

newsletter
on
intellectual
freedom



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The following is the edited text of the Intellectual Freedom Committee's report to the ALA Council, delivered at the ALA Annual Conference in New Orleans on June 28 by IFC Chair Julius Jefferson.

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

INFORMATION

Google Books Settlement

In consideration of the broad potential implications of the proposed Google Book Search Settlement in areas as diverse as intellectual freedom, copyright and fair use, privacy, access to information and economics, the Intellectual Freedom Committee and the Committee on Legislation (COL) request that the ALA President, with advice of the Executive Board, convene an ALA-wide representative group to continue to assess the proposed Google Book Search Settlement and its ongoing impact on ALA members and member institutions and to make recommendations for action by the Association and its members.

The IFC endorses the final report of the Google Book Settlement Task Force calling for the establishment of a publishing industry oversight group within ALA. In addition, the IFC requests that this new body continue to pay special attention to the potential implications of industry changes on privacy, intellectual freedom, and access issues. These are key areas of ongoing concern that led the IFC to join COL in requesting the convening in 2009 of this Google Book Settlement Task Force.

Newsletter on Intellectual Freedom and Library Technology Report

The *Newsletter on Intellectual Freedom* will move from a paper edition to an electronic edition during 2011-2012. Deborah Caldwell-Stone and Barbara Jones have met with ALA Publications to work with them on this transition.

The Nov./Dec. 2010 issue of *Library Technology Reports* was edited by OIF's Angela Maycock. The title: Privacy and Freedom of Information in 21st Century Libraries. For details, please visit alatechsource.metapress.com.

OIF/IFLA Satellite Meeting in Miami, Florida

The Office for Intellectual Freedom is teaming with the Committee on Free Access to

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

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READ BANNED BOOKS

Views of contributors to the *Newsletter on Intellectual Freedom* are not necessarily those of the editors, the Intellectual Freedom Committee, or the American Library Association.

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Information and Freedom of Expression of the International Federation of Library Associations and Institutions to hold a satellite meeting in advance of the 2011 IFLA World Congress.

“Intellectual Freedom in a Changing World” will take place August 10-12, 2011 in Miami, and will feature sessions on some of today’s key intellectual freedom and free speech issues in libraries and beyond. Speakers from Norway, the United Kingdom, Japan, and Mexico will join several U.S. speakers to address religion in libraries, privacy, comic books, and health and sexuality educational efforts. There also will be a session discussing the banning of the book *Vamos a Cuba* in the Miami Public Schools.

Registration is open now at www.ala.org/faife2011. Please contact Jonathan Kelley at jokelley@ala.org for more information or with questions.

LeRoy C. Merritt Humanitarian Fund

The Intellectual Freedom Committee joins current and former Merritt Fund trustees in urging Council members to join the Leroy C. Merritt Humanitarian Fund. In reviewing the membership statistics at this conference, Merritt Fund trustees expressed concern about the low numbers of Councilors who are members of this important affiliate organization devoted to the support, maintenance, medical care, and welfare of librarians denied employment rights or discriminated against on the basis of gender, sexual orientation, race, color, creed, religion, age, disability, or place of national origin; or denied employment rights because of defense of intellectual freedom. Visit ala.org/merrittfund for more information.

PROJECTS

Choose Privacy Week

OIF received a second grant from the Open Society Foundation (Soros Foundation), for 2011–2013. The purpose of this grant is to continue the work of the recently completed first grant. The second grant will be used for the following:

- Continue Choose Privacy Week
- Focus on how to use libraries to educate youth and immigrants on privacy

OIF has submitted the final report for the first three-year grant to the Open Society Foundations, focusing on OIF efforts to:

- Establish Choose Privacy Week as an annual event during the first week of May. OIF has held two CPWs thus far.
- Establish the website, privacyrevolution.org.
- Host a Youth and Privacy conference in Chicago in March 2011. This very successful invitational event

brought together privacy advocates with young people to strategize about ways for libraries to deliver privacy messages to youth. Visit youthprivacy.ala.org to learn more.

For further information on the two grants, please contact Barbara Jones, Deborah Caldwell-Stone, or Angela Maycock at OIF. Angela Maycock successfully coordinated and completed the first grant; Deborah Caldwell-Stone will coordinate the second one. The OSF has been extremely pleased with OIF’s execution of this grant.

Banned Books Week

Banned Books Week 2011 will begin on September 24 and continue through October 1. In lieu of a physical Banned Books Week Read-Out in Chicago, the ALA along with its cosponsors will host a virtual Banned Books Week Read-Out. The Read-Out will feature YouTube videos of authors reading from their favorite banned/challenged books or talking about the importance of the freedom to read.

BBW merchandise, including posters, bookmarks, t-shirts, and tote bags, are sold and marketed through ALA Graphics (www.alastore.ala.org/). More information on Banned Books Week can be found at www.ala.org/bbooks.

Online Learning

OIF conducted a survey regarding libraries’ intellectual freedom online learning interests and needs that was open May 23–June 7, 2011, and received 530 responses. Based on survey results and previous discussions, OIF is developing an online learning plan. The office will offer “Intellectual Freedom Summer School,” a series of online learning opportunities, targeted to busy library professionals as well as webinars related to Banned Books Week in 2011. Visit www.ala.org/onlinelearning for current offerings.

ACTION

Privacy and Self-Service Hold Practices

The Resolution to Protect Library User Confidentiality in Self-Service Hold Practices was developed by the IFC and the IFC’s Privacy Subcommittee after receiving requests from librarians and library users to examine the issue of reader privacy and self-serve holds. Copies of the Resolution had been sent prior to Annual Conference and an open hearing was held during conference for comments. The IFC carefully considered all comments received both prior to and during the 2010 Annual Conference and now is moving adoption of Action Item #19.3.

USA PATRIOT Act

The IFC has worked with the Committee on Legislation (COL) to review the issues associated with the USA PATRIOT Act. A joint working group crafted the following *Resolution to Continue Opposition to the Use of Section 215 of the USA PATRIOT Act and the Use of National Security Letters to*

Violate Reader Privacy, which we are pleased to jointly present with the Committee on Legislation, and move the adoption of Action Item #19.4.

In closing, the Intellectual Freedom Committee thanks the division and chapter intellectual freedom committees, the Intellectual Freedom Round Table, the unit liaisons, and the OIF staff for their commitment, assistance, and hard work.

Resolution to Protect Library User Confidentiality in Self-Service Hold Practices

WHEREAS, the ALA Code of Ethics states, “We protect each library user’s right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted”; and

WHEREAS, the American Library Association affirms that rights of privacy are necessary for intellectual freedom and are fundamental to the ethics and practice of librarianship (*ALA Policy Manual*, 53.1.16, *Privacy: An Interpretation of the Library Bill of Rights*); and

WHEREAS, the lack of privacy and confidentiality has a chilling effect on users’ choices (*ALA Policy Manual*, 53.1.16, *Privacy: An Interpretation of the Library Bill of Rights*); and

WHEREAS, the American Library Association strongly recommends the adoption of policies recognizing circulation records and other records identifying the names of library users to be confidential (*ALA Policy Manual*, 52.4, *Confidentiality of Library Records*); and

WHEREAS, confidentiality extends to (but is not limited to) database search records, reference interviews, circulation records, interlibrary loan records and all other records of personally identifiable uses of library materials, facilities, or services that associate the names of library users with specific materials (*ALA Policy Manual*, 52.4.2, *Confidentiality of Personally Identifiable Information About Library Users*); and

WHEREAS, the confidentiality of library records is protected by law or by attorney general opinion in all fifty states and in the District of Columbia; and

WHEREAS, U.S. courts have upheld the right to privacy based on the Bill of Rights of the US Constitution¹; and

WHEREAS, U.S. courts protect privacy when there is a reasonable expectation of privacy; and

WHEREAS, U.S. courts have ruled that when an individual’s personal data is shared with a third party or the public, the individual no longer has an expectation of privacy in that data; and

WHEREAS, keeping a library user’s personally identifiable information and circulation record absolutely confidential is essential for preserving the library user’s expectation of privacy in his or her reading history; and

WHEREAS, many libraries across the country are instituting self-service hold systems that fail to adequately

protect library users’ confidentiality because the self-service hold systems reveal personally identifiable information linking specific users to specific items; and

WHEREAS, some methods of truncating user names or other personally identifiable information do not adequately protect library users’ privacy, nor preserve the legal expectation of privacy, and may violate a state’s library confidentiality law; and

WHEREAS, there are effective solutions that conceal a library user’s identity while permitting the library to continue its use of open-shelf, self-service holds, such as the use of pseudonyms, codes, numbers, or other means that mask personally identifiable information; and the use of methods that obscure the identity of library user requests and the items requested through the practice of packaging the items inside an envelope or a reusable bag to hold the item, or wrapping them in a full sheet of paper, or an equivalent option. Now, therefore, be it

RESOLVED, that the American Library Association

1. Urges all libraries that implement self-service holds to protect patron identity by adopting practices and procedures that conceal the library user’s personally identifiable information in connection with the materials being borrowed;

2. Urges libraries, librarians, and the responsible bodies of ALA to work with vendors to incorporate applications into integrated library systems that enable libraries to conceal a library user’s identity in a cost-effective manner.

Endorsed in principle by the Committee on Professional Ethics, Committee on Legislation, and the Intellectual Freedom Roundtable and adopted by the ALA Council on June 28, 2011.

Resolution to Continue Opposition to the Use of Section 215 of the USA PATRIOT Act and the Use of National Security Letters to Violate Reader Privacy

WHEREAS, Freedom of thought is the most basic of all freedoms and is inextricably linked to the free and open exchange of knowledge and information; and these freedoms can be preserved only in a society in which privacy rights are rigorously protected; and

WHEREAS, The American Library Association (ALA) is committed to preserving the free and open exchange of knowledge and information and the privacy rights of all library users, library employees, and the general public; and

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¹U.S. Constitution, 4th, 5th, and 9th Amendments and case law, including *NAACP v. Alabama*, 357 U.S. 449 (1958); *Griswold v. Connecticut* 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967); and *Stanley v. Georgia*, 394 U.S. 557 (1969)

FTRF report to ALA Council

The following is the edited text of the Freedom to Read Foundation's report to the ALA Council, delivered at the ALA Annual Conference in New Orleans on June 28 by FTRF President Kent Oliver.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2011 Midwinter Meeting:

FACING THE FUTURE

At the Midwinter Meeting in San Diego, the FTRF Board of Trustees began to set new priorities for the Freedom to Read Foundation, with the goal of firmly establishing FTRF as the premier legal advocate for intellectual freedom in libraries. The trustees took a number of concrete steps toward that goal here in New Orleans, identifying key action areas and approving elements of a strategic plan that will secure FTRF's financial future, expand its membership, and make it possible for FTRF to take the lead in litigation that protects the right to access information. We look forward to concluding the strategic planning process at the 2012 Midwinter Meeting in Dallas.

DEFENDING THE FREEDOM TO READ

The Freedom to Read Foundation's core mission remains the vindication of the public's right to hear what is spoken and to read what is written, no matter how the message is communicated to the public. Laws that aim to restrict publication of constitutionally protected materials—such as state laws that criminalize the distribution of legal materials deemed “harmful to minors” over the Internet—fall squarely within that mission. FTRF is currently participating as a plaintiff in two different lawsuits that are intended to ensure our freedom to read information published via the Internet without restriction or government interference.

The first lawsuit, *Florence v. Shurtleff*, is a long-standing challenge to Utah's “harmful to minors” statute that would impair access to lawful Internet content and allow the state's attorney general to create an Adult Content Registry that could sweep in any site the attorney general deems unacceptable. For several months, counsel for the Freedom to Read Foundation sought to reach an agreement with the Utah attorney general that would restrict application of the “harmful to minors” law to those individuals who have one-on-one contact with a viewer and who subsequently disseminate “harmful to minors” materials to that viewer when the individual knows or believes the viewer is a minor. These negotiations failed, and FTRF and its coplaintiffs filed a motion for summary judgment on June 8, 2011.

The second lawsuit, *ABFFE, et al. v. Burns*, challenges Alaska's newly adopted “harmful to minors” statute that

criminalizes the distribution of certain material to minors under the age of 16. Under the new law, a crime is committed if the material distributed fits within the law's definition of “harmful to minors” and is distributed to a person under 16 years of age or to a person the distributor believes is under 16 years of age.

As I reported earlier, the federal district court hearing the lawsuit issued a preliminary injunction in October 2010, forbidding enforcement of the Alaska statute during the pendency of the lawsuit. Subsequently, FTRF and its coplaintiffs filed a motion for summary judgment that sought a final declaration that the law violated the First Amendment. The state attorney general responded by filing both a cross-motion for summary judgment and a motion asking that the lawsuit be certified to the Alaska Supreme Court for an interpretation of the statute. On June 8, 2011, the Alaska Supreme Court declined the request for certification. The case will now return to the district court for a decision on the motions for summary judgment filed by both parties.

The Foundation continues to monitor with interest *Sarah Bradburn et al v. North Central Library District*, a suit filed by the ACLU of Washington against the North Central Library District on behalf of three library patrons and the Second Amendment Foundation. The suit alleges that the library violated the plaintiffs' First Amendment rights by refusing to disable Internet filters at the request of adult patrons, consistent with standards established in the opinion rendered by the U.S. Supreme Court in the Children's Internet Protection Act case. The Washington State Supreme Court ruled that the North Central Library System policy and actions did not violate the state constitution. We are currently awaiting a decision from the district court judge, who will decide whether the library's policy and actions violate the U.S. Constitution.

Finally, like many other First Amendment organizations, we are anxiously waiting for the Supreme Court's decision in *Brown v. Entertainment Merchants Association* (formerly *Schwarzenegger v. Entertainment Merchants Association*). FTRF joined an *amicus* brief in support of EMA arguing that there are no exceptions to First Amendment protection for depictions or descriptions of violence. The brief also took the position that California's statute is content-based, subjective, and relies on an extremely broad and unconstitutionally vague definition of violence. The implications for library material content and access to currently constitutionally protected information, should the Supreme Court decide in California's favor, are significant. The last scheduled day for decisions from the Supreme Court this term is June 27, 2011; we will make a full report on the decision at the Midwinter Meeting in Dallas.

(On June 27, the Court ruled the California law unconstitutional; see page 178.)

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shhh!! no opinions in the library *IndyKids* and kids' right to an independent press

By Amanda Vender

Amanda Vender is one of the founders and editors of IndyKids (www.indykids.org). She is completing her master's degree in education at Hunter College, City University of New York. This article first appeared in the Summer 2011 issue of Rethinking Schools (see www.rethinkingschools.org). It is reprinted with permission.

Nintendo Power, Sports Illustrated for Kids, and a biography of President Obama were on prominent display as I entered the branch library in Forest Hills, Queens. The librarian looked skeptical when I asked if I could leave copies of *IndyKids* newspaper on the free literature table.

"Does it have opinions?" she asked me. She consulted with the branch manager, who decided I could not leave *IndyKids* because it is "too political."

This is the kind of response *IndyKids* often receives when we approach public libraries. *IndyKids* is a national, progressive newspaper that aims to engage kids in grades 4 to 7 in national and world issues, to encourage them to form their own opinions, and to become part of the larger movement for justice and peace. With the belief that the news does not have to be hidden or "dumbed down" for kids, *IndyKids* publishes articles on the financial crisis, same-sex marriage, health care, war, immigrant and labor rights, and global warming—mixed in with stories on youth activism, recipes, and puzzles.

In contrast, take a look at the children's periodicals section of your local library: *Boys' Life*, published by the Boy Scouts of America, has a cartoon Bible story and an ad for Rossi rifles that offers free junior membership to the National Rifle Association when you buy their new gun. *American Girl* shows girls how to work on the coolest hairstyles and host a pajama fashion show slumber party. *Discovery Girls* helps readers figure out what color nail polish will suit them. But none of that is political, according to the library staff *IndyKids* regularly encounters.

The American Library Association's *Library Bill of Rights* states that "Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval." If this were heeded, librarians would actively seek out and welcome publications like *IndyKids* that present views that are alternative to the mainstream press.

When *IndyKids* started in 2005, we briefly had a positive relationship with both the Queens Library and the New York Public Library (NYPL). Each system distributed one issue of *IndyKids*, but then we encountered problems.

"Although many of our staff members personally agree

with your paper's positions, they also feel professionally obligated to provide a more balanced presentation of political, ecological, and social issues for children than *IndyKids* offers," wrote the coordinator of children's services at the Queens Library.

The NYPL Office of Children's Services also refused to distribute *IndyKids*. "There's a stridency to the tone of the paper," explained the assistant coordinator. "There's not enough balance."

IndyKids launched a campaign against the censorship of the two library systems. Dozens of parents and activists wrote letters to the librarians asking them to distribute *IndyKids* and volunteers distributed fliers.

At that point, the NYPL assistant coordinator said that the library had refused to distribute the second issue of *IndyKids* because it took issue with one fact in the paper—that more than 1 million Filipino people had died in the Philippine-American War: "I could not recommend an item for children that I knew contained facts that could not be verified." I wondered if she often spent her time on the phone with the editor of *Sports Illustrated for Kids* debating facts in the publication.

Although Queens didn't budge on its decision, NYPL eventually agreed to distribute 500 copies of *IndyKids* to ten branches, although they asked us to remove their name from the "special thanks to" section of *IndyKids*' masthead. For a few years we alerted our contact at the NYPL Office of Children's Services when we had a new issue ready for distribution. Each time she reviewed the content and agreed to have the papers delivered to the ten branches. Then, in April 2009, she wrote *IndyKids*: "In the interest of going green, we have been directing our patrons to resources that are available online, including *IndyKids*. So we will not need paper copies of *IndyKids*." Presumably, if *Sports Illustrated for Kids*, *Boys' Life*, and other periodicals become available online, NYPL will not carry any children's magazines at all.

I contacted an organization of librarians for help. A children's librarian responded: "I think some librarians may be intimidated by *IndyKids* because of its progressive slant and choose not to subscribe. Most of us children's librarians live in the constant fear that one of those petition-wielding parents will cry foul over a selection we have made."

