily identify with the protagonist's struggles with identity and loneliness, while the book's honest depiction of contemporary Native American experiences both on and off the reservation provides readers with an opportunity to know and understand a way of life that may be foreign to their own experience. Ultimately, the book uses both humor and tragedy to convey a positive message about persevering and overcoming adversity to achieve a better life," Jones continued.

"*The Absolutely True Diary of a Part-Time Indian*, like many books, may not be right for every student at Stockton High School. But the school library has a responsibility to represent a broad range of views in its collection and to meet the needs of everyone in the school community—not just the most vocal, the most powerful, or even the majority. If a parent thinks a particular book is not suitable for their child, they should guide their children to other books. They should not impose their beliefs on other people's children." Reported in: *Cedar County Republican*, July 28.

Burlington County, New Jersey

A public library in Burlington County has ordered all of the copies of *Revolutionary Voices: A Multicultural Queer Youth Anthology* removed from circulation, after a member of Glenn Beck's 9/12 Project complained about the book's content. The library cited "child pornography" as its reason for removing the book.

The Gay, Lesbian and Straight Education Network (GLSEN) described *Revolutionary Voices*, edited by Amy Sonnie, as "the first creative resource by and for queer and questioning youth of every color, class, religion, gender and ability." It features first-hand coming-out accounts from gay students, and "reflections on identity," according to the *School Library Journal*. It was also named as one of the best adult books for high school students by the *Journal* in 2001.

But, according to Beverly Marinelli, a member of the 9/12 Project in Burlington County, the content is much more sinister than that. In an interview Marinelli called it "pervasively vulgar, obscene, and inappropriate." Marinelli maintained she's "not a homophobe," but called a drawing of Boy Scouts watching two men have sex, "the worst."

The ACLU of New Jersey obtained emails through a Freedom of Information Act request that revealed that Marinelli met with Gail Sweet, the library's director, in April. Following their meeting, Sweet arranged for the Library Commission to discuss the book's removal that month.

The Commission ultimately supported the decision to remove *Revolutionary Voices* from circulation, though "no official challenge" was made, and "no actual vote by the commissioners" was taken, according to Sweet's emails. The reasoning was that the book constituted "child pornography."

In an email to the library's circulation coordinator, Sweet asked: "How can we grab the books so that they never, ever get back into ccirculation [*sic*]. Copies need to totally disappear (as in not a good idea to send copies to the book sale)."

In emails to Sweet, Marinelli linked to articles by conservative websites Big Government and Gateway Pundit, which quote some of the other content in *Revolutionary Voices* that they found objectionable.

Take this excerpt, for example: "I learned the truth about Santa Claus and masturbation in the same year. I was 9. I had a hunch about Santa, but I had no clue about masturbation. I mean, I had no clue there was anything wrong with

it. As far as I know, I've been masturbating my whole life. But it wasn't until 9 that I realized it was an impulse that you had to turn off. Especially in class. Fourth grade craft time taught me shame."

Notably, the Gateway Pundit post that Marinelli linked to mostly targets Kevin Jennings, who the right-wing accused of having a "pro-homosexual agenda" after President Obama nominated him as director of the Office of Safe and Drug-Free Schools.

Around the same time the Burlington library took *Revolutionary Voices* out of circulation, it was also removed from the Rancocas Valley Regional High School library after complaints by Marinelli and others in the local chapter of the 9/12 Project. Reported in: *TPM Muckraker*, August 4.

schools

Bridgewater, Massachusetts

It all came down to a few words in a science textbook, but the matter at hand was hardly black and white. At issue: the use of "mental retardation" to describe a developmental disability and the use of the term "genetic error" to describe the phenomenon that causes Down syndrome.

The parents of a seventh-grader with Down syndrome objected to the book's use of the terms, leading school officials to form a review panel to come up with a resolution. What resulted was a compromise. The panel and School Committee opted to keep the book, the 2003 edition of *Science Explorer: Cells and Heredity*, but to replace the genetics unit with an alternate lesson made with the help of parents of special-needs students.

During their review, panel members delved into sensitive issues of semantics, emerging with a conclusion they hope will show that Bridgewater is an enlightened place. "I think it's an indicator of where this community strives to be," School Committee Vice Chair Stephen Donahue said. "We can maybe be on the forefront of positive change."

In addition to the new course materials, the committee wrote a letter to its congressional delegation in support of Rosa's Bill, legislation that would end the use of "mental retardation" and "mentally retarded." The bill would strike those words from existing laws and replace them with "intellectual disability."

The review panel's actions have the blessing of Tom and Pauline Lewis. Their son, Ian, is 14 years old and entering the eighth grade at Bridgewater Middle School. He has Down syndrome, and his parents took issue with the book's implication that their son is a mistake.

"Our knee-jerk reaction was to remove the book," Tom Lewis said during a hearing into the matter. "But, at this point, what may serve us better is to form a more inclusive committee to see what can be done with it. . . . Our efforts are all about awareness."

The panel had considered several options. Eliminating the book and buying a new edition (the 2009 edition uses different language) would have proved too costly at a time when the district has sought tax increases just to stay afloat. Blacking out the words would have confused the students, committee member Susan Predanowski said. They would have wanted to know what was redacted and why. And there was a case to make for keeping the language as it was.

The Mayo Clinic still uses the term "mental retardation." So does the American Academy of Pediatrics and loads of science textbooks still in use. Web MD, on the other hand, uses "intellectual disability."

"It is a term in flux," said Alan Coughlin, head of the department of science, technology and engineering at Bridgewater-Raynham Regional High. But the trend, Tom Lewis said, is to move away from "mental retardation."

Massachusetts last year renamed its Department of Mental Retardation, opting instead to call the agency the Department of Developmental Services. Those who see nothing wrong with the phrase, he said, "may never have been labeled or cringed in private anguish when a family member was." Reported in: *Taunton Gazette*, July 6.

Lake Fenton, Michigan

Seventh-grade students at Lake Fenton Middle School won't be reading *The Curious Incident of the Dog in the Night-time*, by Mark Haddon, as part of their summer reading program. The school has taken the book, which is about an autistic child who investigates the death of a neighborhood dog, off of its reading list on the school's website after parents complained about its foul language.

Mary Laetz, whose son Michael is a seventh-grade student, said she found out about the language after her son told her and her husband that there were bad words in the book and named pages that featured the language. "He said he felt uncomfortable. He knew they were bad words," she said.

School board trustee Stan Bragg said he understands where Laetz is coming from and thinks it will be banned. Reported in: mlive.com, July 21.

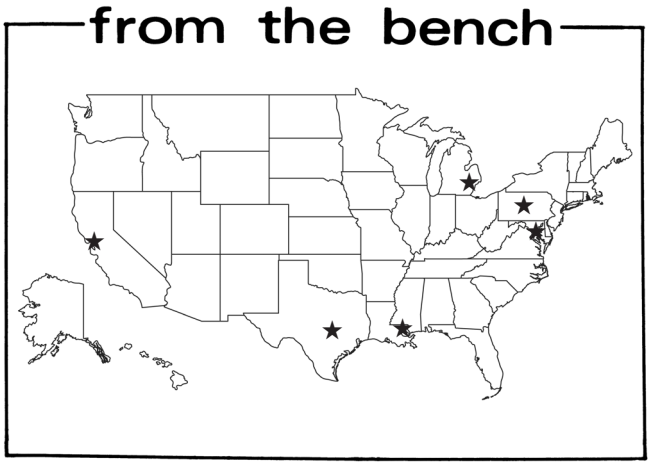
university

Irvine, California

A coalition of civil rights groups and professional bar associations have condemned the University of California Irvine's recent decision to ban the Muslim Student Union after students disrupted an Israeli ambassador's speech on campus earlier this year.

Fifteen groups throughout the country—including the Asian Law Caucus, Afghan-American Bar Association, Arab Anti-Discrimination Committee, South Asian Bar

(continued on page 224)



U.S. Supreme Court

A bitterly divided U.S. Supreme Court held June 28 that a California public law school did not violate the First Amendment in denying official recognition to a Christian student group that effectively excluded homosexual students from membership based on their beliefs and behaviors. But the parties involved in the case, as well as experts on student organizations, disagreed over whether many colleges have policies similar enough to the one at issue in the case to be affected by the decision.

In its 5-to-4 ruling in *Christian Legal Society v. Martinez*, the Supreme Court held that the University of California's Hastings College of Law acted reasonably, and in a viewpoint-neutral manner, in refusing to officially recognize and give funds to a campus chapter of the Christian Legal Society because the group refused to abide by the school's requirement that student groups open their membership to all.

Justice Anthony M. Kennedy joined the court's liberal wing in rejecting the Christian Legal Society's argument that the policy infringed on the student group's First Amendment freedoms of expression and association. The majority opinion, written by Justice Ruth Bader Ginsburg, declared that it is "hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers," although it left open the possibility that the lower courts may still determine that the policy has been inconsistently applied.

"Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership," the majority opinion said.

In a harshly worded dissent, the four other justices on the court denounced the majority opinion as resting on the principle of "no freedom of expression that offends prevailing standards of political correctness in our country's institutions of higher learning."

The minority opinion, written by Justice Samuel A. Alito, Jr., called the court's decision "a serious setback for freedom of expression in this country" and accused the majority of selectively interpreting the factual record to ignore evidence that Hastings had discriminated against the Christian student group based on its views. "The court's treatment of this case is deeply disappointing," and its decision "arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups," the minority opinion says.

The case had been widely watched partly because similar conflicts have popped up at a long list of other colleges where students have tried to set up Christian Legal Society chapters. Although the U.S. Court of Appeals for the Ninth Circuit had ruled in favor of Hastings in the dispute before the Supreme Court, the U.S. Court of Appeals for the Seventh Circuit had held that a similar policy at Southern Illinois University at Carbondale infringed on Christian Legal Society's freedom of expressive association, and some colleges had carved out exceptions to their antidiscrimination policies in response to similar challenges from religious groups.

Leo Martinez, who was named as the defendant in the lawsuit as the Hastings law school's acting chancellor and dean, issued a written statement welcoming the court's ruling as validating a policy "rooted in equity and fairness." His statement said the law school's intent "has always been to ensure the leadership, educational and social opportunities afforded by officially recognized student organizations are available to all students attending public institutions."

The Supreme Court's decision was similarly welcomed by Edris W. I. Rodriguez, a spokesman for Hastings Outlaw, a registered organization for gay, lesbian, and bisexual Hastings law students that had intervened as a defendant in the case. In an e-mail message, he said, "We are pleased that no student will be forced to have his or her student-activity funds support an organization in which he or she cannot participate."

But Michael W. McConnell, a lawyer who argued the Christian Legal Society's case before the Supreme Court, predicted that the ruling actually would have a limited impact on colleges, because, he argued, few actually have the sort of all-comers policy for student groups that the majority ruled on.

"The policy that the Supreme Court addressed is highly

abstract and hypothetical," said McConnell, director of the Stanford Law School's Constitutional Law Center. He expressed confidence that the Christian Legal Society would be able to demonstrate in the lower court that Hastings has enforced its policies selectively, in a manner that hurts religious groups.

The Alliance Defense Fund, which helped represent the Christian Legal Society members seeking recognition on campus, similarly predicted that the decision would have limited impact because few other institutions have exactly the same policy. In a written statement, Gregory S. Baylor, the group's senior legal counsel, said the Hastings policy requires the Christian Legal Society to allow atheists to lead Bible studies or the College Democrats to allow the election of Republican officers. "We agree with Justice Alito in his dissent that the court should have rejected this as absurd," Baylor said.

Among the organizations that had submitted friend-of-the court briefs in support of the Christian Legal Society, the Foundation for Individual Rights in Education issued a statement predicting the court's ruling will lead colleges to withdraw recognition from devoutly religious groups. It called the ruling "a loss for diversity and pluralism on campus, not a win."

By contrast, the American Civil Liberties Union, which submitted a friend-of-the-court brief supporting the law school, issued a statement praising the decision. "Today's ruling sends a message that public universities need not lend their name and support to groups that discriminate," its legal director, Steven R. Shapiro, said.

Justice Ginsburg was joined in the majority opinion by Justices Kennedy, Stephen G. Breyer, John Paul Stevens, and Sonia M. Sotomayor. In the dissenting opinion, Justice Alito was joined by Chief Justice John G. Roberts, Jr., and Justices Antonin Scalia and Clarence Thomas.

One of the central disputes in the case had been the question of which policy the Supreme Court should rule on: the "accept all comers" policy that Hastings had testified to having, or the written nondiscrimination policy on its books, which prohibited registered student organizations from having belief- or behavior-based membership criteria in which the beliefs are religious or the behaviors sexual. The Christian Legal Society's lawyers and the court's dissenting minority had argued that the court should focus on the written anti-discrimination policy, which appeared much harder to defend as viewpoint-neutral.

Justice Alito's dissent argued that the courts had been presented "overwhelming evidence" that Hastings denied recognition to the proposed Christian Legal Society chapter pursuant to the written nondiscrimination policy. Although Hastings said its "accept all comers" policy had been in place since 1990, there was no evidence of its having been put in writing or brought to the attention of others at the law school prior to the July 2005 deposition of Mary Kay Kane, then the dean of the law school, in connection with the Christian Legal Society's lawsuit. Moreover, the justices in the minority argued, the courts had been offered evidence that Hastings had routinely registered student groups with viewpoint-based membership and leadership criteria, and had taken steps to ensure that groups accept all comers only after the Christian Legal Society chapter pointed out a double standard in response to Dean Kane's assertion that an all-comers policy was in place.

The majority opinion, Justice Alito wrote, "ignores strong evidence that the accept-all-comers policy is not viewpoint-neutral because it was announced as a pretext to justify viewpoint discrimination."

The majority opinion argued that the Christian Legal Society had itself stipulated, in U.S. District Court, that the all-comers policy was the only one at issue. The majority rejected the society's "unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written," but the court could not even reach agreement on what the lower-court stipulation had been. The justices in the minority said the Christian Legal Society had conceded the existence of an all-comers policy but had not abandoned the argument that the nondiscrimination policy had been used.

The question of whether many public colleges even have all-comers policies was unsettled after the court handed its decision down. Gregory Roberts, executive director of the American College Personnel Association, a group that represents student-affairs professionals at private and public colleges, said it is common for colleges to require student groups to follow nondiscrimination policies, but he was unfamiliar with all-comers policies such as the one Hastings said it applied. But Ada Meloy, general counsel for the American Council on Education, said, "I think that both are relatively common."

The majority opinion praised the all-comers policy for ensuring that the opportunities offered by student groups are available to all students and that no Hastings student is forced to provide financial support to a group that would not have him or her as a member. The opinion said the all-comers policy also helps Hastings police its written nondiscrimination policy without having to take on the "daunting labor" of trying to determine whether a group had excluded someone based on its biases or the person's beliefs.

The Christian Legal Society had proposed that Hastings prohibit discrimination based on a person's sexual orientation but allow exclusions from membership based on beliefs or behavior—in essence allowing religious groups to bar from membership people who endorse or unrepentantly engage in homosexual behavior. In response, the majority opinion cited Supreme Court precedents holding that laws against certain conduct can amount to invitations to discrimination, that a law barring homosexual behavior opens the door to discrimination against gay and lesbian people.

In seeking to exclude people based on beliefs, the Christian Legal Society "seeks not parity with other organizations, but a preferential exemption from Hastings'

policy," the majority said.

The minority opinion challenged the idea that Hastings even had a true "accept all comers" policy, arguing that the law school had acknowledged that it lets student groups have certain membership and conduct requirements that are not discriminatory.

In addition to signing on with the majority, Justice Stevens wrote a separate opinion in which he argued that even the written nondiscrimination policy challenged by the Christian Legal Society was "plainly legitimate" and "meant to promote, not to undermine, religious freedom." While a free society must tolerate the existence of groups that exclude or mistreat people based on race, religion, or gender, it "need not subsidize them, give them its official imprimatur, or grant them equal access to law-school facilities," Justice Stevens said.

Justice Kennedy wrote a separate concurring opinion in which he made clear that he had accepted the law school's characterization of the factual record, and that is what swayed him. If the court had evidence before it that the purpose or effect of the policy was to stifle or undermine speech, that "would present a case different from the one before us," he said.

The justices in the majority and minority also disagreed strongly with each other over the question of whether the law school's requirements had imposed a serious hardship on the students seeking to form a campus chapter of the Christian Legal Society.

The majority said the Hastings policy "is dangling the carrot of subsidy, not wielding the stick of prohibition," because it leaves such groups free to exclude anyone they wish, so long as they are willing to go without the various benefits that come with official recognition, such as institutional financial support and the use of campus chalkboards and bulletin boards to advertise meetings.

"Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation," said the majority opinion, which argued that the emergence of electronic media and online social networking sites has removed much of student groups' needs for access to officially sponsored communications channels.

Adam Goldstein, a lawyer for the Student Press Law Center, challenged such logic as akin to justifying racial discrimination at lunch counters on the grounds that people can eat at some other location. "The existence of places where rights aren't being violated can't be held up to defend the violation of rights occurring somewhere else," he said.

