DETTY, ELIZABETH WELLER

THE LEGAL ASPECTS OF CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIALS

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THE LEGAL ASPECTS OF CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIALS

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Historical research determines that censorship based on politics, religion, or morality has been a continual issue from early recorded history of man to the present. American settlers brought with them to the new world a heritage of suppression of reading matter by church and state. Censorship of obscenity in reading matter began in the early eighteenth century in the New England colonies; however, it did not become a legal issue in the United States until the early 1800s. From that time until the present, obscenity has been a matter of concern for the judiciary. This study presents an historical perspective of censorship in order to develop the history of censorship in the United States. A definition of obscenity is given as it has evolved through the judiciary from the nineteenth century until the present.

The study examines contemporary censorship problems relating to public school library and instructional materials. Current social, political, moral, and religious issues central to censorship are presented as they affect the public schools. Recent surveys which indicate the extent to which schools are faced with censorship problems are examined.

A legal background is presented for the analysis of court decisions concerning censorship in five areas:

(1) academic freedom of public school teachers, (2) right of students to read and receive information, (3) right of school boards to make educational decisions, (4) right of parents to oversee the education of children, and (5) religious freedom of public school students as it relates to the use of library and instructional materials. Censorship cases are presented in two categories: (1) those supporting school board action and (2) those supporting constitutional rights of teachers, students, and parents.

Chapter Four reviews landmark and other significant decisions of the courts in the five categories previously mentioned. Chapter Five identifies the circumstances under which constitutional rights become involved in censorship problems, describes the major educational issues involved in censorship, and identifies pressure groups chiefly responsible for controversy concerning instructional materials. General conclusions are drawn from analysis of court decisions concerning the legal aspects of censorship of public school library and instructional materials. Such conclusions should be of assistance to school boards and school administrators in dealing with censorship controversy. Guidelines, based on the legal principles established by landmark court decisions and discernible trends revealed by numerous lower federal court decisions, are presented for the formulation of a school board policy concerning the selection and withdrawal of school library and instructional materials. A model policy based on the guidelines is included.

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CHAPTER I

INTRODUCTION

Since ancient times the freedom to read and to know has been challenged.[1] These challengers, book burners and book banners, have based suppression on violation of prevailing philosophies of political orthodoxy, religious thought, and social mores.[2] Throughout the history of the United States many organizations and groups have arisen to serve as censors of library books, textbooks, and other educational materials used by schools.[3] Opposing organizations have worked equally hard to prevent censorship and to protect the First and Fourteenth Amendment rights of students to read, to learn, and to explore ideas. Fostering the Jeffersonian premise that a democracy cannot be both ignorant and free, anti-censorship advocates have promoted academic freedom of

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[1]Robert B. Downs, ed., The First Freedom (Chicago: American Library Association, 1960), pp. 1-3.

[2]Ibid.

[3]James E. Davis, ed., Dealing with Censorship (Urbana, Ill.: National Council of Teachers of English, 1979), pp. i-ix.

those who teach and learn in public schools.[4]

Professional journals, popular periodicals, and other forms of news media have covered controversies that arise as one group attacks and another defends specific books and instructional materials used by the public schools.[5] Debate continues, involving courts at all levels of the judicial system of the United States.

This study reviews court cases dealing with censorship as they affect public schools in five areas: (1) academic freedom of teachers, (2) students' right to read, inquire, and receive information, (3) right of local school boards to select and remove library and instructional materials, (4) parents' right to direct education of children, and (5) religious freedom of public school students as it relates to use of library and instructional materials. In order to clarify the present court holdings concerning obscenity of books and materials, a discussion of the evolution of the court's definition of obscenity is included.

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[4]Diana P. Shugert, "A Body of Well-Instructed Men and Women: Organizations Active for Intellectual Freedom," in Dealing with Censorship, ed. James E. Davis (Urbana, Ill.: National Council of Teachers of English, 1979), pp. 215-221; and Edward G. Holley, "Libraries and the Freedom of the Mind," paper presented at the Cora Paul Bomar Lecture, University of North Carolina at Greensboro, 19 April 1980. (Mimeographed.)

[5]Edward B. Jenkinson, "Dirty Dictionaries, Obscene Nursery Rhymes, and Burned Books," in Dealing with Censorship, Teachers of English, 1979), p. 5.

Although educational journals and the popular press are filled with articles concerning censorship and the public schools, there appears to be no major study of court decisions which affect public schools in these crucial matters. Litigation concerning censorship in general influences decisions on public school censorship. Landmark cases and key studies relating to such litigation are reviewed in this study in order to interpret major judicial issues.

The overall purpose of this study is to provide appropriate information to aid educational decision makers in matters concerning legal aspects of censorship. Moreover, the information will assist in selection of appropriate educational materials and preparation of policies and procedures. Proper selection, policies, and procedures should help prevent litigation and adverse public relations if and when censorship becomes an issue in school systems.

Statement of the Problem

A review of recent court cases establishes that censorship of educational materials in public schools is a real and present dilemma for educational leaders today. The current conservative political and moral climate and public dissatisfaction with taxes, foreign policy, busing, forced desegregation, and government in general have caused many people to strike out at public schools. Propinquity and familiarity make schools targets more accessible than federal, state, or

even local government.[6] Well-organized groups, dissatisfied with public schools for many reasons and with excessive governmental control, are influencing citizens to crusade to "clean up" material presented to students. These groups focus criticism on books and other materials which present ideas they oppose in the areas of religion, politics, and morality.[7] In spite of criticism, public schools in a democratic society must provide students an opportunity to learn divergent points of view in controversial areas. Educators must attempt to support academic freedom.[8] At the same time educational leaders must try to hold and gain public support for financing schools and to retain students in public schools. Community involvement in schools can be a two-edged sword, providing support and interest on one side and criticism and interference on the other. School boards and administrators must be prepared through legal principles, appropriate philosophies, and clearly-defined guidelines to conduct educational programs of schools without being unduly

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[6]Ibid.

