newsletter on intellectual freedom

IFC ALA

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FBI begins visiting libraries

For more background on the following story see www.ala.org/alaorg/oif/fbiinyourlibrary.html.

Across the nation, FBI investigators are quietly visiting libraries and checking the reading records of people they suspect of being in league with terrorists. The FBI effort, authorized by the anti-terrorism law enacted after the September 11 attacks, is the first broad government check of library records since the 1980s, when prosecutors reined in the practice for fear of abuses.

The searches of some records kept by libraries and bookstores were authorized in an obscure provision of the USA PATRIOT Act, quietly approved by Congress six weeks after September 11. The act, passed virtually without hearings or debate, allowed a variety of new federal surveillance measures, including clandestine searches of homes and expanded monitoring of telephones and the Internet.

Section 215 gave the FBI authority to obtain library and bookstore records and a wide range of other documents during investigations of international terrorism or secret intelligence activities. Unlike other search warrants, the FBI need not show that evidence of wrongdoing is likely to be found or that the target of its investigation is actually involved in terrorism or spying. Targets can include U.S. citizens.

Nearly everything about the procedure is secret. The court that authorizes the searches meets in secret; the search warrants carried by the agents cannot mention the underlying investigation; and librarians and booksellers are prohibited, under threat of prosecution, from revealing an FBI visit to anyone, including the patron whose records were seized.

The only limitation in the law is that the investigation cannot be entirely based—though it can be partly based—on activities protected by the First Amendment, like speech or political organizing. For example, campus radicals, the subject of FBI surveillance in the past, could be targeted under the new law only if the government alleged they had some connection to terrorism or espionage.

Libraries across the nation were reluctant to discuss their dealings with the FBI. The same law that makes the searches legal also makes it a criminal offense for librarians to reveal the details or extent of the contact.

(continued on page 239)

Published by the ALA Intellectual Freedom Committee,
Margo Crist, Chairperson

in this issue

targets of the censor

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not in front of the children: "indecency," censorship, and the innocence of youth

Following is the text of a talk delivered by Marjorie Heins, author of Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth, *winner of the Eli M. Oboler Award at the annual program of the Intellectual Freedom Round Table during the ALA Annual Conference in Atlanta in June. Heins discusses the genesis of her most recent book during her years as an ACLU attorney—what she learned from researching the cultural and political origins of indecency and obscenity law and what are some of the current youth-censorhip challenges facing librarians and other believers in intellectual freedom.*

Marjorie Heins directs the Free Expression Policy Project, an independent think tank on artistic and intellectual freedom. From 1991 to 1998, she was a First Amendment litigator at the American Civil Liberties Union, where she directed the ACLU's Arts Censorship Project. In addition to Not In Front of the Children, *she also wrote* Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars *and* Cutting the Mustard: Affirmative Action and the Nature of Excellence, *and numerous articles on civil rights and freedom of expression.*

Thank you so much to everyone involved in the Eli M. Oboler award. Its's an incredible honor for me, and there's no organization I'd rather be honored by. A library is "a mighty resource in the free marketplace of ideas," as a federal court in Ohio once said. Librarians are the people who make that mighty resource a reality.

Let me start by telling a story. The ALA has just won a huge victory—three judges in Philadelphia have struck down the library provisions of the Children's Internet Protection Act, or CIPA, the third federal law in four years imposing censorship on the Internet. CIPA requires libraries and schools to install filtering software as a condition of e-rate discounts or other government aid for Internet connections.

Well, cast your mind back to the ancient days of 1996, just after Congress passed the first of those three Internet censorship laws. This first one, the Communications Decency Act or CDA, made it a crime to display anything "patently offensive" or "indecent" in cyberspace, if it might be available to minors.

We lawyers representing the ACLU, the ALA, and many other organizations involved in challenging the CDA were preparing a witness from Surfwatch, one of the early filtering companies, to testify about how, in the lingo of constitutional law, Internet filters are a "less restrictive alternative" to the CDA in terms of accomplishing the government's presumably compelling interest in protecting the vulnerable minds of youth. As our witness explained how Internet filtering works, I had one of those "Omigod, I can't believe it" moments. Surfwatch's technology identifying key words and phrases would automatically block any Web page with the word "sex," she proudly explained—including sites on sex discrimination, sexually transmitted diseases, and the sex life of plants. If this was a "less restrictive alternative," I thought at the time, we are in serious trouble.

This was one of the moments that inspired me to write *Not in Front of the Children*, and I tell the story in a chapter of the book devoted to the CDA case. What I discovered, working on this case and others, was that whether it was an Internet censorship law, a ruling by the Federal Communications Commission banning a broadcast that it considered indecent, or a school administrator's censorship of a student newspaper, Web site, or T-shirt, the justification was oh so predictably the need to protect children from harm. (No matter that some of these "children" were 16 or 17.)

But where did this powerful assumption of harm to minors come from? And why were not only politicians but judges—and even First Amendment lawyers—so disinclined to question it? Government has a compelling interest in protecting minors from "patently offensive" communications, so the Supreme Court had said. But it didn't explain why.

I decided that a thorough research job on the subject was needed. But *Not in Front of the Children* turned out to be more of a challenge than I'd bargained for. The research led me into not only legal history but also cultural studies, media violence, history of childhood, crime and suspense comics, and of course sexuality—lots of it. The book starts with Plato, who wanted to censor Homer and Hesiod in the interest of protecting youth, and ends with Rudy Giuliani, who wanted to punish the Brooklyn Museum, so his lawyers claimed, in part because it violated its lease by exhibiting works that were inappropriate for children. Let me give you a necessarily abridged, but nevertheless unexpurgated, summary of what I found.

Notions of childhood sexual innocence are relatively new in Western history. Before the 17th century, as the historian Phillippe Ariès wrote in his book *Centuries of Childhood*, "everything was permitted in their presence: coarse language, scabrous actions and situations. . . . The idea did not yet exist that references to sexual matters could soil childish innocence," because "nobody thought that this innocence really existed." It was only toward the end of the 16th century that "certain pedagogues . . . refused to allow children to be given indecent books any longer."

It followed, not surprisingly, that the widespread if not universal phenomenon of youthful masturbation became an object of increasingly hysterical concern among adults in the centuries that followed. The publication in 1710 of an English tract entitled *Onania, or the Heinous Sin of Self-Pollution, And all its frightful Consequences, in both sexes, Considered*, marked the beginning. A Swiss physician named Samuel-Auguste Tissot built upon *Onania* in his

(continued on page 224)

the new FBI guidelines and other anti-terrorism efforts: what every librarian should know

The following is an edited version of a talk delivered by Alan Davidson, Associate Director of the Center for Democracy & Technology, at a program sponsored jointly by the Intellectual Freedom Committee and the Committee on Legislation at the ALA Annual Conference in Atlanta on June 17.

I am very pleased to be here today to talk about the responses to September 11 and their impact on civil liberties. My organization, the Center for Democracy and Technology, has worked very closely with the American Library Association over the years. I have personally learned a lot from Judith Krug of the Office for Intellectual Freedom, as well as from the folks in the ALA Washington office, who often find themselves on the cutting edge of issues affecting individual liberty. So I am pleased to finally make it to this famous convention that I have heard so much about from my friends in the library community.

I have been asked today to provide you with an overview of some of the responses to September 11, their impact on civil liberties, and what the library community should know about them. The very first thing I want to communicate, however, is that while important changes are taking place, and while many of us worry about the impact they will have on our liberty and on the values this country has held dear, it is important that we do not panic. Although some important changes have been made to our laws, the underlying legal protections that establish individuals' rights and responsibilities in this country have not changed.

As librarians, you are guardians of some the most important kinds of information about people: the books they choose to read, the information they seek out online, the ideas they explore. Just because we have all read distressing stories in the newspaper about the erosion of our civil liberties, it does not mean that when asked to turn over information about your patrons that you always have to do it—though you should certainly obey lawful orders from courts—or that it is unpatriotic to ask questions about doing so.

There are still very important rules that set out the balance between the need to conduct criminal and national security investigations, and the need to protect individual privacy. It is important to understand what the law does and does not require. In my time with you today, I hope to give you a sense of the changes made to these rules, and of the underlying protections that are still part of that delicate balance.

What happened on September 11 demands a response. The threats we face today are very real. September 11 was a crisis for our country and for the global community, but it is also now a test of our values—values that have set this nation apart from any other. If we are forced to give up the liberties fundamental to our American way of life, then our country will have lost something very precious.

A Privacy Primer: How the Fourth Amendment and the Law Protect Individuals

Let me step back and talk about the Fourth Amendment, which is the touchstone for our nation's protections for individuals from a prying government. The Fourth Amendment says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

This is where we look in the law to find protection from an unreasonable government intruding into the privacy of our homes and possessions. So, for example, if a law enforcement agent wants on a whim to come into my home, can they do it? Not without proper judicial approval. Under the Fourth Amendment, a warrant is needed to search a home. A court must be shown probable cause that a crime has been, is being, or is about to be committed. There has to be particularity as to the place to be searched or the things to be seized. Similarly, if a government agent would like to listen to a phone call or intercept e-mail, rules limit when and how they can do so, with judicial oversight.

Somewhat less obviously, there are many things in our lives that we may consider private but that are not protected by the Fourth Amendment. The courts have ruled over time that things or information you give to other people are not protected in the same way as things you possess yourself. So, for example, my bank records may contain very personal information, but once they are in the hands of a bank, the government does not need a warrant to go get them. This kind of logic probably applies to library records as well. It applies to the phone calls I make. I get a phone bill from AT&T every month, and the list of calls placed in that bill can be obtained by the government without having to show probable cause, but instead based on "relevance" to an investigation.

As a simple matter, we often think: If the government wants to get my stuff, they have to get a warrant. The fact of the matter is that it is actually much more complicated. We have a complex set of surveillance laws, and there is a whole sliding scale of rules for gaining access to different kinds of information, and not all of these rules are necessarily based on the Constitution. Some are based on laws: library privacy laws, bank record privacy laws, financial privacy laws, laws affecting Internet transactions, electronic communications. In fact, a range of different legal standards exist, from probable cause to mere "relevance," from close judicial supervision to

(continued on page 228)

IFC report to ALA Council

The following is the report of the Intellectual Freedom Committee to the ALA Council delivered at the ALA Annual Convention in Atlanta on June 19 by IFC Chair Margo Crist.

As chair of the ALA Intellectual Freedom Committee (IFC), I am pleased to present this update of the committee's activities. This report will be presented in three sections: Issues, Action Item, and Projects.

Issues

Children's Internet Protection Act

In our 2002 Midwinter Meeting report to Council, the ALA Intellectual Freedom Committee said that we felt confident that ALA would prevail in its challenge to the Children's Internet Protection Act (CIPA) because we could illustrate what library users—and all Americans—stand to lose if librarians are forced to keep people and information apart, if local decisions are replaced by federal mandates, and if education and parenting are replaced by a mechanism that can guarantee neither safety nor liberty.

On May 31, the ALA did prevail! Most importantly, library users prevailed. Calling filters "blunt instruments" because of all the legal and innocuous sites they block and all the "objectionable" sites they fail to block, the three-judge panel of the United States Court of Appeals for the Third Circuit, in Philadelphia, determined that CIPA does indeed violate the First Amendment. Officially, the panel declared Sections 1712(a)(2) and 1721(b) of the Children's Internet Protection Act facially invalid under the First Amendment and permanently enjoined the defendants from enforcing those provisions. If the government chooses to appeal by June 20, 2002, the case will go before the U.S. Supreme Court. In their opinion, the judges agreed with what ALA has said for years, most recently affirmed in its *Libraries and the Internet Toolkit.* Below are a few quotations from the CIPA opinion:

- "[I]t is currently impossible, given the Internet's size, rate of growth, rate of change and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech";
- "To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech"; and
- "[P]rivacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet."

Our communities can rest assured that we are protecting children by educating them to access information efficiently and effectively, to evaluate information critically and competently, and to use information accurately and creatively, all toward the goal of providing children with effective learning and education.

According to a Jenner & Block memorandum dated June 18, 2002, the three-judge panel in the CIPA case held that the FCC and IMLS cannot withhold funds on the ground that a public library has failed to install mandatory filters on every computer. The Court held that "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies' own blocking criteria." While this decision is directly binding only on the agencies and is not a directive to any particular library, the factual findings and legal conclusions of the Court may serve as useful precedents for other lower courts. ALA thus urges any library using mandatory filtering software to consult with legal counsel to reevaluate their Internet Use Policy and assess the risk of future litigation.

According to the ALA Development Office, the CIPA Legal Fund is $800,000, approximately. This figure includes donations from 33 chapters and eight divisions, as well as numerous individuals. It is estimated that the suit will cost about $1.6 million, so the IFC continues to urge all ALA members to:

- Contribute to the CIPA fund, managed by the ALA Development Office (1-800-545-2433, ext. 5050 or www.ala.org/development/) and
- Donate at, and publicize, the URL of the online donation form, "Support ALA's CIPA Legal Fund!" (www.ala.org/cipa/cipalegalfund.html).

For the latest information on CIPA, please visit our Web site at www.ala.org/cipa.

USA PATRIOT Act

On October 25, 2001, Congress passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (USA PATRIOT Act.) This law broadly expands the powers of federal law enforcement agencies investigating cases involving foreign intelligence and international terrorism.

The new legislation amends the laws governing the Federal Bureau of Investigation's access to business records. One provision orders any person or institution served with a search warrant not to disclose that such a warrant has been served or that records have been produced pursuant to the warrant.

The existence of this provision does not mean that libraries and librarians served with such a search warrant

cannot ask to consult with their legal counsel concerning the warrant. A library and its employees can still seek legal advice concerning the warrant and request that the library's legal counsel be present during the actual search provided for by the warrant.

If you or your library are served with a warrant issued under this law, and wish the advice of legal counsel but do not have an attorney, you can obtain assistance from the Freedom to Read Foundation's legal counsel. Simply call the Office for Intellectual Freedom (1-800-545-2433, ext. 4223) and inform the staff that you need legal advice. You need not—and, indeed, should not—disclose the reason you need legal assistance. OIF staff will assure that an attorney returns your call. You should not inform OIF staff of the existence of the warrant.

Information about the USA PATRIOT Act was prepared by the ALA Office for Intellectual Freedom, reviewed by legal counsel, and mounted at http://www.ala.org/alaorg/oif/usapatriotact.html. This Web page includes links to various organizations and analyses of the Act, and additional information, including:

- *Resolution Reaffirming the Principles of Intellectual Freedom in the Aftermath of Terrorist Attacks* (www.ala.org/alaorg/oif/reaffirmifprinciples.html);
- The USA PATRIOT Act in the Library (www.ala.org/alaorg/oif/usapatriotlibrary.html);
- Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff (www.ala.org/alaorg/oif/guidelineslibrary.html); and
- State Privacy Laws regarding Library Records (www.ala.org/alaorg/oif/stateprivacylaws.html).

Open Meetings

At the 2002 Midwinter Meeting in New Orleans, the ALA Council directed the ALA Executive Director to develop an implementation plan to support the conduct of electronic meetings by ALA committees, task forces, etc. For this plan, the Office for Intellectual Freedom was asked to submit a record of conference calls/electronic meetings conducted by the ALA Committee on Professional Ethics, ALA Intellectual Freedom Committee, ALA Intellectual Freedom Round Table, and the Outsourcing Task Force in the last twelve months.

Its report to the Executive Director, OIF submitted the following comments on conducting business via electronic lists:

> As you will note in our description of e-list meetings, we believe there is one ongoing meeting between conferences for all of our committees, governing bodies, etc. This is, in our opinion, the nature of e-lists. Once an e-list is created, and after the first message, discussions on them do not start and end—as long as they exist, they are continuous. That is, someone can leave a message on the e-list at 2:00 a.m. An answer to that message may appear at 1:00 p.m. that afternoon. A reply to that message may appear at 7:00 a.m. the following morning. And so on.
>
> According to ALA Policy Manual, 7.4.3 Open Meetings, "All meetings of the American Library Association and its units are open to all members and to members of the press. Registration requirements apply. Closed meetings may be held only for the discussion of matters affecting the privacy of individuals or institutions." In light of this policy, OIF suggests that ALA committees, round tables, task forces, etc., have an open business e-list and a closed business e-list.
>
> Via ALA's Web site, it should be possible for ALA members to self-subscribe to all open business e-lists. Bona fide members of the press may ask to be subscribed to these open business e-lists. (This method seems to work well for subscribing the press, for example, to the Council's e-list.) All meetings with open content conducted over ALA's e-lists would then be accessible instantaneously to all members of the press and ALA members at their will. (These non-committee members would be able to observe only, and not participate.) For electronic meetings, we believe this method to be the easiest and most cost effective means to achieve Council's goals of accessibility to ALA's open meetings.

The IFC discussed the proposed open meeting implementation and defers approval until it learns more about the financial implications. The committee also discussed OIF's suggestion about e-lists, and believes they move toward accomplishing Council's desire for member participation, but without a financial impact upon ALA offices and units.

Ad Hoc Task Force on Restrictions to Government Information

Following Midwinter, the Committee on Legislation established an Ad Hoc Task Force on Restrictions to Government Information with membership drawn from ACRL, COL-GIS, Federal and Armed Forces Libraries Round Table (FAFLRT), GODORT, IFC, and other ALA units. The Task Force was to gather information and make recommendations to COL on policy regarding government information issues in light of current security concerns.

June Pinnell-Stephens is the IFC representative on the Task Force, and we are pleased to work cooperatively on this joint effort.

The IFLA Internet Manifesto

IFLA's Programme for Free Access to Information and Freedom of Expression (IFLA/FAIFE) prepared The Internet Manifesto for UNESCO endorsement. In brief, this Manifesto proclaims the fundamental rights of users both to access and to publish information on the Internet without restriction and asserts that intellectual freedom is at the core of library service and that freedom of access to information, regardless of medium and frontiers, is a central responsibility of the library and information profession.

The IFC voted to communicate to IFLA/FAIFE that we applaud their effort in developing this document. The Manifesto is attached for your convenience, and can be found online at www.ifla.org/III/misc/im-e.htm.

(continued on page 235)

Privacy: An Interpretation of the *Library Bill of Rights*

This new Interpretation of the ALA Library Bill of Rights was adopted by the American Library Association Council on June 19, 2002, at the ALA 2002 Annual Conference in Atlanta, Georgia.

Introduction

Privacy is essential to the exercise of free speech, free thought, and free association. The courts have established a First Amendment right to receive information in a publicly funded library.[1] Further, the courts have upheld the right to privacy based on the Bill of Rights of the U.S. Constitution.[2] Many states provide guarantees of privacy in their constitutions and statute law.[3] Numerous decisions in case law have defined and extended rights to privacy.[4]

In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others. Confidentiality exists when a library is in possession of personally identifiable information about users and keeps that information private on their behalf.[5]

Protecting user privacy and confidentiality has long been an integral part of the mission of libraries. The ALA has affirmed a right to privacy since 1939.[6] Existing ALA policies affirm that confidentiality is crucial to freedom of inquiry.[7] Rights to privacy and confidentiality also are implicit in the *Library Bill of Rights'* guarantee of free access to library resources for all users.[8]

Rights of Library Users

The *Library Bill of Rights* affirms the ethical imperative to provide unrestricted access to information and to guard against impediments to open inquiry. Article IV states: "Libraries should cooperate with all persons and groups concerned with resisting abridgement of free expression and free access to ideas." When users recognize or fear that their privacy or confidentiality is compromised, true freedom of inquiry no longer exists.

In all areas of librarianship, best practice leaves the user in control of as many choices as possible. These include decisions about the selection of, access to, and use of information. Lack of privacy and confidentiality has a chilling effect on users' choices. All users have a right to be free from any unreasonable intrusion into or surveillance of their lawful library use.

Users have the right to be informed what policies and procedures govern the amount and retention of personally identifiable information, why that information is necessary for the library, and what the user can do to maintain his or her privacy. Library users expect and in many places have a legal right to have their information protected and kept private and confidential by anyone with direct or indirect access to that information. In addition, Article V of the Library Bill of Rights states: "A person's right to use a library should not be denied or abridged because of origin, age, background, or views." This article precludes the use of profiling as a basis for any breach of privacy rights. Users have the right to use a library without any abridgement of privacy that may result from equating the subject of their inquiry with behavior.[9]

Responsibilities in Libraries

The library profession has a long-standing commitment to an ethic of facilitating, not monitoring, access to information. This commitment is implemented locally through development, adoption, and adherence to privacy policies that are consistent with applicable federal, state, and local law. Everyone (paid or unpaid) who provides governance, administration, or service in libraries has a responsibility to maintain an environment respectful and protective of the privacy of all users. Users have the responsibility to respect each others' privacy.

For administrative purposes, librarians may establish appropriate time, place, and manner restrictions on the use of library resources.[10] In keeping with this principle, the collection of personally identifiable information should only be a matter of routine or policy when necessary for the fulfillment of the mission of the library. Regardless of the technology used, everyone who collects or accesses personally identifiable information in any format has a legal and ethical obligation to protect confidentiality.

Conclusion

The American Library Association affirms that rights of privacy are necessary for intellectual freedom and are fundamental to the ethics and practice of librarianship.

Notes

1. Court opinions establishing a right to receive information in a public library include *Board of Education.* v. *Pico,* 457 U.S. 853 (1982); *Kreimer* v. *Bureau Of Police For The Town Of Morristown,* 958 F.2d 1242 (3d Cir. 1992); and *Reno* v. *American Civil Liberties Union,* 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).
2. See in particular the Fourth Amendment's guarantee of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the Fifth Amendment's guarantee against self-incrimination, and the Ninth Amendment's guarantee that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This right is explicit in Article Twelve of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the

(continued on page 222)

IFLA Internet manifesto

Unhindered access to information is essential to freedom, equality, global understanding and peace. Therefore, the International Federation of Library Associations (IFLA) asserts that:

- Intellectual freedom is the right of every individual both to hold and express opinions and to seek and receive information; it is the basis of democracy; and it is at the core of library service.
- Freedom of access to information, regardless of medium and frontiers, is a central responsibility of the library and information profession.
- The provision of unhindered access to the Internet by libraries and information services supportscommunities and individuals to attain freedom, prosperity and development.
- Barriers to the flow of information should be removed, especially those that promote inequality, poverty, and despair.

Freedom of Access to Information, the Internet and Libraries and Information Services

Libraries and information services are vibrant institutions that connect people with global information resources and the ideas and creative works they seek. Libraries and information services make available the richness of human expression and cultural diversity in all media.

The global Internet enables individuals and communities throughout the world, whether in the smallest and most remote villages or the largest cities, to have equality of access to information for personal development, education, stimulation, cultural enrichment, economic activity and informed participation in democracy. All can present their interests, knowledge and culture for the world to visit.

Libraries and information services provide essential gateways to the Internet. For some they offer convenience, guidance, and assistance, while for others they are the only available access points.

They provide a mechanism to overcome the barriers created by differences in resources, technology, and training.

Principles of Freedom of Access to Information via the Internet

Access to the Internet and all of its resources should be consistent with the United Nations Universal Declaration of Human Rights and especially Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The global interconnectedness of the Internet provides a medium through which this right may be enjoyed by all. Consequently, access should neither be subject to any form of ideological, political or religious censorship, nor to economic barriers.

Libraries and information services also have a responsibility to serve all of the members of their communities, regardless of age, race, nationality, religion, culture, political affiliation, physical or other disabilities, gender or sexual orientation, or any other status.

Libraries and information services should support the right of users to seek information of their choice.

Libraries and information services should respect the privacy of their users and recognize that the resources they use should remain confidential.

Libraries and information services have a responsibility to facilitate and promote public access to quality information and communication. Users should be assisted with the necessary skills and a suitable environment in which to use their chosen information sources and services freely and confidently.

In addition to the many valuable resources available on the Internet, some are incorrect, misleading and may be offensive. Librarians should provide the information and resources for library users to learn to use the Internet and electronic information efficiently and effectively. They should proactively promote and facilitate responsible access to quality networked information for all their users, including children and young people.

In common with other core services, access to the Internet in libraries and information services should be without charge.

Implementing the Manifesto

IFLA encourages the international community to support the development of Internet accessibility worldwide, and especially in developing countries, to thus obtain the global benefits of information for all offered by the Internet.

FLA encourages national governments to develop a national information infrastructure which will deliver Internet access to all the nation's population.

IFLA encourages all governments to support the unhindered flow of Internet accessible information via libraries and information services and to oppose any attempts to censor or inhibit access.

IFLA urges the library community and decision makers at national and local levels to develop strategies, policies, and plans that implement the principles expressed in this Manifesto.

This Manifesto was prepared by IFLA/FAIFE.

Approved by the Governing Board of IFLA 27 March 2002, The Hague, Netherlands.

Proclaimed by IFLA 1 May 2002. □

FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's Report to the ALA Council delivered by FTRF President Gordon Conable at the ALA Annual Conference in Atlanta, June 17.

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the Midwinter Meeting:

CIPA Litigation

American Library Association v. *United States.* Our lawsuit challenging the Children's Internet Protection Act (CIPA) has concluded with a unanimous decision by the special three-judge panel that the CIPA statute is facially unconstitutional and violates the First Amendment. The court reached its decision after finding that the mandated use of filtering on all computers will result inevitably in blocked access to substantial amounts of constitutionally protected speech. Chief Judge Becker of the Third Circuit Court of Appeals wrote the decision on behalf of himself and U.S. District Judges Fullam and Bartle.

The opinion filed by the three-judge panel entered factual findings confirming that filters both overblock by blocking access to protected speech and underblock by allowing access to illegal materials. The court also found that less restrictive alternatives exist to allow public libraries to protect children from illegal and inappropriate material. These alternatives include:

- offering filters as a choice for families to use for their own children at the public library;
- providing education and Internet training courses;
- enforcing Internet use policies; and
- using privacy screens, recessed monitors, and particular placement of computer terminals to insure that the patron's viewing remains private.

The panel has permanently enjoined the FCC and LSTA from withholding funds from public libraries that choose not to install filters. Public libraries thus are not required to install filters on their computers to receive funds from either agency.

The CIPA decision, unfortunately, does not address the constitutionality of filtering in schools and school libraries, and school libraries are still required to comply with the provisions of CIPA. However, the court's extensive factual findings on how filters block substantial amount(s) of constitutionally protected speech for adults and minors applies equally to the filters used by schools and school libraries. We believe these factual findings about the ineffectiveness of filters will be helpful to any school or school library resisting filters.

This victory, however, is only the first step. Under the special law governing constitutional challenges to CIPA, the government is entitled to appeal this decision directly to the United States Supreme Court. We anticipate that the government, in fact, will appeal; it has until June 20 to decide.

The Foundation is still actively participating in raising funds for the CIPA lawsuit, and has already donated $100,000 of its own funds to the effort.

Litigation

The Foundation continues to enjoy success in its defense of our right to freely read and receive information. In each of the cases below, we have joined amicus briefs supporting that right:

Tattered Cover Bookstore, Inc. v. *City and County of Denver.* In a decision that strongly reaffirmed the fundamental principle that persons have a right to access and read whatever they wish without government interference, the Colorado Supreme Court ruled in favor of the Tattered Cover Bookstore, quashing a search warrant that sought to compel the disclosure of a customer's book purchasing records. FTRF's brief argued that search warrants or subpoenas that demand information about the reading habits of library or bookstore patrons significantly threaten the exercise of their First Amendment rights.

Byers v. *Edmondson.* The Louisiana Court of Appeals has upheld the dismissal of this lawsuit, which sought to hold the makers of the film *Natural Born Killers* responsible for the criminal acts committed by two young assailants who shot a convenience store clerk after viewing the film several times. The Court of Appeals rejected the plaintiff's argument that the film was obscene and incited violence, ruling that a film's presentation of violent subject matter does not lose its First Amendment protection merely because it has a "tendency to lead to violence."

Yahoo! v. *La Ligue Contre Le Racisme et L'Antisemitisme.* On November 7, 2001, the U.S. District Court in San Jose, refused to enforce a French court's order to fine Yahoo! for hosting pages advertising Nazi and racist memorabilia. The court ruled that no other nation's law, no matter how valid in that nation, could serve as a basis for quashing free speech in the United States. Defendants La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students have appealed the District Court's decision to the Ninth Circuit Court of Appeals. FTRF supported Yahoo! at the district court level, and is participating in another amicus brief supporting Yahoo!'s position on appeal.

In addition to these cases, the Foundation has recently joined in an action to ensure open access to public records and archival materials. *American Historical Association* v. *National Archives and Record Administration* is a legal action challenging President Bush's Executive Order 13233, which permits both former and sitting presidents,

(continued on page 237)

in review

At the Schoolhouse Gate: Lessons in Intellectual Freedom. Gloria Pipkin and ReLeah Cossett Lent. Heinemann, 2002. 236 p. $21.00

"The war against intellectual choice is a war against thinking. Read this book and you will understand the importance of fighting for and defending intellectual freedom and choice." So reads the quote from Stephen Krashen on the front cover of this book, which contains a detailed account of two lengthy and hard-fought battles for intellectual freedom: one representing students' right to read what they choose, and the other—to write what they want.

Unfortunately, America's public schools have rarely been bastions of intellectual freedom. The first section of this book deals with a situation where the freedom to read came under siege at Mowat Middle School in Bay County, Florida, during the 1980s. Recounted by Gloria Pipkin, it started with challenges to *I Am The Cheese,* by Robert Cormier, and *About David,* by Susan Beth Pfeffer, went on to include *Never Cry Wolf,* by Farley Mowat, and ended up with a list of sixty-four books deemed to be 'unsuitable for general study in Bay County Schools,' including many of the classics. As one student asked during the turmoil, "Why teach us to read, and then say we can't?" Though the banned books were eventually restored, the damage was done.