The majority also discounted as "more hypothetical than real" the Christian Legal Society's argument that requiring student groups to accept everyone will leave them vulnerable to being infiltrated and subverted by students who oppose them. "Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs," the majority said.

The dissenters challenged the law school's assertions that it had made sincere efforts to try to accommodate students who belonged to the Christian Legal Society, citing evidence showing that administrators at the school had responded to requests for access to facilities by dragging their feet until the planned events had passed.

"The Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad," the minority opinion said. Reported in: *Chronicle of Higher Education* online, June 28.

Five of higher education's most prominent First Amendment scholars have warned the U.S. Supreme Court that it runs the risk of severely curtailing free speech on college campuses if it rules against a church group over its controversial picketing of military funerals.

The Foundation for Individual Rights in Education, a campus-speech advocacy group, joined the five in submitting a friend-of-the-court brief on July 14. In it, the scholars cautioned the justices against accepting the argument that speech should be denied First Amendment protection if it is directed at a captive audience, deemed "outrageous," and found to cause emotional distress.

A Supreme Court ruling allowing such an exception for the First Amendment "would dramatically endanger free discussion at academic institutions," with speech being at "especially great" risk of being restricted on college campuses, the brief argues.

Will Creeley, director of legal and public advocacy for FIRE, argued that a court ruling carving out such an exception would give students, faculty members, and administrators "a new weapon to silence protected speech with which they disagree," and "the already widespread censorship on campus will worsen."

The case at hand involves a legal battle between the Westboro Baptist Church of Topeka, Kansas, whose members routinely picket military funerals with anti-gay messages, and the father of a marine killed in Iraq in 2006. When the marine's family held a funeral for him at a Catholic church in Westminster, Maryland, the Rev. Fred W. Phelps, who is pastor of the Westboro church, and six of his family members stood nearby holding protest signs with messages such as "Thank God for dead soldiers" and "Semper fi fags." On his Web site after the funeral, Phelps accused the marine's family of having taught their son irreligious beliefs.

The marine's father, Albert Snyder, sued Phelps and other protesters, citing a state law holding people liable for damages for speech or conduct that is deemed outrageous and intentionally inflicts emotional distress. The Supreme Court has held that the First Amendment exempts from such laws speech about public figures and matters of public concern, but it has not ruled on whether the First Amendment similarly protects speech about private citizens that touches

on matters that are arguably public, such as the morality of homosexual behavior.

Because the case involves parties from two different states, it was heard in a U.S. District Court in Baltimore. At the trial, Judge Richard D. Bennett characterized the protesters' speech as about matters of private concern. He instructed the jury that it must balance the protesters' First Amendment right to free expression and Snyder's right, as a private citizen, to privacy and protection from "intentional, reckless, or extreme and outrageous conduct" causing severe emotional distress.

Snyder won a $5 million judgment, but the verdict was overturned by the U.S. Court of Appeals for the Fourth Circuit, which held that the protesters' speech was covered by the First Amendment because it did not assert any factual allegation and involved matters of public concern, such as the presence of homosexuals in the military. In appealing the Fourth Circuit's ruling, lawyers for Snyder argued that the First Amendment does not protect such speech when the target is a private citizen, and that the marine's family was entitled to protection from such speech because its presence at the funeral rendered it a captive audience.

Joining the Foundation for Individual Rights in Education in submitting the brief raising concerns about how colleges might be affected by the Supreme Court's ruling were the law professors Ash Bhagwat of the University of California's Hastings College of Law, David G. Post of Temple University, Martin H. Redish of Northwestern University, Nadine Strossen of New York Law School, and Eugene Volokh of the University of California at Los Angeles.

If the government can hold people legally liable for "outrageous and severely distressing speech" dealing with matters of public concern, the brief argues, "then public universities would be equally able to discipline their students for allegedly outrageous commentary." Moreover, the brief argues, such disciplinary proceedings would be easier to bring than lawsuits, partly because of the much lower costs associated with them. And, it says, the vagueness and subjectivity of "outrageousness" as a legal standard probably would inspire colleges to make viewpoint-based decisions and to broadly restrict speech to protect themselves from litigation.

Much of the speech on colleges about matters of public concern deals with people who are not necessarily public figures, such as professors, the brief says. And exempting speech to a "captive audience" from First Amendment protection would jeopardize freedom of debate on campuses because students often cannot escape exposure to speech without sacrificing their educational and professional opportunities, the brief says.

The Supreme Court agreed in March to take up the case, *Albert Snyder v. Fred W. Phelps Sr. et al.*, and is expected to rule in its term that begins in October. Reported in: *Chronicle of Higher Education* online, July 16.

broadcasting

Washington, D.C.

A federal appeals court struck down a Federal Communications Commission policy on indecency July 13, saying that regulations barring the use of "fleeting expletives" on radio and television violated the First Amendment because they were vague and could inhibit free speech.

The decision, which many constitutional scholars expect to be appealed to the Supreme Court, stems from a challenge by Fox, CBS and other broadcasters to the FCC's decision in 2004 to begin enforcing a stricter standard of what kind of language is allowed on free, over-the-air television.

The stricter policy followed several incidents that drew widespread public complaint, including Janet Jackson's breast-baring episode at the 2004 Super Bowl and repeated instances of profanity by celebrities, including Cher, Paris Hilton and Bono, during the live broadcasts of awards programs. The Janet Jackson incident did not involve speech but it drew outrage that spurred a crackdown by the FCC.

In a unanimous three-judge decision, the Court of Appeals for the Second Circuit in New York said that the FCC's current policy created "a chilling effect that goes far beyond the fleeting expletives at issue here" because it left broadcasters without a reliable guide to what the commission would find offensive.

The appeals court emphasized that it was not precluding federal regulation of broadcast standards. "We do not suggest that the FCC could not create a constitutional policy," the court said. "We hold only that the FCC's current policy fails constitutional scrutiny."

But if the commission decides to appeal the ruling—the latest in a string of court decisions questioning its ability to regulate media—it almost certainly runs the risk that the Supreme Court could reverse long-standing precedents that subject broadcast content to indecency standards that are not allowed for any other media.

Julius Genachowski, the chairman of the FCC, said in a statement that the commission was "reviewing the court's decision in light of our commitment to protect children, empower parents, and uphold the First Amendment."

In a statement, Fox said it was extremely pleased by the decision. "We have always felt that the government's position on fleeting expletives was unconstitutional," said the company, a unit of the News Corporation. "While we will continue to strive to eliminate expletives from live broadcasts, the inherent challenges broadcasters face with live television, coupled with the human element required for monitoring, must allow for the unfortunate isolated instances where inappropriate language slips through."

The case, known as *Fox Television Stations Inc. v. FCC*, has already been to the Supreme Court on a technical matter that did not involve its constitutionality. In 2009, the justices ruled that the FCC's indecency standard was not "arbitrary and capricious" and therefore was allowable.

Rodney A. Smolla, a First Amendment scholar who is president of Furman University in Greenville, South Carolina, said that the Supreme Court had been clear in ruling that when the government created rules about what a person could and could not say, "You have to be very specific about what is in bounds and what is out of bounds."

"This decision demands of the FCC that it regulate with precision and not use general terms like 'indecency,'" Smolla said.

Before 2004, the FCC consistently held that occasional, spontaneous use of certain words that were otherwise prohibited did not violate its indecency standards. But as complaints multiplied over the celebrity obscenities and the Janet Jackson episode, the FCC, under Michael K. Powell, then its chairman, tightened its standard and Congress increased the potential fine for indecency violations tenfold, to up to $325,000 per incident.

The July decision takes the FCC back to the Supreme Court's ruling in 1978 in *FCC v. Pacifica Foundation*, which upheld the commission's finding that George Carlin's classic "seven dirty words" radio monologue, with its deliberate and repetitive use of vulgarities over 12 minutes, was indecent. At that time, the court left open the question of whether the use of "an occasional expletive" could be punished.

In 2009, when the Supreme Court first rejected the appeals court's ruling, justices, including Clarence Thomas, who was in the majority of the 5–4 decision, and Ruth Bader Ginsburg, who dissented, indicated that they had questions about the First Amendment issues in the FCC indecency policy and whether existing standards were still relevant.

The appeals court picked up on that theme in its decision, noting that the media landscape was much different in 2010 than it was in 1978. "Technological changes have given parents the ability to decide which programs they will permit their children to watch," the appeals court said. Noting that it was bound by the Supreme Court's *Pacifica* decision, the court said that it nevertheless wondered why broadcasters were still subject to restrictions that, in the case of cable television, would be found to violate the First Amendment.

Ted Lempert, president of Children Now, said that while the court's decision was troubling, it also emphasized the need for clarity about broadcast standards. "It's of concern because the FCC has been a critical protector of children's interests when it comes to media," he said, adding that he expects that the commission will try to construct a more targeted approach to keeping indecency off the airwaves at times when children are likely to be watching. Reported in: *New York Times*, July 13.

student press

University Park, Pennsylvania

The student newspaper at Pennsylvania State University at University Park will not have to delete articles from its Web site describing criminal charges against five people that were later dropped or dismissed, according to the *Centre Daily Times*, a local newspaper that was also initially ordered by county judges to expunge articles it had published about the charges. After an outcry that the newspapers' First Amendment rights were being violated, the judges rescinded or revised their orders, clarifying that the expungement directives concerned only public agencies, such as the police force, subject to judicial control. Reported in: *Chronicle of Higher Education* online, July 7.

colleges and universities

Berkeley, California

An Alameda County judge has ruled that University of California, Berkeley police improperly searched a journalist's camera after a December protest at Chancellor Robert Birgeneau's campus home.

The June 18 ruling by Superior Court Judge Yolanda Northridge required UC police to return all copies of photographs taken from David Morse's camera, said Morse's attorney, Geoffrey King.

Morse said he was taking photographs of the December 11 protest for the San Francisco Bay Area Independent Media Center, known as Indybay, and identified himself as a journalist at least six times. State law protects reporters and photographers from, among other things, having their work seized by authorities.

The protest resulted in broken windows and other damage at Birgeneau's home. Morse and seven others were arrested and charged with several crimes, although charges were later dropped.

"This is everything we were hoping for," King said. Reported in: *Contra Costa Times*, June 21.

Berkeley and Santa Cruz, California

A federal judge has thrown out terrorism charges against four animal-rights activists who allegedly threatened researchers at University of California, Berkeley and UC Santa Cruz, saying prosecutors filed a vague indictment that failed to specify any illegal acts.

U.S. District Court Judge Ronald Whyte of San Jose did not permanently bar prosecution, but said in the July 12 ruling that the next grand jury indictment must spell out the alleged lawbreaking so that the defendants know what they're accused of doing.

Joseph Buddenberg, Maryam Khajavi, Nathan Pope and Adriana Stumpo were charged in March 2009 with violation of the Animal Enterprise Terrorism Act and conspiracy, punishable by a total of ten years in prison. An FBI agent's affidavit said the four had taken part in protests outside UC Berkeley professors' homes in October 2007 and January

2008, chanting, "five, six, seven, eight, smash the locks and liberate, nine, 10, 11, 12, vivisectors go to hell," and calling the professors animal abusers and murderers.

In February 2008, the agent said, protesters banged on the door of a UC Santa Cruz animal researcher, whose husband opened the door and was struck by a "dark, firm object." Khajavi owned the car that drove the protesters, and two other defendants were in her home when police arrived, the agent said.

The grand jury indictment contained none of those details, however, but merely accused the defendants of engaging in illegal threats, harassment and intimidation. Reported in: *San Francisco Chronicle*, July 14.

Hammond, Louisiana

If a student group wants to invite Sarah Palin to campus, or Bill Ayers for that matter, can a public university say that approval is contingent on the student group paying all extra security costs associated with such a visit?

The issue of whether charging for security keeps some views from being heard on campuses has come up at many institutions in recent years—and a federal appeals court ruling in late July may make it more difficult for public colleges and universities to assert blanket authority to permit only speakers whose security costs will be covered by student groups or some sponsor. The ruling, by the U.S. Court of Appeals for the Fifth Circuit, found that such a policy at Southeastern Louisiana University was unconstitutional. Some legal observers think this could be a key ruling outside the Fifth Circuit, given the limited number of courts that have considered the question.

At the same time, the appeals panel, in a 2-to-1 vote, upheld a number of other provisions of the speaker policy at Southeastern Louisiana. But an appeal to the full Fifth Circuit court is possible—and could lead to a review of other speaker policies that exist at many public institutions. Those provisions cover such matters as where an outside speaker can appear, how far in advance permission must be requested, and so forth.

The challenge to Southeastern Louisiana's policies came from Jeremy Sonnier, a nondenominational Christian preacher who visits many college campuses to offer his views and frequently to disagree with conventional thinking about many moral issues. Sonnier was turned away from Southeastern Louisiana when he showed up on campus one day in 2007, without having asked for permission in advance. Campus police explained that rules governed outside speakers, and a university official told Sonnier that since one requirement was to obtain permission seven days in advance, there was no way he could start speaking to a group on campus that day. He left, but sued—represented by the Alliance Defense Fund, which backs the rights of religious students and professors (and in this case speakers without direct campus ties).

A district court rejected the suit's request to bar enforcement of the rules as a violation of Sonnier's constitutional rights to free expression. And while the Fifth Circuit panel upheld most of that ruling, it found that the rules governing security expenses were inappropriate—even though the university said that it never invoked them.

The university rules in question state the following: "The use of Southeastern Louisiana University Administration staff; University Police, city of Hammond Police, Tangipahoa Sheriffs Deputies, Louisiana State Police, or a private security company in connection with the event is at the sole discretion of the University in determining both the need for, and the strength of the security detail. The sponsoring individual(s) or organization is responsible for the cost of this security beyond that normally provided by the university, specifically those administrators/officers who must be assigned directly to the event and/or away from their normal operational duties."

The court's ruling said that this provision gives too much power to the university. "As the policy states, determining the additional amount of security needed is at the 'sole discretion' of the university; no objective factors are provided for the university to rely upon when making such a determination. Because of the unbridled discretion this provision gives to the university, we conclude that the district court abused its discretion in denying a preliminary injunction with regards to the security fee."

Nate Kellum, senior counsel for the Alliance Defense Fund, said that the problem with requiring outside speakers to cover security costs is that "you are attaching a cost to speech, and that's inappropriate."

The court's decision does not rule out the possibility that legitimate criteria might be developed related to who pays for security costs. Kellum said, for example, that if an outside speaker made large demands for security to cover an appearance, and the university saw no need for such security, it might legitimately say that it wouldn't pay. But the problem with not having criteria and just letting the university decide, he said, is that college and university administrators can then look at any outside speaker and judge security needs not on legitimate analysis but on the chance that someone will be outraged.

"You are judging on content," and raising fees "for having the prospect of a controversial speech," Kellum said. "There's a price of free speech and of having a marketplace of ideas," he added, and public colleges and universities should be ready to pay that cost (if indeed security is needed).

While Sonnier has appeared on many campuses without security and didn't request any of Southeastern Louisiana, the issue raised by Kellum—about security fees being used to justify blocking a visit or add costs to student organizations—is hardly hypothetical.

Security costs were used last year, for example, by officials at Georgia Southern University to justify calling

off a visit by William Ayers, a professor of education at the University of Illinois at Chicago who was once a leader of the Weather Underground. Attempts to charge student groups large fees for security for campus speakers have also been controversial (even after officials backed away from some charges) at the University of Colorado at Boulder (over another Ayers talk and one by Ward Churchill), and at the University of California at Los Angeles (over a planned visit by a leader of an anti-immigrant group).

Eugene Volokh, a law professor at UCLA who writes frequently about constitutional issues related to free speech, blogged that the issues raised in the Southeastern Louisiana case are "pretty important" because "my sense is that many universities do require security fees, sometimes based on the likely public reaction to the speech." He predicted that the decision on security charges will "be influential even outside the Fifth Circuit."

Much of the ruling outside the issue of security fees would probably please the university, as its rules were largely upheld. On these issues, courts evaluate "time-place-manner" rules. The idea is that some limits on the time, place or manner of public speech are appropriate if a public university is to operate. So a university would be within its rights to bar an outside speaker from announcing a rally in a laboratory or the library, but not keeping the person totally away from campus. And public institutions can't discriminate based on the ideas of a given speaker. The legal debates tend to focus on just what is reasonable—and several court decisions have been prompted by itinerant preachers at public colleges. In 2006, for example, the U.S. Court of Appeals for the Eighth Circuit rejected strict limits on the number of times a visiting preacher could appear at the University of Arkansas at Fayetteville, but upheld many other Arkansas rules about such appearances.

The rules challenged at Southeastern Louisiana (and upheld 2–1 by the appeals panel) required an application seven days in advance, basic information about the speaker or speakers, and limits on where someone could appear on campus. A dissent found that the way Southeastern Louisiana defined those limits was too broad. The decision noted that nothing in the rules prevents someone from simply walking around campus and engaging in discussion, and that Sonnier could have tried to follow the rules and won the right to speak to a crowd.

