newsletter on intellectual freedom

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spying under PATRIOT Act disclosed

Public libraries have been contacted about fifty times by federal investigators as part of their anti-terrorism efforts, but the Justice Department won't say whether they looked through, or took information from, their records. The department also released documents May 20 showing it had detained fewer than fifty people as material witnesses without charging them in the war on terror as of January.

"Fewer than ten" FBI offices have conducted investigations involving visits to mosques, the Justice Department said. It also said the FBI does not keep files on information collected at public places or events unless it relates directly to a criminal or terrorist probe.

The information was revealed as part of the House Judiciary Committee's efforts to oversee use of the USA PATRIOT Act, a tool in the Justice Department's war on terror since the September 11, 2001, attacks.

Assistant Attorney General Viet Dinh told a House Judiciary subcommittee that while exact details were classified, an informal Justice Department survey showed libraries had been "contacted approximately fifty times" in the last year using the PATRIOT Act. The law allows the government to secretly view records of materials checked out of public libraries or bought in bookstores, and observe Web activity on library computers. It also forbids librarians or booksellers to talk about any investigations.

Nationwide, librarians have begun posting warning signs, changing policies and even shredding documents in reaction to the law. But "libraries and bookstores should not be allowed to become safe havens for terrorists," Dinh said.

The American Civil Liberties Union, which has jousted repeatedly with the Justice Department over the new powers, said the department's 60-page response to lawmakers' questions did not provide enough details about the library investigations, possible FBI scrutiny of mosque membership lists and other civil liberties issues.

But Committee Chair Jim Sensenbrenner (R–WI) commended the "timing and thoroughness" of the answers. The panel's top Democrat, Rep. John Conyers of Michigan, said

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Nancy C. Kranich, Chair

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correction

The May 2003 issue of the *Newsletter on Intellectual Freedom* was mistakenly identified as volume 52, number 32 on page 89. The correct issue number is 3. The *Newsletter on Intellectual Freedom* regrets the error and apologizes for any inconvenience.

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library and book groups decry PATRIOT Act

A national coalition of publishers, authors, librarians, and booksellers called on Congress May 15 to modify the part of the anti-terrorist USA PATRIOT Act that allows the government to secretly inspect Americans' book-buying and -borrowing habits. The statement was signed by 32 organizations, including the American Library Association, American Booksellers Association, the Authors Guild, the Association of American Publishers, PEN American Center, and the giant booksellers Borders and Barnes & Noble. It endorsed a bill filed in March by Representative Bernard Sanders, Independent of Vermont, that would exempt bookstore sales records and library borrowing records from some provisions of the act. As of late May, the bill had over 100 Democratic and Republican co-sponsors.

''Bookstores are almost universally in favor of this,'' said Wayne A. Drugan, Jr., executive director of the New England Booksellers Association, which signed the statement. ''Books contain information to which everybody should have free access, and that access should not be monitored or supervised by the government.''

Under Section 215 of the USA PATRIOT Act, passed in October 2001, a secret court can authorize the FBI to inspect or seize bookstore or library records without showing probable cause. Further, the law provides that the bookstore or library is forbidden to disclose that the inspection happened. The Sanders bill, dubbed the Freedom to Read Protection Act, would still allow inspection but would require closer court supervision.

Resistance to the PATRIOT Act has been building quietly since it became law. More than ninety cities and towns across the country have passed resolutions against it.

''Libraries are a cornerstone of intellectual freedom, the right to think and explore and read whatever you want to,'' said Krista McLeod, director of the Nevins Memorial Library in Metheun, Massachusetts, and president of the Massachusetts Library Association, which supports the change. ''The privacy associated with that freedom is key. . . . People who come in to use the library have lost a lot of the privacy that they expect.''

Barbara Comstock, spokeswoman for the U.S. Justice Department, said opposition to the PATRIOT Act is misplaced. ''All Section 215 says is that when someone who is not an American citizen or is identified as a terrorist comes to a library to use a computer, we can go into the library and see what he is doing on that computer,'' Comstock said. ''The hysteria about this is due to a lack of understanding that a court order is required. There is no interest in a general sense in knowing what people are reading.'' Reported in: *Boston Globe*, May 16. □

Book and Library Community Statement Supporting the Freedom to Read Protection Act (H.R. 1157)

Our society places the highest value on the ability to speak freely on any subject. But freedom of speech depends on the freedom to explore ideas privately. Bookstore customers and library patrons must feel free to seek out books on health, religion, politics, the law, or any subject they choose, without fear that the government is looking over their shoulder. Without the assurance that their reading choices will remain private, they will be reluctant to fully exercise their right to read freely.

Section 215 of the USA PATRIOT Act threatens bookstore and library privacy. FBI agents do not need to prove they have "probable cause" before searching bookstore or library records: they can get access to the records of anyone whom they believe to have information that may be relevant to a terrorism investigation, including people who are not suspected of committing a crime or of having any knowledge of a crime. The request for an order authorizing the search is heard by a secret court in a closed proceeding, making it impossible for a bookseller or librarian to have the opportunity to object on First Amendment grounds prior to the execution of the order. Because the order contains a gag provision forbidding a bookseller or librarian from alerting anyone to the fact that a search has occurred, it would be difficult to protest the search even after the fact.

The organizations listed below strongly support the Freedom to Read Protection Act of 2003 (H.R. 1157). Introduced in the U.S. House of Representatives on March 6 by Bernie Sanders (I–VT), H.R. 1157 strengthens protections for the privacy of bookstore and library records. Law enforcement officials will still be able to subpoena bookstore and library records crucial to an investigation, but the courts will exercise their normal scrutiny in reviewing these requests.

We applaud Congressman Sanders and the Democratic and Republican sponsors and co-sponsors of H.R. 1157. They have shown great courage by defending civil liberties during a time of crisis.

American Association of Law Libraries
Alibris.com
American Booksellers Association
Barnes & Noble Booksellers
American Booksellers Foundation for Free Expression
Books-A-Million
American Library Association
Borders Group, Inc.
American Society of Journalists and Authors
Association of American Publishers

Association of American University Presses
Association of Booksellers for Children
Authors Guild
Children's Book Council
Comic Book Legal Defense Fund
Florida Publishers Association
Freedom to Read Foundation
Great Lakes Booksellers Association
Medical Library Association
Mid-South Independent Booksellers Association
Mountains and Plains Booksellers Association
Mystery Writers of America
National Association of College Stores
New Atlantic Independent Booksellers Association
New England Booksellers Association
Northern California Independent Booksellers Association.
Pacific Northwest Booksellers Association
PEN American Center
PEN USA West
Publishers Association of the South
Publishers Association of the West
Publishers Marketing Association
Southeast Booksellers Association
Southern California Booksellers Association
Special Libraries Association
Upper Midwest Booksellers Association □

impact of the USA PATRIOT Act on free expression

By Nancy Kranich, Free Expression Policy Project Senior Research Fellow. The following article appeared on the Web site of the Free Expression Policy Project, www.fepproject.org. Nancy Kranich was President of the American Library Association for 2000–2001, and is currently chair of the ALA Intellectual Freedom Committee.

Hours after the terrorist attacks on September 11, 2001, people rushed to libraries to read about the Taliban, Islam, Afghanistan, and terrorism. Americans sought background materials to foster understanding and cope with this horrific event. They turned to a place with reliable answers—to a trustworthy public space where they are free to inquire, and where their privacy is respected.

Since 9/11, libraries remain more important than ever to ensuring the right of every individual to hold and express opinions and to seek and receive information, the essence of a thriving democracy. But just as the public is exercising its right to receive information and ideas—a necessary aspect of free expression—in order to understand the events of the day, government is threatening these very liberties, claiming it must do so in the name of national security.

While the public turned to libraries for answers, the Bush Administration turned to the intelligence community for techniques to secure U.S. borders and reduce the possibility of more terrorism. The result was new legislation and administrative actions that the government says will strengthen security. Most notably, Congress passed into law the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (USA PATRIOT Act) just six weeks after the events of September 11. This legislation broadly expands the powers of federal law enforcement agencies to gather intelligence and investigate anyone it suspects of terrorism.

The USA PATRIOT Act contains more than 150 sections and amends over fifteen federal statutes, including laws governing criminal procedure, computer fraud, foreign intelligence, wiretapping, and immigration. Particularly troubling to free speech and privacy advocates are four provisions: section 206, which permits the use of "roving wiretaps" and secret court orders to monitor electronic communications to investigate terrorists; sections 214 and 216, which extend telephone monitoring authority to include routing and addressing information for Internet traffic relevant to any criminal investigation; and, finally, section 215, which grants unprecedented authority to the Federal Bureau of Investigation (FBI) and other law enforcement agencies to obtain search warrants for business, medical, educational, library, and bookstore records merely by claiming that the desired records may be related to an ongoing terrorism investigation or intelligence activities—a very relaxed legal standard which does not require any actual proof or even reasonable suspicion of terrorist activity.[1]

Equally troubling, section 215 includes a "gag order" provision prohibiting any person or institution served with a search warrant from disclosing what has taken place. In conjunction with the passage of the USA PATRIOT Act, the U.S. Justice Department issued revised FBI guidelines in May 2002 that greatly increase the bureau's surveillance and data collection authority to access such information as an individual's Web surfing habits and search terms.[2]

These enhanced surveillance powers license law enforcement officials to peer into Americans' most private reading, research, and communications. Several of the Act's hastily passed provisions not only violate the privacy and confidentiality rights of those using public libraries and bookstores, but sweep aside constitutional checks and balances by authorizing intelligence agencies (which are within the executive branch of government) to gather information in situations that may be completely unconnected to a potential criminal proceeding (which is part of the judicial branch of government). The constitutional requirement of search warrants, to be issued by judges, is one such check on unbridled executive power. In addition to the dangers to democracy from such unbridled executive power, it is not clear that these enhanced investigative capabilities will make us safer, for under the new provisions, far more information is going to the same

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“a chill wind is blowing in this nation . . .”

Transcript of the speech given by actor Tim Robbins to the National Press Club, Washington, D.C., on April 15, 2003.

TIM ROBBINS: Thank you. And thanks for the invitation. I had originally been asked here to talk about the war and our current political situation, but I have instead chosen to hijack this opportunity and talk about baseball and show business. (Laughter.) Just kidding. Sort of.

I can’t tell you how moved I have been at the overwhelming support I have received from newspapers throughout the country in these past few days. I hold no illusions that all of these journalists agree with me on my views against the war. While the journalists’ outrage at the cancellation of our appearance in Cooperstown (see page 141) is not about my views, it is about my right to express these views. I am extremely grateful that there are those of you out there still with a fierce belief in constitutionally guaranteed rights. We need you, the press, now more than ever. This is a crucial moment for all of us.

For all of the ugliness and tragedy of 9/11, there was a brief period afterward where I held a great hope, in the midst of the tears and shocked faces of New Yorkers, in the midst of the lethal air we breathed as we worked at Ground Zero, in the midst of my children’s terror at being so close to this crime against humanity, in the midst of all this, I held on to a glimmer of hope in the naive assumption that something good could come out of it.

I imagined our leaders seizing upon this moment of unity in America, this moment when no one wanted to talk about Democrat versus Republican, white versus black, or any of the other ridiculous divisions that dominate our public discourse. I imagined our leaders going on television telling the citizens that although we all want to be at Ground Zero, we can’t, but there is work that is needed to be done all over America.

Our help is needed at community centers to tutor children, to teach them to read. Our work is needed at old-age homes to visit the lonely and infirmed; in gutted neighborhoods to rebuild housing and clean up parks, and convert abandoned lots to baseball fields. I imagined leadership that would take this incredible energy, this generosity of spirit and create a new unity in America born out of the chaos and tragedy of 9/11, a new unity that would send a message to terrorists everywhere: If you attack us, we will become stronger, cleaner, better educated, and more unified. You will strengthen our commitment to justice and democracy by your inhumane attacks on us.

Like a Phoenix out of the fire, we will be reborn. And then came the speech: You are either with us or against us. And the bombing began. And the old paradigm was restored as our leader encouraged us to show our patriotism by shopping and by volunteering to join groups that would turn in their neighbor for any suspicious behavior.

In the nineteen months since 9/11, we have seen our democracy compromised by fear and hatred. Basic inalienable rights, due process, the sanctity of the home have been quickly compromised in a climate of fear. A unified American public has grown bitterly divided, and a world population that had profound sympathy and support for us has grown contemptuous and distrustful, viewing us as we once viewed the Soviet Union, as a rogue state.

This past weekend, Susan and I and the three kids went to Florida for a family reunion of sorts. Amidst the alcohol and the dancing, sugar-rushing children, there was, of course, talk of the war. And the most frightening thing about the weekend was the amount of times we were thanked for speaking out against the war because that individual speaking thought it unsafe to do so in their own community, in their own life. Keep talking, they said; I haven’t been able to open my mouth.

A relative tells me that a history teacher tells his 11-year-old son, my nephew, that Susan Sarandon is endangering the troops by her opposition to the war. Another teacher in a different school asks our niece if we are coming to the school play. They’re not welcome here, said the molder of young minds.

Another relative tells me of a school board decision to cancel a civics event that was proposing to have a moment of silence for those who have died in the war because the students were including dead Iraqi civilians in their silent prayer.

A teacher in another nephew’s school is fired for wearing a T-shirt with a peace sign on it. And a friend of the family tells of listening to the radio down South as the talk radio host calls for the murder of a prominent anti-war activist. Death threats have appeared on other prominent anti-war activists’ doorsteps for their views.

Relatives of ours have received threatening e-mails and phone calls. And my 13-year-old boy, who has done nothing to anybody, has recently been embarrassed and humiliated by a sadistic creep who writes—or, rather, scratches his column with his fingernails in dirt.

Susan and I have been listed as traitors, as supporters of Saddam, and various other epithets by the Aussie gossip rags masquerading as newspapers, and by their fair and balanced electronic media cousins, 19th Century Fox. (Laughter.) Apologies to Gore Vidal. (Applause.) Two weeks ago, the United Way canceled Susan’s appearance at a conference on women’s leadership. And both of us last week were told that both we and the First Amendment were not welcome at the Baseball Hall of Fame.

A famous middle-aged rock-and-roller called me last week to thank me for speaking out against the war, only to go on to tell me that he could not speak himself because he fears repercussions from Clear Channel. “They promote our concert appearances,” he said. “They own most of the stations that play our music. I can’t come out against this war.”

And here in Washington, Helen Thomas finds herself banished to the back of the room and uncalled on after asking Ari

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surveillance technology widely disseminated

Congressional efforts to rein in a Pentagon surveillance project may be ineffective because new surveillance technology is being widely disseminated both inside and outside of the military and other less visible federal offices are pursuing similar research, industry executives and computer scientists say.

The Defense Advanced Research Projects Agency's Information Awareness Office, overseen by Adm. John M. Poindexter, faced widespread opposition last year to its Total Information Awareness project after reports about the project raised concerns about civil liberties. On May 20, the agency delivered a 102-page report to Congress to reassure legislators.

But a related program being pursued by the government's intelligence agencies has drawn no public scrutiny. The research being conducted for the National Security Agency, Central Intelligence Agency and the Defense Intelligence Agency is being financed by a little known federal office called the Advanced Research and Development Activity, established during the Clinton administration to provide federal intelligence agencies with basic research capability similar to that of DARPA.

The agency has a budget of about $100 million a year, according to a former government official. Its research covers a wide range of areas from nanotechnology to quantum computing. The agency is pursuing research in areas like facial recognition as well as basic image recognition technologies, according to computer scientists. In March 2000, for example, the organization reviewed 45 research proposals and made grants to nine organizations including corporations, universities and research centers that are studying various image recognition problems.

ARDA is also financing a program called "Novel Intelligence from Massive Data," which was begun after the September 11 terrorist attacks. The intent of the project is to give intelligence analysts early warning of "strategic surprises" in the same way that the Total Information Awareness system was intended to provide advance information about possible domestic terrorist attacks.

Both the Pentagon's Total Information Awareness project and the ARDA research project seek to detect hidden patterns of activity in vast collections of digital data. The development of these technologies has drawn opposition from civil liberties groups and some technical organizations. Moreover, several computer scientists question whether such giant data "hoovering" operations, involving either vast databases or software to scan connected databases through a network, can be successful.

They emphasize that once enemies of the United States are aware that digital sentries are hunting for unusual patterns of information, they will simply alter their behavior.

"You won't find terrorists buying C4 explosives with a Mastercard," one computer scientist said.

"If they were to stick to strictly military-related research and development, there is less of an issue, but these technologies have much broader social implications," said Barbara Simons, a computer scientist who is past president of the Association of Computing Machinery, an organization that has expressed concerns about the Pentagon's project.

Information about the project on the organization's Web site (http://ic-arda.org) states that the agency is developing technologies to avoid events like the September 11 attacks and other actions taken by enemies of the United States.

Since the Watergate era, the nation's intelligence agencies have been generally restricted from conducting domestic surveillance. But concerns about terrorism have led the Bush administration to try to break down barriers between various government agencies. Reported in: *New York Times*, May 21. □

opening Sen. McCarthy's files

Fifty years after Senator Joseph R. McCarthy's communist witch hunt, the U.S. Senate made public May 5 transcripts of his closed-door questioning of more than 400 witnesses that revealed a calculating side to McCarthy's public persona of a threatening bully who did not hesitate to destroy reputations and lives. The documents show that McCarthy used closed hearings to weed out potential witnesses who defended themselves effectively and instead called to the stand only those who appeared weak or confused.

McCarthy, a Republican from Wisconsin, was chairman of the Senate Permanent Subcommittee on Investigations in 1953 and 1954, at the height of the cold war. He used that position to mount an investigation that came to be widely characterized as a witch hunt for communists in the federal government and beyond.

Documents from closed Senate hearings are sealed for fifty years, and so those were made public today with a new round of denunciations from the men and women who run the Senate now. The senators who oversaw the project, Susan Collins, a Maine Republican, and Carl Levin, Democrat of Michigan, made public more than 4,000 pages of transcripts in the same room where McCarthy held many of his hearings.

"We hope that the excesses of McCarthyism will serve as a cautionary tale for future generations," Senator Collins said. Added Senator Levin, "History is a powerful teacher, and these documents offer many lessons on the importance of open government, due process and respect for individual rights." He recalled organizing an anti-McCarthy petition drive as a student at Swarthmore College fifty years ago.

The transcripts show that some witnesses "defended themselves so resolutely or had so little evidence against them that the chairman and council chose not to pursue them," Donald A. Ritchie, the Senate historian who organized the records, said. The closed sessions, he added, served as "as dress rehearsals" for the main show: the televised Army-McCarthy

hearings, which sought to show that the Army had been infiltrated by Communists.

As an example, Eslanda Goode Robeson, the wife of the blacklisted singer-actor Paul Robeson, would not answer when asked if she was a member of the Communist Party. "Under the protection of the Fifth and Fifteenth amendments, I decline to answer," she said. The Fifteenth amendment gave blacks the right to vote.

McCarthy responded: "The Fifteenth has nothing to do with it.

"That provides the right to vote." Eslanda Robeson said: "I always understood it has something to do with my being a Negro, and I have always sought protection under it." McCarthy called her to testify.

By contrast, the composer Aaron Copland effectively evaded every question. McCarthy asked him if he had ever attended a Communist meeting, and Copland answered: "I am afraid I do not know how you define a Communist meeting."

> McCarthy: "Have you ever been a communist sympathizer?"
>
> Copland: "I am not sure I would be able to say what you mean by 'sympathizer.'"
>
> McCarthy: "Do you feel communists should be able to teach in our schools?"
>
> Copland: "I haven't given the matter such thought as to give an answer."

Copland was not called to testify, apparently because his testimony would not have made good theater.

During two years, McCarthy held sensational hearings into supposed Communist subversion and espionage in the Department of State, the Voice of America, the United States Information Libraries, the Government Printing Office, the Army Signal Corps and American military-contractor industries among other agencies, an inquiry that culminated with the televised hearings.

The transcripts made public included testimony by Langston Hughes, James Reston and many obscure government employees and others. McCarthy often hectored his witnesses and showed little regard for their individual rights.

In a news release, the Senate said McCarthy's closed "executive sessions were held preliminary to the public hearings and were not open to the press or public." But an Army lawyer who attended many of the sessions, John G. Adams, wrote at the time that the closed hearings were actually not nearly so exclusive.

"It didn't really mean a closed session, since McCarthy allowed in various friends, hangers-on and favored newspaper reporters," Adams wrote. "Nor did it mean secret, because afterwards McCarthy would tell reporters waiting outside whatever he pleased. Basically 'executive' meant Joe could do whatever he wanted."