In the second section, the struggle for intellectual freedom was extended to student expression in school publications. ReLeah Cossett Lent became the sponsor of *Making Waves,* the school paper at Mosley High School in Bay County. The paper was viewed as a forum for the exchange of ideas and student expression. It was an award-winning student-run publication, with an editorial board composed of students plus the teacher sponsor who advised them. The trouble began with the condemning by faculty of an article on student athlete use of steroids, and continued with the administration's rejection of an ad proposed by a gay and lesbian support group. From there, things only got worse until the nature of the school newspaper was changed entirely.

In the third section of this book, the authors analyze their personal experiences to assess the implications of their battles for their students, the teaching profession and for society. Pipkin and Lent recommend specific strategies to protect and extend the intellectual rights and freedoms of students and teachers.

This book chronicles, in detail, the day-by-day fight for an ideal that consumed the two authors' lives and put their careers on the line as they worked to defend the rights of students. Their legal strategies are recounted; the resistance they encountered is portrayed and the text is emotionally-charged. While the average reader may not need the depth of detail presented here, the narrative serves as a factual record of the events in both cases.

As Susan Ohanian says in the book's Foreword, "Imagine letting kids loose with books of their choice. Imagine letting them publish their own newspapers and magazine. Students making their own choices is not an easy banner to carry these days. All the more reason we must hold it high." So we are reminded, in At the Schoolhouse Gate. *Reviewed by Carol Kolb Phillips, East Brunswick Public Library, East Brunswick, N.J.* ☐

TIPS program elicits fear of "1984"

As part of the country's war against terrorism, the Bush administration wants to recruit a million letter carriers, utility workers and others whose jobs allow them access to private homes into a contingent of organized government informants. The Terrorism Information and Prevention System (Operation TIPS), a national reporting pilot program, was scheduled to start in August in ten cities, with a million informants initially participating in the program.

The program will allow volunteers, whose routines make them well-positioned to recognize suspect activities, to report the same to the Justice Department, which is running the project. The Justice Department will enter the information into a database, which will then be broadly available within the department, and to state and local agencies and local police forces. At local and state levels, the program will be coordinated by the Federal Emergency Management Agency (FEMA).

Operation TIPS is one part of President Bush's new volunteer Citizen Corps program that urges Americans to keep their neighborhoods safe. The program is described on the government Web site www.citizencorps.gov.

"This broad network of volunteer efforts will harness the power of the American people by relying on their individual skills and interests to prepare local communities to effectively prevent and respond to the threats of terrorism, crime, or any kind of disaster," the program's description on the Web site states.

The program has alarmed several civil liberties groups, including the American Civil Liberties Union and the Rutherford Institute, which say the administration should not allow TIPS to become "an end run around the Constitution." Critics say that having Americans act as "domestic informants" is reminiscent of the infamous Stasi, the new-disbanded communist East German secret police service that snooped on dissidents and ordinary East German citizens for more than forty years, compiling a huge catalogue of notes.

Rachel King, an ACLU legislative counsel, said the organization is concerned that law enforcement will use the volunteers, especially those whose occupations allow them to enter homes and monitor residents—to search people's residences, without a warrant. She said that the organization

(continued on page 210)

censorship dateline

libraries

Houston County, Georgia

Denese Shellnutt has yet to see her son's report card because she wants a book removed from the shelf of every Houston County school library. Shellnutt received notice that her son's report card would be held until *You Hear Me?*, a book her 16-year-old son had checked out to complete a poetry assignment for his literature class, was returned. She didn't know about the content of the book until one of her younger children found it for her and asked what "orgasmic war" means. The single parent of three children said she was so shocked by what she read in *You Hear Me?*—a book of poems and stories written by teen-age boys—she's waged a one-woman campaign to get it off the shelves of every school library in the county.

Her campaign apparently has worked—one of the county's assistant superintendents said that he plans to have the book removed immediately and investigate who approved it. The book, edited by Betsy Franco, features poems and stories with curse words, explicit sexual language and tales about suicide and violence. Shellnutt said the book is filled with writings by children who don't know how to handle their problems.

Shellnutt said she also was disturbed that the presence of the book in the school library gives tacit approval of the language and behavior in the book. Shellnutt's son checked out the book from Houston County High School in April.

"He found it in the school library and that puts an OK to this, " she said. "I don't OK it, but the school does."

James Kinchen, the assistant superintendent for curriculum and instruction, said the book is "inappropriate reading material. It will be taken off the shelves immediately." Kinchen said he hadn't read the book, but had seen photocopies of pages of the book that made it necessary for it to be pulled off the shelves. He said it doesn't support the mission, goals and philosophy of the school system, and the use of profanity and vulgar language is against board policy.

Franco, an author of several titles for young children and teens and also the mother of three sons, said she didn't compile the book for adults, but for teen-agers to communicate honestly with other teen-agers. She said she has received nothing but positive reactions about the book, adding that many young people have contacted her to say that it's helped them learn how to make better decisions in life.

"I made a decision from the start not to censor the book. ... Adults spend a lot of time analyzing teens, not letting them speak for themselves," she said. "The title is important . . . I personally think it's time we listen."

The book was chosen in 2001 as one of the top ten "quick picks" for reluctant young adult readers by the Young Adult Library Services Association, a division of the American Library Association. "Quick picks" are selected annually; they are considered outstanding titles that will appeal to reluctant readers. The purpose of the list is to encourage teen-agers to read.

Franco said she knew some people might be offended by the raw or harsh feelings expressed in the book, but they aren't being forced to read it. Her purpose was not to censor teen-agers, but to help them feel like they aren't alone. For those "who do want to read it, I think it should be accessible to them," Franco said.

Kinchen and Charles Stone, the system's coordinator of media services, said Franco's book had to have been recommended by a teacher, the school's media specialist or the school's media committee to end up in the library. The media committee—which is composed of teachers, the media specialist, parents and students—has many responsibilities, including selecting the books that are placed on the shelves of the 33 schools in Houston County.

"How this one got through, I don't know. There could be 10 or 12 like them," Kinchen said. "I can't imagine (the book) being in the building over a year without it being challenged," Stone said. "I don't go on shelf tours. I will plan to do some of that (now), but not on a witch hunt."

A board policy allows parents to challenge books and other instructional materials by filling out a form at the school, which is then reviewed by the school's media committee. If no decision is made at that level or a parent is dissatisfied, they can appeal to the systemwide media committee, then the school board. In this case, Kinchen opted to use his authority immediately to remove the book.

Shellnutt said she refused to fill out the form to challenge the book because she feared the book would be placed back on the shelf. "I hope and pray to God that's the only kids who've checked it out," said Shellnutt as she pointed to two entries at the back of the book. Houston County High is a "public school, but it's still a school library." Reported in: *Macon Telegraph*, June 15.

Dyersville, Iowa

An advice book for teens will not be on the shelves of Dyersville's James Kennedy Public Library. The library's board of trustees voted twice to ban the book *Sari Says: The Real Dirt on Everything from Sex to School*, a nonfiction book written by *Teen People* online-magazine advice columnist Sari Locker. According to Wayne Hermsen, the library board chairman, some of the book's contents were too sexually explicit. The decision was made despite the fact that most library trustees did not get a chance to review the book. At least two trustees had read the book before the board's initial vote on June 26, Hermsen said. At that meeting, the nine-member library board voted 7–0, with two abstentions, to remove or ban *Sari Says*.

Locker defended her approach, saying that educating teenagers sometimes involves sensitive issues. "There's nothing in this book except what teenagers have told me they want to know. In fact, in this book, I actually reprinted hand-written letters from teenagers," she said. "I answer the questions, but I encourage family values. I'm constantly urging teenagers to talk to their parents about things they are asking me."

In the book, Locker answers questions on such issues as how to talk about sex with a date or with parents, alternatives to intercourse, birth control, signs of pregnancy and sexually transmitted diseases. "My personal value is that teenagers shouldn't do something they feel they have to hide from their parents," she said.

Both Hermsen and library trustee Kori Mahoney abstained from voting because they did not have enough information, they said. "I was not familiar with the book. I had not read the book," Mahoney said. "I did not feel comfortable making a decision on a book I had not read."

After the June meeting, Mahoney sent a letter to other board members asking them to reconsider their vote to ban the book. She was not necessarily defending *Sari Says* but wanted the vote brought up again after board members had more information. "Challenging a book is some pretty serious business," she said.

On July 10, the board voted unanimously to amend the language of the vote to "return" from "remove," because some members believed the book had not yet become part of the library's collection, Hermsen said.

Sari Says was brought to trustees' attention by library trustee Betty Anne Scherrman, who raised objections about the book during the June board meeting, according to minutes from that meeting. Apparently, Scherrman noticed the book in a pile of books about to be shelved. She read through portions of the book and then asked the library's director, Shirley Vonderhaar, to reconsider stocking the book. That request was denied.

At the June meeting, Scherrman asked to discuss the book because her request for reconsideration was denied by Vonderhaar. After discussion, a motion by Doris Koopman was made to remove the book and seconded by Frank Mousel.

Sari Says never actually hit library shelves. In fact, the book, which had been purchased by library staff at the time of the vote, was slated to be returned to the supplier, he said. This was the first time a book has been banned at the Dyersville's library, Hermsen said. "There was uncertainty on how to do this. We've never had an incident before," he said. "We completely revamped our policy in light of how this happened." Reported in: *Dubuque Telegraph-Herald*, July 18.

Prince William County, Virginia

Prince William County library officials say they intend to continue limiting what adults can see on the Internet, even though a panel of three federal judges ruled that such restrictions violate patrons' free speech rights. The policy, adopted by Prince William's library Board of Trustees in March, places "limited" filters on computers for adults, to block obscene material, and more restrictive filters on computers for children.

County Library Director Dick Murphy said the idea was to block "Web sites that would be obscene and would not be considered protected speech." The policy has drawn the attention of the American Civil Liberties Union, which said it is "blatantly unconstitutional" and contradicts several court decisions that have found filter technology to be unsophisticated and capable of blocking legitimate sites on the Internet.

"In case after case, the first problem the courts have identified is that there does not seem to exist a filtering device that can discern the difference between Web sites that are protected under the First Amendment and those that are not," said Kent Willis, a spokesman for the ACLU's Virginia chapter. "If Prince William says they've magically come up with a filtering device that can detect obscenity, that seems somewhat fantastic. . . . They're operating in contradiction to every single ruling that exists."

Angela Lemmon Horan, a senior assistant county attorney for Prince William, said library officials researched Internet use in county libraries for four years. They tried less restrictive ways of keeping offensive material at bay, but they still received complaints from patrons that it was accessible, she said. They also studied a 1998 federal court ruling that struck down the use of filters in Loudoun County's public libraries and decided that they were in compliance with the law, added Horan, who has been advising the library board.

If the Supreme Court lets stand the decision that filters violate the First Amendment, "then we've all got to go back and think," Horan said.

Libraries that adopted filtering policies to get federal funds could be forced to repeal their decisions or face legal action, Willis said. "I don't think there's any doubt that if Prince William doesn't voluntarily withdraw this policy—if the . . . law is found unconstitutional by the Supreme Court—that there will be a legal challenge," Willis said. Reported in: *Washington Post*, June 12.

schools

Cedarville, Arkansas

The parents of a Cedarville fourth-grader filed a federal lawsuit July 3 challenging the city school board's placement of the Harry Potter series on a restricted borrowing list, which requires students to present written permission from a parent to borrow one of the four J. K. Rowling titles. The plaintiffs are Billy Ray Counts and Mary Nell Counts, the parents of a Cedarville student; Billy Ray Counts served on the materials review committee that recommended to the board in May that the district maintain unfettered access to the books.

Also serving on the committee was Cedarville High School librarian Estella Roberts, who said that the board's 3–2 vote in June to restrict the series violated the landmark 1982 *Island Trees* v. *Pico* decision, which forbade officials from removing school-library materials "simply because they dislike the ideas contained in those books." Roberts contended that board members "were upset because they didn't have any say" in the committee findings.

"Heavy-handed bureaucrats on the Cedarville School Board are trying to use government as a tool for censorship and to impose their own peculiar religious views," plaintiff attorney Brian Meadors said. The original complainant, Angie Haney, had objected to the Harry Potter series because it characterized authority as "stupid" and portrayed "good witches and good magic." Reported in: *Fort Smith Southwest Times Record*, July 1.

Cromwell, Connecticut

At least two Cromwell residents want a pair of award-winning books removed from the middle school's curriculum, contending that the books promote witchcraft and violence. The women circulated a petition urging school officials to remove *The Witch of Blackbird Pond*, by Elizabeth George Speare, and *Bridge to Terabithia*, by Katherine Paterson. Both books were awarded the ALA's prestigious Newbery Medal for children's literature.

Bridget Flanagan says they are unfit for young readers. "The children read this stuff and they act it out," she said. "I want them to take these books out."

Set in seventeenth-century Connecticut, *The Witch of Blackbird Pond* is the story of a girl accused of being a witch after she befriends a woman believed to be involved in witchcraft. *Bridge to Terabithia* is about a boy and a girl who become friends and create an imaginary kingdom in the woods. Flanagan, 61, has no children in the school system but said she's concerned for other parents and their children. She circulated the petition with resident Andrea Eigner, who has children in the school system. Flanagan said her campaign also received support from two clergymen and another parent, but she didn't know their names.

The petition urges the school board to " . . . eliminate the study of materials containing information about witchcraft, magic, evil spells or related material, now and forever. . . . We believe this material is satanic, a danger to our children, is being studied excessively and has no place in our schools."

Besides the two books, the two women are targeting certain field trips, worksheets and other study material guides. Specifically, they point to field trips to the Salem Witch Museum and to a historic meetinghouse in Wethersfield, and an assembly that they say promoted the popular "Harry Potter" book series. They also point to a spelling instruction program called "Cast a Spell" and to an elementary school librarian who they complain dressed as a witch on Halloween.

Superintendent of Schools Mark Cohan said he had spoken to Eigner in the past on a similar topic and informed her of a series of steps she could take to have the board address her concerns. Cohan said she didn't follow up on the matter. He said he has never spoken to Flanagan. "We have a policy that people can use if they have any questions about any materials in the library," he said. "They may request that we do a review of any book that they think needs a review."

Cohan said school officials are reviewing the petition and expected to meet with the residents at the school board's August 27 meeting. Earlier this year, Eigner fought to cancel a field trip to the Salem Witch Museum. The trip, intended to supplement the teaching of Speare's book, went on as planned.

Tom Murphy of the Connecticut Department of Education said a request to remove a book from a school is made about once a year in the state. Since most school boards have a good idea about the curriculum in their schools, it's rare that a book is removed at a parent's request, Murphy said. "They try to base it on the community's standards and whether it's appropriate for that community," Murphy noted. Reported in: *Hartford Courant*, July 16.

periodicals

Birmingham, Alabama

In late March, promoters of the show *The Vagina Monologues*, were surprised to learn that the *Birmingham*

News would not accept advertising or provide any editorial coverage of it, making it the only newspaper on the continent to do so. According to David Stone, executive producer for the show, "The *News* objects to the title of the show simply because it contains the word 'vagina.'"

Monologues is notable enough to have appeared in every major newspaper where the show has run, including many national entertainment and news magazines, and has been referenced on television shows ranging from "Oprah" to "Everybody Loves Raymond."

Birmingham News Editor Tom Scarritt would not discuss the paper's editorial position on *The Vagina Monologues* and referred questions to advertising director Bob West for comment. One anonymous reporter offered the tentative comment that "the [Vagina Monologues] story remains under evaluation on a day-to-day basis, just like other stories." However, there are others at the *News* who believe pressure to keep the subject out of the paper came from the very top of the organization, namely, publisher Victor Hanson, III.

On Friday, May 31, Bob West said, "Our first responsibility is to our paid readers. We do not want to take the chance of offending anyone. I told them we'd be happy to cover this in our calendar, and we said we would take the ads if they made them a little more conservative, or more informative and less promotional. At that time, they were not interested in revising their ads and that's understandable."

Not true, said Elisabeth Bachorowski, Marketing Director for Clear Channel Entertainment in Salt Lake City, who was attempting to promote the show in Birmingham. "Their first claim was they couldn't take the ads because they had bare naked legs in them. There are no naked ads for the show and I don't understand where that came from. Then they said we could do an informational ad, all text, no graphics, and then later they told us we could not use the name of the show in our ad. It's hard to imagine why we'd pay thousands of dollars for a highly censored ad that doesn't even mention the name of the show."

But that was exactly what happened after promoters caved in and produced an ad that read, "To find out the title of this show, call . . ." which ran in the June 2 edition. Reported in: Infoshop, June 10.

university

Columbus, Ohio

George W. Bush came to Columbus on June 14 for Ohio State University's commencement, and university administrators made sure he wouldn't hear any criticism. At rehearsal and right as the ceremony began, a school administrator, Richard Hollingsworth, Associate Vice President of Student Affairs, warned that any protesters would be kicked out and arrested. Some students said they were told they would be denied their diplomas if they protested. The university was responding to a planned silent protest by a group calling itself Turn Your Back on Bush.

Hillary Tinapple, a graduating senior, was one of the organizers of the group. "I was quite upset ever since I read in the campus paper that Bush had been invited to speak at my graduation," she wrote on the group's web site (turnyourbackonbush.com). "That man signifies everything that is wrong in this nation: the abuse of power, the privatization of profit and the socialization of burdens, the destruction and dismantling of what I call progress without any consideration of the consequences, but most especially the Bush Administration's foreign policy and actions around the 9-11 issues. I am a member of the Green Party, and a passionate community activist, so of course my gut response was that something HAD to be done to show we do not approve."

She called an emergency meeting, and "was excited about seeing new faces in the group," she wrote. "About forty folks came to the first planning/brainstorming meeting, and about thirty came to the next one," she told *The Progressive*. They decided to turn their backs when the President spoke.

But the threat from the administration "changed the whole feeling of the protest," she wrote, and scared off many students. She said that Hollingsworth warned them "he knew about the web site, and that if you do not cooperate, you could be arrested, and if you are arrested, then you would not graduate."

But Randy Dunham, an assistant director of media relations at Ohio State, said the threat to withhold diplomas from protesters was "an urban myth. Somebody took a statement out of context completely. What was said at commencement was anyone who attempts to block the hearing or view of others would be removed from the stadium and subject to arrest."

Asked why a silent protest would warrant an arrest, Dunah said, "If they blocked the view of others" it would be justified.

Tinapple said "four graduates and about ten others" participated in the protest. "At that point , it became more about my freedom of expression as an individual than any single issue about the Bush Administration," she wrote on her web site.

But Dunham said, "This should not have been a political event. The President's speech wasn't about politics. It was about voluntarism."

However, the President, who happens to be a political figure, did talk about subjects other than voluntarism. "We are called to defend liberty against tyranny and terror," Bush said. "We've answered that call. We will bring security to our people and justice to our enemies . . . Our nation is the greatest force for good in history."

"Eight people turned their backs, and none were arrested," said Dunham. "That leaves 59,992 who seemed pretty pleased."

While none of the protesters were formally arrested, the police reportedly did eject at least one of them from the ceremony and threatened him with arrest. Jeff, who was identified as an OSU alumnus on the group's web site, wrote: "I saw one of Columbus's Finest heading our way . . . We were being led out of Ohio Stadium. To the officer's credit, he realized there was a three-year-old in my arms and was not at all hostile. I asked him if I was under arrest, and he did not answer me. When we reached the exit . . . he told me we were being charged with disturbing the peace. If we chose to leave, the charges would be dropped immediately. With our daughter in mind, we chose not to fight it . . . On this day, June 14th, 2002, I came to the realization that we no longer live in a free society."

Yoshie Furuhashi, a lecturer in the English Department at Ohio State, was also one of the organizers of the protest. Her conclusion: "The police and the OSU administration didn't respect our rights to free speech and free assembly at all," she wrote on the group's web site. Furuhashi said that some of the protesters were in touch with the Ohio Civil Liberties Union to see what legal recourse they might have. "There was no need for them to clamp down on free speech," said Joseph Levine, a philosophy professor at Ohio State who joined several dozen protesters outside the ceremony that day. "They knew pretty well what was planned. There was nothing especially disruptive about that. This was an attempt to really put a chill on protest activity." Reported in: *The Progressive*, July 15.

art

New York, New York

In 1936, when the country was in the grip of the Depression and artists were focusing on socially conscious themes, a pair of murals commissioned by the federal Works Progress Administration were installed in a turn-of-the-century Victorian Gothic courthouse on 121st Street in Harlem. The murals, by David Karfunkle, depicted images of conquistadors and slavery, and included two exposed breasts. But in late May, when the building was reopened after a $2.8 million renovation as the Harlem Community Justice Center, visitors were greeted not by the Depression-era artwork but by a pair of large tan drapes running the length of the courtroom and bolted in place, top and bottom.

The draperies, which were installed late last year, were ordered put up by the State Office of Court Administration. The decision to cover the murals was made after meetings with community representatives who found the images offensive, especially since the court, one of the city's new community courts, has a juvenile division that handles cases involving young people.

The situation was first noted by Michael Henry Adams, a historian of Harlem and its architecture. The decision has been criticized by art historians and preservationists, who argue that a thin-skinned and increasingly puritanical public misunderstands the murals' history and significance.

The installation of the curtain and the reaction to it recalled an episode in January in Washington, when the Department of Justice was widely attacked for spending $8,650 on a curtain to cover the partly nude statue "Spirit of Justice"; Attorney General John Ashcroft had said he was uncomfortable with the nudity.

"Does anyone really want to be the John Ashcroft of Harlem?" asked Tom Thurston, a historian and project director for the New Deal Network, an institute at Columbia University.

One of the murals in Harlem, titled "Exploitation of Labor," depicts light- and dark-skinned workers building temples; in one corner, a woman with a bare breast pleads on behalf of a man whose hands are bound. The other mural, "Hoarding of Wealth," shows a conquistador cupping the planet Earth in his hand while noblemen offer models of castles and ships; the scene includes a fair-skinned woman draped in peach fabric that leaves one breast exposed.

"The murals were covered because there are naked women depicted in the mural and there are youth in the court," said David Brookstaver, the spokesman for the State Office of Court Administration. "In addition to the naked women, it depicts slavery."

"The size, scale and placement in a public space implies that the images are representing the institution," said Michele Cohen, program director for public art for public schools for the city's Board of Education. "So institutions become very nervous about the murals."

"If you want the mural, it looks like you support racism and nudity," said Joe Zayas, clerk to Justice Rolando T. Acosta, who presides over the courthouse. "And if you are against the mural, then it looks like you don't value art and the First Amendment." Reported in: *New York Times*, July 28.

foreign

Rome, Italy

Five Internet sites which carried blasphemies against God and the Virgin Mary have been shut down in Italy following a complaint by the Vatican newspaper. The *l'Osservatore Romano* paper said a special police unit "took over an Internet site due to the blasphemous nature of unrepeatable words which accompanied the name of the Madonna," adding that four other similar sites had also been closed. The police blacked out pages on the site so that Internet surfers who try to visit them find nothing but the words "Site seized by the Head of Rome's Special Police Force on the orders of Rome's Chief Prosecutor."

The police also discovered a commercial network which sells T-shirts carrying the same blasphemous logos as appeared on the Internet sites. "This splendid result shows that serious and rigorous investigations can help to ensure that a luxury such as freedom of speech does not end up being used to offend the sensitivities and dignity of others," said *l'Osservatore Romano*.

Pope John Paul II has on several occasions shown his support for the Internet, while warning against some of its specific uses. On May 12, in his most recent comment on the Internet, he announced his intention next year to consider the subject "Internet: a new forum to proclaim the Gospel." Reported in: Yahoo! News, July 10.

Vientiane, Laos

While the people of Laos are being encouraged to go online, they are not allowed to surf the Internet freely. Authorities in Vientiane have installed filters to prevent users from logging onto "unsuitable" websites, said the National Internet Committee. "Like other societies, we want to protect our youth and vulnerable citizens from bad stuff such as pornography and dissident websites that post false information about governments," said Maydom Chanthanasinh, executive director of the committee.

The Internet business in Laos increased rapidly over the past year after the government issued laws for Internet management in late 1999. Of the 5.4 million population, there are some 3,000 Internet users using three Internet Service Providers (ISPs), Maydom said. Filters installed at the three ISPs automatically blocked users from connecting to undesirable sites, he said.

"Like playing football, some may break through to hit a goal of bad sites, but as far as we know any particular immoral and anti-government sites are screened out," he said.

When you try to log on to one of the so-called undesirable sites from Laos, a message appears on the screen asking the user to contact authorities at itcamin@laotel.com. Internet users said they were not interested in logging onto such pages given the fact that most them use the Net in public at Internet cafes.

Phonesavanh Philasouk, an Internet cafe owner said that she needed to help the authorities keep a close eye on customer behavior. Her licence would be revoked if users in her cafe were found to be visiting banned websites, she said. Most of the customers in her shop are foreigners who usually use the Internet to send email. Local users are mostly youngsters who use the Net for entertainment and sending emails to relatives and friends abroad, she said.

"Most Lao users love hitting Thai homepages because of culture and language similarities," she said, adding sites such as kapook.com and TV7 were well known for information about movies and music stars. Internet services in Laos are relatively expensive because of scarce communication lines, Maydom said. Reported in: *The Nation*, July 18.

Moscow, Russia

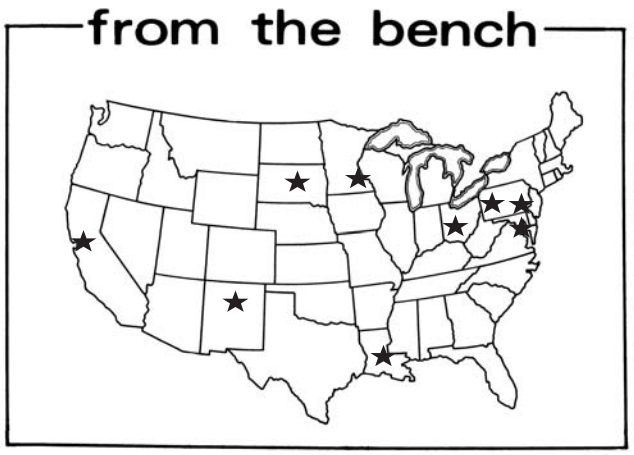
Russia's parliament has passed a tough new law against extremism, which opposition forces fear is designed to provide legal cover for a looming crackdown on all independent political activity. The law, which will enable police to summarily shut down any organization deemed "extremist", was rushed through the required three readings in barely three weeks and passed on June 27—record time for the normally sluggish State Duma, Russia's lower house of parliament. President Vladimir Putin had ordered deputies not to leave for summer recess until they adopted this, and several other "urgent" pieces of legislation.

Supporters of the law said it is needed to combat the explosive rise of violent racists, neo-fascists and Islamic fundamentalists in Russia. A spate of vicious attacks on non-white foreigners by skinheads, an anti-Semitic bombing and a downtown Moscow rampage by flag-waving soccer fans focused public attention on the threat of right-wing mayhem. "People thought Hitler was just a freak, until it was too late," said Boris Reznik, a deputy with the United Russia party. "We need to take action, urgently".

But activists of Russia's powerful Communist Party and many independent left-wing, environmental and anti-globalist groups suspect the legislation is really aimed at them. "We're in favor of fighting fascism, racism and ethnic chauvinism, but these are all included in existing laws," said Tamara Pletneva, a Communist Party deputy. "Under this law, anyone who goes to a meeting and criticizes the president can be arrested and his organization shut down. The goal here is to silence all opposition."

The law's definitions of extremism include activities aimed at overthrowing the existing order, inciting racial or ethnic hatred, terrorism, displaying Nazi symbols, or forming illegal armed units. But it also enshrines some more controversial definitions of extremism that might be stretched to apply to almost any legitimate opposition, such

(continued on page 238)



U.S. Supreme Court

The U.S. Justice Department notified the Supreme Court June 20 that it planned to appeal the May 31 ruling by a federal district court that struck down the Children's Internet Protection Act (CIPA), a law that denies federal funds to public libraries that have not installed Internet filtering software. The American Library Association and the American Civil Liberties Union had sued to overturn the law, saying that it blocked constitutionally protected speech.

The Supreme Court will likely hear arguments in the case early next year, assuming that it does not dismiss the appeal.

Emily Sheketoff, executive director of ALA's Washington Office, said she believed the Supreme Court would be swayed by evidence that demonstrated filters were buggy and unreliable. ACLU Litigation Director Ann Beeson agreed, saying, "We're confident that the Supreme Court will affirm the strong opinion of the lower court declaring unconstitutional forced Internet censorship in libraries." Reported in: *Washington Post*, June 21.

The Supreme Court has been the quietest branch of government about the events of September 11. Congress passed the U.S.A. PATRIOT Act, rolling back civil liberties in key areas, and the Bush administration has held hundreds in secret detention. The court, meanwhile, said nothing. On June 28, the justices made themselves heard for the first time, blocking a federal judge's order to open to the public immigration hearings for terrorism suspects.

In May, Judge John Bissell of U.S. District Court in New Jersey struck down the government's blanket policy of barring the public and the media from detention and deportation hearings in what it calls "special interest" cases. He held that hearings can be closed when there is a danger of revealing evidence that could compromise an investigation, but otherwise the First Amendment requires that immigration hearings, like criminal trials, be open.

The Bush administration asked the Supreme Court to put Judge Bissell's order on hold while it appealed. If the hearings are open, Solicitor General Theodore Olson argued, terrorists "will have direct access to information about the government's ongoing investigation."

The Supreme Court did not explain its decision. It is possible the justices simply wanted to avoid even the chance of compromising national security until the issue can be fully aired. The Supreme Court could end up reaching the same decision as Judge Bissell did. But it was significant that the justices reached down to issue a stay when the court hearing the appeal of the order, the Third Circuit Court of Appeals in Philadelphia, refused to do so. Reported in: *New York Times*, June 29.

People have the right to go door to door to advocate for religious, political or other noncommercial causes without first getting the government's permission, the Supreme Court ruled June 18 in a lopsided constitutional victory for the ministry of the Jehovah's Witnesses. The 8-to-1 decision struck down a Stratton, Ohio, ordinance that made it a crime for any canvasser or solicitor to pay an uninvited visit on any of the 278 residents for the purpose of promoting or explaining any cause without providing identification and obtaining a permit from the mayor's office. The village interpreted "canvassers" to include Jehovah's Witnesses, with whom the mayor, John M. Abdalla, had long had a tense relationship, and "cause" to include their door-to-door ministry.