[7]Ibid.

[8]Thomas C. Hatcher, "Educational Directions in a Pluralistic Society," in Indoctrinate or Educate? eds. Thomas C. Hatcher and Lawrence G. Erickson (Newark, Del.: International Reading Association, 1979), p. 41; Todd Clark, "Editorial Reflections--Freedom to Teach and Learn: Our Responsibility," Social Education 39 (April 1975): 202-203.

swayed by pressure groups.[9]

A review of judicial decisions can help educational leaders understand the complexity of the issues and the schools' responsibility to provide appropriate instructional materials. It is also important that school decision makers understand who the censors are, who is behind censorship, and why censorship is prevalent at this time. Administrators need to be able to identify critical areas where censorship and court action may arise. They should be prepared to deal with problems before controversies become detrimental to the effective operation of the educational process of the school system.

Questions to be Answered

The major purpose of this historical study is to examine and analyze judicial decisions which could influence policy making as it relates to censorship in public schools.

It also examines forces and issues behind censorship problems in schools as well as legal guidelines for making decisions concerning selection and use of educational materials in public schools. Below are listed several key questions which need to be answered so that guidelines can be developed:

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[9]American Library Association, "What to Do Before the Censor Comes--And After," Newsletter on Intellectual Freedom 21 (March 1972):49-56.

1. Under what circumstances are constitutional rights of students, teachers, or parents involved when a school district is faced with a censorship problem?

2. What are the major educational issues involved in censorship of school library and instructional materials?

3. Who are the pressure groups chiefly responsible for censorship?

4. Are there specific trends to be determined from analysis of court cases?

5. Based on precedents established by "landmark" cases, what are legally acceptable criteria which are most likely to assist school districts in preventing legal action and/or poor public relations in censorship cases?

Scope of the Study

This is an historical study of the legal aspects of censorship of public school library and instructional materials in the United States. The research describes the extent to which educational materials and library books in public schools have been challenged. It delineates the resulting litigation, reasons for the litigation, results of the major court cases, and possible effects major court decisions will have on administrators as they deal with censorship.

Methods, Procedures, and Sources of Information

The basic research technique of this historically oriented study is to examine and analyze the available references concerning the legal aspects of censorship of school library and instructional materials.

In order to determine if there was a need for such research, a search for relevant topics was made by consulting Dissertation Abstracts. Related journal articles were located through such sources as Reader's Guide to Periodical Literature, Education Index, Library Literature, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, various books on school law, and a review of related literature obtained through a computer search from the Educational Resources Information Center (ERIC).

Federal and state court cases on the topic were located through the use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, the American Digest System, and 1978, 1979, and 1980 issues of the NOLPE School Law Reporter.

Other supplementary materials related specifically to censorship were received from the Office for Intellectual Freedom of the American Library Association, the Freedom to Read Foundation, and The Division of Educational Media of the North Carolina State Department of Public Instruction.

Definition of Terms

For the purpose of this study, the following selected terms are defined:

Censorship - A process which limits access to books and materials based on value judgments or prejudices of individuals or groups. The act of censorship may be accomplished by (1) suppression of use, (2) removal from the library or classroom, or (3) limiting access of library and instructional materials. Censorship withholds or limits the students' right to read, to learn, and to be informed and the teachers' right to academic freedom.

Censor - One who prevents the adoption or continued use of specific library and instructional materials in public schools. The censor may be a parent, student, school board member, school administrator, teacher, librarian, clergyman, local citizen, member of the community, or representative of a local or national organization. The censor bases his act on value judgment or personal prejudice founded on social, political, moral, or religious views.

Selection - A process whereby specific books and materials are chosen from all available materials. Decisions are based on appropriateness for the users, educational considerations, balance of presentation, budgetary matters, and available space.

Academic Freedom - A concept whereby teaching and learning necessitate freedom to teach, study, and discuss divergent ideas, philosophies, and opinions; making decisions and developing beliefs from study; and expression of ideas thus formed, publicly as well as privately. For public school teachers and students, academic freedom involves use of books and other materials in classrooms and libraries which present various points of view. The philosophy of a balance in presentation is inherent in the concept.

Obscenity - The following is the definition of obscenity asserted by the Supreme Court in 1973. It has been used by courts in the United States since that time:

> (a) whether the average person, applying contemporary community standards would find a work, taken as a whole, appeals to the prurient interest, (b) whether a work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (c) whether the work taken as a whole, lacks serious artistic, political, or scientific value.[10]

Significance of the Study

School districts currently faced with falling enrollment and public pressure for "back to basics" are confronted with the possibility of an additional crisis--censorship of library and instructional materials.[11] When such a crisis does occur,

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[10]Miller v. California, 413 U.S. 15 (1973), p. 24.

[11]"Removing Books from School: More Now Than Anytime in the Last 25 Years," American School Board Journal 166 (June 1979):22; "Censorship on Rise Again in Schools," U. S. News and World Report 86 (June 1979):51.

solving it on the local level may result in better community understanding of curriculum and school board policies concerning the materials selection process.[12] Unfortunately, the result more often is poor public relations and hard feelings in school districts. If the controversy cannot be solved locally, it may result in lengthy involvement of a school district in the courts. This study is designed to offer information that can contribute toward positive local solutions of censorship problems, thus avoiding litigation.