McCarthy called hearings on short notice in Washington, New York, Boston or other cities and was often the only senator in attendance, which was quite unusual. Sometimes he did not show up and left the questioning to his subordinate, Roy Cohn.

The Senate censured McCarthy in December 1954. He lost his seat as chairman the next month, after Democrats regained the majority in the Senate. He died in office a broken man in 1957. He was 47 years old. Reported in: *New York Times*, May 5. □

Jefferson "Muzzles" announced

For the twelfth straight year, the Thomas Jefferson Center for the Protection of Free Expression celebrated the birth date of its namesake by bestowing a dubious distinction on those that have forgotten or disregarded Jefferson's admonition that freedom of expression cannot be limited without being lost. Released each year on April 13, the "Jefferson Muzzles" are awarded to call attention to some of the more ridiculous or egregious affronts to free expression occurring in the preceding year.

Two of this year's ten Jefferson Muzzles went to Attorney General John Ashcroft and the 107th United States Congress for actions related to the war on terror.

"It was another bad year for free speech," said Center director Robert M. O'Neil. "The tragic events of September 11, 2001, and the preparation for the war in Iraq have created new pressures on free expression and may have made it harder to arouse public concern about those pressures."

As every year, a number of local incidents of censorship earned a Muzzle in 2003. Said O'Neil, "The local Muzzles are often representative of a far greater number of similar sorts of incidents. For many of those selected, a half dozen could have been substituted. In the public school context, the number is even higher. Four of the 2003 Jefferson Muzzles involved education-related incidents."

O'Neil believes it is important to call attention to less well-known acts of censorship because "such an indictment challenges the assumption held by many that, because of the First Amendment, attempts at censorship are few in the United States. In fact, such acts occur every day. Our hope is that the Jefferson Muzzles help to dispel the complacency with which many view free speech issues."

Summaries of the 2003 Jefferson Muzzles are listed below. Extensive information on each of this year's "winners" can be found on the Center's Web site at www.tjcenter.org/muzzles.html.

The Thomas Jefferson Center for the Protection of Free Expression of Charlottesville, Virginia, is a nonprofit, nonpartisan institution engaged in education, research, and intervention on behalf of the individual right of free expression.

Summaries of 2003 Jefferson Muzzles

- U.S. Attorney General John Ashcroft for pursuing a number of policies and actions, ranging from the sublime to

the ridiculous, that display a general disregard of First Amendment freedoms, including, but not limited to: adopting a blanket prohibition of public and press access to immigration deportation hearings; refusing to allow incarcerated United States citizens suspected of aiding terrorists from speaking with anyone, including their attorneys; allowing $8,000 in tax dollars be spent on drapes to conceal two semi-nude statues that often appeared behind the attorney general during his press conferences in the Great Hall of the Department of Justice; making a number of public statements which implied that public criticism and opposition to his policies aided terrorism.

- The 107th United States Congress for passing the USA PATRIOT Act, specifically §215, which allows the FBI and other law enforcement agencies to subpoena library and bookstore records, including records showing what materials patrons and customers are reading, as part of any terrorism investigation. Unlike regular search warrants, § 215 does not require a showing of probable cause but only that an agent claim the records are related to an ongoing investigation of terrorism. Further, libraries and bookstores served with a § 215 search warrant are forbidden to disclose that fact to anyone.
- Mayor Tom Bates of Berkeley, California, for his admitted involvement in the stealing/trashing of 1,000 copies of the University of California–Berkeley's student newspaper one day before the November election. The papers contained an editorial endorsement of the mayoral candidate Bates went on to defeat, incumbent Shirley Dean.
- Cedarville (Arkansas) School Board for ignoring the unanimous recommendation of the school's fifteen-member library committee and placing the Harry Potter novels on restricted shelves in the school libraries.
- Director of the National Zoo (DC), Lucy Spelman for refusing to release records on the death of a giraffe to the *Washington Post.* Spelman cited a concern for the deceased giraffe's right to privacy and claimed that releasing the information would breach the veterinarian-animal relationship.
- Tennessee Arts Commission for its blanket ban from its gallery in Nashville of any art depicting a nude character.
- McMinnville (TN) City Administrator Herb Llewellyn for banning public employees from writing letters to the editor or telephoning radio stations without his prior approval.
- Whiting (IN) High School Administration for withholding the salutatorian's diploma because, after delivering her approved graduation speech, she went on to confer upon several teachers humorous fictional awards such as "Trapped in the '80s," "Sesame Street Critic," and "Pain in the Asymptote."
- North Carolina House of Representatives for attempting to control the content of an academic program at the University of North Carolina, Chapel Hill, by voting to withhold public funding for the program because it included a reading assignment on Islam.
- Utica High School (Michigan) Principal Richard Machesky for censoring a story in the student newspaper concerning a lawsuit against the school district's bus depot. □

bookseller reveals secret title

The mysterious book at the center of the Tattered Cover Book Store's landmark First Amendment victory last year was about Japanese calligraphy. It was not, as police had suspected, a "how-to" manual for making methamphetamine.

The revelation, made April 15 after an airing of a film about the case, prompted the head of the North Metro Drug Task Force to admit her investigators had barked up the wrong tree. "We have to follow all the leads, and sometimes they don't pan out," said Lt. Lori Moriarty, commander of the task force.

Dan Recht, an attorney for the Tattered Cover, lauded bookstore owner Joyce Meskis for pursuing the case all the way to the Colorado Supreme Court. "I desperately wanted people to know this because of the ironic twist and because, despite their best efforts, the police can be dead wrong," Recht said.

Meskis had concealed the book's title since March 2000, when members of Moriarty's task force found a Tattered Cover envelope bearing the name of suspected meth maker Chris Montoya outside a drug lab in an Adams County mobile home, and recovered nearby two books on how to manufacture the illegal drug. Officials said they needed the purchasing information to link Montoya to the drug lab, and demanded that the Tattered Cover hand over its records.

Meskis cited First Amendment reasons for refusing to do so: revealing one record could lead to having to reveal other records, thereby compromising her obligation to protect the privacy of her customers. Civil libertarians, free speech advocates, booksellers, and readers rallied behind her, seeing hers as a test case on an issue that didn't have much legal precedent.

Last April, state Supreme Court justices ruled in Meskis' favor, saying both the U.S. and Colorado constitutions protect an individual's fundamental right to purchase books anonymously. Even after the ruling, the store still didn't divulge the subject of the book in question. That changed after an airing of a rough cut of *Reading Your Rights,* a documentary about the case, at the Denver Press Club. A panel discussion followed.

An attorney for Montoya stood up and asked the Tattered Cover to confirm the subject of the book purchased by his client. Recht obliged. The paperback, by Kenneth G. Henshall, is called *A Guide to Remembering Japanese Characters,* he said. Police believe Montoya ordered the book for examples to add to his many tattoos.

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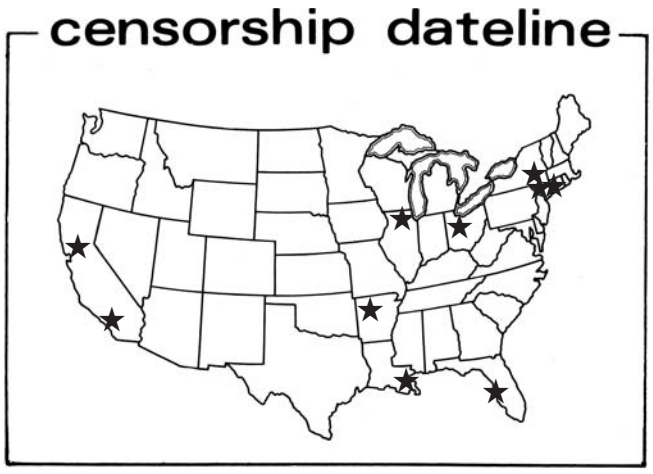


libraries

New Haven, Connecticut

A religious activist wanted the Harry Potter children's books removed from local schools, saying the series makes witchcraft and wizardry alluring to children. Antonio Rivera, who said he is a representative of several churches, asked the New Haven Board of Education to remove the books from city classrooms. He called the series Satanic, and said that they glorify the occult. The books encourage children to use spells, against Christian teaching, he further held.

"Why in the world (would) we want to teach our children witchcraft and sorcery?" he told the school board at a recent meeting.

Elanor Osbourne, associate superintendent for curriculum and instruction for the school system, said the books are not part of the curriculum, although they may be available in school libraries. Written by Scottish author J. K. Rowling, the best-selling series chronicles the exploits of a young wizard who attends a school of wizardry. He uses spells and incarnations to ward off evil.

Nationwide, some religious activists have opposed the books, believing the series runs counter to Christian morals and glorifies Satan. The series has topped the American Library Association's list of most-challenged books since 1999.

Barbara Lassonde, early childhood librarian at the New Haven Free Public Library, said the series made children who wouldn't normally read interested in literature. "Harry Potter has been a huge gift to child literacy," she said. "There's no one in the book who worships the devil. There is a force of evil, and that's realistic because that's the way our world is." Reported in: Associated Press, March 31.

Lima, Ohio

The following is the text of an email from Scott L. Shafer, Director of the Lima Ohio Public Library.

"Let me please place a caveat on my update about the materials removal issue raised last week: Lima, Ohio is a place of heightened security concern in light of world events. The largest oil refinery east of the Mississippi and the only tank manufacturing plant in the U.S. are located across the same road from each other. NO one in Lima, including every one at the Library, wants these facilities to be put into harm's way. However . . .

The Local Office of Homeland Security appeared at the Lima Public Library last Thursday afternoon to "update" The Allen County Hazardous Materials Emergency Plan. They were asked for ID and given the loose leaf binder by the Reference Staff. When the Reference Staff checked the binder back on the shelf they found that the "update" was the removal of the entire contents of the manual and its replacement with a page referring all inquiries to their offices. The same scenario was repeated at our Spencerville branch.

Late Friday, I spoke with Judith Krug, Director of the Office for Intellectual Freedom of ALA, about the incident. It was a very timely call because the Committee met this past weekend. Judith wanted the particulars to illustrate to the Committee the tactics that are being used in the name of homeland security. ALA offered any help they could in dealing with the incident and I appreciate commiserating with Judith.

This morning my Assistant Director, Candy Newland, and Head of Public Relations, Karen Sommer, met with Russ Decker, local Director of the Homeland Security and Emergency Management Agency and his Deputy Director. The purpose of the meeting was to make the Agency aware that the Library took issue with the fact that library materials were removed from the collection. We made clear that the official policy of the Library is to work in cooperation with local civil and legal authority. However, the removal of library materials presents a very serious issue. It is the official policy of the Lima Public Library that all donated materials become the property of the Library and their removal is subject to our approval. If any other Allen County resident had done this, we would have considered it a theft.

To highlight the meeting, the following points became clear:

1. The FBI has been testing libraries to see what information they can obtain on strategic points within the community. Oddly enough, the staff of the Lima Public Library was able to help local agents (posing as patrons) find the materials for which they were looking.
2. Our local office of Homeland Security believes that Library Staff should be reporting any suspicious research

activities to local authorities (Mr. Decker was disabused of this notion immediately).

3. Mr. Decker feels he has sole authority to remove anything/s he feels to be a national threat. A citizen's recourse is to take the issue to court and then a judge will determine whether or not the correct decision was made.
4. Mr. Decker informed us that there was nothing else that they would wish to remove. He had the authority to remove only this particular document. He did not know, however, what would be of interest to other state or federal agencies.
5. Mr. Decker presented us with a copy of the letter that was delivered to our Reference desk concerning the removal of the material. They did not know what to call the "head" of the library here, so they just left the form letter about the "update" at the desk.
6. Mr. Decker stated that he was not worried about the media. He has dealt with them many times. This was such a small issue that they wouldn't be interested. After all, the media had not made a fuss over any of the legislation that had been passed thus far affecting the availability of information.
7. The Office of Homeland Security was aware of the OPLIN discussions of the incident.

Mrs. Newland's final impression is that Mr. Decker feels that he was within his full right to remove the materials. He was doing it as a preventative measure because that information could be used by terrorists to destroy over 140 sites of chemical holdings within Allen County. Making such information available without a record of who looked at it would be inappropriate. Proper ID is required now to see the material, a valid Ohio driver's license which will be checked to ascertain whether or not there are any warrants out against the holder.

I'm not sure there is anything else that we can do about this incident. Had the Library been treated with the forthrightness and respect it deserves, this would have been discreetly and appropriately dealt with. Since local authorities choose to do otherwise, I feel it's our duty to raise the awareness of our colleagues. These be strange times." Reported in: LISNews.com., April 3.

colleges and universities

Irvine, California

A vice president at Irvine Valley College warned professors not to discuss the war in Iraq in their classrooms unless the course is directly related to the issue, a suggestion that several professors said infringed on academic freedom.

Dennis W. White, the vice president for academic instruction at the Southern California community college, said he was responding to complaints from students when he sent the e-mail message to deans and department chairs. In it, he wrote: "It has come to my attention that several faculty members have been discussing the current war within the context of their classrooms. We need to be sure that faculty do not explore this activity within the context of their classroom unless it can be demonstrated, to the satisfaction of this office, that such discussions are directly related to the approved instructional requirements and materials associated with those classes."

Gregory Bishopp, an art history professor and president of the Academic Senate, said that White's message was a violation of professors' academic freedom and that the war was certainly a suitable topic for classroom debate.

Glenn R. Roquemore, president of the college, said the message was just an exchange among the vice president and the deans and was not a new official policy. "This college certainly approves of discussion about war by faculty and their students," he said. "It's not the policy of the college to stifle freedom of speech in any way."

But in an interview White said that while he would "rewrite it more sensitively," he stood by his memo. He argued that the war could be an appropriate topic for discussion in certain courses, including those on cultural anthropology or political science, but not on mathematics. And even in those courses where the war is a reasonable topic for discussion, he said professors should refrain from stating their personal views.

"Outside the classroom, they're free to say whatever, but for a faculty member who has a captive audience to say they are for or against the war is not appropriate," he said. "Inside the classroom, the professor is supposed to be sharing a scholarly, balanced review of the material."

White said his concerns weren't limited to the war. When asked whether he would frown on a professor in a criminal-justice course expressing an opinion on the death penalty, he said, "Yes, for me, it would be problematic."

Bishopp balked at the idea that professors shouldn't express their opinions and joked about whether a "balanced" review meant that courses about the Second World War should be taught from Hitler's perspective. "We're not the League of Women Voters," he said of faculty members. "We're not here to represent anything with any degree of neutrality."

Wendy Gabriella, an anthropology instructor at the college and a lawyer, has sued the college seven times in the last five years over such issues as student demonstrations and open-meeting laws. She said she was dismayed by the latest flap.

"The problem is Dennis White is in charge of the First Amendment on this campus," she said. "So faculty members are wondering what we're supposed to say. How do we make sure that Dennis White deems our conversations appropriate?" Reported in: *Chronicle of Higher Education* online, April 1.

Middletown, Connecticut

Students at Wesleyan University in Middletown were ordered to sheath their chalk in May when the university

president permanently banned a colorful but controversial tradition on campus: chalking. Weighing the importance of free speech against the preservation of a respectful campus, the president, Douglas J. Bennet, declared that the profane messages often scribbled on sidewalks did not ''meet the civility test.'' Late last year, he had imposed a moratorium on chalking.

Though students routinely rely on chalking to convey their political beliefs, organize events and simply express themselves, university officials said that the sidewalk messages had degenerated to the point where obscenity was rampant and unpopular professors were disparaged by name, and that a healthy debate of issues had fallen by the wayside. Some complained that the chalking was so prevalent and vehement that it created an environment intolerant of dissent.

''We had faculty, students and others complaining, 'I'm not going to say anything because I'm just going to get shouted down,'" said Justin Harmon, a spokesman for Wesleyan. ''What does that say about the academic environment?''

The decision struck a nerve on a campus known for its activist heritage and fiercely protective of it. Almost immediately after learning of the president's decision, a band of students marched on his house at 1 A.M., beating drums and chanting, ''Give us free speech back,'' and, ''We want chalk.''

Some students expressed resentment over the president's rejection of a compromise proposed by students. It was that if anyone was offended by seeing his or her name in chalk, the university could erase it.

But regulating the language of chalking would constitute a ''speech code,'' Bennet said in an e-mail message to students. That would put the university in the position of acting as a de facto censor of communal speech.

University officials point to the many other avenues of expression that remain. For example, the student newspaper, *The Wesleyan Argus,* has an opinion page that usually reveals who is writing. That offers a measure of accountability that chalking rarely does, university officials said.

But another form of expression that the university points to as an alternative to chalking requires no such accountability. Fliers and posters can say virtually anything, without identifying the author. Because those messages are confined to kiosks and message boards, those offended need not look at them, while messages scrawled on sidewalks are unavoidable.

Some advocates of free speech found the restriction excessive. ''This is a shame,'' said Teresa Younger, executive director of the Connecticut Civil Liberties Union. ''It is unfortunate that in these times the school's administration has chosen to shut down this avenue of communication as opposed to doing educational outreach around hate crimes.'' Reported in: *New York Times,* May 14.

Tampa, Florida

The University of South Florida violated Sami Al-Arian's academic rights when it suspended and later fired the professor without giving him an opportunity to respond to the university's charges against him, the American Association of University Professors concluded in a report released May 15.

The findings, which follow a yearlong investigation by the Association's Committee on Academic Freedom and Tenure, were originally sent to administrators at South Florida for their response on February 12. Eight days later, Al-Arian was arrested by federal law-enforcement officials on charges of raising money to support Palestinian Islamic Jihad, a group that has been designated a terrorist organization by the U.S. Justice Department.

The charges against Al-Arian, contained in a 50-count indictment, allege that he was responsible for managing money for the group. The indictment also accuses him of using the university and two of its now-defunct entities as fronts for terrorist activities. Al-Arian is being held without bond in a federal prison facility near Tampa.

"The criminal charges against him, while manifestly very serious, remain to be proven in a court of law," the AAUP investigating committee said in an update to its report, which was written after the indictment. But, it notes, "with respect to his dismissal, its implementation before he had any opportunity to defend himself against the administration's charges is fundamentally at variance with" the AAUP's rules on academic due process. "Beyond that," it continues, "the principle of 'innocent until proven guilty' ought to be observed in our institutions of higher learning no less than it is in our courts."

The university responded that the AAUP's report is premature and should be tabled until after Al-Arian's criminal trial, which could take years.

Al-Arian's troubles at the university began on September 26, 2001, when he appeared on Fox News's *The O'Reilly Factor.* The host of the program, Bill O'Reilly, questioned him about alleged ties to terrorism and showed clips of speeches Al-Arian had made more than a decade earlier saying, in Arabic, "death to Israel" and "Jihad is our path." Al-Arian said his words meant death to the Israeli occupation of Palestinian lands and not to individual Israelis.

Shortly after his television appearance, Al-Arian received a death threat, which was soon retracted, and the university barred him from coming to the campus, saying his presence caused safety concerns for the entire university. But after those worries subsided, the AAUP says, the suspension continued for more than fifteen months, "an unconscionable amount of time." Even before his indictment, it says, "the administration had for all practical purposes already removed him from his tenured position at the university without having afforded any of the basic elements of academic due process."

"It was a strong case of not following the rules," said Jordan E. Kurland, associate general secretary of the AAUP. "This could in no way be called a suspension. It acquired a permanence of its own that was in fact a dismissal."

The case came to be debated on many campuses as an example of the challenges to academic freedom and free speech that lingered after the events of September 11. Along the way, the university's stated reasons for dismissing the

controversial professor changed. In August 2002, South Florida filed a lawsuit in state court seeking a ruling on whether dismissing Al-Arian would violate his constitutional rights. At that time, it notified the professor that it intended to dismiss him because he had used his academic position "to raise funds for a terrorist organization." The judge threw the case out.

Finally, the university fired the professor, just days after his arrest, citing the indictment and saying the charges confirmed what university officials had believed all along.

In a written response to the AAUP's committee report, Judy L. Genshaft, the president of the university, and David Stamps, the provost, denied that there had been any violation of the professor's academic freedom.

"The Sami Al-Arian case is unique in academic history," they said. "We know of no other tenured university professor investigated and charged by a federal grand jury with aiding and abetting terrorism, knowingly assisting an organization committed to murdering innocent men, women, and children, and doing so by using his university affiliation."

The committee that investigated the case will next make a report to AAUP members at the organization's annual meeting in June. At that time, the group's members will vote on whether to censure South Florida for its handling of the case. Censure—a serious black mark against a university's commitment to academic freedom—could make it difficult for the university to attract top-notch scholars and administrators, some faculty members fear. Reported in: *Chronicle of Higher Education* online, May 16.