Kellum, however, said that there are numerous problems with the way the rules are set up, and that more "commonsense considerations" were needed. For example, he said that seven days might be needed for someone trying to reserve an auditorium for a large event, but that this wasn't necessary for someone like Sonnier. He noted that the seven-day requirement means someone who plans to speak outside "doesn't know what the weather is going to be" and that "spontaneous speech" prompted by a current event is "completely eliminated." Reported in: insidehighered.com, August 3.

Ypsilanti, Michigan

A federal judge has dismissed a lawsuit filed against Eastern Michigan University by a student who was kicked out of its graduate program in school counseling last year for refusing, on religious grounds, to affirm homosexual behavior in serving clients.

In an order granting summary judgment to the university on July 26, Judge George Caram Steeh of the U.S. District Court in Detroit held that the university's requirement that the student be willing to serve people who are homosexual was reasonable, and did not amount to an infringement of the Christian student's constitutional rights to free speech and free expression of religion.

The university "had a right and duty to enforce compliance" with professional ethics rules barring counselors from being intolerant or engaging in discrimination, and no reasonable person could conclude that a counseling program's requirement that students comply with such rules "conveys a message endorsing or disapproving of religion," Judge Steeh wrote.

The Alliance Defense Fund, a coalition of Christian lawyers that is helping to represent the student, Julea Ward, issued a statement saying it plans to appeal the judge's decision. "Christian students shouldn't be expelled for holding to and abiding by their beliefs," said David French, a senior counsel for the group, which helped out in a similar lawsuit filed against Augusta State University, in Georgia, just days before the Michigan decision (see page 211).

Ward, who entered the Eastern Michigan program in 2006 in hopes of becoming a high-school counselor, had not been disciplined in any way for expressing her views, in classroom discussions or in written course work, that homosexuality was morally wrong. In fact, she had received A's in all of her classes, the judge's summary of her case said.

Her opposition to homosexuality got her into trouble, however, when she enrolled last year in a practicum course that involved counseling real clients in a university-operated clinic. When she encountered a client who wanted to be treated for depression—but previously had been counseled about a homosexual relationship—she asked her faculty supervisor whether she could refer the client to another counselor, explaining that her religious views precluded her from doing anything to affirm the client's homosexual behavior.

To maintain accreditation through the Council for Accreditation of Counseling and Related Educational Programs, the program that Ward was in is required to familiarize its students with the ethics codes set forth by the American Counseling Association and the American School Counselor Association. In refusing to affirm the homosexual behavior of clients, Ward was accused of violating various provisions of the groups' ethics codes, including prohibitions against discrimination based on sexual orientation and an American Counseling Association rule holding that its members should not demonstrate "an inability to

tolerate different points of view."

The faculty members overseeing the counseling program offered Ward three options—voluntarily leaving the counseling program, completing a remediation plan intended to change her thinking about the issue, or requesting a formal hearing. She opted for the hearing, which was held in March 2009 by a panel consisting of five faculty members and a student representative.

At the hearing, Ward said she refused to affirm any behavior that "goes against what the Bible says" and that she disagreed with, but did not plan to violate, the American Counseling Association's prohibition against therapy aimed at changing a homosexual person's sexual orientation. Afterward, the hearing panel unanimously recommended that she be dismissed from the counseling program. She responded by suing.

Along with her First Amendment claims, Ward's lawsuit alleged that the university had engaged in viewpoint discrimination and violated her Fourteenth Amendment rights to due process and equal protection. It also argued that the policy cited in dismissing her amounted to an unconstitutional speech code.

Judge Steeh's ruling held that the policy at issue was not a speech code but "an integral part of the curriculum," and that Ward's dismissal from the program "was entirely due" to her "refusal to change her behavior," rather than her beliefs.

The ruling said that "instead of exploring options that might allow her to counsel homosexuals about their relationships," Ward "stated that she would not engage in gay-affirming counseling, which she viewed as helping a homosexual client engage in an immoral lifestyle."

The ruling said, "Her refusal to attempt learning to counsel all clients within their own value systems is a failure to complete an academic requirement of the program." Reported in: *Chronicle of Higher Education* online, July 27.

Austin, Texas

A federal judge has thrown out a lawsuit by a creationism think tank and school that attempted to force the state of Texas to allow it to offer master's degrees in science education.

In 2008, the Texas Higher Education Coordinating Board rejected the Dallas-based Institute for Creation Research's application to offer master's degrees, which taught science from a biblical perspective. The institute's graduate school sued in 2009, claiming the board violated its constitutional right to free speech and religion.

U.S. District Court Judge Sam Sparks dismissed the institute's lawsuit summarily, writing that it "has not put forth evidence sufficient to raise a genuine issue of material fact with respect to any claim it brings."

He found no merit in the ICR's claims and criticized its legal documents as "overly verbose, disjointed, incoherent, maundering and full of irrelevant information."

The National Center for Science Education, an Oakland, California-based nonprofit that defends the teaching of evolution, cheered the decision. "The Coordinating Board made a principled decision in the first place, and it is good to see it was upheld in a court of law," said Glenn Branch, the center's deputy director.

The ICR's graduate school, which is based in California, has been offering master's degrees in that state since 1981, according to its website. Aimed at aspiring Christian schoolteachers, the curriculum critiques evolution and champions a literal interpretation of the biblical account of creation.

In California, the school is accredited by the Transnational Association of Christian Colleges and Schools, an agency that's not recognized in Texas. To operate its graduate school in Texas, the institute needed preliminary approval from the Coordinating Board and accreditation from a regional body, the Southern Association of Colleges and Schools.

The ICR never got past its first hurdle. After heated meetings packed with public speakers, board members voted to deny the application.

"Religious belief is not science," Texas Commissioner of Higher Education Raymund Paredes said at the time. "Science and religious belief are surely reconcilable, but they are not the same thing." According to the institute's Web site, its mission is to equip "believers with evidence of the Bible's accuracy and authority through scientific research, educational programs, and media presentations, all conducted within a thoroughly biblical framework." Reported in: *San Antonio Express-News*, June 22; *Chronicle of Higher Education* online, June 22.

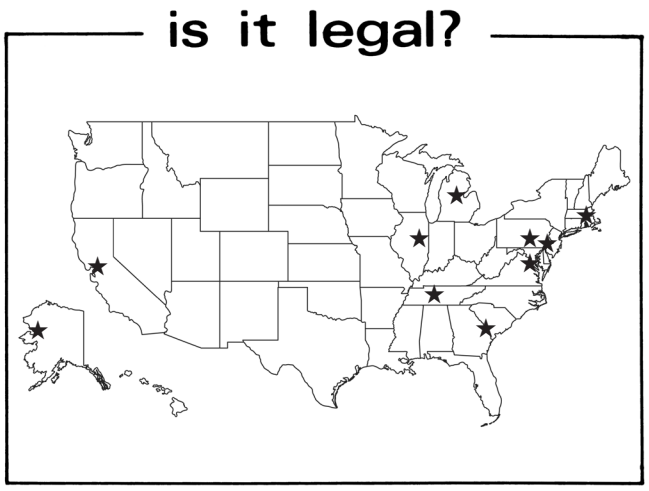
copyright

Menlo Park, California

In a major victory for Google in its battle with media companies, a federal judge in New York on June 22 threw out Viacom's $1 billion copyright infringement lawsuit against Google's YouTube, the No. 1 Internet video-sharing site. The ruling in the closely watched case could have major implications for the scores of Internet sites, like YouTube and Facebook, that are largely built with content uploaded by their users.

The judge granted Google's motion for summary judgment, saying the company was shielded from Viacom's copyright claims by "safe harbor" provisions of the Digital Millennium Copyright Act. Those provisions generally protect a Web site from liability for copyrighted material uploaded by its users as long as the operator of the site takes down the material when notified by its rightful owner that it

(continued on page 225)



colleges and universities

Kotzebue, Alaska

Academic freedom protects the right of faculty members to speak their minds. Does it, however, require colleges to pay them to express opinions? And once a college agrees to classify such expressions as part of specific jobs, can it reverse itself without curtailing free speech?

Such questions have triggered heated debate at a remote college campus in Kotzebue, Alaska, above the Arctic Circle, where two professors have accused the University of Alaska's administration of changing their job descriptions to deter them from writing about politics.

Susan B. Andrews and John Creed, a married couple who are both tenured professors of journalism and the humanities, had job responsibilities that included writing opinion columns in various publications. The university plans to remove that part of their jobs in the coming academic year. The change, the two said in an e-mail, is, part of "a deliberate, years-long, systematic operation to stifle our free speech."

University officials have denied the allegation, saying job descriptions were changed simply to ensure that the professors were teaching enough classes to meet the needs of the community served by their institution, the Chukchi campus of the University of Alaska at Fairbanks.

"The idea that university faculty and staff are in any way inhibited from personally voicing their partisan political opinions is ridiculous," a University of Alaska spokeswoman, Wendy Redman, said. The only restriction the system has placed on the two professors, Redman wrote, is that they can no longer use university resources to write articles expressing their political views.

Both Andrews, a former news anchor for the CBS affiliate in Fairbanks, and Creed, a former reporter for the *Fairbanks Daily News-Miner*, argue that their freelance opinion writing is an important part of their journalistic instruction because it provides their students with models to follow. They have specialized in opinion pieces with a liberal slant, warning of threats to the local environment, wading into debates over education policy or civil liberties, challenging the conduct of oil and tobacco companies, and criticizing the university system's former president, Mark R. Hamilton, when he was in office.

It is common for colleges to count such work as part of the job responsibilities of journalism professors—typically treating it as creative output that fulfills duties loosely classified as research. Until last year, the University of Alaska at Fairbanks classified the writing of Andrews and Creed as fulfilling the research requirement of a three-part workload agreement, which also called for each of them to teach three classes a semester and to provide a public service by promoting their students' work.

Early last year, however, as a result of revisions in the collective-bargaining agreement between the university system and the University of Alaska Federation of Teachers, university administrators were able to substantially alter how the faculty members' workloads were defined. The then-director of the Chukchi campus, Lincoln Y. Saito, told Andrews and Creed that he needed to increase their teaching loads from three classes a semester to four to meet local educational needs. To offset the new teaching demand, he eliminated one of the other parts of their workload agreement—that dealing with research—but told them they could continue to engage in creative work and count it as fulfilling their public-service requirement.

This year university administrators revisited the professors' workload agreement and said Saito had erred in letting the two count their own writing as fulfilling the public-service requirement. If they want to express their views, the administration said, they will need to do so on their own time.

Andrews and Creed say they suspect the university decided to crack down on them last year, after they published an op-ed in the online journal AlaskaReport blasting a candidate for a local school board and then linked to their piece on a university e-mail list.

After the candidate complained that the two were

misusing university resources for partisan political purposes, they received a letter from the office of the university system's general counsel. It said their posting on the e-mail list crossed an ethical line by using university resources to the disadvantage of a political candidate. But no action was taken against them.

When the two professors subsequently sought another ethics determination, about a planned column, from the general counsel's office, they were cautioned against writing partisan political commentary using university resources—something they had felt free to do in the past.

The two have filed a union grievance arguing that other journalism instructors in the system remain free to publish opinion, and that the alteration of their workload agreements represents an effort to limit their academic freedom.

Jan Slater, a professor of advertising at the University of Illinois at Urbana-Champaign and president-elect of the Association for Education in Journalism and Mass Communication, said the dispute ultimately boiled down to the question of whether the university changed the two professors' job descriptions because of the content of their writing.

The two professors say they are scheduled to meet with the chancellor of the Fairbanks campus, Brian Rogers, to discuss their complaint next month. In a recent interview, Creed said he and his wife would be much less likely to write commentary if they had to do so on their own time. "We are not volunteers for the University of Alaska—we are employees," Creed said. Reported in: *Chronicle of Higher Education* online, July 25.

San Francisco, California

In an apparent violation of the state's open meeting law, the University of California regents prevented a filmmaker from entering a public meeting with a video camera July 16 on grounds that he lacked a press credential. An e-mail exchange also revealed that UC had questioned the filmmaker about the content and purpose of his film, and asked his identity as a condition of access—also apparent violations of state law, legal experts said.

"The regents had no basis to exclude this person from the meeting," said Peter Scheer, executive director of the First Amendment Coalition in San Rafael. "He has a right to be there, and to record the event, under the Bagley-Keene open meeting law."

That law says any person attending a public meeting of a state agency "shall have the right to record the proceedings with an audio or video recorder" as long as doing so isn't disruptive. The same law prohibits state officials from requiring attendees to identify themselves.

Lynn Tierney, one of three UC spokespersons who questioned or barred filmmaker Ric Chavez, said the regents never allow anyone but the press to film or record public meetings. "That's how we've been operating for years," said Tierney, who said she had never heard of Bagley-Keene. "If the way we've been operating is out of compliance, we'll give this to our general counsel and he'll help us draft a new policy that's consistent with the law."

The problem began when Chavez, who flew up from Los Angeles for the meeting, like many people, wasn't aware that he had the right to film public meetings without permission. So, he e-mailed UC's public information office asking if he could film the regents meeting in San Francisco. Spokeswoman Leslie Sepuka replied, asking what kind of shots he wanted. Chavez said he wanted general shots of the regents.

Then spokesman Steve Montiel weighed in: "If you're shooting film for a news story, or if you can provide more specific information about the documentary you're working on—who will air it and when, for example—we would consider accommodating you tomorrow. At a minimum, we would need your full name."

Chavez complied and wrote that he's spent a year working on a documentary about UC: "everything that makes them function, the good and bad—the current position the UC is in (and) so forth. I've been interviewing students and workers, as well as some potential interviews with a couple of the Regents themselves."

Chavez added that he didn't know when his documentary would air, but he would post it online and offer it to TV.

Montiel replied: "Ric, sorry, we can't accommodate you."

The next day Chavez showed up anyway and set up his camera on a tripod outside of the building at UC's Mission Bay campus, where the regents were meeting. UC Police, who act as security at regents meetings and have arrested raucous protesters many times this year, told Chavez to aim his camera away from them. He complied.

The meeting was calm and sparsely attended. A Univision TV crew was inside filming. The police told Chavez he needed Tierney's permission to enter with his camera. Tierney gave permission—then withdrew it. Chavez and a person with him asked why, as a reporter looked on.

"I had a lapse in judgment," she told them, her voice rising in anger. "The issue is you don't have any press credential. We don't know why you're bringing the camera in."

Attorney Michael Risher of the ACLU of Northern California called UC's action a violation of state law and said, "It sounds as if they need to update their policies."

As for screening Chavez by e-mail, "that's where they crossed the line," said attorney Stuart Karle, who teaches media law at Columbia University Graduate School of Journalism in New York. "The court is very clear that you can't discriminate based on viewpoint."

UC's general counsel Charles Robinson said he would study the matter. "If there's an issue there, we'll take action," he said.

But Chavez wondered what would change and how soon. "The next time there's a regents meeting, will I go

through the same thing as I went through today?" Reported in: *San Francisco Chronicle*, July 16.

Augusta, Georgia

A graduate student in school counseling is accusing Augusta State University in federal court of violating her constitutional rights by demanding that she work to change her views opposing homosexuality.

In a lawsuit filed July 21 in the U.S. District Court in Augusta, the student, Jennifer Keeton, argues that faculty members and administrators at the university have violated her First Amendment rights to free speech and the free exercise of religion by threatening her with expulsion if she does not fufill requirements contained in a remediation plan intended to get her to change her beliefs.

Keeton's lawsuit accuses the university of being "ideologically heavy-handed" in imposing the requirements on her "simply because she has communicated both inside and outside the classroom that she holds to Christian ethical convictions on matters of human sexuality and gender identity." It argues that her views, which hold that homosexual behavior is immoral and that homosexuality is a chosen lifestyle, would not interfere with her ability to provide competent counseling to gay men and lesbians.

Keeton is being represented by lawyers affiliated with the Alliance Defense Fund, a coalition of Christian lawyers. The group has brought a similar lawsuit on behalf of an Eastern Michigan University graduate student who alleges she was dismissed from a counseling program for her beliefs about homosexuality. That case was dismissed by the court just days after the Georgia suit was filed. In 2006 the group extracted major concessions from Missouri State University in settling a lawsuit filed by a former social-work student who refused to respect a class project's requirement that she sign a letter to the state legislature in support of homosexual adoption.

In a news release announcing the lawsuit against Augusta State, David French, senior counsel for the Alliance Defense Fund, said: "A public-university student shouldn't be threatened with expulsion for being Christian and refusing to publicly renounce her faith, but that's exactly what's happening here. Simply put, the university is imposing thought reform."

The lawsuit says Keeton has stated in classroom discussions and written assignments that she believes sexual behavior "is the result of accountable personal choice," that people are born male or female, and that homosexuality is a lifestyle and not a "state of being." It says faculty members at Augusta State confronted her about her beliefs based on such statements and on a student's claim that Keeton has advocated "conversion therapy" for homosexuals in conversations with her peers—an allegation that Keeton denies.