Censorship of school library and instructional materials has increased in the past decade. The Office for Intellectual Freedom of the American Library Association reports that during 1977 and 1978 more accounts of book censoring were received than in the previous twenty-five years.[13] Approximately three hundred incidents were reported in that two-year span. Ninety percent of these accounts concerned public schools. More than thirty percent of those who responded to the American Library Association's survey experienced pressure for censorship in 1977, a ten percent increase over a survey conducted in 1965. Parents were the source of the pressure for removal of books in seventy-eight percent of the school cases.[14]

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[12]"Textbooks Censors: You Can Survive Their Ire and Extinguish Their Fire." The Executive Educator 1 (July 1979): 26.

[13]Ibid.

[14]Ibid.

It is vital for school administrators, school boards, and school personnel to know and understand why schools are a current target for such attacks. The same conservatism that produced the "back to basics" movement is being directed toward schools in form of censorship.[15] Edward B. Jenkinson, Indiana University, Chairman of the National Council of Teachers of English, has explained the move toward censorship in the following manner:

> . . . schools are a convenient target for unhappy citizens. Many people feel that they cannot fight Washington, the state capitol, or even city hall. When they become unhappy because of inflation, federal or state laws, the so-called moral decline, or anything else, they want to lash out. But they don't always know how to attack the problems that really trouble them. So they vent their spleen upon the schools.[16]

School boards are accessible and hold public meetings. Schools are open to parents who can demand to see principals, teachers, or school librarians. According to Jenkinson, since newspapers, television, and the rest of the media have given schools so much attention, ". . . taxpayers have a tendency to feel that almost everything that's wrong with society stems from the schools."[17] The NEA Reporter stated in 1980, "This year censorship efforts have been focused on

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[15]James C. Hefley, Textbooks on Trial, (Wheaton, Ill.: Victor Books, 1976), p. 188.

[16]Jenkinson, "Dirty Dictionaries," p. 5.

[17]Ibid.

text and library materials that are allegedly 'pornographic,' 'depressing,' 'anti-God,' 'anti-American,' and 'anti-family.'"[18]

To complicate matters further, not all censors are conservatives. Liberal groups have well-organized campaigns to pressure schools and publishers against the use of publication of "sexist" or "racist" books and materials.[19] Both groups, no matter what their intentions, may cause the removal of valuable learning tools from the hands of children.

School boards and school administrators need to have a clear understanding of the problem in order to set legally effective selection and complaint policies and procedures. Once policies and procedures have been adopted they should be followed explicitly in order to withstand pressures and to protect the rights of students to read, to learn, and to be informed. These same policies can help protect academic freedom of teachers of the school district.[20] Teachers and school librarians require this protection in the selection of materials and in handling complaints. Without such support the fear of loss of position or legal involvement may cause them

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[18] NEA Reporter 19 (January/February 1980):1.

[19] Pamela Ellen Procuniar, "The Intellectual Rights of Children," Wilson Library Bulletin 51 (October 1976):165-66.

[20] Lee Burress, "A Brief Report of the 1977 NCTE Censorship Survey," in Dealing with Censorship, ed. James E. Davis (Urbana, Ill.: National Council of Teachers of English, 1979), p. 19.

to become censors, fearing to select or use materials which may cause controversy.

With proper guidance community concern can become a healthy influence rather than a deleterious one. Parents are involved in schools. Forming partnerships with parents and community leaders in reviewing curricula and materials has proved successful in some communities.[21]

It is well recognized that academic freedom is essential at the university level to enable students to search for truth, although problems do occasionally arise even at the college level. Applying the same principle at the public school, pre-college level is often more difficult. Freedom of expression in public education is limited by community standards where financial and community support is given.[22]

Public schools usually reflect community standards even though parents and educators do not always look at the educational process from the same point of view. Dissatisfaction with falling Scholastic Aptitude Test Scores, student discipline, moral decline, lack of patriotism, lack of respect for adults, and belief that American children cannot read and compute as well as their parents did in school, has caused a general lack of confidence in current educational programs.

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[21]"Censorship on Rise Again in Schools," U. S. News and World Report 86 (June 4, 1979):51.

[22]Todd Clark, "Editorial Reflections--Freedom to Teach and To Learn: Our Responsibility," Social Education 39 (April 1975):202.

This loss of faith has resulted in attacks on various phases of some curricula as well as on specific books and instructional materials.[23] Although these attacks have sometimes been led by ultraconservative or extremely liberal groups, they might not have become troublesome controversies if the public had had more confidence in public education.

Current teaching philosophy provides students opportunity to inquire, to look at various sides of an issue, and to make decisions. This may be a questionable process for parents whose own education involved more traditional indoctrination. Herein lies a dilemma--indoctrination of American middle-class values as opposed to teaching students to think and reason.[24]

The United States Supreme Court made it clear that teachers and students do have constitutional rights by stating in the Tinker[25] decision, "It can hardly be argued that either students or teachers shed their constitutional rights. . . at the schoolhouse gate."[26] The Tinker decision is interpreted by authorities such as Judith Krug of the Office for Intellectual Freedom of the American Library Association to mean: "The U. S. Supreme Court has laid to rest the concept of in

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[23]Ibid.

[24]Procuniar, "The Intellectual Rights of Children," pp. 165-66.

[25]Tinker v. DesMoines Independent School District, 393 U.S. 503 (1969).

