newsletter on intellectual freedom

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Judith Krug 1940–2009

Word of the death of Judith Krug, editor of the Newsletter on Intellectual Freedom, *reached us as the* Newsletter *was going to print. Our July issue will be devoted to tributes to and memories of Judith. The following is the text of a statement released by the American Library Association on April 13.*

Judith Fingeret Krug, 69, the long-time director of the American Library Association's (ALA) Office for Intellectual Freedom (OIF) and executive director of the Freedom to Read Foundation, who fought censorship on behalf of the nation's libraries, died April 11 after a lengthy illness.

Krug, who often said, "Censorship dies in the light of day," was the director of OIF and executive director of the Freedom to Read Foundation for more than forty years. She was admired and respected for her efforts to guarantee the rights of individuals to express ideas and read the ideas of others without governmental interference.

Through her unwavering support of writers, teachers, librarians and, above all, students, she has advised countless numbers of librarians and trustees in dealing with challenges to library material. She has been involved in multiple First Amendment cases that have gone all the way to the United States Supreme Court. In addition, she was the founder of ALA's Banned Books Week, an annual week-long event that celebrates the freedom to choose and the freedom to express one's opinion.

"For more than four decades Judith Krug inspired librarians and educated government officials and others about everyone's inviolable right to read. Her leadership in defense of the First Amendment was always principled and unwavering. Judith's courage, intelligence, humor and passion will be much missed—but her spirit will inspire us always," said Jim Rettig, ALA president, and Keith Michael Fiels, ALA executive director.

Krug was the recipient of many awards, including the Joseph P. Lippincott Award, the Irita Van Doren Award, the Harry Kalven Freedom of Expression Award and, most recently, the William J. Brennan, Jr. Award, from the Thomas Jefferson Center for the Protection of Free Expression. Krug also received an honorary doctorate, Doctor of Humane Letters, from the University of Illinois, Urbana-Champaign in 2005. In July, the Freedom to Read Foundation planned to give her an award for her years of vision and

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Published by the ALA Intellectual Freedom Committee,
Kenton L. Oliver, Chair

in this issue

targets of the censor

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remembering Judith Krug

The statements below were released on April 13, two days following her passing. The July issue of the Newsletter *will include additional tributes and recollections of her extraordinary life.*

The following is a statement from American Library Association (ALA) President Jim Rettig on the loss of Banned Books Week founder and library advocate Judith F. Krug who died Saturday, April 11, 2009, after a battle with cancer.

For more than four decades Judith Krug inspired librarians and educated government officials and others about everyone's inviolable right to read. Her leadership in defense of the First Amendment was always principled and unwavering. All who had the privilege to work with her admired her, learned from her example, and enjoyed her sense of humor.

Her professional legacy is the thousands of librarians and others who share her commitment to intellectual freedom. I and all of ALA's members express our deepest sympathy to Herbert Krug and the rest of his family as they mourn Judith's passing and celebrate her remarkable life.

American Library Association (ALA) Executive Director Keith Michael Fiels released the following statement regarding the loss of ALA Office for Intellectual Freedom Director Judith F. Krug.

As a librarian for over thirty years, I heard of Judith Krug long before I ever met her or worked with her. As a Junior High School Librarian in an impoverished community, fresh out of library school, I came to know ALA and the Office for Intellectual Freedom as an outspoken opponent of the censorship that is all too common in schools.

Over the years, I saw the critical role that Judith and the Office played in protecting libraries from the forces of censorship and in promoting tolerance and the First Amendment rights of all library users. Each year, ALA helped thousands of libraries threatened by censorship. With 9/11 and the passage of the USA PATRIOT Act, the work of Judith and the OIF took on a new urgency as the government sought to overturn long-established rights of library users to read freely without fear of government surveillance.

Since coming to ALA as Executive Director six years ago, I have had the privilege of working with Judith on a day to day basis. I was present as the CIPA case was argued, and met with then Attorney General Alberto Gonzales to

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(Judith Krug, 1940–2009. . . from page 69)

leadership. In addition, she served as a senator and vice president of the Phi Beta Kappa society.

Earlier this year, she received the William J. Brennan Jr. Award for her "remarkable commitment to the marriage of open books and open minds." Krug was only the fifth person to receive the award since 1993. The award recognizes a person or group that demonstrates a commitment to the principles of free expression followed by the late U.S. Supreme Court Justice.

"Often in the face of great personal criticism, Krug has never wavered in her defense of First Amendment freedoms, whether testifying before Congress, leading legal challenges to unconstitutional laws or intervening hundreds of times to support and advise librarians in their efforts to keep particular books," according to the Center.

Born Judith Fingeret in Pittsburgh in 1940, she began her library career as a reference librarian at Chicago's John Crerar Library in 1962. Later, she was hired as a cataloger at Northwestern University's dental school library, working there from 1963 to 1965. She joined the ALA as a research analyst from 1965 to 1967 and assumed the post of OIF director in 1967, also taking over the duties of executive director of the Freedom to Read Foundation.

Krug was a member of the ALA, as well as Phi Beta Kappa, serving as an associate on the Chicago area's executive committee and as president from 1991 to 1994. She was also a member of the American Bar Association's committee on public understanding. In addition, she was on the board of directors of the Chicago chapter of the American Jewish Commission, on the Council of Literary Magazines and Presses and the chair of the Media Coalition.

She is survived by her husband Herbert, her children Steven (Denise) of Northbrook and Michelle (David) Litchman of Glencoe and five grandchildren: Jessica, Sydney, Hannah, Rachel and Jason. She is also survived by her brothers, Jay (Ilene) Fingeret and Dr. Arnold (Denise) Fingeret of Pittsburgh, and her sister and brother-in-law, Shirley and Dr. Howard Katzman of Miami. She was preceded in death by her sister Susan (Steve) Pavsner of Bethesda, Maryland. □

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explain why ALA could not back down in its opposition to the provisions of the Patriot Act. Our stand on this issue changed the way that the world saw librarians, and history has proven us correct in our opposition.

I think it is fair to say that Judith Krug's 's energy and leadership were central to all of these accomplishments, and that her work impacted not just libraries, but all Americans. Judith's courage, intelligence, humor and passion will be much missed—but her spirit will inspire us always.

The following is a statement released from American Library Association (ALA) Intellectual Freedom Committee Chair J. Douglas Archer.

I just learned of the death of Judith Krug, founder and longtime Director of the American Library Association's Office for Intellectual Freedom and of the Freedom to Read Foundation. Judith devoted her whole professional life to the advocacy of one of our profession's core values, intellectual freedom. In fact, I believe, as I am sure she believed that it is THE core value of librarianship. Judith has been its most vigorous, creative, persistent and effective advocate for the past forty years.

Her accomplishments would fill page after page. I will only mention the most obvious. She founded the Office for Intellectual Freedom and later the Freedom to Read Foundation, serving as their first and only director. She initiated what has come to be one of the most successful annual publicity "stunts" ever dreamed up by a non-governmental body, "Banned Books Week." She developed the first *Intellectual Freedom Manual*, that loose-leaf notebook that I remember from library school. As current chair of the Intellectual Freedom Committee, it has been my honor and privilege to play a small part in the preparation of its eighth edition.

Judith tirelessly defended intellectual freedom and American libraries in every imaginable forum. She testified effectively before Congress and the courts, was interviewed uncounted times (often at the drop of a hat) by local and national media, debated potential censors from the right, left and middle—always staying on point and in control. She made herself available to all manner of national, state and local library organizations as speaker and resource person. She had a hand in almost every Supreme Court case of the past four decades that touched upon libraries and the freedom for people to read, view or hear what they would—usually successfully. Along the way she recruited and inspired uncounted new recruits to the cause of intellectual freedom. I am proud to have been one of her recruits, to have had her as a mentor, to have stuck around long enough to have become a colleague, and to be able to call her friend.

Over the years she has been honored by numerous library groups and by other supporters of the first amendment. This summer at the Freedom to Read Foundation's Fortieth Anniversary Gala she would have received the William J. Brennan Award, presented by the Thomas Jefferson Center. I wish she could have been there for the event—but not just for honor. I'm sure that she would have delighted in using the festivities to push her cause one more time."

Judith Platt, president of the American Library Association's (ALA) Freedom to Read Foundation released the following statement on the passing of Judith Krug, director of ALA's office for Intellectual Freedom.

With Judith Krug's death I lost a beloved friend. But I am not alone. Everyone who cherishes the right to read and to think and to speak freely has lost an irreplaceable friend.

In the coming days there will be many others to speak about her love of her profession. She considered librarianship to be the highest of callings and there is an entire generation of librarians out there whose commitment to intellectual freedom was forged and shaped by Judith Krug. But I am not a librarian. What brought us together was my work advocating for freedom of expression on behalf of the publishing industry, and when we first started working together Judith was already a legend. At library or free expression gatherings when I met people for the first time and was asked what I did, my shorthand reply was "I do for the publishers something along the lines of what Judith Krug does for the library community, but not nearly as well." This immediately established me as a fighter on the side of the angels but definitely not up to her status as an archangel!

Judith had an abiding faith in the power of "the community of the book." She was convinced that when librarians, publishers, booksellers, and authors stand together in defense of intellectual freedom we are unstoppable. She believed in our obligation to take on that fight wherever and whenever it arose, and more often than not she led the charge. Hers was the first voice raised in a call-to-arms against the Communications Decency Act and she was largely responsible for pulling together the coalition that challenged the CDA and won. I was with Judith in San Francisco the day the Supreme Court handed down its unanimous ruling and to call our celebration that evening "Bacchanalian" would be an understatement. Judith's was literally the first voice raised in warning against Section 215 of the USA PATRIOT Act and the threat it represented to reader privacy, and it is no accident that Section 215 came to be known as "the library provision" (although nowhere in its language is the word 'library' mentioned). She considered it a badge of honor that former Attorney General John Ashcroft dismissed the protests of civil libertarians against the excesses of the PATRIOT Act as having been organized by "a bunch of hysterical librarians."

Judith Krug was the most courageous person I have ever known. She was my friend and role model. I am filled with gratitude that she was a part of my life, and I will miss her terribly.

The Association of American Publishers released the following statement:

The Association of American Publishers (AAP) joined colleagues in the book and free speech community in mourning the loss of legendary free speech advocate Judith Krug, director of the American Library Association's Office for Intellectual Freedom. Mrs. Krug died in Chicago on Saturday after an 18-month battle with cancer.

Judith Krug's name was synonymous with intellectual freedom. She headed the ALA Office for Intellectual Freedom from its creation in 1967. She played a major role in the establishment of the Freedom to Read Foundation as the First Amendment legal defense arm of the American Library Association, and served as the Foundation's Executive Director since 1969. A tireless advocate and teacher, Mrs. Krug helped to instill a commitment to the principles of intellectual freedom in an entire generation of librarians. She was instrumental in the creation of the Banned Books Week observance and was one of the first voices raised in warning against the threat to reader privacy from the USA PATRIOT Act.

Judith Krug's death is a loss for all of us," said Pat Schroeder, AAP President and CEO. "She strongly believed in the natural alliance between librarians and publishers in defending the right to read. She was a marvelous ambassador for the library community."

Judith Platt, director of AAP's Freedom to Read program, who is currently serving as President of the Freedom to Read Foundation, said: "Judith believed in the power of the 'community of the book' and was convinced that when librarians, publishers, booksellers, and authors stand together in defense of intellectual freedom they are unstoppable. She brought out the best in all of us, and I'm proud to have called her my friend."

The Center for Democracy and Technology (CDT) released the following statement:

CDT, and all Americans who care about free speech and civil liberties, have lost a good friend with the passing of Judith Krug, the Director of the Office of Intellectual Freedom of the American Library Association, the Executive Director of ALA's Freedom to Read Foundation and longtime member and former Chair of CDT's Board of Directors. Judith passed away this past Saturday in Chicago.

Judith Krug dedicated her life to the fight against censorship, not only in libraries but also throughout American life. Once the Internet emerged as a key communications medium in our society, Judith was instrumental in taking the defense of free speech and the First Amendment to the online world. She also chaired the Internet Education Foundation, which helps educate policy makers about the power of an open Internet.

Judith was a principal organizer of the Citizen's Internet Empowerment Coalition that worked with CDT to launch a constitutional challenge to the Communications Decency Act in 1996, in *American Library Association* v. *U.S. Dep't of Justice*. That case was consolidated with the *ACLU* v. *Reno* case and together went to the Supreme Court, resulting in a landmark decision that established the merits of free expression on the Internet and provided that speech with the highest level of First Amendment protection. CDT was honored to work with Judith on that challenge.

Judith was a friend and a colleague and unwavering advocate of free speech," said Jerry Berman, founder and current Board Chair of CDT. "She will be remembered not just for her love of words, but in defense of those words against narrow-minded censors," Berman said. "Her legacy rests in the constitutional challenge that secured the free speech rights for the Internet that we exercise today."

Judith was an indefatigable defender of the First Amendment. She was a mentor, a friend and stalwart champion of America's core values," said Leslie Harris, CDT's President and CEO. "Her passion and commitment will be missed." □

reaching through the schoolhouse gate: students' eroding First Amendment rights in a cyber-speech world

By Frank D. LoMonte, Executive Director, Student Press Law Center. The following article was published as an "issue brief" by the American Constitution Society for Law and Policy in February, 2009. It is reprinted with permission and without footnotes.

I. Introduction

Forty years ago, the Supreme Court resoundingly affirmed that young people attending public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The unmistakable implication of *Tinker* v. *Des Moines Independent Community School District* was that students showed up at the schoolhouse possessing the full benefits of the First Amendment; the only question was how much of that bundle of rights they were forced to check at the gate.

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anxiety over religious offense limits free speech

Two decades ago, on February 14, 1989, Salman Rushdie received one of history's most notorious Valentine greetings. Ayatollah Khomeini, then Iran's Supreme Leader, issued a fatwa (a religious edict) calling for the death of the Indian-born British author in response to his novel, *The Satanic Verses*. Khomeini called on all "intrepid" and "zealous" Muslims to execute the author and publishers, reassuring them that if they were killed in the process, they would be regarded as martyrs.

Rarely had a book stirred up such intense feelings. Hitoshi Igarashi, its Japanese translator, was stabbed to death. Ettore Capriolo, the Italian translator, and William Nygaard, the book's Norwegian publisher, were stabbed and shot respectively, although both survived. Bookshops were bombed, and the tome was burned in public across the world. Rushdie, fearing for his life, was forced into hiding.

Horrific though these consequences were, many argued that freedom of speech itself was at stake. To cave in, by withdrawing publication or sale of the work, would represent the crumbling of a defining principle of liberal societies. Britain broke off diplomatic relations with Iran over the threat to kill a British citizen. At no point did Penguin, the original publisher, withdraw the book. It remained possible to argue that Rushdie's intolerant detractors, despite their violence, had lost their battle.

Yet critics today, such as Kenan Malik, a writer and broadcaster, argue that the detractors have gradually won their war. Malik and others suggest that free speech in the West is in retreat. Other publishers, faced with books that were likely to cause widespread offence, have been less resolute. In 2008 Random House was set to publish *The Jewel of Medina*, a misty-eyed account of romance between Muhammad and his wife Aisha. The firm reversed its decision after a series of security experts and academics cautioned them against publication (one American academic described the work as historically inaccurate "soft core pornography"), warning it would be dangerously offensive. Gibson Square, another publisher, took up the novel and saw its offices firebombed in September 2008, twenty years to the day after publication of *The Satanic Verses*. *The Jewel of Medina* has since been released in the United States, but it remains under wraps in Britain.

Other examples of political sensitivity abound. In 2006, the New York Theatre Workshop cancelled a planned production of "My Name is Rachel Corrie", a play about an American student killed by an Israeli Defence Forces bulldozer. The theatre was concerned that the play would be too controversial in the wake of Ariel Sharon's collapse into a coma and Hamas's election victory in the Palestinian

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report cites privacy concerns in cloud computing

Companies looking to reduce their IT costs and complexity by tapping into cloud computing services should first make sure that they won't be stepping on any privacy land mines in the process, according to a report released in late February by the World Privacy Forum.

The report runs counter to comments made at an IDC cloud computing forum, where speakers described concerns about data security in cloud environments as overblown and "emotional." But the World Privacy Forum contends that while cloud-based application services offer benefits to companies, they also raise several issues that could pose significant risks to data privacy and confidentiality.

"There are a whole lot of companies out there that are not thinking about privacy" when they consider cloud computing, said Pam Dixon, executive director of the Cardiff, California-based privacy advocacy group. "You shouldn't be putting consumer data in the cloud until you've done a thorough [privacy] review."

According to the World Privacy Forum's report, the data stored in cloud-based systems includes customer records, tax and financial data, e-mails, health records, word processing documents, spreadsheets, and PowerPoint presentations. The list of potential privacy issues cited in the report include the following:

Breaking the rules. Organizations could find themselves on the wrong side of privacy regulations if they aren't careful, the report said. For example, a federal agency that uses a cloud service to host personal data may be in violation of the Privacy Act of 1974, especially if it doesn't have provisions for protecting the data in its contract with the cloud provider, according to the report. In addition, it said, federal records management and disposal laws may limit the ability of agencies to store official records in the cloud.

Similarly, the privacy rules in federal laws such as HIPAA and the Gramm-Leach-Bliley Act restrict companies from disclosing personal health care or financial data to nonaffiliated third parties unless specific contractual arrangements have been put in place, the report said. In another example, it noted that IRS rules prohibit tax preparers from using third parties such as cloud service providers to host returns. "Companies could be loading data into the cloud illegally without their knowing it," Dixon said.

Surprises in the fine print. Companies need to understand that the data-disclosure terms and conditions set by cloud vendors and the storage and access rights they include in contracts can have a significant effect on privacy, the report claimed. And the privacy risks can be magnified, Dixon said, if a cloud vendor retains the ability to change its terms and policies at will. Users should make sure, she

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Berkman Center rides herd on Internet censorship

Harvard's Berkman Center for Internet & Society in late February launched Herdict, which encourages Internet users to report blocked, or otherwise inaccessible websites. The name is a portmanteau of "herd" and "verdict," and true to its name, Herdict allows people to track blackouts to determine whether the problem is innocuous and temporary or the result of government censorship.

The project is the brainchild of the author and law professor Jonathan Zittrain, who not only co-founded Berkman ten years ago but also conducted pioneering research on Internet filtering earlier in this decade. He eventually helped create the OpenNet Initiative (ONI), which tracks online censorship in countries like China, Iran and Uzbekistan.

Herdict is an outgrowth of ONI's work. But whereas ONI gathers anecdotal evidence and technical analysis for academic study, Herdict hopes to aggregate massive amounts of user data to create real-time reports. It is essentially a public version of the testing software that ONI operatives used to test sites used to monitor government filtering from within the borders of repressive states.

Herdict, then, is part of a larger movement to enlist crowds in an effort to create transparency in government. While it can't stop censorship, it can cast a light on it. Reported in: wired.com, March 3. □

Churchill wins lawsuit, but only $1 in damages

A jury ruled April 2 that the University of Colorado had illegally fired Ward Churchill in response to statements protected by the First Amendment. But it awarded the controversial ethnic-studies scholar only a token $1 in damages, leaving experts on academic freedom confused as to exactly what message other colleges should draw from the verdict.

Judge Larry J. Naves, who presided over the four-week trial in a state court in Denver, gave both sides thirty days to file motions related to the next phase of the proceedings, a hearing in which the judge will determine Churchill's status at the university. Judge Naves could demand that Churchill be reinstated at the University of Colorado at Boulder, or he could order the university to pay Churchill a lump sum for money he could have earned if he had kept his university job, which paid $94,000 a year.

Churchill's lawyers said they hoped to have him back teaching in university classrooms by the fall. That outcome, however, is likely to be strongly resisted by the university, which continues to stand by its conclusions that Churchill committed academic misconduct that merited his dismissal in 2007.

In awarding Churchill only $1 in damages, the jury rejected a call by his chief lawyer, David A. Lane, to award an amount that would send a message "in a big way" to faculty members and students at colleges around the nation.

After the verdict was read, however, Churchill jokingly held up a $1 bill and waved it. Speaking to reporters in a courthouse hallway, he said, "What was asked for and what was delivered was justice." He added that his lawsuit had exposed "the fraud of the university's campaign and collaboration with private right-wing interests."

Lane called the jury's decision "a great victory for the First Amendment and academic freedom," and said he expects to recoup hundreds of thousands of dollars in legal fees from the university.

The University of Colorado system's president, Bruce D. Benson, issued a written statement that said, "While we respect the jury's decision, we strongly disagree." The verdict, he said, "doesn't change the fact that 21 of Ward Churchill's faculty peers on three separate panels unanimously found he engaged in deliberate and repeated plagiarism, falsification, and fabrication that fell below the minimum standards of professional conduct."

Bensen called the jury's $1 award for punitive damages "an indication of what they thought of the value of Ward Churchill's claim." He said the university was weighing what to do next.

The trial in Churchill's lawsuit lasted nearly four weeks, during which 45 witnesses took the stand. Among those who testified were Colorado's former governor, Bill Owens; a long list of administrators and faculty members involved in the university's investigation of charges that Churchill had committed academic misconduct; and several scholars in Churchill's field of expertise, American Indian studies.

The university's lawyers focused on trying to show that the university had treated Churchill fairly and had given him due process in the proceedings that led to his firing for scholarly misconduct. Churchill's lawyers sought to convince the jury that his dismissal was in response to the uproar over an essay in which he compared many of the office workers killed in the September 11, 2001, terrorist attack on the World Trade Center to a Nazi bureaucrat, and said they were not truly innocent victims.

The six-member jury—consisting of four women and two men, all of whom appeared to be in their 20s or early 30s—deliberated for ten hours before reaching its verdict. Earlier in the day, it had tipped its hand by returning to the courtroom to ask Judge Naves if it needed to be unanimous in its decision on how much to award Churchill, and whether it had the option of awarding him no money at all. Judge Naves said yes, its decision had to be unanimous, and that $1 was the least it could award Churchill if it decided in his favor.

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‘torture memos’ vs. academic freedom

When people gathered last May for the commencement ceremony at the University of California at Berkeley’s Boalt Hall School of Law, they were greeted by chanting activists from the National Lawyers Guild and other left-wing groups.

The university, protesters shouted, should fire John C. Yoo, a tenured professor who has taught at the law school since 1993. While on leave at the U.S. Justice Department’s Office of Legal Counsel between 2001 and 2003, Yoo drafted what have come to be known as the “torture memos” — a series of secret memoranda that gave benediction to President George W. Bush’s interrogation and surveillance policies.

Some scholars believe that Yoo’s memoranda were so shoddy that they amounted to professional misconduct. Several of those critics also think that Yoo’s academic job should be in jeopardy. But others — including some who agree that Yoo’s memoranda were pernicious — argue that penalizing Yoo for his work in Washington could set a troubling precedent for academic freedom.

Now the debate over Yoo’s presence at Berkeley has taken on new urgency. At the beginning of March, the government released several previously undisclosed memoranda by Yoo. And the Justice Department will soon complete a review of his conduct. According to a *Newsweek* report, the department might allege that Yoo improperly colluded with the White House to craft justifications for dubious counterterrorist policies. It could be the credible charge of misconduct that critics have been waiting for.