Rockford, Illinois

Shouting and booing, a significant minority of students' family members drowned out the commencement speech on May 18 at Rockford College by Chris Hedges, a *New York Times* reporter and an opponent of the war with Iraq. When Hedges—a Pulitzer Prize winner and an author whose recent book, *War Is a Force That Gives Us Meaning*, looks at war as an addiction—announced that he would "talk about war and empire," several of the more than 400 students from the small liberal-arts college in northern Illinois turned their backs to him.

The situation escalated as Hedges continued by saying that the United States was an occupying force, rather than a liberating one, in Iraq. At that point, some audience members began singing "God Bless America" and chanting patriotic slogans.

Hedges said that two or three audience members went so far as to climb onto the podium from which he was speaking. "It was certainly unpleasant and unnerving," he said. "I have never had a response like that."

Ultimately, after the power to his microphone was pulled twice, Hedges cut his speech short at the request of campus security officers and was escorted away in a security vehicle while the new graduates received their diplomas.

Hedges said the aggressive responses of some audience members to his remarks both "surprised" and "saddened" him. "I had seen that in Belgrade, but I wasn't expecting to see that here," Hedges said. He pointed out that all he had known of Rockford College before his speech was that the Nobel Peace Prize winner Jane Addams, also a pacifist who was shouted offstage once for giving an antiwar speech during World War I, had graduated from the college.

Many college officials and faculty members, including President Paul Pribbenow, were also surprised by the heckling, saying that Rockford College has actively sought to instill the ideals of civic engagement and activism in its students. "As a part of college community values, we teach our students to listen and respect different points of view, even if they don't necessarily agree with them, and we expected that kind of response from our students and from our crowd," Pribbenow said. "Obviously, we can't control the crowd, but I am very proud of our students because they were listening, and it was mostly the audience members who had come to celebrate the day that were talking and being disrespectful."

Some professors, however, were critical of Hedges' speech and said that the hecklers' reactions were simply the consequence of the critical thinking that a liberal-arts college seeks to nurture.

Hedges was selected as the commencement speaker by an informal group, which included Pribbenow, after the originally scheduled speaker, Gov. Rod R. Blagojevich of Illinois, canceled in March. The college is creating a formal committee to make recommendations for next year's commencement speaker.

Pribbenow said that, in the future, the college would try to pick speakers who would talk about issues that people graduating from college need to face, and whose topics would more readily reflect the event of graduation. He would not have them shy away from important topics, he said, but he would try to better inform speakers of what to expect and of the different values that the school and students hold. Reported in: *Chronicle of Higher Education* online, May 22.

student press

Santa Rosa, California

Six weeks after a controversial opinion piece on anti-Semitism appeared in the student newspaper at Santa Rosa Junior College, in Santa Rosa, the college locked the newspaper office and offered to provide a police escort for the newspaper's 19-year-old student editor after she received death threats from local extremist groups.

The Oak Leaf, a biweekly publication run under the direction of the college's journalism department, published an opinion column on March 18 titled "Is Anti-Semitism Ever the Result of Jewish Behavior?" It was written by Mark McGuire, a student at the college. In it, McGuire discussed the conflict between Israel and Palestine, which he referred

to as "Jewish genocide." He decried American support of Israel, which he argued causes the killing of innocent Palestinians and, in turn, fuels hatred of the United States by people abroad.

"Our spineless national 'leaders' refuse to even discuss the Israel issue because the Israeli-American lobby in Washington, D.C., funded by Zionist Jews, is the most powerful lobby in existence," McGuire wrote.

The column sparked controversy on the campus. One professor sent out a collegewide e-mail message on March 24 calling for the resignation of both the editor, Kristinae Toomians, and the faculty adviser to the newspaper, Rich Mellott.

Toomians received letters containing violent threats from a group that calls itself the "Hate Task Force," prompting the security measures taken by the college. She also found fliers with swastikas left on the windshield of her car.

Several professors and students at the college, many of them Jewish, have also received anonymous packets of anti-Semitic literature in the mail.

Both Toomians and Mellott defended the decision to run the column, citing the newspaper's commitment to encouraging debate and free speech on the campus. "The First Amendment isn't there to protect agreeable stories," Mellott said.

But Robert F. Agrella, the college's president, said that "the article should never have been printed. If anything good has come out of this, it is that we are finally focusing in on the work of *The Oak Leaf*, and the staff and the role of the adviser," he said.

Edward LaFrance, who teaches broadcast journalism at the college, described the campus mood as "punitive."

"The piece was inflammatory and hostile," LaFrance said, "but that doesn't justify suppressing the newspaper or altering the way it is run. To me, I find that oppressive." Reported in: *Chronicle of Higher Education* online, May 6.

New Orleans, Louisiana

The president of Loyola University New Orleans angered staffers of the student newspaper in May when he quashed an article about the sudden departure of a music-program director.

In April, reporters at *The Maroon* began looking into rumors that Scott Fredrickson, a professor of music and coordinator of the university's music-business program, was leaving the university. A front-page article, with the headline "Chair's firing shrouded in secrecy," was scheduled to appear in the May 9 edition.

On May 8, however, Loyola's president, the Rev. Bernard P. Knoth, told the staff to delete references to Fredrickson's apparent firing. Then, minutes later, Father Knoth called back and ordered the newspaper's adviser, Liz Scott, not to run the story, according to *Maroon* staffers.

As the newspaper's publisher, Father Knoth has the authority to pull an article. But Scott said that the president normally does not review the newspaper prior to publication.

"The students were furious. They had been up all night working on the story," Scott said. "In retrospect, [Father Knoth] was just trying to protect . . . the university. I can understand why he did it. I just wish he'd done it differently."

Following the decision, four *Maroon* editors went to Father Knoth's office to demand a meeting. Staffers said the meeting was confrontational and Father Knoth ordered them to leave his office after a brief conversation.

Father Knoth said the article about Fredrickson was "inflammatory" and that it was improper for the student newspaper to report on personnel matters.

Bob Wardlaw, a junior at Loyola and the newspaper's editor in chief, said he was "outraged" by Father Knoth's decision. "He could have handled it better than he did. I wouldn't have had a problem adapting the story, to be more accurate. It's almost like having the mayor of your city be the publisher of your paper," he said.

Loyola's student handbook states that "in order to operate effectively, [the student newspaper] is to be a free and independent voice acting in the best interest of the university in pursuit of truth." The *Maroon*'s editors reprinted that policy, as well as the First Amendment, in the space where the pulled article was to have appeared. Reported in: *Chronicle of Higher Education* online, May 14.

baseball

Cooperstown, New York

Dale Petroskey, the president of the Baseball Hall of Fame, announced in early April that he was canceling a scheduled 15th-anniversary celebration of the movie *Bull Durham* that was to take place at the Hall at the end of April because of antiwar comments made by actor Tim Robbins, who starred in the film. Robbins and his wife, Susan Sarandon, who also starred in the movie, were to have participated in the celebration. Petroskey was an assistant press secretary in the Reagan administration.

After the action caused an uproar, Petroskey issued an apology, saying he was sorry he failed to call Tim Robbins and Susan Sarandon before canceling the celebration. In an open letter to the 28,000 people who called or sent a letter or e-mail to the Hall, Petroskey blamed himself for bringing politics into the shrine.

"I inadvertently did exactly what I was trying to avoid," the former Reagan administration official wrote. "With the advantage of hindsight, it is clear I should have handled the matter differently. . . .

"I am sorry I didn't pick up the phone to have a discussion with Tim Robbins and Susan Sarandon rather than sending them a letter."

Instead, Petroskey surprised the co-stars with a letter sent via Federal Express, telling them he'd called off the festivities because they'd criticized the war in Iraq.

The celebration also was to have included actor Robert Wuhl and *Bull Durham* director Ron Shelton. Instead, Robbins, Sarandon, Wuhl, and Shelton appeared on the

season opener of *On the Record with Bob Costas* on HBO, where they were able to discuss the film.

The letters exchanged between Petroskey and Robbins read as follows:

> Dear Mr. Robbins,
>
> The President of the United States, as this nation's democratically-elected leader, is constitutionally bound to make decisions he believes are in the best interests of the American people. After months of careful deliberations, President Bush made the decision that it is in our nation's best interests to end the brutal regime of Saddam Hussein, and to disarm Iraq of deadly weapons which could be used against its enemies, including the United States. In order to accomplish this, nearly 300,000 American military personnel are in harm's way at the moment.
>
> From the first day we opened our doors in 1939, The National Baseball Hall of Fame and Museum—and many players and executives in Baseball's family—has honored the United States and those who defend our freedoms.
>
> In a free country such as ours, every American has the right to his or her own opinions, and to express them. Public figures, such as you, have platforms much larger than the average American's, which provides you an extraordinary opportunity to have your views heard—and an equally large obligation to act and speak responsibility. We believe your very public criticism of President Bush at this important—and sensitive—time in our nation's history helps undermine the U.S. position, which ultimately could put our troops in even more danger. As an institution, we stand behind our President and our troops in this conflict.
>
> As a result, we have decided to cancel the April 26–27 programs in Cooperstown commemorating the 15th anniversary of *Bull Durham.*
>
> Sincerely,
> Dale Petroskey
> President
>
> Dear Mr. Petroskey,
>
> As an American and as a baseball fan, I was dismayed to read your letter canceling my appearance at the Baseball Hall of Fame due to my public criticism of President Bush. I had been unaware that baseball was a Republican sport. I was looking forward to a weekend away from politics and war to celebrate the fifteenth anniversary of *Bull Durham.* I am sorry that you have chosen to use baseball and your position at the Hall of Fame to make a political statement. I know there are many baseball fans that disagree with you and even more that will react with disgust to realize baseball is being politicized.
>
> As an American who believes that vigorous debate is necessary for the survival of a democracy, I reject your suggestion that one must be silent in time of war. To suggest that my criticism of the President puts the troops in danger is absurd. If people had listened to that twisted logic we'd still be in Vietnam. I must remain skeptical of the war plans of Bush, Cheney and Rumsfeld, all of whom have never been in battle, one of whom skirted service in Vietnam for a cushy stateside job. It does not surprise me that these men, in their current federal budget have cut $844 million dollars from Veteran's health care. Yes, let's support the troops. For Life.
>
> I wish you had, in your letter, saved me the rhetoric and talked honestly about your ties to the Bush and Reagan Administrations. You are using what power you have to infringe upon my rights to free speech and by taking this action hope to intimidate the millions of others that disagree with our president. In doing so, you expose yourself as a tool, blinded by partisanship and ambition. You invoke patriotism and use words like freedom in an attempt to intimidate and bully. In doing so, you dishonor the words patriotism and freedom and dishonor the men and women who have fought wars to keep this nation a place where one can freely express one's opinion without fear of reprisal or punishment. Your subservience to your friends in the administration is embarrassing to baseball and by engaging in this enterprise you show that you belong with other cowards and ideologues in the Hall of Infamy and Shame.
>
> Long live democracy, free speech and the '69 Mets; all improbable glorious miracles that I have always believed in.
>
> Sincerely,
> Tim Robbins

periodicals

Bentonville, Arkansas

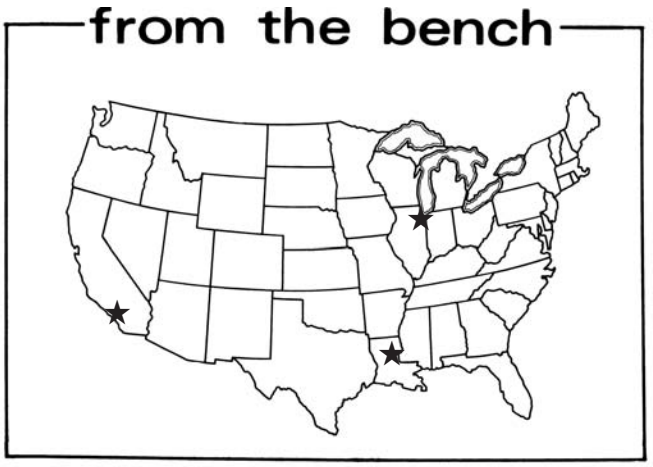
Wal-Mart Stores, Inc., the nation's largest retailer, said May 5 that it had halted sales of *Maxim, Stuff,* and *FHM,* men's magazines that feature a mix of scantily clad starlets and bawdy humor but go to some lengths to avoid being labeled as pornography. The decision came after ''listening to our customers and associates,'' Melissa Berryhill, a spokeswoman for Wal-Mart, said. ''I know we've heard on at least one of those magazines, they weren't pleased with the offering.''

Maxim has been sold in Wal-Mart for the last three years, while *FHM* was added recently. The standards and general content of the magazines have not changed, but Wal-Mart, which is based in Bentonville, has been under pressure from Christian groups in the past over its distribution of various magazines.

The decision to stop selling the so-called lads' magazines is the latest in a series of moves by the company to limit distribution of entertainment products it judges too racy for its shoppers. The company has refused to sell CDs that carry warning labels about explicit lyrics; instead, Wal-Mart Stores sell sanitized versions of albums, with some songs omitted or covers redrawn to pass muster with the chain's buyers. The stores also ask for age identification from purchasers of video games with mature-audience ratings.

The chain's role as a purveyor of pop culture—a role that increases every time a new Wal-Mart opens, with 200,000-square-feet worth of products ranging from groceries to garden tools—seems to be in an evolutionary stage, something not

(continued on page 164)



U.S. Supreme Court

The Supreme Court upheld a Virginia statute April 7 that makes it illegal for Ku Klux Klansmen and others to burn crosses. The case was a difficult one, forcing the court to weigh the free-expression rights of those who burn crosses against the right of their victims not to be physically intimidated and threatened with harm. The court believes it got the balance right in a decision that upholds the ban on cross burning but warns the states against trampling on political speech.

Under Virginia law, it is illegal to burn a cross with "intent to intimidate a person or group of persons." This 50-year-old cross-burning law was challenged by three men who had been convicted under it. Two of the men were convicted of attempting to burn a cross in the yard of a black neighbor. The third led a Ku Klux Klan rally at which there was a burning cross 25 to 30 feet high, accompanied by talk of going out and randomly shooting blacks.

The First Amendment's free-speech protection is not absolute. Many crimes, like filing a fraudulent tax return, are committed by means of the written word, and the Constitution does not protect them. The Supreme Court has long held, in particular, that threats of violence can be prosecuted without running afoul of the First Amendment. In its decision, the court observed that cross burning could be done either to make a general political point, in which case it is protected speech, or to convey a specific message of intimidation, in which case it is not.

The court's heavily fractured decision—its dissents and concurrences crossed ideological lines—sounded a note of caution. Justice Sandra Day O'Connor warned that states cannot assume, or ask juries to assume, that every cross burning carries with it an intent to intimidate. The burden is on prosecutors to show, based on "contextual factors" surrounding a particular cross burning, that the necessary intent was present. Reported in: *New York Times*, April 8.

The government can imprison immigrants it is seeking to deport without first giving them a chance to show that they present neither a flight risk nor a danger to the community, a divided Supreme Court ruled April 30. The 5-to-4 decision upheld the mandatory-detention provisions of a 1996 immigration law as applied to a substantial category of aliens who are lawful permanent residents of the United States and who have been convicted of any of a number of drug crimes and other ''aggravated'' offenses.

The provision does not deal with terrorism, and the decision had no direct application to the legal issues involving the detention and treatment of suspects under the USA PATRIOT Act that Congress passed after the terrorist attacks on September 11, 2001. But the decision was nonetheless notable for the degree of deference the majority showed to the judgments Congress made in 1996 about the desirability of detaining immigrants before deporting them.

Tens of thousands of these so-called ''criminal aliens'' have been imprisoned before deportation under the statute, which replaced a law giving the attorney general the discretion to release individuals on bond while their deportation cases went forward as long as they presented neither flight nor security risk.

Four federal appeals courts, including the San Francisco-based United States Court of Appeals for the Ninth Circuit in this case, have declared the mandatory-detention provision unconstitutional at least as applied to lawful permanent residents, who have more rights than aliens who have not been lawfully admitted into the country.

In addition to overturning the Ninth Circuit, the court the next week vacated the other decisions, from the Third Circuit in Philadelphia, the Fourth Circuit in Richmond, Virginia, and the Tenth Circuit in Denver.

The appeals courts had relied in part on a Supreme Court decision of two years ago, *Zadvydas* v. *Davis*, in which the court interpreted another provision of the immigration law and ruled that the government could not indefinitely detain a deportable alien whose country of origin refused to take him back.

In his opinion for the court, Chief Justice William H. Rehnquist—who had dissented from the earlier decision—said the two cases were substantially different, the first dealing with an open-ended, perhaps lifetime detention, while the current case concerned detentions that last only weeks or months, until the conclusion of deportation proceedings.

The result was to turn the *Zadvydas* decision into a narrower ruling in retrospect than it appeared to be to immigrants'-rights advocates when it was issued in June 2001; it

had appeared then to establish a significant floor of constitutional protection even for aliens who had been adjudged deportable.

The immigrant in the case decided April 30, a Korean-born Californian named Hyung Joon Kim, is still contesting his deportability and is not yet subject to a final order of removal.

Justice Sandra Day O'Connor had joined the majority in the *Zadvydas* decision, which was also decided by a 5-to-4 vote. Her vote with Chief Justice Rehnquist determined the different outcome.

The only federal appeals court to have upheld the mandatory-detention provision at issue was the United States Court of Appeals for the Seventh Circuit, in Chicago, which, unlike the other appeals courts, issued its ruling before the Supreme Court decided the *Zadvydas* case.

Kim came to the United States from Korea with his family at the age of 6 and became a permanent resident two years later. After two criminal convictions in California as a teenager, one for burglary and one for theft, he was placed in deportation proceedings and imprisoned under the new law. After three months in detention, he filed a petition for a writ of habeas corpus arguing that he was constitutionally eligible for release while challenging his deportation.

His case raised two questions: whether habeas corpus review was available despite language in the law suggesting that it was not, and whether the mandatory-detention provision violated the constitutional guarantee of due process.

Six justices agreed that habeas corpus was available, thus giving the court jurisdiction over the case and reiterating the need for Congress to be extremely clear if it intended to strip the courts of jurisdiction over a category of cases. Reaching the merits of the case, five then found no constitutional requirement for a hearing at which a detained immigrant could demonstrate eligibility for release on bond.

The two questions were answered by separate coalitions of justices. Those who agreed that the court had jurisdiction were, in addition to Chief Justice Rehnquist, Justice Anthony M. Kennedy and the four who dissented on the detention issue: Justices David H. Souter, John Paul Stevens, Ruth Bader Ginsburg and Stephen G. Breyer. Those who agreed with the chief justice on the constitutionality of mandatory detention were Justices Kennedy, O'Connor, Antonin Scalia, and Clarence Thomas.

Chief Justice Rehnquist said that ''against a backdrop of wholesale failure'' by immigration authorities under the old law to deal with rising rates of crime by aliens, Congress had adequately demonstrated a need to imprison aliens awaiting deportation for past crimes to keep them from committing new crimes. While Congress might have permitted ''individualized bail determinations,'' he said, ''when the government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.''

After the federal district court in San Francisco ruled in favor of Kim in 1999, the Immigration and Naturalization Service granted him a hearing, found him eligible for release and released him on $5,000 bond. He has been free since then, working and attending college. His lawyer, Judy Rabinovitz of the American Civil Liberties Union, said Kim would now challenge his eligibility for deportation on the ground that the property crimes for which he was convicted were not the ''aggravated'' crimes of ''moral turpitude'' to which the law refers.

In a dissenting opinion, Justice Souter said the decision was ''at odds with the settled standard of liberty,'' under which the government has to justify the detention of individuals on a case-by-case basis, not of entire classes of people. ''Due process calls for an individual determination before someone is locked away,'' Justice Souter said. He read his dissent from the bench, a step he has taken only rarely to emphasize a particularly deep disagreement. Justices Stevens and Ginsburg signed his opinion.

Justice Breyer, who wrote the majority opinion in the *Zadvydas* case, dissented separately on narrower grounds. He said the 1996 law, properly interpreted, made bail available to an alien who raised a substantial legal challenge to deportability. Reported in: *New York Times*, April 30.

Nike found a sympathetic audience at the Supreme Court April 23 for the argument that its defense of its overseas labor practices was the kind of speech that the First Amendment protects to the fullest extent, regardless of whether the speaker is a corporation. The company was asking the justices to dismiss a suit brought by a San Francisco man under California's unfair-trade-practices law, which permits an individual to sue as a "private attorney general" on behalf of all the state's residents without a need to show that anyone has been injured. The plaintiff, Marc Kasky, charged that during the mid-1990's, Nike misrepresented its record in letters, press releases and op-ed articles that amounted to false advertising.

