newsletter on intellectual freedom

IFC ALA

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# court overturns CIPA

A three-judge panel in Philadelphia imposed a permanent injunction May 31 against enforcement of the Children's Internet Protection Act (CIPA), a law signed by President Clinton in 2000 to go into effect July 1 that would have forced libraries to equip computers with software designed to block access to Internet pornography and other material deemed harmful to minors, or risk losing federal funding.

The judges, who heard nearly two weeks of testimony in March and April, said CIPA went too far. "Any public library that adheres to CIPA's conditions will necessarily restrict patrons' access to a substantial amount of protected speech in violation of the First Amendment," the judges wrote in a 195-page decision. They expressed concern that library patrons who wanted to view sites blocked by filtering software might be embarrassed or lose their right to remain anonymous because they would have to request permission to have the sites unblocked.

The ruling was a victory for a coalition of libraries, library patrons, and Web site operators led by the American Library Association and the American Civil Liberties Union, which sued to overturn the law on First Amendment grounds.

"I am ecstatic," said Judith F. Krug, director of ALA's Office for Intellectual Freedom. "We couldn't have wanted anything better. If CIPA would have become law, libraries in economically disadvantaged urban and rural areas would have been forced to use their already scarce resources to install expensive and unreliable filtering software, or be stripped of important assistance that they need to provide online access to all users."

"Filters are not the only—or the best—way to protect children," added ALA President John W. Berry. "Filters provide a false sense of security that children are protected when they are not. The issue of protecting children online is complex, and it requires complex solutions with parents, librarians and community members working together. Librarians care deeply about children, and are committed to helping them find the best and most appropriate information for their needs. We have taken numerous steps to help communities develop policies and programs that ensure that their library users have a positive online experience. The vast majority of library patrons use the Internet responsibly, as outlined by their local policies."

*(continued on page 178)*

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

# in this issue



## targets of the censor





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## *American Library Association* v. *United States*

*The following are excerpts from the opinion in* ALA *v.* U.S., *which overturned the Children's Internet Protection Act. The case was combined with* Multnomah County Public Library *v.* U.S., *brought by the ACLU. The full text of the decision can be found at:* www.paed.uscourts.gov/documents/opinions/02D0415P.HTM.

. . . .The principal focus of the trial was on the capacity of currently available filtering software. The plaintiffs adduced substantial evidence not only that filtering programs bar access to a substantial amount of speech on the Internet that is clearly constitutionally protected for adults and minors, but also that these programs are intrinsically unable to block only illegal Internet content while simultaneously allowing access to all protected speech.

As our extensive findings of fact reflect, the plaintiffs demonstrated that thousands of Web pages containing protected speech are wrongly blocked by the four leading filtering programs, and these pages represent only a fraction of Web pages wrongly blocked by the programs. The plaintiffs' evidence explained that the problems faced by the manufacturers and vendors of filtering software are legion. The Web is extremely dynamic, with an estimated 1.5 million new pages added every day and the contents of existing Web pages changing very rapidly. The category lists maintained by the blocking programs are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking.

There are many reasons why filtering software suffers from extensive over- and underblocking, which we will explain below in great detail. They center on the limitations on filtering companies' ability to: (1) accurately collect Web pages that potentially fall into a blocked category (e.g., pornography); (2) review and categorize Web pages that they have collected; and (3) engage in regular re-review of Web pages that they have previously reviewed. These failures spring from constraints on the technology of automated classification systems, and the limitations inherent in human review, including error, misjudgment, and scarce resources, which we describe in detail. One failure of critical importance is that the automated systems that filtering companies use to collect Web pages for classification are able to search only text, not images. This is crippling to filtering companies' ability to collect pages containing "visual depictions" that are obscene, child pornography, or harmful to minors, as CIPA requires. As will appear, we find that it 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.

The government, while acknowledging that the filtering software is imperfect, maintains that it is nonetheless quite effective, and that it successfully blocks the vast majority of the Web pages that meet filtering companies' category definitions (e.g., pornography). The government contends that no more is required. In its view, so long as the filtering software selected by the libraries screens out the bulk of the Web pages proscribed by CIPA, the libraries have made a reasonable choice which suffices, under the applicable legal principles, to pass constitutional muster in the context of a facial challenge. Central to the government's position is the analogy it advances between Internet filtering and the initial decision of a library to determine which materials to purchase for its print collection. Public libraries have finite budgets and must make choices as to whether to purchase, for example, books on gardening or books on golf. Such content-based decisions, even the plaintiffs concede, are subject to rational basis review and not a stricter form of First Amendment scrutiny. In the government's view, the fact that the Internet reverses the acquisition process and requires the libraries to, in effect, purchase the entire Internet, some of which (e.g., hardcore pornography) it does not want, should not mean that it is chargeable with censorship when it filters out offending material. . . .

Under strict scrutiny, a public library's use of filtering software is permissible only if it is narrowly tailored to further a compelling government interest and no less restrictive alternative would serve that interest. We acknowledge that use of filtering software furthers public libraries' legitimate interests in preventing patrons from accessing visual depictions of obscenity, child pornography, or in the case of minors, material harmful to minors. Moreover, use of filters also helps prevent patrons from being unwillingly exposed to patently offensive, sexually explicit content on the Internet.

We are sympathetic to the position of the government, believing that it would be desirable if there were a means to ensure that public library patrons could share in the informational bonanza of the Internet while being insulated from materials that meet CIPA's definitions, that is, visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors. Unfortunately this outcome, devoutly to be wished, is not available in this less than best of all possible worlds. No category definition used by the blocking programs is identical to the legal definitions of obscenity, child pornography, or material harmful to minors, and, at all events, filtering programs fail to block access to a substantial amount of content on the Internet that falls into the categories defined by CIPA. . . . [T]his inability to prevent both substantial amounts of underblocking and overblocking stems from several sources, including limitations on the technology that software filtering companies use to gather and review Web pages, limitations on resources for human review of Web pages, and the necessary error that results from human review processes.

*(continued on page 158)*

## "digital divide" still a concern

The "digital divide" separating the Internet-savvy from the unplugged is still a cause for concern and the U.S. government should consider subsidizing access, three major consumer groups said in a report issued May 30. Despite the fact that nearly two-thirds of all Americans now have access to the Internet, less-affluent households run the risk of being shut out of the digital economy because they are less likely to be online, the report concluded The U.S. government should reinstate technology-grant programs which have been proposed for elimination in 2003, and should consider subsidizing access for low-income and hard-to-reach households, the report said.

The Civil Rights Forum on Communications Policy, Consumer Federation of America and Consumers Union said the report refutes the Bush Administration's conclusion that the digital divide has disappeared, citing the fact that half of all Americans do not have internet access at home.

Concerns over a "digital divide" first surfaced shortly after the Internet began reaching a mass audience in the mid-1990s, as surveys showed that Internet users tended to be affluent and white. Recent figures have suggested that the gap is subsiding as more Americans go online. As of September 2001, 66 percent of the population used the Internet, with access growing fastest among households earning less than $15,000 per year, according to figures prepared by the Department of Commerce. The same report found racial and ethnic gaps narrowing as well. But households earning more than $50,000 are still three times as likely to have Internet access at home than households earning less than $25,000, the consumer groups pointed out. More-affluent households are also more likely to have signed up for high-speed access, the report noted.

"Is the glass half empty or half full? Given the importance of the Internet across a wide range of activities, the speed with which things develop in cyberspace and the emerging indications of another digital divide on the high-speed Internet, we must say the glass is half empty and in need of filling," the report said.

"The Administration's claim that we no longer need policies to close the gap is simply wrong," said Chris Murray, Legislative Counsel, Consumers Union. "Rather than misdefine the problem of the digital divide, the Bush Administration would like to misinterpret it out of existence."

The computer/Internet supplement to the most recent Current Population Survey (CPS) published by the Department of Commerce was misinterpreted to paint a false portrait of a disappearing digital divide, the report's sponsors explained. Subsequently, the Bush Administration's fiscal year 2003 budget slated two key programs intended to bridge the digital divide—the Department of Commerce's Technology Opportunities Program and the Department of Education's Community Technology Center program—for elimination.

In addition to the Administration's initiatives, the report points out that current FCC policies aimed at deregulating high-speed services will only worsen the problem. Mark Cooper, Director of Research, Consumer Federation of America, said, "The seeds of a continuing digital divide have already been planted and the policies being pursued by the Administration, including the FCC, leave little prospect of a significant improvement for lower income households."

The report entitled *Does the Digital Divide Still Exist? Bush Administration Shrugs, But Evidence Says "Yes"* concludes that:

- Contrary to the Bush Administration's assumptions in the Current Population Survey, the only way we can truly measure the digital divide is by assessing Internet access in the home. The home is where most personal business is conducted and is where the sharpest divide still exists between those who have computers and access to the Internet at home and those that do not.
- Approximately 45 percent of Americans do not use the Internet at all.
- Low-income households have fallen a generation behind. Broadband is the second-generation divide. More households with incomes above $75,000 per year have broadband at home than low-income households that have narrowband Internet at home (incomes below $25,000 per year.)
- Income, education and age are the three best predictors of access to the Internet at home. While other variables, such as race, ethnicity, occupation, and household composition, still have a statistically significant relationship to Internet access, they explain very little of variations in access to the Internet.

Cooper added, "The Administration's current policies aimed at enhancing the price setting power of cable and phone monopolies will only worsen the problem—ensuring that the Internet will not be a mechanism for increasing equality and spreading opportunity, but will be a case of the rich getting richer."

FCC Chairman Michael Powell, a Bush appointee, recently commented on the Digital Divide, saying, "I think there's a Mercedes divide—I'd like to have one; I can't afford one." Under Powell, the FCC is considering back door deregulation that would severely limit the ability of companies to compete with "Baby Bells" to offer DSL "high-speed" Internet and slam the door on competition over cable's advanced telecommunications network. Without competition, prices for broadband Internet will remain prohibitively high for many consumers.

"Access to the Internet today is as important as access to the street or sewers or electricity was fifty years ago," said Mark Lloyd, Executive Director, Civil Rights Forum on Communications Policy. "Being disconnected in the information age is not like being deprived of a Mercedes, or some other luxury. Being disconnected means being disconnected from the economy and democratic debate."

"By abandoning its commitment to closing the digital divide, the Administration places tens of millions of American households at risk of being left out of the digital information age," added Murray.

The full text of the report is available online at www.consumerfed.org/DigitalDivideReport.2002.05.30.pdf. Reported in: *New York Times*, May 31. □

## in review

**Ethics in Librarianship.** Robert Hauptman. McFarland & Co. 2002. x, 151 p. $35.

"Librarians are taught and enculturated to avoid consideration; their only task is to provide information regardless of consequences." (p. 2) So begins (almost) Robert Hauptman's provocative and evocative critique and prescription for ethics in librarianship. If indeed librarians have no function but "to provide information regardless of consequences," then surely librarians have no need for professional ethics, values, or codes. But, as Hauptman makes most clear, librarians do have other purposes than serving up information on demand. He has consistently rejected the notion that librarians are automatons. Consequences do matter. If ethics are important to the library field, why indeed is not more made of them? Hauptman's explanation is that we too often believe that ethical challenges are rare, that most challenges do not rise to some threshold for action, and finally that librarians are often insulated from conflict by their employers and institutions (p. 1).

When I first opened *Ethics and Librarianship,* I had a sense of *déjà vu.* Certainly, it shares a common bond with Hauptman's other work, but it also has a certain resemblance to Michael Gorman's *Our Enduring Values: Librarianship in the 21st Century* (Chicago: ALA 2000). Both books are about the same length. More importantly, both books are far more normative than descriptive. Both cover similar material: their tables of contents could serve as a checklist for good practice. Hauptman's singular contribution in this work and across his oeuvre is his stress (and chapter 12 title) on "Why Ethics Matters." For me, this chapter is the soul of the book. "Ethics matters," Hauptman informs us, "because it helps us to act responsibly." He tells us that librarians and other information professionals must respond to many voices, that professional codes of ethics are not inflexible, and that "social necessity outweighs professional obligations (p. 140)." I differ only in that I believe that social responsibilities are part of our professional obligations and all must be weighed together when making professional and personal ethical decisions.

This is an important book, but it has some major flaws. Hauptman's chief fault, I fear, is that he is too often too offhanded about some of his arguments and premises. Hauptman makes assertions—most of which I agree with—but he makes them in a vacuum. He tells us that pharmaceutical companies and publishers should sell their products to Third World countries at prices substantially lower than they do in First World countries (p. 125). Perhaps that is desirable, but why and what is the ethical basis for differential pricing of either drugs or serials? Or, the redundant animal testing (p. 121) of products may be unethical, but why? If the harming of animals in some circumstances is unethical, why is it not also unethical in all circumstances?

Hauptman argues persuasively for ethics in librarianship. Everyone writing in the field of information ethics takes cognizance of the many changes the information professions have experienced from cave painting to the present. Do changes engendered by new digital realities either change our ethical responsibilities or render them impotent? Hauptman is emphatic in his belief that "new dilemmas . . . are soluble or at least negotiable within the ethical structures that have served us for more than two millennia" (pp. 5-6). He dispels most philosophical thought over the past two millennia as commentary on the pivotal question of how ethical decisions are made. He argues that there are two ways: "Either one holds that something is good or evil and acts upon this belief or one considers the potential results of one's actions and acts accordingly" or deontologism versus utilitarianism (p. 6). The problem with this argument is that it personalizes completely the decision processes. He also informs us of a third approach: the "ethics of convenience" or the manipulation of principles or approaches to meet exigent circumstances. Is this situational ethics or something even less productive?

It is too simplistic to acknowledge philosophical discourse but then to relegate it to mere commentary. Perhaps we can reduce the ethical theory of two or more millennia to deontologism versus utilitarianism. The argument tends to treat everything else as cultural baggage that merely muddies the dichotomy. It also personalizes too completely the decision process and ignores social, historical, or divine factors.

Chapter 2 is entitled "Intellectual Freedom and the Control of Idea." Hauptman notes correctly that "ideas are dangerous." Defending ideas can also be dangerous, as he points out later (p. 106). One of my students and one of his colleagues, both from Uganda, note in a forthcoming book chapter that situational ethics may also be important to consider (Batambuze Charles and Kawooya Dick (2002). "Librarianship and Professional Ethics: The Case for the Uganda Library Association," Robert Vagaan, ed. The Ethics of Librarianship: An International Survey, forthcoming). It may be one thing to take a position when the consequences are minor (reprimand to loss of employment), it may be quite another when summary execution might be the end result—just how far are we willing to take "Give Me Liberty or Give Me Death?"

Hauptman addresses copyright in one chapter (chapter 10) but gives only implied reference to licenses in chapter 11. The question of licensing and access is perhaps one of the more pressing ones in the digital environment. Indeed, licensed access to intellectual property has come to replace the ownership of the information container more and more often in our libraries. Licensed access frequently precludes users except for exempted classes (on-campus users, people with passwords, etc). I suggest that license creates its own ethical dilemmas (is there a pun here?).

The book tends also to be more U.S.-centric than it might be. To my reading, this is particularly true of chapter 10 and its discussion of copyright and intellectual property. Intellectual property has been treated differently at different times and in different societies. It is perhaps true that the Berne Convention and the World Intellectual Property

Organization have or will homogenize copyright practice. I don't recall that the Convention or WIPO is mentioned in the book and neither is found in the index.

The book also has more than its share of typos and oversights—ASIS for example was no longer ASIS when the book was published, but ASIST. Or he writes "this data" rather than the plural. But all that can be fixed in the next edition.

For all that, this book is a very valuable contribution to the information ethics dialogue. It clarifies far more than it obscures. I intend to adopt it for a course of the same name. *Reviewed by Wallace Koehler, MLIS Program, Valdosta State University.* □

## no quick fix to Internet porn

One of the most thorough reports ever produced on protecting children from Internet pornography has concluded there are no simple solutions to the problem. "Though some might wish otherwise, no single approach—technical, legal, economic, or educational—will be sufficient," wrote the authors of the report, "Youth, Pornography and the Internet," which was released May 2 by the National Research Council. "Rather, an effective framework for protecting our children from inappropriate materials and experiences on the Internet will require a balanced composite of all of these elements, and real progress will require forward movement on all of these fronts."

The report was ordered by Congress under a 1998 law. While the report acknowledged a role for legislation and technology in protecting children from harmful material online, it said that educational efforts to instill good Internet habits represent one of the most promising approaches to shielding children from inappropriate material.

"Much of the debate about 'pornography on the Internet' focuses on the advantages and disadvantages of technical and public policy solutions," the report said. "In the committee's view, this focus is misguided: neither technology nor public policy alone can provide a complete—or even a nearly complete-solution."

The report said that over-relying on Internet filters and other technological solutions can instill parents with a false sense of security, tempting adults to believe that "the use of technology can drastically reduce or even eliminate the need for human supervision." And while public policy approaches "promise to eliminate the sources of the problem," they can present thorny constitutional problems, the report said.

"For example, the committee believes that spam containing material that is obscene for minors should not be sent to children. But laws banning such e-mail to minors are potentially problematic in an online environment in which it is very difficult to differentiate between adults and minors," the report explained.

What might seem to a rather bland conclusion to a massive effort of research and discussions with policymakers, educators, librarians, parents and children and others in visits to schools and libraries around the nation is actually a surprising stand, said Alan Davidson, associate director of the Center for Democracy and Technology, a high-tech policy organization in Washington.

"The report dares to be unsexy," he said. "It does not call for legislation to solve this problem," despite a strong push in Congress to pass laws requring such technology tools as pornography filters in schools and libraries.

Recommending a broad approach "is not nearly as satisfying as passing a law or pointing to a technology," Davidson said, "but it is probably, in the long run, the most effective way to protect children online."

In fact, former attorney general Richard Thornburgh, who led the project, predicted in a preface that its conclusions "will disappoint those who expect a technological 'quick fix' to the challenge of pornography on the Internet."

The language of the report is meticulously balanced, but wryly conclusive. Filters designed to block naughty sites, the report explained, "can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable."

Judith F. Krug, director of the American Library Association's office for intellectual freedom, said she had only seen the executive summary of the report, but applauded the committee's approach. "It's evenhanded," said Krug, who testified before the committee. "It confirms the ALA's view that protecting children online is complex, and it's going to demand complex and varied solutions. In other words, filters are not going to be the solution."

The report compared the problem of protecting children from online risks to dealing with a more mundane hazard of daily life. "Swimming pools can be dangerous for children," the authors wrote. "To protect them, one can install locks, put up fences, and deploy pool alarms. All of these measures are helpful, but by far the most important thing that one can do for one's children is to teach them to swim."

Herbert Lin, the director of the study, said, "We think it's the most comprehensive report that's ever been done" on the subject.

Even those who disagree with its conclusions agreed with that evaluation. Bruce Taylor, the president and chief counsel of the National Law Center for Children and Families, said that the report will be the basic document for judges and lawmakers approaching these issues for the forseeable future. "This is going to be the topic of conversation, the book on the coffee table, for the next two years," he said.

Lin, echoing a statement by Thornburgh, said that the process of studying the issues shook the preconceptions that each participant brought to the process. Many of the partici-

pants, he said, believed at the beginning "if only people would just do this—whatever 'this' is—the problem would be all over. Nobody realized how complicated the process was," he said.