At the center of the storm sits Christopher Edley Jr., dean of Boalt Hall, who is fielding anxious phone calls from faculty members and students. “The analogy on everyone’s mind here is the McCarthy era, when professors were harassed and sometimes prosecuted for their outside political endeavors,” Edley said. “That explains the attractiveness of a bright-line rule that requires an actual criminal conviction before a professor can be disciplined for outside work.”

But Edley also said that a higher standard should apply to law professors and other instructors in professional schools. In those fields, Edley says, the university should investigate credible allegations of serious off-campus professional misconduct, even if a criminal conviction is nowhere in sight.

“Law professors, after all, are charged with preparing the next generation of professionals to live their lives according to our ethical canons,” he said.

If the Justice Department’s review includes serious allegations, Edley said, the university might be justified in formally reviewing Yoo’s extracurricular activities. Such a

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Obama must tread fine line on scholars barred for their views

Over the past eight years, several of the world’s most prominent thinkers have not been heard on U.S. soil. Federal authorities, given broad discretion to deny foreigners entry in the wake of the terrorist attacks of September 11, 2001, have been denying them visas or, more awkwardly, stopping them at airports and placing them on return flights home, their visas revoked.

The USA Patriot Act, signed into law that fearful and angry autumn, said federal officials can deny a visa to anyone who “endorses or espouses terrorist activity” or “persuades others” to do so. That provision enabled the Bush administration to revive a cold-war practice known as ideological exclusion—the refusal of visas based not on actions, but on viewpoints or associations.

The question of whether to continue that practice—or drop or significantly alter it—is likely to be a tough call for the Obama administration, forcing it to strike a delicate balance between free-speech concerns and the moral and political imperative to keep Americans safe.

Many now look back at the list of foreign thinkers excluded from the United States during its fight against Communism as a source of embarrassment. It includes such luminaries as the Colombian novelist Gabriel García Márquez, the Chilean poet Pablo Neruda, and the Canadian novelist and conservationist Farley Mowat.

How will history judge the list of those kept out in the fight against terrorism? Hard to say, especially since the Bush administration generally did not make such exclusions public or offer much explanation for those that became known.

It is important to keep in mind that terrorists do not typically show up at the border announcing plans for murder and mayhem. The government, in trying to determine whether someone poses a threat, has to go by whatever information it has. We’ll never know what an abundance of caution saved us from, or what evil we kept away by locking doors.

Clearly, however, the government has made a few questionable calls. Newspapers in Greece expressed outrage and bewilderment over our nation’s 2006 decision to keep Yoannis (John) Milios, a prominent politician there, from entering the United States to attend an academic conference in New York. The government reversed its own unexplained 2005 decision to keep out Waskar T. Ari Chachaki, a Bolivian historian who had been offered a teaching job at the University of Nebraska at Lincoln, after the university sued.

In a letter sent to top Obama administration officials in March, dozens of academic, free-speech, and civil-rights

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censorship dateline

libraries

Council Bluffs, Iowa

Hoops is a book about a young man about to graduate high school with little future in sight. So he seeks help from an "ex-basketball pro turned wino." Seems innocent to some, but one mother is fuming about what she believes is offensive content.

Judi Wheeldon is a Council Bluffs mother who is fighting to ban the book *Hoops*, written by Walter Dean Myers. The 20 year-old novel is on the American Library Association's Best Book for Young Adults List. Wheeldon said her two twelve year-old twin boys checked out the book for school reading and brought it home. But Wheeldon said it's not the "wholesome" material she thought it would be when it came out of their back packs and they opened it up.

Wheeldon said, "We were reading the book and come across some derogatory remarks, racial slurs, sexual content. So I halted their reading until I could go through the book further."

Page after page Wheeldon claimed she read what she calls "inappropriate" reading material for any sixth grader. From the main character shooting his hand with a .32 caliber pistol, to slang homosexual terms, even several racial slurs. Now she's taking action to have the book pulled from Council Bluffs Schools.

Council Bluffs Superintendent Doctor Martha Bruckner formed a committee to read the book and any reviews educational groups have done on it. She said they'll listen to Wheeldon's concerns. Dr. Bruckner said, "as a parent she has a right to complain about almost anything she wants to."

But this former English teacher said banning it isn't a good idea. She says young adults are interested in the topics discussed in *Hoops*. She says kids are "going to run into problems through out their lives, but if we can give them the opportunity to think about those things ahead of time, and to talk to their peers, and to talk to other adults about them then maybe we're making them more ready to hit those issues head on when they run into them." Reported in: action3 News.com, March 31.

Topeka, Kansas

The Topeka and Shawnee County Public Library board voted 5–3 February 19 to restrict minors' access to four books about sex, although the trustees failed to specify just what that restriction would entail.

The titles challenged by complainant Kim Borchers in November 2008 are *The Joy of Sex*, *The Lesbian Kama Sutra*, *The Joy of Gay Sex*, and *Sex for Busy People: The Art of the Quickie for Lovers on the Go*. Borchers, who represents a group called Kansans for Common Sense, had contended in her statement of concern that the materials were harmful to minors under state law.

In a February 13 memo to the board, library Executive Director Gina Millsap reminded trustees that the TSCPL collection contained more than six hunderd books "with subject headings relating to sex, sex instruction, sexual behavior, fertility, etc." and went on to ask, "will staff be expected to review all of these titles and assign some or all of them to a restricted collection?"

Of the sixteen people who weighed in on the challenged titles at the three-hour meeting, fourteen were against restricting them.

"There is not a librarian's desk big enough to hide all the books that someone may find objectionable," said Jason Chaika, vice chairman of the Topeka chapter of the Kansas Equality Coalition. "If we allow individuals or groups to dictate what materials will be restricted, we may just as well rename this library 'Fred Phelps Center for Indoctrination.' To that, I say, 'Not with my tax dollars.' As a gay man, I refuse to be hidden away with the 'dirty' magazines."

Cecil Washington, a Topeka pastor, spoke in favor of limiting access to the material. "Cover your ears," Washington told the room of onlookers gathered in Marvin Auditorium at the library. He then read several explicit lines from a book he found online. The material wasn't from one of the contested books.

"I'm going to stop there," Washington told the board. "You have two pages of this. We have youngsters who are coming to the library who are exposed to this."

Following the vote, the board's chair, Kerry Onstott Storey, who abstained, expressed surprise at the outcome.

"I am extremely disappointed in the board," she said. "I am stunned as chairwoman." After the meeting, Onstott Storey noted that several of the trustees who supported the restriction attend Topeka Bible Church, as does Borchers.

Topeka lawyer Pedro Irigonegaray, who attended the meeting, said he had already been approached by residents interested in initiating a lawsuit to overturn the board's decision. "It really disturbs me greatly that our community has taken a step backward," said Irigonegaray. "Unfortunately, we are seeing what can happen when a small but committed minority decides to take action, and it is now up to the good people of Topeka to join together and say no to this insanity. This is about freedom. Suffice it to say, this is a sad day for our community."

Doug Bonney of the American Civil Liberties Union of Kansas and Western Missouri also weighed in on the civil liberties at issue in the action. Bonney cautioned Onstott Storey in a February 18 letter that any policy restricting access to any titles in the collection is unconstitutional "because it would take these books off the shelves and place them out of the reach of patrons browsing the shelves [even though] Ms. Borchers and her group are not asking that these books be totally removed."

"We've had complaints," Bonney said. "I am certainly recommending we file suit on these complaints and this policy. We're not going to go off half-cocked. We're going to see how they implement this policy. Once they implement it, or even sooner, we look to file a lawsuit if we have to. The library is a public entity. It is a governmental body. It is subject to the First Amendment, which provides for freedom of speech, freedom of press, and freedom of religion. Part of that is the right to receive information without censorship by the government.

"This policy infringes on the rights of both adults and minors. This is not the kind of material that Congress was concerned about in the Internet pornography laws it passed. This material is not obscene. Are they going to take the anatomy books off the shelves?"

Kansas Library Association president Laura Loveless expressed disappointment at the decision. "This is absolutely not common," said Loveless, who also serves as branch manager for the Kansas City, Kansas, Public Library. "Intellectual freedom is the cornerstone of our library business. What we do every single day in making choices is based on the right of people to say what they want to say and the right of people to read what they want to read."

"Unfortunately it opens the door for hundreds of thousands of books in libraries across the state to be restricted," she added. "For the board to turn around and find objections—and they were purchased according to board policy—is confusing as well. This is a very dangerous door to open."

Loveless said she doesn't find the books offensive and firmly believes in other people's rights to have access to that information.

Robert Banks, deputy director of the Topeka and Shawnee County Public Library, said the staff has started talking about how to handle the restriction of the four books. "They are all checked out right now," he said. "There are waiting lists on all of them. At this point in time, we just need to wait for them to be returned. It's going to require a thoughtful response. We'll just do what we need to do." Reported in: *American Libraries Online*, February 20; *Topeka Capital-Journal*, February 20, 21.

St. Louis, Missouri

Responding to protest by a community group, the St. Louis County Library has agreed to a system that would label books for teenagers with sexual content. The teen reading areas in all St. Louis County library branches will include books labeled "High School" for use only by students in ninth through twelfth grade.

Citizens Against Pornography (CAP) said it would decide later when to close the book on how well the St. Louis County Library responded to their protests over questionable teen books. The group protested last year about books they say are inappropriate for teens because they contain sexual content.

CAP members say it appears library officials have listened to their concerns, but they'll take a wait-and-see attitude before deciding whether the library's move to label the books with parental warning stickers will satisfy them.

"I think it is a step in the right direction, but depending on how they implement it will determine whether or not we're satisfied," said Carl Hendrickson, director of CAP. "Until they actually put out some type of information to parents to understand what 'high school' means, and they actually make some review of books as they come in to determine whether they belong in a section for high school students or whether they belong in a section for younger teens,"

CAP, an interfaith community organization that wants to alert the public to the dangers of pornography, says some titles in the teen section contain graphic depictions of homosexual and heterosexual sex acts not suitable for young readers.

At an August 2008 library board of directors meeting, Citizens Against Pornography presented petitions with more than 150 signatures protesting certain titles. The books included descriptions of love-making and sex that "could easily be said that the purpose of the sexual detail is to make it easy for readers to fantasize the described actions, and in doing so bring out sexual feelings," said Jim Melka of West County. Others protested that some titles in the teen section could contribute to an increase in sexually transmitted disease among teens.

"I think we'll wait to see how the implementation works out to determine whether or not we're satisfied," Hendrickson said. "But at least they were aware of the

problem and have taken a small step."

Charles Pace, St. Louis County Library executive director, said the purpose of the labeling system is not to prevent people from checking out materials, but rather to let parents know which materials are for younger and which are for older children.

"It's just something to give parents a little bit of extra guidance, so they know that those materials have mature subject matter," Pace said. "The books will remain where they are, but will just have a different label on them." The library already reviews books with guidance from the American Library Association and in case of further complaints they have a reconsideration of materials policy, Pace said. Anyone who objects to certain passages in specific books can file a request for review, Pace said.

Under the library's labeling system the children's collection continues to consist of reading materials through fifth grade and the teen collection will consist of sixth- through twelfth-grade level materials. The high school collection will be established within the teen collection, Pace said, and will contain books for ninth- to twelfth-grade level readers. However, the books will be marked with labels reading "High School." Signs will also be placed in the libraries explaining what the "High School" labels are for.

While the labeling idea gained traction after the CAP's petitions and protests, there was already "some feeling that we needed to give parents some additional guidance on the age appropriateness of the material," Pace said.

"We're not restricting the books so that they can't be checked out," Pace said. "All we're doing is providing additional labeling, so I really don't have a problem with it in that regard. Obviously, if we were restricting people from checking out those materials, I would have a concern with that, but the labeling just provides guidance of the age appropriateness."

Laura Kostial, a Ballwin parent and member of the CAP, said they will monitor the situation. "I don't know if this will resolve it or not, but we're hoping it will," Kostial said. "I'm not sure if the labels will catch a lot of this, but maybe it will." She said it was never the CAP's intention to remove the books from the library.

"We just wanted them identified so people would know, because from the titles and the jacket summaries and the catalogue there was no way to know what the content was," Kostial said. "Kind of like when you go to a movie or get a video game, you have knowledge of it and are warned. So we just wanted them identified in some way and moved into the adult sections, but at no point did we want them removed from the library. I don't think anybody in CAP ever expressed that desire." Reported in: *Suburban Journals*, February 9.

Cleveland Heights, Ohio

A principal's decision to remove a magazine from a middle-school library has drawn criticism for the Cleveland Heights-University Heights school board from the American Civil Liberties Union.

The ACLU said the First Amendment was violated when Brian Sharosky, principal of Roxboro Middle School, confiscated the November issue of *Nintendo Power* magazine. The magazine covers the world of Nintendo video games, from previews and ratings to secret codes and short cuts.

"Literature should not be removed from a school library simply because one person may find it inappropriate," said Christine Link, ACLU of Ohio executive director, in a statement last week. She called for the board to "immediately order that the magazine be reinstated."

Sharosky deemed that particular issue unsuitable for students in grades six to eight because of a "violent figure" on the cover and content about a game that's rated for mature audiences, according to district spokesman Michael Dougherty

The librarian objected, maintaining that staff members—including the principal—are supposed to follow the policy for challenging a publication. That starts with submitting a form to the superintendent and ends with a decision by the school board.

The Cleveland Heights Teachers Union sided with the librarian, but the administration and board backed the principal as the issue has festered over the past few months. A December statement from the board said the policy applies to community members who question a publication's suitability or value, but the principal still is responsible for acting in the students' best interests day to day.

"In point of fact, the issue here involves an incorrect reading of the board's policy which would remove the authority of a building administrator to make necessary judgments about age-inappropriate materials in a timely fashion," Dougherty said.

Jeff Gamso, the ACLU's legal director, said the policy applies to the principal, but if it doesn't, the district needs one that does. "The principal doesn't get to say, 'Whatever I say goes,'" Gamso said. "There's got to be some mechanism by which decisions are made and a process of review. Or maybe tomorrow it'll be '*Hamlet*—that's an iffy play.'"

Those who label Cleveland Heights a bastion of liberalism may find some irony in the school board being criticized by the ACLU. But Gamso doesn't see it that way. "People may believe we're a wildly liberal organization on the left end of the political spectrum, but that's not true," he said. "We're taking a very conservative point of view. Obey the rules—that's what we're talking about here." Reported in: *Cleveland Plain Dealer*, March 23.

Keller, Texas

It's called *The Boy Book* and it has some North Texas parents steaming mad. With racy chapter titles and content, some say it is too adult for young eyes. Yet a Keller

Independent School District student managed to get a copy of it from her middle school library.

The Boy Book—with its cute little penguin cover—looks like it's written for a child. The book calls women's breasts "boy magnets." Instructions include, "No matter how puny your frontal equipment, don't wear the kind with giant pads inside. If a guy squeezes them, he'll wonder why they feel like Nerf balls instead of boobs."

Chapter 3 talks about drinking.

The 13-year-old student checked the book out from Fossil Hill Middle School when the librarian recommended it to her. "There's stuff kids my age don't need to know yet," said the student, whose family did not want to be identified.

Chapter 6 is for the "serious boyfriend." The book reads, "you can see a future if the two of you are getting horizontal on a regular basis. You borrow his T-shirts."

The student said she was embarrassed. The middle school even has a rule about hugging. "It's weird having that in there when we can't even hug for more than two seconds."

Keller Independent School District (ISD) officials said "the district relies on reviews from quality national journals written by certified librarians" and the book was recommended.

The concerned parent met with school officials. She said she wasn't happy with how the meeting went because they backed the guidelines for the book. Keller ISD officials said they take this very seriously. If the mother will sign off on it, they will initiate a review, and a committee will read the entire book and vote on whether it should stay or go from the library. Reported in: cbs11tv.com, March 3.

Magna, Utah

Stephenie Meyer's popular Twilight series chronicling the romance of a vampire and teenage girl is notoriously all build-up, no bite. But a parent's complaint over sexual content in the Mormon author's fourth novel, *Breaking Dawn*, coincided with the book's temporary absence from the library at Brockbank Junior High.

Officials at the school purchased copies of the book some time ago, but as of March 18 hadn't placed them on library shelves. Principal Terri Van Winkle would not say whether the delay stemmed from a parent's complaint about a honeymoon scene in which sex is implied between the central characters Bella and Edward. But Granite School District officials confirmed a complaint was voiced.

Meanwhile, the school ignored repeated complaints from another parent "appalled" by the "censorship" of a book she says promotes chastity and tolerance.

"Those are values I want my children to be taught," said Kris Jensen of Magna. "My 15-year-old has read the book. I've read the book, and there isn't anything inappropriate."

Granite district spokesman Ben Horsley downplayed the book ban as fiction. A parent phoned the school in summer to complain about the book's content, but "the principal didn't think much of it, because the book wasn't on the shelves to begin with," said Horsley. "The book is available at the local library, and this mom can buy the book. No one has banned it."

Horsley said school librarians make decisions about their collections based on what's educationally appropriate. He acknowledged that other books in the Twilight saga are available at Brockbank. And he said that, after prodding from the district, the school agreed to add *Breaking Dawn.*

Jensen didn't care why the book was snubbed. She objected on principle, saying book bans serve only to shame children and heighten their curiosity. "It's the parent's job to monitor their children and decide what they can and can't read, not the schools," said Jensen.

Meyer is often hailed as the next J. K. Rowling. *Breaking Dawn*, the fourth and final book in Twilight saga, was released in August and sold 1.3 million copies on the first day. The author, a mother of three living in Arizona, describes herself as a devout Mormon on her official Web site.

Though classed as paranormal fantasy, the "Twilight" books read more like a tale of two star-crossed lovers. The series begins with 17-year-old Bella Swan moving from her mother's sunny home in Phoenix to a rain-soaked town in Washington where she encounters Edward Cullen, the brooding adopted son of a local doctor. The Cullens are vampires, but they're the "good kind," drinking only animal blood.

The implied sex scene in *Breaking Dawn* starts with newlyweds Bella and Edward at the beach. The two kiss and caress before he pulls her into the water. The next scene has Bella waking the next morning to torn feathered pillows, bruises, and a sore jaw.

The books are filled with erotic tension. But the consensus among reviewers is that the sexual themes are tender and tasteful. The two lovers remain chaste until married. Wildly popular among teenage girls, the first book was made into a major motion-picture. Reported in: *Salt Lake Tribune*, March 19.

West Bend, Wisconsin

A West Bend couple circulated petitions in late March asking the community library's board to remove books they consider to be obscene or child pornography from a section designated "Young Adults." The books should be reclassified and placed in a restricted area requiring parental approval prior to being released to a child, Ginny Maziarka said. Also, such material should be labeled with a warning about its content, she said.

West Bend Community Memorial Library Director Michael Tyree said state and federal laws prohibit anyone from distributing pornographic books to children. The

books criticized by the Maziarkas are sold in bookstores and are available in public and high school libraries throughout the state, Tyree said.

"We deny that the books are pornography," he said. "These books are from reputable publishers."

The petition drafted by Maziarka and her husband, Jim, also asked the Library Board to balance its collection of books about homosexuality with books "affirming traditional heterosexual perspectives" that are faith-based or written by "ex-gay" authors.

The couple object to "the overt indoctrination of the gay agenda into our community youth," Ginny Maziarka said. She questions why a taxpayer-funded library makes available "every latest gay-affirming book, including those designed to open up young minds to the false and dangerous notion that homosexuality is normal."

Tyree said the library does not have flags on shelves promoting books with homosexual themes. "The balance we achieved here was to provide homosexual books with the heterosexual," he said.

Ginny Maziarka described two of the books the couple targeted for removal from the teen section, *The Perks of Being a Wallflower* and *The Geography Club*, as "explicitly sexual." A third book, *Deal With It! a whole new approach to your body, brain and life as a gURL*, is pornographic and "worse than an R-rated movie," Maziarka said.

"Get them out of the kids' faces at the library," she said.

The Maziarkas said other concerned parents have offered to help them distribute petitions. The petitions will be presented to the Library Board at a later date. Petitions were on display for signing in a room at the library on two evenings.

"We buy books based upon reviews" by the *School Library Journal*, *Library Journal*, *Publishers Weekly*, *Booklist* of the American Library Association, *Kirkus Reviews* and other sources, Tyree said. Those long-established review sources would identify books as obscene, Tyree said.

Tyree described the books targeted by the Maziarkas as age-appropriate for young adults. He acknowledged they contain sexual content. "What is obscene?" he said. "It's not up to them to tell the community what is obscene."

Under Wisconsin's sexual morality law, obscene material is a publication or recording that:

- "The average person, applying community standards, would find appeals to the prurient interest if taken as a whole.
- "Under contemporary community standards, describes or shows sexual conduct in a patently offensive way.
- "Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole."

Prurient interest generally is defined as an obsessive interest in sex.

Ginny Maziarka says her definition of pornography is "any sexual activity that is spelled out explicitly, even crudely." Reported in: *Milwaukee Journal-Sentinel*, March 31.

Casper, Wyoming

The Natrona County Public Library canceled a program by a Buddhist monk scheduled for February 7 because it crossed the line between imparting information and preaching, the library's community relations director said. "It has an intent to proselytize, but we can't do that in a county building," Brenda Thomson said.

The talk by Kelsang Rinzin of the Heruka Buddhist Center in Fort Collins, Colorado, was set as an independent event in the Crawford Room, and not sponsored by the library, Thomson said in a news release.

The talk initially appeared to be informational, she said. "However, advertising released by the agency responsible for the event indicates an intention to proselytize, making the event inappropriate for presentation in this public facility, and in violation of the contract for NCPL meeting space, signed by the event's coordinator," Thomson said. Reported in: *Casper Star-Tribune*, February 10.

schools

Naperville, Illinois

Controversial author Bill Ayers says separate decisions by school officials and a bookshop owner to cancel his scheduled appearances in Naperville are "absurd" and "outrageous."

The University of Illinois-Chicago education professor was booked to speak at Naperville North High School and Anderson's Bookshop, but plans for both were scrapped March 30 after heavy criticism from some portions of the community.

"This cancellation provides terrible lessons for these young people about the limits of freedom and the importance of obedience, and it must be painful for many of them to watch people they admire collapse under pressure," Ayers said. "It has all the hallmarks of suppression of speech: incitement of fear, intimidation of well-meaning folks, mob rule."

Critics, on the other hand, argued Ayers isn't the type of speaker who should be allowed to speak to students in a tax-supported high school. Before his college teaching days, Ayers co-founded the Weather Underground, an anti-Vietnam war group responsible for a series of bombings at public buildings in the 1960s and '70s. He had faded from the spotlight in recent years until the presidential election, in which his ties to President Barack Obama were called

into question.