The company's lawyer, Laurence H. Tribe, told the justices that this was not advertising but rather Nike's side of "an intense debate on the pros and cons of globalization." Tribe said that Nike's critics had used various media to portray the company as an exploitative employer and that "Nike used the same media" to defend itself in what became "a lively political dialogue about the realities of the third world and Nike's role in it."

The California Supreme Court ruled last year that Nike's statements were merely "commercial speech," entitled to only minimal First Amendment protection. It held that Kasky was entitled to take Nike to trial, where he could prevail if he showed that any of the company's communications had been misleading, either in what they asserted or in what they left out.

For noncommercial speech, by contrast, there can be no liability without proof of deliberate or reckless falsehood. The case is thus an important test of the definition of commercial speech and of the constitutional leeway afforded to corporate speakers.

Paul R. Hoeber, a San Francisco lawyer representing Kasky, said that in various responses to its critics, Nike had

excerpts from *Virginia* v. *Black*

Following are excerpts from the Supreme Court's 6-to-3 ruling in *Virginia* v. *Black* that states can outlaw cross burning that is meant to intimidate. Justice Sandra Day O'Connor wrote the majority opinion; Justice David H. Souter and Justice Clarence Thomas wrote dissents. A full transcript is online at http://nytimes.com/national.

from the decision by Justice O'Connor

The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas," even ideas that the overwhelming majority of people might find distasteful or discomforting. Thus, the First Amendment "ordinarily" denies a state "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Thus, for example, a state may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace. We have consequently held that fighting words—those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. Furthermore, "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." And the First Amendment also permits a state to ban a "true threat."

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and

(continued on page 165)

simply been "making factual representations to consumers about its own practices to get them to buy its products." This was not part of a debate over globalization or third-world labor practices but an assertion of facts "that should fit under any definition of commercial speech," Hoeber said.

The justices were attentive to Hoeber but appeared unpersuaded.

"The truth of the matter is, I think it's both," Justice Stephen G. Breyer said. Nike was at the same time trying to sell its products and "make a statement," Justice Breyer said, adding: "I think the First Amendment was designed to protect all the participants in a public debate, and a debate consists of facts. Once you've tied a party's hands behind his back with respect to facts, you've silenced him."

Under the Supreme Court's recent precedents, commercial speech is that which "does no more than propose a commercial transaction." The California court's definition, by contrast, extended beyond a specific offer of sale to include speech by a person or organization "engaged in commerce" and "likely to influence consumers in their commercial decisions." Given that the trend on the United States Supreme Court is to be more protective of commercial speech, not less, this broadened definition got the justices' attention and persuaded them to grant Nike's appeal, *Nike, Inc.* v. *Kasky*, despite some procedural uncertainties in the case.

But the procedural issues consumed long parts of the argument, raising the possibility that the court's eventual decision, due by the end of June, would resolve neither the particular dispute nor the fundamental issues. Kasky's legal complaint cited six statements that Nike made on nine occasions, but in the absence of a trial, these have not been sorted out in any detail.

"The problem with this case is that it comes to us at such a preliminary stage," Justice Ruth Bader Ginsburg told Tribe, Nike's lawyer.

Any trial would be nothing more than a "show trial," Tribe, a professor at Harvard Law School, replied, an effort to pin a "scarlet letter" on the company. What kind of trial could evaluate "such a hopeless mix of fact and opinion?" he asked.

The Bush administration entered the case on Nike's side to defend what Solicitor General Theodore B. Olson said was the federal government's regulatory interest in preventing

deceptive advertising while remaining mindful of the First Amendment. The flaw in California's law, he said, is that it gives private plaintiffs like Kasky the power to "advance their own agendas" by bringing the type of lawsuit that should be reserved for government regulators.

"Anyone with a whim or a grievance or a filing fee," Olson said, "can become a government-licensed censor," without a need to show that anyone relied on or was harmed by the information said to be misleading.

It was not clear that this argument actually offered Nike much assistance. "In five minutes, they'll find someone who bought Nike shoes," Justice Breyer said, adding that Kasky or another plaintiff could easily maintain that he would not have bought Nike shoes if he had not believed what the company said.

"It seems to me your solution doesn't really get to the problem," Justice Ginsburg told Solicitor General Olson.

Hoeber, Kasky's lawyer, described the California law as "admittedly unusual and maybe unique." Kasky is seeking a variety of remedies, including a requirement that Nike disgorge all its California profits attributable to the challenged statements. These included what Kasky has said were overly favorable descriptions of a report that Andrew Young, former ambassador to the United Nations, issued after investigating conditions at Nike's overseas factories, as well as claims that a Nike executive made at a shareholders' meeting in describing factory conditions.

Addressing Hoeber, Justice Sandra Day O'Connor observed that none of the challenged statements were "advertising in the true sense."

Hoeber agreed that they were not in an "advertising format." But he said it would be a mistake to limit the definition of commercial speech to advertising, because "that line would leave out a lot of promotions and representations that consumers rely on."

"It's not a perfect world," Justice Antonin Scalia responded.

Justice Anthony M. Kennedy suggested that anything short of a clear definition would raise additional First Amendment problems. "If it's very difficult to define commercial speech, isn't it true that companies will be chilled in speaking?" he asked.

Hoeber replied: "To the extent that the definition is unclear, it may be. It's plausible." Reported in: *New York Times*, April 24.

The city of Richmond, Virginia, put the streets and sidewalks in and around a crime-ridden public housing project off-limits to nonresidents in 1997 in an effort, duplicated elsewhere around the country, to control crime by controlling access. The question for the Supreme Court April 30 was whether the city violated the First Amendment by turning a public space into a no-trespass zone where those who want to distribute leaflets, speak, or simply visit family at the 4,100-unit Whitcomb Court need the permission of the police or a housing authority official.

After an hourlong argument, the answer to that question appeared to be: perhaps, but not in this case.

The trespass policy was challenged by a man who was arrested on a sidewalk in the middle of the downtown Whitcomb complex, where his mother and children lived. The trespass conviction was the third for Kevin L. Hicks, who had previously been notified by the property manager that he was "not welcome" there and would be arrested if seen on the property again. A state appeals court and the Virginia Supreme Court ruled in his appeal that the policy was so broad, so vaguely written and gave so much discretion to officials to decide who could enter and speak that it violated the First Amendment.

The problem for the justices was that Hicks, who told the police that he was delivering diapers to his baby, had not shown any interest in exercising his free-speech rights on the sidewalks of Whitcomb Court. For this reason, the State of Virginia argued in its appeal, he was not an appropriate person to mount a First Amendment challenge to the trespass policy, and the state courts were "misguided" in even addressing that constitutional issue in this case.

"This defendant is a common trespasser who is not engaged in any expressive activity," William H. Hurd, Virginia's state solicitor, told the justices.

Under the court's precedents, unusually generous rules apply to identifying those who have legal standing to raise First Amendment issues. Even someone whose own speech is not at issue may have standing to challenge a law or policy on the ground that it may inhibit the speech of someone else who is not before the court. This departure from the usual rule, which accords standing only to those with a direct personal stake, is based on the theory that speech is easily chilled and First Amendment interests need special protection.

But Hurd and Michael R. Dreeben, a deputy solicitor general who argued on Virginia's side for the federal government, both said this relaxed rule of standing did not apply to someone engaged in conduct without any speech component at all.

The justices appeared to agree with that analysis. Several members of the court questioned Steven D. Benjamin, the lawyer for Hicks, on whether other possible challenges to the policy would remain available if the court decided that Hicks lacked standing to bring a First Amendment challenge. They appeared reassured when Benjamin said that while the Virginia Supreme Court had invoked only the First Amendment in invalidating the policy, the case could still proceed under alternative theories, including claims that the policy was unconstitutionally vague and interfered with constitutionally protected freedom of movement.

When Benjamin started to explain that Hicks was engaged in "expressive conduct" because "he was going to see his children," Justice Anthony M. Kennedy interrupted him. "You know, I think it's a mistake to put too much on the First Amendment," Justice Kennedy, known as one of the court's strongest First Amendment advocates, told the defense

lawyer. “It tends to trivialize the First Amendment to put too much on it.”

The Virginia Supreme Court’s First Amendment analysis was “very questionable,” Justice Kennedy told Benjamin, at the same time reassuring him that “you have so much else” to draw on in the case.

Justices Stephen G. Breyer and David H. Souter told Benjamin they were concerned that under his theory, every ordinary trespassing case could become a First Amendment case because the trespasser could argue that the speech of someone else might be chilled by the regulations.

The case, *Virginia* v. *Hicks*, drew the attention of dozens of “friend of the court” groups. Fifteen other states, along with local governments and public housing authorities around the country, filed briefs on Virginia’s side, while the American Civil Liberties Union, the National Association of Criminal Defense Lawyers and other civil liberties groups joined the challenge to the policy. Reported in: *New York Times*, April 30.

The Bush administration asked the Supreme Court on April 30 to reverse a California-based federal appeals court decision that barred children in public schools from reciting the phrase “under God” in the Pledge of Allegiance.

In a brief urging the court to take up the controversial case, the Justice Department emphasized that “not every reference to God” amounted to an unconstitutional government endorsement of religion. It said the phrase in the pledge was an “official acknowledgment of our nation’s religious heritage,” no different than other religious references in public life, including the motto “In God we trust,” which appears on American currency.

“The pledge is no more of a coercive religious exercise than the requirement at the opening of federal courts that individuals stand while a court official announces, ‘God save the United States and this honorable court,’“ the department argued in its brief, which was announced by Atty. Gen. John Ashcroft.

The department’s action was the Bush administration’s latest foray into the political battle to define the separation of church and state that is guaranteed in the Constitution. Many conservatives have argued that the nation was founded by religious men and should be informed by religious principles, while liberals have responded that a stark separation is necessary to protect the rights of religious minorities, agnostics and atheists.

When the ruling was announced in June, it ignited a political firestorm, including scathing comments from the White House. The next day, senators recited the pledge while in the House lawmakers sang “God Bless America.”

Justice Department lawyers said the court should step into the case because federal appeals courts in different regions have split on the pledge issue. The U.S. Court of Appeals for the Seventh Circuit in Chicago, for example, ruled in 1992 that the phrase “under God” could be recited by schoolchildren in public schools in Illinois, Indiana and Wisconsin.

But the decision last June by the California-based U.S. Court of Appeals for the Ninth Circuit requires 9.6 million schoolchildren in the nine states covered by that court to recite an abridged version of the pledge.

“The pledge cannot serve its purpose of unifying and commonly celebrating the national identity unless it is one pledge with one content for all citizens at all points in their lives,” the Justice Department said. “There is no reason to tolerate such disruption and disharmony in the schools of this nation.”

The Supreme Court has never directly addressed whether the phrase “under God” violates the Constitution’s First Amendment, which keeps church and state separate. But the government argued in its 30-page brief that the court had implicitly approved the phrase in other rulings that characterized the pledge as an “acknowledgment of the nation’s religious heritage and character.”

The Justice Department said that opinions of six current justices in other cases have “cemented as common ground” the notion that the pledge is constitutional and merely describes the “culture and character” of a nation believed to have been founded under God. Ashcroft said no Supreme Court justice has expressed a different view and that “schools across America” have relied on the court’s “repeated assurances as they have started their day with the pledge.”

“Our religious heritage has been recognized and celebrated for hundreds of years in the national motto [‘In God we trust’], national anthem, Declaration of Independence and Gettysburg Address,” Ashcroft said.

The controversial case came about in March 2000, when Sacramento activist and atheist Michael Newdow went to court seeking a declaration that the phrase “under God” in the pledge is unconstitutional. Congress enacted the Pledge of Allegiance in 1942 and added the words “under God” to it in 1954. Newdow contended that daily recitation by schoolchildren, including his 8-year-old daughter, results in “daily indoctrination . . . with religious dogma.”

A federal judge threw out Newdow’s suit, but a three-judge panel of the appeals court agreed with Newdow. In a 2–1 decision, it said schools could not “coerce impressionable young schoolchildren to recite it or even stand mute while it is being recited by their classmates.” The dissenting judge noted that the court’s holding would preclude many patriotic songs, such as “God Bless America,” in public ceremonies.

Legal observers widely expected the entire U.S. Court of Appeals for the Ninth Circuit to step in and review the case, but it declined to do so. The appeals court ruling is on hold while the government and the California school district involved seek Supreme Court review.

The Justice Department also is urging the court to rule that Newdow lacked the legal authority to bring the lawsuit in the first place, because he does not have custody of his daughter. That approach would avoid a ruling on the merits, leaving the issue open for another day. If the court were to

take up the case, it would hear arguments next fall. Reported in: *Chicago Tribune,* May 1.

Barely a year after ruling that the Constitution does not ban the use of taxpayer money for religious school tuition, the Supreme Court on May 19 agreed to take the next step and decide whether a public subsidy for religious instruction may under some circumstances be constitutionally required.

This potentially explosive issue reached the court in an appeal by the State of Washington, which like many other states has a provision in its Constitution that prohibits the use of public money for religious instruction. The state turned down an application for a scholarship from an otherwise eligible student who sought a theology degree at a private Christian college.

The student sued and won a ruling from the federal appeals court in San Francisco that the state policy amounted to unconstitutional discrimination against religion.

As supporters of tuition vouchers were quick to point out, the case opens the next front in their long-running effort to establish what they describe as a neutral playing field on which explicitly religious activities can stake a constitutional claim to public support on the same basis as secular activities. State constitutions have stood as an obstacle to that goal.

Thirty-seven state constitutions contain a proscription against public financial support for religion. These provisions are generally referred to as Blaine amendments, after the sponsor of a failed effort to attach such an amendment to the federal Constitution in 1875. They have come under increasing scrutiny in light of recent Supreme Court decisions that have invoked a general principle of equal access to expand the space for religion in public life.

The case, *Locke* v. *Davey,* will be argued next fall and could mark the court's next term as an extremely important one for religion even without the prospect of the Pledge of Allegiance case that the Bush administration has appealed to the court.

Washington makes state scholarships available for use at accredited religious colleges, as long as the money is not used to pursue a degree in theology. The policy, embodied in a state law as well as the Washington Constitution, was challenged in 1999 by Joshua Davey, a student at Northwest College, in Kirkland, near Seattle, where he was seeking a degree in pastoral ministries.

Davey, represented by the American Center for Law and Justice, a law firm affiliated with the Rev. Pat Robertson, lost in Federal District Court in Seattle, which held that while the state could not prevent Davey from pursuing religious studies, it was under no obligation to finance those studies.

Last July, the Ninth Circuit overturned that decision, ruling 2 to 1 that the state scholarship program had established a "fiscal forum," much as a government might establish a public forum for free speech. Just as religious speech may not be excluded from a public forum, the benefits of a fiscal forum "may not be denied on account of religion," the appeals court said.

In its appeal to the Supreme Court, Washington said the ruling placed the state in an "intolerable situation." Its own State Supreme Court has upheld the limitation, a part of the state's Constitution since Washington's admission to the Union in 1889, while the federal appeals court has in effect declared the provision unconstitutional. The issue was one of national significance, the state said.

The Institute for Justice, a leader in the movement to expand the use of vouchers for religious school tuition, also urged the justices to take the case, but to affirm rather than reverse the Ninth Circuit's decision. The institute, a public policy and litigating organization, has filed lawsuits around the country attacking Blaine amendments, which stand as significant obstacles to expansion of the Ohio voucher program that the Supreme Court upheld last June. Clark Neily, a lawyer with the group, said that the case the court accepted would "resolve all these cases under one unified theme." Reported in: *New York Times,* May 20.

student press

University Park, Illinois

A federal appeals court ruled April 10 that a 1988 Supreme Court decision that gave wide latitude to high-school administrators to review and censor student publications does not apply to student newspapers at public colleges. The U.S. Court of Appeals for the Seventh Circuit made the ruling in finding that a dean at Governors State University does not have immunity from a suit filed by the editors of *The Innovator,* the student newspaper at the Illinois institution.

The editors sued the dean after she told the newspaper's printer that a university official had to approve the content of the newspaper before it could be printed.

Patricia A. Carter, the dean of student affairs and services at Governors State, admitted making that request to the printer in 2000. But she argued—with backing from the Illinois attorney general—that the suit should have been dismissed because of uncertainty about the constitutional protections afforded to college journalists. Her lawyers cited the 1988 Supreme Court ruling in *Hazelwood School District* v. *Kuhlmeier,* in which the court ruled that high-school journalists did not enjoy the same First Amendment protections as adults.

While the *Hazelwood* decision dealt with high-school journalists, many college journalists have feared that it could be used to limit their freedom. As a result, many journalism groups have backed the Governors State student editors and warned that a ruling against them could have broad implications for college newspapers.

In the decision, the court ruled that college journalists are protected by the U.S. Constitution, unlike high-school journalists. "The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities," the decision said. "While

Hazelwood teaches that younger students in a high-school setting must endure First Amendment restrictions, we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level."

Advocates for student journalists hailed the decision as a major victory. "There has been a growing murmur among college officials that maybe the law isn't so clear, that they can get away with censoring student publications on campus," said Mark Goodman, executive director of the Student Press Law Center, a nonprofit group that provided the plaintiffs from *The Innovator* with legal assistance. "I think this decision slams the door on that argument. No one can reasonably argue at this point that *Hazelwood* applies to colleges or that college student media are not entitled to very strong First Amendment protection." Reported in: *Chronicle of Higher Education* online, April 11.

university

Monroe, Louisiana

A state appeals court in Louisiana on May 16 threw out a defamation lawsuit against a former faculty member at the University of Louisiana at Monroe (ULM) who had operated an anonymous Web site highly critical of the university's administration. The court also ordered the former university administrator who filed the suit to pay the defendant's court costs.

The suit was filed by Richard L. Baxter, the university's former vice president of external affairs, who was one of the officials criticized on the site; at one point, the site described him as "the vice president of excremental affairs." Last summer, Baxter left the administration and resumed a post as professor of mass communications at the university.

Baxter argued that the site, known as Truth at ULM, had posted false and malicious information that had hurt his reputation and had interfered with his career advancement. He sought $75,000 in damages.

The site was operated by John L. Scott, who was an associate professor of economics at Monroe at the time. He now is an associate professor of economics at Southern Arkansas University.

Louisiana law permits dismissal of a defamation suit before trial if the plaintiff has not demonstrated "a probability of success." A trial court had refused to dismiss the case, so Scott appealed to the higher court. Baxter and Scott subsequently agreed to settle the case, with Scott admitting that his Web site had reported some erroneous information about Baxter.

In its ruling, a three-judge panel of Louisiana's Court of Appeal for the Second Circuit ruled that, for the purposes of the suit, Baxter was a "public official." Under U.S. Supreme Court rulings regarding defamation cases, as a public official Baxter would have had to prove that Scott had posted false information with "actual malice," meaning that Scott either knew that the information was false or acted with reckless disregard for whether it was true.

But Baxter had "produced nothing" to show this, the appeals court found. "Actual malice is not shown merely by evidence of ill will or 'malice' in the ordinary sense of the word; nor is it to be inferred from evidence of personal spite, an intent to injure, or a bad motive," the court ruled.

By contrast, the appeals court said, Scott had demonstrated "that he had a reasonable belief in the truth of what he was publishing," and that the Web site included opinion and hyperbole, which are protected from defamation suits because they "cannot reasonably be interpreted as stating actual fact."

The court dismissed the case "with prejudice," meaning that Baxter cannot file it again, and ordered him to pay Scott's court costs.

In response to the ruling, Scott said, "Louisiana law requires that those who want to silence someone by filing a lawsuit must show that they have a case. Dr. Baxter could not show that he had a case."

Baxter said he was disappointed by the ruling but also puzzled, because, he said, he and Scott had recently agreed to settle the case out of court. The statement signed by Scott as part of the settlement said that Truth at ULM had contained factual errors regarding Baxter, among them a statement that Baxter had physically blocked a reporter from attending a meeting.

"Fostering personal anguish was not my intention and I regret any personal anguish that Dr. Richard Baxter has felt as a result of the operation of the Truth at ULM Web site," Scott said in the statement, which was dated April 14.

Baxter said the admission satisfied him enough that he had agreed to settle the case. "I have achieved what I wanted to do, and that is to set the record straight," he said.

Last year, Baxter unmasked Scott as the operator of Truth at ULM by suing the site's Internet provider, arguing that the company had failed to act against the site even though it had defamed Baxter. The company, Homestead Technologies, of Menlo Park, California, told Scott that he would have to pay for the company's legal defense if he wanted to remain anonymous.