[26]Ibid., p. 506.

loco parentis as it relates to the mind."[27] Other legal authorities still question the fact that children have the same constitutional rights as adults. For example, Justice Potter Stewart, in his concurrence in Tinker, expressed doubt on this point: "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[28]

The Supreme Court, nevertheless, asserted in Tinker:

> In our system, State-operated schools may not be enclaves to totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[29]

The 1973 Miller[30] decision led to an increase in censorship litigation on the local level. The United States Supreme Court declined to establish a national standard on what constitutes obscenity. State laws based on "community standards" were given guidelines by the Supreme Court in judging materials under consideration as obscene. The opinion stated: "We emphasize that it is not our function to propose regulatory

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[27]Monroe C. Cohen, ed. Personal Liberty and Education (New York: Citation Press, 1976), p. 85.

[28]Tinker v. DesMoines, p. 515.

[29]Ibid., p. 139.

[30]Miller v. California.

schemes for the States. That must await their concrete legislative efforts."[31] Litigation has resulted in state and district courts.

School boards and administrators should study judicial decisions concerning censorship matters as the rulings relate to the states' responsibility for education as opposed to a national constitutional standard. First Amendment rights for academic freedom of teachers, students' rights to read and inquire, and parents' right to direct the education of children need to be understood. Furthermore, any distinctions made between adults and children as applied to constitutional rights to read, to know, and to be informed need the attention of school boards and administrators.

This study, then, is significant in that it provides educational leaders a comprehensive analysis of the legal aspects of censorship in the public schools. It offers educational decision makers historical perspective and legal guidelines in developing policy. The study provides direction to school districts when crisis censorship situations arise which could involve school districts in litigation.

Design of the Study

The remainder of the study is divided into three major parts. Chapter Two reviews literature related to the history of censorship and the effect of this history on censorship of

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[31] Ibid.

school library and instructional materials in the present. Furthermore, Chapter Two traces the growth of community concern for school curricula and instructional materials which has led to censorship controversies. Also included is a summary of recent surveys which indicate the extent to which public schools are faced with censorship problems.

Chapter Three contains an historical narrative of major legal issues relating to censorship of school library and instructional materials in five categories: (1) academic freedom of public school teachers, (2) students' right to read and receive information, (3) school board authority to select and remove library and instructional materials, (4) parents' right to direct education of children, and (5) religious freedom of public school students as it relates to library and instructional materials. Chapter Three also traces the development of the legal definition of obscenity. Further, Chapter Three presents school censorship cases since 1965 in two categories: (1) cases upholding school board authority to select or remove library and instructional materials and (2) cases supporting constitutional rights of students and teachers in the use of library and instructional materials.

Chapter Four is a discussion and analysis of major cases relating to the five categories identified in Chapter Three. Facts of the cases, decisions of courts, and discussions of the cases are presented for each category.

The concluding chapter of the study contains a summary of the information obtained from review of the literature and from analysis of selected court cases. The questions asked in the introductory part of the study are reviewed and answered in this chapter. Recommendations for formulation of legally acceptable policies concerning selection of library and instructional materials are made. Finally, procedures for handling complaints concerning challenged materials are included.

CHAPTER II

REVIEW OF RELATED LITERATURE

Overview

Censorship has been with mankind since early recorded history. Although a complete review of literature pertaining to censorship is unnecessary and impractical, an historical perspective has been presented to give the reader a world overview of this pervasive subject. This background shows how censorship practices came to be accepted in colonial America and thus in the United States.

Early censorship involved suppression of written material chiefly in the areas of religious and political thought. It was not until the nineteenth century that obscenity and morality became real issues in the courts.

As literacy increased among the common people, more books were published and eventually became available in less expensive editions; legal actions concerning censorship expanded correspondingly. The susceptibility of youth and common man to the evils of obscenity and controversy in the areas of politics and religion have thus been legal issues of increasing importance and frequency.

Censorship in the United States in the twentieth century has involved many areas of society; however, for the purpose of this study, major attention has been given to that involving public schools.

Censorship of public school library and instructional materials has been on the rise in the United States. Results of recent surveys substantiating this fact are presented. This chapter focuses on involvement of organized groups and members of the community as they attempt to restrain freedom of thought. This restraint has taken the form of suppression of or limiting access to public school library and instructional materials.

Historical Perspective on Censorship

Early History

Man has used fire as a symbol of disapproval and cleansing since early history.[1] The destruction of written works considered offensive to authority has been recorded as early as Old Testament times. The Book of Jeremiah describes the burning of a scroll by King Jehoiakim in Jerusalem.[2] Condemning the scroll to fire was the king's expression of displeasure with Jeremiah's prophecy which predicted a sad future for the kingdom.[3]

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[1]Charles Ripley Gillett, Burned Books: Neglected Chapters in British History and Literature, 2 vols. (New York: Columbia University Press, 1932), 1:3.

[2]Jeremiah 35: 9-12 (RSV).

[3]Ibid.

Throughout man's history, basic disagreements in attitudes toward philosophy, morality, politics, and religion have brought with them the plague of censorship. Plato's Dialogues rejected the use of bad fiction with children:

> And shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and receive into their minds ideas for the most part the very opposite of those which we should wish them to have when they are grown up?
>
> We cannot.
>
> Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad. . . .[4]

Poetry also provoked Plato's criticism. The idolization of Homer and the reading of poetry endangered "law and reason" and, as a result, endangered the state.[5]

The state was of utmost importance in ancient Greece and Rome. An attack on the gods, who were central to these cultures and their politics, was interpreted as an attack on the state rather than on religion.[6] Consequently, censorship became a means of suppressing political thought.[7]

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[4]Plato, The Republic, The Dialogues of Plato, 2 vols. trans. B. Jowett (New York: Oxford University Press, 1892) 2:323.