Naperville North history teacher Kermit Eby was once Ayers' student and invited him to speak at the school. Students were required to obtain parental permission to attend. But when some District 203 parents and community members learned early last week of Ayers' scheduled appearance, they flooded the district with angry phone calls and e-mails. Critics commenting on newspaper Web sites and contacting school administrators repeatedly referred to Ayers as a terrorist.

In a district-wide e-mail Naperville Unit District 203 Superintendent Alan Leis announced the cancellation, saying, "Any value to our students would be lost in such a highly charged atmosphere and any debate of issues or viewpoints would be overshadowed by media coverage and anger over the event itself."

Leis said he initially thought Ayers would be an interesting speaker because of his connections to the presidential election. But he said he became more troubled as he did more research, and, "it's very hard to figure out who this guy is."

Ayers said he believes he has been inaccurately portrayed by his critics. "There's not a shred of truth in what was said by Fox News or right-wing bloggers," he said. "They've got this caricature they're beating up, but it's not me."

Ayers said while it's true his Weather Underground group intentionally broke the law, he never hurt or killed anyone and has "met his judicial obligations." He said he condemns acts of terror and has never advocated violence. Although he says he has regrets about some of his actions, opposing the Vietnam War isn't one of them. "People could say they disagree or I'm nuts or despicable, but they would have to know the U.S. government . . . was killing 6,000 people a week," he said. "That was also despicable."

Asked what he would have discussed with Naperville students, Ayers said he couldn't summarize his presentation in a sentence or two and pointed to his blog entries at billayers.org about democracy in education. He said the issue isn't about what he would have said; it's about being allowed to say it.

"To me [banning the talk] runs against the spirit of what they think they're defending," he said. "If they think they're defending democracy, what better way to defend it than to allow a conversation and defeat the noxious ideas in a public square, not suppress them."

Naperville North was not the only school to cancel one of his talks. Ayers was scheduled to speak at Boston College via satellite—a compromise from the original plan to speak in person—but the college canceled both events because of the backlash from area residents and police officers (see page 000).

While Naperville students may not hear Ayers speak, students from Highland Park High School recently did. In January, Ayers spoke with about 80 students and faculty during an after-school event held on campus. His talk was sponsored by the Highland Park Young Democrats, a club made up of students but not sponsored by the school. Those there said Ayers spoke about a variety of topics, including the death penalty, war crimes, human rights, the recent election, his children, and his time in the Weather Underground.

Science teacher Jonathan Weiland, who informally supervises the club, said Ayers did not advocate violence when talking to students during the event or at a dinner afterward. According to Weiland, Ayers said he was not proud of what he had done but pointed to others who he felt had done worse during the Vietnam War. Weiland called the speech a successful event and a good opportunity for students.

"I think school should be about the education of people, and it was one opportunity of thousands that students have at our school and any school to see living history," Weiland said.

Also among those there was Highland Park junior Joey Kalmin, a self-described conservative Republican who strongly supported John McCain in the presidential race. Kalmin said in talking with Ayers he found him to be "a nice guy, and I still disagree with him on 99.5 percent of what he said."

Nice guy or not, Kalmin said he considers Ayers a criminal because of his past and feels another setting may have been more appropriate. He said he attended the talk in an effort to be open-minded and hear another point of view. "If I wanted to hear my own opinion," he said, "I could yell it in the mirror." Reported in: *Daily Herald*, April 1.

Missoula, Montana

Last October, Big Sky High School science teacher Kathleen Kennedy showed her wildlife biology students a video called "The Story of Stuff." The video, made by filmmaker Annie Leonard, is a straightforward critique of consumerism and its discontents, and it points more than a few fingers at both corporate America and Americans themselves.

"What I wanted to do was get the students to think, not to say this is the viewpoint they should all adopt," Kennedy said. "I want them to be aware of our role in the entire spectrum of life and I felt like this video was a good place to start. But I didn't think it was the be-all, end-all explanation of things."

Kennedy showed the video in all three of her biology classes. In one class—a class where some students have self-identified as fairly conservative in their political viewpoints—the video was not exactly successful in engendering a thoughtful discussion. Those students, Kennedy said, thought the video was off base.

"Rather than engage the ideas from the video, they sort of shut down," Kennedy said. "And that taught me something about the limitations of the video as a tool."

That might have been the end of things, but for one development. One female student, a senior, complained to her father about the video.

And as it happened, that father, Mark Zuber, was already upset at another Big Sky teacher for showing yet another video he felt was unfair. The video, a PBS production about right-wing radio personalities called "Rage on the Radio," was shown in a government class by teacher Mark Moe. Zuber said he felt the use of those videos violated school board policy concerning academic freedom.

"I don't object to videos, as long as they are used appropriately, fully explained and explored, and put in the proper context," Zuber said. "But I did object to the way the teachers used them in the class. I don't believe they did the necessary work to set the context to show those videos."

What followed was a lengthy process of complaint pursued with zeal by Zuber, who was unhappy with the response of Big Sky teachers and officials and eventually took his case to the Missoula County Public Schools board of trustees. Zuber spent more than 100 hours researching and preparing his argument before the board on January 29. And it may take that many hours of discussion and deliberation before the fallout from his complaint is fully sorted out.

By the time of his board hearing, Zuber, an engineer with the federal Department of Agriculture, had met with the teachers, Big Sky principal Paul Johnson, and Jack Sturgis, president of the local chapter of the Missoula Education Association, the teachers' union. He'd also seen his complaint about the videos heard by the district's Challenged Education Resources Committee, which found the videos appropriate for use in the chosen classes.

"I don't feel that they gave proper consideration to my complaints, so I pressed to go to the board," Zuber said.

First, Zuber's complaint was reviewed by the school under a board policy—2313—that deals with instructional materials. That's why the challenged materials committee got involved. The scope of that committee, which union rep Sturgis sits on, is relatively narrow.

"What we're looking at there is whether the material is age appropriate, whether it fits with the curriculum and such," Sturgis said. "And in both cases, we found that the videos were appropriate for use in the classroom." That doesn't mean the committee rubber-stamped the way the materials were used in the classroom.

"That committee is looking at the material, at the curriculum, at the class in which it is taught," Sturgis said. "This committee is not a place for reviewing teacher performance."

Zuber didn't just want the materials reviewed—his PowerPoint presentation to the school board was an extremely extensive breakdown of what he views as bias in the videos—but wanted to examine how the teacher presented the materials.

"In the case of 'Rage on the Radio,' I think that could be presented in class in an appropriate way that would promote a good discussion of dehumanizing people with words, which was the assignment," Zuber said. "But I don't think that's what happened."

Zuber said the "Story of Stuff" video used in Kennedy's class was less useful and barely applicable to the subject of wildlife biology. In both instances, the teachers and Zuber disagreed about the material and the way it was presented. The teachers felt they'd followed district policy; Zuber felt they were in violation.

Although his concerns were first dealt with under the materials policy, 2313, Zuber's complaint to the board was based on the district's academic freedom/controversial issues policy, 2330. That policy states: "teachers shall guide discussions and procedures with thoroughness and objectivity to acquaint students with the need to recognize opposing viewpoints, importance of fact, value of good judgment, and the virtue of respect for conflicting opinions."

Said Zuber: "My rationale was that I wanted them to adhere to that policy. I wanted to talk about what constitutes thorough, objective coverage of a topic to the class." Zuber said he thinks the district's academic freedom policy is excellent. Still, he thought it had been violated.

Large packets of information provided by Zuber and the district landed on the trustees' table just minutes before the Jan. 29 meeting. The room was crowded—Zuber supporters, students, Sturgis, Kathleen Kennedy, and a lawyer friend who accompanied her. Zuber unleashed his PowerPoint, complete with thorough attacks on both videos. Although Zuber said his complaint isn't based on any political ideology, he countered the videos with examples of what he called liberal hate speech and an explication of the "progressive" agenda of Free Range Studios, which produced "The Story of Stuff."

The board's packet included a letter from teacher Mark Moe, explaining why and how he used the "Rage on the Radio" video. That explanation proved enough for the board to decide 4–3 that he hadn't violated district policy.

Kennedy hadn't provided such a letter.

"I was told that I didn't need to provide anything and that I didn't need to speak," she said. "It was only as the meeting went on and it became what I saw as a personal attack that I felt like I had to stand up for myself."

Kennedy's turn at the mic was emotional, and she said she was extremely upset by the meeting's tenor. "Both the board and Mr. Zuber said this was not an effort to censor, but when you allow a spectacle like this to occur, it's hard to buy that," said Kennedy, an 11-year teaching veteran.

In the end, the board voted 4–3 that Kennedy's use of the video had violated board policy.

"I think what it boiled down to was that we didn't think she'd given a balanced view," said trustee Jim Sadler, who joined Rick Johns, Drake Lemm and Kelley Hirning in voting against Kennedy's use of the video. "I think the material represented her own bias, and she didn't really do

enough to make that clear or enough to present some other viewpoints."

Board Chairwoman Toni Rehbein, Adam Duerk and Nancy Pickhardt sided with Kennedy's use of the video.

"I felt that the teacher used the video to generate a discussion, to get her students to think clearly and formulate their own thoughts and opinions," Rehbein said. "Part of what we want teachers to do is challenge students to critically think through and defend their ideas. That's what we want in the classroom."

Both Sadler and Zuber agree in theory with Rehbein on teaching controversial issues. It's the practice they felt got sideways of board policy.

Part of what happened at Zuber's hearing is that some members of the board repeatedly used a phrase—balanced—that's not in the academic freedom policy. "The policy talks about teachers guiding discussion with thoroughness and objectivity, with a need to realize opposing viewpoints," said Rehbein. "It does not say you have to be balanced."

To union leader Jack Sturgis, that means teachers don't have to show liberal hate speech to "balance" a video that shows conservative hate speech. "In these cases, the teachers are encouraging critical thinking," Sturgis said. "You don't have to split issues 50–50 to encourage critical thinking."

Sturgis was irritated that the board didn't support Kennedy, and worries that the decision will have a chilling effect on teachers around Missoula. "What seems likely is that teachers are going to worry about this on a day-to-day basis, wondering if the board is looking over their shoulder for any perceived problem," Sturgis said. "Right now, apparently all it takes is for one person to get mad about something and off we go."

Kennedy said the chill has already descended on her. "I feel like I don't really know what I can teach," she said. "And I'm not completely sure I want to continue to teach in that sort of environment."

Although the board found in Zuber's favor in one case, he didn't exactly get all he wanted, which included an apology. And the small victory he did win might soon evaporate. While Zuber prevailed 4–3 in the "Story of Stuff" case, three board members were absent. Rehbein said it's possible the case might be reopened to reevaluate new evidence, including Kennedy's lesson plan.

"I think it's important that the full board speak to important issues like this," she said. "We want to remain a board that works together on these important issues, and part of that is making sure the entire board is heard."

That would please Sturgis and Kennedy, although Kennedy said some of the damage can't be undone. "We're not going to be able to take away the things that were said about me," she said. "But if we can make it clear what the expectations are, I think all teachers would feel a little better."

Rehbein also said the board would be meeting to review its own policies and make sure everyone's on the same page. "This board has done a good job over time of working through its differences, and I think we'll be able to do the same this time," Rehbein said.

That's probably a good thing. Because in subsequent weeks, two more challenged resources cases turned up, both involving works of fiction. One book is local author Jon Jackson's *Dead Folks*, which someone viewed as too graphic in its discussion of sex. The second complaint involves a controversy as enduring as the book itself—J.D. Salinger's classic, *The Catcher in the Rye*. Reported in: *Missoulian*, February 8.

Grant's Pass, Oregon

Loggers made a dramatic transition from tree-killing litterers to kindhearted animal lovers in a *Help the Forest* textbook for first-graders at Grants Pass schools. An eight-page book was replaced with a decidedly rosier version after the original copy generated criticism for its negative portrayal of loggers.

Parents objected to a spread in the book that showed loggers chopping down trees and various bits of litter on the ground. The text on page 6 read: "these people do not take care of the forest. They cut down huge trees. They drop trash on the ground." That was followed by a tearjerker page 7: "the trees are gone. The birds cannot find homes. The animals cannot find food."

After news broke that the book had been pulled from classrooms, the publisher sent the district 108 new copies with a different take on loggers: "these people take care of huge forests. They put out fires. They cut down sick trees. Then new trees can be planted. Animals will still have homes. They will still find food."

The illustrations, too, were changed. Rather than a trash-littered forest floor, the new edition shows a firefighter and a tree planter and in a tree there's a bear.

A top official for Pearson-Scott Foresman, the publishing house, sent a letter along with the books. "The publication of this edition was an egregious error on our part, and I will not attempt to offer an explanation," wrote Paul McFall, senior vice president.

Trish Evens, curriculum director for the Grants Pass School District, told a Seattle radio station she was "very impressed that the company responded."

A representative for Pearson Scott-Foresman called other districts around the state to see whether they had the updated version. Some, said Gene Bindreiff, still had the older copies, so those, too, were replaced.

Bindreiff said that the first edition must have caused a negative response somewhere else, resulting in the second

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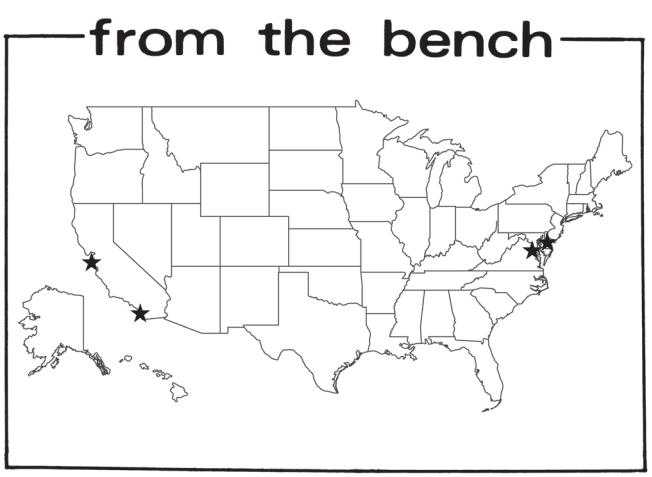

U.S. Supreme Court

A public park in Utah that includes a monument to the Ten Commandments need not make room for a similar monument reflecting the beliefs of an unusual religion called Summum, the Supreme Court ruled February 25.

Permanent monuments in public parks are not subject to the free speech analysis that applies to speeches and leaflets in public forums, the court ruled. Instead, Justice Samuel A. Alito Jr. wrote for eight justices, such monuments are "best viewed as a form of government speech."

Since the government is free to say what it likes, Justice Alito said, the Summum church's right to free speech under the First Amendment was not violated by the city's rejection of its monument.

The decision was unanimous but fractured. In four concurring opinions, six justices set out sharply contrasting views about the decision's scope and consequences.

Ten Commandments cases are typically litigated under the clause of the First Amendment prohibiting government establishment of religion. But the case, *Pleasant Grove City* v. *Summum*, was brought under a different clause of the amendment, the one protecting free speech.

The concurrences offered varying views about whether the decision foreclosed or left open a separate challenge to the Ten Commandments monument under the Establishment Clause. In addition, several justices expressed concern that the court was moving too fast in designating some kinds of expression as government speech immunized from free-speech scrutiny.

The Summum church had sought to donate a monument setting out its Seven Aphorisms to a public park in Pleasant Grove City, Utah. The park already included 15 objects, most of them donated, including a granary, a well, and the Ten Commandments monument, which was given to the city by the Fraternal Order of Eagles in 1971.

The city declined Summum's offer, saying the existing monuments either related to the city's history or had been donated by groups with longstanding ties to it. The church sued, and the federal appeals court in Denver ruled that the First Amendment's free speech protections required the city to display the Summum monument. The appeals court said that the Ten Commandments monument was private speech and that the city park was a public forum. That meant, the court said, that the city was not free to discriminate among speakers.

Justice Alito said the appeals court had gotten it backward. "Permanent monuments on public property," he wrote, "typically represent government speech." This is so, he said, whether or not the monuments were donated and whether or not the government expressly adopted the message conveyed by the monuments.

In a passage reminiscent of a graduate-school seminar in literary theory, Justice Alito went on to say that "monuments convey meaning" in many ways. He used the example of the mosaic of the word "Imagine" in New York City's Central Park, donated in memory of John Lennon, and he quoted the lyrics to that Lennon song in a long footnote.

"Some observers," Justice Alito wrote, "may 'imagine' the musical contributions that John Lennon would have made if he had not been killed." Others, he continued, "may 'imagine' a world without religion, countries, possessions, greed or hunger."

The meaning of a monument may change with context, he said, giving the example of the addition of a statue of three soldiers near the Vietnam Veterans Memorial in Washington that "many believed changed the overall effect of the memorial." And it may change with time. The Statue of Liberty, Justice Alito said, once expressed republican solidarity between France and the United States and only later "came to be viewed as a beacon welcoming immigrants."

These arguments seemed presented in aid of an unspoken premise: that a Ten Commandments monument can be government speech without conveying a religious message. But Justice Alito mentioned the Establishment Clause only in passing and only to say that "government speech must comport with" it.

In a concurring opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, said the decision should foreclose all challenges to the Ten Commandments monument. "The city ought not fear that today's victory propelled it from the Free Speech Clause frying pan in to the Establishment

Clause fire," Justice Scalia wrote. The monument in question, Justice Scalia continued, is virtually identical to one the court allowed to be displayed on the grounds of the Texas Capitol. "The city can safely exhale," he wrote.

Justice David H. Souter, who joined the court's decision but did not adopt Justice Alito's reasoning, was not so sure. If the Ten Commandments monument is now understood to be government speech, he said, "the specter of violating the Establishment Clause will behoove" the city "to take care to avoid the appearance of a flat-out establishment of religion."

One solution, Justice Souter said, is "safety in numbers, and it will be in the interest of a careful government to accept other monuments."

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, also concurred, writing to say that Justice Alito's opinion should not be read to signal an expansion of "the recently minted government speech doctrine to uphold government action." The decisions in this area, Justice Stevens wrote, "have been few and, in my view, of doubtful merit."

Justice Stephen G. Breyer, in his own concurrence, also expressed concern about the court's direction. Free speech doctrine, he said, should not be "a jurisprudence of labels," and "the 'government speech' doctrine is a rule of thumb, not a rigid category." Reported in: *New York Times*, February 26.

The University of California at Berkeley has prevailed in a longstanding legal dispute over a Web site that explains and supports biological evolution. The U.S. Supreme Court declined March 23 to review lower-court decisions that threw out a lawsuit challenging references to religion on the site as unconstitutional.

The high court did not comment on its order rejecting the appeal in the case, *Jeanne E. Caldwell* v. *Roy L. Caldwell et al.* The site, which is intended for both teachers and the public, is run by the University of California Museum of Paleontology. The plaintiff had objected to comments on the site regarding the separate spheres of religion and science and stating that evolution and religion are not incompatible.

A trial-court judge in San Franciso dismissed the case in 2006, saying the plaintiff had asserted only a generalized grievance rather than a specific injury. The U.S. Court of Appeals for the Ninth Circuit upheld that decision last October. Reported in: *Chronicle of Higher Education* online, March 23.

colleges and universities

San Diego, California

A federal judge ruled February 8 that a nondiscrimination policy at San Diego State and Long Beach State universities required for formal campus recognition does not infringe on the rights of religious groups that demand fidelity to Christian ideals and bar openly gay students.

The ruling by District Judge Larry A. Burns decided the lawsuit filed by Every Nation Campus Ministries in 2005. The group had alleged that complying with the policy violated its rights to free speech, free association, and religious liberty. It sought an injunction that would force the campus to recognize the group, and a finding that failing to abide by the policy was unconstitutional.

But Burns, relying on previous case law, said the policy was intended to regulate conduct, not speech or association. He also said any restrictions in the policy were reasonable and "viewpoint neutral" and therefore not unconstitutional.

Recognized groups—there are more than 100 on each campus—receive financial benefits, access to meeting rooms and other areas of campus, and subsidized rentals of meeting facilities, Burns said.

A lawyer for the group was disappointed with the decision and said it would likely be appealed. Also involved in the suit were a sorority and fraternity that had Christian-only membership requirements. Jeremy Tedesco of the Alliance Defense Fund said the school policy "doesn't respect a Christian group's ability to make membership decisions" and control its own club. He said that under the policy, a Republican political group could restrict its membership to Republicans, but a religious group—be it Christian or Muslim—could not.

Susan Westover, the lawyer for the university, said she was pleased with the ruling. "This ruling keeps the doors open for all student organizations which, in order to gain official recognition, must be inclusive, not discriminatory," she said.

In order to get recognition, groups must abide by the nondiscrimination policy that says membership cannot be withheld based on race, religion, age, gender, sexual orientation, disability and the like.

Before 2005, Every Nation was a recognized group and abided by the policy, Burns wrote. But in 2005, the group submitted a new constitution that required members to be Christians and reject homosexuality. Reported in: *San Diego Union-Tribune*, February 9.

Dover, Delaware

The U.S. Court of Appeals for the Third Circuit held March 27 that a public-college professor's statements can be considered job-related, and thus not "citizen speech" protected by the First Amendment, even if they were made in connection with activities not specifically covered by the professor's contract.

Affirming a decision by a lower court last year, a three-judge panel of the Third Circuit, which covers several mid-Atlantic states, ruled that Delaware State University was entitled to fire a communications professor for statements he made about a university presidential search, in reference to his organizing a campus breakfast, and in relation to

advising his students.

The court rejected an assertion by the professor, Wendell Gorum, that his job description did not cover advising a student because doing so went beyond his responsibilities as specified in a collective-bargaining agreement. Citing a 2006 Supreme Court ruling in the case *Garcetti* v. *Ceballos*, involving the disciplining of a Los Angeles deputy district attorney, the appeals court unanimously said the definition of job-related speech is a practical one, and formal job descriptions often bear little resemblance to the duties people actually perform.

The Third Circuit panel also rejected Gorum's argument that all the speech at issue in the case involved matters of public concern that qualified it for First Amendment protection. The judges held that Gorum had failed to show that he believed any public issues were at stake in advising a student-athlete during disciplinary proceedings for weapons possession and similarly had failed to demonstrate that he was dealing with a matter of public concern—or had even spoken publicly—in rescinding an invitation to Allen L. Sessoms, then the university's president, to speak at a 2004 prayer breakfast.

The Delaware State case was being followed by many advocates of free speech and academic freedom. They are worried about a recent wave of court decisions that have applied the Supreme Court's *Garcetti* ruling to academic settings and limited how much public-college faculty members can count on the First Amendment to protect speech connected with their jobs.

Such advocates had not publicly rallied behind Gorum, however, because of the circumstances of his case. The university said it had fired him for doctoring student grades, and the appeals court described his First Amendment claims as "makeweight attempts" to fight his dismissal for violating the university's academic code. It held that he would have been fired even if he had not made any of the statements that he cited in claiming he was the victim of illegal retaliation. Reported in: *Chronicle of Higher Education* online, March 30.

San Juan, Puerto Rico

A federal appeals court on February 19 restored the right of a formerly tenured faculty member in Puerto Rico to sue for damages in what he argues is a case of unfair dismissal.