In fact, *IndyKids* is often asked "Why don't you try to be more balanced?" Our response is that all media relay a point of view. All news publications—those aimed at children as well as those for adults—come from a certain political perspective, whether they admit to it or not. *IndyKids* openly states that it is a progressive publication that gives space to the voices and issues of marginalized people here in the United States and in other parts of the world. If anything, *IndyKids* is more "balanced" than most news publications for children because, in many articles, it states the mainstream point of view and also presents alternative perspectives.

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UN declares Internet access a basic human right

A lengthy report released by the United Nations June 3 argued that disconnecting individuals from the Internet is a violation of human rights and goes against international law. “The Special Rapporteur underscores the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression,” according to the report’s summary, “but also a range of other human rights, and to promote the progress of society as a whole.”

A BBC survey of 26 countries in March 2010 found that 79 percent of people believe access to the Internet is a fundamental right.

Released after the seventeenth session of the United Nations’ Human Rights Council, the report “on the promotion and protection of the right to freedom of opinion and expression” came on a day when its message couldn’t be more important. It was the same day, Wired’s Threat Level blog pointed out, that “an Internet monitoring firm detected that two thirds of Syria’s Internet access has abruptly gone dark, in what is likely a government response to unrest in that country.”

The report’s authors speak to a wider issue, though; this isn’t just a problem in Syria. “[T]he recent wave of demonstrations in countries across the Middle East and North African region has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights,” the report notes. “As such, facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States.” Of course, many of the dictators and leaders across the Middle East region that the report highlights recognized the power of the Internet early—and attempted to cut it from their citizens’ lives.

But people, in most cases, found a way online. In Egypt, for example, hundreds of individuals used old modems and telephone lines to route their traffic through a volunteer network around the globe.

Some countries have taken things one step further. Estonia passed a law in 2000, for example, that declared access to the Internet a basic human right. In 2009, France followed. Legislators in Costa Rica, in 2010, reached a similar decision. In 2009, Finland, the report notes, “passed a decree ... stating that every Internet connection needs to have a speed of at least one Megabit per second (broadband level).” There, should they need to, people will be able to organize even faster. Reported in: theatlantic.com, June 3. □

U.S. underwrites Internet detour around censors

The Obama administration is leading a global effort to deploy “shadow” Internet and mobile phone systems that dissidents can use to undermine repressive governments that seek to silence them by censoring or shutting down telecommunications networks. The effort includes secretive projects to create independent cellphone networks inside foreign countries, as well as one operation out of a spy novel in a fifth-floor shop on L Street in Washington, where a group of young entrepreneurs who look as if they could be in a garage band are fitting deceptively innocent-looking hardware into a prototype “Internet in a suitcase.”

Financed with a \$2 million State Department grant, the suitcase could be secreted across a border and quickly set up to allow wireless communication over a wide area with a link to the global Internet.

The American effort, revealed in dozens of interviews, planning documents and classified diplomatic cables obtained by *The New York Times*, ranges in scale, cost and sophistication. Some projects involve technology that the United States is developing; others pull together tools that have already been created by hackers in a so-called liberation-technology movement sweeping the globe.

The State Department, for example, is financing the creation of stealth wireless networks that would enable activists to communicate outside the reach of governments in countries like Iran, Syria and Libya, according to participants in the projects. In one of the most ambitious efforts, United States officials say, the State Department and Pentagon have spent at least \$50 million to create an independent cellphone network in Afghanistan using towers on protected military bases inside the country. It is intended to offset the Taliban’s ability to shut down the official Afghan services, seemingly at will.

The effort has picked up momentum since the government of President Hosni Mubarak shut down the Egyptian Internet in the last days of his rule. The Syrian government also temporarily disabled much of that country’s Internet, which had helped protesters mobilize.

The Obama administration’s initiative is in one sense a new front in a longstanding diplomatic push to defend free speech and nurture democracy. For decades, the United States has sent radio broadcasts into autocratic countries through Voice of America and other means. More recently, Washington has supported the development of software that preserves the anonymity of users in places like China, and training for citizens who want to pass information along the government-owned Internet without getting caught.

But the latest initiative depends on creating entirely separate pathways for communication. It has brought together an improbable alliance of diplomats and military engineers, young programmers and dissidents from at least a dozen

countries, many of whom variously describe the new approach as more audacious and clever and, yes, cooler.

Sometimes the State Department is simply taking advantage of enterprising dissidents who have found ways to get around government censorship. American diplomats are meeting with operatives who have been burying Chinese cellphones in the hills near the border with North Korea, where they can be dug up and used to make furtive calls, according to interviews and the diplomatic cables.

The new initiatives have found a champion in Secretary of State Hillary Rodham Clinton, whose department is spearheading the American effort. “We see more and more people around the globe using the Internet, mobile phones and other technologies to make their voices heard as they protest against injustice and seek to realize their aspirations,” Clinton said. “There is a historic opportunity to effect positive change, change America supports,” she said. “So we’re focused on helping them do that, on helping them talk to each other, to their communities, to their governments and to the world.”

Developers caution that independent networks come with downsides: repressive governments could use surveillance to pinpoint and arrest activists who use the technology or simply catch them bringing hardware across the border. But others believe that the risks are outweighed by the potential impact. “We’re going to build a separate infrastructure where the technology is nearly impossible to shut down, to control, to surveil,” said Sascha Meinrath, who is leading the “Internet in a suitcase” project as director of the Open Technology Initiative at the New America Foundation, a nonpartisan research group. “The implication is that this disempowers central authorities from infringing on people’s fundamental human right to communicate,” Meinrath added.

In an anonymous office building on L Street in Washington, four unlikely State Department contractors sat around a table. Josh King, sporting multiple ear piercings and a studded leather wristband, taught himself programming while working as a barista. Thomas Gideon was an accomplished hacker. Dan Meredith, a bicycle polo enthusiast, helped companies protect their digital secrets.

Then there was Meinrath, wearing a tie as the dean of the group at age 37. He has a master’s degree in psychology and helped set up wireless networks in underserved communities in Detroit and Philadelphia.

The group’s suitcase project will rely on a version of “mesh network” technology, which can transform devices like cellphones or personal computers to create an invisible wireless web without a centralized hub. In other words, a voice, picture or e-mail message could hop directly between the modified wireless devices—each one acting as a mini cell “tower” and phone—and bypass the official network.

Meinrath said that the suitcase would include small wireless antennas, which could increase the area of coverage; a

laptop to administer the system; thumb drives and CDs to spread the software to more devices and encrypt the communications; and other components like Ethernet cables. The project will also rely on the innovations of independent Internet and telecommunications developers.

“The cool thing in this political context is that you cannot easily control it,” said Aaron Kaplan, an Austrian cybersecurity expert whose work will be used in the suitcase project. Kaplan has set up a functioning mesh network in Vienna and says related systems have operated in Venezuela, Indonesia and elsewhere.

Meinrath said his team was focused on fitting the system into the bland-looking suitcase and making it simple to implement—by, say, using “pictograms” in the how-to manual.

In addition to the Obama administration’s initiatives, there are almost a dozen independent ventures that also aim to make it possible for unskilled users to employ existing devices like laptops or smartphones to build a wireless network. One mesh network was created around Jalalabad, Afghanistan, as early as five years ago, using technology developed at the Massachusetts Institute of Technology.

Creating simple lines of communication outside official ones is crucial, said Collin Anderson, a 26-year-old liberation-technology researcher from North Dakota who specializes in Iran, where the government all but shut down the Internet during protests in 2009. The slowdown made most “circumvention” technologies—the software legerdemain that helps dissidents sneak data along the state-controlled networks—nearly useless, he said.

“No matter how much circumvention the protesters use, if the government slows the network down to a crawl, you can’t upload YouTube videos or Facebook postings,” Anderson said. “They need alternative ways of sharing information or alternative ways of getting it out of the country.”

That need is so urgent, citizens are finding their own ways to set up rudimentary networks. Mehdi Yahyanejad, an Iranian expatriate and technology developer who co-founded a popular Persian-language Web site, estimates that nearly half the people who visit the site from inside Iran share files using Bluetooth—which is best known in the West for running wireless headsets and the like. In more closed societies, however, Bluetooth is used to discreetly beam information—a video, an electronic business card—directly from one cellphone to another.

Yahyanejad said he and his research colleagues were also slated to receive State Department financing for a project that would modify Bluetooth so that a file containing, say, a video of a protester being beaten, could automatically jump from phone to phone within a “trusted network” of citizens. The system would be more limited than the

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— censorship dateline



libraries

Jefferson County, Colorado

In Jefferson County, adults are allowed to watch X-rated content on library computers. Some parents are now questioning that policy. Library officials insist they are only following the law.

In the adult section of Jeffco libraries, it's permissible to view pornography on computers as long as there is a privacy screen. But one parent charged that she and her 5-year-old son saw much more than they should have seen in a public place.

"There were pornographic videos. Two girls kissing, partially nude, on the screen," Carolyn Berry said. Berry said a teenager was viewing an X-rated movie on a Columbine Library computer, and appeared to be touching himself underneath his clothing. "The patron was lying back in his chair, he had his hand down his pants, and was clearly masturbating," Berry said.

Berry complained to the librarian and expected the teen to be thrown out. But 20 minutes later, she says he was still in the library. "He was on the exact same computer," Berry said. "He hadn't been kicked out of the library. He hadn't been kicked off the computers. He was still sitting there."

Berry then called the Jefferson County Sheriff's Office. The 17-year-old got a ticket for trespassing and could face charges of indecent exposure. A sheriff's spokesperson confirmed deputies have responded to other incidents involving people watching pornography at county libraries.

"My first reaction is that we're very sorry if a child in the library was exposed to material that they found objectionable," said Rebecca Winning, associate director of communications and public engagement for the Jefferson County Public Library. Winning said the library tries to protect

kids by keeping the children's section separate from the adult section. "So kids could come to the library, go to the children's area and get all their needs met, and never even walk by [the adult area]," Winning said.

Winning said the library board has decided that a public library cannot control what adults watch. "We follow the law," Winning said. "If the law allows access to certain information that you or I might find objectionable, we allow patrons to access it."

Library computers used by children are equipped with anti-pornography filters, as required by law. Unfiltered computers are available for adults. Any legal content is allowed.

"We do ask patrons to use a privacy screen," Winning said, adding the library has only gotten a handful of complaints about people viewing pornography. "We serve the entire population," Winning said, "the entire spectrum, from children to adults."

Berry wants the library to change its policy, so nobody else gets an unwanted lesson. "I think the library should block those sites," Berry said. "I mean, [somebody] needs to say this is not acceptable behavior in a public place." Reported in: KUSA-TV, July 21.

Worcester, Massachusetts

The Worcester Library board of directors voted July 13 to suspend the meeting room reservation privileges of North East White Pride after a video surfaced in which, board members believe, the group was attempting to incite violence at a meeting in the library scheduled in two days.

The video, found on YouTube, announced the group's meeting and invited people to show up with their bike locks. Board members said the reference was to an assault that allegedly took place on June 4, when about ten people, some of them masked, barged into a White Pride meeting in the library's Banx room. One of the intruders was carrying a metal bike lock.

No one was arrested, according to board members, but police did recover the bike lock.

The group billed the canceled meeting as part of a monthly "meet and greet," but library board members said the meeting date was never confirmed by the person who initially called to book it. The person wanted to book three dates in three consecutive months, but failed to confirm a date or call back when he was told he could only book one date at a time.

"The goal of the meeting is to establish that White people have the right to meet in publicly available conference rooms without threat of violence from anti-White groups ..." the group's website said. "The library's staff has repeatedly acknowledged our rights."

Board members decided that in addition to suspending the group's privileges for ninety days, the board would

work to develop a policy for reserving meeting space. They asked Michael Traynor, deputy city solicitor, to research the definition of hate speech. In addition, the Police Department will be asked to look into whether there have been problems with the New Hampshire-based group in other communities.

Kevin Ksen, a community member who attended the board meeting, said the issue is that the group promotes violence against other people and groups through its inflammatory speech. “That’s the conversation we should be having, and why do we want to allow a group of outsiders to come into our community to promote violence?” he said.

Board member Williams S. Coleman III’s subcommittee was given the task of developing a policy for room reservations. He said the committee would hold hearings to solicit input from the public on the policy. The meetings will begin in August, he said.

The white pride group has held about six meetings at the library, beginning in November. The group first came to public attention in February when it booked a meeting on the same night as a black cultural event.

“It’s the American balancing act,” said Kevin Dowd, president of the board. “We are trying to balance free speech and public safety, and libraries are at the forefront of that.” Reported in: *Worcester Telegram & Gazette*, July 14.

Republic, Missouri

Two of the three Republic High books singled out in a public complaint last year will now be removed from the school curriculum and library. On July 25, the school board voted 4-0—three members were absent—to keep Laurie Halse Anderson’s *Speak*, an award-winning book about date rape, but remove Kurt Vonnegut’s *Slaughterhouse Five* and Sarah Ockler’s *Twenty Boy Summer*.

Wesley Scroggins, a Republic resident, challenged the use of the books and lesson plans in Republic schools, arguing they teach principles contrary to the Bible.

“I congratulate them for doing what’s right and removing the two books,” said Scroggins, who didn’t attend the board meeting. “It’s unfortunate they chose to keep the other book.”

Superintendent Vern Minor said the vote concluded the complaint filed a year ago. Scroggins said he has yet to give any thought to pursuing this further.

In making a recommendation to remove the two titles, Minor explained that “numerous individuals have read the three novels and provided their feedback.” He conceded there wasn’t always consensus about what step to take. “We had some differences of opinion, I’ll be honest with you,” he said.

Minor said the process took a while because the 4,500-student district didn’t want to look at the three books “in isolation.” Instead, a task force was convened to develop

book standards for elementary, middle and high schools. The panel reviewed existing board policy and the public rating systems that already exist for music, TV and video games.

“We very clearly stayed out of discussion about moral issues. Our discussions from the get-go were age-appropriateness,” he said. “The discussion we’ve been having was not are these good books or bad books ... It is this consistent with what we’ve said is appropriate for kids.”

The board adopted the standards—which cover language, violence, sexuality and illegal substances—in April and those standards have since been applied to the three books.

As part of that, numerous individuals were asked to read the novels and provide feedback. “It was really good for us to have this discussion,” Minor said. “Most schools stay away from this and they get on this rampage, the whole book-banning thing, and that’s not the issue here. We’re looking at it from a curriculum point of view.”

Minor provided a quick synopsis of each book in question and explained why it should stay or go:

Support was strong for *Speak*, which has been taught in English I and II courses. Minor said only one page is used to “tastefully, not graphically” describe the rape, and there were only three instances of profanity in the entire novel. By the end of the novel, the girl finds her voice and stops a second attack. “There’s a message at the end that says that’s not appropriate,” he said.

Minor said feedback for *Twenty Boy Summer*, available in the library, focused on “sensationalizing sexual promiscuity.” He said questionable language, drunkenness, lying to parents and a lack of remorse by the characters led to the recommendation.

“I just don’t think it’s a good book. I don’t think it’s consistent with these standards and the kind of message that we want to send,” he said. “...If the book had ended on a different note, I might have thought differently.”

Citing crude language and adult themes, Minor said *Slaughterhouse Five* was more appropriate for college-age students. “The language is just really, really intense,” he said. “I don’t think it has any place in high school ... I’m not saying it’s a bad book.”

Minor explained that the book standards apply to required readings, materials read aloud by a teacher, library resources and independent study selections. He also noted that the “value and impact of any instructional material will be judged as a whole, taking into account the purpose of the material.”

While the vote will prompt removal of the books from the high school curriculum and the library, Minor said students wishing to read materials that fall outside of the standards—including the two books—can select those books for classwork as long as they have signed parent permission. “If the parent thinks ‘For Johnny, it is age-appropriate,’ then

we'll let the parent make the call," he said.

"That would be for independent reading and they wouldn't get it in our library."

Board member Melissa DuVall said districts make decisions every day about what to keep and what to exclude and this is no exception. "We are not going to make everybody happy—and rarely do we," she said. "What we have to be proud of is we took a complaint, we took it seriously and we gave it due diligence." Reported in: *Springfield News-Leader*, July 26.

Channelview, Texas

A Channelview Independent School District parent wanting a children's book banned from the library has finally gotten her wish. In May, Tammy Harris filed a complaint with Brown Elementary School. She wanted *The Adventures of Super Diaper Baby* pulled from the library because it contained the phrase "poo poo head." Harris said her son was suspended for using the same phrase. A committee rejected the complaint in June, but Harris appealed and won and now the book is banned. Reported in: KTRK-TV, July 13.

Gloucester, Virginia

Copies of hundreds of pages of emails, obtained from Gloucester County under a Freedom of Information Act request, show that a small number of complaints about a gay pride exhibit at the Gloucester Public Library caused a flurry of communication between county supervisors and officials. Whether the issue will get a public hearing remains to be seen.

The Library Board of Trustees had been formally asked by member Jody Perkins to discuss how and why the gay pride exhibit was removed and whether library policy was followed. But Perkins resigned from the Board of Trustees on July 15.

Bill Walker, chairman of the Board of Trustees, said that the agenda for the September meeting had not been set. Whether or not the gay pride exhibit is discussed at the meeting, Walker said Library Director Diane Rebertus has the authority to install and take down exhibits.

"It's unfortunate that this whole thing has taken the path it has," Walker said.

Rebertus referred to the display in an email as "low-key." It was installed June 1 and coincided with June being gay, lesbian, bisexual and transgender month. The display first caught the attention of a member of the Board of Supervisors more than two weeks after it had been put up. Supervisor Gregory Woodard received an email June 18 from a Gloucester resident who was "offended by the promotion of homosexuality by our library."

On June 20, Woodard forwarded the email to County

Administrator Brenda Garton. She sent out an email saying Rebertus received a complaint from a woman on June 17. A woman also complained to the County Administration office in a voice mail and said she would not go back to the library.

Rebertus took down the sign on June 18 that went with the display and referred to "Gay Rights Month," but left other materials, which included books and music. The rest of the materials were later removed on June 20.

Garton told Woodard via email on June 20 that when the library staff receives an objection, a form can be filled out by the person lodging the objection. The Library staff researches the complaint before it goes to the Library Board of Trustees to decide whether or not to pull the item.