While drawing on a series of Supreme Court precedents that found constitutional protection for the nonconformist views of the Jehovah's Witnesses—who refuse to salute the American flag, for example—the decision was not limited to religious expression. In his majority opinion, Justice John Paul Stevens noted that the ordinance appeared to apply to neighbors ringing one another's doorbells to solicit support for political candidates or improved public services.

"It is offensive, not only to the values protected by the First Amendment, but to the very notion of a free society," Justice Stevens said, "that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."

Chief Justice William H. Rehnquist was the lone dissenter. He cited a series of recent crimes, including the murder of a Dartmouth University faculty couple by two teenagers who gained entry to the couple's home by claiming to be conducting a survey, in arguing that the Stratton

ordinance was a valid approach to crime control. "The Constitution does not require that Stratton first endure its own crime wave before it takes measures to prevent crime," Justice Rehnquist said.

In a concurring opinion, Justice Stephen G. Breyer said the "crime prevention justification" the chief justice invoked in support of the ordinance was "not a strong one" because the village itself had not relied on it. Stratton argued that the ordinance, adopted in 1998, was justified by the need to protect residents' privacy and deter fraud, mentioning crime only in passing.

"I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so," Justice Breyer said.

Although the scale of the case was small, involving a village on the Ohio River and a 59-member Jehovah's Witnesses congregation from a nearby town, its themes and implications were large, reflected in briefs filed by national organizations. For some, the important theme was not so much the actual restraint on speech as the value the court placed on anonymous speech. Two recent Supreme Court decisions upholding the right of political canvassers and pamphleteers to remain anonymous have alarmed supporters of campaign finance disclosure requirements.

The decision, *Watchtower Bible & Tract Society* v. *Village of Stratton*, found the identification requirement of the Stratton ordinance to be one of its constitutional flaws. At the same time, Justice Stevens uggested, although rather obliquely, that the earlier decisions were limited in their application and did not stand for a broad principle that no disclosure can be required in the campaign finance context.

Many cities and towns have ordinances regulating commercial solicitation, and those were not affected by the ruling. Justice Stevens suggested that the Stratton ordinance might well have been constitutional had the village applied it "only to commercial activities and the solicitation of funds."

A brief from the Mormon Church told the court that restrictions on religious proselytizing were increasingly common. The brief asked the court to rule that religious expression had a "preferred status" under the First Amendment. But the court's treatment of the ordinance as a broad restriction on advocacy made it unnecessary for the justices to reopen their debate over whether religious activities should be exempt from generally applicable regulations.

Jehovah's Witnesses who regularly visited Stratton refused to seek a permit on the ground that their authority to preach derived from the Bible and not the government. Along with the denomination's Brooklyn-based national organization, they challenged the ordinance and lost, both in U.S. District Court and the United States Court of Appeals for the Sixth Circuit, in Cincinnati.

In his majority opinion, Justice Stevens noted that Supreme Court decisions in favor of the Jehovah's Witnesses going back to the 1930's and 1940's have echoed First Amendment principles. "The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged," he said. "It motivates our decision today."

Justices Antonin Scalia and Clarence Thomas did not sign the majority opinion, instead concurring separately in an opinion by Justice Scalia that was oddly churlish in tone. Justice Scalia responded to a comment by Justice Stevens that there were "patriotic citizens" who might "prefer silence to speech licensed by a petty official." That was a "fairy-tale category" of patriots, Justice Scalia said, adding: "If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed." Reported in: *New York Times,* June 18.

The U.S. Supreme Court ruled June 20 that individuals cannot sue colleges for violating a federal law that protects the privacy of student records. In a 7-to-2 decision involving a lawsuit against Gonzaga University, the justices held that the Family Educational Rights and Privacy Act of 1974 does not give individual students and parents the right to sue education institutions that violate the law's provisions by divulging confidential student information.

Writing for the court's majority, Chief Justice William H. Rehnquist said that members of Congress, in adopting the law, had intended that its privacy provisions would be enforced by the U.S. secretary of education, mainly through the withholding of federal funds to institutions that failed to change their policies to comply. The law's privacy provisions "contain no rights-creating language" giving students or parents the ability to sue institutions that release confidential information without permission, the majority opinion said.

Because such provisions "speak only in terms of institutional policy and practice, not individual instances of disclosure," they do not provide grounds for individuals to sue education institutions over specific violations, the majority opinion declared.

The dissenting justices, Ruth Bader Ginsburg and John Paul Stevens, issued an opinion that accused the majority of departing from "over a quarter century of settled law." All of the federal appeals courts that have expressly ruled on the matter have concluded that the 1974 act confers certain privacy rights on individuals, they asserted, and Congress has never seen fit to amend the law to specifically state otherwise.

The decision was hailed as a victory by lawyers representing Gonzaga, a Roman Catholic college located in Spokane, Washington, and by other colleges that had sought to limit their exposure to liability under the 1974 student-privacy law, commonly known as FERPA. Had the Supreme Court ruled the other way, the result could have been "a new cottage industry being established by lawyers" who specialize in suing colleges over violations, said Sheldon E. Steinbach, vice president and general counsel of the American Council on Education. The council had joined

seven other college associations in submitting briefs with the Supreme Court on Gonzaga's behalf.

Other organizations that had expressed support for Gonzaga's position in the case included Security on Campus, a watchdog group that monitors campus crime, and the Reporters Committee for Freedom of the Press, which argued in a legal brief that journalists would have a much more difficult time covering campuses if college officials feared being sued for releasing information about their students.

The American Civil Liberties Union had filed a brief on behalf of the other side, arguing that students' privacy rights would be jeopardized if they did not have redress in the courts. Steven Shapiro, ACLU's national legal director, said the ruling "makes sense only if one assumes that Congress intended to enact a law that cannot be enforced," because "it is unrealistic to expect the federal government to cut off all funding" to institutions that do not comply.

The case before the Supreme Court, *Gonzaga University and Roberta S. League* v. *John Doe*, involved a lawsuit filed by a Gonzaga graduate, who charged that he was unable to get a teaching job because Ms. League, an official of the college, had told the state's teacher-certification office that he had been accused of sexually assaulting another student. The former student, who graduated in 1994, sued the university for negligence, defamation, and invasion of privacy under FERPA. In 1997, a state-court jury ordered Gonzaga to pay him $1.15-million in damages, including $150,000 in compensatory damages and $300,000 in punitive damages for violations of FERPA.

A state appeals court reversed the decision two years later, but that court's ruling was in turn reversed by the Washington State Supreme Court in June 2001. The state Supreme Court ruling held that the university had violated the former student's privacy and civil rights by revealing information in his education records. The university then appealed the case to the U.S. Supreme Court, challenging the appeals court's ruling on the alleged violations of the federal privacy law. Reported in: *Chronicle of Higher Education* online, June 21.

The Supreme Court may have thought it said all that needed to be said about cross-burning ten years ago. That is when, in the case *R.A.V.* v. *City of St. Paul*, the court struck down an ordinance that prohibited cross-burning when it was intended to cause resentment or alarm "on the basis of race, color, creed, religion or gender." The law amounted to "viewpoint discrimination" and violated the First Amendment, the court said.

But in the years since, state and federal courts have invoked the R.A.V. ruling to both uphold and strike down similar laws. On May 28, the Supreme Court agreed to revisit the issue, responding to a plea from the commonwealth of Virginia for clarity on the racially charged subject. It is rare for the Supreme Court to use state court, rather than federal court, decisions as the basis for making new First Amendment doctrine.

Virginia's highest court, also citing R.A.V., last year struck down that state's 50-year-old law forbidding cross-burning, even though the law does not mention the racial criteria the Supreme Court focused on in the 1992 case. Instead, the Virginia statute bars cross-burning "with the intent of intimidating any person or group of persons." But the Virginia Supreme Court found the law "analytically undistinguishable" from the ordinance struck down in R.A.V.

The Virginia law was passed in response to cross-burnings in the state by the Ku Klux Klan, but the state in its petition emphasizes that the law in its wording does not target the Klan alone or any specific kind of intimidation. "The question of how states may ban cross-burning—when the intent is to intimidate—is an important question of federal law that this court should address," Virginia's state solicitor William Hurd told the justices in his petition in Virginia v. Black, the case accepted for review.

Virginia Attorney General Jerry Kilgore said after the court's action, "It is important that Virginia have the ability to protect her citizens from this type of intimidation. Burning a cross to intimidate someone is nothing short of domestic terrorism."

Nine states also filed a brief with the court urging it to accept the case to give them guidance on how to deal with hate crimes, which, they said, are on the rise. "Expressions of hate and bigotry are protected by the Constitution, but actions taken to harm, threaten, intimidate or terrorize others are not equally protected merely because they are rooted in such hate and bigotry," the states said. Arizona, California, Georgia, Kansas, Massachusetts, Missouri, Oklahoma, Utah and Washington joined in the brief.

The Virginia case actually stemmed from two separate cross-burnings involving three defendants in 1998. In one, Klan member Barry Elton Black was arrested after leading a Klan rally that included burning a 25-foot tall cross in a field in rural Carroll County. The cross was on private property but in full view of passing motorists and nearby residents, including many African-Americans.

In the other incident, Richard Elliott and Jonathan O'Mara, both white, tried to burn a cross in the yard of a black neighbor, James Jubilee. The defendants in both cases invoked their First Amendment free-speech rights in defense of their actions.

The Virginia Supreme Court sided with the defendants, finding that "despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content."

Lawyers for the defendants, including noted First Amendment scholar Rodney Smolla, a law professor at the University of Richmond, urged the high court to leave the

Virginia Supreme Court ruling undisturbed. "The court conscientiously applied core First Amendment principles in unpalatable circumstances," the defendants' brief stated.

After the Virginia Supreme Court ruling was appealed to the Supreme Court, the Virginia Legislature passed a new "fallback" law that makes no mention of crosses but makes it a crime to burn any object with the intent to intimidate. But the old law, the one before the U.S. Supreme Court, remains on the books, so the dispute is not moot. If the old law is struck down, the new, more general law would stand unless it, too, is challenged. Reported in: freedomforum.org, May 29.

ALA Policy on Governmental Intimidation

The American Library Association opposes any use of governmental prerogatives which leads to the intimidation of the individual or the citizenry from the exercise of free expression. ALA encourages resistance to such abuse of governmental power and supports those against whom such governmental power has been employed. Adopted February 2, 1973; amended July 1, 1981, by the ALA Council. □

church and state

San Francisco, California

A federal appeals court panel drew outrage from across the political spectrum by ruling June 26 that it is unconstitutional for schoolchildren to recite the Pledge of Allegiance, but the decision may not last long. Some scholars said the ruling, which takes issue with the phrase "one nation under God," will likely either be overturned by the U.S. Supreme Court or reversed by the full U.S. Court of Appeals for the Ninth Circuit.

"I would bet an awful lot on that," said Harvard University scholar Laurence Tribe.

Charles Haynes, First Amendment Center senior scholar, agreed, saying the decision "will very likely be overturned because it is inconsistent with prior lower court rulings—and the views of Supreme Court justices found in the majority opinions of various church-state cases."

The 2-to-1 ruling was in response to an atheist's bid to keep his second-grade daughter from being exposed to religion in school. Circuit Judge Alfred T. Goodwin said: "In the context of the pledge, the statement that the United States is a nation, "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the republic. Rather, the phrase "one nation under God" in the context of the pledge is normative. To recite the pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "The government must pursue a course of complete neutrality toward religion." Furthermore, the school district's practice of teacher-led recitation of the pledge aims to inculcate in students a respect for the ideals set forth in the pledge, and thus amounts to state endorsements of these ideals. Although students cannot be forced to participate in recitation of the pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation, of the current form of the pledge."

The decision was met with widespread criticism. President Bush found the ruling "ridiculous." Senate Majority Leader Tom Daschle, (D-SD), called it "just nuts." Sen. Christopher Bond, (R-MO), said it was "political correctness run amok."

"The Supreme Court itself begins each of its sessions with the phrase 'God save the United States and this honorable court,' " said White House spokesman Ari Fleischer. "The Declaration of Independence refers to God or to the creator four different times. Congress begins each session of the Congress each day with a prayer, and of course our currency says, 'In God We Trust.' "

If allowed to stand, the ruling from the nation's most-overturned Circuit Court would bar schoolchildren from reciting the pledge—at least in the nine Western states the Ninth Circuit covers. The decision does not take effect for several months.

Meanwhile, Sen. Mary Landrieu, (D-LA), yesterday introduced a constitutional amendment to allow references to God on U.S. currency and in the pledge, according to a news release from her press secretary.

"While God is infallible, clearly the judges are not," Landrieu said in a statement. "From the Dred Scott decision, which proclaimed African Americans to be property, to the twisted logic used today by the Ninth Circuit Court, the

courts have made decisions that are clearly wrong." Landrieu said she hoped the courts would make her amendment unnecessary.

"I am confident that our court system will correct itself. But barring that, I offer this legislation as an option for this body to ensure that the Pledge of Allegiance is restored to its rightful place." Landrieu's amendment stipulates that any reference to God in the Pledge of Allegiance or on U.S. currency shall not be construed as affecting the establishment of religion.

The Senate unanimously approved a resolution condemning the appeals court decision.

The court took up the case after a federal judge dismissed the lawsuit brought by Michael Newdow, a Sacramento physician with a law degree who represented himself. "This is my parental right to say I don't want the government telling my child what to believe in," he said.

Newdow, an atheist, says he was trying only to draw a line between church and state—not provoke a national furor—when he went to court to challenge the Pledge of Allegiance. Two years ago, Newdow sued because his second-grade daughter was compelled to listen to her classmates recite the pledge at the Elk Grove school district.

"Many people who are upset about this are people who just don't understand," Newdow said yesterday. "People have to consider what if they were in the minority religion and the majority religion was overpowering them."

Newdow said he sued the school district and Congress, among others, in an effort to restore the pledge to its pre-1954 version. He said he had received a barrage of threatening phone calls because of the panel's ruling.

The U.S. Supreme Court has never squarely addressed the issue, Harvard scholar Tribe said. The high court has said schools can require teachers to lead the pledge but ruled students cannot be punished for refusing to recite it.

"It could be said that references to God in the Pledge and on our money constitute government 'endorsement' of religion," said the First Amendment Center's Haynes. "But such 'ceremonial deism' has been part of the warp and woof of American public life since the nation was founded. "True, the courts are generally stricter in applying the establishment clause in the public schools—and that's the only possible reason that this decision has any hope of being upheld," Haynes said. "But unlike state-imposed religious exercises, patriotic exercises that mention God are unlikely to be seen by the Supreme Court as coercive—as long as kids are allowed to opt out."

But University of Southern California Law School professor Erwin Chemerinsky said he believed the appeals court was right. "I believe the government can't act to advance religion," he said. "That's what Congress did by putting 'under God' in the pledge."

The appeals panel said President Eisenhower alluded to the religious aspects of the pledge on June 14, 1954, when he signed the insertion of the phrase "under God" into law." Millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our nation and our people to the Almighty," Eisenhower said.

Dissenting Judge Ferdinand F. Fernandez, appointed by the first President Bush, chided the decision by Goodwin, a Nixon appointee, and Judge Stephen Reinhardt, appointed by President Carter. Under "Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings," Fernandez wrote. "'God Bless America' and 'America the Beautiful' will be gone for sure, and while use of the first and second stanzas of 'The Star Spangled Banner' will still be permissible, we will be precluded from straying into the third," he added.

Fernandez said the same logic would apply to using "In God We Trust" on the nation's currency.

Congress approved the change to the pledge at the height of the Cold War after a campaign by the Knights of Columbus, a Roman Catholic men's service organization. Americans deluged Congress with mail supporting the change, and religious leaders said the United States' pledge should be different from that of communist countries.

The appeals panel noted that the U.S. Supreme Court has said students cannot hold religious invocations at graduations and cannot be compelled to recite the pledge. But the appeals panel went a step further, ruling the Constitution protects students who don't believe in a monotheistic deity from even having to make an "unacceptable choice between participating and protesting."

The government had argued that the religious content of "one nation under God" is minimal, but the appellate court said the phrase can reasonably be seen by atheists or believers in certain non-Judeo-Christian religions as an attempt "to enforce a 'religious orthodoxy' of monotheism."

In other school-related religious cases, the high court has said that schools cannot post the Ten Commandments in public school classrooms. In March, a federal appeals court ruled that Ohio's motto, "With God, all things are possible," is constitutional and is not an endorsement of Christianity even though it quotes the words of Jesus. Reported in: freedomforum.org, June 27.

Baton Rouge, Louisiana

A state program to encourage sexual abstinence among adolescents has given money to individuals and groups that promote religion, a practice that violates the U.S. Constitution, a federal judge decided July 25. Ruling in a lawsuit filed by the American Civil Liberties Union, U.S. District Court Judge G. Thomas Porteous ordered the Governor's Program on Abstinence to stop giving grants to individuals or groups that use the money to convey religious

messages "or otherwise advance religion in any way in the course of any event supported in whole or in part" by the program. Porteous also decreed that officials of the abstinence program, launched in March 1999 with federal Welfare Reform Act money, keep a closer eye on grant recipients to make sure state financing isn't used in a way that results in religious indoctrination.

"Unfortunately, abstinence-only programs have a long history of crossing the line between the religious and the secular," said Catherine Weiss, director of the ACLU Reproductive Freedom Project. "Today's decision should stand as a wake-up call that this practice is unacceptable."

Bruce Schewe, an attorney for the state, said officials needed time to decide on whether to appeal. In the meantime, he said, the state would immediately comply with the ruling and put controls in place so the program does not cross the line noted by the judge. Schewe said the program "shouldn't have made contracts" with groups such as the Roman Catholic Church Diocese of Houma/Thibodaux, and "we're not going to do it anymore."

Schewe said program officials will travel to religious schools to spread the abstinence message, rather than handing materials and resources over to an institution that might mix in religion, as was done in the past. That will likely require that the program spend more of its budget on administrative costs—and less on getting out its message—to make sure that abstinence and abstinence alone is what's promoted, he said.

In his decision, Porteous said he realized the abstinence program, which has been run by only Richey and another employee, is shorthanded, but he added, "This court cannot allow constitutional violations because a government department/program is understaffed." The judge cited a number of the program's grants that ran afoul of the constitutional ban on states establishing religion. Among them was a contract with the Diocese of Lafayette, whose monthly reports said it had spent its abstinence financing to support prayer at abortion clinics, anti-abortion marches and anti-abortion clinics.

Porteous also pointed to abstinence-promotion skits put on at junior and senior high schools by the "Just Say Whoa" theater troupe. The performances, which included a character named "Bible Guy," had the primary effect of promoting the views of a particular religious faith, Porteous said.

Porteous also took issue with the abstinence program's contract with Southwest Louisiana Area Health Education Center, whose grant application said it sought money to buy Bibles.

Julie Redman, president of Planned Parenthood of Louisiana and a critic of the program, applauded the court's ruling. "Why are these groups promoting abstinence only? Because it's a religiously based position," she said, contending that abstinence programs are effective only if they also suggest use of contraception, something the governor's program does not advocate. Reported in: *New Orleans Times-Picayune*, July 26.

Internet

St. Paul, Minnesota

A federal judge has ordered a South St. Paul man to shut down his anti-abortion Web sites with domain names that are confusingly similar to the trademarked names of some of the nation's best known companies. U.S. District Court Judge Ann D. Montgomery issued a temporary restraining order July 30 against William S. Purdy Sr. on behalf of McDonald's Corp., PepsiCo Inc., Coca-Cola Co., The Washington Post Co. and Washingtonpost.newsweekInteractive Co. She ordered Purdy to immediately shut down his Web sites with the confusing names and transfer their ownership to the appropriate companies. Montgomery also ordered Purdy not to create any more Web sites with names similar to trademarked names owned by the companies and that don't alert Internet users to nature of the Web site's content within the domain name.

Purdy said that he'll appeal the injunction. He said he is buying addresses like bloodycoca-cola.com or pepsideathmills.com to continue his anti-abortion protest. Purdy, who represented himself, argued that the companies don't like what he has to say and that the issue is one of free speech. He said that he opposes the *Post's* abortion rights editorial position and Coke's contributions to Planned Parenthood. He said it was impossible to criticize a company without using its name.

Most of the sites, which divert traffic to anti-abortion Web sites, were set up July 4. The sites contain disclaimers and graphic images of aborted fetuses. Reported in: *San Jose Mercury-News*, July 31.

university

Miami, Ohio

Federal privacy laws prohibit colleges from releasing specific information about confidential campus disciplinary hearings to reporters who request such details under state open-records laws, a federal appeals court ruled June 27. In a lawsuit involving *The Chronicle of Higher Education*, a panel of the U.S. Court of Appeals for the Sixth Circuit unanimously upheld a district-court ruling that disciplinary files qualify as "education records" under the Family Educational Rights and Privacy Act, also known as FERPA.

"A detailed study of [FERPA] and its evolution by amendment reveals that Congress intends to include student disciplinary records within the meaning of 'education

records,'" Judge Karl Forester wrote for the three-judge appeals-court panel. FERPA generally bars colleges from releasing any education records that include "personally identifiable information" without consent from students or their parents.

The decision was welcomed by college officials, who argue that the details of most campus disciplinary hearings should remain private because punishments are "educational" (rather than criminal), with expulsion being the most severe penalty. But campus-crime experts and student-press advocates expressed strong disappointment. They believe that some colleges will be more likely to urge students to report incidents to campus judicial panels, rather than the police, if the incidents are likely to embarrass the college.

The Chronicle had argued that the State of Ohio, where the lawsuit was filed, permitted the disclosure of disciplinary records under its Public Records Act. In 1997, the Ohio Supreme Court ruled that disciplinary records were not education records, and it ordered Miami University to release full records—including the names of students—to a campus newspaper that had sued to obtain them under the state's open-records law. *The Chronicle* then sought to obtain the records from Miami University and similar records from Ohio State University. As Miami and Ohio State were in the process of providing information to *The Chronicle*, the U.S. Education Department sued both institutions, seeking an injunction prohibiting them from releasing personally identifiable student information. When the institutions didn't challenge the suit, *The Chronicle* intervened.

U.S. District Court Judge George C. Smith, ruled in March 2000 that disciplinary records should be considered education records because FERPA had carved out exemptions in certain areas, but no broad exemption for disciplinary records. The appeals court agreed, stating flatly that the Ohio Supreme Court had erred in deeming the disciplinary files public records. "The Ohio Supreme Court misinterpreted a federal statute—erroneously concluding that student disciplinary records were not 'education records' as defined by the FERPA—and prematurely halted its inquiry based upon that erroneous conclusion," Judge Forester wrote.

The Chronicle could still obtain information about campus crime by requesting student disciplinary records that do not include personally identifiable information, he wrote.

The ruling "affirms what we've believed all along," said LeRoy S. Rooker, director of the Education Department's Family Policy Compliance Office. He said he was also pleased that the ruling allows the department to act in advance to prevent the release of disciplinary records in some cases.

Scott Jaschik, *The Chronicle's* editor, said that the newspaper would consult with its lawyers before deciding whether to continue the appeal. "This case is an important one," he said. "Many colleges have faced criticism of the way their judicial systems run, with questions being raised about a range of issues: Are the systems fair? Are the rights of victims and the accused respected? Do minority students get treated unfairly? Do athletes get preferential treatment? We wanted access to these records to explore these issues, which is impossible to do when you don't know which students are involved."

Mark Goodman, executive director of the Student Press Law Center, which assists campus journalists, suggested that the appeals court had overstepped. "There's really a very serious issue of federalism here," he said. "Does the federal government have the ability to overrule a state court regarding the release of state records?" Reported in: *Chronicle of Higher Education* online, June 28.

"disorderly conduct"

Pierre, South Dakota

A teen-ager who flipped up his middle finger and mouthed the f-word several times at a school official was properly convicted of disorderly conduct, the South Dakota Supreme Court majority ruled June 13. But two dissenting justices said the boy, identified only as S.J.N-K. to protect his identity as a juvenile, was within his free-speech rights. S.J.N-K. made the obscene gestures to Yankton Middle School Principal Wayne Kindle.

Kindle and his family had stopped at a grocery store on August 27, 2000, and were about to leave in their van when S.J.N-K. began harassing them. The Kindles drove off, and S.J.N-K. followed in a pickup driven by his brother. The boys cut across a parking lot and swerved in front of the Kindles as they pulled onto the street, forcing the principal to slam on the brakes. Kindle then began driving slowly, but the pickup S.J.N-K. was riding in also slowed. The teen stuck his head out the window and again made the obscene gestures. The two vehicles traveled about a mile before the pickup driver went south and Kindle went north.

S.J.N-K., then 14, was charged with disorderly conduct. Finding the boy guilty, Circuit Judge Glen Eng put him on probation for six months and ordered twenty hours of community service.

Marcia Brevik, who is S.J.N-K.'s lawyer, told the Supreme Court in March that her client's behavior was admittedly vulgar but did not amount to disorderly conduct. Disorderly conduct is defined in state law as causing serious public inconvenience, annoyance or alarm, or as fighting, threatening or violent behavior. Brevik said extending the middle finger and mouthing the f-word are constitutionally protected forms of free speech.

S.J.N-K. was not protected by the free-speech provisions of the First Amendment because he intimidated the Kindles by making the lewd gestures several times, argued Frank Geaghan, an assistant attorney general. The school principal told police he felt threatened because the boy mouthed the f-word as least four times and held up his extended middle finger during most of the episode.

Agreeing with Geaghan and upholding the lower court judge, the Supreme Court said the continuous nature of the boy's actions amounted to disorderly conduct and were not within the realm of free speech. "This was not merely the use of one profane word or one obscene gesture, it was an ongoing aggression that falls outside free-speech protection," wrote Chief Justice David Gilbertson.

The encounter with Kindle and his family was prompted because the principal had refused to allow S.J.N-K. to skip eighth grade. The boy later managed to skip the grade and start high school by transferring to another school. "S.J.N.-K.'s act of retaliation against Kindle for not letting him skip the eighth grade and advance to high school is not political speech," Gilbertson added. "It was an unprovoked form of harassment, done but for no apparent purpose than to incite a violent reaction in Kindle. S.J.N.-K. is not relieved of guilt simply because his attempts to provoke Kindle were unsuccessful."

Former Acting Justice Max Gors, who dissented with Justice Robert A. Amundson in the 3–2 ruling, said S.J.N-K.'s conduct was rude and obnoxious but did not amount to disorderly conduct, especially in a confrontation involving a seasoned school principal. The boy was protected by the Constitution's free-speech guarantee, Gors wrote, adding that S.J.N-K.'s behavior did not amount to provocative "fighting words" that are outside of the constitutional shroud.

"Substitute S.J.N-K.'s language and gesture with the idea being expressed—'I hate you.' If S.J.N-K. had waved with all of his fingers and mouthed, 'I hate you,' we would not be here today," Gors said. Reported in: freedomforum.org, June 15.

prepublication review

Los Alamos, New Mexico

The Bush administration lost a round in its fight to censor a book about China's nuclear weapons program when a federal judge said June 10 that the court has the authority to review its decision. The government is trying to delete twenty percent of a manuscript written by Danny Stillman, retired chief intelligence officer at Los Alamos National Laboratory. He sued the Defense Department and the CIA, claiming they are violating his First Amendment rights.

U.S. District Court Judge Emmet Sullivan rejected the government's argument that the court does not have jurisdiction to review executive branch decisions about classifying information. "The government has asked this Court to take the extraordinary step of insulating its actions from judicial review and from constitutional challenge," Sullivan wrote.

"From a First Amendment standpoint, this decision is up there among the most prominent decisions ever issued in this field," said Mark Zaid, Stillman's lawyer.

Government lawyers said the Constitution gives the executive branch total authority to control access to classified information.

In the 1990s, Stillman made nine trips to China, visiting a nuclear test site and meeting with scientists. He agreed to be debriefed by government officials after each trip, even though none was made in his official capacity. He wrote a 500-page manuscript, titled "Inside China's Nuclear Weapons Program," and submitted it for government review in January 2000, a requirement for employees with security clearance. Reported in: *Washington Post*, June 11.

prisoners' rights

McKean, Pennsylvania

A federal appeals court has reinstated a class-action lawsuit brought by prisoners who want to see R-rated movies. The prisoners, all in a federal penitentiary in McKean, said their First Amendment rights were violated by a 1996 federal law prohibiting "the viewing of R, X and NC-17 rated movies" in federal prisons. The same law bans a variety of "amenities or personal comforts," including martial arts instruction, weight lifting equipment, hot plates and electric guitars.

The law, introduced by Representative Richard A. Zimmer, a New Jersey Republican who has since left Congress, was meant to make prison less pleasant. "Prisons should be places of detention and punishment," Representative Zimmer said at the time. "Prison perks undermine the concept of jails as deterrence. They also waste taxpayer money."

Jere Krakoff, a lawyer in Pittsburgh, represents the prisoners. "If they wanted to ban all movies on the basis of the interest in punishment, they could do that," Krakoff said. He also conceded that prisons may ban all X-rated films and other violent and sexually explicit films. But, he said, "from a political standpoint and a literary standpoint, there is no basis for saying as a categorical matter that all R-rated movies are forbidden."

The legal papers on behalf of the prisoners cite *Schindler's List*, *Amistad*, *Glory* and *The English Patient* as examples of R-rated movies that should not be forbidden in the federal prison system.

In its legal papers, the government emphasized that the rights of prisoners are limited and that prison security, the

deterrence of crime and the rehabilitation of inmates are all served by banning R-rated movies. The lower court judge, Sean J. McLaughlin, ruled that the restriction on R-rated movies was "reasonably related to legitimate penological interests." Aside from referring to common sense, he did not explain how.