Taylor said that despite his own disappointment in the conclusions of the report, "It's at least going to be a truthful presentation of what each side has been saying—so we can keep arguing about it." Reported in: *New York Times*, May 30. □

## Europe votes to end data privacy

European law enforcement agencies were given sweeping powers May 30 to monitor telephone, Internet and email traffic in a move denounced by critics as the biggest threat to data privacy in a generation. Despite opposition from civil liberties groups worldwide, the European parliament bowed to pressure from individual governments, led by Britain, and approved legislation to give police the power to access the communications records of every phone and Internet user. The measure, which must be approved by the fifteen EU member states, will allow governments to force phone and Internet companies to retain detailed logs of their customers' communications for an unspecified period. Currently, records are kept only for a couple of months for billing purposes before being destroyed.

Although police will still require a warrant to intercept the content of electronic communications, the new legislation means they will be able to build up a complete picture of an individual's personal communications, including who they have emailed or phoned and when, and which internet sites they have visited. From mobile phone records, police will also be able to map people's movements because the phones communicate with the nearest base station every few seconds. In urban areas, the information is accurate to within a few hundred meters, but when the next generation of mobile phones comes on stream it will pinpoint users' locations to within a few meters.

The British government, which played a key role in driving through the new measures, has already introduced such powers as part of the anti-terror bill rushed through in the immediate aftermath of September 11, although the data retention measures have yet to be implemented.

The measure was contained in an amendment to a bill originally intended to improve the security of e-commerce transactions. "Looking at the results, it amounts to a large restriction on privacy and increases the power of the state," said Italian independent MEP Marco Cappato, the bill's author who tried to prevent the amended clause being added.

Critics said the move amounted to blanket general surveillance of the whole population. The communications industry has also opposed data retention, questioning the feasibility and cost of storing such vast amounts of information. Reported in: *Guardian,* May 31. □

## FTRF honor roll awardees

Candace D. Morgan, a public librarian and past president of the Freedom to Read Foundation, and Joyce Meskis, owner of the Tattered Cover Book Store in Denver, are recipients of 2002 Freedom to Read Foundation Roll of Honor Awards. The awards were presented at the 2002 American Library Association Annual Conference in Atlanta.

Morgan, associate director of the Fort Vancouver Regional Library in Vancouver, Washington, has made intellectual freedom the cornerstone of her work in librarianship. As chair of the American Library Association Intellectual Freedom Committee, Morgan steered passage of several Interpretations of the *Library Bill of Rights,* including those covering economic barriers, barriers due to gender and sexual orientation, and access to electronic information. Her tenure as FTRF president saw key victories for the Foundation's First Amendment work, including important early recognition of civil liberties online. Morgan's work in the Northwest for intellectual freedom was recognized in 1997 when the Oregon Library Association presented her with its first statewide Intellectual Freedom Award. Morgan also recently testified before Congress and in federal court against the Children's Internet Protection Act, and frequently lectures and conducts workshops nationally on intellectual freedom topics.

Meskis garnered national attention this year when the Colorado Supreme Court upheld her challenge to a court order directing her to turn over private patron records related to a drug investigation. However, she is well known in book circles for her longtime 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 also was elected this May to the board of trustees of the Freedom to Read Foundation. As owner of the much loved Tattered Cover, she has striven to make her stores places where ideas across the ideological spectrum can be accessed by the entire community.

"I am delighted to add these two names to the Roll of Honor," said Gordon Conable, president of the Freedom to Read Foundation. "Candy set an extremely high bar for those who would follow her as Foundation president, while Joyce, who is among the most important independent booksellers in the country, is a welcome addition to our board of trustees. The mission of the Freedom to Read Foundation is continuously advanced by their works and their leadership."

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

## Meskis wins Immroth Award

Joyce Meskis, owner of Tattered Cover Book Store in Denver, has been named the recipient of the 2002 John Phillip Immroth Memorial Award for Intellectual Freedom, presented by the American Library Association (ALA) Intellectual Freedom Round Table (IFRT). The Immroth Award honors intellectual freedom fighters in and outside the library profession who have demonstrated remarkable personal courage in resisting censorship.

Meskis was chosen for her long-standing dedication and contributions to the defense of the freedom to read and intellectual freedom, most recently demonstrated by her stand to prevent law enforcement officials from seizing confidential customer records from her famed Tattered Cover bookstore in the course of an investigation. The Colorado Supreme Court determined that bookstore customers have a right to receive information anonymously, without government interference.

"As the owner of the Tattered Cover bookstore, and as a defendant in a case, Ms. Meskis set a standard of personal commitment, which serves as a model for every bookstore owner," Award Committee Chair Pamela G. Bonnell said. "Throughout this ordeal with law enforcement officials, her advocacy and strong belief in the First Amendment did not waver."

"In the Colorado Supreme Court decision, the Court declared, 'Had it not been for the Tattered Cover's steadfast stance, the zealousness of the city would have led to the disclosure of information that we ultimately conclude is constitutionally protected,'" Bonnell continued. "The Immroth Award Committee is extremely pleased to honor her notable contributions to the cause of intellectual freedom."

In July 2001, the Tattered Cover Bookstore filed suit to quash a search warrant ordering the bookstore to turn over to the police customer records related to the investigation of a methamphetamine laboratory discovered in a group home. Two books relating to the production of drugs also were found in the home, and in an exterior trashcan, police discovered an envelope from the Tattered Cover with an invoice number. They did not find any information with the envelope that would identify the books purchased from the bookstore. The police theorized that the Tattered Cover envelope contained the invoice for the two books and believed that if they could identify who purchased the books, they would be able to prove who built the lab.

The Freedom to Read Foundation and fourteen other groups filed an *amicus* brief arguing that search warrants or subpoenas directed at bookstores or libraries that demand information about the reading habits of patrons significantly threaten the exercise of First Amendment rights.

"Not only is this case a victory for readers and book purchasers in Colorado, but we believe the Court's opinion sets an important precedent for readers, bookstores and library patrons throughout the country, who can now look to Colorado law for guidance when the First Amendment rights of readers collide with the desires of law enforcement," Meskis said. ☐

## ACLU report catalogs "insatiable appetite" for eroding liberties

The American Civil Liberties Union on May 28 released the first definitive run-down on the panoply of new powers that the government has granted itself since September 11, saying that the bulk of these new powers do little to make us safer, yet substantially erode core civil liberties in America.

"There is no proof that the incessant seizure of new powers by Congress and the Bush Administration does anything to increase safety," said Laura W. Murphy, Director of the ACLU's Washington National Office. "This report is an attempt to set the record straight and detail just how extensive this erosion of basic liberty in America has been."

The report—*Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11*—runs the gamut of controversial issues that have cropped up in Washington and across the country since the tragic attacks last fall. It covers, among many other things, the Administration's ongoing stonewall approach to questions about the hundreds of detainees still being held in facilities nationwide; the newfound impetus behind national ID proposals on Capitol Hill; the passage of the USA PATRIOT Act and its implementation; and the potential for a government crackdown on legitimate political dissent created by a number of different bills and executive regulations.

Also covered in the report are the numerous lawsuits filed by the ACLU in light of the Department of Justice's treatment of the detainees. These include, among others, the Michigan federal case seeking a repeal of Attorney General John Ashcroft and Chief Immigration Judge Michael Creppy's order closing all immigration hearings to the media and public, and the New Jersey case filed under the state's freedom of information laws requesting key pieces of information about the more than three hundred young men still detained in that state.

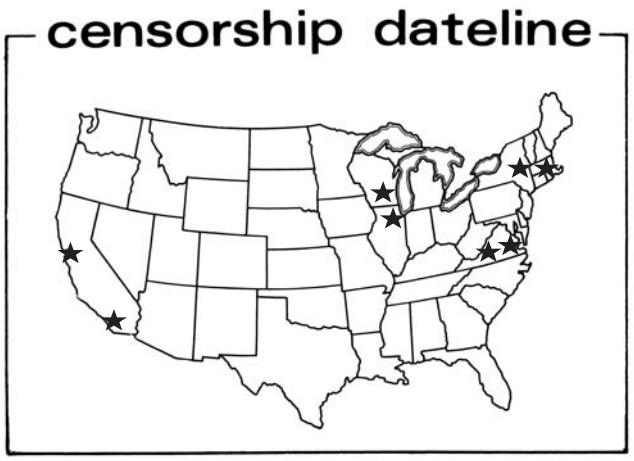
"Criticism of these new and unnecessary powers has been astoundingly diverse, cutting across the ideological divide," Murphy said. "America stands at a prominent cross-roads; we can either continue to erode freedom or we can accept the reality that safety and liberty are not mutually exclusive and can co-exist. Hopefully this report will shed additional light on which path not to take."

*Insatiable Appetite* can be found online at: www.aclu.org/congress/InsatiableAppetite.pdf. ☐

**READ**

**BANNED**

**BOOKS**




## schools

**Deerfield, Illinois**

When Deerfield High School students performed the *The Heidi Chronicles* last fall, the Pulitzer Prize-winning drama drew a nearly sold-out crowd, but some parents want to make sure no other profanity-laden scripts hit the stage. "This [play] was by any measure adult theater, and it was full of profanities and obscenities and adult themes that are simply not appropriate for high school students," said Grady Hauser, who helped with a letter-writing campaign to protest the play.

Another parent, Harry Karkazis of Riverwood, joined Hauser and others when they voiced their concerns to District 113 officials. "If this was shown in a movie-type setting, kids wouldn't even be allowed to get in," Karkazis said.

Deerfield school officials met twice this year with angry parents to discuss the production of *The Heidi Chronicles*. In April, they continued to defend Wendy Wasserstein's Tony Award-winning 1989 play as both educational and entertaining. In previous years, the play has been performed at several nearby high schools, including one in Highland Park, without repercussions.

But Hauser said neither he nor at least a dozen other parents he has met support such material for high school audiences. "Some of the lines of this play couldn't be repeated even on 'shock' radio, they couldn't be reprinted in the newspaper and they couldn't be aired on TV, yet 14-year-old freshmen were actually required to attend," Hauser said. "That, to us, is completely out of bounds."

School Supt. Linda Hanson said officials tried to make some concessions to the parents, telling them that attendance at future plays would be optional for students and that parents would be informed about dramas staged by the school. Hanson and school board President Tom Mandler said they also have heard from many parents who supported the production of *The Heidi Chronicles*, which tells the story of a woman dealing with feminist issues over a 25-year period.

"I have gotten both pro and con comments, and the pro comments are outnumbering the con comments," Mandler said. "[But] there are two sides to every story, and we're open to listening to both."

Carl Menninger, director of the school's theater department, said he wanted to produce *The Heidi Chronicles* because of its literary and theatrical merit. He deleted some of the play's rough language but said he left other parts in for dramatic effect. "My intention was not to shock people, but the character says shocking things, and it's way to illustrate where the [women's liberation] movement was at during its inception," Menninger said.

Menninger said he hadn't decided what to offer next fall, but hopes it will resonate with his students as strongly as *The Heidi Chronicles* had. "I think the kids came away with an experience that gave them a deeper understanding of what it means to stand up to the rest of the world and to stand by your convictions," he said. Reported in: *Chicago Tribune*, April 16.

**Holliston, Massachusetts**

For Kate Crockford, a senior at Holliston High School, Harmony Week turned out to be filled with conflict. In light of the September 11 terrorist attacks and the current crisis in the Middle East, Crockford invited a speaker to talk to two assemblies about civil liberties and ethnic scapegoating—issues she deemed pertinent to the school's weeklong examination of racism, sexism, and classism, among other matters. But speaker Nancy Murray's portrayal of the Middle East bloodshed as an issue of land control—with maps showing Israeli expansion into occupied territory—rather than the result of nationalistic or religious disputes sent some teachers and administrators reeling.

School officials called off the second assembly and asked Murray, director of the Bill of Rights Education Project at the American Civil Liberties Union of Massachusetts, to leave. Teachers told Murray, who made clear that she was not speaking for the ACLU, that they disagreed with her presentation and found it one-sided.

Crockford was stunned and disappointed. "For adults to become so frightened and immediately throw up a wall simply because they disagreed with someone's opinion—I find it absolutely saddening," said Crockford, president of the high school's Gay Straight Alliance.

According to Crockford, Bradshaw announced to students after the assembly was canceled that the school would invite a speaker to counter Murray's views. Murray said she used maps from the United Nations, a Middle East peace founda-

tion, and a French newspaper to show how Palestinians' share of land has shrunk over the years. One teacher questioned her presentation, and then the discussion was suddenly over. She said she would have welcomed a debate.

"This is a very sad example of putting our heads deeply in the sand—of not wanting to know," Murray said.

In recent months, similar flaps have erupted elsewhere in Massachusetts. Dozens of parents blasted Newton North High School after it allowed historian and pacifist Howard Zinn to speak about the September 11 terrorist attacks. He told students the subsequent U.S. bombings in Afghanistan "put us on the same level" as the terrorists, according to news reports and the high school newspaper. The school later invited speakers to present an opposing view.

Likewise at Harvard University, law professor Alan Dershowitz came under harsh criticism for his support of Israeli attacks on Palestinian headquarters as a prudent tactic.

At Masconomet Regional High School, officials sponsored a forum shortly after the attacks and invited Muslim speakers, Meegan said. When some in attendance challenged the Muslim speakers' views, forum organizers let the audience members voice their objection before continuing with the discussion, Meegan recalled.

A similar exchange would have been appropriate at Holliston High, said Meegan, who added that he did not know of the specifics at that school. But others say high schools shouldn't touch issues of such volatility. "You have parents who have widely different viewpoints in this that would just as soon kids learn academics," said Brian Camenker, president of the Parents' Rights Coalition in Waltham. "I think it's more appropriate for college."

Holliston School Committee member Laura Matz said officials made the right call in canceling the second assembly. "The expectation of the presentation was to show both points of view," she said. "That isn't what happened." But School Committee member Jon Coppelman, who didn't know the specifics of what occurred, said it is "unfortunate when something gets aborted this way."

"Everyone needs to question their own assumptions," he said. "We've got to make a very determined effort to set aside pre-existing views and look at it from a broader perspective." Reported in: *Boston Globe,* April 5.

**Clifton Park, New York**

A Shenendehowa senior faces up to a year in jail for allegedly depicting fellow students and at least one teacher engaged in sexual activities in a pornographic story posted on an Internet site, investigators and prosecutors said June 5. Vincent Fuschino was charged in May with second-degree aggravated harassment, a misdemeanor, after an underage female at Shenendehowa High School filed a complaint with the State Police. She allegedly identified herself as a character in the 40-page story.

"It was a story written on the Internet. It was explicit with sexual innuendo," Senior Investigator Curt Lohrey of the State Police at Clifton Park said. "There was sufficient evidence for us to identify a complainant and to charge aggravated harassment."

"This was an unusual case," Lohrey added.

Fuschino, who is an honors student and is enrolled in college-level advanced placement courses, was to appear in Clifton Park Town Court on June 12 before Town Justice James Hughes to answer the charge. A classmate described Fuschino as athletic and bright. He enjoys writing poetry, the student said. However, the student continued, he did not appear to have many friends.

"He acted like he was superior sometimes," the student said. "It really surprised me. He didn't strike me as the sort of person who would do it."

"Obviously, there are First Amendment issues," attorney E. Stewart Jones, who is representing Fuschino, said.

Lohrey said that Fuschino was charged because the characters in the story could easily be identified as specific students based on physical descriptions, their enrollment in certain classes or participation in school activities. "There was enough information in it. That's why charges are involved," Lohrey said. If the characters weren't so recognizable, Lohrey said, "we wouldn't have much of a case."

District Attorney James A. Murphy, III, said that a Court of Appeals case backs the decision to prosecute the Fuschino case due to the public descriptions violating the privacy rights of the complainant. "It's fairly heavy and explicit in certain descriptions," Murphy said regarding the story. The Web site on which the story was posted has disclaimers about the sexual nature of the material found there. Many stories deal with mind control in which characters are forced to perform sexual acts. The stories sometimes give graphic detail.

The Shenendehowa School District worked with State Police investigators on the case, said Lohrey and Kelly DeFeciani, a district spokeswoman. None of the district's computers were used in the alleged incident, they said.

"The investigation is ongoing to see if there are other complainants," Lohrey added. Reported in: *Albany Times-Union,* June 6.

**Stafford County, Virginia**

A middle-school level book about the civil rights era won't be banned from Stafford County schools. But the book's use in Stafford middle schools will be more limited. The School Board voted May 15 to allow *The Watsons Go To Birmingham—1963,* to be read as a class by eighth-graders only. The book will be available for check-out by all students in middle-school libraries.

A parent had asked the board to take the book off middle-school reading lists because the parent was offended by some language. A committee of parents, teachers and central office staff decided the book was most appropriate for eighth-grade, Superintendent Russell Watson said. The committee decided limiting the book to one grade level would keep students from reading it for class more than once, he

added. The book had been read by sixth- and seventh-grade classes in the past.

The book is about Birmingham, Alabama, in 1963 as seen through the eyes of a 10-year-old black child and his family who recently moved there from Michigan. The 1963 Birmingham church bombing, where four black girls were killed, is also depicted.

The book is a 1996 Newbery Honor winner and the same year was named a Coretta Scott King Honor Book. Reported in: *Fredericksburg Free Lance-Star,* May 16.

## student press

**Riverside, California**

When the *Talon* at Rubidoux High School in Riverside reported on an alleged error in the school's course catalog on April 4, the principal confiscated all 2,200 copies of the paper before distribution and threatened to shut down the newspaper. Reporter Elizabeth Brizendine wrote a story claiming the school's course catalog misled students when it wrongfully stated they could receive college credit for the course "Mythology and Sci-fi."

Principal Jay Trujillo originally allowed the story to be run as long as the *Talon* removed what he saw as inaccurate information, editor Matt Medina said. But after Brizendine altered the story and added a quote, Trujillo notified the *Talon* that he changed his mind on the morning the paper was to be distributed.

Trujillo cited an inaccurate statement—that the error affected "some" students and not just one, as he holds—and a "vulgar" remark—the use of the word "screwed" in a student's quote—as grounds for his censorship, said Megan Starr, a school attorney.

Although California has an anti-Hazelwood law that permits censorship only in cases where publication will cause a disruption in the school, Trujillo felt his objections were valid. The censorship led the *Talon* and Trujillo to a distribution stalemate. Trujillo did not budge from his stance when the *Talon* staff offered to make a public announcement in the school and print a clarification in the next issue.

"The principal [felt] that that would be inadequate," Starr said.

Likewise, the *Talon* refused to go along with Trujillo's suggestion to reprint the entire run of the issue with the questionable material removed, Medina said.

Five members of the *Talon* staff appealed Trujillo's decision during an open forum at an April 15 school board meeting. Medina said the next issue, due out on May 2, would include a front-page article and editorial on the censorship. This issue will also be subject to prior review by Trujillo, he said. Reported in: Student Press Law Center Web site, April 19.

**South Lyon, Michigan**

Debate over material in an underground newspaper led to the suspensions of fourteen South Lyon High School students and piqued the interests of the American Civil Liberties Union. The first three suspensions came May 9, when the three editors of the *First Amendment* were sent home. They had come to school with about 500 copies of their newspaper, which administrators confiscated because two of its articles were deemed inappropriate. Another student was suspended the next day for three days for attempting to distribute the newspaper.

In one story, an assistant principal was referred to as a "sadistic tyrant." Principal Larry Jackson said he was further concerned by sentences such as this about the assistant principal: "Now when I see her, her face becomes a filthy pile of flesh screaming threats to all who will listen."

"That type of writing is irresponsible, and to distribute that among our student body is not acceptable," Jackson said. "We're not trying to stifle opinions. But there are appropriate ways and inappropriate ways. And to use hateful language and descriptive words is not appropriate."

The three were suspended for violating several policies, one of which bars distributing items such as the newspaper without administrative approval. The ACLU of Michigan is looking into representing the students, "because students do have constitutional rights, even in schools," executive director Kary Moss said.