On June 22, Woodard wrote to Garton in an email that he was surprised the Library would make a decision to promote gay rights month. Garton responded in an email that she doesn't think anyone intended for the display to promote anything, "just like celebrating military month with a display of materials isn't promoting war."

Minutes later, Woodard responded by email to Garton to ask Rebertus to make the Library Board consider the issue of promoting gay rights. Garton wrote back that she had asked the Library Board of Trustees to discuss it.

Woodard asked Board of Supervisors Chairman Christian "Buddy" Rilee to place the issue on the July meeting agenda, but Rilee declined. "There are so many important issues facing Gloucester and we do not need to go there when it comes to this topic," Rilee wrote. Reported in: *Newport News Daily Press*, July 21.

schools

Snellville, Georgia

The American Civil Liberties Union has sent a letter to Gwinnett County Schools Superintendent to demand Brookwood High School stop using web filtering technology to block lesbian and gay educational web sites on campus.

Nowmee Shehab graduated from Brookwood High recently where she presided over the student gay-straight alliance club. She was amazed to find her school was censoring some gay and lesbian web pages.

"It's kind of shocking that they would block these sites," said Shehab. "Students may not feel safe at home to look up these web sites. It's really important for schools to have safe access to information."

Shehab saw denial pages on school computers when she tried to access the 'It Gets Better' web page, and the 'Georgia Safe Schools Coalition' web page. "It's critical information for teens, such as people contemplating suicide," said Shehab. "It's really important they have access to the 'Trevor Project' which is a hotline for LGBT teens."

But Shehab said censors do allow students to access anti-gay web sites like, 'Parents and Friends of Ex-Gays,' and 'Exodus International.' Web sites like those say that homosexuals can change their behavior.

Now the ACLU says the school district should pull the filters or face a lawsuit. But recent graduate Kelly Stinnett thinks LGBT material should not be accessible in schools. "They always have libraries around the corner they could go to," said Stinnett. "They don't need to access that at school."

Shehab disagrees and said students should have access to pro-gay web pages. "I know some parents may be against this, but if we look at it, we want safe schools for all students," said Shehab. "We don't want bullying to happen and we don't want students to harm themselves."

Gwinnett County Schools said that for now, those web filters will stay in place. The district also said they will unlock the censored pages for any student who needs access for a legitimate educational purpose. Reported in: cbsatlanta.com, June 13.

St. Charles, Illinois

A school textbook that's received national criticism by conservatives is now also taking heat in St. Charles Unit District 303.

Jennifer Nazlian discovered her daughter was using the *Social Studies Alive!* text in her third-grade classroom. While thumbing through it one night, she found herself filled with some of the same disdain for the messages it contained as conservative icon Glenn Beck.

Beck slammed the book in April when it first raised the ire of parents in Frederick County, Maryland. Parents there asked the school board to ban the book in the belief that it contains liberal propaganda about health care, labor and child care. The book contains descriptions of the Exxon Valdez oil spill in Alaska. There's also a passage about child care being important, but so costly that some families can't afford it and still pay for food and health care. The passage goes on to say some countries, like Vietnam, provide child care as a public service.

"Well, let's all move to Vietnam, everybody," Beck said in roasting the book. "It makes it easier for parents to work."

Nazlian said she shares those concerns about the implied messages in the book. She's following the lead of the Maryland parents in asking District 303 to ban the text.

"I am concerned that this book is being used in our curriculum," Nazlian told a school board committee. "I ask that you please review this book and figure out why it's in our district. There are some major concerns with it."

Nazlian may have a built-in champion for her cause on the school board. Judith McConnell won a seat on the board in April in an uncontested election. McConnell is also the coordinator of the Tri City Tea Party Patriots, an affiliate of the Illinois Tea Party. In reviewing the book,

McConnell found herself agreeing with its conservative critics.

"It is really deleterious to our children and to our community," McConnell said of the book. "It is not good for our children."

School Board Vice President Kathy Hewell said this is the first time she can ever remember a parent complaining about the content of a textbook. She said the issue is up to Superintendent Don Schlomann to decide. Reported in: *Daily Herald*, July 17.

Albermarle County, Virginia

The Albemarle County School Board decided to table a vote on whether to remove Sir Arthur Conan Doyle's *A Study in Scarlet* from sixth-grade reading lists. After moving the vote from the consent agenda to the superintendent's business section of the meeting, the board held a long discussion on the work.

The board was asked to exclude the book from the reading lists after a complaint from a parent alleged the book casts Mormonism in a negative light. The complaint cited the novel's reference to Mormons as "murderous" and "intolerant," as reason to remove the work. The complaint also alleged that the work unfairly characterized Mormons as murderous kidnappers. The work would still be available in school libraries.

Currently, the book is only assigned by teachers at Henley Middle School, near Crozet.

Board members argued that the book's negative characterization of Mormons might not be age-appropriate for sixth graders. They said they worried that young children would read the negative characterizations as fact.

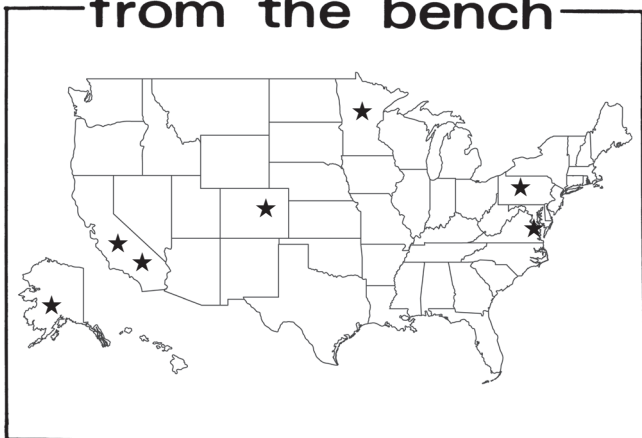
School board at-large member Harley Miles said the book was intended to introduce mystery and deductive reasoning at the sixth-grade level, and does not deal with cultural biases. Miles said he would support moving the book to a higher reading list. "If we move it to a higher level, it becomes about discrimination. At the sixth-grade level, it's a mystery, and is about deductive reasoning... Sixth grade might be a little early to look at the other issues outside of mystery and deductive reasoning," Miles said.

Board member Eric Strucko, of the Samuel Miller District, said he wasn't convinced children as young as sixth grade could appropriately grasp concepts about prejudice to make the book a valuable education tool. Strucko said his own son had read the book, and tackling its bias had been a real challenge.

"We had conversations with the children to clarify the issues, but sixth grade was a tough age to tackle the issues," Strucko said. "I'm struggling with what development age is the appropriate age to tackle these concepts."

(continued on page 200)

from the bench



U.S. Supreme Court

California's attempt to ban sales of violent video games to minors violates the constitutional guarantee of free expression, which allows young people access to creative works such as books, films and onscreen simulations about even the most extreme brutality, the U.S. Supreme Court ruled June 27.

States can protect children from harm, but they have no "free-floating power to restrict the ideas to which children may be exposed," the court said.

The justices also said the state's concern about children's exposure to ultra-violence in video games might apply equally to such accepted fare as "Snow White" and Saturday morning cartoons.

"California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists and movie producers—and has given no persuasive reason why," Justice Antonin Scalia wrote in the majority opinion.

The court voted 7-2 to overturn the law, which has been blocked by court orders since the legislature passed it in 2005. A five-member majority appeared to rule out future efforts to enact a narrower law.

The law would have prohibited the sale or rental to anyone under 18 of a video game that allowed players to kill, rape or maim a human image in a way that reasonable people would find "patently offensive" under prevailing community standards for minors. Prosecutors would have to show that the game lacked serious literary, artistic, political or scientific value. Violations would be punished by fines of up to \$1,000 per game sold.

Lower courts had unanimously overturned similar laws passed by at least seven states and several cities.

California asked the Supreme Court to chart a new course, arguing that laws restricting minors' access to sexually explicit material, which the court upheld in 1968, should be extended to violence—particularly to interactive media like video games.

Five justices, led by Scalia, flatly rejected that argument.

In contrast to hard-core pornography, Scalia said, there is no "long-standing tradition in this country of specially restricting children's access to depictions of violence." He cited examples ranging from the violence in fairy tales like "Snow White" and "Hansel and Gretel," who "kill their captor by baking her in an oven," to fixtures on high school reading lists such as *The Odyssey* and *Lord of the Flies*.

U.S. history is filled with examples of popular media being blamed for juvenile delinquency, from the cheap crime novels of the 1800s to the movies and comic books of the 20th century, Scalia said. He also discounted the state's assertion that numerous studies have shown violent, interactive video games can harm youngsters. At most, Scalia said, the studies show some youths feel more aggressive after using the games—the same effect found in viewers of Bugs Bunny and Road Runner cartoons.

Scalia was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan in the majority opinion. The case is *Brown vs. Entertainment Merchants Association*. (For excerpts of this decision, see page 182.)

Justice Samuel Alito, joined by Chief Justice John Roberts, said the California law should be found unconstitutional on narrower grounds—that it defined the prohibited games with terms such as "deviant" and "morbid," which they considered too vague. They said a more tightly written video games law, based on stronger research, might be constitutional.

In dissent, Justice Stephen Breyer said the California law was only a "modest restriction on expression," which he said was amply supported by research on the effect of video violence. Breyer also questioned the logic of restricting minors' access to portrayals of nudity but not carnage.

"What sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?" Breyer said.

In a separate dissent, Justice Clarence Thomas argued that the Constitution, as originally written, gave parents "absolute authority over their minor children" and allowed the government to ban all outside contact with children—including sale of any product—without parental consent.

The ruling came on the last day of a 2010-11 term in which the court also struck down, on free-speech grounds, a ban on protests at military funerals; a prohibition on the sale of doctors' prescription records to drug companies; and, on the same day, an Arizona campaign finance law providing additional public funds to candidates whose opponents raised large amounts of private money.

The court in recent years has not extended similar free-speech protections to government employees or to organizations seeking to offer political advice to terrorist groups. But another decision last year, overturning a federal ban on videos that showed cruelty to animals, laid the groundwork for the video game ruling.

"The court has now made it abundantly clear that it will not tolerate bans on free expression simply because it is disfavored or distasteful," said David Horowitz, executive director of the Media Coalition, which submitted arguments on behalf of groups of booksellers, publishers, writers and advertisers.

Representatives of the video game industry, whose nationwide sales exceed \$10 billion a year, also hailed the ruling as a victory over censorship.

But the California law's author drew parallels to other recent rulings that favored big business. "The majority of the Supreme Court once again put the interests of corporate America before the interests of our children," said state Sen. Leland Yee (D-San Francisco). Reported in: *San Francisco Chronicle*, June 28.

In *Sorrell v. IMS Health*, a decision announced June 23, a six-justice majority of the Supreme Court struck down a Vermont law that banned some but not all uses of prescription information collected by pharmacies.

The law sought to restrict a form of marketing called "detailing," in which representatives of drug companies pitch information about new drugs to doctors known to be prescribing certain kinds of medicine. The companies obtain prescription records to help them identify the most suitable doctors from data mining companies, which buy the records from pharmacies. The records are meant to be stripped of information that identifies individual patients.

The law banned the use of prescription data for detailing but allowed other uses of it, including by law enforcement, insurance companies and journalists. Drug companies remained free to market their drugs in a more indiscriminate fashion, without knowing the prescribing habits of individual doctors.

The law was challenged by data mining and drug companies, who argued that the law's point seemed to be to protect doctors from hearing about more expensive drugs while the state pushed cheaper generic drugs. The state, as its lawyer Bridget C. Asay put it at the argument in April, said the law sought to address "an intrusive and invasive marketing practice."

Justice Anthony M. Kennedy, writing for the majority, said the case presented fundamental First Amendment issues because it restricted the use of truthful information in private hands based on the identity of the speaker and the content of its speech. He supported his decision with citations to classic First Amendment decisions outside the realm of commercial speech, including ones on prior restraint and incitement.

"If pharmaceutical marketing affects treatment decisions," he wrote, "it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it."

Chief Justice Roberts and Justices Scalia, Thomas, Alito and Sotomayor joined the majority opinion. Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. Justice Breyer said the majority had looked at the case through the wrong First Amendment lens.

It is a mistake, he said, "to apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs." Under ordinary standards applicable to commercial speech, Justice Breyer continued, the Vermont law should have been upheld.

"At best," he wrote, "the court opens a Pandora's box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message."

The majority opinion is an echo, he continued, of *Lochner v. New York*, a 1905 decision that struck down a New York work-hours law and has become shorthand for improper interference with matters properly left to legislatures.

"At worst," Justice Breyer wrote of the majority opinion, "it reawakens *Lochner's* pre-New Deal threat of substituting judicial for democratic decision-making where ordinary economic regulation is at issue." Reported in: *New York Times*, June 23.

In 1978, when the U.S. Supreme Court gravely concluded that indecent radio and TV broadcasts were "uniquely pervasive" and "uniquely accessible to children," that may have been true. Then again, that was before cable television, DirecTV, and satellite radio, and certainly long before the Internet finally became mainstream in the late 1990s. It was also long before TV ratings for broadcast programs--and decades before the kind of parental control technology found in the V-chip became implanted in all televisions and digital converter boxes sold in the United States.

On June 27, the Supreme Court agreed to hear a case that will test whether the remarkable technological changes of the last 33 years have changed the way broadcast censorship should work.

In that seminal 1978 case that arose from comedian

George Carlin's famous monologue, the justices ruled that Federal Communications Commission regulations banning four-letter words were appropriate because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." In addition, the opinion by Justice John Paul Stevens said, "broadcasting is uniquely accessible to children," because there's no way to block it.

Last year, however, a federal appeals court ruled that technological advances have ripped away the underpinnings of the FCC's "indecent" regulations and ruled against the government agency on First Amendment grounds.

The U.S. Court of Appeals for the Second Circuit concluded in a 3-0 opinion that:

"We face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did YouTube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived.

"The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast--almost 87 percent of households subscribe to a cable or satellite service--and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. The Internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs."

The current case arose from the FCC's decision to broaden its indecency regulations as part of then-chairman Kevin Martin's attempt to neutralize the political outcry over Janet Jackson's famous "wardrobe malfunction" during a Super Bowl halftime show in 2004.

Broadcasters including NBC, Fox, ABC, and CBS sued, saying the FCC regulations were so vague they violated the First Amendment.

For instance, the FCC allowed repeated indecent language in broadcasts of *Saving Private Ryan*, but singled out for punishment one mention of the word "fucking" during the Golden Globe Awards. The word "bullshit" is indecent, for instance, but the word "dickhead" is not because it's "not sufficiently vulgar, explicit, or graphic."

In an April 2011 brief requesting that the Supreme Court hear the case, the Obama administration defended the FCC's decision by saying an episode of "NYPD Blue" that aired at 9 p.m. "pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." The lower court decisions "preclude the (FCC) from effectively implementing statutory restrictions on broadcast indecency that the agency has enforced since its creation

in 1934," the brief said.

The order from the Supreme Court agreeing to hear the case asked lawyers for both sides to address only this question: "Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution." A decision is expected by next summer. Reported in: *Privacy Inc.*, June 27.

When Lawrence Golan picks up his baton at the University of Denver, the musicians in his student orchestra see a genial conductor who corrects their mistakes without raising his voice in frustration.

Yet Golan is frustrated, not with the musicians, but with a copyright law that does them harm. For ten years, the music professor has been quietly waging a legal campaign to overturn the statute, which makes it impossibly expensive for smaller orchestras to play certain pieces of music.

Now the case is heading to the U.S. Supreme Court. The high-stakes copyright showdown affects far more than sheet music. The outcome will touch a broad swath of academe for years to come, dictating what materials scholars can use in books and courses without jumping through legal hoops. The law Golan is trying to overturn has also hobbled libraries' efforts to digitize and share books, films, and music.

The conductor's fight centers on the concept of the public domain, which scholars depend on for teaching and research. When a work enters the public domain, anyone can quote from it, copy it, share it, or republish it without seeking permission or paying royalties.

The dispute that led to *Golan v. Holder* dates to 1994, when Congress passed a law that moved vast amounts of material from the public domain back behind the firewall of copyright protection. For conductors like Golan, that step limited access to canonical 20th-century Russian pieces that had been freely played for years.

"It was a shocking change," Golan said. "You used to be able to buy Prokofiev, Shostakovich, Stravinsky. All of a sudden, on one day, you couldn't anymore."

Other works once available but now restricted include books by H.G. Wells, Virginia Woolf, and C.S. Lewis; films by Alfred Hitchcock, Federico Fellini, and Jean Renoir; and artwork by M.C. Escher and Pablo Picasso. The U.S. Copyright Office estimated that the works qualifying for copyright restoration "probably number in the millions."

Congress approved the recopyrighting, limited to foreign works, to align U.S. policy with an international copyright treaty. But the Golan plaintiffs—a group that includes educators, performers, and film archivists—argue that bigger principles are at stake. Does Congress have the constitutional right to remove works from the public domain? And if it does, what's stopping it from

plucking out even more freely available works?

“If you can’t rely on the status of something in the public domain today—that is, if you never know whether Congress is going to act again and yank it out—you’re going to be a lot more cautious about doing anything with these materials,” commented Golan’s lawyer, Anthony Falzone, executive director of the Fair Use Project and a lecturer in law at Stanford Law School. “You really destroy the value and the usefulness of the public domain in a profound way if the rug can be pulled out from under you at any time.”

The change was surprising from a philosophical point of view: Under copyright law, the Constitution grants authors a limited monopoly over their works as an incentive to promote creativity. Over the years, Congress has often delayed the passage of works into the public domain by lengthening the duration of copyright terms. But removing pieces already there was different, Golan’s lawyers argue, a radical change in what one scholar describes as the basic “physics” of the public domain.

That may sound abstract, but the impact on Golan was direct. When a work is in the public domain—a Puccini opera, say—an orchestra can buy the sheet music. Symphonies typically cost about \$150. And the orchestra can keep those pages forever, preserving the instructions that librarians laboriously pencil into scores. But works under copyright are typically available only for rent. And the cost is significantly higher: about \$600 for one performance. With the flip of a switch, the new law restored copyright to thousands of pieces.