The U.S. Court of Appeals for the First Circuit found that a lower court had unfairly applied an unusual law in Puerto Rico in a way inconsistent both with the statute's intent and with the appropriate rights of a tenured professor. The law sets strict limits on how much certain aggrieved employees can receive for an unlawful dismissal—and those levels are so low that faculty groups feared that applying the measure would make meaningful redress impossible for them. In the case at hand, the professor had worked 28 years, but couldn't have obtained even a year's pay as compensation for dismissal, and would have had no chance at getting his job back.

The appeals court said that the law was designed for very different categories of employees than tenured faculty members, who should be entitled to sue for damages if unfairly dismissed.

The American Association of University Professors viewed the lower court's ruling as a significant blow to the rights of tenured professors, because it would enable universities to get rid of tenured faculty members by paying a relatively low price. The AAUP filed a brief urging the appeals court to make the kinds of distinctions it made.

Rachel Levinson, senior counsel for the AAUP, praised the appeals court's decision and said she saw two significant aspects to the decision. "First, the opinion recognizes that for tenure to have meaning, it must have an economic foundation," she said. "That is, tenure is basically hollow if there aren't real remedies for violations of tenure protections." Second, she said that the appeals court "unmistakably recognizes the connection among economic security, tenure, and academic freedom—not only is there no tenure without economic guarantees, but there's no academic freedom without those either."

The original lawsuit in the case was brought by Edwin Otero-Burgos against the Inter-American University of Puerto Rico. Otero-Burgos makes numerous claims in his suit, which deals in part with his argument that the university denied him the right to manage his course and assign grades. The appeals court's ruling doesn't focus on the merits of the case, but on Otero-Burgos's right to sue for damages. The lower court rejected that right, stating that he had to settle for compensation under Puerto Rico's Law 80, which provides victimized employees with three months of salary, plus, for those who have worked 15 years or more, a week of salary for every year of service.

The law was intended for "at will" employees—those who can be fired at any time. The lower court found that tenured professors belonged in that category because they don't have fixed terms of employment for a set number of years.

But the appeals court, accepting the argument of the professor and the AAUP, said that this totally distorted the concept of tenure at the university. "There is a clear difference between a worker whose employment is not subject to a specific temporal limitation, but who may be fired for any reason, and Otero-Burgos, who, under the terms of his tenure contract, presumptively retains his job until retirement," the decision said.

And directly addressing the concern faculty members had about the lower court's ruling, the decision of the appeals court went on to say that "a legal regime that did not grant Otero-Burgos any remedies beyond those provided by Law 80 would render the concept of tenure embodied in the [faculty handbook] meaningless." Reported in: inside highered.com, February 20.

video games

San Francisco, California

A federal appeals court ruled February 20 that California's ban on selling violent video games to minors is unconstitutional, saying the state was trying to interfere with free speech and had failed to show that simulated mayhem causes psychological damage in young people.

The law, sponsored by state Sen. Leland Yee (D-San Francisco), was signed by Gov. Arnold Schwarzenegger in October 2005, but was blocked by a federal judge before it could take effect. It would bar anyone under 18 from buying an interactive video game that is so violent it is "patently offensive," according to prevailing community standards for minors, and lacks serious literary, artistic, political or scientific value. Those games would carry a large "18" label on their packages. Anyone who sold such a game to a minor could be fined as much as $1,000.

In defending the law, the state argued that violent content should be judged by the same obscenity standards as sex. Just as the government can prohibit the sale of explicit pornography to minors, state lawyers contended, it should be allowed to establish an adults-only category of ultra-violent video games.

The U.S. Court of Appeals for the Ninth Circuit in San Francisco disagreed. A 1968 U.S. Supreme Court ruling that allowed tighter restrictions on selling explicit materials to minors than to adults applies only to sexual content and not to violence, the appellate panel said.

"The Supreme Court has carefully limited obscenity to sexual content," Judge Consuelo Callahan said in the 3–0 ruling. "We decline the state's invitation to apply the (same) rationale to materials depicting violence."

Video games, Callahan said, "are a form of expression protected by the First Amendment. . . . The government may not restrict speech in order to control a minor's thoughts."

Callahan said the state could justify the law only by demonstrating that violent video games cause psychological harm to minors and that young people could be protected only by being banned from buying those games. She said the state had fallen short on both counts.

The state cited several researchers' findings that youths who play violent video games are more likely to behave aggressively and get into fights. But Callahan said even some of the researchers acknowledged that their samples were too small to draw conclusions, that there was no proof video games caused violent behavior, or that the games affected minors differently from adults. She also said the state hadn't shown there were no good alternatives to an outright ban on sales to minors. Callahan said those options include an educational campaign, technology that allows parents to control their children's access to video games, and the industry's voluntary rating system that includes an adults-only category.

The president of the Entertainment Merchants Association, which challenged the law in court, praised the ruling. "We are extremely gratified by the court's rejection of video game censorship by the state of California," Bo Andersen said in a statement. He said video game retailers are working effectively to help parents make sure that "children do not purchase games that are not appropriate for their age." Reported in: *San Francisco Chronicle*, February 20.

privacy

Washington, D.C.

A U.S. appeals court on February 13 denied a bid by the cable industry to overrule privacy rules that make it more difficult for them to share subscribers' personal information with other parties.

The U.S. Court of Appeals for the District of Columbia Circuit denied a petition by the National Cable and Telecommunications Association, which argued that federal rules on telecom carriers' use of customer data violated free speech rights under the U.S. Constitution, federal law or both.

At issue are rules set by the U.S. Federal Communications Commission that mandate telecommunications carriers must get an "opt-in" before disclosing customers' information to a carrier's joint venture business partner or an independent contractor.

The FCC "gave sufficient reasons for singling out the relationships between carriers and third-party marketing partners," the court said in denying the petition for judicial review sought by the NCTA.

The cable group's spokesman, Brian Dietz, said it is disappointed with the ruling, but could not comment on whether the group would appeal.

FCC Acting Chairman Michael Copps said the rules are needed to protect consumers. "Telephone carriers today handle vast amounts of their customers' personal information, and in light of documented abuses of consumers' privacy, the Commission appropriately required carriers to institute additional safeguards to protect customers' personal information," Copps said in a statement.

The cable trade group's members sell local phone service using voice over Internet protocol (VoIP) technology. Cable companies have about 18 million phone subscribers nationally, according to NCTA.

Verizon Communications, one of the biggest telephone and mobile phone companies, had backed the cable industry's petition. Reported in: Reuters, February 13.

Pittsburgh, Pennsylvania

A couple in Pittsburgh whose lawsuit claimed that

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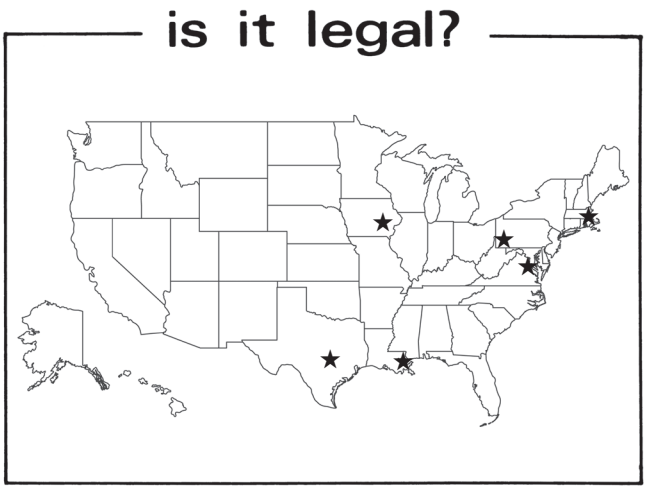

national security

Washington, D.C.

Of all the expanded investigative powers authorized by Congress since the terror attacks of September 11, 2001, few have proved as controversial—or as consistent a source of embarrassment for federal law enforcement—as National Security Letters. Though audits by the Inspector General have uncovered widespread improprieties in the use of the investigative tool, which allows the FBI to demand certain telecommunications and financial records without the need for a court order, a 2007 effort to further constrain NSLs stalled in committee.

Now, with a new administration and a sturdier Democratic majority in place, Rep. Jerrold Nadler (D-NY) and Rep. Jeff Flake (R-AZ) on March 30 reintroduced the National Security Letters Reform Act. The bill would significantly tighten the rules for NSLs—which can currently be used to obtain records "relevant" to an investigation, whether or not they pertain to someone even suspected of wrongdoing—and the gag orders that typically accompany them.

NSLs are not new, but their scope and prevalence were greatly expanded by the USA PATRIOT Act of 2001. In 2000, investigators issued some 8,500 NSL, according to a report by the Office of the Inspector General. In 2006—the last year for which figures were available, the number had risen to at least 49,425, down from a peak of at least 56,507—though no estimates are available for 2001 or 2002, and sloppy record-keeping found by the OIG means all figures are lowbound. The "overwhelming majority" of those are for phone or telecommunications records, and, by 2006, the bulk of those for which a target's nationality was specified were issued in connection with investigations of U.S. persons.

The FBI hasn't coped terribly well with the increased volume: those OIG reports found an NSL process riddled with errors and policy violations—some of which appeared to have been flatly illegal. Agents sent "exigent letters" claiming an emergency when none existed, claimed grand jury subpoenas were pending when they weren't, and in some instances obtained information to which the statute did not entitle them. At hearings in 2007, a visibly angry Rep. Dan Lungren (R-CA), who had supported expanding NSL authority, said the OIG's findings sounded more appropriate to "a report about a first- or second-grade class" than college-educated FBI agents. Thus far, however, FBI officials have successfully argued that they are aware of the problems and have already begun implementing reforms to prevent future errors.

Since Nadler and Flake last sought to supplement those internal efforts with more robust statutory checks, federal appellate courts have added to the list of rationales for congressional action. Civil libertarians have attacked not only NSLs themselves, but the broad gag provisions typically attached to them, which prevent parties served with them from discussing the requests. Congress sought to mollify critics by modifying the PATRIOT Act in 2006 to permit NSL recipients to retain attorneys and challenge orders they regard as unreasonable. But late last year, the Second Circuit Court of Appeals ruled that the law still gave FBI officials too much power to silence speech, with court oversight too anemic to satisfy the First Amendment. The court was prepared to allow a mix of court reinterpretation and FBI policy to bring the review procedures up to constitutional muster, but also invited Congress to fix the defective provision.

The National Security Letters Reform Act would do that, and a good deal more. While it would still permit high-ranking FBI officials to issue NSLs with temporary gag orders attached, the Bureau would have to petition a judge in order to extend that order beyond an initial 30 days. Instead of requiring NSL recipients to challenge such orders, showing there was "no reason" to think disclosure might harm public safety or the integrity of an investigation, the agency would have the burden of showing a court specific facts justifying each six-month extension of the gag.

Perhaps most significantly, however, the law would radically narrow the scope of National Security Letters, which can currently be used to obtain financial or telecommunications transaction records that an FBI agent asserts are "relevant" to an ongoing investigation. Under the Nadler-Flake

bill, NSLs would have to certify that the target to whom the information sought pertained was believed, on the basis of "specific and articulable facts," to be a "foreign power or agent of a foreign power."

The bill also establishes strict "minimization" requirements, mandating the destruction of any wrongly obtained information. While intelligence agencies often rely on "minimization" to protect the privacy of U.S. persons, this often means only that innocent information will be retained without being indexed in a log or database for the relevant case. Anyone whose records are obtained via an NSL without adequate factual basis, or in violation of the statutory restrictions, is entitled to sue the person responsible for issuing the letter, to the tune of $50,000. Reported in: arstechnica.com, March 31.

colleges and universities

Boston, Massachusetts

At Boston College, the placement of Christian art, including crucifixes, in classrooms over winter break has stirred some intense discussions over that particular expression of the Roman Catholic (and catholic) university's identity. And over whether it's undergoing an identity crisis.

"A classroom is a place where I am supposed, as a teacher, to teach without any bias, to teach the truth. And when you put an icon or an emblem or a flag, it confuses the matter," said Amir Hoveyda, the chemistry department chair.

"For 18 years, I taught at a university where I was allowed to teach in an environment where I felt comfortable. And all the sudden, without any discussion, without any warning, without any intellectual debate, literally during the middle of the night during a break, these icons appear," Hoveyda said.

Jack Dunn, Boston College's spokesman, explained that the Jesuit institution first established a committee on Christian art in 2000. "The crucifixes in question have been brought back largely from students who have gone on immersion trips to Central and South America and to Europe. . . . The only thing that's changed really is that in classrooms where crucifixes and iconography and posters hadn't been present, an attempt has been made to place some form of Christian art and that effort was completed in January," Dunn said. "The effort was to present Christian art in those remaining classrooms as a way of manifesting our pride in and our commitment to our religious heritage.

"My sense is that they knew there were a certain amount of classrooms that didn't have any presence of religious art and so they waited until they had a critical mass that would enable them to place the artwork in those classrooms. And that's the only reason it was done now," Dunn said. There are 151 classrooms.

The process was described by some as gradual, but one faculty member deemed it a "tsunami" of religious art that appeared in classrooms over winter break. And while most discussions on this matter have been private, opinions seem to run the gamut.

In a statement provided through Dunn, Rev. T. Frank Kennedy, chair of the committee on Christian Art, wrote (in part), "I suppose a question might be posed to Boston College as to what purpose this Christian Art serves? In a world that is pretty successfully driven by media (imagery) ours is a response that seeks to pose the age-old invitation of Christ to enter into love—a love that is made perfect in its unselfishness. John Paul II spoke of the crucifix on September 15, 2002, saying 'It is the sign of God, who has compassion on us, who accepts human weakness, who opens to us all, to one another, and therefore creates the relation of fraternity.' The Pope also went on to say that though this symbol has been abused in history, it is the Christian's duty to reclaim that symbol as an invitation to love. An invitation to love, and an invitation to faith is exactly that, an invitation. One is not required to respond, one can decline, and one can have many reasons for declining the invitation, but to imply that a Jesuit and Catholic university is not free to offer this invitation is simply an impossibility."

Father Kennedy, who is director of Boston College's Jesuit Institute and a professor of music, continued: "For the identity of Boston College as a Jesuit and Catholic institution which we so proudly have inherited, and so happily transmit to the next generation of alumni/alumnae, impels us as John Paul also noted, 'to offer to share the deep desire we have of recognizing ourselves in the crucifix, and of seeing it, not as something that divides, but as something that is to be respected by all, and that in a certain sense can unify.'"

But Dwayne Eugène Carpenter, chair of the romance languages and literatures department and co-director of the Jewish studies program, said the placement of religious art is in fact divisive. These symbols, he said, are not neutral. "I think it's naive to believe that affixing crucifixes is going to fan the flames of religious devotion. On the other hand, it can have a negative effect on students" who might see them as creating an unwelcoming environment.

Carpenter, a professor of Hispanic Studies, said the issue was seriously debated in a recent meeting of the college's department chairs (Boston College lacks a Faculty Senate at this point). He'd like to see an open forum addressing the subject. So far, he said, it's been addressed mostly in private conversations, of which he's had many.

"I think there were many people who were upset. But my sense is the majority say, 'This is a Catholic school; they're going to do what they're going to do.' I would go on the record as saying, 'It is true. It's a Jesuit institution and as such it has every right to place images wherever it wants. It's just that it's not a very smart thing to do.'"

"I think it's in an identity crisis," Carpenter continued, of Boston College. "At the same time that it wants to proclaim its Catholic identity, it also wants to recruit the best. You can't recruit the best by placing crucifixes in every classroom. You're simply going to limit the number of people who will come here. And I've already heard of several faculty who have said, 'You know, this is not a welcoming place, this is not the place that hired me, and I'll be looking for a job elsewhere.'"

Carpenter added that he doesn't recall any religious art in the classrooms from when he started teaching, in 1990. Hoveyda, the chemistry chair, said the same. He pointed out that much of his job centers around recruiting—faculty, graduate students, even undergraduates. "I can only tell you from my personal experience if I saw the same icon when I interviewed in December 1989, this place would not be under consideration for me. I've had several offers to leave. If I knew icons of this type would appear . . . I most likely would not have made the decision I did [to stay]."

Not every professor feels this way, of course. "Personally, while I deeply respect my university colleagues' right to disagree with the present BC policy, or whatever the present situation should be called, I think too much of a fuss is being made," said Michael J. Naughton, the physics department chair. "In my opinion, we are undeniably both a catholic and a Catholic university, and there's plenty of evidence, and room, for both."

The Observer, a BC student publication, originally published an article on professors protesting the crucifixes. *The Heights*, BC's weekly student newspaper, approvingly noted the new crucifixes in its "thumbs up/thumbs down" opinion feature: "Upon returning from Christmas break, students may have noticed the new crucifixes in all academic classrooms. This thoughtful gift from the Jesuit community has been long overdue."

Boston College likes to compare itself to another Jesuit institution, Georgetown University, which "has a crucifix in every classroom and that's been true for at least a dozen years," said John Glavin, a professor of English who leads tours, upon request, of Georgetown's iconography. While older Georgetown buildings always had crucifixes in the classroom, university officials made a conscious effort awhile back to add crucifixes to the newer classrooms that did not.

"It was not uncontroversial," Glavin said. "But one of the things that was done, which I think was done very sensitively, was the crucifixes, when they were added to rooms, were placed off-center. A number of faculty said they felt uncomfortable lecturing from the middle of the room, above which was a crucifix, for a broad number of quite respectable reasons. So the idea was in adding these crucifixes, they would be put in a prominent place—not hidden away, but at the same time, not the place where all eyes would be directed when listening to a faculty lecture.

"There was some fuss and then the fuss died down and it's never even mentioned now. It's just sort of an ordinary part of the iconography of the place," Glavin said.

Dan Kirschner, a professor of biology and the faculty adviser for Boston College's chapter of Hillel: The Foundation for Jewish Campus Life, said he can see it both ways. "On the one hand, BC wants to be all-inclusive. On the other hand, they do things like this to make people feel not included. On the other hand, it is a Catholic university." He added that in the lecture hall where he teaches, there's a small sculpture of a mother and child (Mary and Jesus?—"I suppose," he replied. "Who else would it be?")—as opposed to a crucifix. "Probably if a crucifix had been placed in my lecture hall, I might have felt more strongly about it not being in my lecture hall."

In addition to the placement of religious art in classrooms, Boston College's committee on Christian Art has been involved with larger-scale art projects across campus, including two mosaics outside the registrar's office—"one of Dorothy Day, of Catholic Worker fame, the other of Pedro Arrupe, S.J. beloved former Superior General of the Society of Jesus who re-inspired us with his invitation to us to become 'men and women for others,'" Father Kennedy, the committee chair, explained. The university commissioned two sculptures: "Tree of Life," by Peter Rockwell and "St. Ignatius Loyola" (the founder of the Jesuits), by Pablo Eduardo.

In terms of new non-Christian sculptures on campus, "There's also one of Doug Flutie," Kirschner said, referencing the famous BC quarterback. "Outside the sports complex." Reported in: insidehighered.com, February 11.

evolution and creation

Iowa City, Iowa

More than 200 faculty members at 20 Iowa colleges have signed a statement opposing a proposed state law that would give instructors at public colleges and schools a legal right to teach alternatives to evolution.

The legislation in question, titled the Evolution Academic Freedom Act and pending before the state House of Representatives' education committee, declares that "in many instances, instructors have experienced or feared discipline, discrimination, or other adverse consequences as a result of presenting the full range of scientific views regarding chemical and biological evolution." The bill expressly protects "the affirmative right and freedom of every instructor" at public schools and colleges "to objectively present scientific information relevant to the full range of scientific views" on evolution, and says "students shall not be penalized for subscribing to a particular position or view."

The statement signed by the Iowa educators in response to the bill says, "it is misleading to claim that there is any controversy or dissent within the vast majority of the sci-

entific community regarding the scientific validity of evolutionary theory." Therefore, it says, "'academic freedom' for alternative theories is simply a mechanism to introduce religious or nonscientific doctrines into our science curriculum."

Measures promoting or protecting the teaching of alternatives to evolution have been proposed in six states this year. Most rely heavily on language suggested by the Discovery Institute, an organization in Seattle that encourages educators to question evolution and to teach "intelligent design," which holds that some form of intelligence has helped shape the universe and life within it.

Of the six states' measures, those proposed in Mississippi and Oklahoma have died in the Legislatures, but those in Alabama, Iowa, Missouri, and New Mexico remain pending. A Florida lawmaker has announced plans to offer up such a bill in his state.

Louisiana enacted such legislation last year, a step that prompted the Society for Integrative and Comparative Biology—an association of biologists—to announce this month that in protest it was scrapping plans to meet in New Orleans in 2011 (see page "New Orleans, Louisiana," below).

But Glenn Branch, a spokesman for the National Center for Science Education, which promotes the teaching of evolution and tracks legislative battles over it, said the new Iowa statement represented the first organized effort by college faculty members throughout a state to oppose a bill calling for the teaching of alternatives.

Iowa State University came under heavy fire from critics of evolution when it denied tenure to Guillermo Gonzalez, an assistant professor of physics and astronomy and a leading advocate of intelligent design, in 2007. Gonzalez's tenure denial came two years after more than 120 Iowa State faculty members signed a statement denouncing intelligent design, partly in reaction to his work. E-mail records revealed that members of his department had considered his support of intelligent design as a problem in his tenure case, but his performance was criticized for other reasons as well, and the Iowa Board of Regents voted overwhelmingly to reject his appeal of the university's decision, which he said had violated his academic freedom. He has since become an associate professor of physics at Grove City College, a Christian institution in Pennsylvania. Reported in: *Chronicle of Higher Education* online, February 25.

New Orleans, Louisiana

An association of biologists has decided against holding its 2011 annual meeting in New Orleans because of a Louisiana law that the group sees as diluting scientific standards for the teaching of evolution and other science topics. The Society for Integrative and Comparative Biology instead will hold its 2011 convention in Salt Lake City, the group's president, Richard A. Satterlie, wrote this month in a letter to Gov. Bobby Jindal of Louisiana.

The society's leaders "could not support New Orleans as our meeting venue because of the official position of the state in weakening science education and specifically attacking evolution in science curricula," Satterlie wrote. "Utah, in contrast, passed a resolution that states that evolution is central to any science curriculum."

According to Satterlie, more than 1,850 scientists and graduate students attended the group's 2009 meeting in Boston last month.

The legislation, which Jindal, a Republican, signed into law last June, allows local school boards to designate supplemental curricular materials that science teachers may use for lessons on topics such as evolution, global warming, and cloning. Backers say the law promotes critical thinking, but opponents say it opens the door to teaching religious ideas in science classrooms. Reported in: *Chronicle of Higher Education* online, February 16.

Austin, Texas

The Texas State Board of Education, in a move watched closely by science educators nationwide, voted March 27 to remove two controversial provisions from its science standards that would have raised questions about key principles of the theory of evolution, but approved a compromise measure that scientists say still could be used to undermine the teaching of evolution.

The board rejected, in two 8–7 votes, requirements that high-school biology students study the "sufficiency or insufficiency" of common ancestry and natural selection of species as explanatory principles behind the development of life on earth.