The suspensions spawned several sit-in protests. The largest attracted about 150 students, Jackson said. When the kids refused to go to class, he took them into a lecture room and answered questions for two hours. A similar sit-in happened the next day. Jackson answered questions for an hour, but ten students refused to go to class. They were suspended.

Junior Dan Schaefer, one of the three editors suspended, didn't expect the first issue of *First Amendment* to cause such controversy. But he was pleased with the signs of support, including about 200 e-mails received since the suspensions. "I don't feel like I have to justify anything I put in the paper, because it's just opinion," he said. Reported in: *Detroit Free Press,* May 16.

## colleges and universities

**Berkeley, California**

A planned pro-Palestinian English course at the University of California at Berkeley came under fire in May after its instructor wrote a course description discouraging students who are "conservative thinkers" from taking the fall 2002 course. The head of Berkeley's English department said that the description of "The Politics and Poetics of Palestinian Resistance," which violates the university's Faculty Code of Conduct, will be revised and the course will be monitored.

Snehal A. Shingavi, a graduate student who is teaching the course this fall, wrote in a Web posting of the course's description, "The brutal Israeli military occupation of Palestine, an occupation that has been ongoing since 1948, has systematically displaced, killed, and maimed millions of Palestinian people. And yet, from under the brutal weight of the occupation, Palestinians have produced their own culture and poetry of resistance." He also wrote, "This class takes as its starting point the right of Palestinians to fight for their own self-determination. Conservative thinkers are encouraged to seek other sections."

Those last two lines, said Marie Felde, a spokeswoman for Berkeley, violate the university's Faculty Code of Conduct, which states that courses may not exclude or discourage qualified students on grounds other than lack of preparation.

"The English department has acknowledged there was a failure of oversight on their part," said Felde.

Randy J. Barnes, co-chair of a student group called the Israel Action Committee, said his group doesn't object to the subject matter of the course. "What we objected to was the blatant and arrogant way the instructor handled it, saying opposing views would not be entertained or tolerated."

Shingavi is a leader of a pro-Palestinian student group at Berkeley, called Students for Justice in Palestine. The group was suspended in April for occupying a campus building for nearly five hours and interfering with classes in session. According to *The Daily Californian*, Berkeley's student newspaper, Shingavi said that by "conservative thinkers," he meant those that are "limited or narrow in scope." He also said students are encouraged to take his course irrespective of their political convictions. But he said the course will deal with various pro-Palestinian arguments, not a debate of Israeli and Palestinian positions.

In a statement released by the university, Robert M. Berdahl, Berkeley's chancellor, said that while universities shouldn't shy away from presenting controversial material, "it is imperative that our classrooms be free of indoctrination—indoctrination is not education. Classrooms must be places in which an open environment prevails and where students are free to express their views."

Janet Adelman, chair of the English department, said Shingavi would rewrite the course description to ensure open access to the course by students, regardless of their political views, as required by the faculty code. She said she spoke with Shingavi and that he agreed to take the line about "conservative thinkers" out of the description.

Until Shingavi's controversial course listing created a controversy, graduate students in the department have had complete autonomy in designing courses, said Adelman, provided they meet the university guidelines. There had been a growing sense that more oversight is needed, she said, but mainly "because we think many of our courses are inappropriately sophisticated for freshmen. From now on, anything that gets posted will be reviewed."

The English department received a barrage of hate mail, much of which questioned why the course was being taught as an English course and why it's being taught at all. "It has a wonderful reading list," she said. "The question of what the poetics of oppression is seems a perfectly legitimate thing to consider." She also said that an instructor's political views should not be a decisive factor in deciding whether or not he should be allowed to teach. Reported in: *Chronicle of Higher Education* (online), May 13.

## publishing

**Minneapolis, Minnesota**

A month before its publication, a provocative book about children's sexuality was denounced by conservatives as evil, prompting angry calls for action against the University of Minnesota Press. The book, *Harmful to Minors: The Perils of Protecting Children from Sex*, argues that young Americans, though bombarded with sexual images from the mass media, are often deprived of realistic advice about sex.

"What's happening to me is a perfect example of the very hysteria that my book is about," New York-based author Judith Levine said in an interview. Levine has been working on the book since the mid-1990s. With the recent sex scandals involving clergy and young people, she admits it's a particularly challenging time to make her case that American youth are entitled to safe, satisfying sex lives.

Publisher after publisher rejected the book—one called its contents "radioactive"—before the University of Minnesota Press accepted the manuscript a year ago. Writes Levine in her introduction, "In America today, it is nearly impossible to publish a book that says children and teen-agers can have sexual pleasure and be safe too."

From the outset, officials at the Minnesota press knew the book would be controversial; they had the manuscript reviewed by five academic experts, instead of the usual two, to be sure its contentions were based on sound research. Still, the uproar exceeded expectations after the book was condemned on conservative Internet sites.

"We've never seen anything quite this angry," said the press director, Douglas Armato. "The book isn't actually out yet. What people are reacting to is not the book itself, but the idea of the book."

In *Harmful to Minors*, Levine argues that abstinence-only sex education is misguided. She also suggests the threat of pedophilia and molestation by strangers is exaggerated by adults who want to deny young people the opportunity for positive sexual experiences. "Squeamish or ignorant about the facts, parents appear willing to accept the pundits' worst conjectures about their children's sexual motives," Levine writes. "It's as if they cannot imagine that their kids seek sex for the same reasons they do."

The book was also attacked by State Rep. Tim Pawlenty, majority leader of the Minnesota House, and a Republican

candidate for governor. "In recent weeks, the headlines have been filled with the stories of victims sexually abused as children," he said in a prepared statement. "This kind of disgusting victimization of children is intolerable, and the state should have no part in it." Pawlenty said that he had not read the book but became upset after reading articles about its content. "We deserve to know why the name of one of our most respected institutions is being associated with this endorsement of child molestation," he declared.

Levine said much of the furor over her book stemmed from an interview she gave in March to Newhouse News Service, amid the Roman Catholic Church sex-abuse scandal. Newhouse quoted her as saying a sexual relationship between a priest and a youth "conceivably" could be positive. Levine said later that she disapproves of any sexual relationship between a youth and an authority figure, whether a parent, teacher or priest. However, she believes teen-agers deserve more respect for the choices they make in consensual affairs, and suggests that America's age-of-consent laws can sometimes lead to excessive punishment.

She cites the Dutch age-of-consent law as a "good model"—it permits sex between an adult and a young person between 12 and 16 if the young person consents. Prosecutions for coercive sex may be sought by the young person or the youth's parents.

"Teens often seek out sex with older people, and they do so for understandable reasons: an older person makes them feel sexy and grown-up, protected and special," writes Levine, who had an affair with an adult when she was a minor.

Several conservative media commentators and activists have accused Levine of condoning child abuse. Robert Knight, director of Concerned Women for America's Culture and Family Institute, is urging the University of Minnesota to fire the university press officials who decided to publish the book. "The action is so grievous and so irresponsible that I felt they relinquished their right to academic freedom," said Knight, who has described the book as "very evil."

Armato said he informed university officials about the irate reaction to the book and explained to them how the decision to publish was made. He stressed that the book was accepted not out of hopes for a profit but because the University of Minnesota Press thought its arguments were worth public debate.

"What we've encouraged them to do is let the book speak for itself," Armato said. "The book is very nuanced and very complex."

Levine, a journalist and author who often writes about sex and gender, has no children. She writes in her introduction that some publishers felt her book was insufficiently "parent-friendly." Parents deserve support and respect, but so do young people, she said. She said the weakening of comprehensive sex-education programs has left sexually active teen-agers uninformed about ways to protect themselves from AIDS and other diseases, and ignorant about contraception.

"Operating in an atmosphere of complete ignorance, it's very easy to exaggerate threats and foment fear," she said. "America's drive to protect kids from sex protects them from nothing. Instead, it is often harming them." Reported in: freedomforum.org, April 6; *Minneapolis Star-Tribune,* April 4.

## broadcasting

**Lynchburg, Virginia**

An ABC affiliate in Lynchburg refused to air a March episode of *Once and Again* because it showed a 14-year-old girl kissing another teen girl. The episode, titled "Gay/Straight Alliance," focused on sexually confused character Jessie (played by Evan Rachel Wood), who falls for her friend, Katie.

"It's obvious to us that this is pure and simple homophobia," said Scott Seomin of the Gay and Lesbian Alliance Against Defamation. Lynchburg is where the Rev. Jerry Falwell's conservative ministry is headquartered. WSET, which replaced the episode with one hour of infomercials, said it was "a management decision." Seomin said this was the first time a station had refused to air a gay-themed network show since 1997, when ABC's Birmingham, Alabama, affiliate pulled the coming-out episode of *Ellen.* Reported in: *USA Today,* March 13

## foreign

**Berlin, Germany**

Responding to the deaths of sixteen people in a school shooting in Erfurt, the German government said it wants to give regulators the right to ban violent computer games. The proposal was added to a long-planned youth protection bill and followed announcement of a plan to toughen gun-control laws approved just before the killings. The changes would give authority over computer software to a federal agency that already regulates the distribution of written material. The government said it was also seeking ways to extend its control to the Internet.

The new regulations would allow the agency to create a blacklist of material deemed seriously dangerous to children, especially material depicting extreme violence. According to a government press statement, any electronic source that "glorifies war, represents people in a way detrimental to their human dignity or shows children in a sexually suggestive physical manner," will be subject to distribution and advertising bans.

The legislation would also create a computer game rating and age labeling system, similar to those already in place for films, in order to make it easier to control distribution of games to children and allow parents to make informed choices about what to let their children play.

Calls for the new regulations grew out of the revelation that Robert Steinhäuser, the teenager who opened fire in the Erfurt school and then killed himself, had owned violent videos and computer games. His parents said that he was obsessed with violence.

German chancellor Gerhard Schröder also expressed support for restricting violence on television. The government said in a statement that Schröder had met with officials of public and private television stations to discuss limiting violent content.

The German Constitution allows for broader restrictions on free speech than the American First Amendment would permit. The proposed legislation also would restrict advertising for tobacco and alcohol products, and would ban the sale of tobacco to children younger than 16. Reported in: *New York Times*, May 9.

**Auckland, New Zealand**

In an announcement that raised concerns about scholarly freedom in New Zealand, academics at the University of Auckland, the country's largest university, were told they would face instant dismissal if they publicly criticized colleagues or the work of the institution. The New Zealand Association of University Staff reacted angrily to the warning, first issued by the University of Auckland's vice chancellor, or president, John Hood, at a meeting of the university's science and medicine schools earlier in the year and made public in April. The departmental heads were told that Auckland would "summarily fire" academics who were found to have brought the university's work into disrepute.

According to an excerpt from the minutes of that meeting, Hood issued his warning because it had "been brought to his attention that there had been occasions where public or semi-public comment had been made which did not reflect a unified collegial approach to the work undertaken within the various faculties."

The university's sensitivity relates to a new system of financing university research in New Zealand. The country's eight public universities must now aggressively compete with one another, and even among separate departments at the same institution, for a share of the research dollars awarded by the government. Under the previous system, money for research was not contested and individual institutions were assured a share of the overall budget. During the initial phase of the new system, a number of Auckland academics had voiced concerns about the suitability of their competitors, both at their own university and elsewhere, for receiving funds.

But the country's university union, which represents faculty and staff members, including about half of Auckland's 1,200 academics, views the wider implications of the edict with "grave concern," according to Grant Duncan, the group's national president. "Although I'm personally inclined to think that this was perhaps an ill-considered use of language, we are still taking this threat very seriously," Duncan said.

He said he doubted that the university had the legal standing to make good on its threat, adding that "in any event, it has yet to spell out exactly what it means when it speaks of the kind of unbecoming speech it will no longer tolerate." Reported in: *Chronicle of Higher Education* (online), April 16.

**Hanoi, Vietnam**

Vietnam has arrested a dissident for publishing anti-government texts on the Internet. Pham Hong Son was arrested by detectives of the Ministry of Public Security on March 27 to "clarify the level of his infringement," a government statement said.

"Pham Hong Son . . . has sent and received anti-state and anti-Vietnam Communist Party documents," it said. "Although (he) was reminded and educated many times by authorities and functional agencies, Son still deliberately infringed." Reported in: Reuters, April 18. □

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*(ALA* v. *U.S. . . . from page 147)*

Because the filtering software mandated by CIPA will block access to substantial amounts of constitutionally protected speech whose suppression serves no legitimate government interest, we are persuaded that a public library's use of software filters is not narrowly tailored to further any of these interests. Moreover, less restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. 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. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy 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. . . .

Under these circumstances we are constrained to conclude that the library plaintiffs must prevail in their contention that CIPA requires them to violate the First Amendment rights of

their patrons, and accordingly is facially invalid, even under the standard urged on us by the government, which would permit us to facially invalidate CIPA only if it is impossible for a single public library to comply with CIPA's conditions without violating the First Amendment. In view of the limitations inherent in the filtering technology mandated by CIPA, any public library that adheres to CIPA's conditions will necessarily restrict patrons' access to a substantial amount of protected speech, in violation of the First Amendment. . . .

[A]lthough software filters provide a relatively cheap and effective, albeit imperfect, means for public libraries to prevent patrons from accessing speech that falls within the filters' category definitions, we find that commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment. Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors. Even Finnell, an expert witness for the defendants, found that between 6% and 15% of the blocked Web sites in the public libraries that he analyzed did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's definitions.

This phenomenon occurs for a number of reasons explicated in the more detailed findings of fact. These include limitations on filtering companies' ability to: (1) harvest Web pages for review; (2) review and categorize the Web pages that they have harvested; and (3) engage in regular re-review of the Web pages that they have previously reviewed. The primary limitations on filtering companies' ability to harvest Web pages for review is that a substantial majority of pages on the Web are not indexable using the spidering technology that Web search engines use, and that together, search engines have indexed only around half of the Web pages that are theoretically indexable. The fast rate of growth in the number of Web pages also limits filtering companies' ability to harvest pages for review. These shortcomings necessarily result in significant underblocking.

Several limitations on filtering companies' ability to review and categorize the Web pages that they have harvested also contribute to over- and underblocking. First, automated review processes, even those based on "artificial intelligence," are unable with any consistency to distinguish accurately material that falls within a category definition from material that does not. Moreover, human review of URLs is hampered by filtering companies' limited staff sizes, and by human error or misjudgment. In order to deal with the vast size of the Web and its rapid rates of growth and change, filtering companies engage in several practices that are necessary to reduce underblocking, but inevitably result in overblocking. These include: (1) blocking whole Web sites even when only a small minority of their pages contain material that would fit under one of the filtering company's categories (e.g., blocking the Salon.com site because it contains a sex column); (2) blocking by IP address (because a single IP address may contain many different Web sites and many thousands of pages of heterogenous content); and (3) blocking loophole sites such as translator sites and cache sites, which archive Web pages that have been removed from the Web by their original publisher.

Finally, filtering companies' failure to engage in regular re-review of Web pages that they have already categorized (or that they have determined do not fall into any category) results in a substantial amount of over- and underblocking. For example, Web publishers change the contents of Web pages frequently. The problem also arises when a Web site goes out of existence and its domain name or IP address is reassigned to a new Web site publisher. In that case, a filtering company's previous categorization of the IP address or domain name would likely be incorrect, potentially resulting in the over- or underblocking of many thousands of pages.

The inaccuracies that result from these limitations of filtering technology are quite substantial. At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."

The number of overblocked sites is of course much higher with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene. Thus, the number of pages of constitutionally protected speech blocked by filtering products far exceeds the many thousands of pages that are overblocked by reference to the filtering products' category definitions.

No presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors. Given the state of the art in filtering and image recognition technology, and the rapidly changing and expanding nature of the Web, we find that filtering products' shortcomings will not be solved through a technical solution in the foreseeable future.

In sum, filtering products are currently unable to block only visual depictions that are obscene, child pornography, or harmful to minors (or, only content matching a filtering product's category definitions) while simultaneously allowing access to all protected speech (or, all content not matching the blocking product's category definitions). Any software filter that is reasonably effective in blocking access to Web pages that fall within its category definitions will necessarily erroneously block a substantial number of Web pages that do not fall within its category definitions. . . .

Software filters, by definition, block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny. . . . Strict scrutiny does not necessarily apply to content-based restrictions on speech, however, where the restrictions apply only to speech on government property, such as public libraries. . . .

The Supreme Court has identified three types of fora for purposes of identifying the level of First Amendment scrutiny applicable to content-based restrictions on speech on government property: traditional public fora, designated public fora, and nonpublic fora. . . .

To apply public forum doctrine to this case, we must first determine whether the appropriate forum for analysis is the library's collection as a whole, which includes both print and electronic resources, or the library's provision of Internet access. Where a plaintiff seeks limited access, for expressive purposes, to governmentally controlled property, the Supreme Court has held that the relevant forum is defined not by the physical limits of the government property at issue, but rather by the specific access that the plaintiff seeks. . . .

In this case, the patron plaintiffs are not asserting a First Amendment right to compel public libraries to acquire certain books or magazines for their print collections. Nor are the Web site plaintiffs claiming a First Amendment right to compel public libraries to carry print materials that they publish. Rather, the right at issue in this case is the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet. Thus, the relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum created when the library provides its patrons with Internet access.

Although a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply. . . .

[W]e believe that where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored. . . .

Applying these principles to public libraries, we agree with the government that generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review. In making these decisions, public libraries are generally free to adopt collection development criteria that reflect not simply patrons' demand for certain material, but also the library's evaluation of the material's quality. . . .

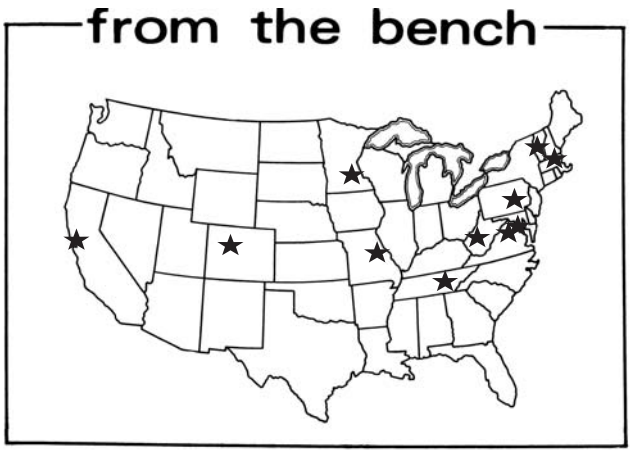
Nonetheless, we disagree with the government's argument that public libraries' use of Internet filters is no different, for First Amendment purposes, from the editorial discretion that they exercise when they choose to acquire certain books on the basis of librarians' evaluation of their quality. The central difference, in our view, is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable. . . .

[E]xercise of editorial discretion is evident in a library's decision to acquire certain books for its collection. As the government's experts in library science testified, in selecting a book for a library's collection, librarians evaluate the book's quality by reference to a variety of criteria such as its accuracy, the title's niche in relation to the rest of the collection, the authority of the author, the publisher, the work's presentation, and how it compares with other material available in the same genre or on the same subject. Thus, the content of every book that a library acquires has been reviewed by the library's collection development staff or someone to whom they have delegated the task, and has been judged to meet the criteria that form the basis for the library's collection development policy. Although some public libraries use "approval plans" to delegate the collection development to third-party vendors which provide the library with recommended materials that the library is then free to retain or return to the vendor, the same principle nonetheless attains.