For big-city orchestras like the New York Philharmonic, that change is like a “mosquito bite,” Golan explained. But Golan’s university ensemble gets only about \$4,000 to rent and buy music each year. That means it can perform some copyrighted works but must rely on the public domain for about 80 percent of its repertoire. And \$4,000 is relatively generous. Other colleges might have only \$500 to spend on music. When the Conductors Guild surveyed its 1,600 members, 70 percent of respondents said they were now priced out of performing pieces previously in the public domain.

Teaching suffers, too. Every year, for example, University of Denver students compete for the honor of playing a concerto, a piece in which the orchestra accompanies a solo instrument. But when a pianist wanted to audition with a piano concerto by Prokofiev, a Russian composer who died in 1953, Golan was forced to tell her no.

“It’s one that any aspiring pianist needs to learn, and to have the experience of actually playing it with orchestra is phenomenal,” Golan said. But “we just didn’t have the money in the orchestra budget to pay the rental price.”

The problem soon got worse. In 1998, after lobbying by entertainment groups like the Walt Disney Company, Congress passed another law, extending copyrights by twenty years. This Copyright Term Extension Act—mocked by critics as the Mickey Mouse Protection Act—meant that a work would not enter the public domain until up to seventy years after its creator’s death.

That legal one-two punch made it hard for Golan to play both foreign and American works, like Gershwin’s *Rhapsody in Blue*.

In response to those changes, reform-minded academics at top law schools fought back with multiple lawsuits challenging the constitutionality of the statutes. The conductor’s tale made him an ideal poster child for their war to protect the public domain.

Reformers suffered a defeat in 2003, when the Supreme Court rejected an online book publisher’s challenge of the twenty-year extension. In that case, *Eldred v. Ashcroft*, the court found the change acceptable in part because it had not “altered the traditional contours of copyright protection.”

This time the question isn’t whether Congress can delay works from entering the public domain. It’s whether removing works already there is a “bright line” Congress can’t cross. If that bright line dims, scholars and librarians will have problems. To understand why, consider the copyright confusion faced by Elizabeth Townsend-Gard.

Townsend-Gard is an associate professor at Tulane University Law School. As a graduate student in the 1990s, she studied history at the University of California at Los Angeles. Her dissertation was a biography of Vera Brittain, a British author known for her World War I autobiography, *Testament of Youth*. Townsend-Gard mined letters, diaries, photos, and other texts for her research. But she worried about getting permission to publish materials she needed, because Brittain’s literary executor, too, was writing a biography of the author.

In 1996 the ground shifted under Townsend-Gard’s feet. At the outset of her research, almost all the works she needed had been in the public domain. When she finished, because of the restoration now under attack by Golan, almost all those works were under copyright.

She ultimately diversified her project so that it became a comparative biography of many subjects rather than just one. But she also grew fascinated with the copyright complexities surrounding the daily work of historians. Townsend-Gard ended up going to law school after finishing her Ph.D., and invented a software tool, called the Durationator, designed to tell users the copyright status of any work.

The market of scholars who might need that tool is large. The law at stake in Golan alone potentially affects anyone studying works created or published by non-U.S. authors or publishers from 1923 to 1989. Most of those materials were in the public domain before. Now they are covered by a complicated copyright statute, Townsend-Gard explained.

“For people who work on the 20th century, it’s fairly horrible,” she said. Now pull back from the view of an individual scholar, and imagine you are working on one of the numerous projects to make millions of digital books available online. Libraries, archives, Google: Copyright restoration has big consequences for their digitization efforts. Most of those ventures will not publish the full texts of works online unless they are clearly in the public domain in the United States.

But when it comes to a foreign book, figuring out its copyright status can require a mammoth investigation. That's because a work must have been under copyright in its home country to qualify for restoration in the United States, says Kenneth D. Crews, director of the copyright advisory office at Columbia University Libraries. So, for example, when Columbia considers digitizing a rare trove of Chinese books, including many from the 1920s and 1930s of great interest to scholars, its staff must grasp the legal nuances of a country that has gone through a revolution—and a transformation of copyright law—since the books were published. Or must try to, anyway.

And if the law is unclear, the university must decide whether digitization is worth risking a potentially expensive lawsuit should a rights-holder turn up later. "It's deterring digitization on anything foreign," Townsend-Gard says, "because people can't figure it out."

The U.S. Court of Appeals for the 10th Circuit took a different view. In a 2010 ruling backing the government, it stressed the argument that recopyrighting foreign works that had fallen into our public domain was crucial to protecting American authors' interests abroad. Our restoration of those

copyrights could drive other countries to grant retroactive copyrights to contemporary American works that had fallen into their public domains.

And big money is at stake. The court quoted Congressional testimony from the mid-1990s in which a group representing publishers, record companies, and other copyright-based industries estimated that billions were being lost each year because foreign countries were failing to provide copyright protections to U.S.-originated works. The recording industry told lawmakers that there were "vastly more U.S. works currently unprotected in foreign markets than foreign ones here."

The government, in its Supreme Court brief, pointed out that the copyright restorations were limited in scope. They applied to foreign works whose creators weren't familiar with U.S. copyright procedures, for example. Other works restored were previously ineligible for protection.

The Supreme Court is expected to decide the case during the term that begins in October. Golan hopes to be in Washington to watch. Unless, that is, he has a concert to conduct. Reported in: *Chronicle of Higher Education* online, May 29.

The U.S. Supreme Court agreed June 20 to hear the

Brown v. Entertainment Merchants Association

The following are edited excerpts from Associate Justice Antonin Scalia's majority opinion in Brown v. Entertainment Merchants Association. (See page 178.)

The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York* (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entertainment Group, Inc.* (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's

command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson* (1952).

The most basic of those principles is this: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union* (2002). . . .

Last term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where "the creation, sale, or possession t[ook] place." A saving clause largely borrowed from our obscenity jurisprudence, see *Miller v. California* (1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the depiction of animal cruelty—though States have long

(continued on page 202)

Obama administration's request to dismiss a lawsuit by a San Francisco pilot against federal agencies that disclosed his HIV-positive status during a fraud investigation, a case that could determine the scope of a post-Watergate privacy law.

At issue in Stan Cooper's case is whether agencies that reveal an individual's medical records or other private information can be sued for causing emotional distress. The Obama administration argued that the 1974 Privacy Act allows damages only for financial losses, which Cooper did not claim in his suit.

The U.S. Court of Appeals for the Ninth Circuit in San Francisco ruled in February 2010 that Cooper could seek damages for emotional harm. The Supreme Court granted review of the administration's appeal and will hear the case in the term that begins in October.

The issue of whether plaintiffs can seek damages for emotional harm under the Privacy Act has divided the nation's appeals courts in other cases. Cooper's lawyer, James Wood, said the case would affect the continuing vitality of a law that was passed in response to revelations of break-ins and surveillance of private citizens during President Richard Nixon's administration.

"More often than not, embarrassment and humiliation are the only damages," Wood said. "Unless these are compensable, it's a free license to the government" to break the law.

Cooper, a small-plane pilot, started flying in 1964 but gave up his license after he was diagnosed HIV-positive in 1985, when FAA rules still denied licenses to anyone with the AIDS virus. Cooper reapplied for a license in 1994 without disclosing his condition. His health briefly worsened in 1995 and he applied for Social Security benefits, with the assurance that his medical records would remain confidential. Although the FAA repealed its HIV ban several years later, the agency revoked Cooper's license in 2005 after obtaining his medical records from the Social Security Administration. The FAA's investigation was part of "Operation Safe Pilot," which examined records of 47,000 Northern California pilots to see if they had committed fraud in obtaining Social Security benefits or a pilot's license.

Cooper pleaded guilty to a misdemeanor charge in 2006 and was fined \$1,000. The FAA restored his license later that year. The Supreme Court case is *FAA v. Cooper*. Reported in: *San Francisco Chronicle*, June 21.

schools

Orwigsburg, Pennsylvania

The Blue Mountain School District in Orwigsburg, Pennsylvania, on June 23 authorized its law firm to prepare an appeal to the U.S. Supreme Court regarding a student's Myspace free speech case.

"We feel we have to pursue because we feel we have an obligation to protect our faculty and staff from the misuse of

social media and other things," school board President Carl Yeich said on behalf of the board.

The case involved a female student, identified as "J.S." in court documents, who posted a profile of Blue Mountain Middle School Principal James McGonigle on Myspace on March 18, 2007. The profile included allegations of sexual misconduct, insults and a picture of McGonigle.

On June 13, the U.S. Court of Appeals for the Third Circuit ruled the postings are protected under previous Supreme Court case law on student speech. "The School District's actions violated J.S.'s First Amendment free speech rights," Judge Michael A. Chagares wrote in an opinion. The vote was 8-6. Furthermore, those in the majority stated the parodies failed to show the profile created any substantial disruption of school activities.

The dissenting judges said the ruling chips away at school authority and does not take the situation seriously.

Prior to the June 13 decision, a three-judge circuit panel had affirmed a prior ruling by a senior district judge upholding the 10-day day suspension of J.S.

"I think we should do that (appeal)," Superintendent Robert Urzillo said. "I think this is a landmark case for districts throughout the country." He went on to say that what J.S. did was "abominable."

Mary Jo Moss was the only board member who voted "no." Member Thomas Wehr was absent from the meeting.

"At this time, I feel we need to move on and put this behind us," Moss said after the meeting, although she does not agree with what the student did.

"The issue involves freedom of speech versus the right to abuse freedom of speech," Board President Yeich said. "Is it freedom of speech or are there other issues that have to be addressed?" Yeich said he knows a lot of teachers and others in the education field and "unfounded, undocumented assumptions and assertions can really ruin a teacher's career."

"With an 8-6 vote (from the 3rd Circuit Court decision), it's clear it's a legal matter that's going to be precedent-setting. If it becomes disruptive to the school day, then you have very much a school issue," said board member Jim Gillespie.

Blue Mountain School District resident Alicia Keller, East Brunswick Township, said she does not agree with what J.S. did but "the school cannot reach into every part of your personal life. The school cannot dictate your home life. The school is not their parent." Reported in: *Orwigsburg Republican-Herald*, June 23.

library

Redding, California

A spat over outdoor literature tables during Constitution Week led city officials in Redding to restrict leafletting outside the public library, an action that united a diverse set of opponents—local Tea Party groups and the American Civil

Liberties Union (see *Newsletter*, July 2011, p.146). Now a judge has issued a ruling that could break new ground on free speech in civic plazas.

“The library is an area dedicated to the free exchange of ideas,” Judge Monica Marlow of Shasta County Superior Court said June 22 in an injunction halting enforcement of the restrictions that took effect in April. The rules she blocked included requirements that leafleters apply for city permits in advance, that only one group can leaflet at a time, and that each group must confine itself to a 30-square-foot area near the library entrance. Marlow also blocked bans on handing out leaflets that ask for money, on placing leaflets on car windshields, and on making any “offensively coarse utterance, gesture or display.”

The prohibition on “offensively coarse” speech—punishable by criminal penalties—is “so vague and lacking of standards that it leaves the public uncertain” about what it can say, Marlow wrote.

ACLU attorney Linda Lye said the key to the ruling was Marlow’s reliance on California constitutional protections for free speech, which are stronger than their federal counterparts. That allowed the judge to define the plaza in front of the library as a “public forum,” where free expression is generally allowed, despite city officials’ assertion that the plaza was simply intended to give patrons a path to the library, Lye said.

City Attorney Richard Duvernay said it was “the first case I’m aware of in the country where a court has found the outside premises of a library to be a traditional public forum.” He said the City Council hasn’t decided whether to appeal.

The dispute arose in September 2010, when local Tea Party groups proposed to observe the nationally designated Constitution Week by handing out copies of the Constitution and writings by the nation’s founders outside the library. Duvernay said they agreed to stay in a confined area near the library entrance. The next day, he said, a Daughters of the American Revolution chapter showed up with its own table and was moved to the same area, over Tea Party objections.

City officials decided they needed regulations, which were promptly challenged in separate lawsuits by Tea Party groups and the ACLU, on behalf of its local members.

The leader of the Redding-based Bostonian Tea Party called the ruling “a big win for free speech.”

“No government official has a right to take away our liberties,” said Suann Prigmore, who traces her family line back to a cavalryman who fought under George Washington.

In her ruling, Marlow said there was “overwhelming evidence” that the area leading to the library, a place where people come to learn and share ideas, is a public forum, where speech can be regulated but not prohibited. She said the city’s stated reasons for the restrictions—such as

keeping the entrance unobstructed, preventing litter from handbills placed on windshields and protecting patrons from harassment—were unsupported by the evidence and generally inadequate to justify limits on expression.

Even if some library-goers objected to being offered leaflets, Marlow said, “annoyance and inconvenience are a small price to pay for preservation of our most cherished right.” Reported in: *San Francisco Chronicle*, June 23.

colleges and universities

Boulder, Colorado

The Colorado Supreme Court agreed May 31 to take up the long-running legal battle between Ward Churchill and the University of Colorado, which fired him as an ethnic-studies professor at its Boulder campus after he became the focus of outrage for a provocative essay he wrote about the September 11, 2001, terrorist attacks.

In a significant victory for Churchill’s lawyers, the State Supreme Court agreed to consider all three of the legal questions raised in their appeal. The first is whether lower state courts erred in rejecting the idea that the university’s investigation of Churchill, in itself, amounted to an adverse employment action. The second is whether the lower courts also erred in holding that the University of Colorado’s Board of Regents is a quasi-judicial body and thus immune from such lawsuits. The third is whether such courts were incorrect in holding that, under federal law, the board’s status as a quasi-judicial body precludes Churchill from suing it to get back the job he was dismissed from in 2007 for alleged research misconduct.

“It is a bright day for the First Amendment, for academic freedom, and for tenure,” Churchill’s chief lawyer, David A. Lane, said. Arguing that a state appeals court’s ruling against Churchill “eliminates any remedy for a professor fired in violation of the First Amendment,” he said, “hopefully, the Colorado Supreme Court is going to right that wrong.”

A spokesman for the Board of Regents, Ken McConnellogue, issued a written statement that said: “Every judge who has heard this case has found the University of Colorado acted appropriately in terminating Mr. Churchill. We believe the Colorado Supreme Court will do the same.”

When Churchill’s case went to trial in state court in Denver, the presiding judge, Larry J. Naves, directed the jury not to consider whether the university’s investigation of the professor was, in itself, an act of retaliation. Churchill nonetheless appeared to have prevailed when the verdict was read. Although the jury awarded him only a token \$1 in damages, it agreed that the board had violated his First Amendment rights in dismissing him at the urging of university officials, seeming to set the stage for Judge Naves to order his reinstatement.

Weeks later, however, Judge Naves instead vacated the

jury verdict, accepting the university system's arguments that the Board of Regents is a quasi-judicial body and, as such, is immune under federal law from being sued for either monetary or nonmonetary damages.

Churchill's lawyers then took the case to the Colorado Court of Appeals, arguing that Judge Naves had erred in holding that the university's investigation of Churchill was not an adverse employment action and challenging his acceptance of the board's claim it had acted as a quasi-judicial body in dismissing him. His legal team also argued that, while judicial bodies are immune under federal law from lawsuits seeking either monetary or nonmonetary damages, the federal courts have not interpreted the law as providing quasi-judicial bodies the same immunity in litigation seeking nonmonetary damages, such as job reinstatement. The appeals court sided with Judge Naves on all points.

In asking the state Supreme Court to take up the case, the lawyers for Churchill argued that, in deciding Churchill's fate, the regents were not independent enough from the university administration for their actions to be considered as analogous to those of other quasi-judicial bodies, such as hearing boards. They also argued that such immunity is intended to shield individual officials, and not governing boards, from liability.

The university system's lawyers, in urging the State Supreme Court not to take up the case, had argued that federal courts have been in agreement that public agencies' investigations of their employees are not in themselves adverse job actions and, in fact, serve the public good. The system's lawyers also argued that the board's proceedings against Churchill offered him all of the safeguards of a regular judicial proceeding, including the right to a hearing where his lawyers could cross-examine the witnesses testifying against him.

The State Supreme Court is expected to take up the case sometime after late fall and hand down its decision early next year. Reported in: *Chronicle of Higher Education* online, May 31.

Minneapolis, Minnesota

The Minnesota Court of Appeals has upheld the University of Minnesota's right to discipline a student in a mortuary-sciences class over comments she posted on Facebook. One comment referred to stabbing someone. Others referred to cadavers used in an embalming lab in a way that upset the families of anatomy-bequest donors. The student, Amanda Tatro, had argued that the university had no authority to discipline her for off-campus activities. In an opinion issued July 11, however, the court said that the university had not violated Tatro's rights by holding her accountable to the program's rules requiring respect and professionalism, and by taking seriously any potential threats. Reported in: *Chronicle of Higher Education* online, July 11.

Internet

Anchorage, Alaska

Holding that an Alaska criminal statute threatened to reduce all speech on the Internet "to only what is fit for children," the U.S. District Court in Anchorage permanently barred enforcement of that statute because it violates First Amendment rights of free speech,

In a lawsuit brought by Alaska booksellers, librarians, a photographer, and other First Amendment and media organizations, Chief U.S. District Judge Ralph Beistline held that Senate Bill 222, which could have made anyone who operates a website criminally liable for posting material deemed "harmful to minors," would have chilled free expression.

"There are no reasonable technological means that enable a speaker on the Internet to ascertain the actual age of persons who access their communications," the Court held. "Individuals who fear the possibility of a minor receiving speech intended for an adult may refrain from exercising their right to free speech at all—an unacceptable result."

"The Judge recognized the clear violation of the First Amendment rights of all citizens posed by this overbroad statute," said Michael Bamberger, General Counsel to Media Coalition and lead counsel for plaintiffs. "Plaintiffs agree with the Court that other Alaska laws already address the important interest in protecting children."

The Court held that if Alaska believes additional protections are necessary, the Legislature can enact a narrowly-drawn statute. "Other jurisdictions have written statutes that survive constitutional muster, and the Alaska Legislature can follow suit if it so desires," Judge Beistline held.