The lawsuit says Augusta State faculty members developed a remediation plan specifically for Keeton and told her she would be expelled from the College of Education's counselor-education program if she did not fulfill its requirements. The plan calls on Keeton to attend workshops on serving diverse populations, read articles on counseling gay, lesbian, and bisexual and transgendered people, and write reports to an adviser summarizing what she has learned. It also instructs her to work to increase her exposure to, and interaction with, gay populations, and suggests that she attend the local gay-pride parade. Keeton has refused to comply. Reported in: *Chronicle of Higher Education* online, July 22.

Urbana–Champaign, Illinois

The University of Illinois at Urbana–Champaign announced July 29 that it is ending an unusual relationship under which an independent Roman Catholic center has for decades nominated instructors to teach Catholic thought at the university and paid their salaries. Further, the university announced that a controversial adjunct who has taught under the relationship would be back for the fall semester.

The decision by the religion department at Illinois to tell that adjunct, Kenneth Howell, that he could no longer teach set off a huge public debate over academic freedom and also led to renewed scrutiny of the highly unusual way Howell has been hired and paid. He has been the only instructor at Illinois who has been nominated and had his salary paid by an outside group.

The announcement gave some good news to multiple players in the disputes. Faculty leaders, who have been critical of an outside group playing a role in instructor selection, were pleased that, from now on, Catholic thought instructors will be selected and paid by the religion department—as has been the case for those who teach courses in all other faiths. But defenders of Howell said they were thrilled he would be back in the classroom in the fall.

But more conflict may be just ahead. The university's decision to sever the Catholic center's role in instructor selection is permanent. But the decision to let Howell teach is only for the fall semester. After that, he would have to go through the normal process of being hired by a department that recently decided it would be better off without his services. And the same defenders who are cheering his return say that they will be closely watching the situation, and expect him to have a "long career" at Illinois.

Howell has taught Catholic thought at Illinois since 2001. He was told by the religion department after the spring semester that he would not be welcomed back, following complaints over an e-mail message he sent to students in his course that drew a complaint from a friend of one of the students. That friend and others viewed the e-mail as anti-gay, while Howell and his defenders have said that he was simply expressing his views and those of Catholic teachings.

With Howell's fans (and some who disagreed with him as well) charging that the university had violated his academic freedom by denying him teaching assignments based on an e-mail in which he expressed opinions, the university announced that a faculty committee would investigate the academic freedom issues involved. Then as faculty members reminded university leaders that the faculty has opposed for decades the arrangement to let an outside group pay for and nominate adjuncts to teach Catholic thought, administrators asked another faculty committee to look at that issue again.

That second faculty group reported its findings in late July, noting all the previous faculty committees that had studied the issue and found the arrangement between Illinois and the St. John's Catholic Newman Center to be inappropriate. The committee "reaffirms the judgments of these previous faculty groups and administrators, who recommended termination of the teaching relationship between the university and Newman Center," the faculty committee's report said. "An adjunct faculty member paid by the Newman Center teaching a university credit course has a clear conflict by having, in effect, two employers whose missions and practices may not always agree. Recent events have illustrated what types of conflicts can arise."

The university announced that it would accept the recommendation—and that while Catholic studies courses would continue in the religion department, hiring would be made by the department and salaries would be provided by the university.

Nicholas C. Burbules, a professor of education at Illinois who was on the faculty committee that reviewed the ties to the Newman Center, said that the administration's action was "long overdue" in that instructors can't "have two masters," but need to report to the university. He stressed that the "structural problems" associated with having instructors selected to teach one set of topics go through a different process than instructors for any other topic predated the Howell controversy. "This was the last straw in an ongoing series of difficulties," he said.

A lawyer for the Alliance Defense Fund, a group that defends religious students and faculty members, and that is representing Howell, said that the organization was much more concerned about his continued teaching than about the link between the university and the Newman Center.

On the question of Howell's future, what became clear was only the next semester. A university spokeswoman said that since the fall semester is approaching and the committee studying the academic freedom issues in the case isn't about to wrap up its work, the administration decided it was appropriate to assign Howell his regular course in Catholic studies for the fall. The spokeswoman said that the decision does not assure him of any continued teaching assignments after the fall, and that future instructors for Catholic studies will be hired by the department alone.

The Alliance Defense Fund had threatened to sue Illinois if it did not assign courses to Howell, but the spokeswoman said that the university's decision did not involve any agreement with that organization.

Jordan Lorence, senior counsel with the Alliance Defense Fund, said that he was "extremely pleased" that Howell would be "back in the classroom" in the fall. He said, however, that it was important to continue to watch what happens at Illinois to make sure Howell's "academic freedom is protected" and that the committee reviewing the academic freedom issues in his case provides "a full exoneration."

Howell should have "a long career" ahead at Illinois, Lorence said. He acknowledged that adjuncts like Howell don't have job security beyond each semester's assignments. But Lorence said he would be looking for any "pretextual reasons" for not renewing Howell in the future. "They will have to prove beyond a shadow of a doubt that there's not an effort to get rid of him because he believes in his Catholicism." Reported in: insidehighered.com, July 30.

Cambridge, Massachusetts

It is not uncommon for international journalists who come to Harvard University as Nieman Fellows to be out of favor with their governments. They often work in countries where free expression and the rule of law exist in name only. They report in an atmosphere of danger where threats, and sometimes violence, are common tools to encourage self-censorship and silence truth-telling.

Colombian journalist Hollman Morris has long worked in challenging conditions, producing probing television reports that document his country's long and complex civil war. He has built contacts with the left-wing guerilla group known as the FARC and told stories of the conflict's victims. He has revealed abuses by the country's intelligence service and enraged government officials, including the president, Alvaro Uribe, who once called him "an accomplice to terrorism."

Morris was awarded a Nieman Fellowship in journalism this spring and planned to travel to the United States to begin his studies at Harvard in the fall. But then, in June, he was told by a U.S. consular official in Bogota that he was being denied a visa under the "terrorist activities" section of the USA PATRIOT Act.

In the 60 years that foreign journalists have participated in the Nieman program, they have sometimes had trouble getting their own countries to allow them to come. The foundation's first brush with the harsh reality of journalism under repressive regimes came in 1960, when Lewis Nkosi, a black South African and writer for *Drum*, a magazine for black South Africans, was awarded a fellowship. His application for a passport was denied by the country's apartheid government. Angry and bitter, he applied for an exit visa. It enabled him to leave, but he was forbidden to ever return.

Morris, though, is the first person in Nieman history to be denied the right to participate not by his own country but by ours. The denial is alarming. It would represent a major recasting of press freedom doctrine if journalists, by establishing contacts with so-called terrorist organizations in the process of gathering news, open themselves to accusations of terrorist activities and the possibility of being barred from travel to the United States.

In the past, Morris has traveled to this country as a speaker at conferences and universities, and he has talked openly about his approach to journalism. In 2007, Human Rights Watch recognized his work by awarding him its annual Human Rights Defender Award.

The Nieman Foundation invites foreign journalists to join its class of fellows, in part because it is good for the U.S. participants to gain an international perspective, but also as a way of rewarding and nurturing excellence in foreign journalism. During the struggle to remove racial barriers in South Africa, Nieman Fellowships were awarded annually to South African journalists, who carried democratic and journalistic values home with them. Many went on to brazenly employ their editorial leadership to challenge the government and help bring an end to apartheid.

Several endangered journalists have come to the Nieman program from Colombia, where 43 journalists have been killed since 1992. In 2000, Ignacio Gomez, a young investigative reporter, was forced to flee after his newspaper, El Espectador, published stories in which Colombian police and military were linked with violent right-wing paramilitaries. In one of the stories, a Colombian military colonel was said to have masterminded the 1997 massacre in Mapiripan, in which right-wing paramilitaries killed nearly 30 people for allegedly supporting left-wing guerrillas. Gomez received hundreds of death threats after that article was published.

The Nieman Foundation program has been a safe, if temporary, refuge for foreign journalists like Hollman Morris, who are targets because they have challenged dictators and privileged oligarchs. Their experiences inspire others in the fellowship and beyond, and contribute to a greater appreciation of our constitutional guarantees of press freedom. It makes no sense that the U.S. government would intervene to prevent a journalist access to learning about the freedoms we so cherish.

We observe international fellows as they return to their countries and see the compound-interest effect of their year at Harvard as it influences the development and politics of their countries. For U.S. fellows, the intimacy of the fellowship experience illuminates their understanding of people from other societies, discoveries that are especially relevant in an increasingly globalized world. Networks of Nieman Fellows and professional alliances seeded at Harvard play significant roles in influencing local attitudes toward the United States. Reported in: *Los Angeles Times*, July 14.

Mt. Pleasant, Michigan

Faculty leaders at Central Michigan University have rebelled against a policy that, they say, gives administrators arbitrary power to forbid them to seek public office.

"This is an important area of academic freedom for faculty and staff, and it should be treated as a fundamental liberty, and not something that is dispensable," said James P. Hill, a professor of political science who is leading the Central Michigan University Faculty Association's bargaining team on the issue.

The policy, adopted in December 2008, requires university employees to obtain the approval of their supervisor, as well of as the provost or the vice president in charge of their department, before undertaking any political campaign or agreeing to be nominated for any appointed political position. Employees must demonstrate that their political efforts won't interfere with their university jobs and "will pose no conflict of interest with professional standards or ethics." The policy does not, however, clearly state what standards or ethics administrators will apply in determining whether an employee's quest for office passes muster.

The university's administration has defended the requirement, saying it is needed to ensure that university employees do not neglect their job duties while pursuing political ambitions. Nevertheless, they have agreed to work with faculty union representatives to come up with mechanisms for keeping the policy from being abused.

Central Michigan's provost, E. Gary Shapiro, said the two sides are "very, very close" to reaching an agreement on compromise language that spells out politically neutral criteria for administrators to use in making decisions, and lets employees appeal unfavorable decisions to the university's president.

Hill declined to comment on where negotiations stood. But he insisted that he will not accept any compromise that leaves administrators with the power to arbitrarily decide which employees can seek office.

The debate raises tough questions about an area that had drawn little attention: colleges' policies for deciding whether employees are free to seek or occupy public office while remaining on the payroll.

Research on such policies conducted by Hill and by Lawrence Sych, an associate professor of political science at Central Michigan, suggests that colleges vary widely in how they regulate their employees' political careers. Some states, like Georgia, prohibit public-college employees from holding any state or federal elective office and require them to take a leave of absence before campaigning. Other states, as well as many private colleges, are much more permissive, leaving college employees free to run for any office so long as they do not claim to represent their institution or use its resources for their campaign.

In giving a presentation on such policies at the annual conference of the American Association of University Professors, Hill said he and Sych were sounding the alarm

because they feared that other colleges, especially in Michigan, will be tempted to use Central Michigan's policy as a model.

The United States does, of course, have a long-standing tradition of college faculty members and administrators entering public office. President Woodrow Wilson, who was elected to the nation's highest office just after serving as president of Princeton University, stands out as one of the best known. Among the prominent politicians who ran for office while on college faculties are former Speaker of the U.S. House of Representatives Newt Gingrich, who was an instructor at West Georgia College (now the University of West Georgia) when he was elected to Congress in 1978, and former U.S. Sen. William P. (Phil) Gramm, who was a professor of economics at Texas A&M University when elected to Congress that same year.

Academics who enter government, whether as elected or as appointed officials, are a research focus of Paul L. Posner, director of George Mason University's public-administration program. Posner brings personal experience to bear on the issue: He was a managing director of the U.S. Government Accountability Office. He said in an interview that college faculty members "have great potential contributions to make to public life," and that what they learn while in office can make them better teachers and enable them to make valuable contributions to scholarship in their field.

Questions are often raised, however, when college employees are seen as mixing their jobs with their political endeavors.

In the 2006 election cycle, for example, Jennifer L. Lawless, then an assistant professor of political science and public policy at Brown University, came under fire for accepting donations from students and their family members in her campaign for a seat in Congress. (She gave the students' donations back.) Also that year, Gary G. Aguiar, an assistant professor of political-science at South Dakota State University, was accused of abusing his power by asking students to help him campaign for mayor of the city of Brookings.

Central Michigan University became the site of such a controversy when one of its faculty members, Gary C. Peters, successfully campaigned for the U.S. House of Representatives in 2008. A long-time state politician, Peters was serving as the state's lottery commissioner when Central Michigan selected him, in April 2007, to fill its Robert and Marjorie Griffin Endowed Chair in American Government. The part-time appointment paid Peters $65,000 in private funds annually to teach one course each semester, plan political forums, develop a journal on Michigan politics, and oversee the gathering of political material for the university's collections.

Two months after taking the position, Peters told the university he planned to run for Congress. In their AAUP presentation, Hill and Sych said some administrators and members of the committee that oversees the endowed chair wondered if it was appropriate for Peters to continue holding that position while a candidate. The relevant policy then on the university's books did not provide any grounds to force Peters to resign, however. In fact, the policy, adopted in 1955, said political activity by university employees was "to be encouraged" and required only that employees have "discussions" with their division and department heads before seeking public office.

After Peters formally announced in August 2007 that he was resigning as lottery commissioner to run for Congress as a Democrat—but still did not leave his faculty position—he was dogged on the campaign trail by a Central Michigan student, Dennis Lennox, who publicly accused him of shirking his teaching duties and using his university salary to subsidize his campaign. Only after winning his U.S. House seat did Peters resign from his faculty job.

The paper by Hill and Sych said they were confident that the controversy over Peters was what had prompted Central Michigan to change its policy; the shift was made a month after Peters won the general election. Lennox, the former student and now a drain commissioner for Cheboygan County, in Michigan, also believes that the negative publicity surrounding Peters's candidacy inspired the change.

University officials don't agree. Steve Smith, director of public relations, said, "I personally don't see any connection" between the policy's adoption and the Peters controversy.

Hill said in an interview that the new policy was among more than 100 inserted in the university's 2008 collective-bargaining agreement, and that no one paid much attention to it at the time. "Now we are stuck with it," he said. The only recourse, he said, has been to push the university to adopt procedures that will keep the policy from being abused.

The proposed compromise spells out criteria for such decisions in detail—establishing what professional standards, ethics guidelines, and employment demands will be applied in any given case—and are intended to keep political considerations from entering into the equation. They preclude administrators from basing decisions on an employee's political affiliation, the office being sought, or a political campaign's prospects for success. An employee who is unhappy with an administrator's decision could appeal it to the university's president but would not have any recourse beyond that. Reported in: *Chronicle of Higher Education* online, July 22.

Harrisburg, Pennsylvania

With students, parents and politicians all frustrated by high textbook costs, recent years have seen many innovations as well as state and federal legislation. Much of the latter has focused on requirements that involve providing information so students and professors can make sound choices. So new laws or proposals call for publishers to

provide details about how different editions of books really are, and basic ordering information so students can comparison shop and colleges can have a stock of new and used options.

Legislation passed by the Pennsylvania Senate in June contains similar provisions, but it also features another requirement—one that is disturbing faculty leaders nationally. The bill requires faculty members at the state's community colleges and universities to select "the least expensive, educationally sound textbooks."

While the Pennsylvania House of Representatives has yet to take up the bill, faculty groups are concerned about it because it would dictate specific choices to professors on which books to select. And while many professors say that they try to avoid expensive textbooks and to select reasonably priced works, many say that they regularly select books that are slightly more expensive than other "educationally sound" options, but that are better.

"This vague and possibly unenforceable standard undermines the right of faculty members to select the best textbook, even if it is more expensive than the alternatives," said a statement issued by the American Association of University Professors. "'Educationally sound' also potentially sets a rather low standard for textbook selection. As a legal requirement, it will have a chilling effect on faculty members' ability to exercise their academic freedom in planning courses of the highest quality. Certainly the legislature has no business deciding what is 'educationally sound' in a college classroom. Only faculty members have the capacity to choose the books that best meet their pedagogical aims. If there is a tradeoff to be made between quality and price, only faculty members have the professional competence to make that choice."

The statement adds: "The Pennsylvania legislation is also worrying because it is part of a national trend to regulate textbook selection. Certainly rising textbook prices are a serious matter. Increased availability of electronic versions of textbooks that certainly should prove less expensive is likely an inevitable feature of a changing marketplace. But the main ways to reduce the expense of a college education are to increase state appropriations to public colleges and universities and to eliminate unnecessary administrative positions."

Cary Nelson, president of the AAUP, emphasized that the association was not calling all measures to reduce textbook costs attacks on academic freedom, and that many of the provisions in the Pennsylvania bill don't raise such issues.

In a news release issued after the bill was passed, State Sen. Andy Dinniman, sponsor of the legislation, said: "I am not interested in and do not want to limit the rights of faculty to select appropriate textbooks. All I want to do is make sure that when textbooks and course materials are selected, that student cost is factored into the equation."

Even student advocates for curbs on textbook prices have generally stopped short of dictating faculty choices—and have not rushed to endorse the Pennsylvania legislation. Nicole Allen, textbooks advocate for the Student Public Interest Research Groups, said that she appreciated that "the legislators in Pennsylvania had their hearts in the right place," but she said that her group has generally backed bills "to give professors the tools they need" to make less costly selections, but not legislation to restrict faculty choices.