In contrast, in providing patrons with even filtered Internet access, a public library invites patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions. Although several of the government's librarian witnesses who testified at trial purport to apply the same standards that govern the library's acquisition of print materials to the library's provision of Internet access to patrons, when public libraries provide their patrons with Internet access, they intentionally open their doors to vast amounts of speech that clearly lacks sufficient quality to ever be considered for the library's print collection. Unless a library allows access to only those sites that have been preselected as having particular value, . . . even a library that uses software filters has opened its Internet collection "for indiscriminate use by the general public." . . .

In providing its patrons with Internet access, a public library creates a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed. Although filtering companies review a portion of the Web in classifying particular sites, the portion of the Web that the filtering companies actually review is quite small in relation to the Web as a whole. The filtering companies' harvesting process, described in our findings of fact, is intended to identify only a small fraction of Web sites for the filtering companies to review. Put simply, the state cannot be said to be exercising editorial discretion permitted under the First Amendment

*(continued on page 181)*




## U.S. Supreme Court

Affirming that free speech principles apply with full force in the computer age, the Supreme Court on April 16 struck down provisions of a federal law that made it a crime to create, distribute or possess "virtual" child pornography that used computer images of young adults rather than actual children. The law, the Child Pornography Prevention Act of 1996, "prohibits speech that records no crime and creates no victims by its production," Justice Anthony M. Kennedy wrote for the majority in the court's latest decision upholding First Amendment protections online. Instead, he said, "the statute prohibits the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages."

Six justices agreed that the law violated the First Amendment in all the respects that the court considered in its review of a challenge brought by a trade association of adult entertainment businesses calling itself the Free Speech Coalition. A seventh justice, Sandra Day O'Connor, agreed that the government could not constitutionally make it a crime to present young-looking adults as children, making the ruling on that aspect a 7-to-2 decision. But O'Connor joined with Chief Justice William H. Rehnquist and Justice Antonin Scalia in voting to uphold the provision criminalizing computer-generated images, resulting in a 6-to-3 decision. The increasing technological sophistication of those images, the dissenters said, made it too easy for pornographers to avoid liability by claiming that their material did not depict real children.

Chief Justice Rehnquist and Justice Scalia said that the court should have upheld the entire law by interpreting it more narrowly to apply only to the "pandering" of material that was "virtually indistinguishable" from real child pornography, and not to the Hollywood films and other forms of mainstream entertainment that was a focus of the majority's concern.

Attorney General John Ashcroft said the court's decision would make prosecuting child pornography "immeasurably more difficult" but that the Justice Department would try to preserve current prosecutions by filing superseding indictments under other laws.

In his majority opinion, Justice Kennedy said the law was unconstitutionally broad, so far-reaching that it had the potential to chill expression with clear artistic and literary merit. Since Shakespeare's Juliet was only 13 years old, Justice Kennedy said, modern productions of "Romeo and Juliet" could theoretically be vulnerable under the law, along with such Academy Award-winning films as *Traffic* and *American Beauty*, which depict teenagers in explicit sexual situations.

The law was not restricted to obscenity—material that under prevailing community standards has no redeeming social value—but rather applied to "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." In another section struck down, the law also made it a crime to advertise or promote material "in such a manner that conveys the impression" that it is real child pornography.

The law defined minors as those younger than 18. It was passed with little public attention as part of a budget measure at the end of the 1996 Congressional session. Since the statute carried criminal penalties of as much as 15 years in prison for a first offense and 30 years for a second, Justice Kennedy said that "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."

Further, he said, justifications for the law's breadth were insufficient because "the government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."

The government argued that material appearing to be child pornography harmed real children by sustaining the market for such pornography and encouraging those who would exploit children. "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," the justice said. He came close to saying Congress had created a thought crime. "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end," Justice Kennedy said, adding, "the right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

The case, *Ashcroft* v. *Free Speech Coalition*, was a government appeal—actually filed in November 2000 under

Attorney General Janet Reno—from a ruling by the United States Court of Appeals for the Ninth Circuit. That court, in San Francisco, invalidated the law in a civil suit brought by the coalition of plaintiffs, none of whom was actually being prosecuted. Previously, three other federal appellate courts had upheld the law in appeals brought by criminal defendants.

Because the law did not require proof that the children in pornographic images were real—in fact, it placed the burden on defendants to prove the images were not of actual children—the Justice Department had come to rely on the law in bringing prosecutions. John H. Weston, a Los Angeles lawyer who has advised Hollywood studios on their potential liability under the law, said that the decision was "enormously valuable creatively" because the law had engendered a "wide swath of self-censorship" in the film industry. Uncertainties remained, Weston said, noting that the plaintiffs did not challenge, and the court did not address, a part of the law that prohibits computer "morphing" to make children appear to be engaging in sex. He said the use of "body doubles" in films showing under-age actresses in sexual situations was still legally vulnerable.

Many states have passed laws identical or similar to the Child Pornography Prevention Act. New Jersey and ten other states explicitly ban computer-generated virtual child pornography in laws that are now presumably unconstitutional.

Steven R. Shapiro, national legal director of the American Civil Liberties Union, said the decision showed the court's continuing "unwillingness to accept the government's position that traditional First Amendment rules need to be watered down for the Internet."

Justice Kennedy's opinion was joined by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justice Clarence Thomas concurred separately, suggesting that the court not foreclose the prospect of upholding a more narrowly drawn law.

In his dissent, Chief Justice Rehnquist agreed that the law, read broadly, was constitutionally troublesome but said that a narrower reading was more accurate. "We should be loath to construe a statute as banning film portrayals of Shakespearean tragedies without some indication—from text or legislative history —that such a result was intended," he said. Reported in: *New York Times*, April 17.

The latest effort by Congress to shield children from pornography on the Internet barely survived an initial Supreme Court test May 13 in a fractured decision suggesting that the court may ultimately find the law unconstitutional. In the meantime, the court continued in effect a U.S. District Court order that has blocked enforcement of the law, the Child Online Protection Act, since February 1999. The statute, which imposes prison sentences and fines of up to $100,000 for placing material that is "harmful to minors" on a Web site available to those under the age of 17, was passed in 1998 and has never taken effect.

In the decision reviewed by the justices, the U.S. Court of Appeals for the Third Circuit in Philadelphia had blocked the law on the ground that its identification of harmful material by reference to "contemporary community standards"—a phrase Congress borrowed from the Supreme Court's test for obscenity—violated the First Amendment when applied to the worldwide community of the Internet. Using a community rather than a national standard gave "the most puritan of communities" an effective veto power over content on the Internet, the court said. The appeals court said this was such an obvious flaw that it was unnecessary to examine the rest of the law.

The justices vacated that ruling, using four rationales expressed in four opinions, making the decision as messy a product as the court has brought forth in several years. Among the eight justices who supported the outcome—Justice John Paul Stevens voted to uphold the Third Circuit—the only common ground was that the appeals court's analysis was incomplete and that the case needed to be sent back for further consideration. It is therefore inevitable that the case will return to the Supreme Court.

Parsing the separate opinions, it is evident that most justices—all nine of whom voted in 1997 to invalidate this law's predecessor, the Communications Decency Act—were at least to some degree skeptical of the law's constitutionality. Only Justice Clarence Thomas and the two others who signed the central part of his opinion, Justice Antonin Scalia and Chief Justice William H. Rehnquist, found that the appeals court was simply wrong and that a community standard as applied to the Internet was constitutionally adequate. Yet though he spoke for only a minority of the court, and evidently failed to retain a majority after receiving the assignment last November to write the decision, Justice Thomas was unaccountably listed as author of the court's "judgment."

Closer to the court's center of gravity in the case, *Ashcroft* v. *American Civil Liberties Union*, was another three-justice opinion, written by Anthony M. Kennedy and joined by David H. Souter and Ruth Bader Ginsburg. "There is a very real likelihood that the Child Online Protection Act is overbroad and cannot survive" a First Amendment challenge, Justice Kennedy said. But he said the court itself should not come to that conclusion in the absence of a "comprehensive analysis" by the court of appeals. For that reason, he agreed with the Thomas three that the case needed to be sent back.

But the two trios of justices agreed on little else. Justice Kennedy said the Third Circuit had approached the case in the wrong order, skipping over an analysis of what the law actually regulates to focus solely on the community standards issue. He indicated special concern with the part of the "harmful to minors" definition that requires consideration of the material "as a whole."

"It is essential to answer the vexing question of what it means to evaluate Internet material 'as a whole' when everything on the Web is connected to everything else," Justice Kennedy said.

Two other justices, Sandra Day O'Connor and Stephen G. Breyer, each said that a national rather than a community

standard should apply. Their reasons differed somewhat. Justice Breyer cited legislative history that he said indicated that Congress intended to apply a national standard. Construing the statute this way "avoids the need to examine the serious First Amendment problem that would otherwise exist," he said.

Justice O'Connor's separate opinion treated adoption of a national standard as constitutionally required. She called it "necessary in my view for any reasonable regulation of Internet obscenity."

It is far from certain that a majority of the court would eventually coalesce around adopting a national standard of what is harmful to minors. Justice Kennedy said that even with such a standard, "the actual standard applied is bound to vary by community nevertheless" and to impose "a particular burden on Internet speech." So however that particular question is resolved, the court is likely to have to address the deeper First Amendment issues that Justice Kennedy identified.

The ultimate question for the court is whether this law shares the fatal flaw of the Communications Decency Act: that in endeavoring to protect children, it risks suppressing too much expression that is suitable and constitutionally protected for adults.

The Child Online Protection Act was challenged in U.S. District Court in Philadelphia by the A.C.L.U. on behalf of a coalition of organizations that offer sexually explicit content, some of it educational or literary, on their Web sites. Ann E. Beeson, who argued the case as litigation director of the Technology and Liberty Program of the ACLU said that she was "quite confident" that the law would ultimately be invalidated.

"The Court clearly had enough doubts about this broad censorship law to leave in place the ban, which is an enormous relief to our clients," said Beeson. "As the Court indicated, this case is still very much a work in progress," she added, noting that a majority of the Court appeared to have grave doubts about the ultimate constitutionality of the law. "Just as the Court has struck down other laws that attempt to reduce the adult population to reading only what is fit for children, we are confident that the Court will ultimately strike down this law."

Both the Justice Department, which defended the law, and Representative Michael G. Oxley, the Ohio Republican who sponsored it, portrayed the decision as favorable. Among the law's defenders, the most realistic statement came from Jay Sekulow, chief counsel of the American Center for Law and Justice, which is affiliated with the Rev. Pat Robertson. The decision made clear that "there are still many constitutional hurdles ahead in the battle to protect children from online pornography," he said.

In another First Amendment decision May 13, the court held by a 5-4 vote that the United States Court of Appeals for the Ninth Circuit should not have invalidated a Los Angeles zoning ordinance that prohibits two adult businesses, typically a bookstore and a video arcade, from being in the same building. The appeals court, based in San Francisco, had awarded summary judgment to the challenges to the law, evidently the only one in the country that specifically bars the sharing of a building by two adult businesses, on the ground that Los Angeles had not provided evidence to show that the provision would reduce crime.

But the evidence in a 1977 police department study of the "secondary effects" of adult businesses on their neighborhoods was sufficient to withstand summary judgment and require a full trial, Justice O'Connor said in an opinion joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Kennedy joined only in the judgment. In a dissenting opinion, Justice Souter said the city's study was inadequate because it examined only the impact of a concentration of separate businesses and offered no evidence that the common practice of combining a bookstore and video arcade caused any more undesirable effects than these businesses operating separately. Justices Stevens, Ginsburg and Breyer joined the dissent. The case is *Los Angeles* v. *Alameda Books, Inc.* Reported in: *New York Times,* May 14.

The Supreme Court let stand a April 1, 2001, ruling that allowed an adjunct faculty member at a community college to sue administrators over his free-speech rights. Kenneth E. Hardy had taken Jefferson Community College, in Kentucky, to court when it failed to renew his contract because he had used offensive words in a classroom discussion. The college declined to extend Hardy's contract in 1998, after he used slurs against women, black people, gay people, and other groups in a discussion about offensive communication.

In 1999, Hardy sued the college and two administrators—Richard Green, then president, and Mary Pamela Besser, a dean—arguing that his dismissal violated his First Amendment right to free speech. A federal district court dismissed all of his claims on the ground that, as a state institution, it is immune to such lawsuits. The court, however, also rejected the argument by Green and Besser that they had legal protection against being sued as individuals.

The case was appealed, and, in 2001, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit unanimously affirmed the district court's denial of the immunity defense to Green and Besser. The college appealed to the Supreme Court, which declined to hear the case.

Hardy, currently a visiting instructor at the University of Louisville, said the justices' ruling "leaves academic freedom in the hands of faculty, not administrators."

By deciding not to consider Jefferson's challenge, the Supreme Court let the lawsuit move to trial without clarifying guidelines for applying the First Amendment to employees' speech. John G. Roberts, Jr., the lawyer representing Green and Besser, said the justices' action doesn't mean that they think the lower court's decision is wrong. "It just means that they don't want to get involved," he said. Reported in: *Chronicle of Higher Education,* April 12.

The Supreme Court agreed April 22 to use a long-running lawsuit over violence and harassment outside abortion clin-

ics to clarify how an anti-racketeering law applies to all manner of demonstrations and civil disobedience. The court said it would consider combined appeals from Operation Rescue, anti-abortion leader Joseph Scheidler and others who were ordered to pay damages to abortion clinics and barred from interfering with their business for ten years.

Federal courts found that the anti-abortion protesters illegally blocked clinic entrances, menaced doctors, patients and clinic staff and destroyed equipment during a 15-year campaign to limit or stop abortions at several clinics. The combined case—*Scheidler* v. *National Organization for Women*, and *Operation Rescue* v. *National Organization for Women*—which the Supreme Court will hear in the term that begins in the fall of 2002, raises broad free-speech questions about court treatment of political and social protest, as well as more arcane legal issues. Organizations as varied as the Southern Christian Leadership Conference, People for the Ethical Treatment of Animals and the anti-abortion group Concerned Women for America asked the high court to step in.

"Social protest has a long and revered history in this nation," lawyers for Operation Rescue wrote in court papers. "From the burning or hanging of effigies in colonial times, to the temperance activists' disruption of taverns, to the civil rights and anti-war sit-ins of the 1960s and 1970s, demonstrations, even illegal ones, have been both an outlet for dissent and an instrument for social and legal change."

The high court will review whether the lower courts went too far in applying the federal Racketeer Influenced Corrupt Organizations Act to anti-abortion activities. The Supreme Court has already ruled in the same case that the National Organization for Women and abortion clinics could sue the anti-abortion protesters under RICO. The question now is whether the law was used correctly.

For example, the court will look at whether clinic blockades and violence amount to extortion under the law. It will also consider whether RICO allows private groups or individuals to ask for the kind of far-reaching ban on future conduct issued in this case.

The court limited its review to two legal questions about application of the RICO statute and federal extortion law. It will not consider the legality or constitutionality of abortion itself, nor wider questions about the political or religious messages of the abortion protesters.

A Chicago-based federal appeals court last year rejected arguments that the Operation Rescue protesters were merely exercising freedom of speech. "Protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables," said a unanimous, three-judge panel of the U.S. Court of Appeals for the Seventh Circuit. "At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients."

The National Organization for Women and abortion clinics in Milwaukee and Wilmington, Delaware, had sued anti-abortion organizations under the federal racketeering law to combat what they described as violent tactics. A jury ruled against the abortion protesters in 1998, and a federal judge barred the defendants from trespassing, setting up blockades or behaving violently at abortion clinics for ten years. He also ordered them to pay $257,780 in damages.

Lawyers for NOW and two abortion clinics argued there is no reason for the Supreme Court to get involved now. The anti-abortion defendants are masquerading as nonviolent political protesters, lawyers for NOW argued in court papers. The protesters exaggerated the free-speech ramifications of their case, and incorrectly painted the appeals court's ruling as out of step with other courts.

The lower court decision does not hamper legitimate protests, such as peaceful picketing or handing out leaflets, the NOW lawyers said. The case, which began in 1986, has traveled to the Supreme Court twice before. The court ruled unanimously in 1994 that protesters who block access to clinics or otherwise conspire to stop women from having abortions may be sued under the law created to fight the Mafia. Reported in: freedomforum.org, April 22.

The Supreme Court weighed the rights of aggrieved students against the potential costs of frivolous litigation April 24 at a hearing about whether students can sue colleges under a federal law that protects the privacy of student records. College officials fear that they will be hit with a flood of litigation if the court upholds a Washington State Supreme Court ruling that said such lawsuits are permissible.

The 1974 Family Educational Rights and Privacy Act prohibits colleges and schools that receive federal funds from releasing most student records without receiving permission from parents or an adult student. But the lawyer for the student at the heart of the case argued that the threat of cutting off federal funds provides little recourse to students who are damaged when colleges violate the law. Ru Paster, an aspiring teacher, has been unable to find a job in the field because administrators at Gonzaga University falsely accused him of date rape, according to his lawyer, Beth S. Brinkman. Last June, the Washington State Supreme Court held that Gonzaga owed Paster $1.15-million for defamation and for revealing the information in his educational records.

The justices and lawyers spent most of the hour-long session parsing the Congressional statute that established the privacy law. Several justices suggested that Congress may have intended to give students and parents the right to sue. In a few instances, the statute refers to specific "rights" of students and their parents.

However, other justices noted that certain groups of students would never have the opportunity to sue, because the statute applies only to colleges and schools that receive federal funds. While the vast majority of public and private colleges receive federal funds, many private elementary and secondary schools do not.

"The remedy is the withholding of funds," said Justice Sandra Day O'Connor. "I don't see how you can extrapolate from that a private cause of action."

The case, *Gonzaga University and Robert S. League* v. *John Doe*, is the second that the Supreme Court has heard in the past year involving the federal law on student privacy, commonly called FERPA or the Buckley Amendment. In February, the court ruled that the law does not prohibit teachers from asking students to grade one another's work. In the majority opinion in that case, Justice Anthony M. Kennedy wrote that applying FERPA to such situations would lead to ludicrous outcomes: teachers around the country might violate the law by putting a happy face or gold star on a student's paper and allowing classmates to see it.

College officials fear that an adverse ruling in the Gonzaga case would pose even greater problems. In a brief supporting Gonzaga, lawyers for eight college and school associations, including the American Council on Education, argued that allowing lawsuits under FERPA would "bring state and federal courts into all facets of American education." Reported in: *Chronicle of Higher Education* (online), April 25.

Briefs were filed on May 20 in the U.S. Supreme Court in a case challenging the constitutionality of the Sonny Bono Copyright Term Extension Act. The appeal in *Eldred* v. *Ashcroft* asks the Court tooverturn a decision by the federal appeals court for the D. C. Circuit,which in February 2001 rejected the argument that the Copyright Term Extension Act is unconstitutional.

The Act, passed by Congress in 1998, extends the copyright term for an additional twenty years, so that a commercially-produced work is now governed by the provisions of copyright law for 95 years; for an individual's work the term is "life of the author" plus 70 years. The federal government's brief, defending the law, will be filed in June. The Supreme Court is expected to hear arguments from the parties this fall.

In support of the challengers' case, the five major national library associations and ten other groups submitted an *amici curiae* (friend of the court) brief asking the Supreme Court to rule that the extended term of protection for copyrighted works is unconstitutional. The brief explains that the new lengthier copyright terms exceed the "limited times" of protection authorized by the Constitution's Copyright Clause to "promote the progress" of science and the useful arts. In addition, the grant of extended terms for works already in existence when the law was passed—retrospective protection—does not meet the constitutional requirement of innovation in order for a work to be copyrighted.