By that point, Lawson L. Swearingen, Jr., the president of the university who had been the focus of much of the Web site's criticism, had resigned. So Scott allowed himself to be identified, and the site was shut down.

His outing as the site's Webmaster still rankles. "I am relieved that the court recognized that this case was all about free speech," Scott said. "But the Web service provider shut down the site a year ago because I couldn't pay them tens of thousands of dollars to insure them, so the suit did silence me."

"In my opinion, this is a case of powerful employees of the state trying to silence a critic," he said. Reported in: *Chronicle of Higher Education* online, May 20.

Internet

Los Angeles, California

A federal judge in California ruled April 23 that the Internet's most popular music-swapping services are not responsible for copyright infringements by users. It was a potential victory for the millions of people who share songs over the Internet, and a blow to record companies trying to shut down systems that enable what they consider to be theft.

The surprise decision—which likened music-sharing services to companies that sell VCRs—was counter to a series of victories for the recording industry in recent years, specifically the 2001 lawsuits that led to the closing of Napster, the seminal and dominant Internet song-sharing service of the 1990s. Since the end of Napster, it was generally thought that the legal tide had turned against free song-swapping on grounds of copyright infringement. Performers are not paid royalties and record companies don't make money on songs traded free on the Internet.

The Recording Industry Association of America, which represents the music industry, and the Motion Picture Association of America—which is attempting to stanch the free sharing of movies on the Internet—sued StreamCast Networks, Inc., and Grokster file-sharing services in 2001, asking the court to order them closed. StreamCast is the parent of the Morpheus song-sharing service.

U.S. District Court Judge Stephen V. Wilson's decision "is significant in part because it breaks the wave of copyright holders prevailing in their claims on new mass-media types of infringement," said Megan E. Gray, a Washington lawyer who specializes in intellectual property. "Upon scrutiny, the [plaintiffs'] case breaks down in several places and they cannot prevail."

The record industry has blamed its current recession on what it calls Internet music piracy. CD shipments fell 9 percent in 2002 compared with 2001, while online CD sales have dropped about 20 percent in the past year, according to Comscore Networks, which tracks Internet use.

Music companies have moved aggressively in the courts to target illegal song-swappers. Earlier in April, the music industry sued four college students that it alleged were running illegal song-swapping Web sites.

Grokster and Morpheus argued that song trading is only one use for their file-sharing systems, which also host legal activities. Suits designed to protect copyright were instead harming useful and important technology, the defendants argued.

In the decision, Wilson invoked the landmark 1984 Sony Betamax case, ruling that the defendants are "not significantly different" from companies that sell VCRs and photocopiers. In essence, he ruled that product makers are not responsible for what consumers do with the products.

"When users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster," Wilson wrote. "Neither Grokster nor StreamCast provides the site and facilities" for direct copyright infringement.

Morpheus and Grokster differ from Napster in that Napster used a centralized server and song-index system, which meant it could be held directly accountable for the actions of its users. Since Napster's demise, file-sharing systems such as Morpheus have moved to decentralized servers, which removes their liability, the judge ruled. If Napster was a song warehouse, Morpheus is a bloodhound: Users ask for songs, and Morpheus shows where those songs are stored on other users' computers.

The music and movie industries said they would appeal yesterday's decision to the U.S. Court of Appeals for the Ninth Circuit.

"Businesses that intentionally facilitate massive piracy should not be able to evade responsibility for their actions," said RIAA chief executive Hilary Rosen. "We disagree with the district court's decision that these services are not liable for the massive illegal piracy that their systems encourage."

The plaintiffs said the decision reaffirmed that sharing and copying copyrighted material is illegal. Further, Morpheus and Grokster quite likely know that their systems enable copyright infringement and use it to lure advertising to their sites, the judge said. Those facts will support overturning the decision on appeal, said David Kendall, lawyer for the MPAA.

"When a user sits down to use Grokster or Morpheus, he or she has the very same experience as Napster," Kendall said. "That facilitation of piracy makes them liable. The distinction between central indexing and outsourcing one level away we don't believe—and the judge disagreed with us—we don't believe is legally significant enough to allow them to escape liability."

Stanford University law professor Lawrence Lessig said the ruling probably will hold up. Further, Lessig pointed out, Wilson's ruling put the ball back in the hands of lawmakers, which Lessig applauded. "When technology changes the way content is distributed, it is up to Congress and not the courts" to make the laws, Lessig said.

"Hollywood sought to control what innovators can make available to consumers," said Cindy Cohn, legal director for the Electronic Frontier Foundation, which represents Morpheus. "This ruling makes clear that technology companies can provide general purpose tools without fear of copyright liability." Reported in: *Washington Post*, April 25. □

libraries

Little Rock, Arkansas; Denver, Colorado

Academic-library groups are denouncing copyright-protection bills that legislatures in several states are considering. The groups say that the bills, if they became law, could erode fair-use rights even more than the Digital Millennium Copyright Act, the controversial federal law that makes it illegal to bypass technologies designed to protect digital works.

The state bills are based on model legislation pushed by the Motion Picture Association of America and cable operators and programmers. The legislation would amend state telecommunications and cable-security laws to prevent digital piracy. But the bills' wording is so sweeping that it could become illegal to view or copy radio, television, or Internet material without communications providers' express permission, said Jonathan Band, a Washington lawyer who represents the Association of Research Libraries, the American Association of Law Libraries, and the American Library Association.

Under the model legislation, theft of a communications service could be defined as encompassing a broad range of activities, including "the receipt, interception, disruption, and transmission" of broadcast works, said Band. He helped the library groups draft a letter to Colorado and Arkansas legislators. The letters warned lawmakers that the antitheft bills could stifle encryption research, security testing, and reverse engineering, a procedure that allows users to take apart and fix defects in software.

"While digital piracy is a serious problem," the letter to the Colorado Senate read, "some of the proposed amendments will undermine the ability of libraries to provide important information services." Band said the state bills also could disrupt the ability of scholars to assemble databases from Web material.

The letters were sent to Colorado and Arkansas legislators because those states are furthest along in considering the antitheft legislation, said Band. But Florida, Georgia, Massachusetts, South Carolina, Tennessee, and Texas are also considering the legislation, according to Edward W. Felten, a Princeton University computer scientist who has been tracking the state bills, which he calls "super-DMCA" bills.

Felten is well known for his unsuccessful lawsuit against the recording industry and the U.S. Justice Department, in which he argued that the digital-copyright law is unconstitutional. That case was dismissed in November 2001.

Band said bills similar to the model legislation already have been signed into law in Pennsylvania, Maryland, Delaware, Illinois, and Michigan. He said it's unclear whether the federal digital-copyright law trumps related state laws, which might make them less of a worry.

Vans Stevenson, the motion-picture group's senior vice president for state legislative affairs, accused the library groups of misunderstanding state antitheft legislation. "People are seeing demons where there are none," he commented, adding that the state laws are intended to thwart theft, not legitimate academic research. Reported in: *Chronicle of Higher Education* online, April 1.

Tallahassee, Florida

A bill approved by the Florida Legislature would give parents access to library records for children younger than 16 if materials are lost or overdue. Parents, however, would not be able to access the children's records if materials are not lost or overdue. Lawmakers passed the measure on May 2. Supporters claimed it will help public libraries collect late fines and give parents the control they deserve. Those who oppose opening the records, even if it's just to collect fines, said it will dangerously erode the right to intellectual freedom.

The existing state law guarantees that all library materials checked out by children or adults are private. Libraries in Palm Beach County have differed on how they've interpreted that law. The Boca Raton Public Library has strictly adhered to the no-tell law, even in the face of angry parents.

"Parents of very young children become very frustrated when their children have books overdue and they want to know which ones they have to find," said Catherine O'Connell, manager of the Boca Raton Public Library. "Our staff is absolutely well-trained about not giving out information."

That's not the case at the branches in the Palm Beach County Library System, which give parents information on what their children have checked out, in the name of cooperation. The county policy is in contradiction to current state

law, but would be in line with the state if the new legislation takes effect.

"Our current policy is that, if a parent asks about a fine, we will tell the parent what the book is," said Kathy Boyes, manager of community relations for the system, which has fourteen libraries and one bookmobile. The county system's policy gives parents, guardians or other adults with financial responsibility access to a child's circulation records.

"We interpret it to mean that we could tell parents what their children have out. We tell only the parent who signed the library card, in terms of fines or lost materials," Boyes said. "They have right to know what book they're paying for."

"I had no idea that parents couldn't have access to what their child checked out," said Corrie DiSalvo, 16, who has been taking stacks of books out of the West Boynton Branch Library since she was in elementary school. "I think parents should be able to know. If you don't have an adult card, they're responsible," said DiSalvo, a student at Atlantic High School.

Her mother, Diane DiSalvo, had no idea she didn't have access to her two children's library records. "I just assumed that if I wanted to know what they checked out, the library would look that up for me," she said. "I think it's important, in this day and age, to be able to see what's going on with your kids. They get too much exposure to things they might not be mature enough to handle."

Some librarians disagree. They say many young teens look for information in libraries on topics that may be too sensitive or even dangerous to bring up at home, such as how to live with a parent who drinks too much or is abusive, and issues they're grappling with, such as homosexuality, date rape, pregnancy, drugs, or sexually transmitted diseases.

In the previous session, the state Legislature considered a bill, sponsored by Sen. Evelyn Lynn, R-Ormond Beach, to let parents know what their children have if it is overdue. It cleared the House but died in the Senate. Lynn's bill became part of this session's legislation, sponsored by Rep. Rene Garcia, R–Hialeah.

"The legislation will, I hope, clear up any confusion about the interpretation of the current law," said Jerry Brownlee, director of the Palm Beach County Library System. "It will have little impact on the operations of our library." Reported in: *South Florida Sun-Sentinel*, May 9.

universities

Harrisburg, Pennsylvania

In an opening salvo against what it calls restrictive campus speech codes, a nonprofit educational foundation filed suit against Shippensburg University in Pennsylvania, charging that its code of conduct violates students' constitutional rights to free speech.

Shippensburg's Code of Conduct, which is typical of colleges nationwide, gives each student a "primary" right to be free from harassment, intimidation, physical harm or emotional abuse, and a "secondary" right to express a personal belief system in a manner that does not "provoke, harass, demean, intimidate or harm" another. The university also prohibits conduct that "annoys, threatens, or alarms a person or group," like sexual harassment, innuendo, comments, insults, propositions, jokes about sex or gender-specific traits and even "suggestive or insulting sounds," leering, whistling, obscene gestures.

The president of the university, Anthony Ceddia, supplemented the code in March with a policy limiting demonstrations and rallies to two specific "speech zones" on campus.

The university, 35 miles from Harrisburg, issued a statement, saying: "Shippensburg University strongly and vigorously defends the right of free speech. As an institution of higher education we encourage and promote free speech among and between individuals and organizations. Through the exercise of this important right our students are able to see various aspects of an idea, analyze those ideas and form their own opinions on those ideas. The university is also committed to the principle that this discussion be conducted appropriately. We do have expectations that our students will conduct themselves in a civil manner that allows them to express their opinions without interfering with the rights of others."

Alan Charles Kors, president of the Foundation for Individual Rights in Education, or FIRE, which filed the suit, said: "Such codes are a moral, educational and legal scandal in American higher education. A nation that does not educate in liberty will not long preserve it and will not even know when it is lost."

FIRE, based in Philadelphia, is made up of professors, policy experts and public intellectuals from across the ideological spectrum, with a board that includes conservatives, liberals and libertarians. Over the next year, the group plans to coordinate legal challenges to campus speech codes in each of the twelve federal appellate circuits. Thor Halvorrsen, the chief executive of FIRE, said the group had compiled a database of campus speech codes that it would post online at http://speechcodes.org.

"Since the late 1980's, there have been several major legal decisions against unconstitutional speech codes in higher education," he said. "FIRE is moving from scattershot approaches to ending the scandal of speech codes to a concerted campaign to make it clear that codes like Shippensburg's are unconstitutional barriers to the free flow of ideas."

Halvorssen said that more than two-thirds of all public colleges and universities have speech codes that are unconstitutional. He said he could not offer a simple definition of what is unconstitutional because colleges restrict speech in many ways, through pluralism statements, tolerance statements, e-mail policies, and the like. "They do not have the guts to call them what they are: speech codes," he said.

The lawsuit marks a new approach for FIRE, which typically works on individual cases where it believes a person's

civil liberties are being threatened. Kors argued that multiple lawsuits will be more effective in dismantling restrictive speech policies: "It is not efficient to proceed case by case, outrage by outrage, for the next hundred years. . . . We want to bring down unconstitutional speech codes nationally. We want the law to pronounce on this, and we want American society to impose its protections on the public universities and colleges it subsidizes."

Kors said that Shippensburg was chosen as the first case in part because its policies are representative of a large number of universities.

Halvorssen said Shippensburg's policy could lead to punishment or suspension of students for almost any passionate expression. "Under this policy, a student who says Republicans are engaging in a racist war could be subject to punishment, as would a feminist student who goes to a rally with a sign that says 'Keep your rosaries off my ovaries,' or an evangelical student who uses expressions that offend a lesbian student," he said. "Prejudice, intolerance and bigotry do not disappear when you prohibit their expression. You know what happens when students offend each other? They have conversations, and an exchange of views."

The plaintiffs are referred to as John and Jane Doe and the complaint said they belong to student organizations that hold beliefs on issues of race, sex, religion, and sexual orientation that may be objectionable to other students and sanctionable under the speech code.

"It's significant that they file as Jane and John Doe and the judge allowed it," Halvorrsen said. "It tells you a lot about the climate on campus, when students are so fearful about saying what they think."

One longtime opponent of speech codes said he supports FIRE's goal but questions its strategy. Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression and a law professor at the University of Virginia, said that even at the height of the speech-code "frenzy," in the late 1980s and early 1990s, only about 200 institutions adopted the kinds of speech codes that were ultimately struck down by federal courts for being overly broad and unconstitutional. Most colleges, he said, simply have policies designed to prevent harassment that could potentially be applied to student speech.

I just can't believe there are anything like that number of genuine speech codes," O'Neil said of FIRE's assertion that more than two-thirds of universities have such policies. "If all they're talking about are policies focused on harassment which could conceivably be applied to student speech but never have been, that really is rolling out the cannon to shoot a mouse." Reported in: *New York Times*, April 24; *Chronicle of Higher Education* online, April 24.

State College, Pennsylvania

The Recording Industry Association of America apologized May 11 to Penn State University for sending an incorrect legal notice of alleged Internet copyright violations. The notice and subsequent apology appeared to be the first time a faulty incorrect notification has been made public. The incident also showed just how easily automated programs that search for copyrighted material can be fooled, as well how disruptive such notices can be on college campuses.

On May 8, the RIAA sent a stiff copyright warning to Penn State's department of astronomy and astrophysics. Department officials at first were puzzled because the notification invoked the Digital Millennium Copyright Act and alleged that an FTP site was unlawfully distributing songs by the musician Usher. The letter demanded that the department "remove the site" and delete the infringing sound files. But no such files existed on the server, which is used by faculty and graduate students to publish research and grant proposals. Matt Soccio, the department's system administrator, said that he searched the FTP server "for files ending in mp3, wma, ogg, wav, mov, mpg, etc., and found nothing that would precipitate this complaint."

Except, that is, when Soccio realized two things. The department has on its faculty a professor emeritus named Peter Usher and the same FTP site hosted Usher's work on radio-selected quasars. The site also had a copy of an a capella song performed by astronomers about the Swift gamma ray satellite, which Penn State helped to design.

The combination of the word "Usher" and the suffix "mp3" had triggered the RIAA's automated copyright crawlers. Reported in: Cnet News, May 12.

University Park, Pennsylvania

An administrator at Pennsylvania State University at University Park sent a stern e-mail message to students, warning that sharing copyrighted material through the Internet could lead to fines and imprisonment under federal law. The message has some students at Penn State wondering if the university is stepping up its efforts to stop file sharing, and if it is bending to pressures from the recording industry in doing so.

The message, which was signed by the provost, Rodney A. Erickson, detailed various punishments that students could face if they are caught downloading music or movies. The loss of Internet privileges, a standard punishment at many colleges, is mentioned, but the message also threatened expulsion, $250,000 fines, and the possibility of facing federal perjury charges. The message also mentioned cases in which students have been sent to jail for copyright infringement.

"The bottom line is that there is a potentially high price to pay for an illegally copied computer program, movie, or recording," Erickson wrote in the message, sent March 31. "Messing up your future is a steep price to pay for music or a video."

Erickson dispatched his message about a month after a hearing on illegal file sharing, held by a subcommittee of the U.S. House of Representatives, at which Graham B. Spanier, the president of the university, was scolded by lawmakers

who insisted that universities weren't doing enough to solve the problem. Spanier also recently helped set up a committee of university administrators and entertainment-industry executives to discuss the file-sharing issue.

But Erickson said his message was not a reaction to those events. Rather, it was merely a standard part of the university's educational campaign on file sharing. "This is not the first message that I have sent out about the issue," he said, adding that he sent out a letter in 2000, when Napster was popular. "This is part of our continuing efforts to inform students about copyright and to make sure they understand that there are consequences for illegal file-sharing activity."

Erickson said that the university was suspending the Internet accounts of students who were found downloading protected music or movies. He said the university would not give the names of students to the entertainment industry for prosecution unless so ordered by a court.

However, the tone of the message struck some students. "It was a rather stern e-mail," said D. Joshua Troxell, a junior who is the president of the student Academic Assembly. Troxell said he was going to talk to administrators about the message and ask whether the university was going to increase penalties for file sharing, or if the university was working with the industry. "That was one of my greatest concerns."

Justin J. Leto, a senior majoring in computer engineering, sent the note to Politech, a technology-oriented online discussion forum. He thinks the message is the result of pressure from the recording industry, and notes that Barry K. Robinson, senior counsel for corporate affairs at the Recording Industry Association of America, sits on Penn State's Board of Trustees.

"The stakes are rising," he said. "They are threatening imprisonment and fines. This is not what we were talking about a month ago. A month ago, we were talking about a slap on the wrist and having your Internet account taken away."

"We have heard stories about the RIAA monitoring and tracking people's online use, identifying people who have downloaded copyright material, and prosecuting them," Leto said. "I'm waiting for the day when we'll see network administrators at Penn State doing the grunt work for the RIAA."

Jonathan Lamy, a spokesman for the Recording Industry Association of America, said the industry group had nothing to do with e-mail warning at Penn State, but was enthusiastic about its contents. "This is welcome news," he said. "We are gratified when colleges like Penn State take steps to educate their students that downloading or offering copyrighted music off a pirate peer-to-peer network is against the law and has consequences." Reported in: *Chronicle of Higher Education* online, April 2.

Marshall, Texas

The American Association of University Professors has found that East Texas Baptist University violated the academic freedom of a longtime professor last year by firing her after deciding she was too outspoken and too willing "to challenge those in authority."

East Texas Baptist dismissed Jane B. Knight, an assistant professor of business, in February 2002, telling her that "she was no longer a fit for the university," according to a report the AAUP published in *Academe,* its magazine. Knight, 61, had worked at the university for 18 years on a series of short-term contracts. East Texas Baptist does not grant tenure.

In a letter to Knight in August of 2001, Richard H. LeTourneau, a former dean of the university's business school, wrote that the professor's "personality," including her "sarcasm" and "mood swings," were causing problems. He wrote: "God has placed you, Jane, in a hierarchy of authority in the institution . . . and it is only as you learn to accept the judgment of those in that chain of authority that you can continue to be effective in your work."

LeTourneau warned Knight that there was "little hope" of her remaining at the university "if you challenge [the letter] or any of the matters I am trying to say in it." Six months later, officials dismissed Knight.

The former professor said university officials "didn't like me because I spoke up" about what she thought were problems in the business school. She added: "None of my ability was ever questioned."

The AAUP report described the letter from LeTourneau as "intimidation that inhibited the appropriate exercise of academic freedom." It also concluded that the "notice of termination" Knight received, which gave her five months' notice, "was severely inadequate," and that the university should have offered her a hearing before dismissing her.

In a letter responding to the AAUP's allegations, J. Paul Sorrels, the university's vice president for academic affairs, noted that East Texas Baptist had not adopted AAUP standards regarding academic freedom or tenure. He said the university had therefore decided not to participate in the "unproductive exercise of measuring the university's actions against a set of standards to which the university does not ascribe."