Before the Alaska legislature enacted the bill, Media Coalition had pointed out its constitutional defects and offered to work with the legislature to draft a bill that would provide further protections for minors without violating the First Amendment.

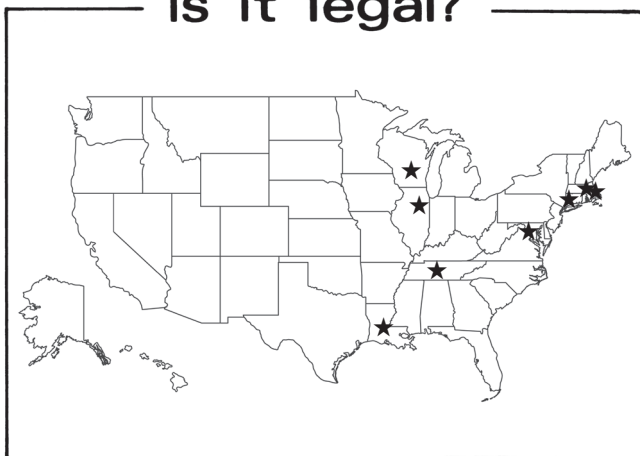
Jeffrey Mittman, Executive Director of the ACLU of Alaska, said, "Alaskans value our freedoms. The court has ensured Alaskans' Internet communications will remain free from unreasonable government infringement."

Before ruling on the case, the federal court had asked the Alaska Supreme Court to answer questions about the scope of the statute, but that court declined to answer the questions.

Plaintiffs include bookstores Bosco's, Fireside Books, and Title Wave Books; Don Douglas Photography; Media Coalition members American Booksellers Foundation for Free Expression, Association of American Publishers, Comic Book Legal Defense Fund, Entertainment Merchants Association, and Freedom to Read Foundation; the Alaska Library Association; and the ACLU of Alaska. Reported in: Media Coalition Press Release, July 1.

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is it legal?



libraries

Madison, Wisconsin

You might want to think twice about activating the “My Reading History” option on the updated computerized materials checkout system for the Madison Public Library.

Clicking “yes” to opt-in for the service means you’ll have a handy record of what you’ve been reading if you need it. But the list of what materials you’ve checked out also will be available to federal authorities if they come knocking at the library door under the USA PATRIOT Act, the controversial anti-terrorist legislation rammed through a 9/11-stunned Congress in 2001 and quickly extended recently for four more years.

Not that you have anything to hide. The question is whether it’s any business of the government what you’ve been reading.

The American Library Association doesn’t think so. It has pushed for changes in the law’s provision that allows the FBI to ask a federal court for access to “any tangible thing,” including library records, deemed relevant to a terrorist threat. The ALA backed proposed revisions to that law to protect privacy and civil liberties, but the library records provision was extended unchanged, despite reassurances the last time the law was extended that it would be. “ALA is more than disappointed in the final outcome,” Lynne Bradley, ALA director of government relations, said.

Up until now, the LINKcat system did not keep a historical record of what patrons checked out. But that is something that patrons of member libraries say they want, said Martha Van Pelt, director of the South Central Library System, the seven-county consortium that runs the online catalog of system materials and individuals’ lists of

materials currently checked out. “It’s something people always have asked for,” she says.

Why? For example, “if they’re reading many titles in a series and they can’t remember which ones they’ve read,” Van Pelt says.

A disclaimer on the LINKcat page where library card holders can sign up for My Reading History says that library staff will not access or release information on patron’s borrowing records “unless required by law to do so.”

“We are always concerned about protecting our readers’ privacy. That is something that is foremost on every librarian’s mind,” said Van Pelt.

It was a committee representing the 41 member libraries using the LINKcat system that opted to offer a reading history in the \$824,779 system revamp purchased from Progressive Technology Federal Systems, Inc. The Maryland-based company provides digitization, archiving and library services to federal and corporate clients.

Carol Froistad, community services manager for the Madison Public Library, said that in deciding to offer the reading history option, staff members insisted that it had to be an “opt-in” service. “We’re leaving it up to individual choice,” she stressed.

Froistad said the option is popular; she believes that people are aware of the privacy and civil liberties implications of the feature and remarks that young people especially “are used to the idea that things aren’t private.”

“I haven’t opted in yet,” she added, however. Reported in: *Madison Capital Times*, June 3.

colleges and universities

New Haven, Connecticut

The Middle East Studies Association (MESA) has asked Yale University to investigate whether alleged government spying on University of Michigan Professor Juan Cole played a role in Yale’s decision to deny him a faculty position. In a letter sent July 5 to campus officials, MESA said it was making the request in response to a recent *New York Times* report accusing the Bush administration of illegally spying on Cole, a critic of its policies, to try to discredit him. The letter urged Yale to establish an investigative committee, with members drawn from the faculties of Yale and other universities, and give it “unrestricted access to all relevant records.” MESA had sent Yale a letter soon after the university denied Cole the job, in 2006, asking whether it had bowed to political pressure. Cole is a past president of MESA and remains a member of its committee on academic freedom.

According to the *Times* report, a former senior CIA official claimed that officials in the Bush White House sought damaging personal information on Cole in order to discredit him.

Glenn L. Carle, a former Central Intelligence Agency officer who was a top counterterrorism official during the administration of President George W. Bush, said the White House at least twice asked intelligence officials to gather sensitive information on Cole, who writes an influential blog that criticized the war.

Carle said his supervisor at the National Intelligence Council told him in 2005 that White House officials wanted “to get” Professor Cole, and made clear that he wanted Carle to collect information about him, an effort Carle rebuffed. Months later, Carle said, he confronted a CIA official after learning of another attempt to collect information about Cole. Carle said he contended at the time that such actions would have been unlawful.

It is not clear whether the White House received any damaging material about Professor Cole or whether the CIA or other intelligence agencies ever provided any information or spied on him. Carle said that a memorandum written by his supervisor included derogatory details about Cole, but that it may have been deleted before reaching the White House. Carle also said he did not know the origins of that information or who at the White House had requested it.

Intelligence officials disputed Carle’s account, saying that White House officials did ask about Professor Cole in 2006, but only to find out why he had been invited to CIA-sponsored conferences on the Middle East. The officials said that the White House did not ask for sensitive personal information, and that the agency did not provide it.

“We’ve thoroughly researched our records, and any allegation that the CIA provided private or derogatory information on Professor Cole to anyone is simply wrong,” said George Little, an agency spokesman.

Since a series of Watergate-era abuses involving spying on White House political enemies, the CIA and other spy agencies have been prohibited from collecting intelligence concerning the activities of American citizens inside the United States.

“These allegations, if true, raise very troubling questions,” said Jeffrey H. Smith, a former CIA general counsel. “The statute makes it very clear: you can’t spy on Americans.” Smith added that a 1981 executive order that prohibits the CIA from spying on Americans places tight legal restrictions not only on the agency’s ability to collect information on United States citizens, but also on its retention or dissemination of that data.

Smith and several other experts on national security law said the question of whether government officials had crossed the line in the Cole matter would depend on the exact nature of any White House requests and whether any collection activities conducted by intelligence officials had been overly intrusive.

The experts said it might not be unlawful for the CIA to provide the White House with open source material—from public databases or published material, for example—about

an American citizen. But if the intent was to discredit a political critic, that would be improper, they said.

Carle, who retired in 2007, has not previously disclosed his allegations. He did so only after he was approached by the *Times*, which learned of the episode elsewhere. While Carle has written a book to be published about his role in the interrogation of a terrorism suspect, it does not include his allegations about the White House’s requests concerning the Michigan professor.

“I couldn’t believe this was happening,” Carle said. “People were accepting it, like you had to be part of the team.”

Professor Cole said he would have been a disappointing target for the White House. “They must have been dismayed at what a boring life I lead,” he said.

In 2005, after a long career in the CIA’s clandestine service, Carle was working as a counterterrorism expert at the National Intelligence Council, a small organization that drafts assessments of critical issues drawn from reports by analysts throughout the intelligence community. The council was overseen by the newly created Office of the Director of National Intelligence.

Carle said that sometime that year, he was approached by his supervisor, David Low, about Professor Cole. Low and Carle have starkly different recollections of what happened. According to Carle, Low returned from a White House meeting one day and inquired who Juan Cole was, making clear that he wanted Carle to gather information on him. Carle recalled his boss saying, “The White House wants to get him.”

“What do you think we might know about him, or could find out that could discredit him?” Low continued, according to Carle. Carle said that he warned that it would be illegal to spy on Americans and refused to get involved, but that Low seemed to ignore him.

“But what might we know about him?” he said Low asked. “Does he drink? What are his views? Is he married?”

Carle said that he responded, “We don’t do those sorts of things,” but that Low appeared undeterred. “I was intensely disturbed by this,” Carle said. He immediately went to see David Gordon, then the acting director of the council. Carle said that after he recounted his exchange with Low, Gordon responded that he would “never, never be involved in anything like that.”

Low was not at work the next morning, Carle said. But on his way to a meeting in the CIA’s front office, a secretary asked if he would drop off a folder to be delivered by courier to the White House. Carle said he opened it and stopped cold. Inside, he recalled, was a memo from Low about Juan Cole that included a paragraph with “inappropriate, derogatory remarks” about his lifestyle. Carle said he could not recall those details nor the name of the White House addressee.

He took the document to Gordon right away, he said.

The acting director scanned the memo, crossed out the personal data about Professor Cole with a red pen, and said he would handle it, Carle said. He added that he never talked to Low or Gordon about the memo again.

Low took issue with Carle's account, saying he would never have taken part in an effort to discredit a White House critic. "I have no recollection of that, and I certainly would not have been a party to something like that," Low said. "That would have simply been out of bounds."

Low, who no longer works in government, did recall being curious about Professor Cole. "I remember the name, as somebody I had never heard of, and who wrote on terrorism," he said. "I don't recall anything specific of how it came up or why."

Gordon, who has also left government service, said that he did not dispute Carle's account, but did not remember meeting with him to discuss efforts to discredit Professor Cole.

Several months after the initial incident, Carle said, a colleague on the National Intelligence Council asked him to look at an e-mail he had just received from a CIA analyst. The analyst was seeking advice about an assignment from the executive assistant to the spy agency's deputy director for intelligence, John A. Kringen, directing the analyst to collect information on Professor Cole.

Carle said his colleague, whom he declined to identify, was puzzled by the e-mail. Carle, though, said he tracked Kringen's assistant down in the CIA cafeteria. "Have you read his stuff?" Carle recalled the assistant saying about Professor Cole. "He's really hostile to the administration."

The assistant, whom Carle declined to identify, refused to say who was behind the order. Carle said he warned that he would go to the agency's inspector general or general counsel if Kringen did not stop the inquiry.

Intelligence officials confirmed that the assistant sent e-mails to an analyst seeking information about Professor Cole in 2006. They said he had done so at the request of the Office of the Director of National Intelligence, which had been asked by White House officials to find out why Professor Cole had been invited to CIA-sponsored conferences.

John D. Negroponte, who was then the director of national intelligence, said that he did not recall the incident, but that the White House might have asked others in his office about Professor Cole. A spokeswoman for the office said there was no evidence that anyone there had gathered derogatory information about him.

Around the time that Carle says the White House requests were made, Professor Cole's conservative critics were campaigning to block his possible appointment to Yale University's faculty. In 2006, conservative columnists, bloggers and pundits with close ties to the Bush administration railed against him, accusing Professor Cole of being anti-American and anti-Israeli. Yale ultimately scuttled the

appointment. Reported in: *Chronicle of Higher Education* online, July 5; *New York Times*, June 15.

Chicago, Illinois

A regional official of the National Labor Relations Board has ruled that Saint Xavier University, a Roman Catholic institution in Chicago, is not sufficiently religious to fall outside that agency's jurisdiction, and has cleared the way for the institution's roughly 240 adjunct faculty members to hold a unionization vote.

In a ruling issued in May, Joseph A. Barker, the director of the NLRB's regional office for the Chicago area, held that Saint Xavier "is not a church-operated institution" under the terms of a key 1979 U.S. Supreme Court decision that defined what characteristics make an institution religious enough that any federal oversight of its labor relations would violate the First Amendment's clauses separating church and state.

He ordered the university to provide the leaders of the proposed union, the St. Xavier University Adjunct Faculty Organization, the names of all faculty members eligible to vote on forming a collective-bargaining unit connected with the National Education Association and its Illinois affiliate.

Barker's decision marked the second time this year that a regional director of the National Labor Relations Board has declared a Roman Catholic college to be too secular to fall outside the board's purview. In a January decision, now under appeal before the NLRB's main office in Washington, D.C., the board's regional director for New York made the same determination in connection with Manhattan College, an institution in Riverdale, N.Y., established by the De La Salle Christian Brothers. That decision cleared the way for adjuncts there to hold an election, but the ballots have been impounded until the dispute over the election's legality is resolved.

In both the Manhattan College ruling and the decision involving Saint Xavier University, which operates a main campus in Chicago and a satellite campus in Orland Park, Illinois, the regional directors based their determinations mainly on the Supreme Court's 1979 ruling in *National Labor Relations Board v. Catholic Bishop of Chicago*. In that decision, the Supreme Court held that the NLRB cannot exercise jurisdiction over parochial schools that are focused on the propagation of religious faith because doing so would cause it to run afoul of the First Amendment's clauses barring the government from establishing religion or prohibiting its free exercise. That decision, which the NLRB applies to colleges on a case-by-case basis, opened the door for the NLRB to develop a test for determining whether educational institutions are of a "substantial religious character."

The regional directors handling the Manhattan College and Saint Xavier University cases both rejected the colleges'

assertions that the NLRB should be bound by more recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit establishing a higher threshold for the board's involvement in a religious college's affairs. The full National Labor Relations Board in Washington used similar logic last August in a case involving employees of a Catholic social service agency in southern Illinois.

A spokesman for Saint Xavier University, Robert C. Tenczar, declined to say whether his institution planned to appeal the Chicago regional director's decision. The university had not attempted to block a similar unionization vote by its adjuncts in January 2010, but the organizers of that effort failed to muster a majority.

In a written statement explaining why Saint Xavier has fought its adjuncts' most recent effort to unionize, Christine M. Wiseman, the university's president, said, "Our rationale for pursuing this issue is that no institution cedes jurisdiction over important matters to a third party without raising legitimate constitutional concerns that have been recognized by the federal courts in a series of decisions on this same question."

Laurie M. Burgess, a Chicago lawyer who represented the Illinois Education Association before the NLRB's regional office, said that she welcomed Barker's decision. She speculated that the spate of recent NLRB decisions asserting jurisdiction over Roman Catholic organizations are not the product of any shift in the board's stance, but a reflection of unions' greater confidence in taking disputes to board members appointed by the Obama administration. "With a receptive board, unions are taking up issues that they might not want to take up under other boards," she said.

Among the institutional attributes that Barker cited in holding Saint Xavier University to be secular enough to fall under the board's purview were the lack of any reference to religion in Xavier's articles of incorporation; the presence of only five members of its founding religious order, the Sisters of Mercy, among the 24 voting members on its Board of Trustees; its reliance on the Catholic Church for only a small portion of its funds; and its lack of any requirements that students take courses in Roman Catholicism.

"There is no evidence that the university would discipline or fire faculty if they did not hold to Catholic values," he wrote. "A faculty member's religious values, or lack thereof, play no role in their hiring or retention at the university and are not a subject of their evaluations" or judgments of their suitability for promotion. The university's mission, he said, is "to educate men and women irrespective of their religious beliefs." Reported in: *Chronicle of Higher Education* online, June 1.

Baton Rouge, Louisiana

The American Association of University Professors issued a report August 1 that finds Louisiana State University

at Baton Rouge violated the rights of two faculty members who, in separate cases, took stands that were unpopular with administrators.

In one case, a research professor—who has since had his position eliminated—took a stance on the reason the levees failed after Hurricane Katrina that angered federal officials, who expressed that displeasure to LSU administrators. While LSU asserts that the end of the professor's job was prompted by tight budgets, the AAUP found that he lost his position—and, before that, was ordered not to pursue certain research topics—because of the controversy caused by his research findings. The AAUP found that this amounted to retaliation that violated the faculty member's academic freedom.

In the other case, a faculty member was removed from her course after reports about the high percentage of students who were receiving low grades. The faculty member maintains that she was simply enforcing academic standards—and the AAUP found that the university's action took place without due process rights and violated the faculty member's right to teach as she saw fit.

LSU is disputing the AAUP's findings in both cases, but is responding with little detail. In the first case, the university says that it cannot say much because of litigation involving the dispute. In the second case, the university says that it cannot say much because the case is working its way through faculty grievance procedures. In the second case, however, the university's response suggests some acknowledgment that the situation may not have been handled appropriately and that better procedures are needed for any similar disputes in the future.

The researcher involved in the post-Katrina debate is Ivor van Heerden, who served for most of his 17 years at LSU in "research professor" slots—positions for which LSU does not award tenure. Although he focused on research, he also played a role in curriculum development, and did some teaching, including serving on the committees of some graduate students.

A coastal geologist and hurricane researcher, van Heerden's areas of expertise made him a logical expert both in advance of and after Hurricane Katrina's landfall. He issued papers and conducted research that helped New Orleans and Louisiana plan for the arrival of the hurricane, and he provided analysis after the fact to government entities and to the news media. The AAUP report notes that, in the immediate aftermath of the hurricane, LSU officials were so pleased with the attention van Heerden was receiving that he was given a university tie pin, lapel pin, cap and T-shirt so he could be associated with LSU whenever he appeared on television.

The university's pride in van Heerden evaporated, however, after he shared in *The Washington Post* and elsewhere his conclusion that the flooding was the result not just of a natural disaster, but also of "catastrophic structural failure"

in the design of the levees in New Orleans. That finding pointed blame at the Army Corps of Engineers—a view that was disputed by federal officials in the immediate aftermath of Katrina, but that the AAUP report notes was later acknowledged. Indeed much of van Heerden’s work that was controversial when he spoke immediately after Katrina is now commonly accepted.

The AAUP report details a series of discussions and exchanges of letters among LSU officials noting federal anger over van Heerden, orders that he stop speaking out in certain ways, orders that he distance himself from LSU, and so forth. (The report notes that federal officials also complained to the University of California at Berkeley about its researchers findings, but that Berkeley rebuffed the complaints.)