The brief also argues that Congress did not adequately consider the substantial harms that flow from keeping works under copyright protection almost perpetually, thereby stifling the public domain.

Joining the brief of the American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association were the following organizations: American Historical Association, Art Libraries Society of North America, Association for Recorded Sound Collections, Council on Library and Information Resources, International Association of Jazz Record Collectors, Midwest Archives Conference, Music Library Association, National Council on Public History, Society for American Music, and Society of American Archivists. Reported in: ALA Washington Office Newsline, May 24.

The Supreme Court on May 20 substantially broadened its review of laws under which states keep the public informed of the whereabouts of convicted sex offenders who have been released from prison. Accepting an appeal from Connecticut, the court agreed to decide whether listing all the offenders in an undifferentiated registry—without making individual determinations of who among them still poses a danger—violates the constitutional guarantee of due process.

Prodded by a federal law that threatened to withhold law enforcement money, each state has adopted versions of New Jersey's original Megan's Law. The law was named for Megan Kanka, a 7-year-old New Jersey girl raped and murdered by a neighbor who was a child molester whose criminal history was unknown in the neighborhood. The federal law gave states several options for collecting and disseminating the information. Connecticut is one of twenty states that publish lists of offenders without first holding individual hearings or otherwise trying to differentiate those who may be dangerous from those who are not. Like many states, Connecticut uses the Internet to give the information maximum exposure.

Last October, the United States Court of Appeals for the Second Circuit in Manhattan, ruling in a case brought by an anonymous offender who maintained that he posed no threat to the community, held that offenders were entitled to individual hearings to determine whether "they are particularly likely to be currently dangerous before being labeled as such."

The appeals court issued an injunction under which offenders must still register with the state's Department of Public Safety, but the state is barred from publicizing their whereabouts. In its due process analysis, the appeals court said that in the context of the law's "extreme and onerous" conditions, individuals who could truthfully be described as convicted sex offenders were nonetheless entitled to a chance to dispute the "false stigma" of being placed on a list that suggested by its very nature that they were unusually dangerous. Other federal appeals courts have upheld Megan's Law in Tennessee and in Washington against similar challenges.

Connecticut's Supreme Court appeal, *Connecticut Department of Public Safety* v. *Doe*, was supported by 23 other states, including New York and New Jersey. While neither of those states follows Connecticut's model, their versions of Megan's Law that list offenders by categories of assessed risk have been the subject of numerous court challenges. In addition, the Bush administration filed a brief vigorously supporting the state and informing the justices

that the fate of a new federal law, the Campus Sex Crimes Prevention Act, was hanging in the balance.

Under that law, which is to take effect in October, states are required to provide community notification of convicted sex offenders who are either enrolled in or employed by colleges and universities; the law does not call for an individualized risk assessment.

Connecticut's appeal, filed by the state's attorney general, Richard Blumenthal, said that an individualized system would not only be "cumbersome and expensive" but also was "intrinsically less accurate than a system in which there is no subjective information relayed, but only objectively true information." The injunction was preventing the state from "disseminating the truthful and accurate information" in its sex offender registry, the state's brief said.

This case, which will be argued next fall, is the second Megan's Law case the court has accepted for its next term. In February, the justices accepted Alaska's appeal of a ruling that the state's law, as applied to those who committed their crimes before its enactment, imposed additional punishment in violation of the Constitution's ban on ex post facto legislation. Reported in: *New York Times*, May 20.

The Supreme Court agreed May 28 to decide the constitutionality of a 50-year-old Virginia law that prohibits burning a cross "with the intent of intimidating any person or group of persons."

The case is an appeal by the state from a decision of the Virginia Supreme Court, which held in a 4-to-3 ruling last November that burning a cross, no less than burning an American flag, was symbolic speech protected by the First Amendment.

The state court decision grew out of two prosecutions in 1998, one of two white men who burned a cross in the yard of a black neighbor in Virginia Beach, and one of a Ku Klux Klan leader in rural Carroll County, who presided over a rally and the burning of a 30-foot cross that was visible for three-quarters of a mile along a state highway.

In hearing the state's appeal, the justices will revisit a subject they last confronted ten years ago, when the court overturned a cross-burning ordinance in St. Paul, in a 5-4 decision that fell well short of resolving a societywide debate over the relationship between free speech and hate speech.

Thirteen states and the District of Columbia have criminal prohibitions against cross burning, and the state and lower federal courts have continued to issue conflicting rulings since the Supreme Court's 1992 decision in *R.A.V.* v. *City of St. Paul*. The attorneys general of Arizona, California, Georgia, Kansas, Massachusetts, Missouri, Oklahoma, Utah and Washington all signed a brief urging the justices to hear Virginia's appeal.

"Cross burning is an especially virulent, even unique, form of intimidation in American society" that states should be able to prohibit, the brief said.

One reason for the continuing confusion is a disagreement among judges and legal scholars over how to interpret the Supreme Court's last decision. The St. Paul ordinance that the court invalidated made it a crime to place a symbol, including a burning cross, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

According to the court's majority opinion, written by Justice Antonin Scalia, this description of the prohibited conduct amounted to "content-based discrimination" because it ruled symbolic speech in or out depending on the groups that the speech targeted. The Virginia law, which was enacted in response to highly publicized Ku Klux Klan cross burnings in the late 1940's and early 1950's, does not refer to any particular group. The law provides that "it shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."

In finding the law unconstitutional, the Virginia Supreme Court's majority said that despite the lack of reference to any specific target, the law was nonetheless "analytically indistinguishable" from the St. Paul ordinance. The Virginia law was in its own way just as selective, the state court said, because it proscribed not all intimidating expression but "selectively chooses only cross burning because of its distinctive message."

Virginia's attorney general, Jerry W. Kilgore, said in the state's appeal, *Virginia* v. *Black*, that the law's sole focus on cross burning was justified by the sense of threat associated with the practice. Even a "white, middle-class Protestant waking up at night to find a burning cross" outside his home would feel more threatened than if he found "say, a burning circle or square," Kilgore's brief said, adding: "In the latter case, he may call the fire department. In the former, he will probably call the police."

The three defendants, Barry E. Black, Richard J. Elliott and Jonathan O'Mara, are represented by a well-known First Amendment scholar, Rodney A. Smolla of the T. C. Williams School of Law at the University of Richmond, and by the American Civil Liberties Union of Virginia and private lawyers. Urging the justices to reject the appeal, they said the Virginia Supreme Court "conscientiously applied core First Amendment principles in unpalatable circumstances." Reported in: *New York Times*, May 28.

## schools

**New Prague, Minnesota**

A federal judge has ruled that the First Amendment rights of a New Prague Intermediate School fourth-grader were not violated when the boy, a Green Bay Packers fan, wasn't allowed to attend a school pizza party at the Minnesota Vikings' headquarters. "Students have a constitutionally protected right to their education," wrote U.S. District Court Judge Ann Montgomery of Minneapolis. But she said the boy's education "was unaffected by the actions" of teachers and officials in the New Prague School District.

The Minnesota Civil Liberties Union (MCLU) sued the district in December 2000 on behalf of Rocky Sonkowsky and his father, Roy, alleging that school officials wouldn't let Rocky attend the 1999 party because the boy, who was 9 at the time, planned to wear a Packers jersey and because they feared he would offend a player and embarrass the school. Vikings receiver Cris Carter was to meet with the students. The rest of Rocky's class was allowed to attend the party at Winter Park, the Vikings' headquarters in Eden Prairie.

Roy Sonkowsky also claimed that his son had been discriminated against because he wasn't allowed to wear his Packers jersey in a class photo taken after the class won a geography contest, in which the grand prize was the Vikings party. Rocky was told that he had to cover the jersey because teachers felt it was disrespectful. The students had been told beforehand to wear a Vikings jersey or colors. Rocky was excluded from the photo until he complied with the order to cover his Packers jersey.

"I'm kind of proud of the youngster for standing up for what he believes in," said C. Paul Jones, professor emeritus at the William Mitchell College of Law in St. Paul. "But he was interfering with what everybody else was trying to do, and what happened to him didn't interfere with what he was supposed to be getting in school."

Charles Samuelson, executive director of the MCLU, said he was disappointed with the decision. The Sonkowsky family might appeal the decision, but the organization hasn't determined whether it will represent the boy again, he said.

In the lawsuit, Roy Sonkowsky also said that Rocky's teachers refused to accept a homework assignment because he had colored a football player green and yellow, the Packers' colors, rather than purple and gold, the Vikings' colors, as students had been told to do. He also said Rocky was not allowed to participate in a parade because he was wearing a Packers jacket, the only jacket Roy Sonkowsky said his son has.

"I always had faith in the teachers in our system," New Prague schools Superintendent Frankie Poplau said. "I'm glad to see some closure for those teachers."

After learning of the controversy, the Vikings gave Rocky and his father tickets to attend a game at the Metrodome between the Vikings and Packers that happened to be scheduled on the Sunday after the lawsuit was filed. "Even if all of Sonkowsky's allegations are presumed true," Montgomery wrote in her decision, "Rocky had no constitutional right violated by the School District or any of its employees. . . . None of these activities meaningfully affect Rocky's education (so) as to invoke a constitutionally protected right." Reported in: *Minneapolis Star-Tribune,* April 12.

## university

**Amherst, Massachusetts**

A federal appeals court has ruled that an administrator at the University of Massachusetts can sue the institution for allegedly punishing her for criticizing a new admissions policy by transferring her to another job. According to the ruling by the U.S. Court of Appeals for the First Circuit, Rita Nethersole was associate vice president for student affairs at the University of Massachusetts system in 1996, when the university revised its admissions policy to increase grade-point-average requirements for incoming students and eliminate special admissions programs. When she complained to her supervisor, Joseph C. Deck, then the system's vice president for academic affairs, he allegedly advised her not to pursue any action. That April, she sent an e-mail message to William M. Bulger, the university's president, urging him to meet with the minority-faculty caucus to hear its concerns about the new policy.

Later that month, the university informed Nethersole that it was considering terminating her in connection with the disappearance of a UMass credit card that had been fraudulently used to buy a laptop computer. But in October, after a hearing determined that there was not enough plausible evidence to warrant her firing, the university reassigned Nethersole to its Boston campus as assistant dean of graduate studies, which, despite no reduction in pay, she regarded as a demotion.

Peter M. Michelson, a lawyer for UMass, maintains that Nethersole's reassignment had nothing to do with her policy complaint. "At that point, she had been out of work for quite a few weeks, so she was given a new job at UMass–Boston," Michelson said. "The president's office is a small office, and she had been in an adversarial hearing with a substantial number of the people there. The feeling was that there had been a breakdown in communication."

Nethersole sued UMass in 1996, but federal district courts twice dismissed her case. She recently amended the lawsuit to claim that the university had violated her First Amendment right to free speech by retaliating against her for complaining about the admissions policy. Nethersole maintains that her request that Bulger meet with minority professors is protected speech; UMass describes that memo as a routine scheduling request. Reported in: *Chronicle of Higher Education* (online), April 17.

## bookstore

**Denver, Colorado**

The Colorado Supreme Court refused April 8 to order a book store to allow police to see its sales records as part of a drug investigation. In a 53-page decision, the judges said police erred when they went after the records to establish who purchased books on drug manufacturing. The court said the search warrant should never have been issued in the first place. According to the Court, the First Amendment and a section of the Colorado Constitution "protect an individual's fundamental right to purchase books anonymously, free from governmental interference."

"The Supreme Court concludes that the law enforcement need for the book purchase record in this case was not sufficiently compelling to outweigh the harm that would likely follow from execution of the search warrant, in part because law enforcement officials sought the purchase record for reasons related to the contents of the books that the suspect may have purchased," the court said.

The decision overturned a Denver district judge who ordered Tattered Cover Book Store owner Joyce Meskis to tell police who purchased two books on drug manufacturing from her store. Meskis argued in an appeal that the order violated her customers' First Amendment rights

In a decision by all six of the participating justices, the Supreme Court stated: "Had it not been for the Tattered Cover's steadfast stance, the zealousness of the City would have led to the disclosure of information that we ultimately conclude is constitutionally protected."

In its 51-page decision, the Court said that search warrants targeting bookseller records pose such a grave threat to free expression that in the future they should only be issued after a hearing at which the bookseller has an opportunity to oppose them. "Search warrants directed to bookstores, demanding information about the reading history of customers, intrude upon the First Amendment rights of customers and bookstores because compelled disclosure of book-buying records threatens to destroy the anonymity upon which many customers depend," the Court said.

Although the decision will apply only to the Colorado courts, it will have national significance, Chris Finan, president of the American Booksellers Foundation for Free Expression (ABFFE), said. "The Colorado Supreme Court has issued the strongest opinion by any court on the importance of protecting customer privacy in bookstores. It will influence judges deciding future cases involving bookstore search warrants and subpoenas," he explained.

There has been an alarming increase in the number of bookstore subpoenas and search warrants since Independent Counsel Kenneth Starr subpoenaed Monica Lewinsky's book purchase records in 1998, Finan added. In the last two years, there have been four cases involving search warrants or subpoenas for bookstore customer information. However, the bookstores successfully resisted these demands.

Attorneys for police and prosecutors said the investigators had no other way to prove who owned the book(s), which they said was critical to their investigation. North Metro Drug Task Force police sought the records after finding a Tattered Cover Book Store envelope outside a mobile home they raided about two years ago northeast of Denver. Inside were a methamphetamine lab and the drug-making how-to books. The envelope was printed with an invoice number and the trailer's address, but no name. Police found no fingerprints on the book and asked for a search warrant to find out who ordered the book.

Denver District Judge J. Stephens Phillips ordered the store to give police a copy of the invoice believed to have been in the envelope. But he turned down investigators' original request to see all records of what one person bought during a month's time. Both sides agreed the case should go straight to the high court to expedite the drug investigation.

The Tattered Cover, one of the country's largest independent bookstores, got help from the American Booksellers Foundation for Free Expression with legal costs. Reported in: *Denver Post*, April 9.

## freedom of assembly

**Washington, D.C.**

A federal appeals court panel on May 31 struck down a rule banning demonstrations on a sidewalk outside the United States Capitol, ruling that the ban violated freedom of speech. The unanimous decision by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld a First Amendment constitutional challenge to the rules, which prohibited "demonstration activity" like parading, picketing, leafleting, vigils, sit-ins and speechmaking. The demonstration ban was adopted by the Capitol Police Board, which has the power to adopt regulations under federal law. But the three-judge panel held that the site of the demonstration, a sidewalk leading to the Capitol steps, was a public forum.

Judge David S. Tatel wrote that the sidewalk wraps around the Capitol almost without interruption, giving pedestrians access to the front of the building, which he called a centerpiece of United States democracy.

"We declare the entire demonstration ban unconstitutional," Judge Tatel wrote in an opinion also signed by the other panel members, Judge Harry T. Edwards and Senior Judge Laurence H. Silberman. Tatel ordered a lower court to immediately enter an injunction barring enforcement of the ban. But he also wrote that police have the right to regulate and limit Capitol protests.

"In the atmosphere we live in today, this is a tremendous affirmation of the First Amendment principle," said Robert Lederman, the New York City artist and activist whose 1997 arrest at the Senate entrance sparked the suit, which was filed by the American Civil Liberties Union. "If you can protest on the sidewalk of the Capitol, then you should be able to protest at government buildings around the country."

Lederman demonstrated at the Capitol to publicize a lawsuit he and others brought to sell their work on New York City sidewalks. Two Capitol police officers in 1997 arrested Lederman, who was distributing leaflets and carrying a sign reading "Stop Arresting Artists" when he was arrested. He was acquitted by a judge in the city's Superior Court who found the ban unconstitutional. Lederman then sued in federal court, challenging the ban's constitutionality and seeking damages from various parties, including the two police officers.

The court rejected the argument by government lawyers that the sidewalk functioned as a "security perimeter" around

the Capitol and therefore justified the ban. The court ordered that an injunction be entered barring enforcement of the demonstration ban.

The ruling to provide even slightly more public access to a symbolic government building comes as security measures have multiplied around federal Washington, with officials shutting down or restricting access to many buildings and offices. U.S. Capitol authorities no longer permit easy tourist access to the building and have imposed time-limited tours, reducing the number of visitors to less than half the pre-attack levels. The 202-year-old structure is undergoing construction of a $368 million underground visitors center and a $100 million effort to install metal posts and pop-up street barriers on the area's perimeter. The two projects are so vast that nearly the entire east side of the Capitol will be a construction zone for at least two years, almost certainly delaying any protests until their completion.

But the appeals panel ruled that security restrictions can go only so far, even at the seat of the nation's democracy. U.S. Capitol Police were first ordered to allow at least some protests and demonstrations on the Capitol grounds in a 1972 Supreme Court ruling that said the 60-acre area met the legal definition of a public forum. The court, however, allowed the agency to regulate protest activity. The policy has evolved over the years and currently limits demonstrations to the center steps of the Capitol's East Front, two grassy patches on the north and south sides of the east Capitol grounds, the lower West Terrace and the West Lawn and adjacent parks. Protesters also can use the sidewalks near congressional office buildings. Reported in: *New York Times*, June 1; *Washington Post*, June 1.

## church and state

**Chester County, Pennsylvania**

In what could become the Supreme Court's next chance to tackle the emotional debate over the Constitution's ban on government endorsement of religion, a federal judge March 6 ordered Chester County officials to remove a Ten Commandments plaque from a courthouse where it has hung since 1920. In an opinion that came less than 24 hours after two days of trial in a lawsuit filed by Chester County atheist Sally Flynn, U.S. District Court Judge Stewart Dalzell rejected county officials' contention that the decalogue is so commonly known that it has lost its purely religious significance.

Dalzell, a 10-year veteran of the federal bench who was appointed by President George Bush, wrote that the decalogue on the courthouse exterior is plainly a Protestant Christian interpretation. "The only plaque on the courthouse facade with any substantive content is the Ten Commandment[s] tablet," Dalzell added. "With neither the Bill of Rights, the Declaration of Independence, the Mayflower Compact nor any other fundamental legal text flanking it, the tablet's necessary effect on those who see it is to endorse or advance the unique importance of this predominantly religious text for mainline Protestantism."

"I'm elated. I'm doing a little dance here," said Flynn, 72, a civil-rights activist. Flynn, who said she has been harassed since filing the lawsuit last year, added: "The only thing more stressful than this in my whole life was childbirth. It's the county law building and it doesn't need religious symbols on it."

The immediate future of the plaque, donated by the Council of Religious Education of the Federated Churches of West Chester, was uncertain. Stefan Presser, legal director of the American Civil Liberties Union's Philadelphia office, which sued on behalf of Flynn and the Freethought Society of Greater Philadelphia, said he would write immediately asking the county commissioners when they would comply with Dalzell's order.

Presser praised the ruling: "At a time when this nation has borne the hatred of religious fanatics from abroad, it is fitting that we can rededicate the gift that we were given 200 years ago."

Margaret Downey, president and founder of the Freethought Society of Greater Philadelphia, said she hoped the county did not appeal: "This has really divided our community." Downey praised the ruling for upholding the rights of Chester County's atheists and religious minorities. Dalzell wrote that the plaque was donated by a religious group and its text is a Protestant Christian interpretation of the Ten Commandments. Only 84 words of the text, Dalzell wrote, "could be fairly regarded as conveying a secular, moral message."

Referring to testimony that the Ten Commandments was accepted by both Jews and Christians, as well as some Muslims, Dalzell noted that the Protestant interpretation on the plaque is "hardly of only philological interest. In 2002, it is easy to forget that people were once executed for championing the wrong text of the Bible," Dalzell wrote. Reported in: *Philadelphia Inquirer,* March 7.