Allen noted that a survey of faculty members for a 2007 report by her organization found that 94 percent of professors said that—given two equally good options—they would assign the less expensive choice. But the survey found that 37 percent of professors said that they don't know the prices of the books when they are making decisions. These results, Allen said, suggest that faculty members need more options and better information, but that they should then be left to make the decisions.

"The most important thing is for students to receive a sound education," she said. "To undercut quality for the sake of costs doesn't make any sense." Reported in: insidehighered.com, June 28.

copyright

Washington, D.C.

If the words "sweeping new exemptions to the anti-circumvention provisions of the Digital Millenium Copyright Act" make you want to whoop for joy and join a conga line, you just might be a fair use advocate—one who wants professors and students to be able to decrypt and excerpt copyrighted video content for lectures and class projects. Since July 26 a lot of advocates have been dancing.

"This is very exciting," said Patricia Aufderheide, a communications professor and director of the Center for Social Media at American University. "We're doing nothing but chat about this, we're so excited."

The thing that has made so many people excited is the latest round of rule changes, issued by the U.S. Copyright Office, dealing with what is legal and what is not as far as decrypting and repurposing copyrighted content.

One change in particular is making waves in academe: an exemption that allows professors in all fields and "film and media studies students" to hack encrypted DVD content and clip "short portions" into documentary films and "non-commercial videos." (The agency does not define "short portions.")

This means that any professors can legally extract movie clips and incorporate them into lectures, as long as they are willing to decrypt them—a task made relatively easy by widely available programs known as "DVD rippers."

The exemption also permits professors to use ripped content in non-classroom settings that are similarly protected under "fair use"—such as presentations at academic conferences.

Using film content as an educational tool is a popular practice. For example, a professor teaching a course on the sociology of crime might want to use excerpts from the HBO drama *The Wire* in a lecture or presentation, says Jason Mittell, an associate professor of American studies and film and media culture at Middlebury College. (In fact, a number of them have.) Or a natural history professor might want to show clips from the *Planet Earth* series.

Even professors in less obvious fields might want to avail themselves of these influential pop-culture artifacts to drive home an idea to students. Edward W. Felten, a long-time fair-use advocate who teaches computer science and public affairs at Princeton University, said he could imagine using movie clips to compare and contrast actual computer hackers with how they are portrayed in movies. "The ways that movies tend to be edited and constructed often allow a point to be made more viscerally," Felten says.

Others agree that using familiar examples from Hollywood can be an engaging way to illustrate academic concepts. While a previous round of exemptions made it OK for film and media studies professors to clip out films, the new act extends the privilege to all professors. (The U.S. Copyright Office issues new rules every three years or so since Congress incorporated anti-circumvention rules into the Digital Millennium Copyright Act, or DMCA, when it passed the landmark legislation in 2000.)

By the same token, it allows professors in "film and media studies" courses to instruct students to make "non-commercial videos"—documentaries, mash-ups, etc.—for assignments. Even students not enrolled in film or media studies programs who wish to rip DVD content for class projects might be covered by the new exemption in some cases, Mittell says, since they are, in a way, students of media and film.

This is not to say professors have not used film clips to enhance teaching, he says. But the hassle of cuing up a scene, then navigating menus or fast-forwarding to a different scene—or, God forbid, switching in a different disc, waiting out previews, and navigating a new menu to highlight a scene that may not last longer than a minute or two—discourages many faculty members from bothering to use film clips at all, quite probably to the detriment of their lessons, says Mittell.

"It would be the equivalent of a literature professor who is only allowed to prepare one quote to read aloud per class, and if you want to read more than one, it will take you five minutes to get to it," he says. English professors come to class with key pages dog-eared. This exemption allows professors who want to draw on another kind of media—films and TV series—permission to do the same.

The rule changes make it clear that professors and students can excerpt film content without worrying about being sued by production studios that own the copyrights. But experts say that some academics were doing this even before the Copyright Office made it legal to do so. Unlike the Recording Industry Association of America, which has famously sought to prosecute college students for pirating music files, the Motion Picture Association of America (MPAA) and other interested parties seem to have been less vigilant in pursuing campus violators.

In a hearing before the Copyright Office in May, film industry officials said they had no problem with professors and students using movie clips for educational purposes; one Time Warner official even said her company is developing a system whereby clips could be made available to professors by way of a download or secure Internet stream, free of charge—indicating that it is not a loss of sales revenue to higher education customers that they are worried about.

Rather, said an MPAA official at the hearing, the industry is worried that legalizing DVD decryption would open the gates to pirating outside of higher education. "An expansion of the current . . . exemption would undermine the technological and legal underpinning of the Content Protection System that is the basis for the DVD movie business," said Fritz Attaway, an executive with the MPAA, which represents the six major U.S. film studios. "Once widespread legal circumvention of CSS is permitted, the ability to limit the scope of the use of the circumvention may well be impossible, thereby undermining the whole system." The exemption would give students the "green light" to hack content scrambling systems "under the guise of class assignments," Attaway said, making it difficult, if not impossible, for copyright owners to know what hacks were legitimate and which were piratical. (He suggested that professors and students videotape movies playing on their televisions instead.)

In response to the July 26 rule change, the MPAA issued a brief statement: "The Librarian [of Congress]'s decision unnecessarily blurs the bright line established in the DMCA against circumvention of technical protection measures and undermines the DMCA, which has fostered greater access to more works by more people than at any time in our history."

But just because the MPAA has declined to hold a higher ed witch hunt does not mean every professor who wants to decrypt and excerpt DVDs for pedagogical purposes has been able to do so, said Aufderheide, the American University communications professor. Aufderheide, who is currently researching how copyright issues affect librarians, says that while a small minority of professors are savvy enough to locate and use decryption software to extract DVD content, use editing software to clip the videos, and then embed the clips into a course website or a PowerPoint slide, the majority would need help from the library staff to do so. "They are really depending on their librarians," she says. "And their librarians don't do this for them, because it's not legal."

Librarians are usually too scrupulous, and too scrutinized

(continued on page 226)

libraries

Coudersport, Pennsylvania

Coudersport, a farm town with a population of just 2,650 people, seems an unlikely location for a battle over gay rights, but when the public library scheduled a screening and community discussion of a documentary detailing the struggle to survive as a gay teen, this remote hamlet quickly moved to the front lines of America's culture war. Librarians received phone calls all morning from clergy "screaming at us," reported a library staff member. "They're threatening large protests and we don't know what to do."

The film, *Out in Silence*, was directed by Joe Wilson, a native of the small town of Oil City, Pennsylvania, and his partner Dean Hamer. Produced in association with Penn State Broadcasting and the Sundance Institute, it had its premiere at the Human Rights Watch International Film Festival at New York's Lincoln Center and was broadcast on PBS. But Wilson and Hamer were more interested in screening it in small towns and rural communities as part of a grassroots campaign to raise visibility and promote civic and political involvement outside the major cities.

When Wilson contacted the Coudersport Public Library about holding a free screening and community discussion, they were delighted to schedule the event for July 28. A week before the event, the librarian tried to postpone, citing concerns by the Board of Directors about "possible protests and community concerns."

Meanwhile, Wilson had already placed advertisements about the event in local media, and the county newspaper, *The Endeavor*, published a front page article about the screening and its importance. Given the publicity, the library changed its tune about postponing, informing Wilson that the screening could definitely take place.

On the morning of July 23, the library suddenly changed its mind yet again. They wrote Wilson canceling the event, stating that the library "cannot be involved" due to the large number of calls they had received from conservative ministers in the area.

"It's especially ironic given that one of the main characters in the film is an Evangelical pastor who is inititially very anti-gay, but becomes more understanding once he actually meets some gay people," said Wilson.

By lunchtime on July 23, the library had reconsidered, stating that "We want our library to be a forum for the exchange of ideas, not a place to be ruled by bullies with agendas."

"Several members of the community who haven't seen the film are concerned about what they believe might be in the film," said Coudersport's library director, Keturah Cappadonia. Cappadonia said that she has heard several complaints, and even that there might be protesters at the screening. "We weren't expecting the reaction we got."

But Cappadonia explained that rumors that the library had canceled the screening were false. "We always intended to show the film. We wanted to do what was best for the library. We had to make sure everyone on the library board agreed to our decision."

She explained that the eight board members had to find time to meet to discuss the screening, and that may be how the misinformation started. A statement issued by officials with the Coudersport Public Library said that "the mission of any public library is to serve a diverse community with varying opinions about what is and is not objectionable material." The press release explained that "we believe the library would fail in its mission if it did not provide information about ideas or topics that each of us might find uncomfortable at some level."

The film was previously shown at the St. Mary's Public Library. Scarlette Corbin, the library's director, said that she felt the film had been well-received. Corbin explained that a film group had rented a room in the library in which to show the film. It was not an event held by the library itself.

"We don't advocate groups one way or another. We are open to the public regardless of their lifestyle choice," she explained.

Corbin noted that one woman had called to express her concern about the documentary, but Corbin added that "she was very respectful about it."

At the Hamlin Memorial Library in Smethport, where the film was also shown, Director Lori Rounsville said that

she received two e-mails about the screening, "one e-mail in favor of it and one e-mail against it." Rounsville's co-worker also received a phone call from a man "that she believed to be quite angry." Rounsville said that she has heard that people are planning to protest, but "I'm not putting a whole lot of faith in it."

For her part, Bradford Area Public Library Director Linda Newman said "my only feeling is that, just because it's being shown, doesn't mean it's being condoned. You always have the option of staying home." Reported in: passportmagazine.com, July 28; *Bradford Era*, June 28.

Mitchell, South Dakota

A book by David Letterman's sidekick, Paul Shaffer, caused a small dust-up at the Mitchell Public Library this summer. Mitchell resident Gladys Baldwin asked to have Shaffer's 2009 book, *We'll Be Here for the Rest of Our Lives* removed from the library. She thought the book, which is filled with show business stories and tales of Shaffer's upbringing in Canada, was objectionable, according to City Councilwoman Geri Beck.

"That is certainly in the eye of the beholder," Beck said. She serves as the council's ex-officio representative on the library's board of trustees, and said the book was discussed by the board and found to be acceptable. It was never removed from the library's shelves, Beck said.

Shaffer, in a comment sent to *The Mitchell Daily Republic* by a CBS media relations staffer, said he was glad people had the freedom to discuss his book. "We are fortunate to live in a country where a woman like that can file a complaint without recrimination," Shaffer said in the e-mail. The book tells some ribald stories. Shaffer performed in a topless club in Toronto, Canada, when he was starting out, which is where he got the title of the book. Those are the words he would use to close every show.

Baldwin said she thought the book was too frank in its depictions and discussions of sex and sexual matters. "Yes, I certainly do," she said. "He didn't need to put that in. Otherwise, the book is all right." Shaffer was a member of the original "Saturday Night Live" band, toured with The Blues Brothers and has been the musical director of Letterman's late-night shows on NBC and CBS since 1982. During that time, he crossed paths with a lot of celebrities and collected a great deal of stories.

The request to remove *We'll Be Here for the Rest of Our Lives* caught the library board by surprise, Beck said. "It's very unusual," she said. "I think the last time was the 'Harry Potter' books." Baldwin submitted comments to Library Director Jackie Hess but did not appear before the board, Beck said. Once Baldwin was told the book would not be removed, she accepted the decision, Beck said. "I think she has moved on." However, Baldwin said she still wonders about the process. "I thought, 'Well, is that the kind of book the library board likes to promote?' Or am I just sensitive?"

Hess has worked at the library since 1980 and has been the director since 1986. Such requests are extremely rare, she said. "I can't remember the last time we had one," she said. "It must have been five or six years ago." No book has ever been removed from the library because of a patron's request, Hess said. Some are disposed of because people aren't reading them.

She said when the protest was lodged, she skimmed the book and found two reviews of it. "The two reviews were from *Publishers Weekly* and the Sunday *New York Times Book Review*," Hess said. "They didn't say there was anything wrong or objectionable." Hess said state and national library intellectual freedom committees were notified of the request to remove the book. "What offends one person might not offend another," she said. "People will either check it out or they won't."

Beck, who said she's "not into the music scene," has not read the book but said after hearing some of the names mentioned in it, she might give it a look. One thing usually happens when someone raises questions about a book, Hess said: More people check it out to see what all the fuss was about. Reported in: *Mitchell Daily Republic*, July 31.

college

Jackson, Mississippi

Isaac Rosenbloom is again able to pursue advanced training as a paramedic at Hinds Community College (HCC) now that the school has reversed its punishment against him for swearing a single time outside of class. Rosenbloom, who supports his wife and two young children as an emergency medical technician, was barred from one of his classes and denied financial aid after a professor initiated a verbal confrontation with him over his language. After HCC found Rosenbloom guilty of "flagrant disrespect," he turned to the Foundation for Individual Rights in Education (FIRE) for help.

"HCC almost ruined a man's life because he cursed after class in the vicinity of a college professor," said Will Creeley, FIRE's Director of Legal and Public Advocacy. "But Hinds Community College isn't some Victorian finishing school—it's a public institution bound by the First Amendment."

Rosenbloom's ordeal began on March 29, 2010, when professor Barbara Pyle and a few students stayed after class to discuss the students' grades. At one point, in the doorway of the room, Rosenbloom said to a fellow student that his grade was "going to f— up my entire GPA."

According to Rosenbloom's account in a recording of his April 6 hearing, Pyle began to yell and told him that his language was unacceptable and that she was giving him "detention." Rosenbloom replied, accurately, that detention was not a punishment at HCC. Pyle then told him that she was sending him to the dean. She submitted a disciplinary

complaint against Rosenbloom, stating that "this language was not to be tolerated [and] he could not say that under any circumstances [including in] the presence of the other students."

HCC found Rosenbloom guilty of "flagrant disrespect" and issued him twelve demerits—just three short of suspension. He also was involuntarily withdrawn from Pyle's course, and a copy of the decision was placed in Rosenbloom's student file. As a result, Rosenbloom lost his financial aid, effectively ending his academic and professional career. Rosenbloom unsuccessfully appealed the decision twice.

FIRE wrote HCC President Clyde Muse on April 27, pointing out not only that HCC's policy is unconstitutional but also that it was applied unconstitutionally to punish Rosenbloom for his protected speech outside of class. In contravention of the First Amendment, HCC bans "public profanity, cursing and vulgarity," assessing a fine of $25 for the first offense, $50 plus ten to fifteen demerits for the second offense, and suspension for the third offense.

After Muse failed to respond to FIRE, FIRE obtained the assistance of attorneys Robert B. McDuff and Sibyl Byrd, who took up Rosenbloom's case and secured a settlement in his favor. HCC removed the finding and demerits from Rosenbloom's record and restored his financial aid. McDuff is a civil rights and criminal defense attorney practicing in Jackson.

"Under the threat of litigation, HCC has seen the light in this case, but its unconstitutional prohibition of 'vulgarity' is still on the books," said Adam Kissel, Director of FIRE's Individual Rights Defense Program. "Official punishment of speech is the wrong way to achieve 'civility' on campus. It is only a matter of time before another student sues HCC over this policy and costs the taxpayers of Mississippi a lot more than $25. FIRE will be watching HCC closely and asking the school why a policy it cannot defend in court remains in force." Reported in: thefire.org, July 28.

broadcasting

Jackson, Mississippi

Mississippi Public Broadcasting reinstated the nationally-syndicated radio program "Fresh Air," two weeks after its decision to cancel the show for "inappropriate content" drew widespread criticism. In a statement released July 27, Executive Director Judy Lewis said that MPB would return "Fresh Air" to its radio schedule on August 2 in a new, 9 p.m. time slot. MPB will also air notices that the show may include adult content, Lewis said.

Lewis also acknowledged the outpouring of support for "Fresh Air" that surfaced on MPB's Facebook page. "Comments from concerned listeners are what led to my decision to remove the program, but I want to give equal attention to listeners who enjoy the program," Lewis said. "Please know that I will not be driven by the slander, threats, curses and total misrepresentations I have received from many over this one radio program. Thoughtful, intelligent, and sincere feedback is certainly helpful, though."

MPB pulled the show July 8, citing "inappropriate content" in an email to a listener. In a post on The Rachel Maddow Show's blog, Laura Conaway reported that MPB officials responded to a complaint about "Fresh Air" host Terry Gross's July 7 interview with comedian Louis C.K. "Mississippi Public Broadcasting shares a campus with offices for the state's colleges and universities, and we have learned that some of those offices play public radio for callers who are on hold," Conaway wrote. "Recently, a caller got put on hold during Fresh Air and heard Terry Gross ask comedian Louis C.K. if he always has sex with his shirt on. The caller complained, the station's zero-tolerance policy for inappropriate conduct kicked in, and away went Terry Gross and 'Fresh Air' for Mississippi."

Lewis initially stood by the decision in a statement released July 15: "Mississippi Public Broadcasting strives to deliver educational, informative, and meaningful content to its listeners," she declared. "After careful consideration and review we have determined that 'Fresh Air' does not meet this goal over time. Too often 'Fresh Air's interviews include gratuitous discussions on issues of an explicit sexual nature. We believe that most of these discussions do not contribute to or meaningfully enhance serious-minded public discourse on sexual issues."