The United States Court of Appeals for the Third Circuit, in Philadelphia, reversed that decision July 25. It sent the case back to the lower court for a fuller consideration of the issues. "Is it a matter of common sense, as was argued here, that prohibiting movies rated R or NC-17 deters the general public from committing crimes, lest they be sent to prison where they are not permitted to watch R-rated movies?" the appeals court judges asked. "We are not so sure." Reported in: *New York Times*, July 28.

copyright

San Francisco, California

Barbie, the 11½-inch plastic symbol of American girlhood, was fair game for a suggestive 1997 pop song in which she invited Ken to "go party," a federal appeals court ruled July 24. "Barbie Girl," by the Danish band Aqua, was an exercise of free expression that did not violate the trademark of toymaker Mattel Inc., said the U.S. Court of Appeals in San Francisco. Upholding a lower-court ruling, the three-judge panel also rejected MCA Records' defamation claim against Mattel for press statements that accused the record company of stealing Mattel's property and likened MCA to a bank robber. Such invective would never be understood as the literal accusation of a crime and isn't grounds for a lawsuit, the court said.

"Barbie Girl" was a worldwide hit and the biggest success in the four-year existence of Aqua, which disbanded last year. In a baby-doll voice, lead singer Lene Nystroem proclaimed, "I'm a blond bimbo girl, in a fantasy world," and implored boyfriend Ken to "make me walk, make me talk, do whatever you please."

Mattel's 1997 lawsuit is one of several the El Segundo (Los Angeles County) company has filed to protect Barbie's honor and $1.5 billion a year in worldwide sales. Last year, the appeals court refused to stop a Utah artist from selling picture postcards showing Barbie in sexual poses. Another suit against an artist who sold modified Barbies as artworks was settled out of court.

In the latest ruling, the appeals court said no one hearing the song or seeing its title would be misled into thinking Mattel had anything to do with it. "Nor, upon hearing Janis Joplin croon 'Oh Lord, won't you buy me a Mercedes-Benz' would we suspect that she and the carmaker had entered into a joint venture," Judge Alex Kozinski wrote. "To be sure, MCA used Barbie's name to sell copies of the song," the court said. "However . . . the song also lampoons the Barbie image and comments humorously on the cultural values Aqua claims she represents"—expression protected by the First Amendment to the Constitution. Reported in: *San Francisco Chronicle*, July 28.

child pornography

Philadelphia, Pennsylvania

Quoting D.H. Lawrence, whose novel *Lady Chatterley's Lover* was banned in the United States for thirty years, a federal appeals court ruled that an amateur photographer's pictures of naked teenage girls were not pornographic. The U.S. Court of Appeals for the Third Circuit's unanimous decision, released on June 19, threw out a lawsuit by the girls' parents, who were outraged that the photos had been taken without their consent.

The suit involved pictures that photographer Kathryn Lesoine, of Waverly, Pennsylvania, took of her stepdaughter and three of her stepdaughter's friends, including a 15-year-old girl and a 16-year-old girl, in 1995 and 1996. Some of the pictures were taken on a beach on Martha's Vineyard island in Massachusetts. The others were taken at Lesoine's studio in Waverly. All were done with the consent of the girls.

In his opinion, Judge John T. Noonan Jr., quoted Lawrence's thoughts on the difference between art and smut. "As an author who was himself once the victim of overzealous censorship has written, genuine pornography 'is almost always under-world; it doesn't come into the open . . . (y)ou can recognize it by the insult it offers, invariably, to sex, and to the human spirit,"' Noonan wrote.

Noonan added that the photographs of the girls offered no such "insult to sex or to the human spirit," and that no jury would consider them within the federal definition of sexually explicit conduct.

In the first set of pictures, the girls were photographed naked in a public shower at the beach, washing off sand. In the studio photographs, they were partially clothed. In both cases, Noonan wrote, no reasonable juror could find the photos lascivious.

The Lackawanna County District Attorney seized many of the photos in 1996, but after reviewing them declined to prosecute, saying no crime had been committed. The families filed their civil suit in 1997, but the case was thrown out by a federal judge in 2001. The mother of a third girl also joined in the suit, but her complaint was thrown out when her daughter, who had since turned 18, filed a motion stating that the lawsuit had been filed without her knowledge and the photos had been taken at her request. Reported in: freedomforum.org, June 21. □

(TIPS program . . . from page 194)
is also worried that the program will adversely affect the fight against terrorism by wasting resources on useless tips and that the program will encourage vigilantism and racial profiling.

"The administration apparently wants to implement a program that will turn local cable or gas or electrical technicians into peeping Toms," King said.

John Whitehead, executive director of the conservative Rutherford Institute, agreed. "This is George Orwell's '1984.' It's an absolutely horrible and very dangerous idea," he said. "It's making Americans into government snoops. President Bush wants the average American to do what the FBI should be doing. In the end, though, nothing is going to prevent terrorists from crashing planes into buildings."

In testimony before the Senate Judiciary Committee July 25 Attorney General John D. Ashcroft said that he had scrapped plans to include a centralized database as part of the controversial program. But he defended the Operation TIPS initiative as a valuable way for truck drivers, ship captains and others to identify potential terrorist activities.

"It builds on existing programs that industry groups have," Ashcroft said. "You have the ability of people who have a regular perception, who understand what's out of order here, what's different here, and maybe something needs to be looked into."

Ashcroft also warned that "the entire United States of America is a target for terrorist activities. I believe that there are substantial numbers of individuals in this country who endorse the al Qaeda agenda," Ashcroft said. "As I observed the events of September 11, and as we reconstruct it, we found that there was a presence across America of individuals, whether it be from San Diego or Phoenix, or Oklahoma City or Minneapolis or any number of locations, that might not appear to those of us who would say, 'Now, where would you find a terrorist?'"

"We don't want to see a 1984, Orwellian-type situation here where neighbors are reporting on neighbors," Sen. Orrin G. Hatch (R-UT) said during Ashcroft's testimony. A government Web site calls Operation TIPS a "national system for reporting suspicious, and potentially terrorist-related activity" involving "millions of American workers who, in the daily course of their work, are in a unique position to see potentially unusual or suspicious activity in public places."

But Ashcroft said the program was not envisioned to include information garnered from private homes by, for example, a telephone service person. Information reported to TIPS would be passed on to relevant law enforcement agencies such as the FBI, he said.

The US Postal Service has announced it will not participate in Operation TIPS and the Bush administration has tempered its language. The most recent description of the program, available on the Citizen Corps web site, no longer mentions the recruitment of postal workers, utility employees or others who might have regular access to people's homes. And Justice Department officials are taking pains to insist the program was never intended to encourage Americans to spy on their fellow citizens.

"None of the Operation TIPS material published on the web or elsewhere have made reference to entry or access to the homes of individuals; nor has it ever been the intention of the Department of Justice, or any other agency, to set up such a program," said Justice Department official Barbara Comstock in a written statement. "Our interest in establishing Operation Tips program is to allow American workers to share information they receive in the regular course of their jobs in the public places and areas."

Comparing Operation TIPS to nongovernmental reporting programs such as Highway Watch, River Watch, and Coast Watch, Comstock insisted that TIPS is merely a way for volunteers to report unusual events noted during the course of their work.

However, as Dorothy Ehrlich, executive director of the ACLU's Northern California chapter pointed out, Americans have always had the right to report suspicious activty to police or even federal authorities. The alarming aspect of Operation TIPS, she said, is the lack of any clear accountability or guidelines about how that information will be used.

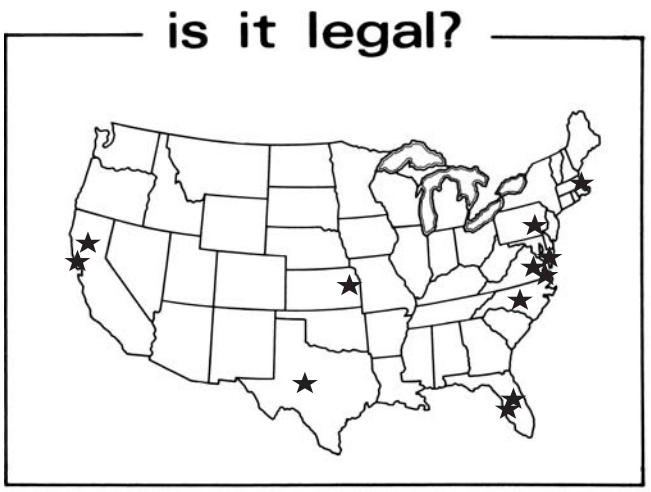
"That's what's wrong throughout many of the expanded proposals to give law enforcement more power since September 11. All consistently lack the necessary checks and balances that ordinarily are required under law," Ehrlich argued. "So you don't have judicial oversight, you don't have the requirement that certain kinds of standards be met in order for a subpoena to be issued."

Riva Enteen, San Francisco program director for the National Lawyers Guild, said those statutory checks and balances are particularly important when suspects are being reported for possible terrorist activities.

"To report someone for terrorist activity, these days, means potential deportation, means incarceration without access to an attorney without charges," Enteen said. "It's a qualitative difference to somebody who might be fishing off the coast without a license. We're talking about people's liberty being at stake if they are tagged terrorists."

It is unclear whether civil libertarians will mount any premptive legal challenge to Operation TIPS. Legal experts at Public Citizen, a consumer advocacy group, said there is nothing unlawful or unconstitutional about the plan. But they and other civil libertarians warned that the program poses an ethical question for the federal government, treading dangerously close to the fine line separating a democracy's need for reasonable security from totalitarianism.

"The notion that you would actually encourage people who are not empowered or trained to do so, to snoop on their fellow citizens and report [on] them is particularly spooky," said Joan Bertin, Executive Director of the National Coalition Against Censorship. "There seems to be no limits, no controls, no guidelines, no rules, no nothing," Reported in: *Washington Times*, July 16; *Washington Post*, July 26; Motherjones.com, July 17. □



Dick Traini speculated that the question of whether the Assembly or the mayor controls library policy could go the courts. Members of the library advisory board and several other Anchorage residents had urged the Assembly to repeal the mayor's policy. They said the public should have open and unrestricted access to information.

"I find the City Hall policy restrictive and very reactionary. Its based on fear of what someone may say or do or show," board member Alden Todd testified. "Spreading word of its terms . . . will make Anchorage officialdom the laughingstock of the cultivated, reading people of America."

No member of the public stood to testify in favor of the mayor's policy. Wuerch was not in the Assembly chambers for the discussion and the vote, the outcome of which was a foregone conclusion, given the number of Assembly members who had sponsored the proposal to repeal the mayor's policy.

Wuerch has said that he wants Loussac to be a "library of the future" that is user-friendly and inviting. Controversial exhibits detract from that vision and make the library a magnet for negativism, Wuerch argued. Members of his administration say the library policy was carefully thought out and legally defensible.

"I think (the) Assembly is entirely wrong," Wuerch said. Reported in: *Anchorage Daily News*, June 26.

libraries

Anchorage, Alaska

The Anchorage Assembly on June 24 overwhelmingly rejected the mayor's new policy on exhibits at Z.J. Loussac Library and voted to replace it with one that contains fewer restrictions on display content. The city's library exhibit policy became a hot-button issue last summer when Mayor George Wuerch objected to a gay pride exhibit at Loussac and city officials removed it. Wuerch then temporarily banned exhibits by nonlibrary groups until a new policy could be drafted.

The ban lasted until Wuerch put in place his new policy in May. His policy limited the placement of exhibits to the ground floor lobby. That is beneath the main floors and not visited by most library users, critics complained. The mayor's policy also prohibited certain types of exhibits, including ones that "advocate or editorialize personal, commercial or political subjects except the importance of voting." Only exhibits related to library resources were allowed.

The Assembly repealed the mayor's policy in favor of a library exhibit plan recommended by the city's library advisory board. That policy allows exhibits with a wide range of views as long as they are not commercial, personal or disruptive. They would also not be limited to the ground floor.

The vote to reject the mayor's policy was 9-0. Two Assembly members were not present.

The mayor could veto the Assembly action, but nine votes would be enough to override. Assembly chairman

York, Pennsylvania

The American Civil Liberties Union filed a lawsuit July 8 in U.S. District Court on behalf of the World Church of the Creator, a white-supremacist group that was denied use of the Martin Memorial Library's meeting room in York. The ACLU is asking the court to declare unconstitutional the library's policy, enacted in the wake of violent street demonstrations January 12 against WCC speaker Matt Hale, that requires groups using the facility to provide evidence of $1 million in liability insurance and a bond to cover security costs.

ACLU Legal Director Stefan Presser said the library arbitrarily chooses what groups can use its meeting room, because it allowed six groups to meet recently without the insurance. "If the library or York County can decide they don't like someone's message today," Presser said, "there would be nothing prohibiting them from silencing others in the future."

However, Library CEO William Schell maintains that the library has a right to recover the cost for additional security and to protect itself from liability for injuries and property damage. He said that no one has been granted a waiver: Six groups signed up before the policy was in place, 21 groups met the requirements, and three—the WCC, a scrapbook collector's club, and a marketing group—were rejected.

"If you have a policy, you have to implement the policy and follow the policy," Schell said. "That's what we are doing." Reported in: *York Dispatch*, July 9.

Abilene, Texas

The Mitchell County Public Library has been sued by an Abilene-area man who alleges that the library violated his First Amendment rights for denying him use of its meeting room for a religious gathering. The Mitchell County Attorney's office replied in early July to the June 26 brief filed by plaintiff attorney Mathew D. Staver, who is representing Seneca Lee.

Staver, president and general counsel of the Orlando, Florida–based Liberty Counsel, said in a written statement that he was "amazed that library directors either intentionally ignore, or intentionally remain uneducated about unconstitutional policies that discriminate against religion." The MCPL suit is the fifth that Staver's group has brought against libraries since 2000; the other three legal actions resulted in the defendant libraries removing content-based restrictions from their meeting-room policies. Liberty Counsel characterizes itself as a "nonprofit civil liberties education and legal defense organization dedicated to preserve religious freedom." Reported in: *American Libraries* Online, July 22.

Richmond, Virginia

Virginia State Librarian Nolan T. Yelich claims the administration of former Gov. Jim Gilmore is withholding documents promised to the Library of Virginia and worries it may have destroyed records that should be available to the public. For several weeks, Yelich and Gilmore argued about the documents turned over to the library—reportedly less than half the papers promised. Gilmore said he would give the library the papers it wanted once library staff told him what they already have; Yelich replied in a July 3 letter that the library wanted to examine what records were still held by Gilmore and his staff.

"We need some indication that the information we seek still exists," Yelich said. Yelich also told Gilmore he was "concerned over the implications of the telephone call we received from your staff in early January that implied your office had approximately one hundred boxes of records awaiting destruction."

G. Bryan Slater, a former member of Gilmore's cabinet, said none of the records Yelich wanted had been destroyed and said Gilmore "wants to do everything that he can to make sure that the records and information that they are entitled to have been turned over." Reported in: *Richmond Times-Dispatch,* July 10.

child pornography

Washington, D.C.

Barely two months after the Supreme Court struck down a ban on "virtual" child pornography, the House of Representatives on June 25 passed another attempt to update child-porn laws for the Internet age. By a vote of 413-8 the House passed a bill that would outlaw pornographic digital images of children, unless they were proven to be computer-generated simulations that did not portray actual underage sex.

The Supreme Court struck down a similar law on free-speech grounds in April, saying it was too broadly written and could outlaw mainstream films like *Traffic* and *Romeo and Juliet* that use adult actors to portray teenage sex. Backers said a rewritten bill was necessary to effectively prosecute the child-pornography trade, which has migrated to the Internet over the past several years.

Without a virtual-porn ban, prosecutors must prove that child pornography seized from Web sites and computer hard drives portrays actual children, a difficult proposition once a picture has been scanned into a computer and passed around the Internet, said bill sponsor Rep. Lamar Smith, a Texas Republican.

The Supreme Court's decision has made existing child-porn cases harder to prosecute and could throw previous convictions in jeopardy, others said. "With every passing day another pedophile escapes prosecution because of the flawed ruling of this high court," said Florida Republican Rep. Mark Foley, a bill co-sponsor.

But Rep. Bobby Scott, a Virginia Democrat, said Congress was wasting its time with another effort that would not survive a courtroom challenge. "This bill just reiterates the mistakes in the original legislation," Scott said.

The Bush administration issued a statement supporting the bill's passage, saying it "would be an important step in protecting children from abuse by ensuring effective child pornography prosecutions."

Similar but separate bills have been introduced in the Senate by Utah Republican Sen. Orrin Hatch and Missouri Democratic Sen. Jean Carnahan. A hearing is scheduled in the Judiciary Committee in the summer, a Carnahan spokesman said.

Congress has so far had little success writing laws that limit pornography on the Internet that do not infringe on free-speech rights. Federal courts have struck down three previous attempts on First Amendment grounds. The rewritten bill, drafted by the Justice Department in response to the Supreme Court's ruling, applies only to computer images that are "indistinguishable" from child pornography, not just material that "appears to be" child porn. It does not apply to mainstream movies, cartoons, drawings or other works that are not realistic digital images. Pornography involving prepubescent children would be outlawed entirely, "virtual" or not.

The bill would flip the burden of proof so that the defendant would be required to prove that the image was a computer-generated fake, rather than requiring prosecutors to prove that it involved real, identifiable children.

Bill sponsors said they were confident that their new bill would pass judicial review, and that without such an "affirmative defense" they would be incapable of prosecuting digital child pornography. But some legal scholars said they are dubious about whether the changes will be sufficient to survive an expected legal challenge, if the bill becomes law.

"I don't understand why they think this statute is going to eradicate any of the problems that the Supreme Court explicitly delineated in its recent decision," said Megan Gray, a lawyer at the Electronic Privacy Information Center who specializes in free speech law.

The courts have repeatedly turned back attempts to limit digital pornography, striking down laws aimed at curtailing publication of smut on the Internet and requiring public libraries to filter Internet content.

In their April ruling, a 6-3 majority of the justices wrote that Congress' first try at banning "morphed" porn was akin to prohibiting dirty thoughts.

"First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end," Justice Anthony Kennedy wrote for the majority. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

Rep. Scott and Rep. Jerry Nadler, a New York Democrat, said most child pornography could be prosecuted under existing obscenity laws. The bill still could be struck down on First Amendment grounds because it would threaten documentary filmmakers, therapists and others who use computer images for legitimate purposes, they said.

"The government may not suppress lawful speech to suppress unlawful speech," Nadler said. Reported in: *Washington Post*, June 25; *New York Times*, June 25.

schools

Lake County, Florida

A new policy banning a racial epithet in Lake County schools was quickly approved by School Board members July 22, but they left it up to classroom teachers to tell students exactly what they mean. The policy specifically bans use of the word nigger, but the board stopped short of including the prohibition in the student code of conduct. A broader statement on harassment was included instead.

"But students will know what we are talking about," said Assistant Superintendent Susan Moxley.

The Lake County chapter of the National Association for the Advancement of Colored People had called for a prohibition on the "N-word" to appear in the code of conduct, which is reviewed with students during the first week of school and goes home to parents. But no one from the civil-rights group showed up to object when the School Board passed the more general ban.

"We have to let everyone know we are not going to tolerate this behavior," School Board member Phyllis Patten said. Patten said the board agreed to include the "N-word" in the overall policy in part to pacify the NAACP. But it would be a mistake to list specific banned words for students because some words would be left out, she said.

Some area residents have complained that the policy accents harassment of blacks and ignores similar harassment of others. "I have heard black kids call my kids 'white trash,' 'cracker' and 'honky.' Is that any worse?" asked Cheryl Murphy of Orlando. While her children attend Orange County schools, the issue is the same, she said.

Officials said the Lake County policy and code of conduct prohibit all slurs. Under the tougher policy and revised harassment statement in the code of conduct, students could be suspended or face other punishment for using the "N-word" or other slurs. Even using the word in jest—black to black—could get a student in trouble.

The policy bans "racial slurs (including but not limited to 'nigger'), jokes, epithets, negative stereotyping, threats, intimidation and hostile acts." The ban in the student code of conduct is much broader. It cites "any willful or deliberate word or act of a serious nature based upon race, color, religion, sex, gender, age, national or ethnic origin, political beliefs, marital or family status, disability or disabling condition, social or family background, or harassment for any other reason."

School-district officials and NAACP leaders agreed that the ban on the word should not stifle classroom discussion. The "N-word" legitimately could come up in literature, history or social-studies classes, they said.

Some had questioned whether the ban would outlaw *The Adventures of Huckleberry Finn*, *The Autobiography of Malcolm X* or similar works that contain the word. Reported in: *Orlando Sentinel*, July 23.

Tampa, Florida

A Robinson High student who was not allowed to pose for her senior yearbook picture in a jacket and tie filed a lawsuit in federal court June 19, claiming the school's actions violated her constitutional rights. Nicole "Nikki" Youngblood, alleged in the suit that the school's dress requirement for yearbook photos is discriminatory. All female students are required to wear a scoop-necked drape and all male students must wear a white shirt, tie and dark jacket. Youngblood, a lesbian, hasn't worn traditionally female clothes in several years. In spring 2001, when she went to be photographed by the studio under contract with the school, she was told she had to wear the drape or get a note from the school allowing her to wear the shirt and tie.

School officials refused, saying that the compromise could lead to problems, including boys wanting to wear the drape as a gag. They told Nicole she could pay for her own picture and run it in the back of the yearbook in the advertising section, the suit states.

Nicole and her mother, Sonia Youngblood, thought the policy was inappropriate and discriminatory and decided not to pay for their own picture. A formal picture of Nicole does not appear in the yearbook, the suit states. Nicole graduated early in December "due in large part to the discrimination she experienced with regard to her senior portrait, the attitude of the principal and school administrators handling her complaint and the ongoing harassment from other students directed at her," the suit states. Reported in: *St. Petersburg Times*, June 20.

Norfolk, Virginia

It's not often that good grades land you in detention. But that, indirectly, is what happened to 12-year-old Jesse Doyle of Norfolk. When his mother dyed his hair a deep, purplish blue one Monday night as a reward for good grades, Jesse found himself the next morning not on the honor roll, but on a chair in the front office—kept out of class for a 'do that Norview Middle School administrators said disrupted education.

The tangle brought the intervention of the ACLU, and landed Jesse on the Today Show and MSNBC. But his struggle is just the latest strand in an age-old battle over dress codes, in which T-shirts and baseball caps have become the fabric of constitutional furor. Hair—sculpted into mohawks, crimped into frizz, infused with hues once reserved for blinking neon—remains a timeless flashpoint, cutting across cultures, generations, ethnicity, and class.

The heyday of coiffure conflicts was the 1970s—with schools railing at long hair, deemed inappropriate on boys. But experts said constraints on student styles have grown tighter over the last decade, as spates of school violence intensified the belief that attire begets attitude.

"We saw a leap in the number of problems related to appearance after Columbine," said Kent Willis, executive director of the ACLU of Virginia, where a military culture of buzz cuts looms large. In the past three years, Willis has dealt with three coiffure conflicts: a notch of blue hair, a full head of pink hair, and Jesse Doyle.

"Appearance is a way to separate yourself from the adult society. It's always been a way to gain attention and to show independence," said Dr. James Feldmann, national director of Kidspeace, a not-for-profit children's center.

But for Jesse, blue hair was "just something I wanted to do." So on April 23 he came to school with his blond hair dyed—to match his Little League whale mascot and Norview's school colors—only to spend four frustrating days on a chair in the school office. Both Jesse and his mom, Kim McConnell, maintain that any "distraction" would have been minimal and brief—had he ever gotten to class.

The ACLU wrote a letter declaring the detention unconstitutional, and Norview allowed Jesse back in class.

The 1972 federal case of *Massie* v. *Henry* set a handy precedent for Doyle and other rainbow-coiffed Southerners, denying a North Carolina high school the right to regulate a teenage boy's long hair. Also central is the 1969 Supreme Court *Tinker* decision, which found, famously, that students "do not shed their constitutional rights at the schoolhouse gate." Reported in: *Christian Science Monitor*, June 12.

universities

Berkeley, California

U.S. Sen. Dianne Feinstein, citing a *San Francisco Chronicle* report that detailed wide-ranging and unlawful FBI activities at the University of California, asked FBI Director Robert Mueller whether the bureau was currently involved in similar intelligence operations. In a pointed letter expressing her "deep concern" about *The Chronicle's* disclosures, Feinstein also asked Mueller to outline steps taken to prevent the FBI from again misusing its power for political purposes.

"Bob, these allegations are serious, and could not come at a worse time," the senator said in her June 18, 2002, letter. "It is vital that we have a strong FBI that enjoys the confidence and trust of the American people. If there are things we need to do to tighten safeguards or to prevent a return to past misdeeds, we must do them now."

Feinstein's letter came as the Bush administration and Congress are expanding the FBI's domestic intelligence powers to prevent terrorist acts like the September 11 attacks on the World Trade Center and the Pentagon. Bill Carter, an FBI spokesman in Washington, D.C., declined to comment on Feinstein's letter but said, "We did receive the letter, and we will respond to the senator as quickly as possible."

For years the FBI denied engaging in misconduct at the University of California. But in an extensive front-page feature, *The Chronicle* reported on June 9 that thousands of pages of FBI records obtained as a result of a 17-year legal battle showed that the bureau had conducted unlawful intelligence activities at the nation's largest public university in the 1950s and 1960s.

The documents, obtained during the course of three lawsuits under the Freedom of Information Act, show that the FBI campaigned to fire UC resident Clark Kerr, conspired with the head of the CIA to pressure the Board of Regents to "eliminate" liberal professors, mounted a covert operation to manipulate public opinion about campus events and to embarrass university officials, and secretly gave Gov. Ronald Reagan's dministration intelligence reports it could use against groups engaged in dissent.

In addition to Feinstein, several prominent public officials and organizations expressed concern about the FBI's past activities at UC-and the possibility that the bureau could again veer from protecting national security to targeting people involved in constitutionally protected activities.

Among those concerned were University of California President Richard Atkinson, the American Association of University Professors, state Senate President Pro Tem John Burton, and Rep. Nancy Pelosi, (D-San Francisco), who is the House Democratic whip and a member of the House committee writing the bill to create the proposed Department of Homeland Security.

Feinstein, a Democrat who is California's senior senator and a member of the Senate Intelligence Committee, asked Mueller to respond to a series of questions, adding that, "The recent release of revised FBI investigatory guidelines has led to understandable concern that a more powerful FBI must remain accountable and corruption-free."

Feinstein noted that *The Chronicle* had reported that the FBI had tried to get Kerr fired as UC president, even though agents consistently found no evidence Kerr was disloyal. A federal appeals court ruled in the freedom of information case that the FBI had mounted a "campaign to fire Kerr."

"Who ordered the original investigation of Clark Kerr?" Feinstein asked Mueller. "Who ordered that the investigation of Kerr continue even when no evidence was found against him?"

Feinstein also referred to a federal court finding in the Freedom of Information Act case, which said the bureau's initially legitimate investigation of the 1964 Free Speech Movement protest had turned into unlawful surveillance that "came to focus on political rather than law enforcement aims."

"What safeguards are now in place to ensure that the FBI does not focus on political aims in the future?" the senator asked.

FBI documents also showed that the late FBI Director J. Edgar Hoover maintained what the bureau called a "Security Index," a secret—and unauthorized—list of citizens deemed potentially dangerous to national security who would be detained without warrant during a national emergency. "Does a 'Security Index,' or something similar, still exist today?" Feinstein asked. "Regardless, has the FBI or the Justice Department considered detaining American citizens during times of crisis? If so, who? And under what circumstances? What is the FBI policy in this regard?"

Other FBI documents showed that in the 1950s the bureau maintained an operation, code-named the Responsibilities Program, in which it secretly disseminated allegations that state and local employees were disloyal, in an effort to get them removed from their public-sector jobs—even though no prosecution was sought and the charges were allegedly vague.

"What is the FBI policy today regarding the so-called 'Responsibilities Program,' or programs like it?" Feinstein asked Mueller.

FBI documents revealed that in 1965 then-CIA Director John McCone and Hoover conspired to covertly give FBI reports to the late conservative Regent Edwin Pauley, so he could use them in an effort to harass liberal students, faculty and regents. R. James Woolsey, head of the CIA from 1993 to 1995, said it was "entirely inappropriate for a director of Central Intelligence to be involved in anything of this sort dealing with political views or investigations of Americans."

Feinstein asked, "What safeguards are now in place to prevent such activity?"

The Chronicle article noted that after Reagan became president and expanded the FBI's domestic intelligence powers, the FBI was caught spying on more than a hundred domestic groups that opposed Reagan's foreign policy. Feinstein asked, "Does this allegation have merit? If so, what are you doing to ensure that this does not happen again? What is current FBI policy regarding presidential directives to investigate certain individuals and/or groups?"

Finally, the senator said she was concerned by court findings that the FBI had repeatedly violated the Freedom of Information Act by delaying release of bureau records regarding the University of California, and by blacking out public information about its unlawful activities. She said she was concerned "particularly in light of" Attorney General John Ashcroft's new policy, under which the Justice Department will defend federal agencies that seek to deny freedom of information requests.

"Many read this as a signal to agencies that future FOIA requests are to be stonewalled," Feinstein said. "As you know, and as we have seen from this *Chronicle* article, FOIA is often the only way the American people can be assured of government accountability." Feinstein asked Mueller, "Did the FBI deliberately redact certain embarrassing information in these documents, improperly claiming that the information needed to be redacted for law enforcement purposes?"

Pelosi questioned whether the FBI was wise in spending nearly $1 million in attempting to withhold public records about its campus activities, but said the legal fight produced a "valuable" court decision upholding public access to government information. She said the FBI needs adequate powers to effectively fight terrorism, but added that the FBI's unlawful activities at UC Berkeley are "lessons learned for the American people" about "what can go very wrong."

"We don't want to see anything like that in our country again," Pelosi said.