**Chattanooga, Tennessee**

Hamilton County commissioners said May 14 they would not appeal a judge's order to remove displays of the Ten Commandments from court buildings. U.S. District Court Judge Allan Edgar on May 3 ordered two of three Ten Commandments plaques removed because they violated the constitutional separation of church and state. Commissioners cited costs in agreeing to drop the appeal. They said all three would be removed within a few weeks.

The American Civil Liberties Union of Tennessee also is challenging a display at the Rutherford County Courthouse in Murfreesboro. More than half of Tennessee's 95 counties have approved Ten Commandments displays, and more than thirty have posted the biblical laws. The judge's order applies only to Hamilton County, but ACLU officials have

said they hope it will be heeded by other county commissions. Reported in: *New York Times,* May 15.

**St. Albans, West Virginia**

A federal judge in West Virginia has ruled that a public school in St. Albans may not include school-sponsored prayer as part of its graduation ceremony. Americans United for Separation of Church and State and the American Civil Liberties Union of West Virginia filed suit in May, arguing that the school's plan to include worship as part of the commencement activities ran afoul of the First Amendment's separation of church and state. In an opinion issued May 30, Judge John T. Copenhaver, Jr., agreed that the religious exercise was inappropriate for an official school event and ordered the school not to include prayer as part of the service.

"We're very pleased that the court agreed that public school activities must remain religiously neutral," said the Rev. Barry W. Lynn, executive director of Americans United. "This ruling strikes the right balance. Students can pray if they wish during the graduation ceremony, but to protect everyone's rights, worship will not be an official part of the ceremony."

The school district in Kanawha County, West Virginia, has a policy that allows students to vote on including prayer at school graduation ceremonies. The prayers are supposed to be "non-sectarian" and "non-proselytizing," and must be approved by school principals before the event. In his ruling, Judge Copenhaver said the county's policy is "plainly invalid" and problematic because it serves to "entangle the government with religion in constitutionally repugnant ways."

AU and the ACLU of West Virginia filed the case on behalf of a graduating senior who objected to the coercive religious practice. AU's Legal Director, Ayesha Khan, who served as lead counsel in the case, also was pleased with the court ruling. "The real winners here are the families in Kanawha County," Khan said. "By ruling against school-sponsored prayer, the judge has protected the religious liberty of every family in the community." Reported in: Americans United Press Release, May 31.

## Internet

**San Francisco, California**

A federal appeals court in California ruled May 16 that organizations that distributed Old West-style wanted posters identifying doctors who provided abortions had illegally threatened them, and it upheld a jury verdict against the organizations. The defendants, two anti-abortion organizations and a number of individuals, also listed doctors' names and addresses on a Web site they called the Nuremberg Files. The names of doctors who had been killed were lined through in black; the names of wounded doctors were highlighted in gray. The defendants said they were engaged in political advocacy, while the plaintiffs, four doctors and two health clinics, maintained that the speech in question encouraged violence against abortion providers.

The decision, by the United States Court of Appeals for the Ninth Circuit in San Francisco, reversed a decision by a three-judge panel of that court. The vote was 6 to 5. The majority rejected a First Amendment doctrine that protects speech advocating violence so long as it is not directed to incite immediate lawless action. "While advocating violence is protected," Judge Pamela Ann Rymer wrote for the majority, "threatening a person with violence is not." Judge Rymer said another doctrine, concerning threats, applied when specific people were named and made to fear for their safety.

Maria Vullo, who argued the appeal for the plaintiffs, said the essence of the court's decision was its rejection of threatening speech. "It's really terrorism," she said about the speech.

Christopher Ferrara, who represented the defendants, said his clients would ask the United States Supreme Court to review the decision. "This is a threat case without any identifiable threat," he said. "We're found liable for the format we chose."

An Oregon jury awarded the plaintiffs $109 million in 1999. The earlier decision by the appeals court panel threw out that verdict. Yesterday's decision reinstated it, though the court instructed the trial judge to reconsider the punitive damages portion of the award in light of recent decisions.

The majority discounted the argument that the language used by the defendants was not overtly threatening. The use of wanted-style posters followed by killings was, the majority said, sufficient to strip the defendants of First Amendment protection. "This is not political hyperbole," Judge Rymer wrote. "They were a true threat."

The dissenting judges said the majority erred in applying the "true threats" doctrine, which is often employed in considering face-to-face encounters, to the mass communications here. "Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process," wrote Judge Stephen Reinhardt. "Private threats delivered one-on-one do not." Reported in: *New York Times,* May 17.

**Montpelier, Vermont**

A court has blocked the state of Vermont from enforcing a two-year-old law that was designed to ban transmission of child pornography. U.S. District Court Judge Garvan Murtha said in his decision that the law, passed in 2000 and amended last year, too broadly restricts indecent speech that is protected under the Constitution. Murtha ruled the law invalid "because it broadly restricts indecent—though constitutionally protected—speech by adults in an attempt to restrict that speech from reaching minors."

No cases have been prosecuted under the law, said William Griffin, the chief assistant attorney general, who argued the case for Vermont. He said he was disappointed with the ruling and the state might appeal.

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## privacy

**Washington, D.C.**

Attorney General John Ashcroft said May 30 that he was stepping up the fight against terrorism by expanding the F.B.I.'s authority to monitor the World Wide Web, political groups, libraries and religious organizations, including houses of worship like mosques. Ashcroft said guidelines restricting the bureau, imposed a quarter of a century ago in response to abuses by federal law enforcement officials, were outdated and left investigators at a disadvantage in fighting terrorism today.

"Men and women of the F.B.I. in the field are frustrated because many of our own internal restrictions have hampered our ability to fight terrorism," Ashcroft told reporters. "In many instances," he added, "the guidelines bar F.B.I. field agents from taking the initiative to detect and prevent future terrorist attacks, or act unless the bureau learns of possible criminal activity from external sources."

Ashcroft said the old guidelines prohibited F.B.I. investigators from surfing the Web "in the same way that you and I can look for information." Justice Department officials said that under 1999 guidelines, the Policies for Online Criminal Investigation, F.B.I. agents could not search for leads on the Internet but could use it only in cases where a criminal investigation had been established.

For example, one official said, agents would have been permitted in recent months to look at Web sites for information about anthrax because of the agency's broad investigation of anthrax-contaminated letters to officials. But agents would not have been allowed to search the Internet for information about smallpox's potential as a biological weapon, he said, because it was not the subject of a criminal investigation.

Those guidelines are based on principles dating to the days of President Gerald R. Ford and Attorney General Edward H. Levi that prohibited agents from using publicly available sources of information like libraries to collect information, except in a criminal investigation. An investigation requires some complaint of wrongdoing. The prohibitions were a reaction to Cointelpro, an F.B.I. domestic spying operation aimed at disrupting political groups. Its best-known target was the Rev. Dr. Martin Luther King, Jr. The guidelines were based on the principle that federal agents should not compile dossiers on people and groups without some reason to believe a crime had been committed.

The changes announced by Ashcroft are certain to produce a new chapter in the debate over whether the nation's security agencies are updating antiquated policies to combat terrorism or simply taking advantage of the September 11 attacks and their aftermath to obtain new powers.

Kate Martin, a policy analyst at the Center for National Security Studies, a civil liberties group in Washington, said Ashcroft's unilateral announcement of the changes "shows that the administration continues to be disdainful of any open policy-making."

Other changes imposed by Ashcroft will allow supervisors in the bureau's 56 field offices to initiate counterterrorism inquiries without approval from headquarters in Washington. Agents also will be allowed once again to search commercial databases without the need to show a crime may have been committed, as was previously required. As for attending events at places like mosques, the change reads: "For the purpose of detecting or preventing terrorist activities, the F.B.I. 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." Reported in: *New York Times*, May 31.

## schools

**Waterford Township, Michigan**

A decade ago, kids passed notes in class or might have written mean comments about fellow students in a notebook. Today, students who use the Internet to demean their peers can face stiff punishments. Waterford Township student Joshua Mahaffey posted comments about fellow students on a friend's Web site last year. The comments landed Mahaffey in a psychiatric hospital for three days and suspended from school for 143 days. Now, Mahaffey and his parents have sued in federal court, asking for his disciplinary record to be cleared because they fear it could block college admission.

They've also asked for monetary damages and that the district's discipline policy be declared unconstitutional.

Five months after the posting on a friend's Web site, Mahaffey was summoned to the principal's office at Kettering High School. After a brief meeting with the principal and other administrators, Mahaffey was suspended indefinitely "for assault, behavior dangerous to self and others, harassment and Internet violations." Mahaffey was taken to the Waterford Police Department and questioned. His parents, Greg and Kari Mahaffey, were called in and voluntarily gave their home computer to investigators.

No criminal charges were filed, although Mahaffey was admitted to Havenwyck Hospital for a psychological evaluation by his parents at the request of the police and school. A hospital report stated "he was not a danger to himself or others" and recommended he "return to school as soon as possible." Mahaffey was suspended in September and attended Pontiac public schools until January 21. He has since returned to Waterford schools.

"Clearly, he made childish and immature comments, but they weren't threats and shouldn't have resulted in his being suspended indefinitely," said Richard Landau, an Ann Arbor attorney for the Mahaffeys. "He never used school computers, never violated the district's Internet policy. This is a First Amendment issue. Students should be able to express their opinions."

The district's attorney, Michael Weaver, said the system should be able to regulate student conduct off campus if it threatens other students. "School districts have to be able to protect the safety of their students." Landau also said the district didn't follow proper disciplinary procedures.

Weaver disagreed. "We're satisfied that (Mahaffey) received due process and that the district followed all the rules." Reported in; *Detroit News*, April 11.

**Hamilton County, Tennessee**

A Tennessee school system has earned $7,000 for helping to promote a new technology designed to block offensive language from television programming. In an agreement with Global Cable, Inc., of Trenton, Georgia, the Hamilton County Schools received 2,800 of the company's ProtecTV devices to connect to classroom televisions. In return, school officials encouraged thousands of students to take fliers home to their parents advertising the product.

The school system also received $33 for each ProtectTV box sold during a two-month sales promotion that started in January. The new electronic device—a hand-sized box selling for $79.95—selectively mutes words and phrases that television viewers might consider objectionable. Besides blocking the obvious lexicon of four-letter curse words, the device mutes or edits from closed-captioning scripts words such as stupid, moron, cocaine, horny, intercourse, hell, and shut up.

Every time a word is spoken, it is compared to a dictionary of more than four hundred offensive words and phrases. If the word matches, it is deleted from the soundtrack and captioning. The viewer will experience a momentary gap in the audio, and for viewers reading the captions the undesirable written word is replaced by XXXXs. The boxes can be connected to a television, VCR, cable box, DVD player, or satellite TV system.

Global Cable Vice President Allan Ward said the company purchased worldwide rights to manufacture and sell ProtecTV last year after he saw it demonstrated at a cable product show in Toronto. Diane LaPierre, a former forklift operator from Calgary, Alberta, developed and patented the technology after trying to use closed captioning to help teach her son to read.

Global Cable approached Hamilton County school board member Marty Puryear about test-marketing the product through an agreement with the Chattanooga-area schools. "It just seemed like something that would work. You are helping public education, and it gives you a chance to test market your product," Puryear said. The school board agreed. Ward sold about 225 devices.

The Hamilton County school system actively promotes character education, district officials said, and ProtecTV helps reinforce the program's goals. "Most of the [television] programs that [teachers] show won't have any bad language in them, but occasionally there will be a video that isn't rated and profanity or nasty words will show up," said Charles Joynes, principal of Clifton Hills Elementary. "I think it's a wonderful tool. It shows students that we are serious, that we don't want that language used."

Besides supporting the district's character-building initiatives, Joynes said, the ProtecTV devices will help shield the district from liability for unintentionally exposing students to objectionable language. The technology "alleviates any problems we could have with parents if a kid goes home and says, 'Guess what I heard today at school,'" Joynes said. "You could just imagine the problems we could have." Reported in: *eSchoolNews Online*, April 15.

**Norfolk, Virginia**

The American Civil Liberties Union has gotten involved in the case of a middle-school student who was suspended from school for having blue hair. Jesse Doyle, a sixth-grader at Norview Middle School, was told that he cannot return to class until has hair has been "returned to its original color," according to his mother, Kim McConnell. McConnell said she was especially surprised by the school's action because she has an older son in the Norfolk school system who "has been coloring his hair for two years, and has never had a problem." Ironically, she said she let Jesse dye his hair "as a reward for getting good grades."

Rebecca K. Glenberg, legal director for the Virginia ACLU, faxed a letter to Norview principal Vivian Hester. The letter explained the ACLU's contention that Doyle's suspension "violates both school policy and the U.S. Constitution," the ACLU said. The school contends brightly colored hair can be disruptive.

ACLU Virginia executive director Kent Willis said the issue is about more than "one kid's little desire to have blue hair. Ultimately, it's about the right to express yourself." Reported in: Associated Press, April 29.

## colleges and universities

**Berkeley, California**

Forty-two members of a pro-Palestinian group at the University of California at Berkeley who may face suspension for occupying a classroom building say they are being unfairly singled out for punishment. More than a hundred members of Students for Justice in Palestine staged a protest in Wheeler Hall, one of the largest academic buildings on the campus, for several hours on April 9, in part to demand that the university divest its financial holdings in companies that do business in Israel. Campus police officers arrested 79 people as they removed the protesters from the building. University officials said the protesters made it difficult for students in the building to take midterm exams and for professors to conduct classes.

Two days before the protest, Chancellor Robert M. Berdahl held a news conference at which he urged pro-Palestinian and pro-Israeli student groups to be respectful of opposing views at forthcoming protests, and warned that any disruption of classes would not be tolerated. The university suspended its recognition of the group pending an investigation into its April 9 protest. For the duration of the suspension, which is of indefinite length, the group cannot stage protests, pass out fliers, or set up tables in public areas on the campus. It also loses access to university resources typically available to student groups, like public-address systems.

The 42 Berkeley students who are members of the organization and were arrested also received letters formally notifying them of the violations of university policy they have been charged with. Among the charges were obstructing teaching, disturbing the peace, and failing to comply with the orders of campus police officers. They face suspensions of up to one year, according to university officials.

"No other protest or nonviolent civil disobedience has been faced with that kind of scrutiny from the administration," Snehal A. Shingavi, a graduate student in English and a member of the pro-Palestinian group, said. He said the threats of suspension contradict Berkeley's history of civil disobedience, and are disproportionate to the disruption caused.

If suspended or otherwise disciplined, the students can appeal the decision to the vice chancellor for undergraduate affairs. Meanwhile, they can dispute the charges against them to a committee made up of students, faculty members, and administrators. That committee can then recommend a course of action to the dean of students.

University officials could not immediately confirm if any Berkeley student has ever been threatened with suspension for participating in a campus protest. They said it is not unheard of for a student group to have its recognition suspended, however, noting that recognition of the pro–affirmative-action group By Any Means Necessary was suspended for several weeks last spring after its conference in the student union descended into chaos. Reported in: *Chronicle of Higher Education* (online), April 29.

**San Francisco, California**

San Francisco State University is vowing to prosecute a "small band of bigots" who turned competing rallies between pro-Israel and pro-Palestinian groups into an ugly clash of words and actions. Palestinian supporters reportedly shouted "Hitler should have finished the job" and "Get out or we will kill you," while pro-Israel protesters reportedly called their counterparts "camel jockeys" and "sand niggers."

Accounts of what actually happened on the San Francisco State campus May 7 differ sharply. But the university's president, Robert A. Corrigan, said, "In my fourteen years as president of this university, I have never been as deeply distressed and angered."

"Strong—even provocative—speech is not the problem, nor are strongly held opinions on highly charged topics. Rather, it was the lack of civility and decency" from "a small but terribly destructive number of pro-Palestinian demonstrators" who became "threatening in gesture and hostile in language," he said.

Based on accounts of various participants, some 450 students and local residents gathered on the campus at a rally in support of Israel, which began with a Holocaust survivor defending recent Israeli military actions as a fight against terrorism. Among other speakers, a Russian immigrant lauded religious freedom and tolerance in the United States. He was reportedly countered by some 100 supporters of Palestinian statehood who yelled, "Go back to Russia, Jew." According to a number of firsthand reports, the pro-Palestinian supporters also drowned out the pro-Israel rally with bullhorns and whistles. From behind metal barricades, per university rules, they toted signs reading, among other things, "End the occupation now" and "Israel is a racist state."

At the rally's end, Palestinian protesters crossed the barriers and began mingling with the supporters of Israel. One pro-Palestinian protester tore down an Israeli flag and stomped on it. A shoving match ensued in a corner of the plaza, during which some members of the pro-Palestinian crowd allegedly yelled such phrases as "Jews off campus," "Death to Jews," "Get out or we will kill you," and "Hitler should have finished the job." A ring of campus and city police officers served as a buffer between the crowds.

Leila Qutami, a San Francisco State sophomore and a member of the General Union of Palestinian Students who attended the rally, called the accusations of the slurs invoking Hitler "lies." She said that her group had planned a silent exhibition that included a mock refugee camp, a mock Israeli checkpoint, and images from Jenin, a refugee camp recently attacked by Israeli tanks. The presence of barricades provoked

the Palestinian supporters, Qutami said, as did what she says were "racist" epithets aimed at the defenders of Palestinian statehood by supporters of Israel.

Qutami, who said she had videotaped the events, said supporters of Israel had called the pro-Palestinian protesters "sand niggers" and "camel jockeys" before the rally even started. She also said the pro-Israel protesters photographed supporters of Palestinian statehood and told them, "We're sending these photos back to the Israeli government and you're never going to get back to your homeland."

"This was not a peace rally," added Qutami. "It was a pro-Israel rally. And, to a Palestinian, that means being in support of the displacement of Palestinians. What [the supporters of Israel are] trying to do is paint us as anti-Semitic, which couldn't be farther from the truth. We are Semitic. Being anti-Israel and anti-Semitic are two totally different things. They're feeding off of the emotion of the American people by saying anything that's against Israel is anti-Semitism. They're the ones being racist."

The pro-Palestinian protesters were "aggressive" but "not violent," said Dennis Dubinsky, a San Francisco State senior and a member of Hillel, a Jewish student group. Dubinsky, one of seven chief organizers of the rally, said the clash was "nothing new" for the institution, which is plagued by perceptions that it is anti-Semitic. The cause of the conflict, Dubinsky said, is that San Francisco State "fosters an environment where—basically they're so against endangering free speech that it ends up fostering an environment of hate speech, almost."

San Francisco State has a history of tension between supporters of Israel and supporters of Palestinian statehood. In January 2001, a Palestinian student who had recently graduated admitted leaving a message on Hillel's answering machine that said, in part, "I will teach you a very good lesson, you fascist Nazi Zionists" and "I will get every single one of you." In 1996, San Francisco State's annual Israel Caravan, a celebration of Israeli and Jewish culture, drowned out a handful of pro-Palestinians who criticized Israel. Reported in: *Chronicle of Higher Education* (online), May 14.

## film

**Baton Rouge, Louisiana**

Movie makers need to be held responsible for their product, said lawyers who blame the movie *Natural Born Killers* for a crime spree that left a woman paralyzed and a man dead. The husband and children of Patsy Byers, shot in 1995 by Sarah Edmondson, will appeal if the First Circuit Court of Appeals rejects their case, attorney Joe Simpson said after arguments in the case April 10. It was expected to be months before the First Circuit rules in the lawsuit against director Oliver Stone and others involved in producing the film.

Edmondson, who was 18 at the time, said she and her boyfriend, Benjamin Darras, had watched the movie repeatedly before setting out from Oklahoma. In Mississippi, Darras shot and killed a businessman. In Louisiana, Edmondson used her father's gun to hold up and shoot Byers, a store clerk who later died of cancer.