The votes followed a contentious, daylong debate. The board's chairman, Don McLeroy, a Republican from College Station, had favored including those requirements and said he was disappointed by the outcome. "Science loses, Texas loses, and the kids lose because of this," said Dr. McLeroy, a dentist. He has argued that the fossil record undermines some aspects of Charles Darwin's theory.

However, in a move described as a compromise with social conservatives, the board voted in favor of a provision that students be required to scrutinize "all sides" of evolutionary concepts such as common ancestry, natural selection, and mutations.

The Discovery Institute, which wants schools to teach that the universe is the product of an intelligent designer, called the vote "a huge victory for those who favor teaching the scientific evidence for and against evolution."

"Texas has sent a clear message that evolution should be taught as a scientific theory open to critical scrutiny, not as a sacred dogma that can't be questioned," said John West, a

(continued on page 114)

success stories

libraries

Muscogee County, Georgia

The Muscogee County School District's eight-member media committee voted unanimously February 25 to keep the young-adult novel *My Brother Sam is Dead* in all elementary school libraries, despite a parent's concerns about profanity in the book.

The Revolutionary War novel by writer James Lincoln Collier and historian Christopher Collier tells the story of the Meeker family through the eyes of the youngest son, 14-year-old Tim. It has won critical acclaim for its dramatic prose and historical accuracy, and for its relevance to instruction in history and civics.

Shirley Waller, whose daughter checked out the book from the Reese Road Elementary library, filed a complaint with the district stating that the novel had too much profanity. On the back of her complaint form, she listed nineteen terms she found objectionable from the book. Fourteen were the word "damn" or some variation of the word, three of which could be considered blasphemous. Waller noted discipline problems could result from children using such language in school.

"I'm shocked," she said after the committee's vote. "I cannot believe that this entire committee thinks this is an appropriate book, that this is wholesome and appropriate."

The book was evaluated based on state curriculum guidelines in English and social studies and for its authenticity, appropriateness, content and interest. The media committee included several school media specialists and administrators who spoke up in support of the book.

"It's a very well-written book, very gripping," said Beth Beasley, the media specialist at Mathews Elementary. "It gave you a point of view that might not be found in a history book."

Melanie Harmon, the PTA president at Reese Road who sat on the committee, said she was impressed with the book's level of detail, and that, as a parent, she had no concerns about the appropriateness of the novel.

But Waller said educators and librarians should consider if a book meets guidelines for acceptable language and behavior before considering its educational value. "Profanity is not allowed in the Muscogee County School District. That should be the first criteria," she said. "It should pass basic guidelines of what is acceptable behavior."

Waller did not speak during the meeting; she said since she was invited by the committee to come, she thought she would be asked to state her opinion and was waiting to be recognized. She said after the meeting that she did not think the committee addressed her concerns about the novel's profanity.

Instructional specialist Doreen Sears said Waller's complaint was covered under the selection criteria for appropriateness—if the book, vocabulary, content, concepts, and themes were suited for the intended audience. All of the committee members felt the book met or exceeded this guideline. "We were evaluating the book as a whole, not taking one part out of context," Sears said.

The committee's options included leaving the book in elementary libraries, removing it, restricting access to it without a parent's permission, and moving it from elementary to middle or high school libraries. The committee's decision to leave the book in elementary libraries can be appealed to the school board.

The committee's decision received applause from one person at the meeting. Jim Brown, a retired educator and substitute for the school district, came to the meeting with his wife, Leda, after reading about the controversy and looking for copies of *My Brother Sam is Dead*. He said he couldn't find a copy in the Shaw High School library, where he was subbing, so he went looking for it at a bookstore. He picked up one of the last two copies.

"People are obviously interested," he said. Leda Brown said children could pick up profane language from many places, so parents should be aware of their children's choice in music, movies, and books.

"Parents have to be informed of what they are reading," she said.

Waller said she will be watching more carefully what her daughter checks out of the school's library, something she didn't feel she had to do before. "I didn't know I needed to," Waller said. "I just really wanted other parents to know it does exist. I talked to parents who did not know." Reported in: *Columbua Ledger-Enquirer*, February 26.

Farmington, Minnesota

A book about a same-sex penguin couple and the egg they hatch together will stay on the shelves at Meadowview Elementary School.

A District 192 resource review panel met March 4 to discuss *And Tango Makes Three* and to take comment from the public. The only residents to show up were Steve and Tammy VanWinkle, who filed a request in February to have the book moved somewhere students couldn't get to it without a parent's permission. The panel's decision will keep the book available to all students at MVES and at all other district elementary schools, a move that limits the opportunity for challenges at other schools. The decisions were unanimous.

Each member of the review panel read the book and wrote a review. The picture book, which is aimed at students 4 to 8 years old, tells the true story of two male chinstrap penguins that hatched an egg and raised a young penguin at New York's Central Park Zoo.

District administrative services director Rosalyn Pautzke, a member of the review committee, said she worried at first when the book talked about love, but said she felt the book's themes were more about family than sexual love.

"I felt good about that," Pautzke said. "I thought it showed a very soft side of these birds."

In their written complaint the VanWinkles said it should be up to parents to talk with their children about topics such as same-sex relationships. They filed the complaint after their kindergarten-age son brought the book home.

"We feel very strongly a topic such as sexual preference does not belong in a library where it can be obtained by young elementary students," they wrote.

And Tango Makes Three was at the top of the American Library Association's list of most challenged books in both 2006 and 2007, but it has also received good reviews from several national organizations and was listed among the top ten books on a national list of books to be in school libraries. Reported in: *Farmington Independent*, March 6.

schools

Delphi, Indiana

Three books challenged by a group of parents for their sexual content and graphic language will continue to be used in Delphi Community High School's curriculum. The school board voted 5–1 March 9 to retain all books in the existing syllabus. That includes the three books specifically challenged: Bobbie Ann Mason's *In Country*, Chris Crutcher's *Chinese Handcuffs*, and Toni Morrison's *The Bluest Eye*.

Months of debate and appeals surrounding the three books used in an eleventh-grade advanced English curriculum culminated in a community discussion leading up to the vote. About 150 people attended the school board meeting. Forty-four people—including parents, teachers, community members, and current and former students—spoke before the board.

Parents Scott and Marcia Jura were among those to speak against the use of the books. Despite the vote, Scott Jura said he didn't feel the night was a defeat. Their son is in the class that uses the books.

"Our object was to go through the process, to be heard, and to give our objections to make parents aware and the board aware," Jura said. "We are disappointed in the decision, but we went through the process."

Jura and others commended members of the crowd, who for two hours took turns explaining why the books should be included or removed without resorting to a single personal attack. Some of the people pointed out passages describing incest and sex. Others commented that other, nearby districts did not teach these particular books.

Others spoke of the slippery slope created when any book is removed from the classroom. Some commented on the importance of the exposure to real-life issues.

Junior Justin Foster asked that the books be kept. He said worse things are discussed in school halls. Foster said reading *Chinese Handcuffs* was hard, but that it was important to expose him to things that happen outside the "bubble" of Delphi.

"It was pretty intense," he said, "but I'm glad we read it because of the discussion we had."

Classmate Nick Stacy agreed that he is more mature after reading that book. "The book goes in depth about the material like rape and abuse and the meaning behind it," Stacy said. "It's taboo today, but the book really taught you, not only does that stuff happen, but there are consequences."

Board member Melinda Rossetter was the lone dissenter on the seven-member board. She had proposed a motion that would have kept the books on an optional reading list but not part of the regular reading requirements. The board president, who does not vote except to break a tie, didn't have to vote on the books question.

"This is not book banning," Rossetter said, explaining her proposal, which was voted down 5–1. "I don't believe our objective here is to deny access to these books to anyone. By the same token, I don't feel we should force such content on anyone, either."

Pat Brettnacher, who is the head of the English department, said she was thankful the board stood beside its teachers. She also was thankful for the community and students who got involved. "So much rich discussion happened," Brettnacher said, "that we all grew from it." Reported in: *Lafayette Journal and Courier*, March 10.

university

Bourbonnais, Illinois

A biology professor at Olivet Nazarene University may soon be able to resume teaching introductory courses and have his book defending evolution taught on the campus.

Richard Colling, the professor, was barred from teaching general biology or having *Random Designer*, his book, taught at the university that is his alma mater and the place where he has taught for nearly thirty years. Colling's book argues that it is possible to believe in God and still accept evolution. When the book appeared in 2004, some anti-evolution churches campaigned to have him fired, and while the university initially defended him, it subsequently put limits on what he could teach and barred his book from being taught.

A report issued in January by the American Association of University Professors found that Olivet Nazarene violated Colling's rights. The report set the stage for a possible censure of the university by the AAUP.

Since the report was issued, Olivet Nazarene officials have been meeting with Colling to try to resolve their dispute. Colling said that he has been assured that the limits on his teaching and the use of his book have both been rescinded. He praised the AAUP report and the university's willingness to work through the issues. As far as he is concerned, he said, the outcome is "a successful and positive resolution of the academic freedom concerns originally raised."

A university spokeswoman said that Olivet Nazarene officials weren't ready to go public with details of the negotiations. But she confirmed that there have been "a series of productive meetings" that were leading to "a common way forward."

While the AAUP follows its reports on academic freedom violations it finds with attempts to negotiate a solution, those settlements rarely are speedy and sometimes never come. Gregory Scholtz, director of the AAUP's department of academic freedom, tenure and governance, said that the final decision of the association's academic freedom committee and members would depend on official notification from the university.

But he said it was encouraging to see progress so quickly. "What we are always after is a resolution that honors our policies," he said. "For this to happen now, instead of after censure is imposed, is a great thing." Reported in: insidehighered.com, February 11. □

(reaching through the schoolhouse gate. . . from page 73)

Recent developments in the law of online speech, however, are rattling the certainty of that assumption. In the view of at least some federal judges, students do not enjoy—anywhere, anytime—the same right to comment on school events as ordinary citizens. Rather, so long as the impact of students' words may foreseeably reach school grounds, courts are increasingly willing to tolerate school punishment for the content of online speech that would enjoy full First Amendment protection if written by anyone not enrolled in school. Once First Amendment rights are lost, they seldom are recovered because people who cannot speak cannot arouse support. The loss is often incremental, with each descending stair step becoming "the new normal," and so this latest incursion on young people's rights must be viewed in the larger context of decades of dangerous retrenchment.

Over the last twenty years, the federal courts have substantially eroded the First Amendment protection of students' speech in the public schools, exhibiting a growing reluctance to second-guess even the most irrational disciplinary overreactions. As a result, student publications in many schools operate under a "zero tolerance" regime for dissent or controversy. Even a mention that students might be gay, get pregnant, or need information about sexually transmitted diseases can bring reprisals and cost journalism instructors their jobs.

When confronted with censorship, students have always been able to take their messages off campus to enjoy the greater freedom that comes with self-publishing. Self-publishing has allowed young writers to address sensitive social issues candidly and to vent their criticism of school personnel and programs. This speech can have real value—not just for the writer, and not just for the student audience, but for adults who seek an inside glimpse into what young people are thinking—even if it may be uncomfortable reading, and we would all be poorer if it were lost. Yesterday, self-publishing meant starting an "underground newspaper." Today, it means creating a website.

The law of online speech is still evolving, and the relatively few cases testing the limits of school authority over students' homemade web pages have arisen not from traditional journalism, but from attacks on school personnel posted on blogs, discussion boards, or social networking sites. There is, however, just one First Amendment. Because it is impossible to craft an intelligible First Amendment standard that places "bad" speech on one side of the line and "good" speech on the other, a ruling that administrators may punish writings with no physical connection to school casts an ominous shadow over all speech, including legitimate journalism and whistleblower activity.

It is hard not to empathize with burdened school principals who see disrespectful websites and blog entries as undermining their ability to keep order. But when students engage in injury-causing behavior off-campus, there are ample off-campus remedies: those victimized may contact the parents, sue for defamation or invasion of privacy, and in extreme cases alert the police. If the speech is itself not injurious—that is, if it merely causes a bothersome level of chatter at the school—there are effective ways to respond that are not directed to the content of the message (i.e., punishing those who will not stop looking at MySpace during class). The First Amendment requires exhausting those remedies first.

The creep of government regulatory authority into students' off-campus expression should concern anyone who

values the free exchange of ideas on the internet. Some recent First Amendment jurisprudence views speech on the internet as qualitatively different from that in print, because of its ease of worldwide access, justifying greater regulatory leeway to prevent harm. This may sound familiar. It was only three decades ago that in *FCC* v. *Pacifica Foundation* (the "seven dirty words" case), the Supreme Court determined that over-the-air broadcasting is so much more intrusive and accessible to youth than the printed word that the government may restrict speech that is merely "indecent" rather than legally obscene. If we are not vigilant, what happens to student speech today could impact all online speech tomorrow.

II. Student Speech Rights in the Pre-Cyberspace Era

A. "Students are persons . . . "

To begin with first principles, the Supreme Court recognized in *Tinker* that "students are persons under our Constitution," so that—even on school grounds during the school day—administrators may restrict student speech only if such speech "materially and substantially disrupts the work and discipline of the school." In that instance, three students' display of black armbands in silent support of a cease-fire between the United States and North Vietnam was held to be protected speech, even though the protest provoked sometimes-heated responses from other students. Justice Fortas's opinion emphasized that, in analyzing students' First Amendment rights, the government's enhanced disciplinary powers at school were to be considered in "light of the special characteristics of the school environment" and the need to maintain order during the school day.

While *Tinker is* often cited as a landmark in recognizing that the First Amendment applies to students even while under school supervision, the decision was not a break from the Court's jurisprudence but a natural progression from it. The decision expressly relied on the Court's earlier First Amendment ruling in *West Virginia State Board of Education* v. *Barnette* that students could not be compelled to forsake their religious opposition to swearing allegiance to the American flag. In *Barnette*, school officials claimed that the state's interest in promoting "national unity" overrode the rights of the individual students to refuse to recite the Pledge of Allegiance. In one of the most famous passages in all of constitutional jurisprudence, Justice Fortas decisively established the paramount right of all citizens—including children—not to be coerced to espouse beliefs dictated by their government: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Tinker stands as the high-water mark for student First Amendment rights, and it was not long before the Burger and Rehnquist Courts began chipping away at it. In 1986, the Court decided in *Bethel School District No. 403* v. *Fraser* that, even in the absence of a substantial disruption, a school did not violate the First Amendment by punishing a student for "offensively lewd and indecent speech" when he used a string of sexual double-entendres while addressing a student assembly. Chief Justice Burger's opinion emphasized the "captive" nature of the audience—attendance was mandatory—and the interest of the school in disowning the speaker's message: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." Concurring in the result, Justice Brennan wrote separately to emphasize that the unique setting of the assembly heightened the state's interest, and that a different setting—even elsewhere in the school—might have yielded a different outcome. Citing the Court's decision in *Cohen* v. *California*, the case of a young war protester who was found to have a protected right to wear a "Fuck the Draft" jacket in public areas of a courthouse, Brennan observed: "If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]"

The affiliation between school and message was likewise pivotal to the last of the troika of landmark student speech decisions, *Hazelwood School District* v. *Kuhlmeier*. In that case, a St. Louis-area high school principal ordered the removal of articles from the Hazelwood East High School *Spectrum* in which teenagers discussed their perspective on divorce, pregnancy, and other social issues. His primary justification was that the student authors failed to effectively disguise the identities of teens who agreed to discuss their pregnancies anonymously, and that they neglected to seek rebuttal from a divorced father who was unflatteringly portrayed. Three *Spectrum* staff members sued, alleging the censorship violated their First Amendment rights. The Supreme Court rejected their challenge. The Court forged a distinction between publications that had by rule or by historical practice been maintained as a public forum for the expression of student opinion, versus non-forum newspapers that functioned as, in effect, the official "voice" of the school, or that might reasonably be so perceived by readers. In a nonforum paper, the Court held, administrators may overrule students' editorial decisions so long as the decision is "reasonably related to legitimate pedagogical concerns." Significantly, the *Kuhlmeier* Court fell back on the justification recognized in *Tinker*—"the special characteristics of the school environment"—and elaborated: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."

An instructive line can be drawn between the speech

in *Barnette* and *Tinker*, which was unmistakably that of the individual students alone, versus that in *Fraser* and *Kuhlmeier*, in which the speech could, in the Court's view, be ascribed to the school. Only in the latter instance has the Supreme Court ever permitted the state's interest in keeping order to override that of the speaker, and in the absence of those special circumstances, *Tinker* continues to supply the default standard.

B. Before the Web: A Bright(er) Jurisdictional Line

In the pre-internet era, courts generally had no difficulty concluding that school officials could not constitutionally punish off-campus publications, even if copies were brought onto campus. For instance, in *Thomas* v. *Board of Education, Granville Central School District*, the Second Circuit reversed a school's decision to suspend the editors of an off-campus student newspaper, *Hard Times*, who were punished because their humor publication contained lewd drawings and language. Though there were some physical ties to campus—some articles were written or typed at school, and copies were stored in a closet at school—these minimal contacts did not transform *Hard Times* into "school speech" and give school officials broad regulatory leeway over it: "[O]ur willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." Because school administrators had "ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith," the *Thomas* court held, "their actions must be evaluated by the principles that bind government officials in the public arena." The court was wary of letting schools regulate off-campus speech that might find its way onto campus only fortuitously: "It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times*, at a neighboring newsstand and lends it to a school friend."

Similarly, the court in *Shanley* v. *Northeast Independent School District* ruled that the First Amendment precluded punishing five high school students for the content of an underground newspaper they created off-campus and distributed after-hours on school grounds. Once a student has purposefully brought writings created off-campus into the schoolhouse during the school day, the rules change. Courts generally have had no difficulty concluding that schools may, under the *Tinker* standard, police independently created writings that are circulated or displayed during class time. This includes authority to require that "underground" publications be reviewed by an administrator for substantially disruptive content before they may be distributed on campus during the school day, although the review must be circumscribed in scope and duration to avoid its abuse as a "pocket veto."

III.Disciplinary Authority Jumps the Schoolhouse Gate: *Morse* v. *Frederick*

The Supreme Court had the opportunity in 2007 to categorically determine whether school disciplinary power could reach off-campus conduct at an event that, unlike a field trip, was not an official school function. Instead, in *Morse* v. *Frederick*, which is often referred to as the "Bong Hits 4 Jesus" because of the message written on the banner that was the subject of the case, the Court fashioned a narrow, fact-specific exception to *Tinker* where speech at a "school sanctioned" event is reasonably interpreted as encouraging students to use illegal drugs.

In *Morse*, a 5–4 majority of the Court held that a school did not violate the First Amendment in punishing a student who, at a public gathering during school hours where teachers provided supervision, stood directly across from the school and displayed a banner that the student later claimed was a nonsensical ploy for attention. Writing for the majority, Chief Justice Roberts expressly rejected the argument that Morse "[wa]s not a school speech case," noting that the events "occurred during normal school hours" and at an activity "sanctioned" by the school. Even in *Morse*, the Court emphasized that the speech was made at a school activity, echoing the point Justice Brennan made in *Fraser*: "Fraser's First Amendment rights were circumscribed" while at school, but had he "delivered the same speech in a public forum outside the school context, it would have been protected."

Justices Alito and Kennedy supplied the decisive votes to create a majority, and their concurrence makes plain that *Morse* does not provide an unrestrained license for policing offcampus expression: "I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use[.]" Justice Alito went on to explain that the First Amendment would not tolerate a standard under which a school could censor speech merely because, in the judgment of administrators, it interfered with the school's self-defined "educational mission," a standard fraught with potential for mischief. *Morse* can be read narrowly, for the unremarkable proposition that when students are acting under school supervision, as they are on a field trip, they are speaking "at school," or more broadly, to say that speech physically off school grounds that is directed at the school equals speech "at" school. The Alito concurrence plainly counsels in favor of a limited reading, but a few courts have regarded *Morse* as a broad license to extend school authority beyond school boundaries.

The limiting Alito construction notwithstanding, *Morse* almost immediately began being cited for the proposition that students no longer enjoy refuge in the First Amendment for any speech reasonably, or even unreasonably, interpreted

as condoning anything dangerous and illegal—specifically, violence. Courts have always been hesitant to second-guess the disciplinary decisions of school administrators, but never more so than when administrators are responding to perceived threats against students or school personnel. Hence, in one of the earliest applications of *Morse*, the Fifth Circuit found no constitutional violation in a Texas principal's decision to remove a high school sophomore from school and transfer him to a disciplinary alternative school in response to a violent fantasy story written in a notebook the student was carrying in his school backpack. The opinion expressly cited the infamous April 1999 killings of 12 students and a teacher at Colorado's Columbine High School, and the somewhat less well-known March 1998 slaying of four middle-school students and a teacher in Jonesboro, Arkansas, by a pair of shooters aged 11 and 13. It concluded: "School administrators must be permitted to act quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."

IV. Courts Struggle With School Authority Over Cyber-Speech

A. Jurisdictional Lines Blur Where Speech Involves Violence

Anxiety over school violence has prompted a number of courts to relax the geographical barriers to school discipline where students use electronic communications to share thoughts interpreted as signaling violent tendencies. While "true threats" lie outside the purview of the First Amendment, these cases entail something noticeably less than concrete and imminent danger—speech that in the world outside of school would normally be protected.

In some instances, courts have found sufficient nexus with the school by showing that the off-campus speaker actually "brought" the website onto campus, such as by using a school computer to show the site to others. In one such case, *J.S.* v. *Bethlehem Area School District* (Bethlehem), the Pennsylvania Supreme Court held that a school did not violate the First Amendment by expelling an eighth-grade student for creating a web page that profanely enumerated the reasons his teacher should die and solicited donations for a hit-man. The court emphasized both the severity of the impact on the targeted teacher—she was so traumatized that she went on antidepressants, was unable to complete the school year, and did not return for the following year—and that the student creator used school computers at least once to show the site to a classmate and told others at school about the site. While the court looked at other factors indicating that the student directed his speech at the school—the audience was a "specific audience of students and others connected with this particular School District" and school officials "were the subjects of the site"—it appears that the student's actual dissemination of the speech on school grounds was essential to the outcome. The court framed the standard this way: "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."

In other cases, no physical nexus with the school has been required. Rather, these courts have permitted school discipline on the theory that online speech is capable of reaching school, and foreseeably likely to do so, or that the impact of the speech is anticipated to be felt at school. For instance, in *Wisniewski* v. *Board of Education*, the Second Circuit found no impediment to disciplining a student for his use of an instant messaging icon designed to look like a cartoon of his teacher being shot. The student, Aaron Wisniewski, did not use school computers to create or send his message, and there was no evidence that he showed the icon to anyone at school or that he intended for his classmates to do so. Nevertheless, the court found that it was reasonably foreseeable that the caricature would come to the attention of the teacher and of school officials, and that if seen, it would "foreseeably create a risk of substantial disruption within the school environment."