U. C. President Atkinson said the FBI records showed that the bureau's campus activities—which included planting news articles that falsely cast the Free Speech Movement as a communist plot—played a secret part in

history. Atkinson said they helped propel Reagan's 1966 campaign for governor, which focused largely on protests at UC Berkeley. "I would argue that that campaign was very much fueled by the FBI," said Atkinson, who hailed the Freedom of Information Act as a way to hold government accountable.

"In today's environment," he added, "we must be certain as a democratic society that we strike the appropriate balance between necessary intelligence gathering and protection of individual rights and civil liberties."

Burton, who as a young assemblyman spoke in support of the Free Speech Movement, said he had assumed the FBI was investigating protesters during the 1960s. But he said he was surprised by the FBI's close relationship with Gov. Reagan and the extent of the bureau's campus activities. "They're supposed to be a law enforcement agency, not agents provocateurs," Burton said. Former FBI officials and Edwin Meese, III, who was Gov. Reagan's chief of staff, have said the FBI gave Reagan no political assistance.

Kevin Starr, the state librarian and a historian who specializes in California, called the report "pioneering research" about a tumultuous time. Starr said the FBI's covert campaign against Kerr helps account for the abrupt end of the presidential adviser's career in federal government. "I feel a sense of shock about the destruction of Clark Kerr," said Starr, who described Kerr as one of the nation's great thinkers on higher education.

The Chronicle's report, he said, showed that "the instability of UC Berkeley was partly engineered by outside people, in this case the FBI, by destabilizing the leadership."

Mary Burgan, director of the American Association of University Professors, a national organization that promotes academic freedom, called the FBI's activities at the University of California sad. "I certainly hope it is history rather than current events," she said. Reported in: *San Francisco Chronicle*, June 23.

Sacramento, California

Gov. Gray Davis of California has asked public universities in the state to review their policies on free speech and hate crimes in the wake of anti-Semitic incidents on some campuses. In a July 10 letter to the president of the University of California system and the chancellor of the California State University System, Governor Davis, a Democrat, wrote that his request was motivated by concern over recent anti-Semitic incidents at some of California's public universities. He referred to an incident in April, when two Orthodox Jewish men were attacked near the University of California's Berkeley campus, and an altercation that occurred in May between pro-Palestinian supporters and a group supporting Israel at San Francisco State University.

"While I respect the fundamental right to free speech, nothing justifies these acts of violence, harassment, and abuse," the governor wrote. "I know you agree. We must put a stop to them and do everything we can to be sure that no more occur."

In addition to requesting reviews of policies concerning demonstrations and First Amendment rights, the governor asked each university to review "official university activities, including course descriptions, to ensure that they are forums for intellectual inquiry and not vehicles of discrimination, intimidation, or hate."

According to Hilary McLean, a spokeswoman for the governor, Davis expects written assessments from each university system outlining the actions it is taking to promote the objectives outlined in the letter. But the governor set no deadline for these responses.

Charles B. Reed, chancellor of the California State system, has already responded to the governor's request with a letter outlining the university's strategies for preventing hate crimes. Reed cited a 38-person panel appointed to improve the "campus climate" at San Francisco State as one example of measures taken by the system.

Reaction to the governor's letter was mixed. Laurie Zoloth, a professor of Jewish studies at San Francisco State, praised the governor for directing his attention to upholding standards of "responsible activity."

"It's a good step in the right direction on a long road," said Zoloth. "There needs to be a clear line drawn between free expression of ideas and virulent anti-Semitic attacks that lead to physical intimidation of students and faculty."

Others, like Thor L. Halvorssen, executive director of the Foundation for Individual Rights in Education, said that the governor's letter was troublesome because it did not define what constitutes discrimination or hate within the university setting. "Instead of outlining point-by-point limits on behavior, universities are trying to dictate attitudes [of their students and faculty members], and that is not the place of the university or the governor," Halvorssen said. Reported in: *Chronicle of Higher Education* online, August 1.

Cambridge, Massachusetts

The Massachusetts Institute of Technology has become the first major academic research institution to outline a policy designed to protect intellectual openness on campus amid growing pressure to limit access to sensitive information and materials as part of the war on terrorism. Recommendations developed by a faculty committee include confining classified research to separate, off-campus locations, refusing contracts that require government prescreening of research results and assembling a standing faculty committee to monitor and respond to legal restrictions on the disclosure of scientific information.

For decades, MIT has conducted classified research on radar, satellites and electronic air defense systems at its off-campus, federally funded Lincoln Laboratory. Other research universities also typically restrict classified research

to separate, off-campus facilities accessible only to staff with security clearances. But because of legal restrictions imposed after last year's terrorist attacks, universities now find themselves reviewing their policies to balance the need for academic openness on campus with new national security concerns.

Congress has passed two measures since October that, among other things, restrict the handling of biological agents commonly used by university researchers. Also, the Department of Defense recently proposed to make it illegal for scientists to publish certain basic research without prior government approval. The measure was pulled back in the face of vehement opposition from scientific organizations.

"Since the Cold War, we've struggled with the issue of academic freedom and what is sensitive research versus classified research," said Joanne Carney, director of the Center for Science, Technology, AAAS and Congress at the American Association for the Advancement of Science. In the wake of the September 11 terror attacks, she said, that dilemma has intensified.

Bruce Alberts, president of the National Academy of Sciences, called the MIT report "an important first step. Other universities will need to take a close look at it to see what new policies they need to protect faculty and students in the new, security-conscious environment."

The proposed guidelines, contained in a report to be considered by MIT administrators, reflect the school's dual role as a cutting-edge research institution and a world-renowned place of higher education. The report said MIT should not accept or hold documents on campus that are deemed "sensitive" or that are to be restricted from foreign students. Also, classified work should be restricted to classified facilities separate from the campus, the report said.

The MIT committee further said the school should not enter into contracts that require its research findings to be prescreened by the federal government or other sponsors. The report also said the school should consider moving some of its biological research off campus to a separate facility. Reported in: *Washington Post*, June 13.

Chapel Hill, North Carolina

Three students and a conservative Christian organization have filed a lawsuit against the University of North Carolina, saying the required reading of a book about Islam is unconstitutional. The suit, filed July 22 in U.S. District Court in Greensboro, said the university is infringing on students' First Amendment right to religious freedom by requiring them to read *Approaching the Qur'n: The Early Revelations*. As part of an annual summer reading program, all incoming freshmen this year have been told to read the book, which includes 35 translated sections of the holy book of Islam. They were also expected to attend discussion sessions about it.

UNC amended its policy to say students don't have to read the book if it offended them—but required them to write a one-page paper stating their objections. The lawsuit was filed by the Virginia-based Family Policy Network and three UNC freshmen identified only as John Doe No. 1, an evangelical Christian, John Doe No. 2, a Catholic, and Jane Roe, who is Jewish. Joe Glover, president of the Family Policy Network, said the lawsuit aims to halt UNC's program for now.

"Our long-term goal is to make sure the precedent is affirmed that you cannot force people to take a class about a religious text at a state university," he said. "I think a lot of universities are interested to see how this turns out."

Named as defendants are UNC Chancellor James Moeser and Associate Vice Chancellor for Student Learning Cynthia Wolf Johnson. Lawyers for the plaintiffs said they'll ask the court to grant an injunction before the discussion groups meet August 19.

Steve Crampton, an attorney who helped prepare the lawsuit for the group, said the book, translated by Haverford College Professor Michael Sells, is a one-sided view of Islam that omits passages about killing "infidels." It includes about one-third of the "suras," or sections of the Quran. "It is in effect Islamic propaganda they are forcing the students to study," he said.

According to the lawsuit, the book was "carefully selected to create a favorable opinion of the religion of Islam" and students who opt out of the reading will be "exposed to ridicule and hostile questioning. They also will be ostracized as dissenters."

The reading of the book also required listening to a companion CD on which Islamic prayers are read in Arabic by clergy members. The lawsuit interpreted that element of the assignment as the students being "forced to listen to the spell cast by a holy man."

In e-mails to critics, Moeser said the university wanted students to gain insight into a religion followed by a billion people around the world. He said there was no penalty for students who don't participate in the reading. "We offer the summer reading this year in that spirit of seeking understanding—not in advocacy of Islam over Christianity or Judaism or any other religion," he wrote. Reported in: *Durham Herald-Sun*, July 23; *Chronicle of Higher Education*, July 26.

Internet

Washington, D.C.

The House of Representatives on July 15 overwhelmingly approved a bill that would allow for life prison sentences for malicious computer hackers. By a 385-3 vote, the House approved a computer crime bill that also expands police ability to conduct Internet or telephone eavesdropping without first obtaining a court order.

The Bush administration had asked Congress to approve the Cyber Security Enhancement Act (CSEA) as a way of responding to electronic intrusions, denial of service attacks and the threat of "cyber-terrorism." The CSEA had been written before the September 11 terrorist attacks last year, but the events spurred legislators toward the near-unanimous vote.

CSEA, the most wide-ranging computer crime bill to make its way through Congress in years, now heads to the Senate, where it is not expected to encounter serious opposition, although there was not much time for senators to consider the measure.

"Until we secure our cyber infrastructure, a few keystrokes and an Internet connection is all one needs to disable the economy and endanger lives," sponsor Lamar Smith (R-TX) said earlier this year. "A mouse can be just as dangerous as a bullet or a bomb." Smith heads a subcommittee on crime, which held hearings that drew endorsements of CSEA from a top Justice Department official and executives from Microsoft and WorldCom. Citing privacy concerns, civil liberties groups objected to portions of CSEA.

At the urging of the Justice Department, Smith's subcommittee voted in February to rewrite CSEA. It now promises life terms for computer intrusions that "recklessly" put others' lives at risk. A committee report accompanying the legislation predicts: "A terrorist or criminal cyber attack could further harm our economy and critical infrastructure. It is imperative that the penalties and law enforcement capabilities are adequate to prevent and deter such attacks."

By rewriting wiretap laws, CSEA would allow limited surveillance without a court order when there is an "ongoing attack" on an Internet-connected computer or "an immediate threat to a national security interest." That kind of surveillance would, however, be limited to obtaining a suspect's telephone number, IP address, URLs or e-mail header information—not the contents of online communications or telephone calls.

Under federal law, such taps can take place when there's a threat of "serious bodily injury to any person" or activity involving organized crime.

Another section of CSEA would permit Internet providers to disclose the contents of e-mail messages and other electronic records to police in cases involving serious crimes. Currently it's illegal for an Internet provider to "knowingly divulge" what users do except in some specific circumstances, such as when it's troubleshooting glitches, receiving a court order or tipping off police that a crime is in progress. CSEA expands that list to include when "an emergency involving danger of death or serious physical injury to any person requires disclosure of the information without delay."

Clint Smith, the president of the U.S. Internet Service Providers Association, endorsed the concept earlier this year. Smith testified that CSEA builds on the controversial USA PATRIOT act, which Congress enacted last fall. He said that this portion of CSEA "will reduce impediments to ISP cooperation with law enforcement."

The Free Congress Foundation, which opposes CSEA, criticized the vote. "Congress should stop chipping away at our civil liberties," said Brad Jansen, an analyst at the conservative group. "A good place to start would be to substantially revise (CSEA) to increase, not diminish, oversight and accountability by the government."

If the Senate also approves CSEA, the new law would also:

- Require the U.S. Sentencing Commission to revise sentencing guidelines for computer crimes. The commission would consider whether the offense involved a government computer, the "level of sophistication" shown and whether the person acted maliciously.
- Formalize the existence of the National Infrastructure Protection Center. The center, which investigates and responds to both physical and virtual threats and attacks on America's critical infrastructure, was created in 1998 by the Department of Justice, but has not been authorized by an act of Congress. The original version of CSEA set aside $57.5 million for the NIPC; the final version increases the NIPC's funding to $125 million for the 2003 fiscal year.
- Specify that an existing ban on the "advertisement" of any device that is used primarily for surreptitious electronic surveillance applies to online ads. The prohibition now covers only a "newspaper, magazine, handbill or other publication."

Most industry associations, including the Business Software Alliance, the Association for Competitive Technology, the Information Technology Association of America, and the Information Technology Industry Council, have endorsed most portions of CSEA. The three votes in opposition to the measure came from Reps. Dennis Kucinich, Jeff Miller, and Ron Paul. Reported in: CNet News, July 16.

copyright

Washington, D.C.

The American Civil Liberties Union filed a lawsuit July 25 in an attempt to overturn key portions of a controversial 1998 copyright law. The suit asks a federal judge to rule that the Digital Millennium Copyright Act (DMCA) is so sweeping that it unconstitutionally interferes with researchers' ability to evaluate the effectiveness of Internet filtering software. By suing on behalf of a 22-year-old programmer who's researching the oft-buggy products, the

civil liberties group hopes to prompt the first ruling that would curtail the DMCA's wide reach.

After the DMCA was used to intimidate Princeton professor Ed Felten and his colleagues into self-censoring a presentation last year, the law became an instant magnet for criticism. But so far, every judge has upheld the DMCA's broad restrictions on the "circumvention of copyright protection systems." This case will be different, the ACLU hopes, because it features a sympathetic plaintiff, Ben Edelman, and because it involves the socially beneficial act of critiquing software that is frequently used in public schools and libraries.

Edelman had testified as an expert witness in a case the ACLU brought against the Children's Internet Protection Act, a federal law that compelled public libraries to install filters on Internet computers. "I did considerable work for them in preparation for the lawsuit, and remained interested in the software," Edelman said. "I started thinking about how to make my research that much better. What became clear to me was that what I really needed, one way or another, was a way to get the entire block list."

In the library-filtering lawsuit, which is now before the U.S. Supreme Court, Edelman reviewed software sold by Surfcontrol, N2H2, Websense and Secure Computing, and concluded that "blocking programs are fundamentally unable" to do a consistent job of blocking only pornographic Web sites. Companies that make filtering software typically include an encrypted list of sexually explicit or otherwise banned Web sites. Inventing and distributing a utility that circumvents that copy protection, which Edelman says he would like to do, would run afoul of the DMCA's legal prohibitions.

"I don't want to go to jail," said Edelman, who graduated from Harvard in June, and who plans to study law there this fall. "I want to go to law school."

Using Microsoft's Visual Basic environment, Edelman also has published a series of reports on domain names, including a study of how 4,525 domains point to one porn site and a report on widespread errors in the "whois" database.

Some legal experts applauded the ACLU's case, while cautioning that it was a long shot. "They're hoping to get a statement from the court on the constitutionality of the DMCA," said Dan Burk, a professor at the University of Minnesota who specializes in intellectual property law. "I would be very surprised if the court agreed that the First Amendment overrides Congress' ability to create this sort of act. I don't think courts are very amenable to First Amendment arguments right now."

Burk noted that the suit also asks for Edelman to be immunized from lawsuits based on copyright, trade secret and breach-of-contract grounds. "This is going to be a long process," Burk said. "There are a lot of claims here that the court has to sort through before they get to the DMCA claim."

In the suit, which was filed in Massachusetts under the title *Edelman* v. *N2H2*, the ACLU will ask for an injunction that bars Seattle-based N2H2 from suing its client. N2H2 and many other blocking software companies have a long history of aggressively using the law to defend the secrecy of their encrypted lists. CyberSitter once threatened journalists with criminal prosecution for quoting from its encrypted blacklist, and the owner of CyberPatrol sued two programmers for distributing a cphack.exe utility that decoded the software's blacklist. The cphack.exe authors agreed to settle the case.

During the trial over the Children's Internet Protection Act this year in Philadelphia, N2H2's attorneys convinced a three-judge panel to eject the public from the courtroom before hearing testimony about the company's confidential blocking techniques.

David Burt, a spokesman for N2H2, said he did not know if his employer would sue someone who released a blacklist-decryption utility. "I couldn't make that decision, although I will say on the record it's not something we would rule out," Burt said. "We'd have to look at the circumstances. We'd have to talk to our lawyers about that."

"People have published examples of wrongfully blocked sites, and we didn't threaten to sue them over that," Burt said. "That's not the kind of thing we'd threaten to sue over. There's nothing illegal in publishing a list."

The ACLU's lawsuit seeks permission for Edelman to do three things: Decrypt N2H2's blacklist, publish the decrypted blacklist and distribute the decoding utility. Burt also said that his company's lawyers would decide how to respond to the ACLU's lawsuit. But Burt added that he doubted that N2H2 would agree to the publication of the complete contents of its decrypted list of off-limits Web sites.

The ACLU is also asking a federal judge to declare that the license agreement accompanying N2H2's software is unenforceable because it is an "unconscionable" misuse of copyright and contrary to federal and state public policy. N2H2's license says: "You shall not copy or make any changes or modifications to the software, and you shall not decrypt, decode, translate, decompile, disassemble, or otherwise reverse engineer the software."

"The contract section was one of the causes of action I thought was pretty dicey," said Tom Bell, a professor of law at Chapman University. "That's a hook shot from center court."

Bell said that courts generally have viewed license agreements for computer software as binding. "Some of the claims are pretty clearly not going to fly," Bell said. "I'd say the best of the claims have a 60 percent shot of prevailing. There are a lot more weak claims that only have a 10 percent shot of prevailing. But if you add it all up, it's still worth trying."

So far, every lawsuit challenging the DMCA has failed. Probably the best-known case was one brought by the eight

largest movie studios against *2600* magazine for publishing the DeCSS.exe DVD-decryption utility. In a decision last November, the U.S. Court of Appeals for the Second Circuit flatly rejected both First Amendment and "fair use" challenges to the DMCA.

"Our task is to determine whether the legislative solution adopted by Congress, as applied to (the magazine) by the district court's injunction, is consistent with the limitations of the First Amendment, and we are satisfied that it is," the three-judge panel wrote.

The Electronic Frontier Foundation, which represented the hacker zine, chose not to appeal its defeat to the Supreme Court.

Ed Felten, the Princeton University computer scientist, said he's "happy to see people challenging the DMCA, because I think it's a harmful law." But Felten said he learned firsthand that it's difficult to do. "Based on my experience, the most difficult aspect of challenging a law like this is convincing the court that you have standing to challenge the law or that there is an immediate case or controversy that the court needs to take up," Felten said.

After the recording industry briefly threatened Felten and his co-authors with a DMCA lawsuit last year, the scientists sued to seek an injunction allowing them to present their paper on security vulnerabilities in a copy-protection scheme. A federal judge tossed out the suit, ruling that the Recording Industry Association of America had long since abandoned any pretense at a threat. "The plaintiffs liken themselves to modern Galileos persecuted by authorities," said U.S. District Court Judge Garrett Brown. "I fear that a more apt analogy would be to modern-day Don Quixotes feeling threatened by windmills which they perceive as giants. There is no real controversy here."

When enacting the DMCA in 1998, Congress ordered the Library of Congress to weigh exemptions to the law's broad prohibition against circumventing copy-protection techniques. In October 2000, the Library of Congress ruled that "the case has been made for an exemption for compilations consisting of lists of websites blocked by filtering software applications."

But that exemption explicitly does not permit a researcher to write and distribute software that decodes the encrypted blacklists. Because Edelman wants to do just that, the ACLU argues, the Library of Congress' decision is insufficient.

The DMCA's limited exemption for some forms of reverse-engineering also does not apply, the lawsuit claims. According to the DMCA, reverse-engineering must be done for "the sole purpose of identifying and analyzing those elements of the program" necessary to create similar software. Because Edelman's purpose is instead to critique filtering software, the ACLU said, he could be liable under the DMCA unless the court intervenes. Reported in: CNET News, July 25.

Washington, D.C.

The entertainment industry's campaign to rally Congressional support for new methods of copyright enforcement is yielding results. And it is raising alarm among some technology executives and consumer advocates who fear that proposed regulations would excessively limit how people consume information and entertainment in digital form.

The major movie studios, worried about how to protect their works in a digital age, have been pressing technology companies to voluntarily incorporate copy-protection mechanisms into hardware and software. But lately, Hollywood has had more luck in Congress than in private negotiations, where technology executives remain wary of the expense and skeptical that any technical solution can effectively eliminate the sort of digital piracy that is already common with music and is finding its way into movies and television.

"The debate about copy protection has clearly been joined in Washington," said Alan Davidson, associate director of the Center for Democracy and Technology, a consumer rights advocacy group. "But there are a lot of questions raised by the potential solutions that haven't been answered. Internet users should be very concerned about whether they will be able to do the things that today they reasonably expect to do in the future."

In a flurry of activity on digital copyright protection, several members of Congress urged the Federal Communications Commission in July to require that makers of computers, television sets and recording devices embed technology into their machines to prevent TV viewers from redistributing digital broadcasts over the Internet. Consumer groups worry that the agency will act without examining how such a move would affect the kinds of machines people can buy and what they can do with them. Under the system proposed by the studios, a person would not be able to record a show in one place and retrieve it over the Internet to watch someplace else—Even in another room of his or her house.

In a separate action, Representatives Howard L. Berman, Democrat of California, and Howard Coble, Republican of North Carolina, introduced a bill that would immunize copyright holders from laws governing computer intrusion if they disabled or impaired a "publicly accessible peer-to-peer network" to prevent their works' being traded.

In other words, movie studios could legally hack into computers that used file-trading software like Kazaa or flood the networks with large files to bring traffic to a halt, as long as this did not deliberately damage a user's computer.

Music and movie industry representatives applauded the measure. But providers of file-sharing software, who say their services are used for legitimate means like trading music with the copyright holder's permission, as well as piracy, assailed the bill for encouraging "vigilante justice" that places copyright holders above the law.

And a draft Senate bill, originally intended to update laws that outlaw the counterfeiting of holograms and other measures used by software producers to guarantee the authenticity of CD's, has quietly been expanded to cover movies, music and other consumer products. Should that bill become law, a consumer who removed a watermark from a DVD or electronic book to send it over the Internet could be liable for fines up to $25,000. Internet providers are worried that they could be held responsible for material using their networks if someone had disabled the authentication mechanism.

The bill, which was offered by Senator Joseph R. Biden, Jr., Democrat of Delaware, is being viewed by some technology companies as a back-door attempt by Hollywood to push through broad copy-protection legislation that was widely criticized when it was packaged in a bill by Senator Ernest F. Hollings of South Carolina earlier this year. The draft contains no provisions for removing a watermark for research or to use excerpts of protected material for satire or commentary, which has customarily been viewed as acceptable under copyright law.

"This started out as a pretty unexceptional anti-counterfeiting bill," said Stewart Baker, general counsel of an association of Internet service providers, "and with almost no notice or discussion has been turned into a digital-rights management protection bill."

The attention to digital copyright protection is fueled largely by the conviction among lawmakers that broadband Internet services and digital television would be more widely adopted if consumers knew that they could get movies digitally. Jack Valenti, chairman of the Motion Picture Association of America, said the studios were eager to inaugurate a new delivery system—and presumably new revenue—for their products. But he said it makes no sense for them to provide their most valuable assets in digital form without assurance that consumers will not be able to make perfect copies and swap them over the Internet.

Still, some analysts say that the slower growth in the adoption of broadband, or high-speed, services this year has little to do with the lack of mainstream entertainment available on the Internet and more to do with overblown expectations.

Gigi Sohn, president of Public Knowledge, a public-interest group focused on intellectual property issues, suggested that the lack of copy protection was just one fairly minor reason why the entertainment industry had not provided its material over digital television. "Why aren't they doing it?" Sohn said. "It's expensive, and they haven't figured out a business model." Sohn said she had told legislators that if they thought they must pass additional laws to protect Hollywood's copyrights, they should also insist on an agreement that the studios would actually deliver their material over the new channels. She noted that they had already promised to do so in 1998, after Congress gave major copyright holders additional protections in the Digital Millennium Copyright Act, but that so far, there had been little to show for that agreement. Reported in: *New York Times*, July 29.

defamation

Kansas City, Kansas

A free-distribution newspaper, its editor and publisher have been convicted of criminal defamation for reporting that Mayor Carol Marinovich and her husband, a county judge, lived in another county. "I feel vindicated because I just felt all along that they deliberately lied about my address," said Marinovich, mayor of the unified government serving Kansas City, Kansas, and Wyandotte County. "They knew full well that I lived in Kansas City, Kansas, and they maliciously lied to destroy people's confidence in me."

By law, Marinovich and her husband, Wyandotte County District Judge Ernest Johnson, must live in the county where they hold office. Reports in *The New Observer* claimed they actually lived in the nearby and more affluent Johnson County.

The six-member jury which heard two days of testimony in the unusual case returned verdicts July 17 after four hours of deliberation. Jurors found Observer Publications, Inc., Publisher David Carson and Editor Edward H. Powers, Jr., guilty on seven counts each of misdemeanor libel, all involving claims about the residence of the mayor and her husband. The jurors failed to reach a verdict on one of four counts referring to the mayor's husband, and they acquitted the defendants on a claim that Steve Nicely, a former reporter for *The Kansas City Star*, had been hired to "lie for Marinovich."

Mark Birmingham, one of the attorneys for the defense, said he would ask the judge to set aside the verdict, and if that didn't happen he would appeal.

Powers, 61, and Carson, 85, are both disbarred lawyers who use their periodically distributed paper to disseminate their political views. They have long been critical of Marinovich and Nick Tomasic, the Wyandotte County district attorney who filed the defamation case against them the day after a primary last year in which Marinovich led a field of five candidates in her re-election bid.

Powers said after the verdicts that the charges were politically motivated, saying Marinovich didn't want the public to hear the *Observer's* message. "They wanted to control the news," he said.

"You can't print a lie," Farris told jurors in his closing argument. "That's a crime in the state of Kansas and it's a misdemeanor—some of us wish it was a felony." Farris said another judge told the newspaper that Marinovich and her husband were Wyandotte County residents. Still, he said, under a story headlined as an "apology," the paper wrote, "There are too many Marinovich sightings by too many reliable people" to believe that she lives in Wyandotte County.

Birmingham told jurors the charges were a "politically motivated prosecution intended to censor a newspaper that did not support Carol Marinovich in her re-election campaign." The defense said Carson and Powers believed the claim that Marinovich lived outside the county was true.

First Amendment proponents decried the verdict. "That's a scary thought in a democracy with a free press," said Dick Kurtenbach, executive director of the American Civil Liberties Union of Kansas and Western Missouri. "The idea of jailing someone for what they print in a newspaper is not what a democracy is all about."

Most defamation cases are civil matters in which defendants can be ordered to pay monetary damages. "We typically associate criminal defamation with authoritarian governments. There are a lot of Latin American dictatorships with criminal defamation statutes," said Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press in Washington, D.C.

To be constitutional, criminal defamation laws require "actual malice" for a conviction. That means a story would not just have to be wrong, but the paper publishing it would have to know it is wrong, or show reckless disregard for its truth or falsity. Kansas is one of just two or three states that have criminal defamation statutes meeting that standard, Dalglish said. Reported in: freedomforum.org, July 18. □

(Privacy: An Interpretation . . . from page 191)

law against such interference or attacks." This right has further been explicitly codified as Article Seventeen of the "International Covenant on Civil and Political Rights," a legally binding international human rights agreement ratified by the United States on June 8, 1992.

3. Eleven state constitutions guarantee a right of privacy or bar unreasonable intrusions into citizens' privacy. Forty-eight states protect the confidentiality of library users' records by law, and the attorneys general in the remaining two states have issued opinions recognizing the privacy of users' library records.
4. Cases recognizing a right to privacy include: *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Griswold* v. *Connecticut* 381 U.S. 479 (1965); *Katz* v. *United States*, 389 U.S. 347 (1967); and *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Congress recognized the right to privacy in the Privacy Act of 1974 and Amendments (5 USC Sec. 552a), which addresses the potential for government's violation of privacy through its collection of personal information. The Privacy Act's "Congressional Findings and Statement of Purpose" state in part: "the right to privacy is a personal and fundamental right protected by the Constitution of the United States.".
5. The phrase "Personally identifiable information" was established in ALA policy in 1991. See: Policy Concerning Confidentiality of Personally Identifiable Information about Library Users. Personally identifiable information can include many types of library records, for instance: information that the library requires an individual to provide in order to be eligible to use library services or borrow materials, information that identifies an individual as having requested or obtained specific materials or materials on a particular subject, and information that is provided by an individual to assist a library staff member to answer a specific question or provide information on a particular subject. Personally identifiable information does not include information that does not identify any individual and that is retained only for the purpose of studying or evaluating the use of a library and its materials and services. Personally identifiable information does include any data that can link choices of taste, interest, or research with a specific individual.
6. Article Eleven of the Code of Ethics for Librarians (1939) asserted that "It is the librarian's obligation to treat as confidential any private information obtained through contact with library patrons." Article Three of the current Code (1995) states: "We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired, or transmitted."
7. See these ALA Policies: Access for Children and Young People to Videotapes and Other Nonprint Formats; Free Access to Libraries for Minors; Freedom to Read; Libraries: An American Value; the newly revised Library Principles for a Networked World; Policy Concerning Confidentiality of Personally Identifiable Information about Library Users; Policy on Confidentiality of Library Records; Suggested Procedures for Implementing Policy on the Confidentiality of Library Records.
8. Adopted June 18, 1948; amended February 2, 1961, and January 23, 1980; inclusion of "age" reaffirmed January 23, 1996, by the ALA Council.
9. Existing ALA Policy asserts, in part, that: "The government's interest in library use reflects a dangerous and fallacious equation of what a person reads with what that person believes or how that person is likely to behave. Such a presumption can and does threaten the freedom of access to information." Policy Concerning Confidentiality of Personally Identifiable Information about Library Users.
10. See: Guidelines for the Development and Implementation of Policies, Regulations and Procedures Affecting Access to Library Materials, Services and Facilities. □

libraries

Mesa, Arizona

A committee of librarians and patrons at the City of Mesa Library voted 5–1 to reject a mother's request to remove *El Libro Vaquero*—a series of Spanish-language comic books—because it contains drawings of partially nude women and scenes portraying sex and violence. Maria Mancinas said her 12-year-old son read one of the comic books, which she called pornographic and degrading to women and Latinos, earlier this year. "It happened to my son and it could happen to anybody," Mancinas said. "Unfortunately, the committee did not listen and seem to get it."

Library staff pointed out the series is shelved in the adult section. Neighborhood outreach librarian Maria Hernandez said that although she wouldn't want her own children reading them, the library serves the entire public.