Citing the bulk of evidence that van Heerden’s position had been renewed year after year until he offended campus leaders by creating a headache for them with Washington, the AAUP panel said that he was denied reappointment in a way that violated his academic freedom. Further, the AAUP found that since van Heerden worked at LSU for 17 years, he should have been afforded the protections of tenure after seven years, which would have given him heightened due process rights.

A.G. Monaco, associate vice chancellor for human resource management at LSU, said via e-mail that “while the AAUP is at liberty to discuss the Ivor van Heerden case, LSU is not in a position to comment due to pending litigation.” Van Heerden has sued the university. Reported in: insidehighered.com, August 1.

Boston, Massachusetts

Researchers who conduct oral history have no right to expect courts to respect confidentiality pledges made to interview subjects, according to a brief filed by the U.S. Justice Department July 1. The brief further asserts that academic freedom is not a defense to protect the confidentiality of such documents.

With the filing, the U.S. government has come down firmly on the side of the British government, which is fighting for access to oral history records at Boston College that authorities in the U.K. say relate to criminal investigations of murder, kidnapping and other violent crimes in Northern Ireland. The college has been trying to quash the British requests, arguing that those interviewed as part of an archive on the unrest in Northern Ireland were promised confidentiality during their lifetimes.

Particularly now that the Justice Department has weighed in, the case could have an effect on oral history well beyond the archives at Boston College—and some experts predict a negative impact.

The U.S. position in the case deals with a number of issues raised by Boston College—some of which don’t

relate to issues of academic rights. (For example, the college suggests that release of the records could endanger the peace process in Northern Ireland, and the U.S. rejects that view.)

On the issues related to the rights of researchers and colleges, the brief rejects all of the college’s arguments. The government argues that there is no right of confidentiality a researcher can grant that would withstand a subpoena. The Justice Department notes that Boston College acknowledged in its communication with research subjects that its confidentiality pledges assure privacy “to the extent American law allows,” which the government says isn’t very far in cases like this—whatever implication may have been read into that statement by researchers or by interview subjects.

Just because college researchers thought they could maintain confidentiality—and told sources they would do so—is no reason for the courts to go along, the brief says. Boston College wants “the court [to] enforce a promise simply because it was unwisely or mistakenly made,” the brief says. “This too should be rejected because it would turn the law on its head. To grant the motion to quash would encourage other persons engaged in collecting ‘oral histories’—whether they be legitimate academics, or the purveyors of pulp fiction collecting ‘confessions’ about organized crime—to promise complete confidentiality, relying on the court to enforce that ill-advised promise.”

The brief goes on to argue that while professors’ documents have been protected from release in the context of civil lawsuits, this case involves serious criminal charges. Academic protections don’t apply, the Justice Department says.

“Courts have not recognized an ‘academic privilege’ akin to the attorney/client privilege or the Fifth Amendment protection against self-incrimination,” says the federal brief.

Many historians have been backing Boston College in the case. Clifford M. Kuhn, a historian at Georgia State University who is a past president of the Oral History Association, filed an affidavit on behalf of Boston College in which he said that if Britain’s request is granted, the field of oral history could be damaged.

“Trust and rapport are at the very core of the oral history enterprise,” he said in his brief. As part of the process of “informed consent,” interview subjects request certain levels of confidentiality, and researchers approve them. “The reason for this protocol is to foster candor and openness in the interview itself, so as to most fruitfully and fully enhance the historical record.”

If researchers can’t make such pledges, Kuhn said, they may face “self-censorship during the interview.” He added that “if promises made by a repository are not kept to narrators, there might be a damaging ripple effect on potential future oral history interviews and projects.”

Writing on the history blog *Cliopatria*, Chris Bray, a

graduate student in history at the University of California at Los Angeles, called the Justice Department's brief "unmistakably aggressive in tone and in scope."

Kathi Westcott, associate counsel of the American Association of University Professors, said that the AAUP recognizes that colleges are not immune from subpoenas. But she said that the association rejects "the government's contention that academic freedom is irrelevant to the court's assessment of what circumstances necessitate a response to these types of subpoenas and the scope of response that is appropriate."

Westcott said it was "disappointing to see the government take a position that disregards clear legal precedent protecting academic research." She said that many courts have "recognized that academic scholarship is deserving of specified protection and that such protection requires a balancing approach in attempting to ensure that investigative demands are sufficiently factually based and narrow so as to limit the potential chilling effect these types of requests might have on future academic research."

One leading expert said that it's possible that both sides are correct in this case: oral history may not have the legal protections Boston College asserts, and the field may pay a big price if the British government prevails.

John A. Neuenschwander is the author of *A Guide to Oral History and the Law*, published in 2009 by Oxford University Press. In an interview, Neuenschwander said that he searched for precedents that would create a true legal privilege for oral history confidentiality pledges—and could not find any. "There is nothing to absolutely defend a promise of confidentiality," said Neuenschwander, a professor emeritus of history at Carthage College and a municipal judge in Kenosha, Wisconsin.

At the same time, Neuenschwander said that offers of confidentiality are common and much needed to create a frank record of history. "Let's say you are working on a project on the Texas Legislature, and you talk to legislators right after a session. You promise to seal the interviews for twenty years, and they in turn can really let it rip because what they say won't be out any time soon. That's the bargain you make, and it gets the historian the fullest possible record," he said.

Typically, these promises aren't challenged in court by anyone. And Neuenschwander said that he thought it was safe to indicate that they would protect confidentiality—unless hit with a court order. "They just can't give an ironclad guarantee." Boston College is private, but he noted that public colleges and universities also need to check state open records requirements on these issues to see if they can protect interview subjects.

For many oral history projects, it is hard to imagine a subpoena, but trends in research may mean more controversies, Neuenschwander said. In the past decade, oral history projects have been much more likely than in previous

years to examine recent history and to interview people who may have committed or who know about illegal acts, Neuenschwander said.

Social scientists who study dangerous or controversial behaviors (some of which are illegal) deal with these issues, Neuenschwander said, by simply making the names of research subjects anonymous. There is a process through which the National Institutes of Health can grant "certificates of confidentiality" for such research. But history research is different, Neuenschwander said, in that—eventually—historians want to say who did what. A long-term seal of an interview protects confidentiality while needed, but eventually lets people write about the players involved.

The Boston College case—involving charges of murder and an information demand from Britain—is highly unusual, Neuenschwander said. He said he hoped that people "don't overreact" based on the outcome in this case.

"Given the publicity this case has gotten, I think it's going to have a fallout effect of people not being willing to come forward," he said. "It will have a chilling impact on future interviewees, and that's very sad."

Boston College, asked about the Justice Department's brief, released a statement that said: "In filing the motion to quash the subpoena, Boston College is asking the court to weigh the important competing interests in this matter in light of our contention that the premature release of the tapes could threaten the safety of the participants, the enterprise of oral history, and the ongoing peace and reconciliation process in Northern Ireland. Given the ongoing legal proceedings, we will reserve further comment until the matter is resolved by the court." Reported in: insidehighered.com, July 5.

privacy

Washington, D.C.

The Federal Bureau of Investigation is giving significant new powers to its roughly 14,000 agents, allowing them more leeway to search databases, go through household trash or use surveillance teams to scrutinize the lives of people who have attracted their attention.

The FBI soon plans to issue a new edition of its manual, called the *Domestic Investigations and Operations Guide*, according to an official who has worked on the draft document and several others who have been briefed on its contents. The new rules add to several measures taken over the past decade to give agents more latitude as they search for signs of criminal or terrorist activity.

The FBI recently briefed several privacy advocates about the coming changes. Among them, Michael German, a former FBI agent who is now a lawyer for the American Civil Liberties Union, argued that it was unwise to further ease restrictions on agents' power to use potentially

intrusive techniques, especially if they lacked a firm reason to suspect someone of wrongdoing.

“Claiming additional authorities to investigate people only further raises the potential for abuse,” German said, pointing to complaints about the bureau’s surveillance of domestic political advocacy groups and mosques and to an inspector general’s findings in 2007 that the FBI had frequently misused “national security letters,” which allow agents to obtain information like phone records without a court order.

Valerie E. Caproni, the FBI general counsel, said the bureau had fixed the problems with the national security letters and had taken steps to make sure they would not recur. She also said the bureau, which does not need permission to alter its manual so long as the rules fit within broad guidelines issued by the attorney general, had carefully weighed the risks and the benefits of each change.

“Every one of these has been carefully looked at and considered against the backdrop of why do the employees need to be able to do it, what are the possible risks and what are the controls,” she said, portraying the modifications to the rules as “more like fine-tuning than major changes.”

Some of the most notable changes apply to the lowest category of investigations, called an “assessment.” The category, created in December 2008, allows agents to look into people and organizations “proactively” and without firm evidence for suspecting criminal or terrorist activity.

Under current rules, agents must open such an inquiry before they can search for information about a person in a commercial or law enforcement database. Under the new rules, agents will be allowed to search such databases without making a record about their decision.

German said the change would make it harder to detect and deter inappropriate use of databases for personal purposes. But Caproni said it was too cumbersome to require agents to open formal inquiries before running quick checks. She also said agents could not put information uncovered from such searches into FBI files unless they later opened an assessment.

The new rules will also relax a restriction on administering lie-detector tests and searching people’s trash. Under current rules, agents cannot use such techniques until they open a “preliminary investigation,” which—unlike an assessment—requires a factual basis for suspecting someone of wrongdoing. But soon agents will be allowed to use those techniques for one kind of assessment, too: when they are evaluating a target as a potential informant.

Agents have asked for that power in part because they want the ability to use information found in a subject’s trash to put pressure on that person to assist the government in the investigation of others. But Caproni said information gathered that way could also be useful for other

reasons, like determining whether the subject might pose a threat to agents.

The new manual will also remove a limitation on the use of surveillance squads, which are trained to surreptitiously follow targets. Under current rules, the squads can be used only once during an assessment, but the new rules will allow agents to use them repeatedly. Caproni said restrictions on the duration of physical surveillance would still apply, and argued that because of limited resources, supervisors would use the squads only rarely during such a low-level investigation.

The revisions also clarify what constitutes “undisclosed participation” in an organization by an FBI agent or informant, which is subject to special rules—most of which have not been made public. The new manual says an agent or an informant may surreptitiously attend up to five meetings of a group before those rules would apply—unless the goal is to join the group, in which case the rules apply immediately.

At least one change would tighten, rather than relax, the rules. Currently, a special agent in charge of a field office can delegate the authority to approve sending an informant to a religious service. The new manual will require such officials to handle those decisions personally.

In addition, the manual clarifies a description of what qualifies as a “sensitive investigative matter”—investigations, at any level, that require greater oversight from supervisors because they involve public officials, members of the news media or academic scholars.

The new rules make clear, for example, that if the person with such a role is a victim or a witness rather than a target of an investigation, extra supervision is not necessary. Also excluded from extra supervision will be investigations of low- and mid-level officials for activities unrelated to their position—like drug cases as opposed to corruption, for example.

The manual clarifies the definition of who qualifies for extra protection as a legitimate member of the news media in the Internet era: prominent bloggers would count, but not people who have low-profile blogs. And it will limit academic protections only to scholars who work for institutions based in the United States.

Since the release of the 2008 manual, the assessment category has drawn scrutiny because it sets a low bar to examine a person or a group. The FBI has opened thousands of such low-level investigations each month, and a vast majority has not generated information that justified opening more intensive investigations.

Caproni said the new manual would adjust the definition of assessments to make clear that they must be based on leads. But she rejected arguments that the FBI should focus only on investigations that begin with a firm reason for suspecting wrongdoing. Reported in: *New York Times*, June 12.

Washington, D.C.

Many privacy advocates are worried about the extent to which tech companies are becoming unofficial government intelligence agents, handing over data about their users to the feds without the users ever realizing it unless they're charged with a crime. The issue came to the fore when Twitter fought back against a gag when the Department of Justice subpoenaed it for information about WikiLeaks supporters—supporters who then alleged that Facebook and Google had likely quietly complied with government requests for information that they had received.

It turns out that users may never realize their social media accounts were searched even if they are charged with a crime. Reuters went through years of court filings to dig up actual evidence of tech companies complying with law enforcement subpoenas without alerting their users. Reuters found two dozen cases since 2008 of judges letting agents from the FBI, DEA, and ICE poke around in individuals' Facebook accounts in cases of suspected arson, rape, and terrorism. In several cases, the defendants hadn't realized this until Reuters called them about it.

"Many of the warrants requested a laundry list of personal data such as messages, status updates, links to videos and photographs, calendars of future and past events, 'Wall postings' and 'rejected Friend requests,'" writes Reuters. Rejected Friend requests!!! Now that's getting personal.

In a 2008 manual for law enforcement, Facebook specifies the kind of information it provides, ranging from Neoprints (essentially a user profile page screenshot) and Photoprints (a snapshot of all the photos a person has uploaded) to IP logs, contact details, and group members. Recently, Israel revealed that monitoring a Facebook protest group helped it block activists' air travel to Tel Aviv to attend a conference on Palestine.

Reuters found a few unsealed cases where Facebook forensics work paid off. In one 2010 case, an FBI agent went through the Facebook accounts of "four young Satanists" suspected of burning down a church in Ohio. When Reuters contacted the Satan-lovers' lawyers, they said they hadn't known about this. In another case, the DEA searched the Facebook account of a Hollywood psychiatrist after he was arrested for running a celebrity "pill mill."

At the pill-provider's bail hearing, a "police detective pointed to comments [Nathan] Kuemmerle made on Facebook and in the site's popular game 'Mafia Wars' to argue that he should be denied bail," reports Reuters. "According to Kuemmerle's lawyer, John Littrell, the detective testified on cross-examination that the information was from 'an undercover source.' Littrell told Reuters that neither he nor his client was ever informed about the warrant, and that he only learned of its existence from Reuters."

Facebook is not doing anything wrong, per se, but simply complying with the law as it is set up. Companies aren't required to notify users when they receive a warrant, though

some sites (such as Twitter) have adopted a policy of doing so. But it likely makes you set your status to "troubled" to find out that Reuters was the first one to inform these folks' lawyers of the authorities social media investigations.

To what extent is this happening? Facebook wouldn't tell Reuters how many warrants it receives in a given year. In 2009, it told *Newsweek* that it gets "10 to 20 police requests" each day. The fact that Reuters only dug up eleven cases where this evidence was used in 2011 (double that in 2010) makes one wonder how many of those police requests lead nowhere. Overfishing much? Reuters does note that there might be more Facebook-based prosecutions in sealed cases.

Technologist Chris Soghoian notes that the number of cases found is so low because Reuters' excavation was limited to public, federal search warrants issued to Facebook. Non-public warrants, subpoenas, and state law enforcement requests are not included, and likely make up the bulk of requests for information issued to the social networking giant.

The situation could get worse. Congress is currently considering the Protecting Children from Internet Pornographers Act of 2011. The Act will require Internet Service Providers to retain even more data for the authorities to search through. Despite the Act's name, it will apply to all of us, not just Internet pornographers. Reported in: forbes.com, July 12.

Cambridge, Massachusetts

In 2006, Harvard sociologists struck a mother lode of social-science data, offering a new way to answer big questions about how race and cultural tastes affect relationships. The source: some 1,700 Facebook profiles, downloaded from an entire class of students at an "anonymous" university, that could reveal how friendships and interests evolve over time.

It was the kind of collection that hundreds of scholars would find interesting. And in 2008, the Harvard team began to realize that potential by publicly releasing part of its archive.

But the data-sharing venture has collapsed. The Facebook archive is more like plutonium than gold—its contents yanked offline, its future release uncertain, its creators scolded by some scholars for downloading the profiles without students' knowledge and for failing to protect their privacy. Those students have been identified as Harvard College's Class of 2009.

The story of that collapse shines a light on emerging ethical challenges faced by scholars researching social networks and other online environments. The Harvard sociologists argue that the data pulled from students' Facebook profiles could lead to great scientific benefits, and that substantial efforts have been made to protect the students.

Jason Kaufman, the project's principal investigator and a research fellow at Harvard's Berkman Center for Internet & Society, points out that data were redacted to minimize the risk of identification. No student seems to have suffered any harm. Kaufman accused his critics of acting like "academic paparazzi."

Adding to the complications, researchers like Kaufman are being asked to safeguard privacy in an era when grant-making agencies increasingly request that data be shared—as the National Science Foundation did as a condition for backing Harvard's Facebook study.

The Facebook project began to unravel in 2008, when a privacy scholar at the University of Wisconsin at Milwaukee, Michael Zimmer, showed that the "anonymous" data of Kaufman and his colleagues could be cracked to identify the source as Harvard undergraduates.

"The steps that they tried to take to engage in innovative research, to me fell short," said Zimmer, an assistant professor at Milwaukee's School of Information Studies and co-director of its Center for Information Policy Research. "It just shows that we have a lot of work to do to make sure that we're doing this kind of research correctly and in ways that don't jeopardize the subjects that we're studying."

The controversy over the Harvard data set, known as "Tastes, Ties, and Time," comes amid growing interest in social-network research across disciplines, including sociology, communications, history, geography, linguistics, business, computer science, and psychology. The daily minutiae of our digital lives are so culturally valuable that the Library of Congress is on the eve of opening a research archive of public tweets.

"If you had to dream of research content, it would be sending out a diary and having people record their thoughts at the moment," said Alex Halavais, an associate professor of communications at Quinnipiac University and soon-to-be president of the Association of Internet Researchers. "That's like a social scientist's wet dream, right? And here it has kind of fallen on our lap, these ephemeral recordings that we would not have otherwise gotten."

But that boon brings new pitfalls. Researchers must navigate the shifting privacy standards of social networks and their users. And the committees set up to protect research subjects—institutional review boards, or IRB's—lack experience with Web-based research, according to Zimmer. Most tend to focus on evaluating biomedical studies or traditional, survey-based social science. He has pointed to the Harvard case in urging the federal government to do more to educate IRB's about Web research.