It is unsurprising that courts hesitate to second-guess disciplinary decisions where school officials are responding to what they say were credible threats of bodily harm. Nevertheless, the leap made in *Wisniewski* to reach the court's desired outcome ought not to be made casually. *Wisniewski* may mean that digital speech off campus is punishable under the same standards as on-campus speech because, owing to the pervasiveness of electronic communications, the speech itself is capable of entering the school. What is missing in this standard is any requirement that the speaker intend that the message be viewed at school, or that he do anything on campus to call attention to the speech; indeed, the court said Wisniewski's intent was immaterial. Importantly, the *Wisniewski* case did not involve content posted on an unsecured website, where anyone with an internet connection could view it, but rather an electronic text message. Wisniewski's teacher could not stumble onto his message with a Google search; the message could not reach the teacher unless one of its recipients forwarded or printed it. This means that the speaker is charged with anticipating that his message will be shown, without his authorization, to people with whom he never intended to communicate. That legal standard would be dangerously open-ended enough, but the alternative way to read *Wisniewski*—that online speech is punishable as on-campus speech because the effects of the speech will be felt on campus—is even more perilous, for that rationale can apply equally to all speech, online or not. If this latter reading of *Wisniewski* prevails, then it is no exaggeration to say that students never—at any time and in any medium—have First Amendment rights coextensive with those of adults.

To be sure, the Supreme Court's constitutional analysis in *Kuhlmeier* is deeply flawed, but like it or not, *Kuhlmeier*

is the law. And by applying "public forum" analysis to school speech, *Kuhlmeier* roots school officials' disciplinary authority squarely in geography. As the real-estate pros say, location matters. Public forum analysis is all about the government's ability to control the way that the space it owns—the park, the sidewalk, the courthouse lobby—is used for expressive conduct. Outside the school context, no one would seriously suggest that government may regulate lawful speech off government property based on the way people might react to it on government property. The state may reasonably regulate the time, place, and manner of speech on government property, not affecting government property.

We would not in any other context permit the punishment of legal off-campus activity—and recall that in *Wisniewski*, the police investigated and found no unlawful conduct—based solely on its impact on persons on-campus. We would not permit the principal to discipline a student who cheats on his girlfriend and callously breaks off their relationship, even though the girlfriend comes to school sobbing and the breakup distracts her and those around her from their studies. We would not permit the principal to punish an 18-year-old beauty queen who poses scantily clad for a swimsuit magazine, even though the magazine is the talk of the school and students cannot stop discussing it during class time. If we would not countenance state interference in these contexts, then surely we cannot afford speech a uniquely lesser-protected status.

B. Disciplinary Policies Without Geographical Limits Are Fatally Overbroad

In several recent instances, students have brought facial challenges to disciplinary policies purporting to penalize all "disruptive" or "abusive" speech, regardless of where the speech is uttered and whether it physically makes its way onto campus. Courts evaluating disciplinary policies that lack any geographic nexus with the school have had little difficulty recognizing the policies as unconstitutional, because they are not sufficiently tailored to minimize impact on legitimately protected speech.

In *Killion* v. *Franklin Regional School District*, a student was suspended from school for making crass comments about the school's athletic director—including crude remarks about the size of his genitals—in an email circulated to several classmates. A copy of the email was left in a teacher lounge, but the message otherwise had no physical connection to the school or school events. The court held that the school district's policy penalizing "verbal/written abuse of a staff member" was unconstitutionally vague and overbroad, because it was neither limited to instances in which the conduct caused or threatened a substantial disruption, nor geographically limited to school premises.

In *Flaherty* v. *Keystone Oaks School District*, a different judge in the Western District reaffirmed *Killion* in the case of a high school student disciplined for using an online message board to transmit vulgar trash-talk, including insults about a student athlete and his mother, in discussing a school volleyball rivalry. The school took the position that it could punish the student because he brought "shame" and "embarrassment" to the volleyball program and the school with his comments. The court disagreed. The court found that a school handbook policy prohibiting "[i]nappopriate language" and "verbal abuse" toward school employees or students was overbroad and vague, "because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity."

Although these cases arise out of First Amendment challenges, their reasoning is grounded in fundamental notions of due process—namely, that the government may not punish conduct without giving reasonable notice of what is prohibited. A student cannot be expected to live her life looking over her shoulder and wondering whether her statements about conditions at her school might get back to those at school and prompt a reaction.

V. Dueling Views of "Substantial Disruption" Via Online Speech

A. *Doninger* and *Blue Mountain*: *Tinker* Stretched to the Breaking Point

Whether perceived or real, threats of violence against the school community present the trickiest interplay of First Amendment freedoms versus legitimate public safety interests. But when the speech presents opinions that are merely insulting or belittling of school personnel, with no undercurrent of violence, the school cannot invoke "public safety" to validate a disciplinary decision. These latter types of cases are the most foreboding for legitimate journalism, and for the rights of journalists and commentators to frankly criticize school officials. Although *Tinker*'s requirement that the school demonstrate actual or foreseeable disruption should guard against the worst overreaching by errant officials, that protection is often more illusory than real, because of the leeway that courts afford schools in determining when a student's conduct is "disruptive."

The most egregious reach by a court seeking to rationalize school discipline of purely off-campus speech came in the case of a Connecticut high-school junior who used a personal blog to seek public support for her side in a dispute with school administrators. The student, Avery Doninger, was a class officer who became frustrated in negotiating with her principal over the scheduling of a battle-of-the-bands concert. Doninger created a publicly accessible entry on the blogging site LiveJournal.com in which she used a coarse word ("douchebags") to refer to administrators and asked those who supported her position to email and phone the administrators to rally support for the concert. Her principal responded by declaring Doninger ineligible to seek senior-class office and by refusing to seat her when her classmates elected her anyway, and later by banning Doninger and her supporters from wearing T-shirt messages

protesting her treatment.

The case initially came to district court on Doninger's petition for an injunction to permit her to reclaim her student office pending trial. The district court denied the petition, finding no First Amendment violation on two bases: first, that Doninger's off-campus blog posting was punishable as "lewd" speech under the *Fraser* standard even though it took place far outside *Fraser's* "captive audience" context, and second, that holding class office was a privilege and not a right, and that school officials were free to revoke the privilege if the student failed to demonstrate "good citizenship."

The Second Circuit affirmed denial of the injunction, but on a different rationale. The appeals court questioned whether *Fraser* could legitimately apply to off-campus speech, and instead decided the case under the *Tinker* standard, finding Doninger's speech to be substantially disruptive. The court relied on evidence that Doninger's blog entry was misleading, because a portion of the blog, which both the district and appellate courts took out of context, asserted that a final decision had been made to cancel the concert, when in fact there was a chance it would be held, as it ultimately was. In the Second Circuit's view, that transmittal of misleading information created a foreseeable risk that administrators would have to waste time quelling protests from students incensed by the "cancellation." The court ignored evidence that disruption of school was not cited as the basis when the school disciplined the student—the only justification given was the use of disrespectful language. The court also glossed over the fact that three weeks elapsed between the blog posting and the discipline with no sign of unruly student reaction to the "cancellation." In the court's view, *Tinker* permits not merely preemptive action to stop a potential disruption, but after-the-fact punishment of a potential disruption that never came to pass.

The case returned to district court on the school officials' motion for summary judgment. The court granted judgment for the defendants on Doninger's main First Amendment claim, leaving only a subsidiary claim arising from the ban on pro-Doninger T-shirts at a school function. The court recognized that the facts were in dispute as to whether the discipline truly was based on disruption of the school or the use of crude language, but concluded that in either case, First Amendment law was not clearly settled that the discipline was unlawful. Because they violated no clearly established legal right, Doninger's principal and superintendent were entitled to qualified immunity, meaning they could not be compelled to pay damages.

Both the district and appellate courts emphasized that the outcome was driven by the unique nature of the discipline—stripping the student of elective office but not removing her from classes or otherwise depriving her of a constitutionally protected interest. This provides a future speaker the opportunity to challenge a suspension or expulsion as distinct from Avery Doninger's punishment. But in the process, it does violence to the law of First Amendment retaliation, for it has never been the law that retaliation for the content of speech is lawful so long as the speaker is not deprived of a constitutional entitlement. Rather, retaliation for engaging in protected speech is unlawful if the retaliatory act would be sufficient to deter a reasonable person from speaking again—an analysis that none of the Doninger rulings bothered to conduct.

A few months after the Second Circuit handed down *Doninger*, a district court in Pennsylvania fashioned a makeshift First Amendment standard to uphold a middle school's punishment of a student who, angry over being punished for a dress-code violation, created a mock MySpace profile ridiculing her principal. The profile was a wildly exaggerated mockery of a typical social networking page, in which the principal, who was pictured but not named, bragged about being a pedophile who had sex in his office. As in *Doninger*, no school resources or time were used, and there was no evidence that the student displayed the contents of the web page on school grounds; in fact, MySpace was inaccessible on school computers. The sum total of the profile's impact on school decorum was one teacher's testimony that he twice had to quiet his class at the start of the day to silence talking about the website, and more generalized testimony about a "buzz" among students indicating they had viewed the site. Nevertheless, the court in *J.S.* v. *Blue Mountain School District* (Blue Mountain) held that the website was sanctionable under a legal analysis that borrowed elements from *Tinker*, *Morse*, and *Fraser*. Even conceding that no substantial disruption occurred, the court found that a school may lawfully punish "vulgar, lewd, and potentially illegal speech that had an effect on campus."

The *Blue Mountain* ruling heavily emphasized the ease with which the internet empowers students to transmit messages, suggesting that the availability of online communications makes established First Amendment standards obsolete: "Today, students are connected to each other through email, instant messaging, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting 'send.' . . . Off-campus speech can become on-campus speech with the click of a mouse." This perception that digital media are uniquely dangerous, and that their dangerousness calls for relaxing the burden on government to justify limiting speech, pervades the rulings in *Blue Mountain*, *Bethlehem*, *Wisniewski*, and *Doninger*. Fortunately, this casualness about First Amendment standards is not universally accepted.

B. Discussion Does Not Equal Disruption: *Layshock*

In *Layshock* v. *Hermitage School District*, a district court confronted a high school student's claim that his school violated his First Amendment rights by suspending him for an offcampus MySpace page that, like the page in the *Blue Mountain* case, used vulgar language to ridicule the school principal. The court did not linger over the propriety of school authority over online speech, simply observing that it was the state's burden to show a sufficient "nexus"

with the school—and indicating that a substantial disruption of school orderliness could supply that nexus. The court applied the *Tinker* standard, finding that the parody page merely caused curiosity and discussion on campus, not true disruption: "The actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."

The school argued for application of the *Fraser* "lewd speech" standard, contending that Justin Layshock's parody profile—in which the "principal" purported to describe himself as a "big whore" and a "big hard-ass"—was punishable by virtue of its accessibility on campus. The court categorically rejected extending *Fraser* to off-campus speech: "[B]ecause *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school."

Significantly, the *Layshock* court took care to examine the basis for the punishment, and had no difficulty concluding that the suspension was imposed purely for the content of the student's speech, and not for any non-speech disruptive conduct on campus. Thus, the school could not justify its actions by claiming that the discipline was for on-campus misconduct, such as Layshock's admitted use of a school computer to show the profile to several classmates during a Spanish class. The court properly recognized that contention as a post-hoc attempt to decouple Layshock's punishment from the content of his message.

VI. The Perils of Unbridled School Discretion Over Online Speech

A. Runaway Government Authority: The Failed Experiment of *Kuhlmeier*

Twenty years of experience with the *Kuhlmeier* standard has proven that, given largely unreviewable discretion to determine what content is hurtful to the school's educational mission, many school administrators will abuse that authority to refuse to publish anything they perceive as critical or controversial. This includes benign mentions of same-sex relationships between students, acknowledgment that high-school girls have babies, and disclosure of possible wrongdoing by school employees. The brunt of censorship falls disproportionately on gays, religious minorities, and other "outliers," for whom being a teenager in high school can already be a daily gamut of ostracism. When such students seek the empowerment of a voice in student media as an antidote to their alienation, they often are told by school authorities that their mere visible presence in a student publication is intolerable to the community. This noxious brand of censorship lends official sanction to the heckler's veto; for the students victimized by it, the impact is as palpable as a schoolyard beating.

Censorship of topical speech, even where it is sharply critical of school policies or school personnel, cheats the listening audience, including the adult audience, as well as the speaker. Some of the most important policy decisions facing America involve the effectiveness of our educational programs. If a student wishes to voice her opinion that abstinence-only sex education is ineffective and that students are tuning out the lectures, that is potentially valuable information—for educators, policymakers, and parents. Sadly, in some school districts, publication of that student's opinion will be treated as a career-ending infraction for her journalism teacher.

Those who oppose the censorship of student expression frequently find themselves shadow-boxing against mythical justifications. The first is the contention that schools are legally liable for the speech of students, so that administrative control is necessary to minimize exposure. In reality, there is no evidence that student publications are litigation-prone; indeed, there is not a single published appellate case holding a public high school liable for defamation, invasion of privacy, or other tortious injury inflicted by student media. To the contrary, in the very few student-media cases on record, all of which are at the college level, courts have been quite clear that schools incur greater risk of liability by interjecting themselves into editorial decisions. The second myth is that, like journalists in the professional world, students must be answerable to an experienced editor (i.e., the principal) so they can learn sound journalistic practices. But there is no "teaching" in the typical censorship case. A student learns nothing about journalistic standards by being told: "I am killing your story because I allow only coverage that is biased in favor of the school." As flimsy as these rationales are when applied to school-sponsored newspapers or broadcasts, they are of course wholly inapplicable to individual speech on social networking pages. There can be no pretense that schools' interest in controlling that speech is based on anything other than its editorial content.

B. The Internet Does Not Justify a New First Amendment Rulebook

Those who advocate for a greater government role in policing students' online speech invariably come back to one assertion: as Judge Munley postulated in *Blue Mountain*, the internet is qualitatively different from other methods of communication, making traditional First Amendment jurisprudence a poor fit. Under this view, the ability of students to instantaneously reach a worldwide audience—including the entire school community at once—so magnifies the ability to do harm that greater restraints are justified. This contention misfires for several reasons.

First, as *Tinker* makes clear, school authority over student speech must be moored in the state's interest in maintaining the orderly functioning of the school. Students have always had the ability to reach enough fellow students—through leaflets, posters or whisper campaigns—to create disorder within the school. The courts have not previously seen fit to relax the *Tinker* standard simply because, for instance, copiers and fax machines became more plentiful

or cellular telephones more ubiquitous. One's right to display a yard sign endorsing a political candidate does not change just because the country road fronting the house is widened into an interstate highway. The ease with which the message can be successfully transmitted and received has never been the deciding factor in whether speech enjoys First Amendment protection. The district court's sly turn of phrase in *Doninger*—that online speech can enter the campus "with the click of a mouse"—could just as easily be replaced by "the whirr of a fax machine," or even "the scrape of a pair of sneakers." Communication has been portable since the day cave paintings gave way to mastodon skins. Interestingly, no school has ever argued that school newspapers should be entitled to a higher level of First Amendment protection than that afforded to the *New York Times* on the grounds that it is far easier to reach a damagingly large audience in the *Times*.

There is in fact no evidence that websites are such an efficient way of successfully reaching a sufficiently large audience to disrupt school that a new-and-different level of First Amendment solicitude is warranted. There are professionally trained journalists operating professionally designed blogs whose viewership numbers in the double digits. The implication that the online medium makes speech punishable in a way that verbal communication or a handwritten note would not be relies on the fanciful notion that teenagers' social networking pages enjoy an audience the size of the "Drudge Report." It is not enough to say that speech was "put on the internet" any more than it would be sufficient to say that speech was "put on a sign." Some signs are illuminated in neon over Broadway, and others are planted in a front yard in the countryside. And so it is with the web.

The concern that online remarks about the principal could be viewed by a nationwide audience and could persist indefinitely in cyberspace is of no constitutional significance. That a viewer in Tacoma might form a negative impression of a principal in Tampa has no bearing on the school's ability to maintain good order. If the principal is injured in his career ambitions, like landing that dream job in Tacoma, by factually false allegations, he can and should pursue a defamation action. But his career prospects are not the interests of the state, and they carry no weight in a *Tinker* analysis.

The pervasiveness of digital communications cuts against unbridled expansion of state authority, not in favor of it. To a greater and greater degree, young people live their lives online—they form and dissolve relationships, collaborate in playing games or creating works of art, and furnish the real-time minutiae of their daily lives for their friends to follow. The Pew Internet and American Life Project reports that more than half of all teenagers have created and posted content to the internet so that they could be considered "publishers." For this generation and those to come, to say that government can regulate their "electronic communication" is meaningless; there is no other communication. In short, while it is fashionable to assert that "the internet has changed everything" in American culture, the foundational rules of our Constitution remain. It is our view of the nature of speech, not the Constitution, that must change to keep pace with technology.

Consider the practical implications of a rule that off-campus speech is punishable if people on campus are reasonably likely to learn about the speech (*Wisniewski*) and if the speech causes school officials to expend any substantial amount of time responding to it (*Doninger*). Such a rule is inherently flawed because it lacks a limitation that only "wrongful" or "low-value" speech may be punished, and, indeed, it is impossible to create a "low value speech" standard that intelligibly constrains the government's enforcement discretion. The problem is clear when you consider the student who addresses a state legislative committee at a public meeting to call attention to a safety hazard at her school. Although most would agree that the student's speech is of high value and is worthy of protection, she has engaged in speech that people at the school are reasonably likely to learn about (*Wisniewski*) and that is quite likely to require a response from school officials (*Doninger*). As a result, in the Second Circuit, she may have no First Amendment claim if she is vindictively punished by her principal. This illustrates why the analysis applicable to on-campus speech is such a poor fit for off-campus speech. When analyzing on-campus speech, the substantive merit of the speech is not decisive, because the *Tinker* line of cases speaks in terms of control over school premises while school business is being conducted. If the freshman algebra class decides that they will no longer answer questions about algebra because they wish to turn the class into a discussion group about recycling, they have said nothing wrongful—their speech beneficially addresses a matter of public concern—but they have disrupted class and can be punished. But if a student's off-campus website asks community members to contact the principal's office to urge the school to recycle, it should be beyond dispute that the website is protected speech even if the principal's email box is bombarded with messages. That we can no longer be confident of the answer exposes the fatal weakness in attempting to cram off-campus speech into an ill-fitting on-campus framework.

The notion that speech can be punishable merely because it "targets" a school audience is untenable. There is a meaningful difference between speech that is about the school and speech that is intended to be read at the school during school hours. It is one thing to say that a student who holds up a "Bong Hits" banner while surrounded by fellow students at a school-supervised outing across the street from school is purposefully addressing his speech to a school audience. It is quite another matter to assert that a blog posted in the evening on LiveJournal.com—the potential audience of which is comprised mostly of adults who never intend to set foot in the school—is "targeting" a school audience. To shut down speech that is theoretically accessible to the entire world to make sure that none of it reaches

the sliver of the world that attends Avery Doninger's Lewis B. Mills High School is overbreadth writ large.

The Supreme Court has thus far regarded the internet with the same First Amendment solicitude as print publishing, and not the lesser status afforded to over-the-air broadcasting. Accordingly, the Court has resisted efforts to impose content-based controls in the name of protecting young viewers, finding congressional efforts unconstitutionally overbroad. Though the Supreme Court has not yet had occasion to apply its online-speech jurisprudence in the school setting, Justice Alito's forceful concurrence in *Morse* suggests that he and concurring Justice Kennedy are prepared to venture outside the schoolhouse gate as far as the neighboring hillside, but no further. This should give pause to expansionists who believe *Wisniewski* and *Doninger* flung the gate wide open.

Let us be clear about what is at stake if the *Doninger* line of reasoning is allowed to prevail. Courts generally have held that where a student produces an off-campus publication for distribution on school premises during school time, it is not unconstitutional to require prior administrative review as a precondition to circulating the publication. If speech about the school on a student's website occupies the same status as an underground newspaper because of the website's potential to be accessed at school, or to provoke a reaction at school, then there is no principled objection to prior administrative review before the website may be posted—or to discipline a student who posts without prior review. That is the path down which the *Doninger* reasoning inexorably points us.

If administrators assert authority to pre-approve or punish students' speech about the school in their off-hours that has the potential of reaching school, commentary on social networking sites will be the least of the casualties. As we have seen, administrators frequently invoke "disruption" as a pretext to suppress speech that is merely factual and critical. Journalism, when practiced at its best, is meant to be provocative; that is, to cause people to talk. If anecdotal evidence that students talked during school hours about something they read equated to "disruption," then even the best journalism—in fact, especially the best journalism—would be subject to prior restraint and to disciplinary sanction.

Factual—and yes, critical—coverage of school affairs by student journalists has never been more important. Established media companies are in financial free-fall, slashing jobs and cutting news space, with education reporting among the unavoidable casualties. Recently in Minnesota, the story of a police inquiry into a teacher's text-message communications with students was broken by a professional newspaper as a result of reporting by high school journalists, who took the story to the local newspaper because the principal censored it from the student paper. If students are not free to report frankly on the goings-on in their schools, the community may never learn that "temporary" trailer classrooms have become permanent, that restrooms are dangerously unsanitary, or that campuses are prowled by gangs.

VII. Conclusion

The first generation of online First Amendment law has, regrettably, developed around a recurring fact pattern: a relatively unsympathetic student plaintiff challenging a relatively sympathetic principal's imposition of discipline for relatively frivolous speech. This fact pattern represents only a small fraction of the range of students' online expression, yet it is setting the standard for the more substantive speech in which students engage, and will increasingly engage, on blogs, on website bulletin boards, and on news sites both student and professional. To the extent that student speech receives any attention in the adult world today, that attention is overwhelmingly negative, focusing on the handful of admittedly heartbreaking cases in which young people have abused websites and text-messaging to abuse their peers, at times with tragic consequences. But there is another student speech story to be told. Student journalists are high achievers, and study after study confirms the link between student journalism and improved school retention, higher standardized test scores, and greater college readiness. When courts speak of the "special characteristics" of the school environment, their focus is on the captive listeners who may be exposed involuntarily to offensive speech. But it is because students are legally compelled to stay in school for the best hours of their day that we must proceed with extreme caution in letting schools punish their expression, let alone extending that disciplinary authority without boundary. And it is because student journalism is such a valuable outlet for expression that courts cannot be permitted to carelessly improvise new constitutional standards to catch the Aaron Wisniewskis of the world. The Supreme Court's jurisprudence is clear, and technological innovation has not rendered it obsolete. If the publication of a student's speech does not take place on school grounds, at a school function, or by means of school resources, then a school cannot punish the speaker without violating her First Amendment rights.

Censorship carries real human costs. While irresponsible accusations posted online can be hurtful, reputations can be injured as well by disciplinary overreactions. Justin Layshock's principal can readily demonstrate to the next employer that, notwithstanding what the employer may have read on MySpace, he is not a "big steroid freak" whose hobbies include "smoking big blunts." A student will have a much more difficult time clearing his name and pursuing a successful future if branded guilty of disrupting classes and sent to "alternative school," as Justin Layshock originally was before his parents interceded and got his punishment reduced. Federal courts afford school disciplinary decisions a wide berth of discretion and require only minimal due process safeguards for a suspension of up to ten days, even though the suspension may leave a permanent scar. The practical difficulty of overturning a disciplinary decision—with the principal as accuser, judge, jury and executioner—and the lasting consequences of an unjust conviction, counsel strongly in favor of restraint.