Simpson and attorneys Rick Caballero and Ron Macaluso appealed a district court ruling, which dismissed the case on grounds that the filmmakers were protected by the Constitution's free-speech provisions. "We're fighting the First Amendment and that's a fight that we really don't care for except in this special circumstance," Simpson said. He said more than a dozen murders around the world have been attributed to *Natural Born Killers.* Similar cases against the movie's makers have failed, but none has reached the U.S. Supreme Court.

However, in 1999, the Supreme Court denied Stone's and Time Warner's request to be dropped as defendants on First Amendment grounds. They were joined by 27 media companies including ABC, CBS, NBC, Fox Broadcasting Co., the Los Angeles County Bar, the Recording Industry Association of America, Inc., and the Motion Picture Association of America, Inc.

State District Judge Bob Morrison threw out the case against Stone and Time Warner in March 2001, saying they are protected by the First Amendment. Morrison ruled that the Byers family could not show that Stone meant the film to incite violence. Reported in: freedomforum.org, April 12.

## Internet

**Washington, D.C.**

Saying the Internet holds dangers for children, the House voted May 21 to expand wiretapping authority to target molesters who find young victims online and to establish a new domain for kid-friendly Web sites. The wiretapping measure was approved 396–11; it would allow investigators to seek wiretaps for suspected sexual predators to help block physical meetings between molesters and children they meet via the computer.

Lawmakers cited the recent death of Christina Long, a 6th grader from Danbury, Connecticut, in urging passage of both bills. Police say she was strangled and her body dumped in a ravine by a 25-year-old man she met in an Internet chat room. "The threat to our children is real," shouted Rep. Nancy Johnson (R-CT), the chief sponsor of the wiretapping measure.

Wiretaps could be authorized for people suspected of engaging in child pornography, of trying to get children to perform sexual acts for money or of traveling to or bringing children for sexual activity. Rep. Robert Scott (D-VA) argued against expanding wiretap authority, voicing concerns that even current limited use by law enforcement typically results in overhearing innocent conversations.

A similar wiretapping bill passed the House last year but died in the Senate.

A second bill approved on a 406-2 vote would have the federal government oversee a ".kids.us" domain on the Internet that would have only material appropriate for children under 13. Web site operators' participation would be voluntary. Parents could set computers to only allow a child access to addresses ending in .kids.us.

Supporters of the bill, sponsored by Rep. John Shimkus (R-IL) said that it should reduce the chance of accidental exposure to pornography and to other Web sites considered harmful to children, and that it would not provide any access to interactive features, such as chat rooms. Groups opposing the domain, including the American Civil Liberties Union, called the legislation a backdoor attempt at censorship. Reported in: Associated Press, May 22.

**Washington, D.C.**

The Federal Trade Commission (FTC) has extended a rule that allows children's Web sites to adjust their parental consent practices based on a federally approved "sliding scale." Under federal law, operators of youth-oriented Web sites must obtain parental consent before collecting any personal data about children younger than 13. But under interim rules, Web sites may obtain that consent through a simple e-mail message if they are only using the data that they collect internally. Web sites that divulge such information to other parties—through chat rooms, marketing agreements, etc.—must obtain a more verifiable form of parental consent, either through a digital signature, a printed and mailed form or some other established electronic method.

That sliding scale approach was set to lapse in April, forcing all kid-oriented Web sites to follow the stricter parental-consent guidelines, but the FTC announced April 22 that it had extended the sliding scale mechanism through 2005. The FTC said that it based its decision on the continued lack of widely available, inexpensive electronic mechanisms for verifying parental consent. Reported in: *Washington Post,* April 22.

**Columbus, Ohio**

An anti-pornography law that prosecutors say is aimed only at sexual predators could affect mainstream literature and movies, says a group that sued to overturn the measure May 6, hours after Gov. Bob Taft signed it. The law adds computer images to the list of possible ways to display sexually explicit material and other content deemed "harmful to juveniles." But opponents say the law is unconstitutional.

"The lawyers are telling us . . . in all likelihood they believe the Ohio law will be sustained," Taft said after signing the bill. "This bill leaves no doubt: If you exploit children in Ohio through any medium, you will be punished," Taft said.

Attorneys for a Dayton bookstore owner, Ohio Newspaper Association, Video Software Dealers Association, and others filed a challenge in U.S. District Court in Dayton. The groups said the definition of "harmful" is too broad and unfairly applies Ohio standards to the Internet, a global medium.

"It covers violence. It covers glamorization of crime. It covers brutality," said Michael Bamberger, an attorney for the opponents. "It covers many things, all of which are First Amendment protected."

Jim Latham, co-owner of Wilkie News bookstore in Dayton, said he would be afraid even to display questionable material and might have to card juveniles or cordon off sections of his store.

The "harmful to juveniles" definition has been law for 26 years, and police and prosecutors so far have not gone after books or movies, countered Franklin County Prosecutor Ron O'Brien. "This bill does not make anything else illegal that is not illegal now," agreed its sponsor, state Rep. Jim Hughes, a Columbus Republican. Hughes said the bill was narrowly tailored to conform with federal court decisions on obscenity laws.

His bill added to the 1974 definition of the word "material," so that it includes images that appear on a computer monitor, TV screen or liquid crystal display, transmitted via e-mail through the Internet, or recorded on a computer hard drive or floppy disk. Simply connecting to a Web site does not violate the law, says an analysis by the Legislative Services Commission. The image must be part of a "direct presentation to a specific, known juvenile or group of known juveniles."

The groups challenging the law said they don't question the state's power to stop child pornography or enticing minors into inappropriate activity. But banning dissemination of harmful materials on the Internet criminalizes a broad range of constitutionally protected speech for users worldwide, Bamberger said. Courts have ruled against similar laws in other states, he said.

"The way the Internet is set up, you cannot distinguish between states in terms of the people that receive transmissions on the Internet, nor can you distinguish and exclude minors," Bamberger said.

Hughes said he wrote the bill because of a case he handled while an assistant prosecutor in Franklin County. Mark Maxwell of Oxford was sentenced to 18 years in prison in 1999 on 18 counts related to enticing minors into sex through Internet chat rooms and e-mail. Maxwell was arrested at an ice cream store, where he set up a meeting with a 13-year-old girl, who wore a police wire. But Hughes said four counts were dismissed because jurors said the law on disseminating pornography did not include electronic images.

A 2001 state law covers using the Internet or telephone to solicit sex from minors. Several police agencies in Ohio have task forces dedicated to Internet crimes. Reported in: freedomforum.org, May 7.

**Harrisburg, Pennsylvania**

Pennsylvania Attorney General Mike Fisher announced April 22 that a new state law requires internet service providers

to deny access to any child pornographic material on their service that is available to individuals in the Commonwealth. Fisher said his Child Sexual Exploitation Unit would enforce the new law. "We must do everything we can to protect children from sexual exploitation," Fisher said. "This new law is designed to stop the proliferation of Internet child pornography by requiring that Internet service providers prevent access to sites that contain this offensive and illegal material." Reported in: PRNewswire, April 22.

**Sterling, Virginia**

The unedited video of journalist Daniel Pearl being murdered is back online. An Internet hosting company in Sterling, Virginia, which the FBI threatened with federal obscenity charges, said May 27 that it would resume distribution of the horrific 4-minute video. Pro Hosters owner Ted Hickman said he and his customer, ogrish.com, decided to thumb their nose at the bureau's warnings for two reasons: a realization that the FBI's threats were spurious, and the legal aid of the American Civil Liberties Union.

"We have decided to take the hot seat in this position, mainly because we and ogrish.com believe strongly in freedom of speech and freedom of press and the First Amendment," Hickman said. "It's definitely something that I think people should be able to view if they choose to."

A week earlier, FBI agents from the Newark field office contacted a number of hosting companies, including Pro Hosters. After consulting with his customer—ogrish.com owner Dany Klinker, who lives in the Netherlands—Hickman deleted the video showing the 38-year-old *Wall Street Journal* reporter being slain in Pakistan by a radical Muslim group.

A videotape of Pearl's execution was delivered to a U.S. consulate in February, and a copy eventually appeared online. CBS News broadcast a 30-second excerpt, which anchor Dan Rather defended as necessary to "understand the full impact and danger of the propaganda war being waged." Reported in: Wired.com, May 28.

## press freedom

**Washington, D.C.**

Lawyers for the *Washington Post* on May 11 challenged a subpoena served by the United Nations war crimes tribunal on a former reporter for the newspaper, arguing that journalists who work in conflict zones should not be required to give testimony unless absolutely vital because it could hamper their work and endanger their lives. Lawyers at the court said a ruling on this case is expected to set an important precedent for future war crimes tribunals, above all for the new International Criminal Court, set to begin work in July.

European reporters and documentary filmmakers have already testified voluntarily in several cases at the court in The Hague that deals with war crimes in the former Yugoslavia, but no American has agreed to appear. Until now, however, the tribunal had never subpoenaed a reluctant reporter. In this case, the burning issue is not the confidentiality of a reporter's sources or notes, a subject often fought over in American courts, the lawyers said, but the principle of when and why a reporter working in a war zone or an area of conflict can be summoned to appear as a witness.

The lawyers for the *Washington Post* said they wanted the court to draw up rules on behalf of journalists everywhere that deal with the circumstances under which they can testify. These might resemble federal guidelines in the United States. In earlier cases, lawyers, court employees and Red Cross workers have been exempted from testifying, according to Geoffrey Robertson, who led the *Post's* legal team. "We say there is another category that should be entitled to exemption from testifying, namely, journalists."

The *Post* is seeking to block the appearance of its former correspondent, Jonathan Randal, in the case of Radoslav Brdjanin, a Bosnian Serb, who has been charged with genocide, persecution and deportation of non-Serbs during the Bosnian war. When the trial began early this year, prosecutors said they wanted to introduce as evidence an article by Randal published in 1993 which quoted Brdjanin. Lawyers for Brdjanin said they would accept the article as evidence only if they had a chance to cross-examine Randal. Prosecutors agreed and asked the judges to issue a subpoena. It was served by French bailiffs in Paris, where Randal lives. Reported in: *New York Times*, May 22.

## access to information

**Detroit, Michigan**

The Bush administration ordered state and local officials April 18 not to release information about immigration detainees even as the government lost a crucial related battle in federal appeals court. The new directive was issued by James W. Ziglar, the commissioner of the Immigration and Naturalization Service, in consultation with the Justice Department. The rule prohibited state and local employees from disclosing the names of immigration detainees in their custody. The regulation followed a ruling in March by a New Jersey judge that ordered two county jails to release the names of immigrants detained after September 11.

The order was part of the government effort to keep secret the names of people taken into custody after September 11 and bar access to their immigration hearings. That effort was dealt a legal setback in April when a federal appeals court in Cincinnati said the government must release transcripts of past immigration court hearings in the case of Rabih Haddad, a detainee and a co-founder of a Muslim charity whose assets the government had frozen.

The court, the United States Court of Appeals for the Sixth Circuit, said there was just a "slim likelihood" it would

reverse a lower court decision that compelled the government to open Haddad's future immigration hearings.

Michigan newspapers, including *The Detroit Free Press* and *The Detroit News*, have sued to open the hearing of Haddad, a native of Lebanon who lived with his family in Ann Arbor. The newspapers were joined in the suit by the American Civil Liberties Union and Rep. John Conyers, Jr., Democrat of Michigan. The ACLU has filed similar suits to gain information about detainees in federal and state court in New Jersey. The suits pitted First Amendment rights against a law approved after the September 11 attacks that permitted the secret detention of immigrants.

The civil liberties union criticized the new directive, saying the order was an effort to circumvent the authority of state legislatures that adopt public information laws and state courts that enforce them. Bush administration officials acknowledged that the rule, issued under the Immigration Nationality Act, had at least in part been prompted by the suit in New Jersey that sought to release detainees' names.

"Disclosure of that information could provide terrorist organizations with information that threatens the lives of American citizens and the national security of the United States," said Mark Corallo, a spokesman for the Justice Department.

In Haddad's case, the government will now have to appeal to the Supreme Court to withhold transcripts of past hearings. Haddad, a co-founder of the Global Relief Foundation, was taken into custody in December because his visa had expired. A judge in Federal District Court sided with the newspapers and rejected government arguments that opening the hearings would pose a security risk. The Justice Department asked the appeals court for a stay while it considered the case. It received a temporary stay, but on April 18 the appeals court rejected a longer stay that would have permitted the government to withhold Haddad's immigration file while the appeals court considered the case.

The government continued to argue that open hearings would compromise investigations of terrorist threats. The appeals court said First Amendment rights took precedence. "We recognize that the government alleges substantial injuries to the integrity of its terrorism-related investigation," the decision said, "but the likelihood of such harms occurring in this particular case is remote, given the fact that information about Haddad's detention has already been disseminated."

The decision was reached by a panel of judges comprised of R. Guy Cole Jr., Martha Craig Daughtrey, and Karen Nelson Moore. The immigration court had refused to give reporters access to records of Haddad's previous hearings. A lawyer for *The Free Press*, Herschel Fink, said he would ask a federal district judge to hold Elizabeth Hacker, an immigration court judge, in contempt if reporters were denied access again. Reported in: *New York Times*, April 19.

## copyright

**Atlanta, Georgia**

The protectors of Margaret Mitchell's *Gone with the Wind* dropped their yearlong battle to stop publication of Alice Randall's *The Wind Done Gone*, agreeing to an out-of-court settlement. Under the terms of the settlement, Randall's publisher, Houghton Mifflin, agreed to make an unspecified contribution to Morehouse College, a historically black school in Atlanta. In return, lawyers for Mitchell's estate agreed to stop trying to block sales of Randall's book, which tells the "GWTW" story from a slave's point of view.

An Atlanta judge had blocked publication of *The Wind Done Gone* in April 2001, ruling that it violated the copyright of Mitchell's 1936 classic about the Civil War. A month later, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta ruled that the injunction was an "extraordinary and drastic remedy" that "amounts to unlawful prior restraint in violation of the First Amendment." The book was published in June 2001 and was on bestseller lists for weeks.

Even though the book was already available, lawyers for the Mitchell estate had said they would continue the lawsuit in hopes of getting damages. Lawyers for the Mitchell trust argued that Randall appropriated characters, scene, setting, plot and even some passages straight from *Gone with the Wind*. Houghton Mifflin and Randall argued that *The Wind Done Gone* was a parody protected by the First Amendment. They also maintained that, by imagining what Scarlett O'Hara's slaves thought and felt, the book offered a new perspective on Mitchell's story.

Under the settlement, Randall retains rights to any movie adaptation of her book.

"We're glad that it is all behind us," said her husband, David Ewing. "(The book) will now forever be in the hands of readers, librarians, and book stores."

The Mitchell family has long-standing ties to Morehouse. In the 1940s, Mitchell paid for dozens of scholarships for students under a secret arrangement with the school's president. This year, Mitchell's nephew gave the college $1.5 million to endow a humanities chair in her name.

The publishing industry closely watched the lawsuit, which could have affected how extensively parodies can borrow from a copyrighted works. Reported in: *Newsday*, May 10. □

**NEW TEXT HERE**

*(court overturns CIPA . . . from page 145)*

The court permanently enjoined the Federal Communications Commission and agencies administering the Library Services Technology Act from withholding funds from public libraries that have chosen not to install blocking technology on all Internet-ready terminals. More than $255.5 million has been committed to libraries over four years with the federal e-rate program. LSTA has distributed more than $883 million alone to libraries since 1988.

In a powerfully worded but sometimes wistful opinion, Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit, wrote that the three-judge panel hearing the case was "sympathetic" to the government's goal of using technology to protect children from the worst of the Internet. But, he added, "Ultimately this outcome, devoutly to be wished, is not available in this less than best of all possible worlds."

The law at issue, the Children's Internet Protection Act, was Congress's third effort since 1996 to shield children from pornography carried over the Internet. As with the two earlier versions, this one ran afoul of constitutional protections. The act required schools and libraries to install a "technology protection measure," like Internet filters, to prevent access to child pornography and materials considered obscene or "harmful to minors." Libraries and schools that did not comply would lose federal subsidies for financing Internet access.

The law included provisions for a special three-judge panel to hear any legal challenges to it. Along with Chief Judge Becker, Judges John P. Fullam and Harvey Bartle III of U.S. District Court served on the panel. Judge Becker was appointed by President Ronald Reagan, Judge Bartle was appointed by President George H. W. Bush, and Judge Fullam was appointed by President Lyndon B. Johnson.

The decision came a month before a Congressionally imposed deadline for libraries to install filters or lose the federal Internet financing. The appellate court's decision addressed only the provisions of the law affecting public libraries; schools are still subject to the law's provisions.

The libraries and other plaintiffs presented numerous examples of legitimate sites that had been erroneously blocked by the four most popular filtering programs. The three-judge panel mentioned many of those blocking errors in its opinion, including sites covering topics in education, medicine, politics and religion. Other sites the filters blocked, the panel noted, included the Knights of Columbus Council 4828 in Fallon, Nevada; a site for Tenzin Palmo, a Buddhist nun; a site that promotes federalism in Uganda; and the Lesbian and Gay Havurah of the Jewish Community Center of Long Beach, California.

The panel called filters "blunt instruments" because of their propensity to overblock legitimate sites and underblock objectionable sites. "We find that it 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," the opinion stated.

The panel said that libraries could use less restrictive alternatives to filters, like setting policies on what users could view on the Internet, or offering parents filters for when their children use computers. Libraries could also keep children from seeing objectionable material on another patron's computer by having screens positioned to be visible only from the user's vantage point, the court said.

The government had argued that the filtering software was effective enough to block most of the objectionable material, and that the law did not require a perfect performance. Government lawyers also contended that libraries restrict all manner of materials in the normal course of buying books. But the court ruled that mandating filters in a public forum like a library subjects the restrictions to a high degree of scrutiny under the First Amendment—far more than that which should apply to a library's budget-based purchasing decisions.

"The court has barred the law from turning librarians into thought police armed with clumsy filters," said Ann Beeson, litigation director of the A.C.L.U.'s technology and liberty program.

Ginnie Cooper, director of the Multnomah County Library in Oregon, a plaintiff in the lawsuit, welcomed the court's recognition that librarians are well-versed in using their professional skills to help patrons find what they want online and avoid Internet sites they don't want to see. "The court's decision affirms the importance of local control in determining library Internet policies," she said. "No one wants children to be exposed to pornography on the Internet, on television or anyplace else. What's important is finding effective solutions to this problem."

David Burt, a spokesman for N2H2 Inc., a filtering company based in Seattle, and a consultant to Congress when it drafted the law, said that the thousands of blocked sites the court alluded to constituted a tiny fraction of the world's Web sites. "We consider a 99-plus percent accuracy rate to be something to be proud of," he said.

Nationwide, roughly half of the nation's public libraries use Internet filters, according to a recent survey of 355 libraries published in the *Library Journal*. Of those, almost all filter children's terminals, while approximately half also filter adult PCs.

According to the *Library Journal* study, the average cost of using filters was $1,772 per library system. Smaller libraries were far less likely to use the technology, and those that did spent an average of $360 on the technologies annually. Reported in: *New York Times*, June 1; *Washington Post*, June 3. □

## success stories

## libraries

**Tampa, Florida**

With the go-ahead of two Hillsborough County School District materials review committees, *The A–Z Encyclopedia of Serial Killers*, by Harold Schechter and David Everitt, and *The Encyclopedia of Serial Killers*, by Michael Newton, were reshelved at the district's high schools. The decision was made over the objections of Valrico resident Tony Pawlisz, who filed a complaint after his 16-year-old son brought home the Schechter book.