Also attending the meeting were State Sen. David Petersen (R-Mesa) and Rep. Mark Anderson (R-Mesa), who objected to the books. Petersen said he would talk to city council members about the matter. Reported in: *Arizona Republic*, July 19.

Hendersonville, North Carolina

The Henderson County Public Library board reinstated the video of the hit 1999 movie *Blair Witch Project* to the library collection June 11, reversing their unanimous month-old order to pull it. "We may have been misguided in our decision last month," board Chair Art Harrington noted before the 4–1 vote, alluding to some hundred messages officials had received about the ban, half of which were opposed to the action.

Among those voicing their displeasure were the Friends of the Library, which presented an anti-censorship petition signed by the members. "I think the board needs to trust the library staff," Friends President Ray McKenzie-Wilson asserted. Trustee Stan Shelley, who cast the dissenting vote, countered, "It's possible for a library staff member to make a mistake. If you accept that, it's not wrong at times to remove items from the library." Shelley explained that he objected to the movie's "excessive amounts of profanity [that] is offensive to the community."

"Personal preference should not be a reason to remove something. If it is blatantly offensive to the community as a whole, that should be the only reason to remove material," HCPL Director Bill Snyder remarked after the vote. Reported in: *Hendersonville Times-News*, June 12.

Natrona County, Wyoming

A Natrona County School District committee has decided that *Where The Heart Is*, by Billie Letts, will not be removed from the shelves of the middle and high school libraries. Complainant Mark Westby, the father of a seventh-grader, had challenged its graphic violence, obscene language, and depictions of drug use. "As our kids are being bombarded with these things, they are influenced by them," Westby wrote to the district.

The book deals with a 17-year-old girl who is pregnant and abandoned by her boyfriend in a Wal-Mart parking lot in Oklahoma. The girl lives in the store, gives birth there, and is eventually taken in by the community where the store is located. Westby said that he and his wife grew concerned after their daughter asked what the word "fornication" meant, saying she had read it in the book.

"The underlying theme of this title appears to be that of choices and of making good choices," the committee of eight teachers, administrators, librarians, clergy, parents, and community members wrote in their evaluation. "While negative images do exist within the context of the book, they are depicted in a negative light. Topics such as drug abuse and abandonment become central to the actions in the novel—however, the main character struggles to overcome these and to become a survivor." Reported in: *American Libraries* Online, June 17.

public art

Seattle, Washington

Seattle's Parks and Recreation Department reversed its earlier decision July 29 to remove four hand-painted tiles

from a public art project at Lynn Street Park in the Eastlake neighborhood because of their depictions of wine glasses and bottles. Department officials said they learned that removing the tiles might harm some of the 160 or so other tiles in the project and found that children don't often visit the small park.

"This was a new situation for us. No one's ever proposed a project like this before," said department representative Dewey Potter. "Alcohol is not allowed in any park, and we were just being consistent with our policy."

The project was sponsored by Friends of Lynn Street Park Art Tile Project to celebrate and commemorate the tightknit neighborhood. During two community tile-making workshops, more than 120 people drew images of Fourth of July fireworks, fish and houseboats. Others remembered residents of the community such as Tom and Peggy Stockley, who died in the 2000 Alaska Airlines crash. Tom Stockley was a *Seattle Times* wine columnist, and several tiles dedicated to him depicted wine—such as one with shrimp, a lemon slice and a glass of vino.

"I'm really, really glad to see that there's some common sense in the Parks Department and city bureaucracy," said Stockley's daughter Paige Stockley. "It's obvious you shouldn't be promoting alcohol abuse, but if you have a tile that's promoting coconut shrimp and a glass of rosé, come on."

The Parks Department had notified the tile-project group the previous week that four tiles were going to be removed. But then Mayor Greg Nickels weighed in and the department reconsidered its decision. "The mayor said, 'Put a cork in it,' " said his spokeswoman Marianne Bichsel. Reported in: *Seattle Times*, July 30. □

(not in front . . . from page 187)

1758 treatise warning against the myriad "maladies" caused by masturbation—everything from loose teeth to consumption. For the next 150 years, as the historian Peter Gay recounts in *The Bourgeois Experience: Victoria to Freud*, preventive measures ranged from "avoidance of tight lacing" to "cauterization of the sexual organs, infibulation, castration and clitoridectomy," as well as elaborate mechanical restraints: "modern chastity belts for girls and ingenious penile rings for boys or straitjackets for both, all designed to keep growing or adolescent sinners from getting at themselves."

Why do I recount this sad and appalling history? Because it was an obvious step from repressing sexual desires in youngsters to repressing the books and pictures that might inflame such desires. Censorship law, which until the middle of the 19th century had been concerned primarily with challenges to church or state power, now turned its attention to sexual arousal. The first obscenity laws in Britain and America were passed in the mid-19th century, and when it came time for courts to interpret them, the definition of obscenity turned explicitly on the presumed need to protect minors from sexual ideas.

The legal standard for obscenity—announced in the 1868 English case of *Regina* v. *Hicklin*—was whether the matter charged as obscene was likely to "deprave and corrupt those whose minds are open to such immoral influences," and in particular "would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character." This Hicklin standard became the definition of criminal obscenity in both England and the U.S. for most of the next century. It didn't seem to occur to American judges that—even putting aside First Amendment concerns—it made little sense to reduce the adult population to reading and viewing only what was considered fit for children. America's leading enforcer of obscenity law, Anthony Comstock, suppressed not only books and magazines that he considered lascivious but medical illustrations and contraceptive devices.

Actually, by the early 20th century a few jurists did question the prevailing law, starting with the aptly named Judge Learned Hand. In a 1913 obscenity case involving a novel called *Hagar Revelly,* which recounts in Dreiseresque fashion the travails of a young woman who, in the court's description, is "impulsive, sensuous, fond of pleasure, and restive under the monotony and squalor of her surroundings," Judge Hand protested against the *Hicklin* test, writing: "it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few." But Hicklin was the prevailing law, and Hand dutifully followed it.

It took another 20 years for the federal courts in New York to reject *Hicklin.* In a 1934 case involving a sex education pamphlet that birth control activist Mary Ware Dennett had written for her teenage sons, the U.S. Court of Appeals reversed Dennett's obscenity conviction on the ground that although "any article dealing with the sex side of life and explaining the functions of the sex organs is capable in some circumstances of arousing lust," it can hardly be said, therefore, that "there should be no instruction of the young in sex matters, and that the risk of imparting instruction outweighs the disadvantages of leaving them to grope about in mystery and morbid curiosity and of requiring them to secure such information, as they may be able to obtain, from ill-informed and often foul-mouthed companions, rather than from intelligent and high-minded sources."

Well, judges are only human, so it is not surprising that they imported the attitudes of their own social class in distinguishing between "foul-mouthed" and "high-minded" sources of sexual information. The descendant of this distinction is today's obscenity law rule that protects sexual art

of information only if it has "serious literary, artistic, political, or scientific value."

Four years after the Dennett case (in 1934), the same Court of Appeals explicitly rejected *Hicklin* in a famous case that released Joyce's *Ulysses* from the grasp of the censor. The court in the *Ulysses* case substituted for *Hicklin* a legal standard that turned on the "prurient appeal" of a work not to vulnerable minors but to the average adult—what Judge John Woolsey, the trial judge in the case, called "l'homme moyen sensuel." Yet it still took another 24 years—until 1957—for the U.S. Supreme Court to reject *Hicklin.*

In those 1957 cases, the Court said that indeed, the First Amendment does *not* allow censorship laws that reduce adults to reading only what's fit for children. Sex is "a great and mysterious motive force in human life," wrote Justice William Brennan in the one of these decisions (it's among my favorite quotes in Supreme Court annals), so that most art, literature, and information about sex *is* First Amendment-protected. The part that isn't, and therefore can be suppressed—so-called obscenity—must be "utterly without redeeming social value," Brennan said.

Of course, this obscenity standard has evolved over time—the Supreme Court, not surprisingly, has had a lot of trouble articulating the dividing line between constitutionally protected and unprotected speech about sex, and its changing definitions have turned—and still turn—on such vague and elusive concepts as "patent offensiveness," "community standards," and lack of "serious value."

But as a matter of culture and politics, the problem of how to "protect" youth remained. The Court responded in two ways: first, by inventing a "harmful to minors" standard (known in the legal trade as "obscenity lite"), which criminalized the distribution to minors of "girlie magazines" and other erotica that clearly wouldn't meet the obscenity test for adults; and second, by allowing the Federal Communications Commission free rein in censoring radio and television even more broadly—to ban anything it considered "indecent."

"Obscenity lite" was the creation of a 1968 case called *Ginsberg* v. *New York,* and again, Justice Brennan was the architect. Brennan's opinion in Ginsberg acknowledged that there is no empirical evidence minors are harmed by reading girlie magazines. Instead, he upheld New York's "harmful to minors" censorship law based on the state legislature's asserted interest in "the ethical and moral development of youth," and on the opinion of psychiatrists who (here Brennan quoted Dr. Willard Gaylin) made a distinction "between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive." In other words, psychiatrist Gaylin said, "The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved."

Well, that is an intriguing concept, and students of the human sexual drive in all its polymorphous perversity have often suggested that pornography *needs* forbiddenness to give it an erotic charge. Maybe censorship laws are really society's way of training the young to view sexual fantasy as transgressive and therefore sexy. But this is an interesting theory for the Supreme Court to adopt as a justification for "harmful to minors" censorship laws—especially given that their origin was in efforts to *suppress*, not *enhance*, youthful libido.

The second way the Supreme Court accommodated the First Amendment to the strongly felt social interest in censoring youth was the leeway it gave the FCC in controlling the airwaves. The pivotal case involved the famous George Carlin Filthy Words monolog (seven words you definitely couldn't say on the radio, as Carlin presciently put it). If you haven't heard or read the Carlin monolog, I heartily recommend it—it's hilarious. And it can easily be found online on any Web site that makes available U.S. Supreme Court decisions.

Ever since the 1930s, the FCC enforced a federal law against "obscene *or* indecent" broadcasts by threatening to revoke licenses of any radio stations that allowed such words as "damn" or "by God" to be aired. But by the early 1970s, with the '60s counterculture penetrating community radio, the commission was badly in need of a definition for its free-floating concept of "indecency." It took the first steps toward creating one in a case involving that icon of the counterculture, Grateful Dead guitarist Jerry Garcia.

In a 1970 interview on radio station WUHY in Philadelphia, Garcia held forth on music, philosophy, and politics in his characteristic uninhibited style. "I must answer the phone 900 fucking times a day," he complained; and later: "Political change is so fucking slow." For these improprieties, WUHY was fined by the FCC, which now—borrowing of the then-current Supreme Court obscenity test—defined indecency as language that is "patently offensive by contemporary community standards and wholly without redeeming social value." (They left out the third part of the obscenity test: whether the "dominant theme" of the material appealed to the "prurient interest.")

[There were] contemporaneous developments in the field of private censorship. "Harm to minors" crusades have two kinds of fallout: censorship laws, passed by government, and private, corporate censorship (sometimes known as "industry self-regulation"). It's characteristic of our culture that of all the media messages that might be thought detrimental to the "ethical and moral development" of youth, the Supreme Court has allowed sexual ones to be censored by government; whereas violence and other troublesome ideas have for the most part been relegated to "industry self-regulation."

In the 1950s, a psychiatrist named Fredric Wertham became obsessed by the evil deeds described in crime and

suspense comics. He fulminated against a wide range of comics, from science fiction to Batman. The latter, he said, was a particular problem because of the "subtle atmosphere of homoeroticism which pervades the adventures of the mature Batman and his young friend Robin."

Based on truly junk science (informal interviews with delinquents; no control groups), Wertham announced that comics caused juvenile delinquency, and generated a moral panic that led to congressional hearings in 1954 where Senator Estes Kefauver and others displayed lurid covers for the delectation of the press.

No matter that, as psychiatrist Bruno Bettelheim was to point out some years later in a perceptive book called *The Uses of Enchantment*, violent stories are popular with children precisely because they allow less-than-sunny desires and fantasies to be worked out in imagination rather than repressed.

No legislation was passed, however, for the industry quickly responded with a code of good conduct that required comics to promote, among other Boy Scout virtues, "honorable behavior" and "respect for parents." Shortly after the 1954 hearings, and as a result of the code, 24 of the 29 crime-and-mayhem comic publishers went out of business.

Now back to the FCC and indecency. Soon after the Jerry Garcia case, WBAI radio (New York City's Pacifica station) broadcast the George Carlin Filthy Words monolog; a listener from Morality in Media complained that his "young son" (aged 15) had heard it; and the FCC had the case it needed to respond to intensifying pressure from Congress to restrict both violence and indecency on the airwaves. Rather than tangle with the powerful TV industry over media violence, the agency chose to go after the left-leaning Pacifica over vulgar words. It now changed the definition of indecency it had announced in the Jerry Garcia case by dropping the "wholly without redeeming social value" part of the test. (Carlin's monolog obviously had redeeming value, since it was a satirical commentary on taboos surrounding four-letter words.) Henceforth, said the FCC, any language that was "patently offensive as measured by contemporary community standards for the broadcast medium" would be prohibited. The Carlin monolog was declared indecent under this standard. The explicit rationale as articulated by the FCC was the need to protect children.

The case eventually made its way to the Supreme Court, and in its infamous 1978 *Pacifica* decision, the Court upheld the FCC's authority to censor the airwaves according to its broad and vague indecency standard. Like the FCC, the Court relied on the presumed need to protect children. The decision was a 5–4 split, and would probably have come out differently if Richard Nixon had not had the opportunity several years before to appoint four new justices to the Court.

John Paul Stevens (a Gerald Ford appointee), wrote for the narrow majority in *Pacifica.* He brushed aside the earlier Supreme Court rule that the adult population cannot be reduced to reading (or hearing) only what is fit for children with the riposte that those who want indecent speech can find it at their local nightclub or record store. And although his decision turned on the need to protect children, Stevens did not elaborate on the nature of the harm he thought would befall them upon hearing Carlin's raunchy language. He only said that the monolog "could have enlarged a child's vocabulary in an instant."

Justice Lewis Powell wrote a concurring opinion in *Pacifica* that was only slightly more expansive than Stevens's on this point. Vulgar speech, Powell asserted, "may have a deeper and more lasting negative effect on a child than on an adult." What was the nature of the "negative effect"? Powell said only that "the language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts." That's rather circular, obviously. But Powell just assumed that sexual information was harmful to minors, and vulgar language as well.

As Justice Brennan pointed out, now dissenting in *Pacifica*, these harm-to-minors arguments have much more to do with cultural and moral attitudes than with actual measures of psychological harm. "Surprising as it may be to some individual Members of this Court," Brennan wrote, "some parents may actually find Mr. Carlin's unabashed attitude towards the 'seven dirty words' healthy and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding those words." The justices in the *Pacifica* majority not only ignored the rights of these parents, said Brennan, but, through an "ethnocentric myopia," they failed to appreciate "that in our land of cultural pluralism there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."

The *Pacifica* decision was an intellectually indefensible, if politically understandable, response to free speech on the airwaves; but one of its ironies was that for nine years afterwards, partly because of Reagan era deregulation, broadcasters could pretty well avoid censorship problems if they steered clear of the seven words and a few others of the same general sort. That situation changed in 1987, though. *As Not in Front of the Children* recounts, pressures from the religious right in the late '80s caused the FCC to expand its indecency enforcement from a finite number of taboo words to anything that, "in context," it thought was patently offensive, including sexual innuendo and double entendre. This expansion led to WBAI's decision to stop reading the poems of Allen Ginsberg. Ginsberg became a lifelong foe of the FCC, and was a plaintiff in several lawsuits thereafter challenging its indecency enforcement.

I tell you all this not just because it's amusing history. The FCC continues policing the airwaves—witness the recent indecency finding against female rapper Sarah Jones's smart, funny, and explicitly feminist rap, "Your Revolution." And

Congress in the 1996 CDA, as you know, chose the FCC's broad indecency standard to govern all of cyberspace. (One of the lovely ironies here was that the Carlin monolog, reproduced as an Appendix to the Supreme Court's *Pacifica* decision, is now easy to find on the Internet, as I've mentioned. Among other places, online law libraries have it. Because the monolog had been adjudicated indecent, any Internet site containing it would have been subject to criminal prosecution under the CDA.)

Let me shift now from dirty words that might redden the ears of vulnerable youth to censorship of safer sex information that might otherwise protect them from disease and death. Researching *Not in Front of the Children*, I discovered that perhaps the most striking example of youth censorship—enacted in the same year as the CDA—was a portion of the 1996 welfare reform law that mandated "abstinence-only-unless-married" instruction as a condition of federal sex education funds.

Under this abstinence-only law, teachers not only can't give information about birth control and safer sex in their sex-ed classes, but they must transmit a series of ideological messages, among them that "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity," and that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." The first of these homilies is clearly not fact but opinion; and the second is simply a lie. If it were true, then the vast majority of Americans (who do not remain virgins until their wedding night, if they marry at all) have been psychologically and physically scarred by their extramarital experiences.

"Abstinence-only" sexuality education is more than simply an insult to our young people and a travesty of sex education. It poses grave public health risks. It exists because sex-ed in the U.S. has for decades been not a matter of public health but an "ideological minefield," as I titled the chapter in *Not in Front of the Children* that I devote to this sorry subject.

In that chapter, I compare sexuality education here in the U.S. with some other places around the globe. Nowhere except perhaps in fundamentalist Islamic nations is sex-ed viewed so largely as a political rather than a public health concern; not only in continental Europe but in parts of Latin America, the subject is taught more comprehensively and with less political turmoil than in the U.S. For example, Profamilia's sex-ed manual (from the Dominican Republic) addresses masturbation and pornography—topics that most American sex educators wouldn't dare touch.

Similarly, the Mexican government's sexual health agency isn't afraid to make teenage use of condoms smart, acceptable, and cool. In the absence of anything approaching comprehensive sex-ed in American public schools, the Internet has become an important source of information for youngsters, as we showed the court in the CDA case. And thanks to the ALA's lawsuit against CIPA, those youngsters who are getting only ideology in their sex-ed classes can at least use the unfiltered computers in their local libraries to get safer sex and contraceptive information.

Obviously, in order to illustrate proper condom use, you have to show an erect penis. One of our arguments in the CDA case was that the law—incorporating that very broad FCC "indecency" standard—not only reduced the adult population of the Internet to reading only what some prosecutor somewhere considered to be fit for children, but that it unconstitutionally restricted the rights of minors to access important, educational information and ideas.

As most of you know, Congress quickly responded to the Supreme Court's 1997 decision invalidating the CDA. It passed the Child Online Protection Act or COPA, the second of those three federal Internet censorship laws. (If the acronyms are confusing, it's because Congress can't seem to resist the rhetorical flourish of putting "child" and "protection" into as many of these laws as possible. In reality, COPA, like CIPA, censored adults as well as minors.)

COPA adopted the harmful-to-minors test from the *Ginsberg* girlie magazine case in place of the CDA's broad indecency standard. Last year, a federal court of appeals invalidated COPA because its reliance on community standards, in the global context of the Internet, would unconstitutionally force Web publishers to self-censor their speech to comport with the standards of the most puritanical community. That is, because the Web is available everywhere in the U.S., Web speakers could be prosecuted in the most conservative community. The Supreme Court reversed this ruling last month—the justices clearly didn't want to invalidate the community standards test, vague and uncertain as it is, because it is a bedrock of obscenity as well as harmful-to-minors law. The justices sent the COPA case back to the lower courts to decide if they should invalidate the law on some other ground.

Meanwhile, as you also know, at the end of 2000, Congress passed and Bill Clinton signed CIPA. This law was in many ways more insidious than the previous two. Instead of a criminal ban on "indecency" or "obscenity lite," which at least require some judicial oversight of the censorship standards, CIPA delegated censorship decisions to private Internet filtering manufacturers. And those manufacturers, as we know, not only keep their lists and codes and algorithms secret; they vastly overblock. By necessity, they must use mechanical means, with results that—if perhaps not quite so ludicrous today as Surfwatch's banning of any site with the word "sex"—still provide countless examples of overblocking—from Beaver College to magna cum laude and pussy willows. (I'm sure you all have your own favorite examples.) At the same time, as the three-judge court in Philadelphia found in its May 31 decision, filters don't do a very good job of blocking out pornography, and thus provide a false sense of security.

Now, I don't mean to minimize the understandable concerns that people have about some truly disturbing material out there in cyberspace—or on TV or even in comic books. Although a few unfriendly reviewers of *Not in Front of the Children* excoriated me for doing just that. One of my purposes in writing the book was to suggest how assumptions about harm from speech are relative, culturally driven, and evolve with time. (Most of us today wouldn't countenance grisly anti-masturbation devices, though they were the proper thing for "responsible" parents to impose a hundred years ago.) If assumptions about harm are relative, and "harm to minors" really functions as a metaphor for what society's opinion leaders simply consider inappropriate at any given time, then the answer to this perennial concern about the socialization of children is probably not Internet filters, indecency laws, or even movie ratings and v-chips.

Instead, as a physician with whom I shared a panel on media violence last year put it, there are three answers to society's concerns about media messages and youth: education, education, and education. Education not only in sexuality—what's common, what's dangerous, what's unrealistic, what's fantasy—but education in media literacy.

Now education is less headline-grabbing than a law with "child protection" in the title, and certainly less of a symbolic statement of disapproval. It's also more expensive for the government than passing censorship laws, even taking into account the hundreds of thousands, if not millions, of tax dollars that have been paid to government lawyers to defend those laws (unsuccessfully) in court. Thus, we have a big job ahead of us to persuade our political leaders that education, not censorship, is a better way to advance "the ethical and moral development of youth."

Bringing actual minors into the debate would help, and empower them at the same time by giving them an opportunity to speak. I hope that *Not in Front of the Children* can also help by giving a thoroughgoing history and analysis of harm-to-minors-based censorship.

On the Bad Frog Beer label: a mean-looking frog who appears to be "giving the finger" led to an actual censorship case when the young wags who created the Bad Frog Brewery brought a court challenge to the New York Liquor Authority's disapproval of their sophomoric label design. The Liquor Authority said that seeing this irreverent beast with its finger extended "in a manner evocative of a well-known human gesture of insult" could have "adverse effects" on "children of tender age." (I tell the story in the introduction to *Not in Front of the Children.*) It's an example of how "harm to minors" has become an all-purpose rhetorical excuse for whatever attitudes those in authority may hold on matters of propriety and taste.

It also provided me with the challenge of locating the art for this, and the other illustrations for the book—an activity required by publishers these days but not necessarily one in which authors are adept. I had to use my very bad Spanish to ask sex education folks in the Dominican Republic and Mexico for permission to reproduce their works. I had to track down the long-deceased British publication Oz for its wonderfully irreverent send-up of the beloved British children's book character Rupert Bear; and the owners of the copyright in *Crime SuspenStories* and *Tales from the Crypt* for their gory comic book covers.

All these disparate players in the history of free expression contributed to the Oboler Award that you've honored me with today. I'm tremendously grateful to them as well as the members of the Intellectual Freedom Roundtable and all of the ALA. May you prosper; may you continue to support the "mighty marketplace of ideas"; and may you prevail in the Supreme Court! □

(the new FBI guidelines . . . from page 188)

subpoenas issued with very little attention from a judge, governing when and how different kinds of information can be obtained by the government.

You do not have to be the target of an investigation, or even be suspected of a crime, to have your information seized. In many cases, the law allows information to be obtained when it is "relevant to an ongoing criminal investigation." There is a story about one of Monica Lewinsky's close friends who, in the context of the Kenneth Starr investigation of President Clinton, had many of her e-mails seized because there were communications with Monica Lewinsky, who was under investigation. Some of this e-mail contained personal discussions with Monica. They were eventually entered into the Congressional Record as part of Congress' investigation, and became public. It was an extremely awkward situation.

This woman was not the target of an investigation. She was not suspected of any criminality. She simply had information that was relevant to an ongoing criminal investigation. It is important to realize that a lot of innocent people can get swept up in these kinds of investigations—something we are certainly seeing after September 11.

Not only do we have an extremely complicated set of rules for how crimes can be investigated, we also have a totally separate set of rules for intelligence investigations. The basis for this is something called the Foreign Intelligence Surveillance Act, or FISA, which was passed in the late 1970's. FISA basically says: Although we have all of these rules for criminal investigations, we treat intelligence investigations differently. The logic is that intelligence investigations are critical to national security, and these kinds of investigations are directed mostly at people who are not Americans—but rather at foreign powers or their agents.

So for foreign intelligence investigations we have a completely different set of rules and – it sort of sounds like a conspiracy theory—this nation has a set of secret courts

that apply a different set of procedures. These courts approve operations like wiretapping or seizure of materials for foreign intelligence investigations. It sounds like something out of the "X-Files"—secret courts and "FISA" and so on—but this is the compromise we have developed over many years: a complicated set of laws trying to balance our real need to protect national security with our real need to protect individual rights.

September 11 and the USA-PATRIOT Act

September 11 has changed that balance. This country's initial response legislatively was the passage of the USA-PATRIOT Act, a sweeping law of one hundred and fifty-six sections, passed just six weeks after September 11, adding dozens of new provisions to the law. Most of these were not that controversial, like making bio-terrorism a crime. But a small set of provisions was highly controversial, and made a very big difference to the delicate balance between privacy and surveillance that had been crafted over time.

Unfortunately there was not much time to consider the implications of these changes. The USA PATRIOT Act, as with a lot of the responses to September 11, happened very quickly and without much public debate. This conference today has probably been in session longer than the entire Senate floor debate on the substance of the USA PATRIOT Act. Of course, the bill passed overwhelmingly in both the House and Senate. It is very difficult to have a coherent conversation about complicated laws and complicated rules in that kind of environment. With just a few hours of debate, the USA PATRIOT Act changed laws that had taken decades to create. So, it is not surprising that some of the changes made have become cause for concern.

A few examples of the things in the USA PATRIOT Act that now, eight months later, appear very problematic: A new provision to allow access to business records—which probably includes records held by libraries—with greatly reduced judicial oversight. The USA PATRIOT Act allows the FBI to seize "any tangible thing," which includes business records that are held and maybe even the machines they are held on, whenever they are "sought for" an intelligence investigation. No probable cause is required, no evidence of criminal activity, no suspicion of criminal activity. This is actually one of the broadest and the lowest standards we have ever seen.

Reports from the field—both from the library community and the ISP community—indicate that these provisions are being used broadly. Not just to get information about particular individuals, but to harvest whole databases of information in attempts to pick out patterns of activity. No longer is the FBI looking for information about what Alan Davidson did online on a specific day. Now, agents can ask ISPs and libraries, "show me all of your web logs so we can try to figure out patterns of people who were online at certain times, communicating with certain sites, and so on." A lot of innocent behavior can get swept up in such a wide net.

A second major proposed change in the USA PATRIOT Act was a great one for lawyers – the change of one word. It was the proposal to change the word "the" to the word "a." You might ask, is this is why lawyers make a lot of money? Or, is this why lawyers should be hung? Probably both.

Changing this single word in the law would have changed the FISA statute's meaning dramatically. Under previous law, the special investigative powers in FISA could only be used when "*the* purpose"—the primary purpose, the only purpose—of the investigation was intelligence gathering. FISA's special powers could not be used for criminal investigations. The purpose of the investigation had to be intelligence gathering. Changing "the purpose" to "a purpose" would have enabled law enforcement officials to use the powers in FISA if just "a purpose" of the investigation was gathering intelligence. A FISA investigation could be an investigation of drug trafficking. It could be an investigation of tax invasion. It could be an investigation of computer piracy of copyrighted works. As long as there was an intelligence nexus, the law enforcement community could argue that they were conducting an intelligence investigation, and the dramatic and very special powers of the foreign intelligence gathering could be brought to bear.

After much deliberation, the language was finally amended to read "a significant purpose," but that change is still widely viewed as a dramatic change to the law. No longer are these special powers reserved simply for foreign intelligence investigations. They will now be used in many domestic criminal investigations.

There are many other things that were changed in the USA PATRIOT Act. For example, the USA PATRIOT Act expanded the use of certain surveillance techniques on the Internet. The very weak standards that govern how law enforcement can gain access to the list of phone numbers you call (and which are kept by the phone company) are now being applied to what URL's you visit, what e-mail addresses you send to and receive from, revealing very personal information without adequate oversight. There are new computer trespassing provisions, and new secret searching provisions never before codified in law. New roving wiretaps will make it easier for law enforcement to follow a suspect from device to device, but also create the potential for broader surveillance of innocent communications as a suspect moves from a Kinko's to a library's public terminal area to another computer. A new process for nationwide service of warrants has been created, so many of you may be receiving orders not just from your local magistrate but from judges anywhere in the country.

All of these things erode the balance created over time, a balance rooted in the Fourth Amendment and established by Congress to protect sensitive information. Even in the wake of these changes, there have been further efforts to

amend the law. Just weeks after the USA PATRIOT Act passed, new legislation was introduced that would even further weaken some of the privacy protections that the Act had changed. One such bill has passed out of the House Judiciary Committee to provide for more sharing and disclosure of information from ISPs. So, we have still not reached the end of this story.

These are complicated changes. This country has a very delicate set of laws that have been changed in a dramatic way, and that continue to be changed today. These kinds of changes can have a real impact on people's privacy, as well as a chilling effect on the way that people seek information, and the way they speak, particularly online.

Changes to the FBI Guidelines

Of all the follow-on activities we have seen in recent months, nothing has been as dramatic as the new FBI guidelines issued by the Attorney General just a few weeks ago.

The FBI is different from many federal entities. For example, the FBI does not have the same kind of grounding in law that the Food and Drug Administration has. There is no law that spells out what the FBI can or cannot do, or that describes how it shall do it. This has been very controversial over time.