Despite the statement's reference to "careful consideration and review," the cancellation appeared to have been a prompt decision. The *Jackson Free Press* obtained another e-mail Farrell sent to staff at 1:33 p.m. on July 8—less than 24 hours after the July 7 Louis C.K. interview aired—announcing that MPB was pulling the show immediately "due to content issues with the program."

In comments to *Current*, a biweekly newspaper for public broadcasting professionals, Lewis said that she received more complaints about "Fresh Air" than any of MPB's other programs. "Most of the comments I've received have to do with the salaciousness of Ms. Gross," Lewis said. "She talks a lot about sexual issues and the language she uses—a lot of people of Mississippi are not accustomed to hearing. They're not accustomed to hearing (the) word 'orgasm' on the air, and three o'clock in the afternoon is not the best time to air this." Reported in: *Jackson Free Press*, July 15, 27.

Internet

Washington, D.C.

The Transportation Security Administration (TSA) reversed itself July 5, announcing that it will no longer block TSA employees, using work computers, from accessing websites that contain a "controversial opinion." The

TSA on July 2 had informed its employees that five categories of websites would be off-limits because they were deemed "inappropriate for government access." Those categories were: "Chat/Messaging," "Criminal activity," "Extreme violence (including cartoon violence) and gruesome content," "Gaming," and any websites that contained a "Controversial opinion."

Sources were puzzled as to why the federal agency would block websites that contain controversial opinions and questioned whether the move would violate First Amendment rights and the freedom to access information.

At about 5:30 p.m. July 5 the TSA sent out another memo to its employees explaining that the category of "controversial opinion" was "an IT software catch-all phrase used to describe sites that may violate TSA's acceptable use policy, such as sites that promote destructive behavior to one's self or others."

The memo went on to say that "after further review, TSA determined this category may contain some sites that do not violate TSA's policy and therefore has concluded that the category is no longer being considered for implementation." The TSA also emphasized that it encourages the "sharing [of] ideas and opinions." Reported in: cbsnews.com, July 6. □

(FTRF report . . . from page 194)

infringing on First Amendment freedoms.

I am equally pleased to report that there is a successful conclusion in *American Booksellers' Foundation for Free Expression v. Strickland*, FTRF's challenge to an Ohio statute that classified profanity, violence, cruelty, and glorification of crime as obscenity for minors and then made it a crime to disseminate those materials on the Internet.

After a federal district court found the statute unconstitutional, the Ohio legislature revised the law, which was then reviewed by the Ohio Supreme Court and the Sixth Circuit Court of Appeals. Both courts sought to determine if the law could be interpreted in a manner that would limit its application to personally directed communications and exempt materials that are posted on generally accessible websites, public chat rooms, and online public forums, thereby protecting free expression on the Internet. The Ohio Supreme Court held that the law was limited to person-to-person electronic communications and could not be applied to materials distributed via mass methods that do not allow the user to prevent distribution to particular recipients; the Sixth Circuit then held that the revised law, as interpreted by the Ohio Supreme Court, did not violate the First Amendment or the Constitution.

Thus, as a result of the litigation pursued by FTRF and its litigation partners, Ohio abandoned the overbroad, unconstitutional law that significantly infringed on First Amendment rights. A much narrower law is now in place that does not impair the freedom to read.

NEW LITIGATION

Despite legal victories like the result in *ABFFE v. Strickland*, states continue to pass unconstitutional laws that are intended to restrict and regulate the distribution of constitutionally protected speech on the Internet. The legislature in Alaska has enacted a law that criminalizes the distribution of "harmful to minors" materials on the Internet, without provisions to assure that the laws are not enforced in a manner that impairs free speech. FTRF has agreed to participate in a lawsuit challenging the law, which will be filed in the coming weeks. A full report on the new lawsuit will be presented at the Midwinter Meeting.

ONGOING LITIGATION

The Foundation continues to monitor and to participate in lawsuits that address First Amendment rights in the library. One lawsuit, *Sarah Bradburn et al. v. North Central Regional Library District*, has drawn particular scrutiny since it challenges a library's policy of refusing to honor adults' requests to temporarily disable Internet filters for research and reading, even though the decision in *U.S. v. ALA* clearly provides for disabling filters on the request of an adult user.

On May 6, 2010, a majority of the Washington State Supreme Court concluded that the library's filtering policy did not violate the Washington State Constitution. Notably, three justices of that court filed a vigorous dissent on the grounds that the decision was inconsistent with the U.S. Supreme Court's opinion in *U.S. v. ALA*. The decision, however, does not decide the question of whether the NCRL's filtering policy violates the First Amendment of the U.S. Constitution; the lawsuit will be returned to the federal district court, which will decide the constitutional issues raised by the lawsuit. FTRF is not a participant in the lawsuit, which was filed by library users and the ACLU.

FTRF has been involved in *Entertainment Software Association et al. v. Schwarzenegger*, a lawsuit challenging a California law that restricts the sale or rental of video games classified by the state as "violent video games" to those under the age of 18. After the Ninth Circuit Court of Appeals upheld the district court's order enjoining enforcement of the law on the grounds that the statute violated the First Amendment, the State of California filed a petition for certiorari with the U.S. Supreme Court. On April 26, 2010, the Supreme Court granted California's petition and asked the parties to brief two questions:

1 Does the First Amendment bar a state from restricting

the sale of violent video games to minors?
2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

The Supreme Court has set a briefing schedule that requires all briefs to be filed by September 2010. FTRF is an amicus curiae in this case, and will be filing a brief in support of the plaintiffs.

JUDITH F. KRUG FUND

Over the past year, a substantial amount has been donated to the Freedom to Read Foundation in memory of our founding executive director, Judith Krug. The FTRF Board decided to set aside these donations and create the Judith F. Krug Fund, with the intent of establishing projects and programs that would embody Judith's lifelong devotion to educating librarians, library workers, and the public about the importance of intellectual freedom. Plans for the fund were finalized at this meeting, and I am pleased to report that the Krug Fund will have two major components:

1. Banned Books Week Read-Out! Grants for Libraries and Community Groups

Libraries and community groups will be invited to submit competitive applications for two grants (one for $2,500, the other for $1,000), to fund local Banned Books Week Read-Out! events that will allow the successful applicants to stage a full Banned Books Week Read-Out!, with funding to stage a major event featuring great authors. It is hoped that the grant program will seed local Read-Out! events and encourage young people to understand censorship and the need to assure everyone's access to wonderful books.

The call for proposals will go out July 2010 and the announcement of the winning libraries or community groups will be made in August 2010.

2. Online Learning for LIS Students

FTRF staff will work with LIS leaders to develop an intellectual freedom curriculum that would be provided to library school students via online instructional tools. The project contemplates both live lectures and seminars by leading intellectual freedom scholars that would be archived for future viewing and self-directed content on IF topics. The project would carry on Judith's passionate devotion to teaching intellectual freedom principles to new members of the library profession; she made a point of speaking and teaching at library schools, including extended seminars at Simmons and other library schools.

2010 ROLL OF HONOR RECIPIENT ROBERT M. O'NEIL

It gives me great pleasure to announce that Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, is the recipient of the 2010 Freedom to Read Foundation Roll of Honor Award. O'Neil, who also serves on the law faculty at UVA, has a storied history as an advocate for the First Amendment. He began his legal career as a clerk for Supreme Court Justice William J. Brennan, Jr., in 1962, and from there held a number of positions in academia, including president of the University of Virginia. He is also a member of the National Advisory Board of the American Civil Liberties Union.

O'Neil was the keynote speaker at FTRF's 10th Anniversary Gala in 1979. At the Foundation's 40th Anniversary Gala in 2009, he presented the Thomas Jefferson Center's William J. Brennan Jr. Award for free expression posthumously to FTRF Executive Director Judith Krug.

O'Neil has made academic freedom a hallmark of his career, particularly through his work with the American Association of University Professors. Among the many books he has written are *The Rights of Public Employees*, *Classrooms in the Crossfire*, *Free Speech in the College Community*, and *Academic Freedom in the Wired World*. We are very pleased to add Bob O'Neil to the FTRF Roll of Honor.

2010 CONABLE CONFERENCE SCHOLARSHIP

I am also pleased to announce the winner of the 2010 Gordon M. Conable Conference Scholarship, Aubrey Madler. Madler, an information specialist with the University of North Dakota's Center for Rural Health, is the third recipient of the Conable Scholarship. Madler holds a B.S. in Elementary Education from Mayville State University and worked as a paraprofessional in libraries for several years prior to receiving her M.L.S. from Texas Women's University in 2008. In her capacity at the Center for Rural Health, she provides reference services and maintains databases, online information guides, and print collections for the Rural Assistance Center. She also serves on the Intellectual Freedom Committee of the North Dakota Library Association and maintains a blog in that capacity.

The Conable Scholarship provided the funds that made it possible for Madler to attend the 2010 Annual Conference in Washington, D.C. Madler attended various FTRF and other intellectual freedom meetings and programs during the conference, spent time consulting with a mentor, and reported about her experiences and thoughts via OIF's blog (http://oif.ala.org/oif). She also will prepare a more formal report upon her return to North Dakota.

FTRF MEMBERSHIP

The Freedom to Read Foundation continues to offer free one-year memberships to graduating library school students to provide new entrants to the library profession an opportunity to understand and participate in the crucial work of the Foundation. This successful program has garnered over 200 new librarian members for FTRF and will be continued through December. More information on the program can be found at www.ftrf.org/graduates.

Membership in the Freedom to Read Foundation is the critical foundation for FTRF's work defending First Amendment freedoms in the library and in the larger world. Your support for intellectual freedom is amplified when you join with FTRF's members to advocate for free expression and the freedom to read. I strongly encourage all ALA Councilors to join me in becoming a personal member of the Freedom to Read Foundation, and to have your libraries and other institutions become organizational members. Please send a check ($35+ for personal members, $100+ for organizations, $10+ for students) to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at *www.ftrf.org/joinftrf.* □

(professors . . . from page 194)

helped develop the policy under consideration there as chairman of his campus faculty's committee on academic freedom and responsibility.

Pasternack said it is "important to have this freedom in writing," especially when weighing in on divisive topics such as the administrative and academic reorganizations his campus is going through to deal with a tight budget. Technological advances such as online discussion boards offer "a lot of opportunity to speak," Pasternack said, but "it is important to have that mesh with freedom not to have that speech held against you."

The U.S. Supreme Court appeared to have opened the door to court rulings curtailing the speech rights of public-college employees with its 2006 decision, in *Garcetti v. Ceballos*, holding that government agencies can restrict the statements their employees make in connection with their official duties.

The *Garcetti* case did not deal directly with higher education; it involved a dispute within a district attorney's office. Moreover, the court acknowledged that the employee speech restrictions allowed by its ruling might not be appropriate for academic settings, with the majority opinion explicitly putting off to another day the question of whether the court's reasoning "would apply in the same manner to a case involving speech related to scholarship or teaching." Nevertheless, several federal courts have cited the *Garcetti* ruling in denying faculty members and other college employees any First Amendment protection for statements related to their jobs.

Among the those decisions, the U.S. Court of Appeals for the Seventh Circuit ruled in 2008 that a tenured associate professor at the University of Wisconsin at Milwaukee was not protected by the First Amendment when he complained that administrators there had mishandled a grant. The U.S. Court of Appeals for the Third Circuit held last year that a Delaware State University professor was not protected when he spoke about job-related activities not specifically covered by his contract.

Pending before the U.S. Court of Appeals for the Ninth Circuit is a case dealing with the question of whether the First Amendment protected a professor at the University of California at Irvine from repercussions over statements he made in connection with personnel decisions in his academic department.

Meanwhile, the U.S. Court of Appeals for the Fourth Circuit has been asked to take up the case of Michael S. Adams, a prominent conservative commentator and associate professor of criminology at the University of North Carolina at Wilmington who claims he was denied a promotion based on his online columns and other expressions of opinion. In ruling against Adams in March, a U.S. District Court held that he had caused his columns to be considered as work-related speech—rather than as outside speech clearly protected under the First Amendment—by including them in the package of materials submitted as part of his promotion bid.

Other recent federal court decisions have similarly adopted a fairly expansive view of the applicability of the *Garcetti* ruling to higher education.

Among them, the U.S. District Court for the Southern District of Alabama held in May that a faculty member's calls for more diversity in hiring were not protected, especially since they did not amount to a formal discrimination complaint. In ruling against Moira K. Miller, a former tenure-track assistant professor of English at the University of South Alabama who alleged that the university chose not to reappoint her in retaliation for such speech, Judge Kristi K. DuBose noted that Miller herself had acknowledged she expressed her views as a faculty member.

Judge DuBose's decision said that although the public may have an interest in the diversity of the faculty in the University of South Alabama's English department, "Miller simply did not speak on behalf of the public as a citizen."

Judge Frederic Block of the U.S. District Court for the Eastern District of New York similarly held in March that two tenured nursing professors at the City University of New

York's Medgar Evers College, Anthony Isenalumhe and Jean Gumbs, were not protected by the First Amendment in filing complaints about a manager with union and college officials. In rejecting the professors' claims that administrators had illegally retaliated against them over such speech, Judge Block called their lawsuit "nothing more than an attempt—regrettably all too common—to dress an internecine feud in First Amendment garb."

"There may be circumstances in which such struggles implicate the First Amendment, as when it involves what may and may not be taught in a public university," Judge Block's ruling said. "Here, however, the speech at issue involves a string of complaints by faculty members unhappy with the administration of their department. While the complaints may well be justified, the First Amendment does not transform a federal court into a battleground for their resolution."

Judge Block's decision cited a January ruling by a three-judge panel of the U.S. Court of Appeals for the Second Circuit holding that a teacher at a public elementary school in New York City public was not protected by the First Amendment when he filed a grievance with his union over a supervisor's failure to discipline an unruly student. In rejecting the teacher's claim that he was the victim of illegal retaliation, the Second Circuit found irrelevant the teacher's argument that filing grievances was not one of his everyday job responsibilities.

In a separate decision in May involving a New York City public-school teacher who was removed from the classroom for writing vulgar slang terms offered by eighth graders on the blackboard during a lesson on HIV prevention, a U.S. District Court held that "teacher instruction is public employee speech," and therefore is not protected.

Although the courts generally treat First Amendment cases involving higher education differently than those involving elementary and secondary schools, Rachel Levinson, senior counsel for the AAUP, said she finds the decisions in the Second Circuit "incredibly worrisome." In a presentation delivered in June at the association's annual conference, Lawrence White, vice president and general counsel at the University of Delaware, said there was nothing in the two decisions involving public schools stating that disputes involving college faculty members should be handled any differently.

In June, in ruling against a former librarian at Ohio State University at Mansfield who claimed he had been forced out of his job over a controversial reading-assignment recommendation, Judge William O. Bertelsman of the U.S. District Court for the Southern District of Ohio construed the *Garcetti* decision's exception for academic speech in the narrowest possible terms, as solely covering "scholarship or teaching." Holding that the *Garcetti* majority "recognized no broader exception to the rule it propounded," Judge Bertelsman said the librarian was not protected by the First Amendment when he made a book recommendation as part of his work with a faculty committee.

The only recent speech-related federal court decision welcomed by the AAUP was a March ruling, by a U.S. magistrate judge, which held that a professor of obstetrics and gynecology at the Wright State School of Medicine was protected by the First Amendment in teaching certain medical techniques and procedures that his boss opposed. In rejecting the medical school's argument that the *Garcetti* precedent should be applied in an academic setting, U.S. Magistrate Judge Michael R. Mertz said universities "should be the active trading floors in the marketplace of ideas."

In explaining his decision to urge the University of Illinois system to adopt a policy protecting the job-related speech of faculty members, Matthew W. Finkin, a professor of law at the Urbana-Champaign campus, said faculty members "don't want to be in the hands of the judiciary" when disputes related to academic freedom arise.

Michael Bérubé, a professor of literature at Pennsylvania State University who is on the AAUP's national council and who drafted the Modern Language Association statement urging the revision of faculty handbooks to protect speech, says the courts have torn "a gaping hole" in academic freedom with their recent rulings. The MLA statement, adopted by the group's executive council, is "our last resort," he said.

The MLA statement says faculty members at public colleges can now conceivably face disciplinary action for "everything a faculty member might do or say in the course of his or her working day," including serving on academic committees or discussing university procedures and policies. The statement says such a development "has even more chilling implications in light of the financial crisis many universities now face," because faculty members who speak out about cost-cutting measures "can now face administrative retaliation if they participate in college and university governance, and they may have no recourse under the First Amendment."

Among the other institutions where faculty members are pushing for the formal adoption of policies protecting academic freedom are Auburn University, Oakland University, and the University of Wisconsin at Madison.

Most of the proposed policies are modeled after the one adopted by the University of Minnesota last year. It defines academic freedom as "the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the university." It also states, however, that faculty members have a responsibility to faithfully perform their professional duties, to recognize "the demands of the scholarly enterprise," and to make clear when they are speaking on matters of public interest that they are not speaking for their institution.