[5]Ibid.

[6]Morris L. Ernst and William Seagle, To the Pure... A Study of Obscenity and the Censor (New York: Viking, 1928), p. 16.

[7]Ibid., p. 27.

The ancient civilization of China also had its book burners. Hwangti, the monarch who built the Great Wall, believed ". . . when men become too wise they become worthless."[8] Because of this belief, he caused the destruction of all the literature of China except that dealing with medicine, science, and agriculture. Further, he executed or expelled many authors and scholars.[9]

Early Christians, in embracing their new philosophy, were prompted to burn any of their own books opposed to the teachings of Jesus. "And a number of those who practiced magic arts brought their books together and burned them in the sight of all. . . ."[10]

Only a few books in the famous library in Alexandria, Egypt, escaped destruction when Omar, leader of the Moslems, captured the city in A.D. 642. It is reported that as many as 700,000 volumes (many of which were painstakingly collected from other centers of learning) were burned. The unnecessary destruction of these manuscripts was an early form of mass censorship. Historical records indicate the scrolls were used to heat the four thousand baths of the city for at least six months.[11] Some historians

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[8]George W. Lyon, "Book Burners in History," The Saturday Review 25 (August 15, 1942):12.

[9]Ibid.

[10]Acts 19:19 (RSV).

[11]Lyon, "Book Burners in History," p. 12.

report that Omar believed the knowledge contained in the Koran was sufficient for man. If a book agreed with the Koran, it was unnecessary. If it opposed the Koran, it should be destroyed.[12]

Censorship and the Church in Rome

At the Council of Nice in A.D. 325, the first formal approach to book censorship was taken by the Roman Catholic Church. The teachings of Arius and his book, Thalia, were the initial target for the Council's condemnation.[13] In A.D. 405, Pope Innocent I sent the Bishop of Toulouse a list of ". . . authentic books of the Bible and listed a number of apocryphal documents that were condemned."[14]

In the era before the printing press was invented, written works were in manuscript form. Since few copies were available, the complete destruction of a written work was relatively simple. After the invention of movable type in the middle of the fifteenth century, such destruction became more difficult.[15]

In 1524, Charles V of Belgium is reputed to have published the first list of forbidden books by the Roman Catholic

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[12]Ibid.

[13]Redmond A. Burke, What Is the Index? (Milwaukee: Brace Publishing Co., 1952), p. 5.

[14]Ibid.

[15]Robert B. Downs, ed., The First Freedom: Liberty and Justice in the World of Books and Reading (Chicago: American Library Association, 1960), p. 2.

Church.[16] This list was drawn up under clerical advice. Heresy, not morality, was the basis for condemning books by the Church in Rome.[17]

The famous Index Librorum Prohibitorum was compiled in 1559 by Pope Paul IV. The Index was divided into three lists: (1) authors whose entire works were forbidden, (2) specific works prohibited, and (3) forbidden works by anonymous authors. The Index was published in 1564 at the close of the Council of Trent after the theological faculties from all over Europe had been consulted.[18]

While some Popes condemned books, other encouraged the writing of many works, including obscenity. Pope Nicholas V, for example, brought to Rome, Francisco Filelfo, ". . . a perfect master in the art of scurrilous vituperation."[19] In a similar vein, Valla, who wrote allegedly obscene satire on religion, was asked to translate Thucydides' works into Latin.[20] It should be pointed out that during this same Renaissance period, many Roman priests were engaged in copying and preserving various types of worthy literature.

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[16]Edmund Gosse, "The Censorship of Books," English Review 4 (March 1910):622.

[17]Ibid., p. 623.

[18]Ibid., p. 622.

[19]Ludwig Pastor, The History of the Popes from the Close of the Middle Ages (St. Louis: B. Hurder, 1898), p. 197.

[20]Ibid.

Licensing of books was required by Pope Innocent VIII ". . . to prevent publication of any works presenting an erroneous interpretation of Catholic doctrine."[21] The Council of Trent (1545-1563) appointed a Council to judge all publications. The Council lasted for almost four hundred years.[22]

In 1948 the last official list was published. It included many masterpieces of the Western world. After many centuries, Church control over reading by Roman Catholics officially ceased in 1966 when publication of the Index ended.[23]

English Censorship: Sixteenth and Seventeenth Centuries

Censorship in England during the Reformation involved heresy against the state as well as against religion. The writings of Martin Luther were publicly burned in Cambridge in 1520 to show disapproval by Cardinal Thomas Wolsey. In 1521 London was the scene of a similar burning of Luther's works by John Fisher, Bishop of Rochester.[24] Henry VIII issued a list of eighteen forbidden books, five by Martin Luther. His list, however, did not prevent the reading of the author's works.[25]

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[21]Ibid.

[22]Burke, What Is an Index?, p. 7.

[23]Anne Lyon Haight, Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places (New York: Bowker, 1970), p. 109.

[24]Gillett, Burned Books, 1:19.

[25]Ibid., 1:20.

During the sixteenth century, England was the scene of many book burnings and seizures. In 1556 the Stationers' Company was the exclusive printer for England. Search and seizure of printers, binders, and sellers of books was a common event carried on in the name of the state and religion.[26] In 1559 Queen Elizabeth decreed that a license must be bought in order to engage in the publication of printed materials.