Knight filed a complaint with the Texas Human Rights Commission, charging that the university had discriminated against her based on her age and gender. Although the former professor said she could not talk about the terms of the university's settlement offer, she said she was planning to accept it. Reported in: *Chronicle of Higher Education* online, May 20.

church and state

Denver, Colorado

A recently enacted voucher law will drain millions of dollars from Colorado public schools and violate the state constitution's ban on public financing of religion, Americans United for Separation of Church and State charges in a law-

suit filed May 20. Americans United and allied organizations brought the legal action in Denver County District Court of behalf of an array of Colorado parents, clergy and taxpayers.

Religious schools should be funded by their supporters, not the taxpayers, said the Rev. Barry W. Lynn, Americans United executive director. If allowed to proceed, the Colorado voucher law will force school districts statewide to divert their limited funds into religious schools. The plain language of the Colorado Constitution prohibits this kind of public aid to religion.

The lawsuit in Colorado is an important battle in a larger conflict over the proper relationship between religion and government in America, continued Lynn. Sectarian pressure groups and their political allies want to dismantle the public school system and force all Americans to pay for an array of religious schools. It would be a disaster if we allow that to happen.

The voucher law, called the Colorado Opportunity Contract Pilot Program, requires eleven school districts to participate and allows all others to join. The vouchers for tuition at religious and other private schools will be available to low-income students who attend public schools deemed unsatisfactory in at least one academic area. The lawsuit argues that the voucher plan violates several provisions of the Colorado Constitution. That document states in part that "[n]o person shall be required to support any ministry or place of worship, religious sect or denomination against his consent."

In addition, the Colorado Constitution prohibits the state from granting funds in support of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school controlled by any church or sectarian denomination.

According to the Colorado Department of Education, about seventy percent of all the state's private schools that offer education beyond kindergarten are religious. The lawsuit argues that, "All or almost all of the sectarian private schools eligible to participate in the Voucher Program are places of worship."

The voucher law also contains no restrictions on how the religious schools can spend the tax dollars they receive. Asserts the lawsuit, "Thus, participating sectarian private schools are free to use these funds in whole or in part for sectarian purposes, such as religious instruction, worship services, salaries or stipends of clergy or members of religious orders, purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer."

The lawsuit also asserts that the voucher law could end up costing the state's public schools millions in lost education funds. "If all of the available student slots in the Voucher Program are filled, the Program will, by the time it is fully implemented in the 2007–08 school year, result in a loss of revenue to the eleven school districts required to participate in the Program of more than $90 million each year," the lawsuit reads.

In addition to Americans United, groups sponsoring the Colorado lawsuit include the Colorado PTA, the National Education Association, the National PTA, American Federation of Teachers, American Civil Liberties Union, American Jewish Committee, American Jewish Congress and People for the American Way. Reported in: Americans United press release, May 20.

Washington, D.C.

The U.S. secretary of education, Roderick R. Paige, came under fire in April for comments attributed to him in a Baptist publication saying that he preferred educational institutions that promote "the values of the Christian community." The comments, which were contained in an article by the Baptist Press, the news service of the Southern Baptist Convention, drew strong condemnation from Democratic lawmakers and civil-liberties groups, some of whom demanded that the secretary apologize or step down.

"By expressing your preference for schools that teach the values of a single faith, you send an unacceptable signal that some families and their children are favored over others because of their faith," Sen. Edward M. Kennedy (D–MA) wrote in a letter to Paige. "I urge you to repudiate these divisive comments."

Education Department officials scrambled to contain the damage. In a hastily arranged news conference Paige explained that some of his quotes had been taken out of context. In an interview later, Daniel Langan, a spokesman for the department, said that Paige had "the utmost respect for the separation of church and state." He added that "the secretary is a powerful advocate for all children, regardless of where they live, learn, and worship."

In an article titled "Rod Paige: America's education evangelist," which the *Baptist Press* published April 7, the secretary was quoted as saying, "All things equal, I would prefer to have a child in a school that has a strong appreciation for the values of the Christian community, where a child is taught to have a strong faith."

Langan said that the quotation had not been rendered quite accurately and that Paige had been referring to Christian colleges and universities, not elementary or secondary schools. Department officials said that a tape of the original interview showed that the secretary had been asked, "Given the choice between private and Christian private and public universities, who do you think has the best deal?"

According to the officials, Paige actually responded, "All things being equal, I'd prefer to have a child in a school where there's a strong appreciation for values, the kinds of values that I think are associated with the Christian communities."

That explanation, however, did not seem to quell the furor. Critics cited some of the other comments the secretary had made in the article, which department officials had not refuted. "The reason that Christian schools and Christian

universities are growing is a result of a strong value system," the article quoted Paige as saying. "In a religious environment the value system is set. That's not the case in a public school where there are so many different kids with different kinds of values."

That remark especially infuriated the Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State. "Secretary Paige's comments are outrageous and offensive," Lynn said. "Our public schools serve children from varied religious backgrounds. As our nation's top educator, Paige should celebrate religious diversity, not denigrate it."

Lynn called on Paige to apologize and retract his comments or resign. So, too, did U.S. Rep. Jerrold Nadler (D–NY). Nadler circulated a letter to the department hoping to get his Democratic colleagues to sign onto it. "If you are unprepared to make clear that this sort of religious bigotry has no place in the Department of Education," Nadler's letter stated, "then we would urge you to resign and allow a person who understands this nation's commitment to diversity and religious equality to assume your duties." Reported in: *Chronicle of Higher Education* online, April 10.

press freedom

Washington, D.C.

The FBI has opened an internal ethics investigation to determine whether its agents abused their authority by secretly seizing from a news organization documents on international terrorism, officials said April 23. An Associated Press reporter in the Philippines sent an unclassified FBI document to another AP reporter in Washington last September as part of the research for an article, but the package never arrived. FedEx originally said the parcel might have fallen off its delivery van. But the FBI, in an April 3 letter, acknowledged that its agents had confiscated the package.

FBI officials offered no explanation for the seizure. But the bureau's Office of Professional Responsibility has opened a review "to ascertain the details relating to this incident and to take appropriate personnel action, as warranted," according to the letter, from Eleni P. Kalisch, acting assistant director for Congressional affairs, to Senator Charles E. Grassley (R–IA), who had expressed concern about the case.

Kalisch told Grassley that she shared his concerns about the case and that the FBI took "very seriously" possible violations of the First Amendment protecting freedom of the press and the Fourth Amendment ensuring the right to due process.

At a time when the FBI has assumed broader investigative powers to fight terrorism, the episode has provoked outrage from some members of Congress and from news media advocates, who say the federal agents appear to have crossed the line. "The FBI does not have the right to seize material without a warrant, without even notifying anyone, and just making it vanish," Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, said. "That, in our minds, is completely illegal."

Dalglish said her group was looking into another unconfirmed report suggesting that federal agents had recently intercepted a package that another major news organization sent from a Middle East bureau to the United States.

In the Associated Press incident, a customs inspector in Indianapolis appears to have opened the Washington-bound package in a periodic, routine inspection, officials said. Upon seeing that the package contained an FBI report related to terrorism in the Philippines, the inspector notified the FBI, which seized the document without notifying FedEx or The Associated Press, officials said.

FBI agents in Indianapolis appear to have determined that the document, an eight-year-old laboratory report detailing materials seized from the apartment of a man convicted in the 1993 World Trade Center bombing, was too sensitive for public consumption, officials said. But The Associated Press said, after discovering the package had been intercepted, that the laboratory report was unclassified, did not contain information it believed would compromise public safety or national security, and had twice been introduced in open court in New York.

Louis D. Boccardi, president of The Associated Press, said he looked forward to learning the results of the FBI's investigation. "That the package belonged to the press was apparent on its face," Boccardi said. "The interception was improper and clandestine."

Grassley said he was glad the FBI appeared to be taking the case seriously enough to open the internal investigation, which could lead to disciplinary action against any agents found to have violated internal policies. "It's highly unusual for the government to intercept communications of the media, and I want to make sure we don't have any attempts to censor or stymie the news," Grassley said.

If agents were in fact trying to censor the press, Grassley added, "the FBI should own up, take responsibility, apologize and ensure it does not happen again."

While the Customs Service said its inspection of the package was random, press advocates said they were suspicious of that claim, in part because it was the second time federal agents had focused on John Solomon, the AP reporter in Washington to whom the package was addressed. In 2001, the Justice Department subpoenaed Solomon's home phone records to try to determine the source of leaks in articles he had written about an investigation into Senator Robert G. Torricelli of New Jersey.

Grassley said the Customs Service had not responded to his requests for an explanation in the case. "I don't know what the Customs Service has to hide," he said. "Maybe this is just the tip of the iceberg."

Customs officials said that they were still finalizing a response to the senator and could not comment on the inquiry.

But one customs official said the agency believed its employees had handled the episode properly by turning the package over to the FBI "If I was an inspector and I opened something suspicious related to the FBI, I sure as heck would call somebody else in to look at it, especially in these times," the official said. "A.P. was not singled out here."

An FBI official also defended the bureau's handling of the episode. "This was an internal FBI document," the official said. "It was not something that was supposed to be released publicly. It's like taking something from an FBI file and handing it to someone." The official added that investigators might want to determine how the document, which the FBI originally sent to Philippine authorities as part of an investigation, wound up in the hands of The Associated Press.

"This document was not the property of The Associated Press," the official said. "That's the rub." Reported in: *New York Times,* April 23.

publishing

Las Vegas, Nevada

Several national organizations have joined the American Civil Liberties Union in asking a federal judge in Las Vegas to lift a ban on a book written by anti-tax activist Irwin Schiff. ACLU officials said the involvement of other groups in a friend-of-the-court brief shows the case has national implications beyond Schiff and his theories.

"These groups . . . recognize the significance of an attempt by the government to ban a book and are quite concerned about the precedent that it might set," ACLU lawyer Allen Lichtenstein said.

Government attorneys have asked U.S. District Court Judge Lloyd George to convert his March 19 temporary order preventing Schiff from distributing his book into a preliminary injunction. ACLU of Nevada director Gary Peck said the parties included the American Booksellers Foundation for Free Expression, the Freedom to Read Foundation, the PEN American Center and the Association of American Publishers.

Jonathan Bloom, a New York lawyer representing the Association of American Publishers, said the groups aren't endorsing Schiff's book. "Even misguided or mistaken ideas have the right to be placed in the public arena, and the government doesn't have the right under the Constitution to pick and choose which ideas can see the light of day," Bloom said. Bloom questioned why government attorneys challenged the book this year, although it was first published thirteen years ago. It is titled, *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes.*

"We're hoping we can persuade the judge that the temporary restraining order should be lifted and no injunction against sale or distribution of the book be imposed," he said.

George issued the temporary order after the government filed a civil complaint filed against Schiff and two associates. In April, the judge asked for additional legal briefs before deciding whether to make the order permanent.

Government attorneys argued the defendants had been advocating the "false and frivolous position that paying federal income taxes is voluntary." Schiff argues that the court has no jurisdiction and calls the federal income tax "a legal fiction." The Internal Revenue Service raided Schiff's Las Vegas office, Freedom Books, on February 11. Reported in: *Las Vegas Sun,* May 2.

copyright

Washington, D.C.

The Bush administration has sided with the recording industry in its court battle to force Internet providers to disclose the identities of subscribers who may be illegally trading materials online. A Justice Department brief supports the claim by the Recording Industry Association of America that it should be able to force Verizon Communications under the digital copyright law to identify a subscriber suspected of providing more than 600 songs from well-known artists for other Internet users to download.

The subpoena was sought by the music industry under the 1998 Digital Millennium Copyright Act, which allows companies a shortcut to obtain Internet users' names without a judge's order under certain circumstances. Verizon asserts that the shortcut was meant to be limited to cases where the material on Web sites is stored on the Internet provider's computers. To extend the statute to material that resides on subscribers' computers, like songs and movies that are traded using KaZaA and other popular peer-to-peer software, Verizon says, violates the constitutionally protected rights of free speech and due process of Internet subscribers.

But in a filing with the U.S. District Court in Washington April 18, the Department of Justice wrote that the law did not violate the free speech rights of everyday users because it was directed only at those who violate copyrights.

The law's subpoena provision "targets the identity of alleged copyright infringers, not spoken words or conduct commonly associated with expression," the Justice Department wrote in its brief. The brief also asserted that the law did not violate due process protections because the Constitution does not specifically prohibit the process set up by the digital copyright law, which requires that copyright holders ask a court clerk for an order to compel Internet providers to surrender customer names.

Sarah B. Deutsch, vice president and associate general counsel for Verizon, said the company was disappointed by the Justice Department brief. Lifting the requirement on copyright holders to go before a judge to request identifying information, she said, would permit any copyright holder

easily to obtain personal information about an Internet subscriber. "This would let copyright holders use the court's power to send people threatening letters and never sue," Deutsch said.

The recording industry welcomed the Justice Department brief. "The government's filing today supports the proposition that we have long advocated—copyright owners' have a clear and unambiguous entitlement to determine who is infringing their copyrights online, and that entitlement passes constitutional muster," said Matthew J. Oppenheim, senior vice president for business and legal affairs at the recording industry group. "Verizon's persistent efforts to protect copyright thieves on pirate peer-to-peer networks will not succeed."

Legal experts said the Justice Department's brief was a significant setback for Verizon. Judge John D. Bates, who has ordered Verizon to turn over the name of the subscriber at issue in the case, held a hearing on April 1 on the constitutional issues in the case. He must decide whether to grant Verizon's request to stay his order pending an appeal. "To have the government entering the case to defend the law certainly makes the law as interpreted look more legitimate," said Jessica Litman, a professor of copyright law at Wayne State University.

But Professor Litman said the appeals court could still rule in Verizon's favor based on an interpretation of how Congress intended the law to be applied. When it was passed in 1998, peer-to-peer software like KaZaA, which allows users to trade files directly from their home computers, did not exist. "The Web was only five years old in 1998," she added. Reported in: *New York Times*, April 21.

Washington, D.C.

Academic-library groups have joined 33 other organizations in filing a legal brief in support of Verizon Communications. The company is trying to conceal from the recording industry the names of music fans who have used Verizon telephone lines to trade copyrighted material illegally.

The U.S. District Court for the District of Columbia has ruled in favor of the Recording Industry Association of America in its suit against Verizon. In two separate rulings, Judge John D. Bates has said that Section 512 of the Digital Millennium Copyright Act permits a copyright owner—in this case, represented by the recording-industry group—to send a subpoena ordering a communication-service provider to reveal information about a subscriber. Under the law, the subpoenas can be issued by a court clerk without any approval from a judge.

Verizon is challenging those rulings before the U.S. Court of Appeals for the District of Columbia Circuit. Among those supporting Verizon's appeal are the American Association of Law Libraries, the American Library Association, and the Association of Research Libraries.

Campus-network administrators have been tracking the case because, if the recording industry prevails, they fear that the industry could present similar subpoenas to colleges demanding that they identify students who illicitly swap music online.

The brief, which was filed on May 16, says that Section 512 of the digital-copyright law threatens consumers' privacy and fails to honor the constitutional right to free speech.

"If the court upholds the Digital Millennium Copyright Act subpoena provision, it will create a new, easy way to silence controversial speakers online," says Cindy Cohn, legal director of the Electronic Frontier Foundation. The San Francisco-based organization, which promotes civil liberties in cyberspace, joined the library groups in the brief.

The brief also says the Recording Industry Association of America has already shown clumsiness in ferreting out people who download music illegally. The brief observed that the industry group mistakenly claimed that a computer server in the astronomy department at Pennsylvania State University at University Park was being used to illegally download copyrighted work by Usher, a rhythm-and-blues artist. A Penn State manager who investigated found no illegal music on the machine—but did find a directory named for an emeritus professor who happens to have the same last name (see page 153).

"Although the RIAA has apologized for its error, and several dozen more like it, if the lower court's decision is permitted to stand there is no telling how many future errors will result in clerk-stamped subpoenas forcing the improper disclosure of individual identities," the brief argues. Reported in: *Chronicle of Higher Education* online, May 19.

Atlanta, Georgia

On April 12, two computer science students decided to cancel their presentation to a security conference in Atlanta after they were threatened with prosecution under, among other statutes, the Digital Millennium Copyright Act. The researchers, Billy Hoffman and Virgil Griffith, were scheduled to talk about possible security vulnerabilities in the Blackboard Transaction System, a computerized debit-card system widely used on college campuses. But Blackboard obtained a temporary restraining order against Hoffman and Griffith, preventing them from presenting their findings; the pair were also sent cease-and-desist letters threatening further legal action. In addition, Blackboard's attorneys sent a cease-and-desist letter to the organizer of the conference—a person who goes by the name "Rockit"—letting him know that he too could face prosecution if he allowed Hoffman and Griffith to present their findings at the event, an annual gathering of hackers known as Interz0ne.

Instead of the scheduled discussion, several hundred conference attendees were read the cease-and-desist letter, said Scott Milliken, an attendee. Attendees said they saw the case as a clear infringement on the First Amendment rights of the two students, and they contacted the Electronic Frontier Foundation and Lawrence Lessig, a Stanford law professor

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library

Cedarville, Arkansas

The Harry Potter series is back on library shelves in the Cedarville School District, following a federal judge's order to give students access to the popular books about the boy wizard. A secretary at the rural school district said April 25 that superintendent David Smith instructed librarians to take the books out of a back office and return them to shelves. The school board voted the previous night not to appeal the federal court order, which was issued April 22.

Cedarville Mayor Beverly Pyle, who was at the school board meeting, said she was tired of the issue. "I just wish it would go away," Pyle said. "I am a Christian . . . but I grew up watching *Bewitched.* I can see both sides."

The board drew wrath from national free-speech groups for its June 2002 decision to require students to obtain parental permission to check out the books. The 3–2 decision, which overruled a decision by the district's library committee, came after a parent complained about the books.

The books written by British author J. K. Rowling have been assailed by some Christian groups for their themes of spells, sorcery and magic. According to the American Library Association, the books were the most frequently challenged of 2002, but rarely did those challenges lead to restrictions or bans.

Plaintiffs Billy and Mary Nell Counts said they feared their daughter, Dakota, would be stigmatized if she were identified as someone who read books the district considered "evil." More than 190 million copies of the novels have been printed in at least 55 languages and have sold in more than 200 countries. Reported in: Yahoo! News, April 28.

university

Lawrence, Kansas

The governor of Kansas, Kathleen Sebelius, vetoed a provision in a budget bill that would have cut some $3.1-million in state funds to the University of Kansas because of its use of what were called "obscene" materials in a popular undergraduate course on human sexuality.

"In a democracy, academic freedom in higher education is essential," Sebelius, a Democrat, wrote in her veto message, issued April 21. The measure would have prohibited public universities from using state funds, "as part of a human sexuality class or other similar class for undergraduate students," for the purchase or display of videotapes considered obscene under Kansas law. Material is obscene, the provision said, if an average person applying "community standards" would find it obscene, if it shows certain sexual acts, or if it lacks "serious literary, artistic, education, political or scientific value."

Under the amendment, violators would have lost state appropriations for their department or division. University officials said the measure was narrowly tailored to cover one class: "Human Sexuality in Everyday Life," which has been taught for twenty years by Dennis Dailey, a professor of social welfare.

State Sen. Susan Wagle, a Republican, who sponsored the amendment, said she was told that Dailey had displayed pictures in class of the genitalia of girls at ages 5 and 10, had told female students to explore their own genitals as homework, and had implied that a woman leaving class for the restroom was going to masturbate. Reported in: *Chronicle of Higher Education* online, April 25.

police surveillance

Denver, Colorado

The Denver police will end their longtime practice of keeping secret files on protesters like Quakers and Roman Catholic nuns under a proposed lawsuit settlement announced April 17. The American Civil Liberties Union and city officials submitted the accord to federal court for approval. The ACLU sued after learning that the Police Department had gathered intelligence files on more than 3,400 individuals and groups.

"The end of this political spying enhances the professionalism of the Police Department and is a victory for the First Amendment," said Mark Silverstein, state legal director for the civil liberties group.

The changes outlined in the settlement have been in force since October, said the city attorney, J. Wallace Wortham, Jr. The police will not collect information on protesters unless "there is reasonable suspicion of criminal activity," Wortham said.

City officials have conceded that the police went too far when they started documenting individuals and groups about three years ago. It was condemned by Mayor Wellington E. Webb, who was a subject of surveillance when he was a young protester. People named in the files were allowed to view their information in the fall. Many who waited for up to an hour to see their files received papers that smelled of marker ink where the police had deleted names.

The ACLU said that among the groups listed as criminal extremists in the files were the American Friends Service Committee, a Quaker group that has won the Nobel Peace Prize, and the Chiapas Coalition, a loose-knit group that supports the rights of Mayans in Chiapas, Mexico, the site of a guerrilla uprising. Amnesty International was listed as a civil disobedience group.