Pasternack, of UC-Davis, who is a leader in the effort to get the University of California's Board of Regents to

adopt a policy broadly protecting faculty speech, said most faculty members simply assume they are free to speak out about institutional matters. "It has been somewhat of a process," he says, "to educate faculty that a gap in their academic freedom exists." Reported in: *Chronicle of Higher Education* online, June 21. ☐

(protest . . . from page 195)

privileges of its Muslim Student Union for a year after members of the group repeatedly disrupted a February speech by an Israeli diplomat. Some Jewish groups were pleased with the decision and said they hoped the university would take action if protests against Israel take on a tone that threatens Jews.

Several authors of the original letter said they were disappointed with Yudof's response. The signatories included leaders of such groups as Scholars for Peace in the Middle East, Stand with Us, the Zionist Organization of America and several UC professors and lecturers.

Rabbi Aron Hier, director of campus outreach for the Simon Wiesenthal Center in Los Angeles, said Yudof has evident personal empathy for Jewish concerns and that Jewish groups will work with him and the UC campus climate council. But Hier said he wished Yudof had addressed the groups' request that anti-Semitism be studied and condemned separately. "This can't be placed in some collective box of racism and intolerance in general," he said.

Joel Baker, executive director of Conservative Judaism's Pacific Southwest region, described Yudof's letter as "a little harsh and a little dismissive." Baker said he thought Yudof was trying to do a good job but that he needed to deal more directly with the Jewish community's concerns. Even if fears of anti-Semitism on UC campuses turn out not to be matched by reality, Baker said perceptions remain important. Reported in: *Los Angeles Times*, July 7. ☐

(X-rated . . . from page 195)

In giving ICM's proposal the green light in a meeting in Brussels, the Internet Corporation for Assigned Names and Numbers, which governs Internet addresses, reversed a 2007 vote to reject the dot-xxx domains, saying the decision was purely based on technical grounds. Peter Dengate Thrush, the agency's chairman, said it had no interest or stake in the content of Web sites.

"The applicants believe that this will allow people to filter pornography more effectively," he said. "If they do that and it works, that's great for them. But that's not part of our issue."

The agency now has to negotiate a final contract with ICM. Duke's organization plans to continue its fight against the dot-xxx domains. Reported in: *New York Times*, June 25. ☐

(censorship dateline . . . from page 200)

Association-Northern California and National Lawyers Guild—urged university officials to abandon all efforts to suspend the Muslim student organization.

"Taking the unprecedented step to ban this group will memorialize UCI as a campus that violates its students' constitutional rights, and will have negative repercussions that will reverberate around the country," according to a letter signed by the groups and sent to the chancellor's office in late July.

"Such a decision would amount to selective punishment of a group whose ideas are disfavored by the UC administration, and sets an extremely dangerous precedent that threatens all Americans who exercise their Constitutional rights to freedom of expression and association."

Campus officials banned the Muslim Student Union for one year, placed the group on disciplinary probation for another year and ordered 50 hours of collective community service. The suspension goes into effect September 1, if officials reject an appeal submitted by Muslim students.

The suspension was the result of a months-long internal review by the university following the arrest of eleven students during Israeli Ambassador Michael Oren's speech on campus in February. Oren was repeatedly interrupted by the union members.

The Jewish Federation had obtained documents from the university through the Freedom of Information Act and released information in June about the Muslim union's suspension. Many local Jewish groups applauded the university's action, arguing that the students' behavior disregarded civil discourse and school policies.

Muslim advocacy groups, however, said the suspension was severe, draconian and selective. Banning the group would deprive Muslim students a critical campus resource, they said.

Previous protests of speakers on campus have never resulted in such severe sanctions, according to the coalition's letter to UCI officials. Student protesters who disrupted Jagdish Bhagwati, a Chancellor's Distinguished Fellows Series speaker in 2006, were not reprimanded and did not face any sanctions, according to the letter.

However, university spokeswoman Cathy Lawhon said that the coalition "has no way of knowing whether that earlier group was disciplined or not because the proceedings are not public. I don't know how they can say that since

nobody has public knowledge of that."

Mahdis Keshavarz, spokeswoman for the student group, said the Muslim students, who have not yet heard back from university officials about their appeal, are happy that the civil rights and law groups have taken an interest in their case. Reported in: *Orange County Register*, July 27.

foreign

Moscow, Russia

A Moscow court on July 14 found the opposition *New Times* magazine guilty of defaming a United Russia deputy by writing that he "supervised" an ultranationalist youth group and awarded him a token 1 ruble (3 cents) in damages. Analysts warned that the verdict spelled a setback for free media that would encourage self-censorship.

The author of the disputed article, Yevgeny Levkovich, and other people blamed poor semantics for the ruling, noting that the word used in the article, kurirovat, or "supervised," could be interpreted to mean "in control of" or "to provide support for."

The Presnensky District Court sided with the interpretation that the article accused Maxim Mishenko, the State Duma deputy who sued the *New Times*, of being in control of the ultranationalist Russky Obraz. There is little dispute that Mishenko has provided support for Russky Obraz, perhaps best known for organizing rowdy anti-migrant marches on the November 4 holiday known as National Unity Day. Last year, an Internet site co-founded by Russky Obraz quoted Mishenko as saying: "I have a good feeling about Russky Obraz. I have cooperated with them on many projects and am continuing with my cooperation."

"Mishenko had ties to Russky Obraz, and I think the verdict is the result of using wrong definitions," said Galina Kozhevnikova, a researcher with the Sova center, which monitors ultranationalist groups. Mishenko's spokeswoman Natalya Maslova said the deputy had cut ties with Russky Obraz at the end of last year "after they started barking Nazi slogans."

The *New Times* article, "Nazi on the March," published November 9, quoted an unidentified Kremlin official as saying that Mishenko had a supervisory role in Russky Obraz and that the group was supported by the Kremlin. Mishenko denied the claim in the same article.

Mishenko filed the defamation suit against Levkovich and *New Times* editor-in-chief Yevgenia Albats, who were ordered to pay 1 ruble in damages. Mishenko's lawyers also want *New Times* to publish a retraction in an upcoming issue, but *New Times* lawyer Viktor Zinoviev said the magazine was waiting for a full copy of the court's verdict before making a decision on a retraction or filing an appeal.

Levkovich said he stood by his article and Mishenko should explain why he had links to Russky Obraz in the first place. "It is strange that a person who represents the ruling political party has ties to such an organization," Levkovich said.

The pro-Kremlin youth group Young Guard praised the court ruling, saying in a statement: "The false fact that Maxim Mishenko, the deputy, supervised an extremist organization can be considered nonethical political behavior. That means this information was damaging to his reputation."

This was not the first time that *New Times* has been accused of defamation. Earlier this year, Moscow police sued the magazine for an article in which current and former OMON riot police officers spoke of the force being used for various unlawful activities, including to provide protection to prostitutes. Reported in: *Moscow Times*, July 15. ☐

(from the bench . . . from page 208)

was uploaded without permission.

Viacom, which sued Google in 2007 and accused it of copyright infringement after tens of thousands of Viacom videos were uploaded to the site, had argued that Google was not entitled to those protections because it had deliberately turned a blind eye and profited from rampant piracy on YouTube.

But Judge Louis L. Stanton of United States District Court for the Southern District of New York sided with Google, saying that while the company certainly knew that copyrighted material had been uploaded to its site, it did not know which clips had been uploaded with permission and which had not.

Google and groups supporting Internet companies hailed the decision, saying it would protect not only YouTube but also other sites that host user-generated content.

"This is a victory for the Internet and for the people who use it," said Kent Walker, Google's general counsel. "The decision will let a whole new generation of creators and artists share their work online." Walker said the decision "was an affirmation of the emerging legal framework and ratifies the rules we have all been living under."

But Viacom, the owner of Comedy Central, MTV and Nickelodeon, said it would appeal the ruling, which it said was fundamentally flawed.

"Copyright protection is essential to the survival of creative industry," Michael Fricklas, Viacom's general counsel, wrote in a blog post. Fricklas said that before YouTube put in place a filtering mechanism to more easily detect copyright infringement, the company had built itself on pirated material and sold itself to Google for $1.65 billion.

"YouTube and Google stole hundreds of thousands of video clips from artists and content creators, including Viacom, building a substantial business that was sold for

billions of dollars," Fricklas said. Legal experts said that the ruling blessed YouTube's practices for dealing with copyrighted material, as well as those of many other sites that handle user-generated content in a similar fashion.

"The ruling should give online service providers a lot of comfort that copyright owners aren't going to be able to force them to change their behavior or put them on the hook for problems that their users create," said Eric Goldman, director of the High Tech Law Institute at the Santa Clara University School of Law.

Forcing companies like Google to police every video uploaded to their sites "would contravene the structure and operation of the DMCA," Judge Stanton wrote, using the shorthand for the Digital Millennium Copyright Act.

"The present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then sent a mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them," Judge Stanton wrote.

Judge Stanton also rejected comparisons between YouTube and other Internet companies that had been found to violate copyrights, like Grokster.

The case has revealed the tensions between Google and media companies over copyrights. Since its filing, though, those tensions have eased substantially, as YouTube has set up an automated system to detect and block infringing videos and has signed revenue-sharing agreements with more than a thousand media companies. But media companies remain concerned that they will continue to lose control over their content as more of it becomes digital, making it easier to copy.

Documents produced as part of the case proved embarrassing for both companies. E-mail messages from YouTube's founders, Chad Hurley, Steve Chen and Jawed Karim, for example, suggested they were willing to overlook the pirated videos on the site as they tried to increase the traffic to the site and sell the company.

Google produced e-mail messages that showed that Viacom employees and contractors were uploading copyrighted clips to YouTube even as the company was complaining about copyright infringement.

To a large extent, the case addressed past conduct, as Viacom said it was not seeking damages for any actions since Google put in its filtering system, known as content ID, in early 2008.

But Michael S. Kwun, a lawyer at Keker & Van Nest who previously worked at Google, said the decision would ensure that Internet companies were not legally required to develop such a system and could expect legal protection as long as they took down content when copyright holders complained. "I have no idea how much money YouTube spent on developing its content ID system, but if that was required for any new start-up, you wouldn't see any," Kwun said. Reported in: *New York Times*, June 23. ☐

(is it legal? . . . from page 216)

by university lawyers, to assist faculty in breaking the law, says Aufderheide. Ditto campus information-technology hands. The outside possibility of an expensive lawsuit by a powerful body like the MPAA has been a deterrent, even if lawsuits against university targets have been rarely, if ever, carried out, says Aufderheide and several other experts in academe.

The new exemptions, however, will permit librarians to help professors and students decrypt, edit, and repurpose DVD content, says Aufderheide. Such services could become standard parts of the library's service menu, which would almost certainly increase the frequency with which professors teach with excerpted film and television content. Reported in: insidehighered.com, July 28.

privacy

San Francisco, California

Twitter has settled a Federal Trade Commission investigation into the security and privacy protections it offers users.

For the last eleven months, the FTC has been looking into two security breaches at Twitter in 2009 in which a hacker got access to the accounts of several prominent members, including Barack Obama, then the president-elect, and was able to read their private Twitter messages and send out fake messages from their accounts.

The FTC's punishment was not severe. Twitter, based in San Francisco, agreed to set up a security program that will be audited by an outside company, and, according to the FTC's news release on the case, "will be barred for twenty years from misleading consumers about the extent to which it maintains and protects the security, privacy and confidentiality of nonpublic consumer information."

"When a company promises consumers that their personal information is secure, it must live up to that promise," said David Vladeck, director of the FTC's bureau of consumer protection, in a statement. "Likewise, a company that allows consumers to designate their information as private must use reasonable security to uphold such designations. Consumers who use social networking sites may choose to share some information with others, but they still have a right to expect that their personal information will be kept private and secure."

The incidents occurred in the first half of 2009. In the first, more serious attack, an unknown hacker used an automated software program to guess at Twitter's administrative password—a weak, lowercase, common dictionary word, the FTC said—and obtain control over the service. The hacker penetrated 45 user accounts for a short period of

time, reset their passwords and posted the new passwords online.

The hacker also sent humorous messages out from the accounts of some users, including President-elect Obama, whose account that day offered his thousands of Twitter followers the opportunity to win free gasoline.

In a post on the company's blog, Twitter's general counsel, Alexander Macgillivray, wrote that the incident occurred when the service employed fewer than 50 people and was growing rapidly. "Even before the agreement, we'd implemented many of the FTC's suggestions and the agreement formalizes our commitment to those security practices," he wrote.

In the second incident, in April, a hacker accessed a Twitter employee's personal e-mail account and was able to use information obtained there to guess the employee's administrative password to the service, which he used to get into ten more user accounts. This attack was perpetrated by François Cousteix, a 23-year-old French-born hacker who went by the online handle Hacker-Croll. He avoided jail time this week when a French court gave him a suspended sentence over the incident.

Over the last few years, the FTC has become more aggressive on matters of data security. It said the case was the thirtieth it had brought over faulty data security measures, but the first against a social networking service.

In a fact sheet about the settlement that Twitter distributed, the company referred to more recent data breaches involving AT&T, Google and Apple, and wrote of the FTC, "We think they saw it as an opportunity to make an example of us in the hopes of curtailing breaches—including those many more serious than ours—in our industry." Reported in: *New York Times*, June 25.

Washington, D.C.

They're calling it a tweak—a "technical clarification"—but civil liberties advocates say the Obama administration and the FBI's demand that Congress approve a huge expansion of their authority to obtain the sensitive Internet records of American citizens without a judge's approval is a brazen attack on civil liberties.

At issue is the scope of the Federal Bureau of Investigation's power to obtain information from "electronic communications service providers" using national security letters (NLS), which compel private companies to allow government access to communication records without a court order. The administration wants to add four words—"electronic communication transactional records"—to Section 2709 of the Electronic Communications Privacy Act, which spells out the types of communications data that can be obtained with an NSL. Yet those four little words would make a huge difference, potentially allowing investigators to draw detailed road maps of the online activity of citizens not even suspected of any connection to terrorism.

In their original form, NSLs were extremely narrow tools designed to allow federal investigators to obtain very basic telephone records (name, address, length of service, calls placed and received) that could be linked by "specific and articulable facts" to persons suspected of being terrorists or foreign spies. In 1993, Congress amended the statute to clarify that NSLs could be issued to electronic information service providers as well as traditional phone companies. But wary of the potential for misuse of what the House Judiciary Committee called this "extraordinary device" in a world of rapidly changing technology, Congress placed tight limits on the types of records that could be obtained, making clear that "new applications" of NSLs would be "disfavored."

The administration is presenting this change as a mere clarification meant to resolve legal ambiguity—as though Congress had simply misplaced a semicolon. Yet the Bush-era Office of Legal Counsel already rejected that argument in a 2008 opinion, concluding that the FBI had for years misread the "straightforward" language of the statute. And clarity is certainly needed, as it is hard to know just what falls under "categories of information parallel to subscriber information and toll billing records."

The standard reference for lawyers in this sphere, David Kris' National Security Investigations and Prosecutions, simply notes that the scope of NSLs as applied to online activity is unclear. Even the Justice Department seems uncertain. In a 2001 response to congressional inquiries about the effect of the newly enacted USA PATRIOT Act, the Department of Justice told Congress that "reasonable minds may differ" as to where the line should be drawn between addressing information equivalent to toll billing records and "content" requiring a search warrant.

Many believe that Congress would be wise to specify in greater detail just what are the online equivalents of "toll billing records." But a blanket power to demand "transactional information" without a court order would plainly expose a vast range of far more detailed and sensitive information than those old toll records ever provided.

Consider that the definition of "electronic communications service providers" doesn't just include ISPs and phone companies like Verizon or Comcast. It covers a huge range of online services, from search engines and Webmail hosts like Google, to social-networking and dating sites like Facebook and Match.com to news and activism sites like RedState and Daily Kos to online vendors like Amazon and Ebay, and possibly even cafes like Starbucks that provide WiFi access to customers. And "transactional records" potentially covers a far broader range of data than logs of e-mail addresses or websites visited, arguably extending to highly granular records of the data packets sent and received by individual users.

As the Electronic Frontier Foundation has argued, such broad authority would not only raise enormous privacy concerns but have profound implications for First Amendment

speech and association interests. Consider, for instance, the implications of a request for logs revealing every visitor to a political site such as Indymedia. The constitutionally protected right to anonymous speech would be gutted for all but the most technically savvy users if chat-forum participants and blog authors could be identified at the discretion of the FBI, without the involvement of a judge.

The right of "expressive association," which a unanimous Supreme Court similarly found to enjoy constitutional protection, would be equally imperiled. The Court previously held that the government could not force politically controversial groups like the NAACP to reveal their membership rosters without judicial process. But as legal scholar Katherine Strandburg has argued, data-mining technology now holds out the temptation that just such patterns of "expressive association" can be revealed by sophisticated analysis of communications patterns and social-network ties—and perhaps even patterns of physical movement, as could be inferred from records of location-sensitive mobile devices. And when the goal is to detect the patterns of previously unidentified terrorists, such analysis requires vacuuming up the records of huge numbers of innocent persons, more or less by definition.