The First Quarto of William Shakespeare's play, Richard the Second, was published by the Stationers' Company in 1597 and the next two quartos were printed in 1598. At that time Queen Elizabeth I was extremely sensitive about the uncertainty of her successor to the throne and about the various factions who favored a number of candidates. A scene from the play depicting Richard II's deposition so angered the Queen that she ordered the scene expurgated. Fear of her further wrath prevented publication of Act IV, Scene I, lines 154-318, until 1608 after her death. The scene reads in part as Richard II speaks:

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[26]Norman St. John-Stevas, Obscenity and the Law (London: Secker and Warburg, 1956), p. 6.

> Now mark me, how I will undo myself.
> I give this heavy weight from off my head
> and this unwieldy sceptre from my hand,
> The pride of kingly sway from out my heart.
> With mine own tears I wash away my balm,
> With mine own hands I give away my crown,
> With mine own tongue deny my sacred state,
> With mine own breath release all duteous oaths.
> All pomp and majesty I do forswear;
> My manors, rents, revenues I forgo;
> My acts, decrees, and statutes I deny.
> God pardon all oaths that are broke to me!
> God keep all vows unbroke are made to thee![27]

The absence of the scene is an example of the fear created by the power of the throne over publications in England during the sixteenth century.

The Star Chamber period of England was one of almost complete suppression. In 1641 the English Parliament abolished the Star Chamber and the English common courts were expanded. For a short period there were no censorship laws; however, less than three years later Cromwell again called for licensing of publications to prevent religious abuse.[28] The following year the English poet, John Milton, fought for the right to print and publish without a license. His was a personal defense since he had published several unlicensed pamphlets on divorce.[29] In Areopagitica, Milton wrote:

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[27]William Shakespeare, The Complete Plays and Poems of William Shakespeare, ed. William Allan Neilson and Charles Jarvis Hill, The Tragedy of Richard the Second (Cambridge, Mass.: Houghton Mifflin Co., 1942), p. 623.

[28]St. John-Stevas, Obscenity and the Law, p. 8.

[29]John Milton, Paradise Lost and Selected Poetry and Prose, ed. Northrop Frye (New York: Rinehart and Co., 1951), p. 464.

> Who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were in the eye. A good book is the precious life blood of a master spirit, embalmed and treasured up on purpose to a life beyond.[30]

The Printing Act of 1662 in England limited all printing to the Stationers' Company of London and to Cambridge and Oxford Universities. This law prohibited the publication in England of any books offensive to the faith of the Church of England or seditious toward the government. Because this law was difficult to enforce, however, it was abandoned when it expired in 1695.[31]

Censorship in the American Colonies

The first settlers came to the new world from countries where licensing was required for printing and where church and state intervention was an everyday occurrence. Having fled from injustices which included the suppression of freedom of speech and religion, it might be expected that colonists would establish such freedom in the new land. That was not the case. Instead, early censorship in America reflected the historical suppression of the settlers' diverse backgrounds. The main features of the English licensing system became the standard for most of the colonies in

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[30] Ibid.

[31] Robert W. Haney, Comstockery in America: Patterns of Censorship and Control (Boston: Beacon Press, 1960), p. 14.

America.[32] Such restrictions were warmly supported by the British colonial governors as protection against rebellion.[33]

Puritanism, as practiced in the New England colonies, was an outgrowth of Calvinism.[34] Literary historian Percy Boynton describes the Puritan as "narrowly orthodox" in his religion. He writes further:

> He was a cruel man, living in a cruel age in the fear of a cruel God. He had no qualms about subjecting other men to the rigors of the bilboes or the whipping post, to the tortures of branding and maiming, to treating women of unruly tongue to a swing on the ducking stool or a taste of the gag or the cleft stick, and to humiliating both men and women in the stocks or the pillory, with public rebuke in church or the stigma of the scarlet letter.[35]

The middle colonies were populated by settlers with greater diversity in religious faith than the New England Colonies. For this reason, perhaps, their repression on literature was not as severe as that of their northern neighbors.[36]

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[32]Paul Blanshard, The Right to Read: The Battle Against Censorship (Boston: Beacon Press, 1955), p. 32.

[33]Ibid., p. 33.

[34]Eli M. Oboler, The Fear of the Word: Censorship and Sex (Metuchen, New Jersey: The Scarecrow Press, 1974), pp. 64-65.

[35]Percy H. Boynton, Literature and American Life (Boston: Ginn, 1936), p. 22.

[36]Blanshard, The Right to Read, p. 33.

The Massachusetts Bay Colony, on the other hand, included literary censorship as part of its police power.[37] Many of the colonists in Massachusetts were well educated and respected the power of the printed word; however, these attributes were limited by religious bigotry and moral orthodoxy.[38]

Presses were tightly controlled by colonial governors. The first printing press was established by Stephen Daye in 1638 in the Massachusetts Bay Colony. At least one bookstore was opened in 1652 and eight were in existence as early as 1686.[39]

Nevertheless, there was suppression of what could be read, controversial religious literature being the chief target. In 1650 a theological pamphlet, The Meritorious Prince of Our Redemption, by William Pynchon of Springfield, was the target of the first serious confrontation involving censorship. The General Court, the legislative body of the colony, ordered the pamphlet burned in the Boston marketplace.[40]

Roger Williams fled the Massachusetts Bay Colony when he could no longer tolerate the authority of government

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[37] Ibid.

[38] Ralph Edward McCoy, Banned In Boston: The Development of Literary Censorship in Massachusetts (Ph.D. dissertation, University of Illinois, 1956), pp. 2-3.