Pawlisz, who is running for a seat on the Hillsborough County Commission, voiced a fear that the books' gruesome details might incite young readers into committing Columbine-like acts. "If anything happens from this point on, the blood is on their hands," Pawlisz said.

Conceding one challenged book's "sensationalist format," Durant High School media specialist Carol Schaefer wrote in her defense of *The A–Z Encyclopedia of Serial Killers* that it "was one of the few books that dealt with serial killers and the 'pop culture' that exists around them in our society." Reported in: *St. Petersburg Times*, April 9, 20.

**Fairfax County, Virginia**

The board of the Fairfax County Public Schools voted April 22 to retain *Gates of Fire* in the district's high schools over the objections of a father who protested the book's graphic language. "The book contains too much profanity, too much violence, and lurid depictions of sadistic behavior," complainant Stan Barton explained in writing to the board. "I think we as a school board have a right and an obligation to set standards.

A historical novel by Steven Pressfield, *Gates of Fire* recounts in sometimes grisly language the Persian defeat of the Spartans at Thermopylae in 480 B.C. Barton is a member of Parents Against Bad Books in Schools (PABBIS), an organization that seeks more parental influence in the materials-selection process for the school district. Complaints by PABBIS founder Kathy Stohr in 2001 to *Druids*, by Morgan Llywelyn, and *Pillars of the Earth*, by Ken Follett, resulted in the books being age-restricted. In reaction, local free-speech advocates formed the Right to Read Coalition. The school board invited both groups to attend a May 5 town meeting called to explain the district's selection process. Reported in: *Washington Post*, April 25.

## schools

**St. Paul, Minnesota**

Saying patriotism should come from the heart, Gov. Jesse Ventura on May 22 vetoed a bill that would have required public school students to recite the Pledge of Allegiance at least once a week. Ventura had hinted he would veto the bill, saying on several occasions he had seen no problem with patriotism in the United States, particularly after September 11. He compared a pledge requirement to the indoctrination practiced by the Nazis and the Taliban.

"I am vetoing this bill because I believe patriotism comes from the heart," Ventura said in his veto message. "Patriotism is voluntary. It is a feeling of loyalty and allegiance that is the result of knowledge and belief. A patriot shows their patriotism through their actions, by their choice."

Being a patriot means voting, attending community meetings, paying attention to the actions of government and speaking out when needed, he said. "No law will make a citizen a patriot," Ventura said.

The measure was a compromise that easily passed both the House and Senate. But the Legislature adjourned and cannot override the veto unless Ventura convenes a special session for some other purpose, which appeared unlikely.

A Senate provision would have required teachers to tell students who don' t want to participate that they don' t have to. State Sen. Mee Moua (DFL-St. Paul) argued that the statement would have helped prevent nonparticipants from being branded as unpatriotic. But House negotiators said such a declaration would undermine the pledge' s importance and set a bad precedent for any other classroom directive, and the provision was dropped.

Instead, the vetoed bill would have directed school districts to inform students of their rights in a student handbook or school policy guide. School boards would have had the

power to opt out of requiring the weekly recitation via annual votes. Many schools already offer the pledge. A Minnesota School Boards Association survey last year found that 169 of 230 districts responding said that their students say the pledge with some regularity. But state Sen. Mady Reiter, a chief sponsor of the bill, said that wasn't enough.

"I am very disappointed that the governor . . . saw fit to veto a Pledge of Allegiance bill which gave opt-outs at every opportunity," said Reiter (R-Shoreview).

Half the states now require the pledge as part of the school day, and half a dozen more recommend it, according to the National Conference of State Legislatures. This year, legislatures in several states were considering making the oath mandatory. It wasn't immediately clear how many had passed such requirements. Reported in: freedomforum.org, May 23.

**Albany, New York**

In response to criticism from writers and publishers, the New York State education commissioner said June 4 that literary passages in state-administered tests would no longer be altered to delete unwanted words or phrases.

"It is important that we use literature on the tests without changes in the passages," said the commissioner, Richard P. Mills. "I have looked carefully at the Education Department's current practices and the concerns of the writers and have directed that these changes be made."

Mills had received letters from prominent figures in literature, including novelists Annie Dillard and Frank Conroy and poet Wendell Berry, complaining about the state's policy of editing passages in the Regents exam, a policy described in an article in the *New York Times* June 2. The editing—characterized by critics as an ill-conceived effort to be politically correct—deleted nearly all references to race, religion, ethnicity, sex, nudity, alcohol and even modest profanity.

"Who are these people who think they have the right to 'tidy up' my prose?" wrote Conroy. "The New York State Political Police? The Correct Theme Authority?" Many writers and publishers were made aware of the state policy by Jeanne Heifetz, the mother of a high school senior in Brooklyn.

Heifetz inspected ten high school English exams from the past three years and discovered that the vast majority of the passages—drawn from the works of Isaac Bashevis Singer, Anton Chekhov, and William Maxwell, among others—had been sanitized of virtually any reference to race, religion, ethnicity, sex, nudity, alcohol, even the mildest profanity and just about anything that might offend someone for some reason. Students had to write essays and answer questions based on these doctored versions—versions that were clearly marked as the work of the widely known authors.

In an excerpt from the work of Singer, for instance, all mention of Judaism was eliminated, even though it is so much the essence of his writing. His reference to "Most Jewish women" became "Most women" on the Regents, and "even the Polish schools were closed" became "even the schools were closed." Out entirely went the line "Jews are Jews and Gentiles are Gentiles." In a passage from Annie Dillard's memoir, *An American Childhood,* racial references are edited out of a description of her childhood trips to a library in the black section of town where she is almost the only white visitor, even though the point of the passage is to emphasize race and the insights she learned about blacks.

The State Education Department, which prepares the exams, acknowledged modifying excerpts to satisfy elaborate "sensitivity review guidelines" that were in use for decades, but are periodically revised. It said it did not want any student to feel ill at ease while taking the test.

After making her discovery, Heifetz contacted most of the affected authors or their publishers, and found them angered that their words had been tampered with without their consent. Word circulated among groups concerned about censorship and literary affairs, and an assortment of them, including the National Coalition Against Censorship, the Freedom to Read Foundation, the Association of American Publishers, the New York Civil Liberties Union and PEN, jointly sent a letter to Mills, calling for an end to the practice. "Testing students on inaccurate literary passages is an odd approach to measuring academic achievement," the letter said.

Tom Dunn, a spokesman for the State Education Department, said Mills ordered an end to the editing after conferring with the state Regents chancellor, Robert M. Bennett, and members of the Board of Regents. But Dunn said the state had begun backing away from its policy even before the announcement, and had already made sure that all literary passages contained in a Regents exam to be administered on June 18 and June 19 were true to the authors' language. Reported in: *New York Times*, June 2, 5.

## publishing

**Baltimore, Maryland**

A book chronicling the history of the Bryn Mawr School, a private school in Baltimore, will be published by the Johns Hopkins University Press—ending a dispute in which the press had called off plans to publish the work, in response to threats of legal action from the school. More than 140 historians had petitioned the school to allow the book's publication.

In a letter from the Bryn Mawr School's trustees to Andrea D. Hamilton, the book's author, the school established only one condition of publication: that the book contain a disclaimer stating that it is "not an official or sanctioned history" and that "the opinions expressed in this work are those of the author only and do not represent the opinions of the Bryn Mawr School, its trustees, administrators, faculty, alumnae, or students." Bryn Mawr had control over the book's fate because of a contract Hamilton signed in 1995 to gain access to the school's archives. The contract read, in part: "No record, nor any part of a record, may be published or reproduced without the prior written authorization of the School Archivist."

In 1998, Hamilton, a part-time professor at Southern Methodist University who wrote the book as a dissertation in history at Tulane University, signed a publishing contract with the Johns Hopkins University Press. The press then canceled the contract in 2000, after Bryn Mawr threatened legal action. School officials were tight-lipped about the controversy but were reportedly dissatisfied with certain aspects of the book's portrayal of the school.

A "full and accurate" account of Bryn Mawr, argued the letter, which was sent by David M. Funk, president of Bryn Mawr's Board of Trustees, would include "academic and scholastic experiences and perspectives of faculty and students" as well as "perspectives of the four living heads of the school." The 44-member board made "the right decision," said Funk.

Hamilton noted that no complaints were ever stated formally, but she speculated that school authorities had taken issue with her briefly mentioning reports that the school's founder was a lesbian; conflicts at Bryn Mawr over desegregation in the 1960s, which Hamilton described as "not a happy time" at the school; and what she characterized as the school's efforts toward "being elite and wanting to be diverse" and "tensions like that." But she was quick to note that the book is "about the Bryn Mawr School, but it's more about the way girls' education has changed in the last 125 years in relation to society" in general.

She called her research experience "terrible" but said that the petition on her behalf had "restored my belief in the decency and courage of people in academia." On the stipulation that relegates her work to an unofficial history, Hamilton had no reservations. "I never intended my book to be an official or sanctioned history," she said. "If it had been that, it wouldn't have been an independent, academic pursuit. I don't want to be the school's official historian."

Jim Jordan, director of the Hopkins press, said: "We're certainly delighted by the news. It's the appropriate action." He added, "We look forward to publishing with" Hamilton. Reported in: *Chronicle of Higher Education* (online), May 23. □

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*(ALA* v. *U.S. . . . from page 160)*

when it indiscriminately facilitates private speech whose content it makes no effort to examine. . . .

While the First Amendment permits the government to exercise editorial discretion in singling out particularly favored speech for subsidization or inclusion in a state-created forum, we believe that where the state provides access to a "vast democratic forum," open to any member of the public to speak on subjects "as diverse as human thought," and then selectively excludes from the forum certain speech on the basis of its content, such exclusions are subject to strict scrutiny. These exclusions risk fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects. . . .

The provision of Internet access in public libraries, in addition to sharing the speech-enhancing qualities of fora such as streets, sidewalks, and parks, also supplies many of the speech-enhancing properties of the postal service, which is open to the public at large as both speakers and recipients of information, and provides a relatively low-cost means of disseminating information to a geographically dispersed audience. Indeed, the Supreme Court's description of the postal system in *Lamont* seems equally apt as a description of the Internet today: "the postal system . . . is now the main artery through which the business, social, and personal affairs of the people are conducted . . . ."

In short, public libraries, by providing their patrons with access to the Internet, have created a public forum that provides any member of the public free access to information from millions of speakers around the world. The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak. In particular, speakers on the Internet enjoy low barriers to entry and the ability to reach a mass audience, unhindered by the constraints of geography. Moreover, just as the development of new media "presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts," the development of new media, such as the Internet, also presents unique possibilities for promoting First Amendment values, which also inform our assessment of the interests at stake, and which we believe, in the context of the provision of Internet access in public libraries, justify the application of heightened scrutiny to content-based restrictions that might be subject to only rational review in other contexts, such as the development of the library's print collection.

A faithful translation of First Amendment values from the context of traditional public fora such as sidewalks and parks to the distinctly non-traditional public forum of Internet access in public libraries requires, in our view, that content-based restrictions on Internet access in public libraries be subject to the same exacting standards of First Amendment scrutiny as content-based restrictions on speech in traditional public fora such as sidewalks, town squares, and parks:

The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means. The model for speech that the framers embraced was

the model of the Internet—distributed, noncentralized, fully free and diverse. Indeed, "[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media." In providing patrons with even filtered Internet access, a public library is not exercising editorial discretion in selecting only speech of particular quality for inclusion in its collection, as it may do when it decides to acquire print materials. By providing its patrons with Internet access, public libraries create a forum in which any member of the public may receive speech from anyone around the world who wishes to disseminate information over the Internet. Within this "vast democratic forum," which facilitates speech that is "as diverse as human thought," software filters single out for exclusion particular speech on the basis of its disfavored content. We hold that these content-based restrictions on patrons' access to speech are subject to strict scrutiny. . . .

To survive strict scrutiny, a public library's use of filtering software must be narrowly tailored to further a compelling state interest, and there must be no less restrictive alternative that could effectively further that interest. We find that, given the crudeness of filtering technology, any technology protection measure mandated by CIPA will necessarily block access to a substantial amount of speech whose suppression serves no legitimate government interest. This lack of narrow tailoring cannot be cured by CIPA's disabling provisions, because patrons will often be deterred from asking the library's permission to access an erroneously blocked Web page, and anonymous requests for unblocking cannot be acted on without delaying the patron's access to the blocked Web page, thereby impermissibly burdening access to speech on the basis of its content.

Moreover, less restrictive alternatives exist to further a public library's legitimate interests in preventing its computers from being used to access obscenity, child pornography, or in the case of minors, material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit speech. Libraries may use a variety of means to monitor their patrons' use of the Internet and impose sanctions on patrons who violate the library's Internet use policy. To protect minors from material harmful to minors, libraries could grant minors unfiltered access only if accompanied by a parent, or upon parental consent, or could require minors to use unfiltered terminals in view of library staff. To prevent patrons from being unwillingly exposed to offensive, sexually explicit content, libraries can offer patrons the option of using blocking software, can place unfiltered terminals outside of patrons' sight lines, and can use privacy screens and recessed monitors. While none of these less restrictive alternatives are perfect, the government has failed to show that they are significantly less effective than filtering software, which itself fails to block access to large amounts of speech that fall within the categories sought to be blocked.

In view of the severe limitations of filtering technology and the existence of these less restrictive alternatives, we conclude that it is not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment. Because this conclusion derives from the inherent limits of the filtering technology mandated by CIPA, it holds for any library that complies with CIPA's conditions. Hence, even under the stricter standard of facial invalidity proposed by the government, which would require us to uphold CIPA if only a single library can comply with CIPA's conditions without violating the First Amendment, we conclude that CIPA is facially invalid, since it will induce public libraries, as state actors, to violate the First Amendment. . . . □

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*(from the bench . . . from page 170)*

The American Civil Liberties Union, the Shelton, Connecticut, Sexual Health Network, Inc., and other groups, including the American Booksellers Foundation for Free Expression, sued the state in February 2001. The groups said in their suit that Vermont's new law, aimed at preventing the distribution of child pornography, was too broad and would allow authorities to censor anything deemed offensive to minors. The American Booksellers Foundation for Free Expression and several other groups were later dropped from the case after the judge said they failed to prove they had standing.

But the ACLU and the Sexual Health Network, Inc., a for-profit corporation that provides information about sex through, among other means, the Internet, prevailed. In April, Murtha granted the two their request for an injunction blocking enforcement of the law.

The law gives Vermont jurisdiction over material on a computer anywhere that is deemed to be offensive to minors. It makes exceptions for schools, museums, and public libraries, and for employees of those places who are doing work that serves their educational purposes.

In its arguments, the ACLU said Vermont law already regulated the possession of child pornography, and prohibited the use of the Internet to entice children into committing sexual acts. "The state's need to protect minors can be effectively addressed by two other statutes that don't regulate the content of legal adult speech," David Putter, a Montpelier lawyer who argued the case for the ACLU, said April 19. The ACLU had also argued that the law was too broad.

"This case is about legitimate valuable information that is being prohibited on the basis that it might be harmful to some minors," Putter said. The ACLU also claimed the law was unconstitutional because it violated the Commerce Clause, which limits state regulation of commerce if it impedes free trade in the nation. Murtha noted that the Vermont law could apply to commerce that takes place entirely outside the state.

"The law forces every speaker on the Internet in every state or community in the United States to abide by Vermont's standards, even if the online speech would not be found 'harmful to minors' in any other location," he wrote in his decision. Reported in: freedomforum.org, April 23.

## video games

**St. Louis, Missouri**

In a First Amendment case closely watched by the video game industry, a federal judge has upheld a St. Louis County ordinance that restricts minors' access to violent video games. According to the judge, games are not a form of protected speech. The ordinance requires arcade owners to segregate violent video games that are deemed harmful to minors into "Restricted-17" areas. It also prohibits the sale or rental of such games to minors unless they have the consent of a parent or guardian. In passing the ordinance, county legislators said that "exposure of children to graphic and lifelike violence contained in some video games has been correlated to violent behavior."

The Interactive Digital Software Association led a group of companies and game-related associations in the First Amendment challenge to the ordinance. Arguing that it restricted free expression rights, they maintained that if movies and plays are entitled to First Amendment protection, then so should interactive video games.

After examining games such as "The Resident of Evil Creek," "Mortal Combat," "DOOM," and "Fear Effect," the judge rejected IDSA's motion for summary judgment. "This court reviewed four different video games, and found no conveyance of ideas, expression or anything else that could possibly amount to speech," U.S. District Court Judge Stephen N. Limbaugh wrote. "The court finds that video games have more in common with board games and sports than they do with motion pictures."

In his opinion, Limbaugh held that even if video games were found to be a form of expression meriting some First Amendment protection, the ordinance would still be constitutional, because it served the compelling governmental interest of protecting the physical and emotional health of children. "The court finds that the county council can rely on society's accepted view that violence is harmful to children, especially when plaintiffs have admitted that intense violence may not be suitable for those younger than 17 years of age," Limbaugh wrote.

Limbaugh's decision conflicts with the Chicago-based U.S. Court of Appeals for the Seventh Circuit decision in *American Amusement Machine Association* v. *Kendrick,* which struck down a similar Indianapolis ordinance. In that decision, Judge Richard Posner wrote: "To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."

In a statement, IDSA President Doug Lowenstein acknowledged the Seventhth Circuit's decision and added, "We expect the same outcome here." Gail Markels, senior vice president and general counsel for IDSA, added, "The judge erred by focusing on the medium rather than the content. Games are protected speech. They tell stories, contain dialogue and are as complex as movies and plays." Reported in: *ABA Journal eReport,* May 3.

## etc.

**Richmond, Virginia**

A three-year court battle waged by the Sons of Confederate Veterans may be over, and the Confederate battle flag could appear on Virginia state license plates as early as this summer. A federal appeals court ruled April 29 that refusing to allow the group to display its logo is "viewpoint discrimination," upholding a ruling that U.S. District Court Judge Jackson L. Kiser handed down in January last year. Kiser said that the refusal to issue the tag bearing the Confederate flag amounted to discrimination and violated the group's right to free speech.

"This is a great victory, and it upholds our constitutional rights," said Brag Bowling, first lieutenant commander of the SCV's Virginia division. "It will be a great recruiting tool, something for all of our members to be proud of."

The SCV, a group that celebrates ancestors who fought in the Civil War, asked the Virginia General Assembly in 1999 to approve the special plate. After an impassioned plea on the Assembly floor by Del. Jerrauld C. Jones (D-Norfolk) the legislation passed, but barred the symbol that has been the group's logo since it was organized in 1896. In that speech, Jones said many black Americans connect the flag to hate and terrorism. He said it reminded him throughout his life of fear, anger and claims of racial supremacy.

A lawsuit filed on behalf of the SCV by the Rutherford Institute went first to the U.S. District Court. That decision was appealed by former Virginia Attorney General Mark L. Earley. After the state argued that the license plates constitute public speech and the state had the right to regulate which groups are allowed on Virginia plates, the U.S. Court of Appeals for the Fourth Circuit heard the case last October.

"The purpose of the special plate program primarily is to produce revenue while allowing, on special plates authorized for private organizations, for the private expression of various views," the three-judge panel said. State law requires that at least 350 special plates must be ordered before a design can be issued. Bowling said the group already has more than that.

But the battle still may not be over: It will be up to Attorney General Jerry Kilgore whether or not to appeal the most recent court decision to the U.S. Supreme Court. Reported in: *Richmond Virginian-Pilot,* April 30. □

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