Although it is understandable that courts empathize with school administrators and wish to afford them leeway to respond rapidly to danger signs, schools are not seeking latitude only in dangerous situations. Avery Doninger and Justin Layshock manifested no violent tendencies, and it was known before discipline was imposed that their speech caused no discernable disorder. Where there is no emergency, we must be governed by Justice Brennan's caution: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." That is to say, courts are getting it exactly backward: it is the student speaker, not the school, who is entitled to latitude. If the speaker must approach the First Amendment line with trepidation, knowing that the first toe to touch the line will be sliced off, then the speaker will stop a yard short of the boundary, and a good deal of protected speech will never be said. Unless school administrators are required to respect the breathing space that Justice Brennan saw was so vital—unless they are required to work within narrow and specific parameters constraining their power to punish—then valid, protected, non-disruptive speech will be lost. ☐

(anxiety. . . from page 74)

territories. In June 2007, the Royal Court Theatre in London cancelled a reading of an adaptation of Artistophanes's *Lysistrata*, which was set in a Muslim heaven, for fear of causing offense. In 2005, the Barbican in London was accused of excising sections of its production of *Tamburlaine* to remove scenes attacking Muhammad. And in 2004, the Birmingham Repertory, another British theatre, cancelled a production of *Bezhti*, a play depicting a rape in a Sikh temple, after protests by members of the local Sikh community.

The most notorious example of the trouble that can be stirred up is the cartoons of Muhammad first published by *Jyllands-Posten*, a Danish newspaper in 2006. The pictures, one showing Muhammad in bomb-shaped headgear, one with him wielding a cutlass, another saying that paradise was running short of virgins for suicide-bombers, provoked a tumultuous response around the world. Many Western newspapers decided it would be irresponsible to republish the cartoons. Some governments, including those in Britain and America, denounced their publication. To free-speech campaigners, all this was seen as further evidence of self-censorship amid increasing fears of upsetting sensibilities of some Muslims.

In February, Geert Wilders, a strident anti-Muslim Dutch politician, was denied entry into Britain where he intended to screen his film, *Fitna*, a nasty rant against Islam. Wilders was deported on the grounds that his opinions "threaten community harmony and therefore public safety." The film was anyway shown in Westminster despite dire predictions that as many as 10,000 Muslims would turn out in protest. The fears were wide of the mark: not one person turned up to complain.

Two decades after the fatwa was imposed on Rushdie, it appears that many Western artists, publishers and governments are more willing to sacrifice some of their freedom of speech than was the case in 1989. To many critics that will be seen as self-censorship that has gone too far. But a difficult balance must be struck: no country permits completely free speech. Typically, it is limited by prohibitions against libel, defamation, obscenity, judicial or parliamentary privilege, and the like. Protecting free expression will often require hurting the feelings of individuals or groups; equally the use of free speech should be tempered by a sense of responsibility. But that sense should not serve as a disguise for allowing extremists of any stripe to define what views can or cannot be aired. Reported in: *The Economist*, February 14. ☐

(report. . . from page 74)

added, that they're protected against attempts by cloud providers to access or use data for any secondary purposes — for instance, using personal health information to deliver targeted marketing messages to consumers.

Lost protections. Storing data in cloud-based systems and accessing it via the Internet could have an impact on any legal protections afforded to the data, according to the report. For instance, it claimed that trade secrets and privileged lawyer-client information may not have the same level of protections when hosted on third-party servers as they do when stored internally.

Open doors on data. The report said that government agencies as well as parties involved in legal disputes may be able to more readily obtain data from a third party than from the owner of the information. For instance, laws such as the USA PATRIOT Act and the Electronic Communications Privacy Act give the federal government authority to compel disclosure of records held by cloud vendors, the report maintained, adding that many of the vendors are likely to have less incentive to resist such requests than the actual data owners do.

Location counts. The location of a cloud provider's operations may have a significant bearing on the privacy laws that apply to the data it hosts, the report said. It added that companies should examine whether laws such as the European Union's Data Protection Directive could be applied to data that is stored by a cloud vendor in Europe,

even if the information is being kept there on behalf of a U.S. company.

In addition, companies should have plans in place for protecting their data in the event that a cloud provider is bought by another vendor or declares bankruptcy, the report warned. A change in ownership could result in new terms and conditions or a change in where data is kept, it said. Similarly, a bankruptcy filing could force a cloud provider to sell its assets, which might end up including the data of its customers, according to the report.

David Hobson, managing director of Global Secure Systems Ltd., a UK-based security vendor and consulting firm, agreed that companies storing data in the cloud need to have a full understanding of the information and the confidentiality requirements attached to it.

"The minute you outsource the data, you are opening yourself up to potential problems," Hobson said. Often, a company may not even know exactly where its data will be stored, Hobson said, noting that the information sometimes can end up in multiple locations, each of which may be subject to different privacy requirements.

Businesses also should do due diligence on hosting companies and make sure that the data security and privacy practices in cloud environments are at least as good as their own are, Hobson said. And it's important to know the kind of business continuity and disaster recovery measures that cloud providers have in place, and their policies for dealing with data breaches, according to Hobson. It's easy for users who are intent on cutting costs via cloud computing to overlook such issues, he said, but he thinks privacy protections need to be spelled out in contracts.

On the other hand, Jeff Kalwerisky, chief security evangelist at Burlington, Massachusetts-based Alpha Software Inc. and a former executive at Accenture Ltd.'s risk management consulting practice, said that while some of the privacy concerns are valid, technology fixes are available for many of them.

For instance, encrypting data, both while it's stored on a cloud vendor's servers and being transmitted to end users, mitigates some of the privacy risks associated with accidental or malicious exposure of the information, Kalwerisky said. In addition, implementing a two-factor authentication scheme for controlling access to data hosted by a cloud vendor will ensure that only users who have legitimate access to the data will be able to see it, according to Kalwerisky.

"You've got to think about some of these things carefully," he said. "But if you do all of it right, and you do all of it upfront, there isn't a heck of a lot of difference whether you [store data] yourself or if a cloud provider does it."

As with everything, there are risks and benefits to cloud computing, said Robert Gellman, a Washington-based privacy policy consultant who wrote the World Privacy Forum's report. "It's not that there's anything sinister going on with cloud computing," Gellman said. "But information may be at risk for disclosure or uses that you didn't anticipate, and that may have legal consequences for you." Reported in: *Computerworld*, February 25. □

(Churchill. . . from page 75)

Churchill's legal team appeared to suffer a major setback two days earlier when Judge Naves dismissed one of the professor's two claims against the university—that its investigation of Churchill was, in itself, an act of retaliation. But the jurors' responses to the various questions Judge Naves had posed to them to shape their deliberations showed that its members had clearly agreed with the lawsuit's other key claim, that Churchill's termination was a retaliatory act.

The jury concluded that the controversy over Churchill's essay, which was protected under the First Amendment, was "a substantial or motivating factor" in the college's decision to discharge him. It also said that the university had failed to show that he would have been fired even if he had never made his controversial remarks.

Ken McConnellogue, a university spokesman, said he disagreed with the verdict but could see how the jury came to its decision. "The speech was the flashpoint that got all of this going," he said. "But we maintain we ruled early and said often it wasn't about the speech, it was about his academic misconduct. Those two things were in such close proximity that you can see where the jury would make that connection."

Robert M. O'Neil, a prominent First Amendment scholar who heads the Thomas Jefferson Center for the Protection of Free Expression, in Charlottesville, Virginia, said the jury's verdict was so "superficially inconsistent" that he found it hard to guess what implications it might have for colleges elsewhere.

"It just seems to be there is a curious paradox," he said, between the jury's finding that university officials violated Churchill's rights and its decision to give him a nominal damage award suggesting he had not been harmed in any way. "I find it very hard to reconcile those conclusions."

Cary Nelson, president of the American Association of University Professors, expressed concern before the verdict that a jury of people without extensive backgrounds in academe would fail to grasp the nuances of controversy among scholars. He said a decision in the university's favor would have had "a chilling effect" on academic freedom, sending "a message that, justly or unjustly, your recourse to the courts is limited if you feel that you have been basically sacrificed for political reasons."

Stephen H. Balch, chairman of the National Association of Scholars, issued a written statement calling the jury's verdict a "sorry result" that "will only further attenuate

an already fraying relationship between the protections of academic freedom and their corollary obligations," such as commitment to honesty.

"The outcome of the Churchill trial is unfortunate, but it was a trial that in a better academic world would never have occurred," Balch said. "The best point at which to protect professionalism is not career exit, but career entrance and stage-by-stage thereafter."

Ada Meloy, general counsel for the American Council on Education, said, "I think colleges recognized, from the fact that this went as far as it went, that they have to be very careful about respecting faculty members' First Amendment rights." Colleges should also carefully follow their procedures in disciplining faculty members, she said. Reported in: *Chronicle of Higher Education* online, April 3. □

("torture memos" vs. academic freedom. . . from page 76)

move very likely would be triggered by the university-wide Academic Senate; the dean cannot initiate it. Edley emphasized that he is speaking hypothetically, and he said that any punishment need not necessarily include revocation of tenure. The university's rules allow far milder sanctions, including written censure and a reduction in salary.

Yoo has spent this semester as a visiting professor at Chapman University, in Southern California. Among his staunchest advocates is John C. Eastman, dean of Chapman's law school. Eastman not only argues against any academic punishment for Yoo but also defends Yoo's Justice Department memoranda on their merits.

"After September 11 we were in uncharted territory," Eastman said. "Not since 1803, with the Barbary pirates, had we been in a war against a non-nation state. So I think the Office of Legal Counsel's job was to try to find out where the new lines were, . . . and I think John actually got it right most of the time."

Few other scholars agree. They note that the unrelenting theme of Yoo's memoranda was that the president and the executive branch had essentially unfettered powers to defend the country, and that Congress had no right to dictate the "method, timing, or place" of the president's wartime actions.

The memoranda had broad consequences. They provided the legal rationale for the detention of José Padilla and other U.S. citizens deemed "unlawful combatants" and for a much-disputed domestic surveillance program, the details of which are still not known.

The White House also cited Yoo's memoranda when it pressed the Defense Department to use coercive interrogation techniques, overriding objections from Pentagon lawyers that those techniques would violate the Uniform Code of Military Justice.

Almost immediately after Yoo left the Justice Department, in 2003, his successor, Jack L. Goldsmith, took the rare step of revising and repudiating the memos. Goldsmith, who now teaches at Harvard University, is a conservative who broadly shares Yoo's views on presidential power and the Fourth Amendment. But as he recounted in his 2007 book, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, he found that Yoo's memoranda "rested on cursory and one-sided legal arguments." The idea that Congress could not oversee the interrogation of detainees, he wrote, "has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."

Other scholars have offered even harsher judgments. Testifying before Congress in 2005, Harold Hongju Koh, dean of Yale Law School, called one of Yoo's memoranda "perhaps the most clearly erroneous legal opinion I have ever read."

The question now being explored by the Justice Department's Office of Professional Responsibility is whether Yoo and his colleagues were not merely overzealous but were actively contriving rationales for illegal actions that they knew the administration was already undertaking. The department is reportedly reviewing e-mail messages and early drafts of the memoranda.

"Evidence may emerge that supports a finding that Yoo essentially 'sold' his professionalism to the White House because he chose to give the executive branch what it wanted," says Stephen Gillers, a law professor at New York University.

If such evidence does emerge, how should the University of California respond?

Academic sanctions for outside legal work have been rare. One recent example on people's lips is the case of Mark M. Hager, who resigned from a tenured position at American University in 2003 not long after his law license was suspended for alleged misconduct in a product-liability lawsuit. But Hager's case is very different from the matters that are at issue with Yoo. Precisely because of the high stakes and the political sensitivities here, even many of Yoo's critics hope that his university will tread cautiously.

"A lot of people, myself included, think that the memos represent serious failings of legal ethics, or possibly complicity in crime," says David J. Luban, a law professor at Georgetown University. "But academic tenure shouldn't depend on what people like me think. I think his tenure should be safe unless some impartial official body outside the university makes an independent finding that the memos are professional or criminal misconduct. "

The law school should await an outside body, Luban and others say, because universities don't have the capacity to routinely review their law professors' outside legal practices. Moreover, universities would drive themselves crazy if they responded to public complaints about every

controversial professor. Bill Clinton was disbarred for dishonesty; should he therefore have been denied a faculty position at the University of Arkansas?

In the academic blogosphere, Yoo's status has been heatedly debated for more than a year by Brian R. Leiter, a professor of law at the University of Chicago, and J. Bradford DeLong, a professor of economics at Berkeley.

Leiter, who is no fan of Yoo, insists that Yoo's academic position should be protected unless and until he is convicted of a crime. The university does not have the capacity to investigate Yoo's Justice Department work, Leiter argues. And even if it did, such an inquiry would open the floodgates for all kinds of politically tinged challenges to academic freedom.

DeLong, though, believes that plenty of evidence already exists to justify a university review of Yoo's status. In an open letter in February to Berkeley's chancellor, Robert J. Birgeneau, DeLong urged the university to consider possible discipline. Academic freedom, he wrote, should not shield "those whose work is not the grueling labor of the scholar and the scientist but instead hackwork that is crafted to be convenient and pleasing to their political master of the day."

Yoo is not the only professor on the hot seat. In a case with close parallels, Tel Aviv University's law school was hit by protests against Pnina Sharvit-Baruch, a law instructor who has advised the Israeli government on the legitimacy of military strikes against civilian areas in Gaza.

At Berkeley, meanwhile, many people view Yoo with deep ambivalence. Edley says that he and others feel affection for Yoo as a colleague. "He's never shirked his responsibility to put his views up for debate," Edley says.

According to several accounts, some students have recently begun to shun Yoo's classes. "I would rather take constitutional law with someone who I am confident respects and upholds the rights guaranteed under the Constitution," says Lorraine Leete, a second-year student who is active in the National Lawyers Guild.

But other students, even on the left, say that Yoo is a very strong teacher, and they support Edley's view that the university should wait for the Justice Department's report before taking any action.

"Last year I took structural constitutional law with him," says Jonathan H. Singer, a second-year law student who is an editor of MyDD, a liberal blog. "In terms of being a professor, I found that he checked his views at the door. He was not doctrinaire. He was open to opinions. He stimulated discussion. I think there's great value in taking classes not just with professors you agree with, but with people who will challenge you."

Patrick Bageant, another liberal second-year student, agreed that Yoo is excellent in the classroom. "A lot of people here feel, correctly, that the political process was probably corrupted when those memos were written," Bageant says. But like the law school's dean, Bageant says the university should not rush to judgment.

It's "disturbingly ironic," Bageant said, that some of the same people who feel Yoo bent the law "are also willing to corrupt or bend the university's tenure rules to express their outrage about what took place." Reported in: *Chronicle of Higher Education* online, March 20. □

(Obama. . . from page 76)

organizations argued that ideological exclusion hurts the nation's own interests because it "impoverishes academic and political debate" on our soil, "sends the message to the world that our country is more interested in silencing than engaging its critics," and "undermines our ability to support political dissidents in other countries."

The letter, addressed to Secretary of State Hillary Rodham Clinton, Attorney General Eric H. Holder Jr., and Secretary of Homeland Security Janet Napolitano, urged an end to such exclusions and asks the administration to "immediately revisit" the cases of seven well-known scholars previously denied entry. Signatories include the American Association of University Professors, the Association of Research Libraries, and several groups representing academic disciplines.

Melissa A. Goodman, who helped put the letter together as a staff lawyer at the American Civil Liberties Union, said she hopes the administration will be receptive, especially given President Obama's campaign pledges to make the federal government more transparent and to repair the nation's image abroad. She acknowledged, however, that the administration has not sent any clear signals how it plans to deal with ideological exclusion. And she fully expects to be accused by conservative commentators of trying to put Americans at risk. "We are always braced for that," she says. Reported in: *Chronicle of Higher Education* online, March 20. □

(dateline. . . from page 84)

printing. Reported in: Associated Press, March 17.

Cleburne, Texas

Rocking and rolling like a sellout football crowd, spectators reacted passionately or politely February 9 to twelve speakers who spoke their minds to Cleburne school trustees

about the controversial Ken Follett novel *Pillars of the Earth*. Superintendent Dr. Ronny Beard removed the book the previous week from a summer reading list for a dual credit, high school English class.

A committee of five was formed to study whether the book is age-appropriate for students 17 and 18. Even if the committee decides in favor of the book, there will apparently be changes in how and whether parental approval will be sought before students read the book as part of the course.

According to a prepared statement from Beard: "I want to clarify that I have not pulled *Pillars of the Earth* from the curriculum used in this particular senior-level college-credit English course. What I have done is pulled the book from the summer reading list until this issue is resolved.

"Whether or not the *Pillars of the Earth* is to be considered age-appropriate reading for this course will be determined following board policy. However, a more important question needs to be answered—do parents have the right to preview potentially objectionable material prior to their children's exposure to it as part of the school's curriculum? This question is also addressed in board policy and the answer is a resounding 'Yes.'"

On the summer reading list, students were given an option to read another book if they believed they would have objections to literature with sex, violence and language issues. *Pillars of the Earth* contains a rape scene and passages of explicit sex.

From a crowd of some two hundred, 44 citizens signed up to speak to the trustees. The board chose six to speak in favor of the book and six to speak against it. Speaking in favor were Will Holleman, Susan Smith, Brooke Sartin, Cannon Madison, Will Benson, and Dr. Elizabeth Alexander. Speaking in opposition were Dr. Ted Benke, Scott Cain, Jami Shelton, Jean Davlin, Don Rossek, and Mary Mertz.

Benke, among the leaders of a citizens' group protesting the book, said, "in August of 2008, my wife and I made a complaint to CHS personnel regarding the book *Pillars of the Earth* for two reasons. No. 1, the book's pornographic content and No. 2, the absence of parental notification for the assignment. We oppose the book as curriculum and are outraged that pornography would ever be included in a school assignment. We support the right of parents to be involved in the decision-making process of school curriculum.

"The *Cleburne Times-Review* editor, when asked to print an excerpt from the book, said it was too graphic for a family newspaper. A TV reporter, when asked to read a graphic passage on the air, said she'd lose her job if she read it. In a meeting with one educator in the district, when we attempted to read a graphic passage, this person vehemently said, 'Stop, I don't want to hear that pornography.'"

Holleman said, "I am told I am not mature enough to handle this novel. I'm 18 years old. Here are a few reasons why I am mature enough to read a novel. At the age of 6, my grandfather died. At the age of 14, my parents were divorced. I don't remember a single bit of my eighth-grade year because of it. Ninth-grade year, I was involved in a car wreck where I suffered a clavicle break and torn stomach muscle. I was lucky. My cousin sitting next to me had to be resuscitated back to life. Soon, two friends of the family died before they reached the age of 22. A year ago, my house was broken into by a best friend, and I'm told I'm not mature enough to handle this material?"

Cain said, "As an attorney, I make my living with the English language. Books are my stock and trade, how I make my living. But the issue today is not about banning books, not about burning books, not about censorship, like so many have claimed. It's not about a teacher. Quite frankly, it's not even about a book, *Pillars of the Earth*. The issue is whether portions of this book are appropriate curriculum for the age group it is designated for. And the issue is parental consent or a parent's right to consent.

"The first question is [whether] the *Pillars* content is appropriate for this age group. Supporters argue that you have to consider the whole literary work. But when you look at excerpts that have been called into question, it's not the content of those excerpts that is the issue. It is the graphic language that the author chooses to use to describe those events that is a problem."

Smith said, "Students do not shed their constitutional rights at the schoolhouse door. Students are entitled to the curricular decisions and the free flow of information that their teacher provides them. I have three main points and, time willing, a proposed solution to this problem. First, you cannot deny students access to an idea merely because you disagree or dislike it. Second, you can only ban a book if you find it is pervasively vulgar. Third, academic freedom. Allow a proven, professional teacher to decide what to include in the curriculum. Read the letters that these students have submitted to you. I was floored. If those letters are not a testimony to the decisions that our teachers make for our students, I don't know what it is. Keep the choice where it has been for 10 years, with the families. The families have the choice." Reported in: *Cleburne Times-Review*, February 10.

Stafford County, Virginia

Many Stafford County high school students have read *A People's History of the United States,* by Howard Zinn, without opposition from conservatives. Until now.

Several people want the book removed from a North Stafford High School advanced-placement history class, even though it's not the primary textbook. At a recent Stafford School Board meeting, eight speakers claimed Zinn's book was un-American, leftist propaganda. Some said students aren't mature enough to form their own opinions of the book. They also cited pundits on the right and left who have criticized it.

Opponents of the textbook have yet to submit a formal challenge, said Stafford school spokeswoman Valerie

Cottongim. Those who publicly complained are not parents of the juniors and seniors taking the AP class, she said.

"The principal has said that none of the parents or students have come forward with any complaints," Cottongim said.

School Board members John LeDoux, Nanette Kidby, and Dana Reinboldt requested copies of the book to review but did not comment further on the matter.

Stafford parents have filed complaints in the past against two books: *James and the Giant Peach*, by Roald Dahl and Quentin Blake, and *The Color Purple*, by Alice Walker. The school system still uses the books, Cottongim said.

Zinn's more than 600-page book was published in 1980 and has sold more than a million copies. Zinn's book "presents American history through the eyes of those he feels are outside of the political and economic establishment," according to howardzinn.org.

Stafford resident Meg Jaworowski, however, said the book's writings "defile our great nation and capitalist free-market system." Students, she said, know little about historical facts, such as Abraham Lincoln's Gettysburg Address. "I could go on and on but with such a pathetic grasp of historical facts, high school history, to include AP history, needs to be about the business of educating and not indoctrinating," she said in a statement distributed to the School Board.

Zinn said he was amused by the objections. "To learn facts, just facts, is not an education," he said in a recent telephone interview. "That's playing the game of trivia. Education is not trivia. Education is looking behind the facts."

Chris Quinn, Stafford's assistant superintendent for instruction, said students in the AP class also read an article titled, "Howard Zinn's Disappointing History of the United States," which criticizes Zinn's book.

Those materials are supplemental; the class's main textbook is *Liberty, Equality, and Power: A History of the American People*, by John Murrin.

North Stafford is the county's only school to use Zinn's book, which it first purchased in 2003, Quinn said. "A truly educated person has to be exposed to a lot of different points of view," he said.

Christopher Koehler, who teaches in North Stafford's social studies department, said the book meets the College Board's criteria. He said he read the book as an AP student at Courtland High School in Spotsylvania County in 1987–88.

"I'm a conservative," he said. "I've been a Republican my whole life. But I value the marketplace of ideas. I value history given from a variety of perspectives."

He doesn't teach the class with Zinn's book and stressed that he was speaking for himself, not the school division.

Ian Jobling, who lives in Fairfax County and runs the Web site whiteamerica.us, spoke against Zinn's book at Stafford's public hearing. Jobling encourages people to protest "anti-white" textbooks, such as Zinn's. "Such protests are likely to prove fruitful, as school materials are perhaps the most powerful evidence of the anti-white bias that pervades our society," he wrote.