[39] Ibid., p. 2.

[40] Haney, Comstockery in America, p. 17.

"over conscience." He founded the town of Providence in Rhode Island as a haven for freedom of religion and speech.[41]

As early as 1654 the General Court, objecting to the beliefs and teachings of the Society of Friends, ordered that Quaker books be burned.[42] In 1662 this same legislative body limited printing to the Harvard College Press in Cambridge.[43] The papist doctrine of the Imitation of Christ, by Thomas à Kempis, was refused American publication in 1669. It had to be revised to suit local religious belief before it could be accepted.[44]

The first known attack on obscenity in Massachusetts occurred in 1668 with the censorship of Henry Neville's Isle of Pines.[45] The book was a humorous and sexually promiscuous story of an Englishman, George Pine, who professed to have been shipwrecked on an island with four young women.[46] A printer, Marmaduke Johnson, put forth an unlicensed edition of the book and was fined as a result.[47] Since Johnson's

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[41]Haight, Banned Books, p. 25.

[42]Haney, Comstockery in America, p. 17.

[43]McCoy, Banned in Boston, p. 4.

[44]Haney, Comstockery in America, p. 17.

[45]Felice Flanery Lewis, Literature, Obscenity, and Law (Carbondale and Edwardsville: Southern Illinois University Press), p. 2.

[46]Ibid., pp. 2-3.

[47]Ibid., p. 3.

offense was actually one of publishing without a license, and since he was known locally as a troublemaker, it was not clearly an obscenity case.[48]

Eighteenth-Century Censorship in America

Shortly after the Isle of Pines incident, in 1711, "An Act against Intemperance, Immorality, and Profaneness, and for Reformation of Manners," was passed to prohibit the publication of obscene materials in the Massachusetts Bay Colony.[49]

The 1711 Massachusetts obscenity act and an obscenity law legislated in Vermont at about the same time were adopted prior to similar legislation in England.[50] It was the English common law, however, that established the early precedence in the courts of the United States.[51] This matter will be discussed in greater detail in nineteenth-century censorship.

Official licensing continued well into the eighteenth century in Massachusetts, although little official action was actually taken against recalcitrant printers.[52] Few

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[48] Ibid.

[49] Ibid.

[50] Ibid., pp. 4-5

[51] Ibid.

[52] Lawrence C. Wroth, "Printing in the Colonial Period, 1638-1703," ed. Lehmann-Haupt, The Book in America (New York: Bowker, 1951), p. 46.

restrictions were imposed on the importation and sale of books from abroad except when there was explicit conflict with Puritan doctrine.[53]

Although other colonies were more tolerant than the Massachusetts Bay Colony, they also fostered governmental supervision of the press as well as intolerance of minority religious groups.[54] In spite of the early Massachusetts and Vermont obscenity laws, courts in colonial days, and in the first era of American independence, did little to curb sexual ideas through censorship of obscenity. During its earliest years, the United States inherited from its colonial beginnings an active history of censorship for sedition and heresy, but little for obscenity.[55]

The main progress toward freedom of the press in the colonial period was made by newspapers. Two major incidents during this period were the cases of James Franklin of Massachusetts and John Peter Zenger of New York. James Franklin was jailed in Massachusetts for expressing personal political views in his paper, The New England Courant. Franklin was released from jail by the Massachusetts court in

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[53]Worthington C. Ford, Boston Book Market, 1697-1700 (Boston: The Club of Odd Volumes, 1917), pp. 57-58.

[54]Wroth, "Printing in the Colonial Period, 1638-1703," p. 43.

[55]Morris L. Ernst and Alan U. Schwartz, Censorship: The Search for the Obscene (New York: Macmillan Co., 1964), p. 7.

1722.[56] Soon after this, the landmark Zenger case in 1734 in New York helped establish freedom of the press to criticize governmental authorities.[57] Primarily as a result of these two cases, freedom of newspapers from censorship was generally accepted when American colonies became independent. However, the same freedom was not extended to other forms of printed matter.[58]

In 1787 when delegates from the new states met in Philadelphia to form a nation, George Washington and Benjamin Franklin presided over four months of secret sessions. James Madison made copious notes on the meetings.[59] The notes indicate that no mention was made of freedoms relating to religion, press, or speech. Furthermore, the new Constitution did not mention these freedoms until the First Amendment was added.

According to Chaffee ". . . the original Constitution contained a considerable number of safeguards for human rights and was consequently equivalent to a bill of rights even though it did not carry the name."[60] On the other hand, Thomas Jefferson did not believe the Constitution sufficiently protected human rights. On December 20, 1787, Mr. Jefferson

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[56]Lewis, Literature, Obscenity, and Law, p. 4.

[57]Ibid.

[58]Ibid.

[59]Ernst and Schwartz, Censorship, p. 7.

[60]Zechariah Chaffee, Jr., Documents of Fundamental Human Rights (New York: Atheneum, 1963)1:4.

wrote from Paris to James Madison concerning omissions from the newly formed Constitution:

> I will now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by laws of nations. . . . Let me add, that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no government should refuse, or rest on inference.[61]

In 1791, the first ten amendments to the Constitution, the Bill of Rights, were adopted. On the basis of the First Amendment, many legal decisions influencing human rights have been made; these are basically the rights which guarantee the free interchange of ideas.

In spite of the separation from England, British legal precedents continued to have a strong influence on the courts in the United States.[62] Statutory censorship laws did not develop in this country until the nineteenth century.

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[61]Saul K. Padover, ed., The Writings of Thomas Jefferson (New York: Heritage, 1967), pp. 311-312.