The project at the center of this dispute dates to Facebook's younger days. Even then the Harvard-born network was on its way to conquering American higher education. In 2006, with clearance from Harvard's IRB and Facebook, Kaufman's team began dipping into the profiles of one class to build a data archive for social-science

research.

The researchers downloaded each student's gender, home state, major, political views, network of friends, and romantic tastes. To determine race and ethnicity, they examined photographs and club affiliations. They recorded who appeared in students' photo albums. And they culled cultural tastes like books, music, and movies.

The archive was built to feed a team of five sociologists—four from Harvard, one from the University of California at Los Angeles—whose research interests include culture, race, and public health. Their push to vacuum up so many Facebook profiles helped overcome a big obstacle to social-network research: getting enough data. Typically researchers conduct such studies through external surveys of social-network users, Zimmer says. Or they'll do an ethnography of a smaller group. That means the available data can be soiled because of self-reporting biases and errors. Or it may not truly represent the population. Not only had Kaufman's team amassed an ample data set, but they had improved it by collecting information from the same class over four years. The data, as Kaufman puts it, amount to "a complete social universe."

But here's where things got sketchy. Kaufman apparently used Harvard students as research assistants to download the data. That's important, because they had access to profiles that students might have set to be visible to Harvard's Facebook network but not to the whole world, Zimmer argued in a 2010 paper about the case published in *Ethics and Information Technology*. The assistants' potentially privileged access "should have triggered an ethical concern over whether each student truly intended to have their profile data publicly visible and accessible for downloading," Zimmer said.

Kaufman has declined to discuss who helped collect the data. But the sociologist did concede in a videotaped 2008 talk that the assistants created "an interesting wrinkle to this, from a legal point of view."

"We faced a dilemma as researchers," Kaufman said on tape. "What happens if a student has a privacy setting that says, 'You can't see me unless you're my friend,' and our undergraduate research assistant who is downloading the data is a friend of that person? Then can we include them in our data?"

He left that question unanswered at the time. But Kaufman talks openly about another controversial piece of his data gathering: Students were not informed of it. He discussed this with the institutional review board. Alerting students risked "frightening people unnecessarily," he said.

"We all agreed that it was not necessary, either legally or ethically," Kaufman claimed.

The Harvard case reflects how the Internet is changing the relationship between researchers and their subjects, sometimes creating what Elizabeth A. Buchanan, director of the Center for Applied Ethics, at the University of

Wisconsin-Stout, calls a “strange distance” between the two. Researchers may grab content posted online without interacting with the people who wrote it or considering them “human subjects.” But they may be aggregating data that can be traced to individuals.

The fundamental question is how best to protect subjects, she says, “and sometimes in Internet research ... those issues get muddled.”

For example, Quinnipiac’s Mr. Halavais did a Twitter study focused on protests surrounding the Group of Twenty summit in Pittsburgh. But something unanticipated happened: Some people were arrested for using Twitter to help demonstrators evade police. After that, one of the key people in the study deleted his Twitter account. What the subject didn’t know was that researchers had collected his tweets in an archive and planned to publish papers about the data.

Halavais didn’t seek approval from his review board—as he sees it, studying Twitter is like studying newspapers. “We did not predict that the very act of tweeting something might be considered a criminal offense,” he said. “I don’t think an IRB would have been able to predict that any better than we would.”

A rule of thumb holds that if an online community requires a password to enter, then researchers must seek IRB approval to study its members. But some scholars go further, Halavais says, arguing that researchers should seek approval to study open publishing platforms like blogs and Twitter.

Attitudes toward privacy are also evolving, among both researchers and companies. Fred Stutzman, a postdoctoral fellow at Carnegie Mellon University who studies privacy in social networks, used to harvest Facebook data that students made public on his university network. He isn’t sure he’d do that today.

“This is the nature of these systems,” said Stutzman, who has criticized the Library of Congress’s Twitter project. “Maybe in three years, we’ll look at public tweets and say, Oh, my God, those weren’t public. A lot of people that are using Twitter nowadays may actually want to go back and delete their accounts or take those things out of the public at a later date, and they no longer can.”

Twitter recently alarmed researchers by saying that collecting tweets and making them openly available violates the terms of service, a blow to academics who want to share data.

Facebook, too, has taken a stricter approach to research as the company has matured and weathered several privacy controversies. Cameron Marlow, its head of data science and “in-house sociologist,” has built up a small but tightly controlled program for external research since joining Facebook, in 2007.

Asked about the Harvard sociologists’ project, Marlow says things would be different had it begun now: “We would have been much more involved with the researchers who

are doing the data collection.” All work would be done on Facebook servers, for example. And releasing data? Unlikely.

“We tend to not release any data, for the fact that it’s almost impossible to anonymize social-network data,” he says.

Zimmer proved him right. Within days of Harvard’s release from the data archive, he zeroed in on the institution without even downloading the profiles. Most of what he needed was in the archive’s code book—a lengthy document, at the time easily available online (it has since been restricted), that described in detail how the data set was collected and what it contains. The size of the class, uniquely titled majors like “organismic and evolutionary biology,” and Harvard’s particular housing system all clued Zimmer in to the source of the Facebook information.

Kaufman, for his part, won’t comment on whether Harvard is, in fact, the source of his data. But assuming that Zimmer is correct, why does it matter? What’s the danger?

One issue, Zimmer says, is that someone might be able to figure out individual students’ identities. People with unique characteristics could be discovered on the basis of what the Harvard group published about them. (For example, the original code book lists just three students from Utah.) Their information could be absorbed by online aggregators, like Pipl. A prospective employer might Google a student and use the resulting information to discriminate against him or her, Zimmer says.

“These bits and pieces of our personal identities could potentially have reputational harm,” he says.

He’s right about how easy it is to identify people who are presumably part of the data set. By searching a Facebook group of Harvard’s Class of 2009, a reporter quickly tracked down one of those three Utah students. Her name is Sarah M. Ashburn. The 24-year-old is in Haiti working for a foundation that helps AIDS victims.

The Facebook-data controversy was news to her. In a telephone interview, Ashburn said her main qualm with the project is its use of students who may have had privileged access to data that was supposed to be shared only with friends, or friends of friends. Because of that, she feels that the researchers should have informed the class about their project.

Still, she isn’t concerned about the possibility that her own data is out there. “Anything that’s put on Facebook somehow will make it out into the general public, no matter what you attempt to do,” she said. “So I never have anything on my Facebook profile that I wouldn’t want employers, my grandmother, like anyone in the world to be able to see.”

In their defense, the Harvard sociologists stress that researchers outside their own group had to apply for access to download the data and agree not to share it or identify

(continued on page 204)

success stories



schools

Richland, Washington

The Richland School Board has reversed its decision to ban the use of a young-adult novel by a popular Northwest author in classrooms. *The Absolutely True Diary of a Part-Time Indian*, by Sherman Alexie, now is cleared for any grade level in Richland high schools.

The board voted 4-1 July 11 to allow Alexie's novel back into schools. Phyllis Strickler this time was the lone dissenter. On June 14, the board voted 3-2 to remove the book from the district's reading lists. At that time, Mary Guay and Rick Donahoe joined Strickler in voting against *Absolutely True*.

That had been a mistake, Guay and Donahoe said. The board is allowed to revisit a vote when a member who voted with the majority asks for a redo, said Richard Jansons, the board president.

None of the board members had read *Absolutely True* when they first voted on it. That was the job of the Instructional Materials Committee, or IMC, established a little more than a year ago to review all books used in Richland schools. Guay and Donahoe thought that the entire IMC read the book before its members gave it mixed reviews in June.

But to speed up the process, IMC members split up in groups. Each group reads a particular book and then shares its findings with the rest of the members. Once Guay and Donahoe found out that only part of the committee had read the book, they wanted to revisit their votes against it. "That was my misunderstanding," Donahoe said.

He read the book two days after the June 14 meeting and found it to be "outstanding," he said. The book is based on Alexie's own upbringing on the Spokane reservation and his attending school in nearby Reardan, a predominantly white

farming town. The book's 14-year-old protagonist struggles with poverty, racism and death.

Those themes, and particularly the main character's perseverance in the face of these challenges, bear important lessons for students, Donahoe said. "When I'm voting a book out of the classroom, I'm denying parents the right to choose to have that book read by their students," he said. In the future, he will read every book he will vote on, Donahoe said.

So will the other member who switched her vote from the one she cast four weeks ago. "I made a big mistake," Guay said. "I will be getting every book we vote on." Her original vote and its reversal had nothing to do with her facing a challenger in the upcoming school board elections who is an IMC member, Guay said.

All members of the board had read *Absolutely True* by the time they met to reconsider the decision. But Jansons said that couldn't be expected to happen for each book—that's what the IMC is there for. The district has about 70 books left to review and has given itself six to nine months to do it, he said.

"If the expectation is that (the board) read every one, that's going to take me a while," Jansons said. "But I won't vote to remove a book from the selection before I read it."

Most who spoke up during public input on the book issue appeared to be in favor of allowing the novel in the schools. Kim Maldonado, a teacher at Hanford High School, said she had thought about using *Absolutely True* in a 10th-grade support class she taught two years ago. Her class included mostly "kids from tough backgrounds," Maldonado said. Among them was a Native American youth, whom she asked to review the book before she gave it to the whole class.

"He read it five times," Maldonado said. "It changed his life. It made him understand his heritage and his issues with his father." The book taught the children in her class that they can get out of the tough situations they were in, she said. And the character's journey through high school teaches kids that education can better their lives, she added.

Others in support of Alexie's book said that negative reviews focused too much on the few harrowing situations described in it and too little on its overall message of hope and humor.

Two in the small crowd stood to speak out against the novel. David Garber read from a *Wall Street Journal* article critical of coarse themes and language in young-adult novels that names *Absolutely True* as an example. Garber is a member of the IMC and of a group that rates novels based on how much of their contents it finds offensive.

Dave Hedengren questioned if board members lost the ability to know when a book went "over the mark," and equated some of the books taught in Richland schools with Internet pornography, which is electronically blocked from school computers.

The district cannot meet the exact standards of every parent in its votes on novels, which is why the last say over what a student reads is with the parent, Jansons said. "That's why

we have the opt-out policy,” he said. “I trust the process we’re using.” Reported in: *Tacoma News-Tribune*, July 12.

prisons

Hagerstown, Maryland

Maryland corrections officials lifted a ban on a book written by inmate Marshall “Eddie” Conway, but the troublesome—and almost certainly unconstitutional—policies that led to the banning in the first place remain. The book *Marshall Law —The Life & Times of a Baltimore Black Panther*, is no longer prohibited reading at the Maryland Correctional Training Center in Hagerstown, but the prison system is sticking by its assertion that it can restrict inmates’ speech rights beyond what is necessary to maintain security.

Originally, prison officials said the autobiography had been banned because the author and the inmates whose photos appear in the book failed to notify the victims of their crimes of the book’s publication. A lawyer for the American Civil Liberties Union had questioned this procedure, saying giving the victims tacit veto power over an inmate’s right to speak out is a violation of the First Amendment.

Rick Binetti, a spokesman for the Maryland Department of Public Safety and Correctional Services, said the ban had been lifted because all the proper notifications had now been made.

The author of the book is a former minister of defense for the Baltimore Black Panther Party and was convicted of killing Baltimore police officer Donald Sager in 1970. He is serving a life sentence and is being held at the Jessup Correctional Institute. The book is co-authored by Dominique Stevenson, a prison activist with the American Friends Service Committee.

Maryland corrections officials say it has been their long-standing policy to notify crime victims when the inmates who committed the crimes are being interviewed or photographed. If the victims or their families objected to these sessions, corrections officials have typically bowed to their wishes.

Courts have held that authorities can put restrictions on the free speech of inmates, but these restrictions must be reasonable and directly related to prison security. The banning of “Marshall Law” failed on both those counts.

The Maryland Department of Public Safety and Corrections encourages inmates to read. Its libraries follow the guidelines of the American Library Association, which state that even those individuals that a lawful society chooses to imprison permanently deserve access to information, to literature, and to a window on the world. As for censorship of reading material, the guidelines say that only those items that present an actual compelling and imminent risk to safety and security should be restricted. Reported in: *Baltimore Sun*, July 20. □

IFC report ...from page 169)

WHEREAS, ALA opposes any use of governmental power to suppress the free and open exchange of knowledge and information; and

WHEREAS, The USA PATRIOT Act includes provisions such as Sections 215 and 505 that threaten the free and open exchange of knowledge and information; and

WHEREAS, Section 215 of the USA PATRIOT Act allows the government to request and obtain library records secretly for large numbers of individuals without any reason to believe they are involved in illegal activity; and

WHEREAS, Section 505 of the USA PATRIOT Act permits the FBI to obtain records from libraries with National Security Letters (NSLs) without prior judicial oversight; and

WHEREAS, Orders issued under Sections 215 and 505 automatically impose a nondisclosure or gag order on the recipients, thereby impairing the reporting of abuse of governmental authority and abrogating the recipients’ First Amendment rights; and

WHEREAS, The Foreign Intelligence Surveillance Act (FISA) Court issued more than 220 Section 215 orders between 2005 and 2007, some of which may have been issued to libraries; and

WHEREAS, A recent Department of Justice report on surveillance activities for 2010 disclosed a dramatic increase in surveillance of Americans between 2009 and 2010, with the government more than quadrupling its use of Section 215 orders compared to 2009; and the FBI more than doubling the number of US persons it surveilled with NSLs, requesting 24,287 NSLs on 14,212 people (up from 14,788 NSLs on 6,114 people in 2009); and

WHEREAS, The Office of the Inspector General (OIG) of the Department of Justice reported the issuance of 234,043 NSLs under Section 505 between 2003 and 2008, at least one of which was issued for library user records; and

WHEREAS, ALA has repeatedly called on Congress to institute reforms to the USA PATRIOT Act that protect reader privacy and rescind the nondisclosure or gag orders on the recipients of Section 215 and 505 orders for library user records; and

WHEREAS, Members of Congress have sought to address the concerns of ALA and restore privacy rights by introducing legislation such as the Freedom to Read Protection Act, the National Security Letters Reform Act, and the USA PATRIOT Act Improvements Bill; and

WHEREAS, Congress reauthorized Section 215 of the USA PATRIOT Act without any reforms and extended the sunset provision until June 1, 2015; therefore, be it

RESOLVED, that the American Library Association:

1. Continues to support reforms that protect reader privacy and civil liberties, especially the freedom to read without fear of government surveillance.

2. Continues to oppose the use of Section 215 of the USA PATRIOT Act and the use of National Security Letters to violate reader privacy.

3. Supports the passage of legislation which includes such reforms as heightened protections for library and bookseller records; judicial review of FISA orders, NSLs and their associated gag orders; and the sunset of the USA PATRIOT Act's NSL authorities, as proposed in S.1125, the USA PATRIOT Act Improvements Bill.

4. Expresses its thanks and appreciation to the members of Congress who work to protect reader privacy.

Endorsed by Intellectual Freedom Round Table, the Committee on Professional Ethics and the Association of Specialized and Cooperative Library Agencies.

Endorsed in principle by the Government Document Round Table.

Adopted by ALA Council on June 28, 2011. □

FTRF report ...from page 170)

DEVELOPING ISSUES: E-BOOKS AND PRIVACY

At its meetings, the FTRF Board of Trustees traditionally sets aside time to discuss emerging issues that raise concern from an intellectual freedom perspective. At the past few meetings, our discussions have focused on e-books, reader privacy, and the use of cloud computing for data storage and use.

It is clear that third-party vendors who provide access to e-books have the capability to track patron data and use information and to retain that information. The laws governing the sharing and disclosure of data held by third parties allow third-party vendors to adopt privacy policies that may differ substantially from the privacy policy in place at the library, thereby permitting patron use information to be divulged by the third-party vendor in contravention of library policy and state law.

As ALA takes up the issue of e-books and libraries, the FTRF Board of Trustees strongly encourages Council, its committees, and its task forces to prioritize the protection of reader privacy in the e-book environment.

2011 ROLL OF HONOR AWARD RECIPIENT CHRISTOPHER M. FINAN

It is my privilege to announce this year's FTRF Roll of Honor Award recipient, Christopher M. Finan, president of the American Booksellers Foundation for Free Expression (ABFFE). Chris, a longtime friend (and current trustee) of the Freedom to Read Foundation, is a member of the Media Coalition and a member and chair of the board of the National Coalition Against Censorship.

He has a distinguished career in both study and activism on behalf of the freedom to read. His work on behalf of free speech began in 1982 when he joined the Media Coalition as

its coordinator. Finan then joined ABFFE in 1998 as its president, and since then has worked on a host of First Amendment issues, including federal, state, and local legislation and litigation. He has been particularly active in fighting state "harmful to minors" statutes and advocating the role of the bookseller as a partner with libraries, users, publishers, and all who produce, distribute, or use First Amendment protected materials. Finan has been a leader in the efforts to amend the USA PATRIOT Act. Recently he has worked with ALA and brought in new partners to expand the influence and scope of Banned Books Week nationwide. Finan's book, *From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America* (Beacon, 2008), received the Intellectual Freedom Round Table's Eli M. Oboler Memorial Award in 2008.

2011 CONABLE CONFERENCE SCHOLARSHIP WINNER AUDREY BARBAKOFF

I am also pleased to announce the winner of the 2011 Gordon M. Conable Conference Scholarship, Audrey Barbakoff, a reference librarian with the Milwaukee (Wis.) Public Library. Per the terms of the scholarship, all of Audrey's travel and conference-related expenses were paid by the Foundation. Audrey has attended all FTRF activities at this conference, as well as several other intellectual freedom meetings and programs, and she will write a report on her experience for the Freedom to Read Foundation newsletter.

Barbakoff holds a B.F.A. from the University of Illinois at Urbana-Champaign and a Masters of Library and Information Science from the University of Washington, which she received in 2010. In her capacity at the Milwaukee Public Library, she provides reference and readers' advisory services; coordinates programs and displays; and blogs. She also coordinates the Teen Advisory Board and leads preschool story times. Barbakoff is a member of the Wisconsin Intellectual Freedom Round Table and recently had an article about the ethics of filtering computers in public libraries published on the peer-reviewed website *In the Library with the Lead Pipe*. This is her first ALA Conference.