The FBI guidelines were first adopted in 1976 under Attorney General Edward Levy, the widely respected Attorney General under the Ford Administration. The Levy guidelines were designed to prevent the abuses of COINTELPRO—an FBI counterintelligence program that ran in the 1950s and 60s. Only after COINTELPRO had been operating for years did Americans learn the full extent of how the FBI persecuted Dr. Martin Luther King, Jr., or how files were created on a large numbers of scientists, people who were suspected communists, and even people who were political enemies of government officials. Again, it sounds like the "X-Files."

I think that people in my generation, who came of age after Watergate and after COINTELPRO, find it hard to believe that our government ever engaged in activities like this, and want to believe that even if it did happen it could never happen again. Unfortunately, we only find out about these kinds of abuses many years after they have taken place. It is rare when we get a chance to really understand them and to do something about them.

In the mid-seventies, there was a real recognition of the abuse that had taken place. Attorney General Levy's FBI guidelines played a major role in reigning in this very powerful apparatus, which had developed literally hundreds of thousands of files on Americans and American organizations.

For example, what prevents the FBI from coming to a controversial Noam Chomsky lecture, taking pictures of everybody who is there, writing down their names, putting all of those names into a file, and then using that file as the basis of investigations if any one of those names ever pops up in some other investigation? What prevents the FBI from going to churches or mosques and doing the same thing? The FBI guidelines are what prevent those kinds of behaviors.

The guidelines prevent abuses by relying on the notion of a *criminal nexus* that permits investigations to move forward. No matter what the FBI is investigating, there has to be a criminal basis for it at some point. This is the key element that has been changed by Attorney General Ashcroft, and it is what is so troubling about the new guidelines.

There are actually several sets of guidelines. There are domestic guidelines that govern investigations of domestic organizations and individuals, and there are foreign guidelines that are used for investigating foreign organizations. The changes that have been announced are to the domestic guidelines. They cover the investigation of American citizens and American persons, and investigations of organizations that originate in the United States. We don't know much about what the foreign guidelines say. They are thought to be much more lenient, but they are highly classified. These more lenient foreign guidelines were the ones used, for example, to investigate Al'Qaeda. So, even under those more lenient guidelines, we saw the problems and intelligence failures we have been hearing about in the papers recently.

It is very troubling to see these domestic guidelines being changed when in fact they were not the guidelines used in our investigations before September 11 and it makes us ask the question: Are these changes really meant to respond to the problems that came up after September 11?

The old FBI guidelines were based on the notion of a *criminal nexus*, the idea that there has to be some evidence of criminal activity for an investigation to move forward. The guidelines set up three levels of inquiry that the FBI can go into. First, at any time, the FBI can for a certain duration perform limited and prompt checking out of leads. These leads could come from any number of sources; many of them come from local law enforcement. In discussion of these guidelines, some people had been arguing that old guidelines were too restrictive, and that they prevented the FBI from surfing the Internet or reading the newspaper. The fact of the matter is actually that, in many cases, those kinds of sources have *always* been where leads have come from. If you look, for example, at cases of abuse by local police departments, the FBI generally does not find out about those cases from the local police themselves. They find out about them from reading the newspaper. So, to say that the FBI was never allowed to look for public sources of information is very hard to believe.

This second stage of inquiry under the guidelines is known as a preliminary inquiry. Under the old guidelines, the FBI could perform preliminary inquiries for a long period of time, ninety days, and they can do almost anything. They can go to meetings. They can take pictures.

They can surf the Internet. They can buy commercial databases. They can use LEXIS-NEXIS. They can do all of these things in a preliminary inquiry. The main requirement to begin a preliminary inquiry is that the "responsible handling of data" requires more than just checking out leads, and that some investigation is actually required. Under the old guidelines, preliminary inquiries required no approval from headquarters for ninety days. There are only a few things that cannot be done under these inquiries: you cannot do wiretaps, you cannot open people's mail, and you cannot read the envelopes of people's mail in a preliminary inquiry. If, after ninety days of this intensive investigation, the agent cannot show there is a reason to open a full investigation, extensions can be granted with the permission of FBI headquarters. This provides a way to stop agents from going on fishing expeditions where nothing productive was happening. It is a very low threshold—we are not talking about probable cause that a crime has been or will be committed. We are talking only about cases where "responsible handling" involved more investigation.

The third stage of inquiry is a full investigation, and that requires a reasonable indication of criminal activity—again, an extremely low standard. The guidelines do not require agents to prove crimes before they investigate them—the FBI just had to have an idea that there was reasonable indication of criminal activity, and then a full investigation could go forward for very long periods of time. The point was to prevent the kinds of abuses that had happened in COINTELPRO. As long as investigations are based on indication of criminal activity, we had an oversight mechanism so people could not do improper investigations without somebody, after some period of time, formally approving their activity.

The new guidelines take a step away from this criminal nexus. They change the standards for how long preliminary investigations inquiries can last, and what the standards are for them. The new guidelines create a new fourth category of investigation, seeking out other information. So, for example, the new guidelines say that, for the purpose of detecting or preventing terrorist's activities, the FBI is authorized to visit any place and attend any event that is open to the public on the same terms and conditions as members of the public generally. That standard removes the old requirement that such activities had to happen in the context of a preliminary inquiry where there had to be some indication of criminal activity.

Other provisions are very controversial. For example, agents will now be given the authority to surf the Internet to identify public websites, bulletin boards and chat rooms, and to observe information open to the public view in such forms to detect terrorists activities and other criminal activities. This is before there are leads, before there is any reasonable indication of criminal activity. These guidelines explicitly permit agents to go out and gather information and then keep it for future purposes—and such information does not have to be related to terrorist activities. It can be for any illegal activity: evidence of computer piracy, exchange of copyrighted works, tax evasion, or lying on a federal student aid form.

Once this information is collected, it can become part of a file. A concern is that these files exist for very, very long periods of time. Storage, especially in the electronic age, is very inexpensive. Imagine you attend a meeting, a university discussion about the plight of the Palestinians, including perhaps a debate about the use of violence. Under the new guidelines, the FBI can attend—even without indication of criminal activity—and take down the names of all the people who were there and of anyone who stood up and said anything. All that information could become part of a file. If later on, somebody at the meeting comes under investigation for any reason or is implicated in any crime, the FBI could begin casting suspicion on any known associates, perhaps anybody else who attended that meeting.

There is not so much a Fourth Amendment problem with these guidelines as there is a First Amendment problem. These guidelines raise the specter not of the improper seizure of information, but of chilling political activity, political speech, and access to information. They are especially troubling because the FBI already had a lot of the authority the new guidelines supposedly grant. It is simply a myth to say the FBI was not allowed to surf the Internet—of course it was. Agents could do it in these preliminary inquiries, which started at a very, very low threshold and, of course, they could do it again as part of their general information gathering and fact-finding. Nobody ever told the FBI researchers in Quantico that they could not learn about anthrax by looking at online resources—of course they could. Agents do use these tools, and we agree that they *should* use these tools. But can they use these tools to investigate particular persons or particular organizations without there being some nexus of criminal activity and without there being some oversight? *This* is what the FBI guidelines changed.

The new guidelines detract from two things. First, they detract from our intelligence gathering capability. It has become clear since September 11 that our intelligence failures are largely not in information collection, but rather in being able to analyze the information we already have. Almost every day, a new revelation comes forward about information that was available to our intelligence agencies before September 11. Agents need better capabilities to "connect the dots," not lower privacy protections.

The new guidelines exacerbate the problem by permitting even more information to be collected, about more people, and without ever addressing the fundamental problem of analysis.

The second major problem is the very real risk that we will fall back into a world where the FBI is maintaining

dossiers on innocent people, keeping that information for indefinite periods of time without giving individuals a chance to do anything about it. The FBI has long relied on a model of data mining and creating large files for future use. In some ways, the private sector is already doing this. We have LEXIS. We have the credit reporting agencies. These bodies collect far more information about people then we may feel comfortable with. But if a telemarketer has me on their list, I get a phone call during dinner. If the FBI has me on their list, I might become the target of an investigation—and that's quite a difference.

This is not a right/left, liberal/conservative, Democrat/Republican issue. The people who are most concerned about this come from across the political spectrum. People from the right and the left will agree that this is not just about Attorney General Ashcroft's guidelines. My conservative friends shudder to think how they would feel if Janet Reno were Attorney General with these guidelines. During the Clinton Administration, concerns were raised about, for example, investigations of religious groups leading up to Y2K, or investigations of anti-abortion groups, that many people felt bordered on attacks on political speech.

All of this is highly controversial, but the point is that the new guidelines constitute a big change in the way the FBI does business.

How You Should Respond to Law Enforcement Requests

Let me go back to the theme I started with. As great a concern as these changes are, I encourage you not to fall victim to rhetoric that the FBI can now do. You in the library community are going on the front lines, receiving requests for information, perhaps, or being asked to help in investigations. It is important to know your rights and your responsibilities.

The underlying requirements to compel disclosure of any information have not changed. A subpoena or court order is required to compel disclosure of records. Disclosure cannot be compelled based on mere requests except perhaps in very rare circumstance. I encourage everyone here to remember: When faced with an order or a request for information about patrons, it is not unpatriotic to ask questions about it or to even ask if it has been crafted too broadly. The law exists to protect individuals and to provide clear guidelines for law enforcement about when it can access information.

First, you should comply with lawful orders. As a general rule, when somebody gives you a subpoena or a court order that says to produce something, you should do it. But at the same time, I encourage you to seek counsel when you get an order like that, so you can understand what your responsibilities are and what you should and should not do.

Second, talk to the people who are presenting you with these orders or requests. Many of these orders are broadly drafted, akin to: 'Give me all of your web logs for the last year' or 'Give me all of the information about all of the patrons who visited the following websites.' Oftentimes what is actually needed is much narrower. Third, many times, producing something that more precisely matches what is needed may be faster and may preclude a demand for broader information that may cover more people.

In summary, we encourage everybody who receives these orders to: first, seek counsel; second, talk to law enforcement; and third, consider whether there are ways to narrowly tailor orders when you get them. Remember that requests for information are not the same thing as orders that compel you to disclose. I know everybody, especially in this environment, wants to help important law enforcement efforts. But there is also a duty to protect the privacy of patrons. The law has a very clear set of rules that are in place to let you know when you are required to help and where we as a society have made a determination that there are privacy values that need to be protected.

There are other things you can do to help maintain this balance between individual privacy rights and our national security/law enforcement mission. More and more people like you are becoming involved in the design of internal computer systems, and have both input and understanding on the kinds of information those systems keep. We have been trying to get people to build privacy by design into the systems they create. Does the new computer system need to maintain records of patron requests for long periods of time? Do you really need to track the identity of every person who makes a certain kind of request, or can you support anonymity?

To paraphrase the movie *A Field of Dreams*, "If you keep it, they will come." If a system collects and keeps sensitive information, sooner or later somebody will try to get it. It may be a law enforcement agent. It may be in the context of a civil suit, like a party to a divorce case. There are lots of different ways to design systems and some of them are going to be much more friendly to liberty than others. I encourage you to try to minimize the data stored to the minimum you need to do your jobs. And to the extent you do consider collecting information, weigh the privacy costs against the benefits, and be sure those whose information is being collected understand the tradeoffs as well.

The International Context

Not surprisingly, the United States is not the only government in the world that is thinking about how to respond to terrorism. And a lot of governments are doing so without the tradition of civil liberties and individual rights we have in this country. It should be no surprise that the laws being put in place abroad do not always have the same kind of balance as the laws in this country.

One development, dating back since before September 11, is the Council on Europe's Convention on Cybercrime.

This is something we are going to be hearing more about. The Council of Europe is a treaty organization made up of 43 different countries. This group originally took up the issue of cybercrime at the behest of the US government several years ago. "Be careful what you wish for you because you might get it." Although the US government got the machinery rolling in Europe to create a treaty on cybercrime, the treaty that came out is one that we are unlikely to sign. Nor should we.

The treaty was finalized last November in Budapest, and those countries that sign it will be expected to create many new criminal laws. There are cybercrime provisions, hacking provisions, intellectual property provisions, and child pornography provisions that anybody who signs has to commit to. Signatories also are required to have certain kinds of search and seizure capabilities for law enforcement. The treaty includes controversial data preservation laws that, for example, say the government can require an Internet provider to preserve all data concerning a particular suspect. The biggest problem is that the treaty incorporates all of these substantive requirements, all of these procedural requirements, but has no specific privacy protection.

Here in the United States, we have often allowed law enforcement to gain access to information, but we have always done it with the notion that there has to be some protection or some standard, to be interpreted by the courts. The Council of Europe is almost totally silent on those protections. Therefore, many countries could easily enact the provisions of this treaty without establishing protections for individual's privacy and for free expression rights. In addition, we are likely to see an increase in requests for information here in the U.S., but with those requests originating from outside the United States—from countries that have adopted this framework and do not necessarily have adequate privacy protections.

Another element is a controversial protocol on racism and xenophobia that is being added to the Council of Europe Cybercrime Treaty. The original treaty dropped provisions on hate speech or racist speech that could not be agreed on. However, an "add-on" protocol—kind of like a browser "plug-in"—has just been adopted as an addendum to the Cybercrime Treaty. This protocol requires countries to criminalize certain kinds of hate speech or racist speech. The problem is like the one raised in U.S. Supreme Court Justice Potter Stewart's famous comment on pornography, "I know it when I see it"—but in fact these materials are very difficult to define.

This Protocol criminalizes "racist and xenophobic material," which is "any material that advocates, promotes or incites hatred, discrimination or violence against any individual or group of individuals based on race, color, descent or national or ethnic origin." This is a very broad definition. It likely criminalizes materials protected under the First Amendment of our Constitution. (For example, a recent controversy over the French hate speech law involved materials including dissemination of excerpts of Mein Kampf.) The Protocol mandates that any signatory country creates new hate speech crimes, and establishes new laws making it a crime to disseminate racist material on a computer. Linking to that kind of racist material would be a crime. There are also new crimes for threats based on racism or xenophobia, or insults to particular ethnic groups or racial groups. There is a crime for the denial of genocide. There is a crime for aiding and abetting any of those other crimes.

The Justice Department's position is that implementing this treaty would be unconstitutional in the United States. We agree. Our First Amendment, rooted in the ideal of a marketplace of ideas, supports different points of view, even if disagreeable. Unfortunately, this Protocol will likely serve as a great add-on for a lot of countries that are just now developing their cybercrime laws. It is easy and tempting for countries to take this package from the Council of Europe—for many countries a very trusted source—and adopt the whole thing, instantly creating a structure that attaches criminality to a lot of speech that, while undesirable to many, is also something that many believe is important to permit.

Do people in this country need to be concerned? Perhaps not, except for two things. First, we are likely to see many more orders and many more requests for help from foreign governments which are targeting speakers here in the United States who might be breaking foreign law. This is already a big issue as Europeans worry about political hate speech Web sites operating here in the U.S.

Second, there is the controversy brewing over jurisdiction in cyberspace—the question of who is subject to what laws on the Internet. Some of you may have heard about therecent case where Yahoo! was sued in France. Yahoo! runs an auction site in the U.S; among the millions of items auctioned annually have been World War II memorabilia, including material with swastikas, Nazi artifacts, and Nazi memorabilia. In France, it is a crime to view, obtain, buy or see much of this material online. Several French groups sued Yahoo! and prevailed, with a French court ruling:

> [We] order the Company Yahoo! Inc., subject to a penalty of 100,000 francs per day of delay and/or per kilobyte of file in violation of [this] prohibition¼ to cease all hosting and availability in the territory of the Republic from the Yahoo.com site¼ of messages, images and text relating to Nazi objects, relics, insignia, emblems, and flags, or which evoke Nazism. . . .—*First Deputy Justice Jean-Jacques Gomez, County Court of Paris; May 22, 2000.*

The French court imposed a stiff fine on Yahoo! unless it prevented people in France from viewing this material. The ruling affected all of their sites – not just their auction sites. If a person had a Geocities account and posted

excerpts from *Mein Kampf,* Yahoo! would have to take it off or, if they chose not take it off, they would somehow have to prevent people from France from seeing it.

The problem has been that the sole jurisdictional tie to France in this case was that Yahoo! has a website that is viewed in France. This action was not directed at Yahoo! France. It was directed at Yahoo! the company in Santa Clara, California, and their servers in Santa Clara, California. The French argument is that if French citizens can see it, the publisher should be obliged to follow French laws. You have to make sure that either you filter out people from France—which is very, very difficult to do—or you have to make sure the material is not there. What is even more troubling is that Yahoo! was neither the originator nor the publisher nor the author of this material. It was simply a conduit that people used.

If this rule of law is allowed to stand, it will create a situation in which any of us who publish a website, which can be viewed globally, could find ourselves liable under potentially hundreds of different national laws, and thousands of different state, local, or regional laws. Even if you could figure out the location of visitors to your website (the technology for which is not highly available today but which may become more available in the future), how would a publisher possibly figure out how all of the laws of all of those countries apply to all of the materials that you have on your website? It is a daunting task and a chilling rule of law, allowing only the lowest common denominator of speech to stand. The only speech that could be put out on a global network would be speech that is globally acceptable everywhere.

Is such a ruling enforceable? The answer is yes and no. The good news is that Yahoo! went to the US courts and said: we deserve protection under the First Amendment. They asked—and ultimately received—a judgment from the US courts saying this French ruling will never be enforceable in the United States. CDT filed an amicus brief describing why this is so very important for speech, as did the Freedom to Read Foundation. That decision is being appealed right now, but we are cautiously optimistic that it will prevail.

Here is the bad news. In addition to the civil fines against Yahoo!, a criminal action has been brought in French court against Tim Koogle, the former CEO of Yahoo!, and against Yahoo! the company. The case is in its preliminary stages. The alleged crime includes crimes against humanity and other acts of racial violence. Potential penalties, if found guilty, include up to five years in jail. This is not something that we can stop in the US courts. Sure, Tim Koogle, if found guilty, would almost certainly never be extradited; there is no dual criminality, nothing recognized as a crime here in the United States. But one can imagine that being found guilty of a crime in France would put a crimp in ones family vacation plans.

I am personally optimistic that cooler heads will prevail in the long run and we will find a different solution to this problem. This is not a rule of law that makes sense. What will happen when the first French ISP that hosts a human rights group finds out that it is being held liable under Chinese anti-sedition law? Better solutions exist; countries have the ability to regulate the Internet activities of those within their borders, and this should allow countries to regulate behavior consistent with traditional notions of national sovereignty. Still, we face an uphill battle in having that conversation with our counterparts in Europe right now.

To wrap up: There are several reasons we should care about what is happening abroad. Rules are being made that broadly affect the privacy and human rights of many Internet users around the world. And these kinds of laws will someday be used to try to reach people here in the United States—to get information about people here, or to hold publishers and collectors of information liable under foreign law.

Conclusion

I did not come here to say that the world has radically changed and you have no rights anymore. But choices are being made today about the legal framework for the future. Changes are being made regarding government access to information in ways that can affect both privacy rights and rights of association and freedom of expression.

I encourage all of you to stay involved in this debate. Know your rights and responsibilities, should you be faced with requests for information. Get involved in the political debates. Stay involved in what is happening. And in particular, I hope you will be sensitive to the idea of privacy by design when you build your own information systems. Think about how you might be able to do so in a way that protects people's privacy and their freedom of expression.

Let me conclude with a quote that is particularly apt to our time. Justice Louis Brandeis, in his great dissent in the *Olmstead* case, said:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Today we are in a debate full of the best intentions. But as a nation, we have not had the opportunity to fully explore the implications of some of the things we are doing. I encourage you all to stay involved, and to be part of the national discussion about the implications of our actions and responses in these difficult times. Thank you for your time; I appreciate being here. □

(IFC report . . . from page 190)

Outsourcing Task Force

As you may recall, at the 1999 Midwinter Meeting the ALA Council asked the IFC to review the report of the ALA Outsourcing Task Force, and determine appropriate action. After reviewing that report, the IFC thought that a "checklist" of things to consider when outsourcing library services or functions would be helpful to ALA members.

The IFC drafted a checklist which focuses on the intellectual freedom issues that should be addressed when a library is considering outsourcing. The checklist was designed for librarians, library and government officials responsible for developing such contracts, and vendors who would become parties to the contracts. The IFC reported that this checklist was a draft, and included it in the IFC 2000 Midwinter Meeting Report to Council for information only. The IFC also urged other groups to review and add to it as it developed.

It subsequently came to the IFC's attention, however, that other ALA groups had developed outsourcing procedures and checklists. Understanding the value of one document, including a checklist and procedures, the IFC invited representatives from the American Association of School Librarians (AASL), the Association for Library Collections & Technical Services (ALCTS), the Association for Library Trustees and Advocates (ALTA), ALA Committee on Professional Ethics (COPE), the Human Resources Development and Recruitment (HRDR) Advisory Committee, and the Public Library Association (PLA) to begin discussion of how best to develop one outsourcing checklist for our association.

Members of the Outsourcing Task Force coming into this conference included: Carolyn Caywood, IFC and chair; Carrie Gardner, AASL; Lori Robare, ALCTS; Mary Jo Aman, Committee on Professional Ethics; Stephanie Jones, Federal and Armed Forces Libraries Round Table; June Pinnell-Stephens, IFC; Judith Wild, LITA; Deirdre Brennan, PLA.

The Task Force met at this conference and, since their terms end after this conference, Caywood and Pinnell-Stephens will no longer be on the task force. The task force voted Vivian Wynn, IFC, chair.

After discussing various ways to approach developing a useful document to begin addressing outsourcing concerns, Wynn moved, and the task force voted, to ask OIF staff to draft a preliminary integrated document for review before the 2003 Midwinter Meeting.

Resolutions from the ALA Committee on Legislation

The committee voted to endorse in principle the ten resolutions sponsored by the ALA Committee on Legislation presented to the Council at this conference.

Draft Interpretation of the Library Bill of Rights *on Privacy*

As a reminder of the context for this document, here is a bit of history.

In 1999, ALA Council resolved that the Library and Information Technology Association be asked to examine the impact of new technologies on patron privacy and the confidentiality of electronic records. The Task Force on Privacy and Confidentiality in the Electronic Environment was formed at the 1999 ALA Midwinter Conference with broad participation from across ALA.

In July 2000, ALA Council approved the Final Report of the Task Force on Privacy and Confidentiality in the Electronic Environment and referred it to the Intellectual Freedom Committee for review. The recommendations contained therein were:

- That ALA revise its policy statements related to Confidentiality of Library Records (rev. 1986), and Concerning Confidentiality of Personally Identifiable Information About Library Users (1991), in order to specifically and appropriately incorporate Internet privacy.
- That ALA develop model privacy policies, instructional materials, and privacy "best practices" documents for libraries; and
- That ALA urge that all libraries adopt a privacy statement on Web pages and post privacy policies in the library which cover the issues of privacy in Internet use as accessed through the library's services.

In its own end-of-conference report to Council, the IFC responded to this referral by saying: "The Intellectual Freedom Committee gladly accepts Council's charge to review the recommendations. IFC has been reviewing and will continue to monitor the appropriateness of all ALA policies regarding privacy and confidentiality and will address all three recommendations in our Midwinter Meeting report to Council."

At the 2001 ALA Midwinter Conference, the IFC established a standing Privacy Subcommittee, which is charged to monitor ongoing privacy developments in technology, politics and legislation and identify needs and resources for librarians and library users.

At its 2001 spring meeting, the committee decided that fully dealing with the issues raised by the Council referral called for developing an Interpretation of the *Library Bill of Rights* on privacy. Initial work began on a draft Interpretation at that time and continued through the 2001 Annual Conference and the Committee's 2001 fall meeting. In its deliberations, the committee thought carefully about the implications of 9/11 on privacy issues. We have sought to develop the Interpretation for lasting impact, knowing that this issue was of importance to libraries prior to those events and that it has enduring importance for those who rely on us in our libraries.

The committee believes it is important to emphasize that we have thought carefully about the USA PATRIOT Act. We believe that no conflict exists between the Interpretation on

privacy and the USA PATRIOT Act. The PATRIOT Act does not impose any duty on libraries to collect or retain confidential information about its patrons for law enforcement purposes. In addition, only FBI agents can use the PATRIOT Act to request information. An FBI agent who wishes to obtain confidential patron information is still required to present a search warrant or other court order before he or she can legally obtain those records.

During the last year, we have worked intensively on the *Interpretation*, including at our Spring Meeting in March 2001, the 2001 Annual Conference in San Francisco, our 2001 Fall Meeting, the 2002 Midwinter Meeting, and a very intensive electronic consideration that has been conducted in the months since Midwinter.

The first and second drafts were distributed to the ALA Council, Executive Board, Division Presidents and Executive Directors, Committee Chairs and staff liaisons, Round Table Chairs and staff liaisons, and Chapter Presidents and Executive Directors for review and comments in December 2001 and May 2002.

During the six-month drafting process, we heard from many divisions, chapters, committees, round tables and members, and have received useful criticism and suggestions that we incorporated into the second draft, which you received in May.

We held a hearing at this conference and refined that document based on those additional comments. You will note small, but useful, changes in the third and final draft, which is before you today.

A related document that has helped address many specific questions related to local procedure and implementation is the "Questions and Answers on Privacy and Confidentiality" The committee continues to develop this document as a tool for use in libraries with their communities. It will appear online as a virtual appendix to the *Interpretation.* The IFC welcomes comments and suggestions.

Since this *Interpretation* on privacy complies with ALA's other intellectual freedom policies, and because of the broad and supportive comments received from ALA units and the field, the ALA Intellectual Freedom Committee strongly urges Council to endorse it.

Projects

Intellectual Freedom in Library Schools

In light of its interest in providing librarians and others with continuing education programs on intellectual freedom, the IFC mailed a survey in the winter of 2001 to all library school admissions officers. It asked if and how intellectual freedom concepts are taught in library schools. At the 2001 Annual Conference, the committee reviewed preliminary data obtained from this survey.

Since the 2002 Midwinter meeting, the subcommittee (Barbara Jones, chair, and Pat Scales) overseeing the "Intellectual Freedom in Library Schools" project:

- Called the library schools that did not respond to the initial survey;
- Contacted the research department at the University of Illinois–Urbana to ask for assistance in compiling the survey results and follow-up information; and
- Prepared a document for IFC to review at this Conference.

At this meeting, the IFC:

- Accepted IFRT's intellectual freedom core competencies guidelines as a draft document on which to seek reaction in the next survey; and
- Approved steps to execute a more detailed survey and analyze results more conclusively.

Sixth Edition of the Intellectual Freedom Manual

The sixth edition of the *Intellectual Freedom Manual*, published in October, 2001, is selling very well. It has received uniformly favorable reviews and OIF has received favorable comments for it referencing several existing pages on the ALA Web site, including all ALA intellectual freedom policies, statements, and guidelines on the OIF Web site. One reminder: to keep the new print edition to a manageable length, it was decided to mount some historical and other material on the OIF Web site at www.ala.org/alaorg/oifintellectualfreedommanual.html.

2002 Banned Books Week

Banned Books Week (BBW) will be celebrated September 21–28. This year's theme is "Let Freedom Read." BBW materials include an image of the U.S. flag created with books. Libraries, schools, and individuals who would like to celebrate the freedom to read may freely save a 2002 Banned Books Week image for their Web sites.

As you may recall, the *BBW Resource Guide* will now be published every three years. The next edition is scheduled for 2004. The *Annual List of Books Challenged or Banned* (a.k.a. the short list) will supplement the *Resource Guide* between revisions. The "short list," however, will not be helpful unless *you* report your challenges to OIF.

The 2003 BBW will be celebrated September 20–27. The BBW Web site is www.ala.org/bbooks/.

In closing, I would like to thank the Intellectual Freedom Committee, the Division and Chapter Intellectual Freedom Committees, the Intellectual Freedom Round Table, the various unit liaisons, and Judith Krug, OIF director, and staff, for their commitment and hard work.

The Intellectual Freedom Committee at this conference passed a motion of appreciation to the law firm of Jenner & Block for their extraordinary work and outstanding presentation, which led to ALA's successful challenge to the constitutionality of the Children's Internet Protection Act in the Federal Courts for the Eastern District of Pennsylvania.

For almost nine months, our lives have been changing dramatically—and not so much for the better. Every day seems to bring more changes, more news of freedoms here and elsewhere being curtailed or threatened, more fears of returning to a more restricted society or worse, more challenges to our profession, a non-stop barrage of bad news with what seems like no good news in sight. The IFC suggests that the good news is with us now. The good news is our intellectual freedom principles are alive and well! Not only are they alive and well, court after court after court recognizes and decides in our favor, on the side of our principles, on the side of the First Amendment, on the side of our users, young and old alike, and, therefore, on the side of the future:

> Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.—*Judge Lowell A. Reed, Jr.,* American Civil Liberties Union, et al., *v.* Janet Reno. □

(FTRF report . . . from page 193)

and their relatives, to restrict access to presidential records eligible for release under the Presidential Records Act of 1978. The lawsuit was filed on November 28, 2001; FTRF filed an amicus brief in support of the action on February 28.

U.S. Supreme Court Cases

Since we last met in New Orleans, the United States Supreme Court decided three cases in which the Freedom to Read Foundation had joined amicus briefs.

Ashcroft v. *American Civil Liberties Union* (formerly *ACLU* v. *Reno*) (COPA). This lawsuit sought to overturn the Children's Online Protection Act (COPA)—also known as CDA II—which restricts online materials deemed "harmful to minors." In June 2000, the Third Circuit Court of Appeals barred enforcement of COPA, finding that the law's reliance on community standards to identify material that is harmful to minors violates the First Amendment. On May 13, 2002, the United States Supreme Court reversed that decision, upholding the law on the narrow grounds that the law's reliance on community standards did not, by itself, render COPA unconstitutional. Because the Court believed the Third Circuit did not sufficiently address all the First Amendment issues raised by COPA's restrictions on Internet speech, the Supreme Court returned the lawsuit to the Third Circuit for a fuller consideration of those issues. The nine justices agreed that the injunction preventing any enforcement of COPA must remain in place while the lower courts examine COPA's constitutionality.