Zinn called his opponents "anti-American, narrow-minded, and censorial." He said all historians have different points of view. "The whole idea of education is to have young people experience all sorts of ideas," he said. "And if you want to shut off students from certain ideas, then you are depriving them of a proper education." Reported in: fredericksburg.com, March 19.

Brookfield, Wisconsin

A student calling her teacher to check in about a field trip? Not a problem. The two friending one another on Facebook is another story. Per new policy, the School District of Elmbrook in Brookfield, has banned all chatter between Elmbrook staff and students on instant messaging or social networking applications not sponsored by the district.

The policy, approved by the school board on February 10, stipulated a range of "practices considered irresponsible," including personal communication between staff and students via social networking and IM.

During the school day, accessing sites deemed problematic is less of a problem as many schools have filters in place that prevent anyone, staff or students, from logging on to Facebook, MySpace, and even select email servers. But policing this new ban during a teacher's off-hours may prove tricky. While the restricted sites aren't named, it's understood that these popular applications, perhaps even Twitter, are included.

Still, Elmbrook does allow students to communicate with teachers and other staff through email and other district-sponsored applications, such as Blackboard educational software, and student information service Infinite Campus. The district reportedly plans to add other social networking sites that have an educational component in coming years. "We are building out a new Web portal technology built around iGoogle that will incorporate similar Web 2.0 tools, but do it in our controlled environment," says Chris Thompson, chief information officer for School District of Elmbrook.

For now, though, writing a note on a teacher's MySpace profile or transmitting content to students through Facebook is off limits. Reported in: *School Library Journal*, February 23.

student press

Lincolnshire, Illinois

After printing stories detailing the casual sexual encounters of students, the Stevenson High School newspaper must now submit to new restrictions that have drawn fire from

parents and critics concerned about censorship.

The Statesman's "hooking up" issue, which included such quotes as "getting felt up isn't even a base anymore," was the award-winning paper's latest effort to tackle delicate subjects. But Jim Conrey, spokesman for the Lincolnshire school, said that the controversial content isn't the problem, rather shoddy journalism.

"We think another pair of eyes is needed to look for red flags," Conrey said. "It's not about censorship."

He said the January 30 issue—the 3,400 copies were snapped up—recklessly exposed the identities of the students by using their first name and graduation year and failed to achieve balance by omitting those opposed to hooking up. It also abandoned ethics by including the timeline of one student's successful quest to get a girl into bed at a party, which Conrey described as a "how-to guide for sexual predators."

For the last year, the administration has unsuccessfully voiced its concerns to Barbara Thill, the journalism teacher who serves as adviser to the *Statesman*, he said. So the administration created a new review process that will include other school officials, possibly the head of the English department or other administrators.

The administration has the backing of School Board President Bruce Lubin, but has been criticized by some parents, who attended a recent school board meeting to complain. First Amendment advocates are also angered.

"Prior review is camouflaged censorship," said Randy Swikle, Illinois director of the Journalism Education Association.

Thill did not return calls for comment, and Jamie Hausman, a newspaper editor and a senior, said the staff would not comment on the controversy.

Asked if the paper would submit to the new review procedure, Hausman said, "At this point . . . there's no real say in the matter." Reported in: *Chicago Tribune*, February 14.

colleges and universities

San Jose, California

The Consul General of Israel was verbally abused and forcibly driven from the stage during a guest-speaking engagement aimed at fostering understanding of Jewish culture February 5 at San Jose State University.

The diplomat, Akiva Tor, had to be escorted out of the room by security officers and campus police before the event ended, according to Rabbi Abraham Cooper of the Wiesenthal Center and Michelle Salinsky, president of Spartans for Israel, the group which co-sponsored the speaking event.

"We were extremely concerned about our safety and Mr. Tor's safety," said Salinsky, a senior majoring in political science. "Mr. Tor said he's never felt more disrespected. This was clearly an infringement of our expression of free speech. I think a lot of Jewish students do not feel safe on campuses because of the escalation of hate perpetrated against Jews."

San Jose State University spokeswoman Pat Harris said the sponsors of the event were responsible for moderating the speaking forum but maintained that officers and security personnel acted appropriately.

In a statement, the university president Jon Whitmore defended the university's policies but expressed concern about the event.

"Our campus places high value on the free exchange of ideas in a manner that is inclusive and respectful of differing views," the statement read. "At a recent campus event, numerous members of the audience with views differing from the invited speaker were so vocal in their expression of opposition and so uncooperative with the moderator's requests for orderly means of handling questions and answers that they disrupted the event and did not allow the speaker to respond to posed questions. The university fully endorses the free expression of ideas and opinion, but does not condone behavior and methods of expression that disrupt free and orderly discussion."

Two days earlier Tor spoke at California State University, East Bay, in Hayward, about 20 miles north of San Jose without incident. That speech was attended by numerous students and others critical of Israeli policy, who engaged in spirited dialogue with the diplomat for more than an hour. Reported in: cnn.com, February 28.

Atlanta, Georgia

Republicans in the Georgia Statehouse say they are tired of spending state dollars on studies of oral sex and male prostitution. More specifically, the lawmakers are objecting to university faculty members who have research expertise in those and other areas deemed unnecessary.

Facing a $2.2-billion budget shortfall, the lawmakers say they are working with conservative Christian organizations to pressure the state's Board of Regents to fire instructors like a University of Georgia professor who teaches a graduate course on queer theory.

"Our job is to educate our people in sciences, business, math," state Rep. Calvin Hill said. Professors aren't going to meet those needs "by teaching a class in queer theory," he added. The lawmakers took aim at some of the faculty members after reading about them in an annual guide to faculty experts issued by one of the universities for publicity purposes.

University officials responded by explaining that the instructors were not teaching "how-to" courses, but on the sociological issues surrounding topics such as oral sex and male prostitution.

"Teaching courses in criminal justice, for example, does not mean that our students are being prepared to become

criminals," a Georgia State University spokeswoman, Andrea Jones, told the AP. "Quite the opposite. Legitimate research and teaching are central to the development of relevant and effective policy." Reported in: *Chronicle of Higher Education* online, February 6.

Statesboro, Georgia

Georgia Southern University has rescinded a speaking invitation to William Ayers, an education professor at the University of Illinois at Chicago who remains controversial for his involvement in the 1960s in the radical group the Weather Underground.

A student group at Georgia Southern, the Multicultural Advisory Council, had planned to have Ayers speak on March 2. When word of the planned event got out, however, students, alumni, and parents began protesting his visit to campus officials.

Some students set up a group page on the online social networking site Facebook called "Stop GSU from paying William Ayers (admitted terrorist) with student funds!" The site's description alleged that Ayers had close ties with Barack Obama during the 2008 election and the Weather Underground was a terrorist group "responsible for several murders, of which Ayers was not suspected of being a part of." A few of those posting on the site threatened to withhold donations to the university over the matter.

The university, in announcing the withdrawal of the speaking invitation and cancellation of the event, said it was doing so because of security costs. A university representative, Christian Flathman, said officials had estimated the security costs associated with the event to be in excess of $13,000, partly because the effort would involve "securing a major facility and the closing of several major parking lots that would disrupt university operations." Ayers's speaking fee was about $1,500.

Ayers had spoken at Georgia Southern before without any serious incidents. Michelle Haberland, an associate professor of history at the university, said that many students and faculty members there believe the university's estimate of security costs was inflated. "Since the security argument is obviously a sham, one can only conclude that the university feared the political outcry of a few blowhards," she said. "In the meantime, they denied my students an opportunity to hear what a very important, if controversial, historical figure had to say."

An article published in the university's student newspaper, *The George-Anne Daily*, quoted Ayers as calling the university administration's actions "outrageous."

The University of Nebraska at Lincoln similarly cited safety concerns last fall in canceling its heavily protested plans to have Ayers speak there. In January, Ayers canceled a speech at the University of Toronto after being denied entry into Canada. Reported in: *Chronicle of Higher Education* online, February 12.

Boston, Massachusetts

After Boston College administrators canceled a March 30 planned campus appearance by William Ayers, student organizers thought they had found a way for the lecture to go on, by video conference. But according to the college's student newspaper, *The Heights*, administrators said that the controversial University of Illinois at Chicago professor, who was a member of the Weather Underground in the 1970s, would not speak on the campus, period.

A written statement from the college's vice president for student affairs, Patrick Rombalski, said "rumors" that Ayers would speak at an off-campus location or via teleconference were untrue, *The Heights* reported. "The truth is that Ayers will not speak today on campus or off campus, nor will there be an on-campus teleconference tonight," the statement said. "We are exploring the possibility of working with the academic community to address the issues of civic activism and education within an appropriate academic forum at a future date."

Administrators had cited safety concerns and sensitivity to community sentiment when they canceled the lecture the previous week. The college chapter of Americans for Informed Democracy, which had planned the lecture, was holding instead a discussion of academic freedom. Reported in: *Chronicle of Higher Education* online, March 30.

Huron, Ohio

A university official removed a sculpture that depicts a girl and a teacher in a sex act from a campus gallery, prompting complaints from an anti-censorship group. The piece by artist James Parlin, called "The Middle School Science Teacher Makes a Decision He'll Live to Regret," had been part of an exhibit at Bowling Green State University's Firelands campus.

"Not understanding metaphor makes art a foreign language to the viewer," Parlin said. Parlin explained that the man in the sculpture is based on the father of children his own children knew. The artist from Edinboro, Pennsylvania, said he was struck by the thought of how powerful an urge must be that a person would commit an act he knows will ruin his life.

"Is there such a thing as a compulsion that overcomes freedom?" Parlin said. "To me, this is kind of the crux of our moral lives."

The exhibit at the campus's Little Gallery had included 13 painted aluminum figures by Parlin, each about 13 to 17 inches tall. David Sapp, an art professor and director of the gallery, closed the entire exhibit to protest the sculpture's removal.

The National Coalition Against Censorship, based in New York City, condemned the university's actions, saying it raised serious free-speech concerns. On its blog, the coalition said removing the sculpture was "an unacceptable violation of the academic freedom to openly discuss ideas

and social problems in a public university."

The university issued a statement saying it "strongly supports the right of free speech and artistic expression. However, we also have a responsibility to not expose the children and families we invite to our campus to inappropriate material."

The coalition said the university could have taken steps short of removing the sculpture, such as posting signs for parents or closing the gallery during children's productions at the theater next door.

Parlin, an art professor at Edinboro University, has an undergraduate degree in religious thought and a master's in fine art. He said the exhibit has been shown in other venues without complaint. Reported in: *San Francisco Chronicle*, March 25.

foreign

Beijing, China

Google said March 24 that its YouTube video-sharing Web site had been blocked in China.

Google said it did not know why the site had been blocked, but a report by the official Xinhua news agency of China said that supporters of the Dalai Lama had fabricated a video that appeared to show Chinese police officers brutally beating Tibetans after riots last year in Lhasa, the Tibetan capital.

Xinhua did not identify the video, but based on the description it appears to match a video available on YouTube that was recently released by the Tibetan government in exile. It purports to show police officers storming a monastery after riots in Lhasa last March, kicking and beating protesters. It includes other instances of brutality and graphic images of a protester's wounds. According to the video, the protester later died.

"We don't know the reason for the block," a Google spokesman, Scott Rubin, said. "Our government relations people are trying to resolve it."

Rubin said that the company first noticed traffic from China had decreased sharply late March 23. By early the next day, he said, it had dropped to nearly zero.

China routinely filters Internet content and blocks material that is critical of its policies. It also frequently blocks individual videos on YouTube. YouTube was not blocked in Hong Kong, the largely autonomous region of China. Beijing has not interfered with Internet sites there.

"The instant speculation is that YouTube is being blocked because the Tibetan government in exile released a particular video," said Xiao Qiang, adjunct professor of journalism at the University of California, Berkeley, and editor of *China Digital Times*, a news Web site that chronicles political and economic changes in China.

Xiao said that the blocking of YouTube fit with what appeared to be an effort by China to step up its censorship of the Internet in recent months. Xiao said he was not surprised that YouTube was a target. It also hosts videos about the Tiananmen Square protests and many other subjects that Chinese authorities find objectionable.

The video about the beatings was pieced together from different places, Xinhua said, citing an unidentified official with the Tibetan regional government in China. There has been no independent assessment of whether the video is authentic. Lobsang Nyandak, a representative of the Tibetan government in exile, said that the video was authentic.

The government did not directly address whether YouTube had been blocked. When asked about the matter at a news conference, a Foreign Ministry spokesman, Qin Gang, said: "Many people have a false impression that the Chinese government fears the Internet. In fact, it is just the opposite."

Even as China steps up its censorship efforts, the country's Internet participation is booming. Often, critics find a way to avoid censors and debate controversial topics. Ai Weiwei, a prominent Chinese artist, has been using his blog on Sina.com to criticize the government's management of the rescue and relief efforts after the devastating earthquake last May in Sichuan Province.

In recent months, Beijing has announced major crackdowns on pornographic Web sites, even citing Google and other large companies for listing the sites on their search engines. Many critics say they believe that Beijing is using the word "pornography" as a rationale to eliminate Web sites that it deems troublesome.

YouTube has been blocked for varying periods of time in several countries, including Pakistan, Thailand and Turkey. These countries often state directly why they have acted. Reported in: *New York Times*, March 25.

Dubai, United Arab Emirates

British author Geraldine Bedell has been banned from a book festival in Dubai because one of the characters in her new book is gay. The novelist, whose book *The Gulf Between Us* is set in the Middle East, was initially welcomed to the event by the organisers. But when they realized the novel featured a homosexual sheikh who had an English boyfriend and was set in the backdrop to the Iraq war, the book was withdrawn.

The director of the festival, Isobel Abulhoul, wrote to Bedell and told her, "I do not want our festival remembered for the launch of a controversial book. If we launched the book and a journalist happened to read it, then you could imagine the political fallout that would follow. This could be a minefield."

Bedell, who lived in the Middle East, described the sheikh as only a minor character in her book. "You can't ban books and expect your literary festival to be taken seriously," she said.

The first International Festival of Literature in Dubai started on February 26 and featured authors including Kate Adie, Anthony Horowitz, Jamil Qureshi, Sir Ranulph Fiennes. It described itself as: "The first true literary Festival in the Middle East celebrating the world of books in all its infinite variety."

The Gulf Between Us, published by Penguin, tells the story of a single mother trying to raise three boys in the Gulf emirate of Hawar in the summer of 2002, shortly before the invasion of Iraq.

Canadian author Margaret Atwood pulled out of the festival after she learned of the ban. In a letter addressed to the festival's director, Atwood said she could not attend because of the "regrettable turn of events surrounding" the book.

"I was greatly looking forward to the Festival, and to the chance to meet readers there; but, as an International Vice President of PEN—an organization concerned with the censorship of writers—I cannot be part of the Festival this year," Atwood said in the letter, posted on her Web site.

Abulhoul described Atwood's decision not to attend the festival as "regrettable." Reported in: *Daily Telegraph*, February 16.

Leicester, United Kingdom

Muslims have complained that the Koran is often displayed on the lower shelves, which is deemed offensive as many believe the holy book should be placed above "commonplace things." Now library officials in one city have been told to keep all holy books, including the Bible, on the top shelves in the interests of equality. It has caused concern from Christian charities that this will put the Bible out of the reach and sight of many people.

The situation was brought to light in guidance published by the Museums, Libraries and Archives Council on how to handle controversial materials. It said some Muslims in Leicester had moved copies of the Koran to the top shelves of libraries, because they believe it is an insult to display it in a low position. The city's librarians consulted the Federation of Muslim Organisations and were advised that all religious texts should be kept on the top shelf to ensure equality.

A short case study on the situation has been written into the appendix of the guidance, available on the MLA website. It states, "some libraries in Leicester have received complaints about the Koran not being placed on the top shelves in libraries. Some customers go along the shelves and place the Koran so it is shelved higher than other books. This action arises from the practice in many Muslim homes of the Koran being placed on a high shelf above commonplace things, as it is the word of God.

"The authority consulted the Federation of Muslim Organisations in Leicester about this matter, and they advised that all religious texts should be kept on a top shelf together. This meant that no offence is caused, as the scriptures of all the major faiths are given respect in this way, but none is higher than any other."

Some critics expressed concern that the books will now just be treated as objects to revere rather than books to read.

Robert Whelan of the Civitas think-tank said, "libraries and museums are not places of worship. They should not be run in accordance with particular religious beliefs. This is violating the principles of librarianship and it is part of an insidious trend. One of the central planks of the Protestant Reformation was that everybody should have access to the Bible."

Simon Calvert of the Christian Institute said: "It is disappointing if the policy of libraries is dictated by the practices of one group. It is particularly disappointing if this is done to put the scriptures beyond reach. I hope there will be a rethink. I understand that Muslims revere their own text, but in public libraries there should not be a policy of putting religious texts out of reach."

Inayat Bunglawala, of the Engage think tank, which encourages Muslims to play a greater role in public life, said that there should not be a "one size fits all" rule. He said: "If Muslims wish to see the Koran placed on a higher shelf, and library rules say it should be there, then that is a welcome and considerate gesture. But one size does not fit all. If Christians do not want to see the Bible treated in the same way, I do not see why it has to be dealt with the same."

An MLA spokesman said there were no rules to say other libraries must follow suit with Leicester. He said, "different libraries can legitimately treat religious texts in different ways—there is not a one size fits all solution and no group has asked for there to be one. The key is to show understanding, respect, and equality to all local library users." Reported in: *Daily Telegraph*, February 18. □

(from the bench. . . from page 88)

Street View on Google Maps is a reckless invasion of their privacy lost their case. Aaron and Christine Boring sued the Internet search giant last April, alleging that Google "significantly disregarded (their) privacy interests" when Street View cameras captured images of their house beyond signs marked "private road." The couple claimed in their five-count lawsuit that finding their home clearly visible on Google's Street View caused them "mental suffering" and diluted their home value. They sought more than $25,000 in damages and asked that the images of their home be taken off the site and destroyed.

However, the U.S. District Court for Western

Pennsylvania wasn't impressed by the suit and dismissed it February 17, saying the Borings "failed to state a claim under any count."

Ironically, the Borings subjected themselves to even more public exposure by filing the lawsuit, which included their home address. In addition, the Allegheny County's Office of Property Assessments included a photo of the home on its Web site.

The Borings are not alone in their ire toward the Google Maps feature. Residents in California's Humboldt County complained that the drivers who are hired to collect the images are disregarding private property signs and driving up private roads. In January, a private Minnesota community near St. Paul, unhappy that images of its streets and homes appeared on the site, demanded Google remove the images, which the company did.

However, Google claims to be legally allowed to photograph on private roads, arguing that privacy no longer exists in this age of satellite and aerial imagery.

"Today's satellite-image technology means that . . . complete privacy does not exist," Google said in its response to the Borings' complaint

Not long after the feature launched in May 2007, privacy advocates criticized Google for displaying photographs that included people's faces and car license plates. And last May, the company announced that it had begun testing face-blurring technology for the service. Reported in: cnet news, February 18. □

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is it legal?. . . from page 92)

senior fellow at the institute.

Hundreds of college and university professors from Texas and around the country joined other science educators in September in signing a statement endorsing evolution as "an easily observable phenomenon that has been documented beyond any reasonable doubt." Many of those educators testified at the state board's hearings.

Ronald Wetherington, an anthropology professor at Southern Methodist University who supports evolution, said that while the board's actions would make it harder for the state to reject texbooks that take an uncritical stance on evolution, the language about teaching "all sides" of theories could encourage some publishers to interject pseudoscience into the texts. "The battle has been largely won today, but we are nowhere near winning the war," he said.

The standards approved by the state board also instruct students to take a skeptical look at global warming. Dr. McLeroy, to the chagrin of environmentalists, made his feelings clear. "Conservatives like me think the evidence [for human contributions to global warming] is a bunch of hooey," he said.

The controversy over curriculum standards in Texas has ramifications outside the state because many major textbook publishers revise their offerings to conform with standards in Texas, whose schools form one of their biggest mass markets. Reported in: *Chronicle of Higher Education* online, March 28

copyright

Boston, Massachusetts

A defendant in a lawsuit who asks the federal government to intervene in his case might be careful what he wishes for.

The U.S. Department of Justice in March rejected the argument that the recording industry's litigation against alleged copyright infringers is unconstitutional. Charles R. Nesson, a professor at Harvard Law School defending Joel Tenenbaum, a student at Boston University being sued by Sony BMG Music Entertainment, had asked the Justice Department in February to prevent copyright holders from collecting statutory damages except from offenders seeking commercial gain.

The Justice Department fiercely denied that request, in a 31-page memo filed March 21. "The remedy of statutory damages has been a cornerstone of our federal copyright law since 1790," the agency said. Even copyright violations not motivated by profits limit the legal distribution of protected work, it said. "The public in turn suffers from lost jobs and wages, lost tax revenue, and higher prices for honest purchasers."

Nesson has argued that the penalties Tenenbaum faces, if he loses the case, are grossly disproportionate: up to $150,000 for each of the seven songs he is accused of illegally downloading. The Free Software Foundation, in a legal brief on Tenenbaum's behalf, cited several recent cases to support the position that the recording industry's lost profits for each infringement—which it estimates at $0.35—should not prompt damages of more than 425,000 times that amount.

Still, the Justice Department points out that damages are subject to review for "excessiveness," says the blog Recording Industry vs. the People, whose author also wrote the Free Software Foundation brief. And the federal agency does not say that Tenenbaum should have to pay the damages the recording industry seeks, says the blog Copyrights & Campaigns, just that the law that defines them does not violate the Constitution. Reported in: *Chronicle of Higher Education* online, March 23. □

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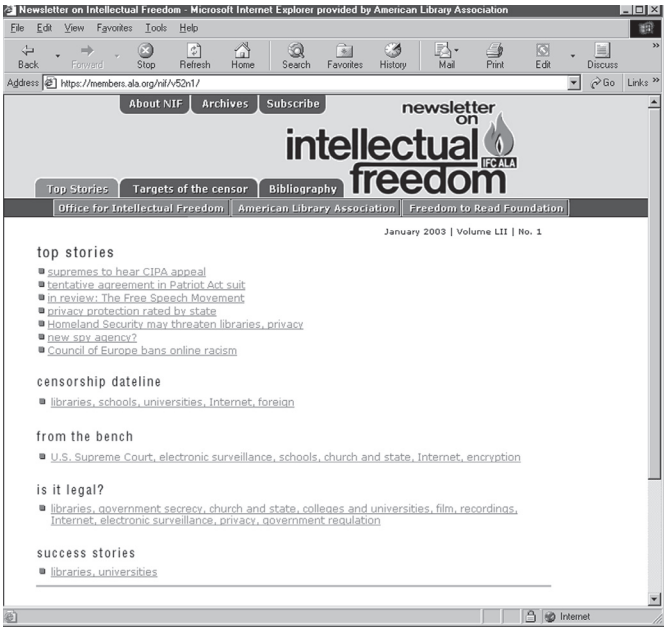

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