FTRF MEMBERSHIP

As the Freedom to Read Foundation explores various alternatives for developing new membership as part of its strategic planning process, it continues a membership initiative that has introduced nearly 300 new librarians to the work of the Foundation. Since 2009, FTRF has offered free one-year memberships to graduating library school students, providing them with an opportunity to acquaint themselves with FTRF and its work defending both First Amendment freedoms and privacy rights. The program will continue for another year, during which we will intensify our focus on retaining these new members. More information on the program can be found at www.ftrf.org/graduates.

Other programs that help to expand FTRF's membership are the state chapter initiative, which aims to count every single

state ALA chapter as an FTRF member, and FTRF's organizational membership campaign. These schemes broaden the Foundation's reach while insuring critical, necessary support for the Foundation's programs.

Your own membership in the Freedom to Read Foundation is needed to sustain FTRF's unique role as the defender of First Amendment rights in the library. Please consider joining (or rejoining) FTRF as a personal member, and please consider inviting your organization or your institution to join FTRF. A brand new membership brochure, available from the FTRF office, can help you extend these invitations. Or you can simply send a check (\$35+ for personal members, \$100+ for organizations, and \$10+ for students) to: Freedom to Read Foundation

50 E. Huron Street
Chicago, IL 60611

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

shhh! no opinions ...from page 171)

Mainstream publications pretend to have no political leanings at all. But corporate publications for children present a view that is overwhelmingly favorable to the U.S. government and corporations, while ignoring the opinions and actions of common people.

For example, a *Scholastic News* story dated February 11, 2011, on the forced resignation of Hosni Mubarak asks "What's Next for Egypt?" It quotes crowds chanting "Leave! Leave!" and unnamed Egyptian officials, but then focuses on President Obama's remarks. The article makes no mention of long-standing U.S. government financial support to the Mubarak regime. In contrast, an *IndyKids* article on the subject presents the perspectives of nine Egyptian kids, aged 10 to 13, who offer their opinions on events in Egypt and describe their participation in the uprising. It also contains information on U.S. aid to Egypt, shining light on the historic relationship between the two countries.

Or consider another current events issue of ongoing significance: WikiLeaks. When the story first broke, *Scholastic News Online* covered it in an article titled "U.S. Military Secrets Leaked, Details in Internet Postings Cause Concern" (July 27, 2010), which focused on the author's "concern" for the "Afghan war effort," not for the Afghan civilians who have been killed or how the U.S. public has been misled about the war. The article quoted only a U.S. Defense Department spokesman and portrayed WikiLeaks as an internet phenomenon that "think[s] it will protect others if they share secret information that, in their opinion, is covering up the truth." *Scholastic News* assumed the legitimacy of the war and focused the debate on the benefits and drawbacks of the Internet.

In covering the same issue, *IndyKids* quoted a U.S. national

security advisor on why he opposed release of the documents, the founder of WikiLeaks on why he released the documents, and the president of Veterans for Peace on why he thinks the war is being waged in the first place. *IndyKids* also offered a short list of the key revelations from the leaked documents.

Information on current events that is accessible and interesting to kids is hard to find, particularly substantive national and world news. The vast majority of periodicals for kids encourage readers to embrace fashion and sports, and avoid news of any significance. For example, a recent look at the top twenty past news stories on the *Time* for Kids website turns up seven entertainment and sports stories, three of them promoting Disney products. Three articles are about the weather. The others include an interview with the CEO of Ford Motor Co., a story about the British royal wedding, and one about a miniature horse with a prosthetic limb. Just one article can be considered to be hard political news: "A Strike Against Terror," which cheers the U.S. assassination of Osama bin Laden, quoting only Obama and CIA director Leon Panetta.

Then there's the online news site *Tween Tribune* (www.tweentribune.com). It boasts 46,033 teachers who send their students to the site, which culls from the Associated Press what it calls the most "compelling news from a tween's perspective." An article about the Washington State Potato Commission executive director's vow to eat nothing but potatoes for 60 days garnered 1,253 comments from readers. A "top world news" story on the world's largest chocolate bar, found in Armenia, received 3,869 comments.

A major underlying issue in *IndyKids*' struggle to enter public libraries is children's right to access accurate and broad information. A common criticism of *IndyKids* by adults is that the news—which includes civilian deaths, torture, government spying—is too frightening for kids. Adults, including librarians, parents, and teachers, feel they must protect kids from violence, injustice, and bias. Kids will get enough of the horrors of the real world when they grow up, they reason.

But not all kids want to live in ignorance, as *IndyKids*' growing readership shows. Julian Rocha, age 10, wrote to *IndyKids*: "Every time I watch the news or read the newspaper, the way that they explain it is so complicated. *IndyKids* is great for me because I want to learn about different things happening around the world." Libraries should give kids that opportunity. □

U.S. underwrites ...from page 173)

suitcase but would only require the software modification on ordinary phones.

By the end of 2011, the State Department will have spent some \$70 million on circumvention efforts and related technologies, according to department figures.

Clinton has made Internet freedom into a signature cause. But the State Department has carefully framed its support as

promoting free speech and human rights for their own sake, not as a policy aimed at destabilizing autocratic governments. That distinction is difficult to maintain, said Clay Shirky, an assistant professor at New York University who studies the Internet and social media. "You can't say, 'All we want is for people to speak their minds, not bring down autocratic regimes'—they're the same thing," Shirky said.

He added that the United States could expose itself to charges of hypocrisy if the State Department maintained its support, tacit or otherwise, for autocratic governments running countries like Saudi Arabia or Bahrain while deploying technology that was likely to undermine them.

In February 2009, Richard C. Holbrooke and Lt. Gen. John R. Allen were taking a helicopter tour over southern Afghanistan and getting a panoramic view of the cellphone towers dotting the remote countryside, according to two officials on the flight. By then, millions of Afghans were using cellphones, compared with a few thousand after the 2001 invasion. Towers built by private companies had sprung up across the country. The United States had promoted the network as a way to cultivate good will and encourage local businesses in a country that in other ways looked as if it had not changed much in centuries.

There was just one problem, General Allen told Holbrooke, who only weeks before had been appointed special envoy to the region. With a combination of threats to phone company officials and attacks on the towers, the Taliban was able to shut down the main network in the countryside virtually at will. Local residents report that the networks are often out from 6 p.m. until 6 a.m., presumably to enable the Taliban to carry out operations without being reported to security forces.

The Pentagon and State Department were soon collaborating on the project to build a "shadow" cellphone system in a country where repressive forces exert control over the official network. Details of the network, which the military named the Palisades project, are scarce, but current and former military and civilian officials said it relied in part on cell towers placed on protected American bases. A large tower on the Kandahar air base serves as a base station or data collection point for the network, officials said.

A senior United States official said the towers were close to being up and running in the south and described the effort as a kind of 911 system that would be available to anyone with a cellphone.

The United States is widely understood to use cellphone networks in Afghanistan, Iraq and other countries for intelligence gathering. And the ability to silence the network was also a powerful reminder to the local populace that the Taliban retained control over some of the most vital organs of the nation.

When asked about the system, Lt. Col. John Dorrian, a spokesman for the American-led International Security Assistance Force, or ISAF, would only confirm the existence of a project to create what he called an "expeditionary

cellular communication service" in Afghanistan. He said the project was being carried out in collaboration with the Afghan government in order to "restore 24/7 cellular access. As of yet the program is not fully operational, so it would be premature to go into details," Colonel Dorrian said.

In May 2009, a North Korean defector named Kim met with officials at the American Consulate in Shenyang, a Chinese city about 120 miles from North Korea, according to a diplomatic cable. Officials wanted to know how Kim, who was active in smuggling others out of the country, communicated across the border. "Kim would not go into much detail," the cable said, but did mention the burying of Chinese cellphones "on hillsides for people to dig up at night." Kim said Dandong, China, and the surrounding Jilin Province "were natural gathering points for cross-border cellphone communication and for meeting sources." The cellphones are able to pick up signals from towers in China, said Libby Liu, head of Radio Free Asia, the United States-financed broadcaster, who confirmed their existence and said her organization uses the calls to collect information for broadcasts as well.

The effort, in what is perhaps the world's most closed nation, suggests just how many independent actors are involved in the subversive efforts. From the activist geeks on L Street in Washington to the military engineers in Afghanistan, the global appeal of the technology hints at the craving for open communication.

Malik Ibrahim Sahad, the son of Libyan dissidents who largely grew up in suburban Virginia, said he was tapping into the Internet using a commercial satellite connection in Benghazi. "Internet is in dire need here. The people are cut off in that respect," wrote Sahad, who had never been to Libya before the uprising and is now working in support of rebel authorities. Even so, he said, "I don't think this revolution could have taken place without the existence of the World Wide Web." Reported in: *New York Times*, June 12. □

editorial dateline ...from page 177)

Other board members said removing the book from the sixth-grade reading list would eliminate a valuable educational opportunity. Jason Buyaki, of the Rivanna District, and Pamela Moynihan, of the Rio District, said the book was a valuable tool to combat discrimination.

"What would be most useful for this whole process would be to have a useful curriculum about prejudice and intolerance," Buyaki said. "If we place this in the library, there's no instruction. There's nobody to say, 'there's some stereotypes here.'"

Moynihan said that it was important to tackle prejudice issues early, before children develop their own prejudices, and before minority children begin to view themselves as minorities. "I don't think it's ever good to censor our reading lists.

If we were to scrub our entire reading list, I don't think we'd come up with anything that didn't offend someone," Moynihan said. "It's important to show kids both sides of the issue."

Some Albemarle County residents agreed. Tim Dodson, a ninth grader at Western Albemarle High School, and recent graduate of Henley Middle School, said the book had not affected his view of Mormons. "My views of Mormonism were not shaped by the book... If it really wasn't age appropriate, I think you guys would have heard about it years ago," he told the board.

Dodson also worried that removing the book because some people found it offensive would set a bad precedent for the entire school system. Dodson referenced Ray Bradbury's *Fahrenheit 451* as an example of censorship gone awry. "I think such a removal would be quite ridiculous," Dodson said.

School board candidate Ned Galloway urged the board to consider the potential educational opportunity the proposed removal presented. Galloway said the issue was deeper than simply the removal of one book. "World-class education systems would take this moment as an educational opportunity, and I hope you'll consider that as you consider your decision tonight," he said during public comment. Reported in: *The Daily Progress*, July 14.

foreign

Kokshetau, Kazakhstan

A Kazakh weekly newspaper is facing calls for its closure over a crossword clue critics say was insulting to the Kazakh nation. The row is over a crossword in the May 26 issue of the Russian-language *Stepnoi Mayak* (Steppe Lighthouse), a newspaper in the northern city of Kokshetau. The offending clue asked, "Name the house of a Kazakh street bum." The answer was given as "yurt," the traditional home of the nomadic peoples of Eurasia, including Kazakhs. The crossword sparked a series of protests in Kokshetau and other Kazakh cities.

The chairman of the Bolashaq (Future) movement, Dauren Babamurat, said that the newspaper should be closed as it compared Kazakhs with street bums. Babamurat added that such a harsh punishment would be a lesson for other newspapers in Russian in Kazakhstan.

Deputy Nurlan Onerbaev called on parliament to discuss the possible closure of *Stepnoi Mayak* and several other newspapers printed in the Russian language. Onerbaev claimed the newspapers often intentionally misprint some names of Kazakh historic figures. Onerbaev's request to close the newspapers was signed by fourteen deputies and sent to Kazakh State Secretary Qanat Saudabaev.

Stepnoi Mayak chief editor Sergei Kibasov said that the crossword with the controversial question and answer was taken from another "foreign periodical" and printed by mistake.

"It was our fault," Kibasov said. "We are very sorry and we have apologized both officially and non-officially." According to Kibasov, "it would be too much to close the newspaper for such a mistake." Kibasov refused to name the periodical that originally carried the crossword.

Tamara Kaleeva, chairwoman of the Almaty-based Adil Soz media rights defense center, said that it is necessary to take into account that the periodical's editors did not intend to offend the Kazakh nation, its symbols, or honor, and therefore it should just print an apology and make sure that all future borrowings from other periodicals are thoroughly checked before being used. Reported in: Radio Free Europe/Radio Liberty, June 22. □

from the bench ...from page 185)

prisons

Corcoran, California

California prison officials can prohibit inmates from viewing R-rated movies and movies that "glorify violence or sex" without violating the First Amendment, a federal court has ruled.

A California Department of Corrections policy provides that only movies rated G, PG or PG-13 by the Motion Picture Association of America may be shown to inmates, although films that "have been placed on the department's discretionary showing list may be considered for viewing."

"Regardless of their rating or listing, movies/videos which, in the opinion of the reviewer, glorify violence or sex, or are inflammatory to the climate of the [prison] shall not be shown," the policy adds.

Inmate Perry Robert Avila, housed in a California prison in Corcoran, challenged the constitutionality of this policy in federal court. He contended that the prison's policy of categorically prohibiting all R-rated movies—even those without excessive sex or violence—violates the First Amendment. For example, Avila said the MPAA may rate some movies R merely because they portray adult themes.

California prison officials countered that the policy does not violate any free-speech rights and furthers the prison's legitimate interests in safety.

On July 8, U.S. District Court Judge Jennifer L. Thurston sided with prison officials in her opinion in *Avila v. Cate*. She reasoned that the policy did advance the prison's legitimate safety interests. Citing several other federal courts that had upheld bans on R-rated movies in prisons, she concluded that "reliance on the MPAA system is reasonable even though it may exclude movies that do not further penological goals."

Avila contended that the prison policy at least should allow all of the movies on the National Film Registry—even the R-rated ones—to be shown in the prison. However, Thurston

noted that many movies on the registry—such as *Alien*, *Apocalypse Now* and *Halloween*, were of a “graphic nature.”

Avila also argued that prison officials should allow movies unless they are specifically shown to contain excessive sex or violence. Thurston wrote that “the suggestion that all movies be presumptively allowed to be shown unless they are shown to glorify violence or sex or inflame the prison population would require the prison to spend limited resources watching every movie produced.” She said having to do that would be an “excessive burden on an already cash-strapped system.” Reported in: firstamendmentcenter.org, July 14. □

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had laws against committing it. . . .

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct.”

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair’s breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik v. Jacksonville* (1975). . . .

California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s *Fairy Tales*, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare.

Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. (“Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame”). In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island. . . .

Justice Alito has done considerable independent research to identify video games in which “the violence is astounding,” “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools.” Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“ethnic cleansing’ [of] . . . African Americans, Latinos, or Jews.” To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription. . . .

California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a “well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny. *Brown v. Entertainment Merchants Association*

The following are edited excerpts from Associate Justice Antonin Scalia's majority opinion in Brown v. Entertainment Merchants Association. (See page 178.)

The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York* (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entertainment Group, Inc.* (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson* (1952).

The most basic of those principles is this: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union* (2002). . . .

Last term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a

legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where "the creation, sale, or possession t[ook] place." A saving clause largely borrowed from our obscenity jurisprudence, see *Miller v. California* (1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the depiction of animal cruelty—though States have long had laws against committing it. . . .

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct." . . .

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people within it. Distribution was halted immediately after privacy concerns were raised, said Kevin Lewis, a Ph.D. candidate who is part of the research team. By that time, he claimed, fewer than twenty researchers had access. Each presumably still has a copy.

After the initial release, the researchers took additional steps to protect the students’ identities. For example, a revised code book substituted general regions, like “mountain” and “Pacific,” for students’ home states, and general major categories, like “humanities” and “life sciences,” for their academic backgrounds.

As for the criticism of Harvard’s institutional review board, the university seems to agree on the need for greater guidance. A spokesman, Jeff A. Neal, notes that “current federal human-subjects regulations were written well before the Internet age, and there is still little published guidance for IRB’s on the implications of new and emerging technologies and potential risks.” He adds, “Federal regulators, professional associations, and IRB’s are all working to understand these risks and to develop guidelines.”

The biggest victim in this case may be scholarship. The controversy has tainted Harvard’s data. And “once a data set has been clearly de-anonymized, it becomes a little bit like kryptonite,” said Halavais. “People will touch it, but you’re putting your own ethical stance at risk if you do.”

There may never be another chance to touch it. The Harvard sociologists are still using the data for their own research. But they haven’t settled on a secure way of publicly sharing it again. Reported in: *Chronicle of Higher Education* online, July 10. □

intellectual freedom bibliography

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

- Albanese, Andrew Richard. "Now You See It..." Publishers Weekly. Vol. 258, no. 24, June 13, 2011, pp. 22-25.
- Berry, John N. III. "The People's Library." Library Journal. Vol. 136, no. 11, June 15, 2011, pp. 24-27.
- "CA Privacy Laws Include Electronic Records." Library Hotline. Vol. 40, no. 29, July 25, 2011, p. 2.
- "Dan Savage Kicks Off ALA with Insight into Mission." Library Hotline. Vol. 40, no. 26, July 4, 2011, p. 1.
- Darden, Edwin C. "School Law News of the Weird." American School Board Journal. Vol. 198, no. 6, June 2011, pp. 36-37.
- Davis, Lennard J. "Dangerous Ideas." The Chronicle Review. Vol. 57, no. 39, June 17, 2011, p. B13-14.
- Eisenback, David. "The Professor and the Pornographer." The Chronicle Review. Vol. 57, no. 38, June 3, 2011, p. B24.
- "Fight for Troy Drums Up Support and Satire." Library Hotline. Vol. 40, no. 29, July 25, 2011, p. 3.
- "Patriot Act Extended Without Reforms." Library Journal. Vol. 136, no. 11, June 15, 2011, p. 15.
- Ruefle, Anne. E. "Rules or Reading?" Library Media Connection. Vol. 29, no. 6, May/June 2011, pp. 34-35.
- Scales, Pat. "Scales on Censorship: Hello Madduh, Hello Faddah." School Library Journal. Vol. 57, no. 6, July 2011, p. 13.
- Scales, Pat. "Scales on Censorship: Policy Buster." School Library Journal. Vol. 57, no. 5, May 2011, p. 19.
- "Scores Respond to WSJ Attack on YA Literature." Library Hotline. Vol. 40, no. 23, June 13, 2011, p. 3.

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