Ashcroft v. *Free Speech Coalition* (formerly *Free Speech Coalition* v. *Reno*). On April 16, 2002, the U.S. Supreme Court overturned the Child Pornography Prevention Act (CPPA), known as the "virtual child pornography act." CPPA expanded the existing federal law criminalizing child pornography to include computer-generated images designed to simulate child pornography and sexually explicit images of adults who "appear to be" minors. The Supreme Court struck down the law on two grounds. First, the Court ruled that the law was overbroad, prohibiting otherwise legal, non-obscene images depicting teenagers engaging in sexual activity, such as filmed depictions of Romeo and Juliet or Lolita. Second, because the prohibition on child pornography is based on the link between the creation of the image and the sexual abuse of the children shown in the image, there is no legal basis to prohibit any image that does not use actual children in its creation, such as images created by using computer technology or by photographing adults pretending to be children.

Los Angeles v. *Alameda Books, Inc.* The plaintiffs in this case sought to overturn a Los Angeles zoning ordinance targeting adult-oriented businesses on the grounds that there was not sufficient evidence that housing more than two adult businesses in one building produces harmful secondary effects. The Supreme Court upheld the law on May 13, 2002, finding that the city had presented sufficient grounds for the ordinance. FTRF joined in an amicus brief that showed how broadening zoning ordinances to control adult businesses can adversely affect mainstream businesses by including them in the definition of an adult business.

State Internet Content Laws

State legislatures continue to enact "mini-CDA" legislation, even though the courts overwhelmingly find them unconstitutional and strike them down. The most recent state is Ohio, which passed a new obscenity and "harmful to juveniles" law that includes Internet content and broadens the definition of "harmful to minors" to include materials that contain violence, cruelty, foul words, or glorification of crime. On May 6, 2002, FTRF joined with several other plaintiffs in challenging the law, in a suit entitled *Bookfriends, Inc.* v. *Taft.* The case is before the U.S. District Court in Dayton, Ohio, and is in its initial stages. Lawyers for the plaintiffs are preparing a motion for a preliminary injunction to prevent enforcement of the law while the lawsuit is pending. The motion will be filed within the week.

In other such cases:

PSINet v. *Chapman.* Attorneys for FTRF and the other plaintiffs have filed a brief with the Fourth Circuit Court of Appeals, urging the court to uphold the U.S. District Court for the Western District of Virginia's permanent injunction forbidding enforcement of Virginia's Internet content law. The parties are now awaiting a date for argument from the Court of Appeals.

ACLU v. *Napolitano.* On February 19, 2002, the U.S. District Court in Arizona struck down Arizona's revised

Internet content law after FTRF and several other plaintiffs challenged its constitutionality. A final judgment is pending in this case while the parties prepare proposed findings of fact and conclusions of law for the District Court. A temporary restraining order prevents enforcement of the law.

ABFFE v. *Dean.* The efforts of Vermont legislators to rewrite and amend their Internet "harmful to minors" statute to forestall the lawsuit filed by FTRF and other plaintiffs has failed. On April 19, 2002, the U.S. District Court in Brattleboro, Vermont, declared the law unconstitutional and entered a permanent injunction barring its enforcement. Attorneys for the State of Vermont have filed a motion asking the Court to reconsider its decision.

Federal Legislation

Members of Congress immediately responded to the Supreme Court's decision to overturn the "virtual child porn" ban in *Ashcroft* v. *Free Speech Coalition* by proposing H.R. 4623, "The Child Obscenity and Pornography Prevention Act of 2002," a bill to prohibit and regulate images of children engaged in sexual conduct. This bill was fast-tracked by the House Subcommittee on Crime and has been marked up and referred to the full House Committee on the Judiciary.

Another measure, the "Dot Kids Implementation Efficiency Act of 2002," H.R. 3833, mandates the creation of a .kids Internet subdomain under the .us Internet domain. The proposed subdomain will be administered by a private company and will exclude all materials deemed "harmful to minors" while prohibiting any links to materials located outside the domain. This bill has passed the House and has been referred to the Senate's Committee on Commerce, Science, and Transportation.

Roll of Honor Award

This year's Roll of Honor Awards are presented to two remarkable women. Candace Morgan has been a tireless advocate of the First Amendment as a librarian at Ft. Vancouver Regional Library in Washington. She has been chair of the Intellectual Freedom Committee and president of the Freedom to Read Foundation, has testified against the Children's Internet Protection Act before Congress and in federal court, and frequently speaks and conducts workshops on intellectual freedom topics.

Joyce Meskis, owner of the Tattered Cover Book Store in Denver, recently stood up for her customers' privacy (as you read above). Even before that, however, she was well-known in book circles for her stands against censorship. Meskis is a former board member of the American Booksellers Foundation for Free Expression and a founder of Colorado Citizens Against Censorship. She has made the Tattered Cover a beloved institution, a place where ideas across the ideological spectrum can be accessed by the entire community. I am also thrilled to announce that Joyce was elected this May to the board of the Freedom to Read Foundation. □

(censorship dateline . . . from page 200)

as "jeopardizing the security of Russia", "humiliating human dignity" and "hooliganism and acts of vandalism".

Under the law, authorities will have the prerogative to immediately suspend any party, religious group or non-governmental organization whose members are accused of extremism. Courts can subsequently ban such groups. Broadcasters, newspapers and Internet sites charged with disseminating extremist ideas can be similarly be closed down.

The only protective clause in the law states that activities which" advocate legitimate rights and freedoms" cannot be construed as extremism, as long as they are carried out legally. The law calls for creation of a new federal commission—in effect, a new police agency—to collect information on suspected extremists.

Some left-wing oppositionists are particularly worried about the law's stipulation that "fomenting social antagonism" and "inciting mass unrest" are forms of extremism. Oleg Shein, an independent Duma deputy and trade union activist, said Russia's flagging economic growth, rising inflation and a looming wave of tough market reforms explain the Kremlin's desire for these provisions in the law. "There is a flowing tide of social disaffection over stagnating incomes and rising prices, and this has the authorities worried," said Shein. "Rather than let society organize itself, with independent trade unions and other grassroots protest groups, the Kremlin has opted for old-fashioned repression of protest. The purpose of this law is not to battle extremism, but to crush public initiative".

Critics charged Russia already has enough laws to combat genuine extremism, but these are not being implemented effectively. For example, they point out, only 120 police were on hand to supervise some 8,000 drunken soccer fans watching a June 9 World Cup game on a giant screen near the Kremlin. It took hours for police to mobilize and contain the subsequent riot.

"We are in no doubt about whom the authorities consider extremists," said Maxim Kuchinsky, a leader of Rainbow Protectors, a left-wing environmental group. "Not racists or nationalists, but those who are trying to build an independent civil society in Russia." Kuchinsky was one of two hundred anti-globalists who attempted to stage a peaceful rally on Moscow's Pushkin Square on May 28. About 2,000 specially-equipped riot police quickly closed in on the protesters, arresting 27 and dispersing the rest. Organizers said they had obtained a legal permit, but it was canceled at the

last moment because the demonstration "interfered with the work of city authorities". Said Kuchinsky: "The police got ahead of themselves. It was not legal to ban a meeting on those grounds, but under the new law it will be". Another case in point, critics said, was the discovery of several booby-trapped road signs near Moscow painted with anti-Semitic slogans this summer. One of them, which read "Death to Yids!", exploded on May 27, seriously injuring a woman who had been trying to remove it. The district police chief in charge of the investigation, Nikolai Vagin, was subsequently quoted by the English-language *Moscow Times* as saying he saw nothing anti-Semitic in the sign: "I think the slogan . . . is not a call to ethnic hatred," Vagin remarked. "In our country the word 'yid' gets applied to all sorts of people."

According to Boris Kagarlitsky, a left-wing sociologist, "Extremist attitudes are commonly found among Russian officials and police themselves. That's why they can't be trusted to define extremism, or to implement any law that gives them unlimited power to fight against it". Reported in: Johnson's Russia List, June 30. □

(FBI begins . . . from page 185)

But the University of Illinois conducted a survey of 1,500 public libraries in January and February, 2002, and found that of the 1,021 libraries which returned the questionnaire, 85 had been asked by federal or local law enforcement officers for information about patrons related to September 11, said Ed Lakner, assistant director of research at the school's Library Research Center. The libraries that reported law enforcement contacts were nearly all in large urban areas.

Perhaps even more worrisome, about one-fifth of the libraries said staff had changed their attitude toward or treatment of users in some way. More than ten percent (118) reported that they had become more restrictive of Internet use. Seventy-seven said they had monitored what patrons were doing.

The American Library Association, in guidelines adopted in January, advised the nation's librarians to "avoid creating unnecessary records" and to record information identifying patrons only "when necessary for the efficient operation of the library (see page 242)."

In a June 26 appearance on CNN's Crossfire, ALA Washington Office Director Emily Sheketoff noted, "It is going to be very hard for this to be tested in the courts" because librarians "can't tell anybody [and] the person whose records have been requested doesn't know."

However, Paterson, New Jersey, Public Library Director Cindy Czesak revealed in the June 26 *Bergen Record* that FBI agents had visited there seeking patron information. When they discovered that PPL does not have a computer sign-in sheet, Czesak said they exclaimed, "We know who borrows the books, so why don't we know who uses the computers?" Investigators have connected three of the alleged airline hijackers to the city of Paterson.

"They can't find what we don't have," said Anne M. Turner, president of the California Library Association and director of the Santa Cruz library.

Ann Brick, an American Civil Liberties Union lawyer in San Francisco, called Section 215 "a stunning assault on . . . First Amendment freedoms" and said it also appears to violate constitutional standards on searches. But she said it could be hard to challenge, because "how can a target challenge government activity that they don't know about?"

Judith Krug, Director of the American Library Association's Office for Intellectual Freedom, tells worried librarians who call that they should keep only the records they need and should discard records that would reveal which patron checked out a book and for how long when the materials are returned. She is frustrated by the hate mail she says she receives when she speaks out against the USA PATRIOT Act.

"People are scared and they think that by giving up their rights, especially their right to privacy, they will be safe," Krug said. "But it wasn't the right to privacy that let terrorists into our nation. It had nothing to do with libraries or library records."

Kari Hanson, director of the Bridgeview Public Library in suburban Chicago, said an FBI agent came seeking information about a person, but her library had no record of the person. Federal prosecutors allege Global Relief Foundation, an Islamic charity based in the Chicago suburb, has ties to Osama bin Laden's terror network.

"Patron information is sacrosanct here," Hanson said. "It's nobody's business what you read."

In Florida, Broward County library director Sam Morrison said the FBI had contacted his office. He declined to elaborate on the request or how many branch libraries were involved.

"We've heard from them, and that's all I can tell you," Morrison said. He said the FBI specifically instructed him not to reveal any information about the request. The library system had been contacted before. A week after the September 11 attacks, the FBI subpoenaed Morrison to provide information on the possible use of computer terminals by some of the suspected hijackers in the Hollywood, Florida, area.

In October, investigators revisited the county's main library in Fort Lauderdale and checked a regional library in Coral Springs. At least 15 of the 19 hijackers had Florida connections.

The process by which the FBI gains access to library records is quick and mostly secret under the USA PATRIOT Act. First, the FBI must obtain a search warrant from a court that meets in secret to hear the agency's case.

The FBI must show it has reason to suspect that a person is involved with a terrorist or a terrorist plot—far less difficult than meeting the tougher legal standards of probable cause, required for traditional search warrants.

With the warrant, FBI investigators can visit a library and gain immediate access to the records. Bookstores also can have their records searched by the FBI.

"What's so frustrating is that we're supposed to be watchdogs over the government's use of power," said Chris Finan, director of the American Booksellers Foundation for Free Expression. "But there is so much secrecy that we can't even tell what the government is doing or how much it's doing it."

Some libraries said they would still resist government efforts to obtain records. "State law and professional ethics say we do not convey patron information, and that is still our stance," said Pat McCandless, assistant director for public services for Ohio State University's libraries. "To the best of our ability, we would try to support patron confidentiality," she said.

On June 13, Rep. F. James Sensenbrenner (R-WI), the chairman of the Judiciary Committee, and Rep. John Conyers (D-MI), the ranking Democrat on the committee, sent Attorney General John D. Ashcroft a 12-page letter seeking details about the implementation of fifty provisions of the USA PATRIOT Act, including Section 215, and promising hearings on the matter. Although it did not criticize the USA PATRIOT Act directly, the Sensenbrenner/Conyers letter seemed to suggest that the Justice Department should exercise restraint in seeking subpoenas for bookstore, library and newspaper records.

Without recommending them, the letter identified two potential safeguards: "requiring supervisory approval" before the records are sought or "requiring a determination that the information is essential to an investigation and could not be obtained through any other means."

Sen. Russ Feingold (D-WI), the only member of the Senate to vote against the USA Patriot Act, said the power to investigate libraries was "one of the most troubling" aspects of the law.

"The new law authorizes the FBI to seek a secret court order for . . . the borrowing history not only of a suspected terrorist, but of anyone who has any contact" with that person, Feingold said in a statement. "Being able to borrow books from a public library without fear of government snooping is a basic First Amendment right."

Librarians and the FBI have been down this road before, most recently in a Cold War initiative that began in 1973. Herbert Foerstel was the head of branch libraries at the University of Maryland at College Park in 1986 when he learned that FBI agents had approached staff at two science libraries and asked about the reading habits of anyone with a foreign-sounding name or a foreign accent. After meeting with his subordinates and reminding them of their duty to keep information about patrons confidential without a court order, Foerstel did some research and took part in a Freedom of Information Act lawsuit. He learned, to his surprise, that the FBI had been visiting science libraries around the nation for 13 years under a project that became known as the FBI Library Awareness Program, and that FBI monitoring of public libraries had actually started many years earlier.

Foerstel testified at congressional hearings on the program and later wrote a book about it titled *Surveillance in the Stacks.* He said the FBI maintained it was gaining valuable information about which scientific topics interested people from Communist nations, and asserted its legal authority to conduct surveillance in libraries, though it backed off from the Library Awareness Program under public pressure.

With the revelations, "a lot of library users felt they could no longer trust libraries and were no longer willing to ask reference questions if they thought the topic was controversial," Foerstel said. He said those fears appeared to subside when state governments passed laws, now in effect in every state except Kentucky and Hawaii, making library records confidential.

But a federal law like the USA Patriot Act overrides state confidentiality laws, prompting concerns from library and bookstore organizations about the possible effect on readers. Reported in: *USA Today,* June 25; *Washington Post,* June 24; *San Francisco Chronicle,* June 23; *Philadelphia Inquirer,* June 25; FEN Newswire, June 25; *Milwaukee Journal-Sentinel,* July 8; *Nation,* July 25; *American Libraries* Online, July 8. □

the USA PATRIOT Act in the library

Background

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") became law on October 26, 2001. The legislation originated with Attorney General John Ashcroft, who asked Congress for additional powers that he claimed were needed to fight terrorism in the wake of the events of September 11, 2001. Few amendments were made to Ashcroft's initial proposal to Congress, and the bill became law without any hearings or markup by a Congressional committee.

The USA PATRIOT Act amended or revised 813 federal statutes, including the laws governing criminal procedure, computer fraud and abuse, foreign intelligence, wiretapping, immigration, and the laws governing the privacy of student records. These amendments or revisions expanded the authority of the Federal Bureau of Investigation and law enforcement to gain access to business records, medical records, educational records and library records, including stored electronic data and communications. The Act also

expanded the laws governing wiretaps and "trap and trace" phone devices to Internet and electronic communications. These enhanced surveillance procedures pose the greatest challenge to privacy and confidentiality in the library.

Enhanced Surveillance Provisions Affecting Library Confidentiality

Section 215: Access to Records Under Foreign Intelligence Security Act (FISA)

Allows an FBI agent to obtain a search warrant for "any tangible thing," which can include books, records, papers, floppy disks, data tapes, and computers with hard drives.

Permits the FBI to compel production of library circulation records, Internet use records, and registration information stored in any medium.

Does not require the agent to demonstrate "probable cause," the existence of specific facts to support the belief that a crime has been committed or that the items sought are evidence of a crime. Instead, the agent only needs to claim that he believes that the records he wants may be related to an ongoing investigation related to terrorism or intelligence activities, a very low legal standard.

Libraries or librarians served with a search warrant issued under FISA rules may not disclose, under of penalty of law, the existence of the warrant or the fact that records were produced as a result of the warrant. A patron cannot be told that his or her records were given to the FBI or that he or she is the subject of an FBI investigation.

Overrides state library confidentiality laws protecting library records. Codified in law at 50 U.S.C. §1862.

Section 216: Relating to the Use of Pen Register and Trap and Trace Devices

Extends the telephone monitoring laws ("pen register," "trap and trace") to include routing and addressing information for all Internet traffic, including e-mail addresses, IP addresses, and URLs of Web pages.

State law enforcement agencies may apply for and obtain an order under this provision, which is not limited to the investigation of terrorism or foreign intelligence matters.

Federal agents can obtain a nationwide court order for a wiretap from any federal court having jurisdiction over the offense under investigation.

The officers and agents seeking warrants under the pen register statute only need to affirm that the information sought is relevant to a criminal investigation.

Compels a recipient of a monitoring order to provide all necessary cooperation to law enforcement authorities to facilitate installation of the monitoring device, or provide the information to the investigating officer from their own records. The recipient cannot disclose that communications are being monitored.

Libraries that provide access to the Internet and e-mail service to patrons may become the target of a court order requiring the library to cooperate in the monitoring of a user's electronic communications sent through the library's computers or network. Codified in law at 18 U.S.C. §§3121-3127

Section 214: Pen Register and trap and trace authority under FISA

Extends the FBI's telephone monitoring authority in FISA investigations ("pen register," "trap and trace") to include routing and addressing information for all Internet traffic, including e-mail addresses, IP addresses, and URLs of Web pages.

As with Section 215, the agent only needs to claim that he believes that the records he wants may be related to an ongoing investigation related to terrorism or intelligence activities, a very low legal standard.

As with Section 216, libraries that provide access to the Internet and e-mail service to patrons may become the target of a court order. Codified in law at 50 U.S.C. §1852

Other Provisions of Interest That Do Not Directly Affect Libraries

Section 218: Foreign intelligence information requirement for FISA authority.

Amends FISA so that foreign intelligence or terrorism need only be "a significant purpose" of the investigation, rather than "the purpose" of the investigation.

Relaxes the legal standard for FISA surveillance.

Section 219: Single-Jurisdiction Warrants for Terrorism and Section 220: National Search Warrants for Electronic Evidence

Both provisions permit federal courts located in a district where a crime or act of terrorism has occurred to issue a court order that may be served and executed nationwide. Section 220 affects stored e-mail and other electronic data.

Section 206: Roving Surveillance Authority under FISA

Permits the use of "roving wiretaps" in a FISA investigation, which allows the investigating agency to obtain a single court order to monitor the electronic communications of a person at any location or on any device, including e-mail and Internet communications.

The order need not identify the person or entity whose assistance is required for the monitoring. It is a generic order that may be presented at any time to a newly discovered service provider.

Updates FISA to match federal wiretap laws that allow roving wiretaps. □

Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff

Increased visits to libraries by law enforcement agents, including FBI agents and officers of state, county, and municipal police departments, are raising considerable concern among the public and the library community. These visits are not only a result of the increased surveillance and investigation prompted by the events of September 11, 2001 and the subsequent passage of the USA PATRIOT Act, but also as a result of law enforcement officers investigating computer crimes, including e-mail threats and possible violations of the laws addressing online obscenity and child pornography.

These guidelines, developed to assist libraries and library staff in dealing with law enforcement inquiries, rely upon the ALA's Policy on the Confidentiality of Library Records, its Policy Concerning Confidentiality of Personally Identifiable Information about Library Users, and the Code of Ethics.

Fundamental Principles

Librarians' professional ethics require that personally identifiable information about library users be kept confidential. This principle is reflected in Article III of the Code of Ethics, which states that "[librarians] protect each library user's right to privacy and confidentiality with respect to information sought or received, and resources consulted, borrowed, acquired, or transmitted."

Currently, 48 states and the District of Columbia have laws protecting the confidentiality of library records, and the Attorneys General of the remaining two states, Hawaii and Kentucky, have ruled that library records are confidential and may not be disclosed under the laws governing open records. Confidential library records should not be released or made available in any format to a federal agent, law enforcement officer, or other person unless a court order in proper form has been entered by a court of competent jurisdiction after a showing of good cause by the law enforcement agency or person seeking the records.

General Guidelines

Confidentiality of library records is a basic principle of librarianship. As a matter of policy or procedure, the library administrator should ensure that:

The library staff and governing board are familiar with the ALA Policy on the Confidentiality of Library Records, the Policy Concerning Confidentiality of Personally Identifiable Information about Library Users, and other ALA documents on users' privacy and confidentiality.

The library staff and governing board are familiar with their state's library confidentiality statute or attorney general's opinion.

The library adopts a policy on users' privacy and confidentiality, which includes procedures for the staff and board to follow if the library is served with a court order for records or if law enforcement agents conduct inquiries in the library.

The library staff is familiar with the library's policy on confidentiality and its procedures for handling court orders and law enforcement inquiries.

Library Procedures Affect Confidentiality

Law enforcement visits aside, be aware that library operating procedures have an impact on confidentiality. The following recommendations are suggestions to bring library procedures into compliance with most state confidentiality statutes, ALA policies on confidentiality and its Code of Ethics:

- Avoid creating unnecessary records. Only record a user's personally identifiable information when necessary for the efficient operation of the library.
- Avoid retaining records that are not needed for efficient operation of the library. Check with your local governing body to learn if there are laws or policies addressing record retention and in conformity with these laws or policies, develop policies on the length of time necessary to retain a record. Assure that all kinds and types of records are covered by the policy, including data-related logs, digital records, and system backups.
- Be aware of library practices and procedures that place information on public view; e.g., the use of postcards for overdue notices or requested materials, staff terminals placed so that the screens can be read by the public, sign-in sheets to use computers or other devices, and the provision of titles of reserve requests or interlibrary loans provided over the telephone to users' family members or answering machines.

Recommended Procedures for Law Enforcement Visits

Before any visit:

- Designate the person or persons who will be responsible for handling law enforcement requests. In most circumstances, it should be the library director, and, if available, the library's legal counsel.
- Train all library staff, including volunteers, on the library's procedure for handling law enforcement requests. They should understand that it is lawful to refer the agent or officer to an administrator in charge of the library, and that they do not need to respond immediately to any request.
- Review the library's confidentiality policy and state confidentiality law with library counsel.

- A court order may require the removal of a computer workstation or other computer storage device from the library. Have plans in place to address service interruptions and any necessary backups for equipment and software.

During the visit:

- Staff should immediately ask for identification if they are approached by an agent or officer, and then immediately refer the agent or officer to the library director or other designated officer of the institution.
- The director or officer should meet with the agent with library counsel or another colleague in attendance.
- If the agent or officer does not have a court order compelling the production of records, the director or officer should explain the library's confidentiality policy and the state's confidentiality law, and inform the agent or officer that users' records are not available except when a proper court order in good form has been presented to the library.

Without a court order, neither the FBI nor local law enforcement has authority to compel cooperation with an investigation or require answers to questions, other than the name and address of the person speaking to the agent or officer. If the agent or officer persists, or makes an appeal to patriotism, the director or officer should explain that, as good citizens, the library staff will not respond to informal requests for confidential information, in conformity with professional ethics, First Amendment freedoms, and state law.

If the agent or officer presents a court order, the library director or officer should immediately refer the court order to the library's legal counsel for review.

If the court order is in the form of a subpoena:

- Counsel should examine the subpoena for any legal defect, including the manner in which it was served on the library, the breadth of its request, its form, or an insufficient showing of good cause made to a court. If a defect exists, counsel will advise on the best method to resist the subpoena.[1]

  Through legal counsel, insist that any defect be cured before records are released and that the subpoena is strictly limited to require release of specifically identified records or documents.
- Require that the agent, officer, or party requesting the information submit a new subpoena in good form and without defects.
- Review the information that may be produced in response to the subpoena before releasing the information. Follow the subpoena strictly and do not provide any information that is not specifically requested in it.

If disclosure is required, ask the court to enter a protective order (drafted by the library's counsel) keeping the information confidential and limiting its use to the particular case. Ask that access be restricted to those persons working directly on the case.

If the court order is in the form of a search warrant:

- A search warrant is executable immediately, unlike a subpoena. The agent or officer may begin a search of library records as soon as the library director or officer is served with the court's order.
- Ask to have library counsel present before the search begins in order to allow library counsel an opportunity to examine the search warrant and to assure that the search conforms to the terms of the search warrant.
- Cooperate with the search to ensure that only the records identified in the warrant are produced and that no other users' records are viewed or scanned.

If the court order is a search warrant issued under the Foreign Intelligence Surveillance Act (FISA) (USA PATRIOT Act amendment):

- The recommendations for a regular search warrant still apply. However, a search warrant issued by a FISA court also contains a "gag order." That means that no person or institution served with the warrant can disclose that the warrant has been served or that records have been produced pursuant to the warrant.
- The library and its staff must comply with this order. No information can be disclosed to any other party, including the patron whose records are the subject of the search warrant.
- The gag order does not change a library's right to legal representation during the search. The library can still seek legal advice concerning the warrant and request that the library's legal counsel be present during the actual search and execution of the warrant.
- If the library does not have legal counsel and wishes legal advice, the library can still obtain assistance from Jenner & Block, the Freedom to Read Foundation's legal counsel. Simply call the Office for Intellectual Freedom (1-800-545-2433, ext. 4223) and inform the staff that you need legal advice. OIF staff will assure that an attorney from Jenner & Block returns your call. You do not have to and should not inform OIF staff of the existence of the warrant.

After the visit:

- Review the court order with library counsel to ensure that the library complies with any remaining requirements, including restrictions on sharing information with others.
- Review library policies and staff response and make any necessary revisions in light of experience.
- Be prepared to communicate with the news media. Develop a public information statement detailing the principles upholding library confidentiality that includes an explanation of the chilling effect on First

Amendment rights caused by public access to users' personally identifiable information.
- If possible, notify the ALA about your experience by calling the Office for Intellectual Freedom at 800-545-2433, extension 4223.

See also: Policy on the Confidentiality of Library Records; Policy Concerning Confidentiality of Personally Identifiable Information; American Library Association Code of Ethics

Note

1. Usually, the library can file a motion to quash the subpoena or a motion for a protective order. Normally, a hearing is held where the court will decide if good cause exists for the subpoena or if it is defective, and then decide whether the library must comply with the subpoena. Consult with counsel on all issues, including the payment of costs if the library is the unsuccessful party. ☐

The USA PATRIOT Act and the First Amendment

A Statement from the Freedom to Read Committee of the Association of American Publishers

Why the Book Community Is Concerned. The right of an individual to read what he or she chooses without the government's knowledge or interference is a basic precept of any free and open society. As Supreme Court Justice William O. Douglas wrote: "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. . . . Fear will take the place of freedom in the libraries, book stores, and homes of the land."

The publishing community, along with other segments of American society, recognizes the urgency of providing federal and state law enforcement officials with the tools they need to gather and act upon intelligence that may prevent the commission of terrorist acts on American soil. However, it is essential that in pursuit of enhanced law enforcement capabilities, the fundamental constitutional protections that surround the freedom to read not be sacrificed without the most stringent standard of judicial oversight.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act (commonly referred to as the USA PATRIOT Act) passed by Congress in the wake of the horrific events of September 11, 2001, contains provisions that threaten the First Amendment-protected activities of book publishers, booksellers, librarians, and readers.

Section 215 of the Act, titled "Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations," gives the government expansive authority to conduct broad searches of any home or business pursuant to an investigation of terrorism. Section 215 poses a significant threat to the work of investigative journalists who write about subjects that may be related to terrorism. Section 215 also threatens the privacy and First Amendment rights of library patrons and bookstore customers whose reading choices and Internet usage patterns may be subject to disclosure despite existing protections for the confidentiality of library readership records and customer records in bookstores. Under section 215, a library or bookstore can be compelled to turn over information about patrons and customers, including borrowing records of a particular individual or a list of individuals who have borrowed or purchased a particular book or visited a particular web site.

Specifically, section 215:

- Gives the FBI authority to obtain a search warrant for "any tangible things (including books, records, papers, documents and other items) for an investigation to protect against international terrorism or clandestine intelligence activities. The ability to obtain a search warrant is limited only by the need to show relevance.
- Provides that an order pursuant to this section is to be obtained ex parte (that is, without an adversarial hearing) and that the production of things pursuant to such an order and indeed the existence of the order itself may not be disclosed to anyone other than those persons necessary to produce the materials.
- Overrides state shield laws and federal common law protection for journalists' source materials. Such materials are generally discoverable only under a far more demanding standard that reflects an understanding by legislatures and the courts that journalists cannot properly serve the public interest in disseminating information if their efforts are routinely co-opted by law enforcement.

The incursions on First Amendment-protected activities are particularly troubling because search warrants for books, journalists' interview notes, bookstore purchase records, library usage information, and other similar materials (1) can be obtained without an adversarial hearing or the need to show probable cause, and (2) are issued under a gag order that denies the party subject to the order the right to reveal the fact that such a warrant has been received, thus leaving publishers, librarians and booksellers unable to defend their right to disseminate and the right of their patrons to receive constitutionally protected materials.

What You Can Do about It. Write to Senator Patrick Leahy (D-VT) and Representative James Sensenbrenner (R-WI), chairmen of the Senate and House Judiciary Committees, urging them to hold public hearings on this issue. Write to thank Senator Russ Feingold (D-WI), the only member of the Senate to raise these serious First Amendment questions during the debate—questions that ultimately led him to become the only member of the Senate to vote against the bill. Write to your Senators and Representatives and ask them to re-visit the question of giving up precious First Amendment rights so easily. ☐

Library Bill of Rights

Adopted June 18, 1948.
Amended February 2, 1961, and January 23, 1980,
inclusion of "age" reaffirmed January 23, 1996,
by the ALA Council.

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

I. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

V. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

intellectual freedom bibliography

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