Moreover, the distinction between "content" and merely "transactional" information is not nearly as sharp as might be supposed. Certain communications protocols, for instance, transmit each keystroke a user makes in real time as a separate data "packet." Given the known regularities of the English language, standard keyboards, and human hands, it is theoretically possible to infer the content of a communication from a sufficiently precise record of packet transmission timing. While such an attack would probably be infeasible given current technologies and record-keeping practices, the legal change proposed by the FBI would not be limited to present technologies or practices.

More practically, consider records of keyword-sensitive targeted advertising delivered to users of Webmail services like Gmail, which could indirectly hint at the contents of the e-mail that triggered a specific ad. Or again, consider downloaded movies. Under the Video Privacy Protection Act of 1988, records of a customer's video-rental history are private and protected by law. But even if subscriber viewing histories using services like iTunes or Netflix were considered out of bounds, that history could be reconstructed from transaction logs showing the precise size of a user download. The examples are hypothetical—what matters is the more general point: An abstract distinction between metadata and "content" gives us no way of predicting the extent of highly intimate information that might be extracted as technology changes and the analytic tools of investigators become more sophisticated.

We increasingly live online. We flirt, shop, read, speak out, and organize in a virtual space where nearly every action leaves a digital trace—and where those breadcrumb bits often track us through the physical world as well. If the Obama administration gets its way, an agency that has already proved itself utterly unable to respect the limits of its authority will have discretion to map our digital lives in potentially astonishing detail, with no judge looking over their shoulders. That the administration and the FBI would seek such power under the guise of a "technical clarification" is proof enough that they cannot be trusted with it. Reported in: *The American Prospect*, July 29.

Nashville, Tennessee

Hidden inside Ashley Hayes-Beaty's computer, a tiny file helps gather personal details about her, all to be put up for sale for a tenth of a penny. The file consists of a single code—4c812db292272995e5416a323e79bd37—that secretly identifies her as a 26-year-old female in Nashville.

The code knows that her favorite movies include "The Princess Bride," "50 First Dates" and "10 Things I Hate About You." It knows she enjoys the "Sex and the City" series. It knows she browses entertainment news and likes to take quizzes.

"Well, I like to think I have some mystery left to me, but apparently not!" Hayes-Beaty said when told what that snippet of code reveals about her. "The profile is eerily correct."

Hayes-Beaty is being monitored by Lotame Solutions Inc., a New York company that uses sophisticated software called a "beacon" to capture what people are typing on a website—their comments on movies, say, or their interest in parenting and pregnancy. Lotame packages that data into profiles about individuals, without determining a person's name, and sells the profiles to companies seeking customers. Hayes-Beaty's tastes can be sold wholesale (a batch of movie lovers is $1 per thousand) or customized (26-year-old Southern fans of "50 First Dates").

"We can segment it all the way down to one person," says Eric Porres, Lotame's chief marketing officer.

One of the fastest-growing businesses on the Internet is the business of spying on Internet users, a *Wall Street Journal* investigation has found. The *Journal* conducted a study that assesses and analyzes the broad array of cookies and other surveillance technology that companies are deploying on Internet users. It reveals that the tracking of consumers has grown both far more pervasive and far more intrusive than is realized by all but a handful of people in the vanguard of the industry. The study found that:

- The nation's fifty top websites on average installed 64 pieces of tracking technology onto the computers of visitors, usually with no warning. A dozen sites each installed more than a hundred. The nonprofit Wikipedia installed none.
- Tracking technology is getting smarter and more intrusive. Monitoring used to be limited mainly to "cookie" files that record websites people visit. But the *Journal*

found new tools that scan in real time what people are doing on a Web page, then instantly assess location, income, shopping interests and even medical conditions. Some tools surreptitiously re-spawn themselves even after users try to delete them.

- These profiles of individuals, constantly refreshed, are bought and sold on stock-market-like exchanges that have sprung up in the past 18 months.

The new technologies are transforming the Internet economy. Advertisers once primarily bought ads on specific Web pages—a car ad on a car site. Now, advertisers are paying a premium to follow people around the Internet, wherever they go, with highly specific marketing messages.

It's rarely a coincidence when you see Web ads for products that match your interests. In between the Internet user and the advertiser, the Journal identified more than 100 middlemen—tracking companies, data brokers and advertising networks—competing to meet the growing demand for data on individual behavior and interests.

The data on Hayes-Beaty's film-watching habits, for instance, is being offered to advertisers on BlueKai Inc., one of the new data exchanges.

"It is a sea change in the way the industry works," says Omar Tawakol, CEO of BlueKai. "Advertisers want to buy access to people, not Web pages."

The *Journal* examined the fifty most popular U.S. websites, which account for about 40% of the Web pages viewed by Americans. (The *Journal* also tested its own site, WSJ.com.) It then analyzed the tracking files and programs these sites downloaded onto a test computer.

As a group, the top fifty sites placed 3,180 tracking files in total on the *Journal's* test computer. Nearly a third of these were innocuous, deployed to remember the password to a favorite site or tally most-popular articles.

But over two-thirds—2,224—were installed by 131 companies, many of which are in the business of tracking Web users to create rich databases of consumer profiles that can be sold.

The top venue for such technology was IAC/InterActive Corp.'s Dictionary.com. A visit to the online dictionary site resulted in 234 files or programs being downloaded onto the Journal's test computer, 223 of which were from companies that track Web users.

The information that companies gather is anonymous, in the sense that Internet users are identified by a number assigned to their computer, not by a specific person's name. Lotame, for instance, says it doesn't know the name of users such as Hayes-Beaty—only their behavior and attributes, identified by code number. People who don't want to be tracked can remove themselves from Lotame's system.

And the industry says the data are used harmlessly. David Moore, chairman of 24/7 RealMedia Inc., an ad network owned by WPP PLC, says tracking gives Internet users better advertising. "When an ad is targeted properly, it ceases to be an ad, it becomes important information," he says.

Tracking isn't new. But the technology is growing so powerful and ubiquitous that even some of America's biggest sites say they were unaware, until informed by the *Journal*, that they were installing intrusive files on visitors' computers. The *Journal* found that Microsoft Corp.'s popular Web portal, MSN.com, planted a tracking file packed with data: It had a prediction of a surfer's age, ZIP Code and gender, plus a code containing estimates of income, marital status, presence of children and home ownership, according to the tracking company that created the file, Targus Information Corp.

Both Targus and Microsoft said they didn't know how the file got onto MSN.com, and added that the tool didn't contain "personally identifiable" information.

Tracking is done by tiny files and programs known as "cookies," "Flash cookies" and "beacons." They are placed on a computer when a user visits a website. U.S. courts have ruled that it is legal to deploy the simplest type, cookies, just as someone using a telephone might allow a friend to listen in on a conversation. Courts haven't ruled on the more complex trackers.

The most intrusive monitoring comes from what are known in the business as "third party" tracking files. They work like this: The first time a site is visited, it installs a tracking file, which assigns the computer a unique ID number. Later, when the user visits another site affiliated with the same tracking company, it can take note of where that user was before, and where he is now. This way, over time the company can build a robust profile.

One such system is Yahoo! Inc.'s ad network, which collects fees by placing targeted advertisements on websites. Yahoo!'s network knows many things about recent high-school graduate Cate Reid. One is that she is a 13- to 18-year-old female interested in weight loss. Reid was able to determine this when a reporter showed her a little-known feature on Yahoo!'s website, the Ad Interest Manager, that displays some of the information Yahoo! had collected about her.

Yahoo!'s take on Reid, who was 17 years old at the time, hit the mark: She was, in fact, worried that she may be 15 pounds too heavy for her 5-foot, 6-inch frame. She says she often does online research about weight loss.

"Every time I go on the Internet," she says, she sees weight-loss ads. "I'm self-conscious about my weight," says Reid, whose father asked that her hometown not be given. "I try not to think about it. . . . Then [the ads] make me start thinking about it."

Yahoo! spokeswoman Amber Allman says Yahoo! doesn't knowingly target weight-loss ads at people under 18, though it does target adults.

"It's likely this user received an untargeted ad," Allman says. It's also possible Reid saw ads targeted at her by other tracking companies.

Information about people's moment-to-moment thoughts and actions, as revealed by their online activity, can change hands quickly. Within seconds of visiting eBay.com or Expedia.com, information detailing a Web surfer's activity there is likely to be auctioned on the data exchange run by BlueKai, the Seattle startup.

Each day, BlueKai sells 50 million pieces of information like this about specific individuals' browsing habits, for as little as a tenth of a cent apiece. The auctions can happen instantly, as a website is visited. Spokespeople for eBay Inc. and Expedia Inc. both say the profiles BlueKai sells are anonymous and the people aren't identified as visitors of their sites. BlueKai says its own website gives consumers an easy way to see what it monitors about them.

Tracking files get onto websites, and downloaded to a computer, in several ways. Often, companies simply pay sites to distribute their tracking files. But tracking companies sometimes hide their files within free software offered to websites, or hide them within other tracking files or ads. When this happens, websites aren't always aware that they're installing the files on visitors' computers.

Often staffed by "quants," or math gurus with expertise in quantitative analysis, some tracking companies use probability algorithms to try to pair what they know about a person's online behavior with data from offline sources about household income, geography and education, among other things.

The goal is to make sophisticated assumptions in real time—plans for a summer vacation, the likelihood of repaying a loan—and sell those conclusions.

Some financial companies are starting to use this formula to show entirely different pages to visitors, based on assumptions about their income and education levels.

Life-insurance site AccuquoteLife.com, a unit of Byron Udell & Associates Inc., tested a system showing visitors it determined to be suburban, college-educated baby-boomers a default policy of $2 million to $3 million, says Accuquote executive Sean Cheyney. A rural, working-class senior citizen might see a default policy for $250,000, he says.

"We're driving people down different lanes of the highway," Cheyney says.

Consumer tracking is the foundation of an online advertising economy that racked up $23 billion in ad spending last year. Tracking activity is exploding. Researchers at AT&T Labs and Worcester Polytechnic Institute last fall found tracking technology on 80% of 1,000 popular sites, up from 40% of those sites in 2005.

The *Journal* found tracking files that collect sensitive health and financial data. On Encyclopaedia Britannica Inc.'s dictionary website Merriam-Webster.com, one tracking file from Healthline Networks Inc., an ad network, scans the page a user is viewing and targets ads related to what it sees there. So, for example, a person looking up depression-related words could see Healthline ads for depression treatments on that page—and on subsequent pages viewed on other sites.

Healthline says it doesn't let advertisers track users around the Internet who have viewed sensitive topics such as HIV/AIDS, sexually transmitted diseases, eating disorders and impotence. The company does let advertisers track people with bipolar disorder, overactive bladder and anxiety, according to its marketing materials.

Targeted ads can get personal. Last year, Julia Preston, a 32-year-old education-software designer in Austin, Texas, researched uterine disorders online. Soon after, she started noticing fertility ads on sites she visited. She now knows she doesn't have a disorder, but still gets the ads. It's "unnerving," she says.

Tracking became possible in 1994 when the tiny text files called cookies were introduced in an early browser, Netscape Navigator. Their purpose was user convenience: remembering contents of Web shopping carts. Back then, online advertising barely existed. The first banner ad appeared the same year. When online ads got rolling during the dot-com boom of the late 1990s, advertisers were buying ads based on proximity to content—shoe ads on fashion sites.

The dot-com bust triggered a power shift in online advertising, away from websites and toward advertisers. Advertisers began paying for ads only if someone clicked on them. Sites and ad networks began using cookies aggressively in hopes of showing ads to people most likely to click on them, thus getting paid.

Targeted ads command a premium. Last year, the average cost of a targeted ad was $4.12 per thousand viewers, compared with $1.98 per thousand viewers for an untargeted ad, according to an ad-industry-sponsored study in March.

More than half of the sites examined by the *Journal* installed 23 or more "third party" cookies. Dictionary.com installed the most, placing 159 third-party cookies. Cookies are typically used by tracking companies to build lists of pages visited from a specific computer. A newer type of technology, beacons, can watch even more activity.

Beacons, also known as "Web bugs" and "pixels," are small pieces of software that run on a Web page. They can track what a user is doing on the page, including what is being typed or where the mouse is moving. The majority of sites examined by the *Journal* placed at least seven beacons from outside companies. Dictionary.com had the most, 41, including several from companies that track health conditions and one that says it can target consumers by dozens of factors, including zip code and race.

Dictionary.com President Shravan Goli attributed the presence of so many tracking tools to the fact that the site was working with a large number of ad networks, each of which places its own cookies and beacons. After the *Journal* contacted the company, it cut the number of networks it uses and beefed up its privacy policy to more fully disclose its practices.

The widespread use of Adobe Systems Inc.'s Flash

software to play videos online offers another opportunity to track people. Flash cookies originally were meant to remember users' preferences, such as volume settings for online videos.

But Flash cookies can also be used by data collectors to re-install regular cookies that a user has deleted. This can circumvent a user's attempt to avoid being tracked online. Adobe condemns the practice. Most sites examined by the Journal installed no Flash cookies. Comcast.net installed 55.

That finding surprised the company, which said it was unaware of them. Comcast Corp. subsequently determined that it had used a piece of free software from a company called Clearspring Technologies Inc. to display a slideshow of celebrity photos on Comcast.net. The Flash cookies were installed on Comcast's site by that slideshow, according to Comcast.

Clearspring, based in McLean, Virginia, says the 55 Flash cookies were a mistake. The company says it no longer uses Flash cookies for tracking. CEO Hooman Radfar says Clearspring provides software and services to websites at no charge. In exchange, Clearspring collects data on consumers. It plans eventually to sell the data it collects to advertisers, he says, so that site users can be shown "ads that don't suck." Comcast's data won't be used, Clearspring says.

Wittingly or not, people pay a price in reduced privacy for the information and services they receive online. Dictionary.com, the site with the most tracking files, is a case study. The site's annual revenue, about $9 million in 2009 according to an SEC filing, means the site is too small to support an extensive ad-sales team. So it needs to rely on the national ad-placing networks, whose business model is built on tracking. Dictionary.com executives say the trade-off is fair for their users, who get free access to its dictionary and thesaurus service.

"Whether it's one or ten cookies, it doesn't have any impact on the customer experience, and we disclose we do it," says Dictionary.com spokesman Nicholas Graham. "So what's the beef?"

The problem, say some industry veterans, is that so much consumer data is now up for sale, and there are no legal limits on how that data can be used. Until recently, targeting consumers by health or financial status was considered off-limits by many large Internet ad companies. Now, some aim to take targeting to a new level by tapping online social networks.

Media6Degrees Inc., whose technology was found on three sites by the *Journal*, is pitching banks to use its data to size up consumers based on their social connections. The idea is that the creditworthy tend to hang out with the creditworthy, and deadbeats with deadbeats.

"There are applications of this technology that can be very powerful," says Tom Phillips, CEO of Media6Degrees. "Who knows how far we'd take it?" Reported in: *Wall Street Journal*, July 30. ☐

intellectual freedom bibliography

Compiled by Angela Maycock, Assistant Director, Office for Intellectual Freedom

"Booksellers Oppose MA 'Harmful to Minors' Law." *Library Hotline*. Vol. 39, no. 30, August 2, 2010, pp. 5–6.

Buller, Tyler. "Stirring the Pot." *American School Board Journal*. Vol. 197, no 6, June 2010, pp. 24–26.

"Family Won't Seek Damages for Webcam Spying." *Education Week*. Vol. 29, no. 32, May 19, 2010, p. 5.

"Fingerprint Recognition Adopted in UK School." *Library Hotline*. Vol. 39, no. 24, June 21, 2010, p. 7.

"Learning from a Book Challenge in Cheshire, CT." *Library Hotline*. Vol. 39, no. 27, July 12, 2010, pp. 4–5.

"Librarians Head for the Hill to Rally for Reading." *American Libraries*. Vol. 41, no, 8, August 2010, pp. 38–44.

"NJ PL, Citing Child Porn, Removes GLBT Book." *Library Hotline*. Vol. 39, no. 31, August 9, 2010, pp. 4–5.

"PLs Navigate Between Education and Advocacy." *Library Hotline*. Vol. 39, no. 30, August 2, 2010, pp. 3–4.

Staino, Rocco. "Playwrights Define Censorship." *American Libraries*. Vol. 41, no, 8, August 2010, p. 12.

Smith, Tricia. "Digital Daily." *American School Board Journal*. Vol. 197, no 6, June 2010, pp. 27–28.

"Texas Curriculum Changes Addressed." *American Libraries*. Vol. 41, no, 8, August 2010, pp. 9–10.

Waggoner, Chuck. "A Moment to Ponder." *American School Board Journal*. Vol. 197, no. 7, July 2010, pp. 26–27.

Zehr, Mary Ann. "Ethnic-Studies Classes Subject to Sharp Curbs Under New Ariz. Law." *Education Week*. Vol. 29, no. 32, May 19, 2010, p. 24.

NEWSLETTER ON INTELLECTUAL FREEDOM
50 East Huron Street • Chicago, Illinois 60611