Another file, on a group of teenagers called the Trench Coat Mafia, was put together six months after the shootings at nearby Columbine High School in 1999. Eric Harris and Dylan Klebold, the students who fatally shot twelve other students and a teacher before killing themselves, had been rumored to be in the group.

The agreement did not resolve what will be done with the files after the information is purged from police computers. The ACLU wants the information given to the Colorado Historical Society. The police want to destroy the files. Reported in: *New York Times*, April 18. □

(spying under PATRIOT Act . . . from page 129)

the Justice Department could "have been more forthcoming in terms of the manner in which and how freely the new powers have been used."

The number of material witnesses detained around the country without charges has been a closely guarded secret, with officials repeatedly insisting that the law prevented their names and circumstances from being made public. In the documents released, Justice officials said that as of January, the number of people detained as material witnesses was fewer than 50, with 90 percent of those detained for 90 days or less and half held for 30 days or less.

The documents do not say how many are still being held as material witnesses, an arrangement prosecutors use with a judge's approval for people believed to have important testimony that might not be obtained otherwise. Sometimes the people are eventually charged, as in the conspiracy and terrorism support case brought in April against software engineer Maher Hawash in Portland, Oregon.

The USA PATRIOT Act, passed by Congress shortly after the 2001 attacks, greatly expanded the government's surveillance and detention powers. The law was buttressed last year when the secret Foreign Intelligence Surveillance Court of Review backed the Justice Department's position that prosecutors and the FBI could share intelligence and criminal information involving spies or terrorists. Under previous guidelines, the government's criminal and intelligence sides were barred from directly communicating.

The Justice documents say that ruling led to a review of 4,500 intelligence files to determine if they could help bring criminal charges, with the information "incorporated in numerous cases" that were not further identified.

The numbers the department provided on several of the most hotly debated issues appeared relatively low. In a survey conducted by researchers at the University of Illinois at Urbana–Champaign, about 550 libraries across the country reported receiving requests over the past year from federal and local investigators for records of patrons. More than 200 libraries said they had resisted such requests from authorities. It was not clear how many of these requests were specifically filed under the PATRIOT Act's provisions.

Justice Department officials maintained that the relatively small numbers in some critical intelligence areas showed that agents were using their new powers sparingly.

"We've had so much erroneous hysteria out there about our counter-terrorism authority and how it's used," said a spokeswoman for the department, Barbara Comstock. "What this demonstrates is that these tools have been very carefully targeted, and when we do use them, it's because there are valid reasons that often involve life and death."

In the 1970's, in response to public outrage over abuses by the FBI and CIA in monitoring legitimate political dissent, tight new restrictions were placed on federal agents. But after the September 11 attacks, federal authorities complained that the restrictions had gone too far, and several major overhauls—most notably anti-terrorism legislation known as the PATRIOT Act and new guidelines instituted last year by Ashcroft—significantly loosened those restrictions.

The report analyzed the new tools made available to the federal government under the PATRIOT Act, and found that the department had made widespread use of surveillance and eavesdropping tools to track suspected terrorists. In the first year after the attacks, for instance, Ashcroft approved 113 emergency authorizations for secret foreign intelligence warrants for electronic or physical surveillance, compared with fewer than fifty in the previous twenty-three years.

In addition, according to the report, the Justice Department sought 248 times to delay having to notify the target of an investigation that a warrant had been executed. The department said it was never turned down by a court in its requests to delay the notification, and the delays sometimes amounted to ninety days or more. The department said the delays were necessary to avoid endangering sources and informants, jeopardizing undercover operations, or preventing the destruction of evidence.

The department maintained that its expanded powers had given it greater speed and flexibility in responding to terrorist threats. In the case of the anthrax attacks in the fall of

2001, for instance, the department said a provision of the law allowing a court to issue a search warrant in another jurisdiction allowed a Washington judge to issue a warrant for Florida. That "saved investigators from wasting valuable time on petitioning another judge in another district for that authority," the department said.

Provisions of the act were also put to use in tracing Internet communications during the investigation into the murder of the *Wall Street Journal* reporter Daniel Pearl, as well as in investigating kidnappings, a school bomb scare and other breaking investigations in the United States, the department said.

Lawmakers said they agreed that the continuing terrorist threat required more inventive responses from law enforcement. But Republicans and Democrats alike said they shared concerns about civil liberties implications for ordinary Americans.

"As we move forward in the process of providing the strong measures that are necessary to combat terrorism, we must also keep in mind the importance of protecting civil liberties Americans hold dear," said Representative Steve Chabot, Republican of Ohio, who presided at the meeting.

The new data from the department did little to mollify some Congressional critics who accused the department of withholding information critical to an assessment of its performance on terrorism.

"I would hope that the administration would be more responsive to Congressional requests for specific, rather than general, information," said Representative Jerrold Nadler, Democrat of New York. "'We can't tell you,' or, in effect, 'it's none of your business' are not adequate or acceptable answers." Reported in: Associated Press, May 21; *New York Times*, May 21. □

(impact of the PATRIOT Act . . . from page 132)

intelligence agencies that were failing to manage the ocean of information they collected prior to September 11.

We do not know how the USA PATRIOT Act and related measures have been applied in libraries, bookstores, and other venues because the gag order bars individuals from making that information public. The executive branch has refused to answer inquiries from members of the House and Senate Judiciary Committees, and from civil liberties groups under the Freedom of Information Act, regarding the incidence of surveillance activities, except an admission of snooping in libraries by FBI agents.[3]

Officially, librarians are not allowed to comment on FBI visits to examine library users' Internet surfing and book-borrowing habits. Unofficially, though, some details have surfaced. Two nationwide surveys conducted at the University of Illinois after September 11 found that more than 200 out of 1,500 libraries surveyed had turned over information to law enforcement officials.[4] A March 2003 article in the *Hartford Courant* revealed that librarians in Fairfield and Hartford, Connecticut, were visited by the FBI, but only one case involved a search warrant.[5] And an *FWWeekly* article on April 17, 2003, cited a case in New Mexico where a former public defender was arrested by federal agents and interrogated for five hours after using a computer at a Santa Fe academic library, apparently as a result of a chat room statement that President Bush was out of control.[6] It is unclear whether any of these incidents involved secret search warrants as authorized under section 215 of the USA PATRIOT Act.

Federal officials claim that the USA PATRIOT Act and related measures have helped quash terrorist attacks. Mark Corallo, a Justice Department spokesman, has assured the public that, "We're not going after the average American. If you're not a terrorist or a spy, you have nothing to worry about."[7] Nevertheless, many Americans are uncomfortable relying on government officials for assurances that they will protect both civil liberties and national security effectively.

The USA PATRIOT Act is just one of several troubling policies that compromise the public's privacy rights. Another is the Enhanced Assisted Passenger Pre-screening System (CAPPS-II), which profiles airline passengers and provides "No-Fly" watch lists to the Transportation Security Administration.[8]

The danger here is that all airline passengers are assigned a risk assessment "score" without recourse. As a result, innocent people could be branded security risks on the basis of flawed data and without any meaningful way to challenge the government's determination.

A third example is the Department of Defense Total Information Awareness program that seeks to scan billions of personal electronic financial, medical, communication, education, housing and travel transactions, analyze them utilizing both computer algorithms and human analysis, and then flag suspicious activity.[9] Americans innocent of any wrongdoing could be targeted by this system because it will collect information (and misinformation) on everyone, much of which can be misused. Furthermore, a planned identity tracking system could follow individuals wherever they go.

And, finally, not to be overlooked, is the proposed "Domestic Security Enhancement Act of 2003," a more extreme version of the USA PATRIOT Act, which could be introduced in Congress at any time. This proposed legislation, leaked by a Justice Department official to the Center for Public Integrity, would make it easier for the government to initiate surveillance and wiretapping of U.S. citizens, repeal current court limits on local police gathering information on religious and political activity, allow the government to obtain credit and library records without a warrant, restrict release of information about health or safety hazards posed by chemical and other plants, expand the definition of terrorist actions to include civil disobedience, permit certain warrantless wiretaps and searches, loosen the standards for electronic eavesdropping of entirely domestic activity, and strip even native-born Americans of all of the rights of United States citizenship if

they provide support to unpopular organizations labeled as terrorist by our government.[10]

Citizens and organizations around the country are standing up and passing resolutions opposing the USA PATRIOT Act and related measures,[11] and are urging local officials contacted by federal investigators to refuse requests that they believe violate civil liberties—whether Fourth Amendment rights to be free of unreasonable searches and seizures, First Amendment intellectual freedom and privacy rights, Fifth Amendment protections of due process, Sixth Amendment rights to a public trial by an impartial jury, Fourteenth Amendment equal protection guarantees, and the constitutional assurance of the writ of habeas corpus.[12]

In addition, some in Congress are now leading legislative efforts to counter some of the more egregious provisions of the law. For instance, an alliance of librarians, booksellers, and citizen groups is working with Representative Bernie Sanders and more than seventy additional sponsors on the "Freedom to Read Protection Act of 2003." If passed, this act would exempt libraries and bookstores from section 215 and would require a higher standard of proof than mere suspicion for search warrants presented at libraries and bookstores.[13]

Similarly, Senators Leahy, Grassley, and Specter have introduced the "Domestic Surveillance Act of 2003" to improve the administration and oversight of foreign intelligence surveillance.[14]

Librarians and booksellers are counting on these efforts, along with public outcry, to stem federal actions that threaten Americans' most valued freedoms without necessarily improving national security. Until the protection of civil liberties reaches a balance with the protection of national security, libraries must affirm their responsibility to safeguard patron privacy by avoiding unnecessary creation and maintenance of personally identifiable information (PII) and developing up-to-date privacy policies that cover the scope of collection and retention of PII in data-related logs, digital records, vendor-collected data, and system backups, as well as more traditional circulation information. In short, if information is not collected, it cannot be released.

If libraries are to continue to flourish as centers for uninhibited access to information, librarians must stand behind their users' right to privacy and freedom of inquiry. Just as people who borrow murder mysteries are unlikely to be murderers, so those seeking information about Osama bin Laden are not likely to be terrorists. Assuming a sinister motive based on library users' reading choices makes no sense and leads to fishing expeditions that both waste precious law enforcement resources and have the potential to chill Americans' inquiry into current events and public affairs.

The millions of American who sought information from their libraries in the wake of September 11 reaffirm an enduring truth: a free and open society needs libraries more than ever. Americans depend on libraries to promote the free flow of information for individuals, institutions, and communities, especially in uncertain times. In the words of Supreme Court Justice William O. Douglas, "Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."[15] —May 5, 2003

Endnotes

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2. U.S. Department of Justice, Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations, May 30, 2002, www.usdoj.gov/olp/fbiundercover.pdf. For analyses of the Guidelines, see Electronic Privacy Information Center, www.epic.org/privacy/fbi; ACLU, archive.aclu.org/congress/l060602c.html; and the Center for Democracy and Technology, www.cdt.org/wiretap/020530guidelines.shtml. See also: "In Defense of Freedom—Statement of Principles," and Letters to Congress on the Attorney General's Guidelines, June 4, 2002; www.indefenseoffreedom.org.
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8. "Proposed (CAPPS II) Rules," *Federal Register*, Vol. 68, No. 10, January 15, 2003. For an overview and analysis of CAPPS II, see: Electronic Privacy Information Center, "Passenger Profiling," www.epic.org/privacy/airtravel/profiling.html.
9. U.S. Department of Defense, Defense Advanced Research Projects Agency, Information Awareness Office, "Total Information Awareness," www.darpa.mil/iao/TIASystems.htm. For background and analyses, see: Electronic Privacy Information Center, "Total Information Awareness," www.epic.org/privacy/profiling/tia/.
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12. For an analysis of civil liberties threats, see: Nancy Chang, *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten our Civil Liberties* (New York: Seven Stories Press, 2002); Nancy Chang, "The State of Civil Liberties: One Year Later—Erosion of Civil Liberties in the Post 9/11 Era, (New York: Center for Constitutional Rights, 2002) www.ccr-ny.org/v2/whatsnew/report.asp?ObjID =nQdbIRkDgG&Content=153; and Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York: Century Foundation Press, 2002).
13. "Freedom to Read Protection Act of 2003" (Introduced in House), H.R.1157, March 6, 2003.
14. "Domestic Surveillance Oversight Act of 2003" (Introduced in Senate), S. 436, February 25, 2003.
15. William O. Douglas, "The One Un-American Act" (from a speech by Justice Douglas to the Authors Guild Council in New York, December 3, 1952, on receiving the 1951 Lauterbach Award), *Nieman Reports*, vol. 7, no. 1 (Jan. 1953): p. 20. □

("a chill wind . . . from page 133)

Fleischer whether our showing prisoners of war at Guantanamo Bay on television violated the Geneva Convention.

A chill wind is blowing in this nation. A message is being sent through the White House and its allies in talk radio and Clear Channel and Cooperstown. If you oppose this administration, there can and will be ramifications.

Every day, the air waves are filled with warnings, veiled and unveiled threats, spewed invective and hatred directed at any voice of dissent. And the public, like so many relatives and friends that I saw this weekend, sit in mute opposition and fear.

I am sick of hearing about Hollywood being against this war. Hollywood's heavy hitters, the real power brokers and cover-of-the-magazine stars, have been largely silent on this issue. But Hollywood, the concept, has always been a popular target.

I remember when the Columbine High School shootings happened. President Clinton criticized Hollywood for contributing to this terrible tragedy—this, as we were dropping bombs over Kosovo. Could the violent actions of our leaders contribute somewhat to the violent fantasies of our teenagers? Or is it all just Hollywood and rock and roll?

I remember reading at the time that one of the shooters had tried to enlist to fight the real war a week before he acted out his war in real life at Columbine. I talked about this in the press at the time. And curiously, no one accused me of being unpatriotic for criticizing Clinton. In fact, the same radio patriots that call us traitors today engaged in daily personal attacks on their president during the war in Kosovo.

Today, prominent politicians who have decried violence in movies—the "Blame Hollywooders," if you will—recently voted to give our current president the power to unleash real violence in our current war. They want us to stop the fictional violence but are okay with the real kind.

And these same people that tolerate the real violence of war don't want to see the result of it on the nightly news. Unlike the rest of the world, our news coverage of this war remains sanitized, without a glimpse of the blood and gore inflicted upon our soldiers or the women and children in Iraq.

Violence as a concept, an abstraction — it's very strange.

As we applaud the hard-edged realism of the opening battle scene of *Saving Private Ryan*, we cringe at the thought of seeing the same on the nightly news. We are told it would be pornographic. We want no part of reality in real life. We demand that war be painstakingly realized on the screen, but that war remain imagined and conceptualized in real life.

And in the midst of all this madness, where is the political opposition? Where have all the Democrats gone? Long time passing, long time ago. (Applause.)

With apologies to Robert Byrd, I have to say it is pretty embarrassing to live in a country where a five-foot-one comedian has more guts than most politicians. (Applause.)

We need leaders, not pragmatists that cower before the spin zones of former entertainment journalists. We need leaders who can understand the Constitution, congressmen who don't in a moment of fear abdicate their most important power, the right to declare war, to the executive branch. And, please, can we please stop the congressional sing-a-longs? (Laughter.) In this time when a citizenry applauds the liberation of a country as it lives in fear of its own freedom, when an administration official releases an attack ad questioning the patriotism of a legless Vietnam veteran running for Congress, when people all over the country fear reprisal if they use their right to free speech, it is time to get angry. It is time to get fierce. And it doesn't take much to shift the tide.

My 11-year-old nephew, mentioned earlier, a shy kid who never talks in class, stood up to his history teacher who was questioning Susan's patriotism. "That's my aunt you're talking about. Stop it." And the stunned teacher backtracks and began stammering compliments in embarrassment.

Sportswriters across the country reacted with such overwhelming fury at the Hall of Fame that the president of the Hall admitted he made a mistake and Major League Baseball disavowed any connection to the actions of the

Hall's president. A bully can be stopped, and so can a mob. It takes one person with the courage and a resolute voice.

The journalists in this country can battle back at those who would rewrite our Constitution in Patriot Act II, or "Patriot, The Sequel," as we would call it in Hollywood. We are counting on you to star in that movie.

Journalists can insist that they not be used as publicists by this administration. (Applause.) The next White House correspondent to be called on by Ari Fleischer should defer their question to the back of the room, to the banished journalist du jour. (Applause.)

And any instance of intimidation to free speech should be battled against. Any acquiescence or intimidation at this point will only lead to more intimidation. You have, whether you like it or not, an awesome responsibility and an awesome power: the fate of discourse, the health of this republic is in your hands, whether you write on the left or the right. This is your time, and the destiny you have chosen.

We lay the continuance of our democracy on your desks, and count on your pens to be mightier. Millions are watching and waiting in mute frustration and hope—hoping for someone to defend the spirit and letter of our Constitution, and to defy the intimidation that is visited upon us daily in the name of national security and warped notions of patriotism.

Our ability to disagree, and our inherent right to question our leaders and criticize their actions define who we are. To allow those rights to be taken away out of fear, to punish people for their beliefs, to limit access in the news media to differing opinions is to acknowledge our democracy's defeat.

These are challenging times. There is a wave of hate that seeks to divide us—right and left, pro-war and anti-war. In the name of my 11-year-old nephew, and all the other unreported victims of this hostile and unproductive environment of fear, let us try to find our common ground as a nation. Let us celebrate this grand and glorious experiment that has survived for 227 years.

To do so we must honor and fight vigilantly for the things that unite us—like freedom, the First Amendment and, yes, baseball. (Applause.) □

(censorship dateline . . . from page 142)

quite defined either by Wal-Mart or its customers. With sales of $244.5 billion last year, Wal-Mart towers over its discount competitors and has recently begun to challenge supermarket chains and drugstore empires for customers as well.

It sells more DVDs than any other chain, and has made a point of trying to attract younger shoppers through its entertainment software, including movies, games and CDs. It has a dominant position in the magazine publishing industry—selling 15 percent of all single copies, according to industry executives—and has already been able to force changes in the distribution system for magazines.

Magazine industry executives said Wal-Mart occasionally declines to sell particular issues of some magazines, including the September 2001 issue of *InStyle* that featured an artfully arranged nude photo of the actress Kate Hudson. Last year, Wal-Mart also took exception to a single photo in a compilation of *Sports Illustrated* swimsuit issues and decided not to sell the one-time publication.

Stephen Colvin, president of Dennis Publishing USA, which owns both *Maxim* and *Stuff*, confirmed that Wal-Mart had declined to stock the magazines, but said Wal-Mart accounts for ''less than 3 percent'' of the copies his company sells at newsstands.

''Like a lot of categories of magazines, we have our ups and downs with Wal-Mart depending on what is in the issue,'' Colvin said.

Maxim, *Stuff*, and *FHM* have a combined circulation of almost five million, with much of their success deriving from newsstand sales. *Maxim* is the largest of the three, with an average circulation in the second half of last year of 2.5 million, and it sells an average of 848,000 copies a month on newsstands, a highly lucrative revenue stream.

Colvin said his company had trouble figuring out where Wal-Mart's taste threshold lies. ''Maybe they think Tyra Banks should have been wearing pink instead of black,'' he said of a recent cover model. ''I don't think that these decisions are often rational; they are subjective. For any men's magazine to put a woman on the cover seems a bit troubling to them.''

Officials at *FHM*, where newsstand sales increased 9.6 percent in the second half of last year, to a total of 438,000, said they believed that a double standard was at work. ''We respect Wal-Mart's right to make a product decision, however we do not agree,'' said a spokeswoman for *FHM*, which is owned by Emap of Britain. ''*FHM* never publishes full frontal nudity and never will. And *FHM* is far more consistent in its adherence to this policy than *Details*, the *Sports Illustrated* swimsuit issue and many women's fashion magazines, which publish bare breasts under the guise of art.''

Many publishing executives are concerned that Wal-Mart's strong position in magazine sales might put the chain in the role of taste maker for the industry as a whole. But few want to offend the biggest retailer of magazines in America.

''They are extremely important,'' said Dan Capell, editor of *Capell's Circulation Report*, a newsletter about magazine circulation. ''They are the largest retailers of magazines and probably the fastest growing.''

Nadine Strossen, a professor of constitutional law at New York Law School and president of the American Civil Liberties Union, said Wal-Mart was well within its rights to determine what it would sell on its shelves. ''They are sending a message that they don't approve of the content of those magazines,'' she said, adding that ''we defend their right to do that.''

At the same time, Wal-Mart's heft in the marketplace means it may have other obligations when it comes to selling magazines, she added. ''It is particularly true when you have a store that in many parts of the country has a dominant

position, so that if you can't buy a magazine at Wal-Mart, you can't buy it at all,'' she said. ''It has literally the same practical effect in many communities as outright government censorship,'' Strossen added.

Berryhill disagreed, saying that ''there are many magazines that are more than happy to sell subscriptions to reach rural areas, or to reach homes that may not be able to make a trip to the store to buy these.'' Also, most grocery stores and drugstores sell magazines, she added.

Wal-Mart's decision might have been driven, like many other things at Wal-Mart, by the desire to turn a profit. ''We try to understand what we think they are going to want when they come into a Wal-Mart,'' Berryhill said. ''We just try to make good decisions that are going to appeal to the majority of our customers.''

The Timothy Plan, a mutual funds management firm that invests in companies based in part on whether the companies share its values, has been pressing Wal-Mart to pull women's magazines like *Cosmopolitan* and *Glamour* from checkout lanes and put them back into the magazine rack. Arthur Ally, president of the Timothy Plan, said that he saw magazines like *Maxim* and *FHM* as ''a level worse.''

''It is soft-core pornography,'' he said. ''It's very addictive and leads to harder stuff.''

The Magazine Publishers of America, an industry trade group, issued a carefully worded statement on the matter. ''The M.P.A. believes in the right to freely disseminate legally protected material,'' the statement read. ''It also believes that, in this free society, consumers should have the freedom to decide for themselves what they want to purchase. The M.P.A. is aware that some parties may not be comfortable with this position, and respect their right to disagree.'' Reported in: *New York Times,* May 6. □

(excerpts from Virginia *v.* Black . . . *from page 145)*

rightly so. The history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

The Supreme Court of Virginia ruled that in light of *R.A.V.* v. *City of St. Paul* even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint.

It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V.* v. *City of St.Paul* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R.A.V.,* we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional. We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. The ordinance did not cover "those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects."

We did not hold in *R.A.V.* that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment: "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "The Federal Government can criminalize only those threats of violence that are directed against the president . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the president." And a state may "choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity."

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "burning a cross at a political rally would almost certainly be protected expression." Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning,* and in plays such as the stage adaptation of Sir Walter Scott's *The Lady of the Lake.*

from a dissent by Justice Souter

I do not think that the Virginia statute qualifies for this virulence exception as *R.A.V.* explained it. The statute fits

poorly with the illustrative examples given in *R.A.V.*, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in *R.A.V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R.A.V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R.A.V.*'s general rule.

R.A.V. defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," and the explanation was rounded out with some illustrative examples. None of them, however, resembles the case before us.

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the president, the second of *R.A.V.*'s examples of the virulence exception and the one the majority relies upon. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the president. Again, however, threats against the president are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the president every day on every subject and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the president, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning. . . .

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

from a dissent by Justice Thomas

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia might well consider passing legislation to restrict the activities of the Ku Klux Klan." As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of terrorism." The bill was presented to the House of Delegates by a former F.B.I. agent and future two-term Governor, Delegate Mills E. Godwin, Jr. "Godwin said law and order in the state were impossible if organized groups could create fear by intimidation."

That in the early 1950's the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation."

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests. □

(is it legal? . . . from page 158)

who specializes in copyright issues, seeking advice on what to do next.

Representatives for Blackboard balked at the claim that they were stifling free speech. They portrayed the students as being substantially different from mere security researchers. "I've met one of the individuals at a trade show, and he was a very nice young gentleman, but his definition of 'research' was very different from ours," said Greg Baker, Blackboard's vice president of product development. "The things these people are doing are not what I'd call research but is closer to damage—kind of like you or I going to an ATM machine and cutting the phone line and then listening in as to what happens on it. It's them of their own volition doing damage to physical cables."

"The local Bank of America," added Michael Stanton, a spokesman for the firm, "may have a physical bank machine at its location, and if I were to publish a guide to take it apart, telling you how to pull apart a circuit board and monitor the history of what transactions take place, I think it certainly does not fall under the guise of research and it's not an inherent security issue, either."

The Blackboard system—known as CampusWide—allows students to use debit cards to conduct transactions at their college campuses: at dining halls, on vending machines, and in laundry rooms, among other places.

Hoffman, a computer engineering student at Georgia Tech who goes by the name "Acidus," published his first exposé on security flaws he says he found in Blackboard in 2002, in the spring issue of *2600* magazine. The article, titled "CampusWide Wide Open," seems to draw on published technical specifications of the system and on interviews with Blackboard experts to conclude that "there are several ways to cheat the system" and that it is "horribly insecure."

Hoffman also wrote about times he physically broke in to Blackboard equipment on campus. "This metal box has a handle and a lock," he wrote of one Blackboard device, "but the front of the handle and lock assembly has 4 flat head screws. I used a cheap metal knife and opened this locked box. Inside I found the LCM [Laundry Center Multiplexes] that controlled the laundry room I was in. Everything had 'AT&T CampusWide Access Solution' written on it, as well as lots of Motorola chips. Sadly this was early in my investigation, and I haven't gone back to look again."

Although he does not indicate that he has done any of these things, Hoffman tells how a person might be able to fool the system to "get another load of wash" in a laundry room, say, or to "make the Coke machine think money has been paid" and cause it to "spit out a Coke!" Hoffman writes, "You fool door readers as well if you could get to the wires that go from the reader and go to the magnet holding the door shut. Just send the correct pulses."

According to a timeline of his research posted on the Web, Hoffman called the company to tell them of his findings and was "blown off." Only then, he says, did he publish them. After Blackboard learned of his article, officials at Hoffman's college questioned him—"I basically got reamed"—about his research, but the campus police did not file any charges against him.

On its face, the case is similar to one involving Ed Felten, a computer science professor at Princeton, who in 2001 declined to present his findings of security flaws in technology meant to secure music files after attorneys for the recording industry seemed to suggest they'd sue him under the DMCA. The recording industry's apparent threat caused civil libertarians to say that the DMCA should be struck down because it threatened legitimate academic research, but the recording industry, in a sudden about-face, announced that it had never had any intention of suing Felten. A judge later dismissed Felten's efforts to have a court rule that the recording industry never had a case in the first place.

This case is somewhat different from the Felten case, however, in that Blackboard is claiming violations not just of the DMCA, but also of less controversial state and federal computer security laws; some of the research that Hoffman and Griffith did might have involved breaking into systems on campus, an act that might be illegal under those other laws. Attorneys at the Electronic Frontier Foundation said they were investigating the case in order to decide whether the group should become involved.

"We're concerned right off the bat when we hear of speakers at a conference being served with a [temporary restraining order] moments before they're supposed to speak," said Wendy Seltzer, an attorney at the EFF. "It's the kind of thing that makes us nervous."

One attendee at the conference—an engineer who goes by the name "Decius"—said that after the cease-and-desist letter was read to the group, "a few of us got up and decided that the best thing that we could do was to make as many people aware of what happened as possible. In addition to contacting the press, several individuals said they wished to contact universities using the system to say they were unhappy to hear it was not secure and were unhappy to hear that the company was behaving in this manner."

Decius added: "We live in a society in which we are increasingly dependent on this high-tech infrastructure which our lives are arranged around, and if we can't take these things apart and understand how they work, then I think we have a very serious threat to our freedom." Reported in: Salon.com, April 15.

video games

Seattle, Washington

On May 20, Washington became the first state to enact a law against renting or selling some violent computer games

to children under 17. Within hours after it was signed by Gov. Gary Locke, one trade group pledged to block the law as an unconstitutional infringement on minors' rights.

About a dozen other states, cities or counties have tried regulating violent computer games, only to have courts knock down their laws as violations of the First Amendment to the U.S. Constitution. But Washington's new law is more narrowly drawn than many and so is more likely to survive judicial scrutiny, said its principal sponsor, Rep. Mary Lou Dickerson (D–Seattle).

The federal court battle over the law could help define the limits of a government's power to regulate violence in the relatively new medium of video games. It's already well established that the First Amendment forbids such regulation in more traditional media like books, music and movies. House Bill 1009, known as the Videogame Violence Bill, will go into effect July 27 unless a lawsuit by the Washington, D.C.-based Interactive Digital Software Association, set to be filed within the next few weeks, halts its implementation before then.

That group represents about 25 makers of computer games. The new law levies a fine of up to $500 on any person who rents or sells to someone 17 or under computer games in which the player kills or injures "a human form who is depicted, by dress or other recognizable symbols, as a public law enforcement officer." Police officers and fire fighters are included in that category.

"It is important to foster an environment where young people respect those who uphold the law," Locke said in a prepared statement. To enforce the new law, police officers can issue a ticket on the spot if they witness an unlawful sale or rental, or they can go into court, file a written statement and obtain a ticket from the court, which they then deliver to the alleged wrongdoer. It's unclear even to lawmakers in Olympia whether consumers can call police and report a violation. The law's 15 sponsors cited an increasing number of studies linking an exposure to violent computer games with hostile and antisocial behavior. They also cited a need to foster respect for public law enforcement officers.

"This law is a big deal, and it has an absolutely excellent chance of surviving court challenges," Dickerson said. To survive, laws restricting expression must be very narrow in their scope and must serve a legitimate purpose. Opponents of Washington's law disagree that it's narrowly enough written. "Does it apply to Army officers? What about a plainclothes policeman chasing other policemen who went bad?" asked Douglas Lowenstein, president of the game makers' trade association.

In any case, with the games up to 80 hours long, it's "utterly impossible" for retailers to know whether a game might run afoul of the law, he said. He said the proper approach to regulating the amount of violence minors see is to educate parents about the ratings that computer games voluntarily carry and to urge retailers to stringently enforce those voluntary ratings.

"We're not unsympathetic to the broad concept of making sure kids don't get inappropriate games, but violent content is protected speech under the First Amendment," Lowenstein said. "Over 80 percent of the time, parents are involved in the rental of video games. You want to solve this problem, you can go this unconstitutional route, or you can educate parents and encourage retailers to enforce the rating."

Under a system administered by the Entertainment Software Ratings Board, video game makers rate their games E (for ages 6 and over), T (13 and over), M (17 and over), EC (3 and older) and AO (18 and older). Retailers aren't obligated by law to educate customers about the system, though, and no law requires them to enforce it.

Similarly, no laws enforce the self-imposed ratings used for movies in theatres and on rentals, though the outcry against such violence is far less.

Unlike movie theaters, with a single point of entry, video stores frequently have large staffs that receive minimal training and experience large customer volumes. So educating and enforcing the standards "is not as simple as people want it to be," Lowenstein said. Reported in: *Seattle Post-Intelligencer,* May 21. □

Michael Moore donates $25,000 to ALA Spectrum Initiative

The American Library Association (ALA) announced on May 14 that Michael Moore, author, activist, and winner of the 2002 Oscar for best documentary film, has donated $25,000 to support the ALA Spectrum Initiative. Moore originally pledged this support for Spectrum during a speaking engagement at ALA's June 2002 Annual Conference in Atlanta.

"I am so pleased to be able to share this news with the library community," said ALA President Maurice J. (Mitch) Freedman. "In a time of nationwide draconian cuts in library funding nationwide, this is a real bright spot. It was a pleasure to have Michael Moore speak at my program in Atlanta, and we are proud to have him as a partner in the ALA's efforts. The Spectrum Initiative is critically important to the library profession and to all the diverse users librarians serve every day."

After librarians organized to save his book *Stupid White Men* from being censored or pulped last year, Moore has been a self-proclaimed lover of libraries and librarians. In addition to making a personal donation to Spectrum, Moore has offered to devote a portion of his Web site to promote ALA's Campaign to Save America's Libraries, the Children's Internet Protection Act (CIPA) Legal Defense Fund and the ALA's education efforts around the USA Patriot Act and libraries. He also has offered to have several

thousand copies of his books and films donated to libraries that are under-funded or dealing with budget cuts.

"This donation is only the beginning of what will be an ongoing effort on my part to rally my fellow Americans to support their local libraries. I intend to raise tens of thousands more, both in my appearances around the country and via my Web site," Moore said. "I will not allow one of our most precious natural resources—our free, public libraries—to suffer any further abuse. It is their budgets that get cut first. It is their staffs who are paid some of the lowest wages among professionals in the country. And now, it is their privacy—and the privacy rights of any person who holds a library card—that is now under attack.

"I am proud to do what I can to support our libraries and their librarians. Without them, and without this basic American right to read a book—any book—regardless of one's socio-economic status, we will surely be less free as a people. Freedom is only preserved when its citizens have total access to all information and the free flow of ideas," Moore added.

Established in 1997, the Spectrum Initiative is ALA's national diversity and recruitment effort designed to address the specific issue of under-representation of critically needed ethnic librarians within the profession. Spectrum' s mission is to improve service at the local level through the development of a representative workforce that reflects the communities served by all libraries in the new millennium. The Spectrum Initiative's major drive is to recruit applicants and award $5,000 scholarships to American Indian/Alaska Native, Asian, Black/African American, Hispanic/Latino or Native Hawaiian/Other Pacific Islander students for graduate programs in library and information science. □

Chmara named to FTRF Honor Roll

Theresa Chmara, General Counsel of the Freedom to Read Foundation and partner with the law firm of Jenner & Block in Washington, D.C., is the recipient of the 2003 Freedom to Read Foundation Roll of Honor Award. The award was presented at the 2003 American Library Association Annual Conference in Toronto as a part of the Opening General Session.

Chmara joined the Foundation's legal team in the early 1990s and became FTRF General Counsel in 2000. In that time, she has represented the First Amendment interests of innumerable librarians and library users. She was a key member of the legal team that helped to win the case of *ALA* v. *Department of Justice*, which overturned portions of the Communications Decency Act, and of the team that has

guided the Children's Internet Protection Act case to the U.S. Supreme Court. She is the lead faculty member of the ongoing Lawyers for Libraries training institutes, and serves on the board of the American Booksellers Foundation for Free Expression.

"Theresa's value lies not just in her encyclopedic knowledge of First Amendment law, but in her ability to explain it to lay audiences and her willingness to do whatever she can to promote intellectual freedom, a core value of librarianship," said Gordon Conable, president of the Freedom to Read Foundation. "From coming to the aid of an individual librarian trying to protect the banning of a single book in a library to leading the legal team in the Supreme Court case against the Children's Internet Protection Act, Theresa has left an indelible mark on the library community."

The Freedom to Read Foundation Roll of Honor was established in 1987 to recognize and honor those individuals who have contributed substantially to the FTRF through adherence to its principles and/or substantial monetary support. The Freedom to Read Foundation was founded in 1969 to promote and defend the right of individuals to freely express ideas and to access information in libraries and elsewhere. The Foundation enacts this plan through the disbursement of grants to individuals and groups, primarily for the purpose of aiding them in litigation; and through direct participation in litigation dealing with freedom of speech and of the press. □

SIRS state and regional achievement award

The Bill of Rights Defense Committee (BORDC) of Northampton, Massachusetts, is the winner of the SIRS State and Regional Achievement Award presented by the American Library Association (ALA) Intellectual Freedom Round Table (IFRT). The award, funded by SIRS Mandarin, Inc., consists of a citation and $1,000. It recognizes innovative and effective intellectual freedom projects.

"This is such a wonderful honor for us," said Director Nancy Talanian. "We are especially pleased to be strengthening our relationship with librarians who are staunch supporters of the First Amendment."

BORDC is being honored for helping to lead a national, grassroots movement to protect civil liberties guaranteed by the Bill of Rights. This project has been unusually successful in recruiting activists across the country to work at the local level in coalition-building and promoting awareness of the negative impact on intellectual freedom and civil liberties posed by the USA PATRIOT Act and other similar pieces of federal legislation and regulation. One measure of their success is the number of towns, cities and counties across the country that they have assisted in passing local resolutions that protect the Bill of Rights and support rolling back those portions of recently-passed federal legislation that infringe on civil liberties. At this time, 94 communities and one state (Hawaii) have passed such resolutions.

June Pinnell-Stephens, member of IFRT's SIRS State and Regional Intellectual Freedom Achievement Award Committee, presented the award to Talanian during the IFRT program at the ALA Annual Conference in Toronto. □

Pipkin and Lent win Immroth Award

Gloria Pipkin and ReLeah Lent, English teachers for the Bay County, Florida, schools, have been named the winners of the John Phillip Immroth Memorial Award for Intellectual Freedom for 2003, presented by the American Library Association (ALA) Intellectual Freedom Round Table (IFRT).

The Immroth Award honors intellectual freedom fighters in and outside the library profession who have demonstrated remarkable personal courage in resisting censorship. The award consists of $500 and a citation. The Immroth Award Committee recognized Pipkin and Lent, plaintiffs in a federal lawsuit against the school board, the superintendent and principal, for their public stand in defense of the freedom to read and intellectual freedom.

"They set a standard of personal commitment, which serves as a model for all," said Chair Pamela Bonnell-Mihalis. "Amid bomb and death threats, their deep-seated commitment to the First Amendment did not waver. Had it not been for their steadfast stance, *I Am the Cheese, About David*, and twenty-four other books would have remained restricted and not restored to the classrooms and library."

The award was presented during the IFRT program at the ALA Annual Conference in Toronto. □

(bookseller reveals . . . from page 136)

Recht noted that Meskis could easily have disclosed that information to police because it didn't incriminate Montoya, who since has been convicted on an unrelated drug charge. Instead, he said, "she did the right thing and fought the case independent of what book was being sought."

"For us, it was always about the constitutional issue," Meskis added.

Moriarty said she still would pursue the purchasing records if she had to investigate the case all over again. "As passionate as Joyce Meskis is about protecting the First Amendment, we're as passionate about protecting the community," she said. Reported in: *Denver Post*, April 16. □

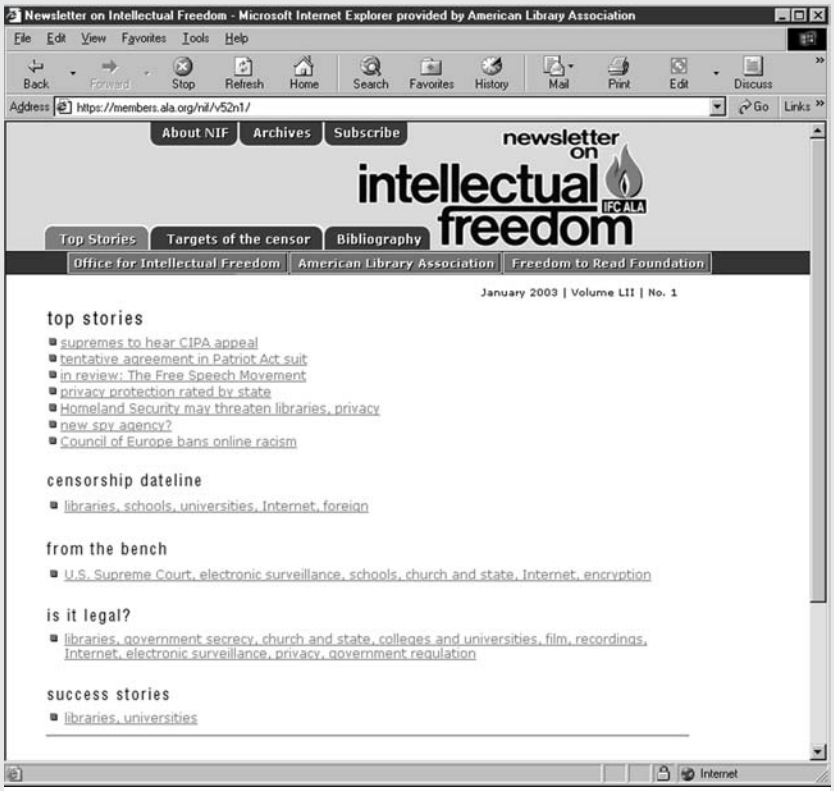
log on to

newsletter on intellectual freedom *online*

The Newsletter on Intellectual Freedom (NIF)—the only journal that reports attempts to remove materials from school and library shelves across the country—is *the* source for the latest information on intellectual freedom issues. *NIF* is **now available** both **online** and in **print!**

To celebrate the launch of the online version, for this first year only, a $50 subscription will entitle new and renewing subscribers to **both** the online and print editions.

The online version is available at www.ala.org/nif/. The *NIF* home page contains information on accessing the *Newsletter*, and links to technical support, an online subscription form, and the Office for Intellectual Freedom.



www.ala.org/nif

Current institutional and personal subscribers were sent a letter explaining how to access the online version. If you did not receive a letter, or if you would like more information on how to subscribe to either the print or online version, please contact Nanette Perez at 1-800-545-2433, ext. 4223, or nperez@ala.org.

intellectual freedom bibliography

Compiled by Beverley C. Becker, Associate Director, Office of Intellectual Freedom.

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