[62]Ernst and Schwartz, Censorship, pp. 8-9.

Censorship in the United States

Nineteenth Century

Colonial America was a pioneer in controlling obscene literature since both Massachusetts and Vermont had adopted obscenity laws before England enacted similar legislation. Yet, English common law was the basis for decisions in the two earliest cases in the United States.[63] The English courts framed three criteria for obscenity: (1) intent of the accused, (2) corruption of youth, and (3) disturbance of the peace.[64] The latter two criteria have figured prominently in American courts. All three were considerations in the first two obscenity cases cited below.

The first known ruling of a United States court to establish precedent concerning censorship was in 1815. The case, Commonwealth of Pennsylvania v. Sharpless,[65] involved exhibiting a painting described as a ". . . lewd and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman."[66] This case merits mention for two reasons. First, Pennsylvania had no obscenity law until 1860. Second, the case was decided on the principle of English common law

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[63]Lewis, Literature, Obscenity, and Law, p. 4.

[64]Ibid., p. 5.

[65]Commonwealth of Pennsylvania v. Sharpless, 2 S.&R. 91 (Pa. Sup. Ct. 1815).

[66]Edward De Grazia, Censorship Landmarks (New York: Bowker, 1969), p. 39.

and books were mentioned by dictum only.[67] The case was referred to the Pennsylvania Supreme Court from a lower court, and Sharpless was found guilty.

The second case, Holmes,[68] in 1821, involved the book, Memoirs of a Woman of Pleasure, currently known as Fanny Hill. The case was heard in Massachusetts and the decision was determined on English common-law principle. As for the three criteria framed by English law, the court stated: (1) intent of accused: ". . . a scandalous and evil deposed person. . ." (speaking of the author); (2) corruption of youth: ". . . contriving, devising and intending, the morals as well as youth as of other good citizens of said commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires. . ."; and (3) disturbance of the peace; ". . . against the peace. . . ."[69] In both of the above cases the judges were ". . . directing their attention to the disputed points of law on which the appeals were based, rather than to the issue of whether or not the painting and the novel were in fact obscene."[70] The judges seemed to "tacitly assume . . . that obscenity was readily recognizable beyond doubt

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[67]Curtis Bok, "Commonwealth v. Gordon et al.," in The First Freedom: Liberty and Justice in the World of Books and Reading, ed. Robert B. Downs (Chicago: American Library Association, 1960), pp. 100-101.

[68]Commonwealth v. Holmes, 17 Mass. (1821).

[69]Ibid., p. 336.

[70]Lewis, Literature, Obscenity, and Law, p. 6.

or question."[71] They seemed to have no question in their minds that they had the authority to ban obscene materials.[72]

Judge Curtis Bok discussed these two decisions in the case of Gordon[73] in 1949.

> The formulation of the common-law proscription of obscene publication did not, therefore, amount to very much. It is a good example of a social restriction that became law and was allowed to slumber until a change of social consciousness should animate. It is the prevailing social consciousness that matters quite as much as the law.[74]

In England, the contribution of Thomas Bowdler to censorship is so significant that it should be mentioned at this point. In the literary field, he is known as the prototype of an overly zealous book censor, so much so that his name has become a synonym for prudishness and senseless expurgation of good literature. Bowdlerism came into the English vocabulary after Dr. Bowdler gave up his profession as a physician and became a censor. After he inherited a fortune, he had time to follow his own desires. His inspiration for work concerned the writings of Shakespeare. He was a great admirer of the Bard as the greatest writer of England. He believed, nevertheless, that Shakespeare needed purification for the ordinary

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[71] Ibid.

[72] Ibid.

[73] Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949).

[74] Curtis Bok, "Commonwealth v. Gordon et al.," p. 101.

reader. He defined his task:

> . . . to render the plays of Shakespeare unsullied by any scene, by any speech, or if possible, by any word that can give pain to the most chaste, or offense to the most religious of readers.[75]

In 1818 he published his expurgated version, Family Shakespeare. Then Bowdler got out his red pencil, sharpened his scissors, and began work on Edward Gibbon's Decline and Fall of the Roman Empire.

The social consciousness to which Chief Justice Bok, supra, referred, apparently brought about legislation concerning the obscenity issue in the United States. Obscenity laws were passed by Vermont in 1821, Connecticut in 1834, Massachusetts in 1835, Pennsylvania in 1860, and New York in 1868.[76]

In 1857 England passed Lord Campbell's Act. The legislation gave judges power to sieze books and printed matter considered obscene. This law was the major legislative action which gave the largest impetus to the censorship of obscene materials not only in England but in America as well.[77] When Lord Campbell introduced the bill to the House of Lords, he declared it was not designed to suppress works of recognized

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[75]Richard Hanser, "Shakespeare, Sex. . . And Dr. Bowdler," The Saturday Review 38 (23 April 1955):7-8.

[76]Lewis, Literature, Obscenity, and Law, pp. 6-7.

[77]Ibid., p. 7.

literary or artistic merit. The act was meant to apply ". . . exclusively to words (a) written for the single purpose of corrupting the morals of youth and (b) of a nature to shock the common feelings of decency in any well regulated mind."[78] The phrasing of the law did not make Lord Campbell's intent clear, but it did provide a clear legal definition for "obscene libel." Victorian society was ready to use Lord Campbell's Act to usher in an era of censorship.[79]

In England, the first case tried under Lord Campbell's Act was the Hicklin[80] case in 1868, eleven years after the English law was passed. An anti-papist pamphlet, The Confessional Unmasked, Showing the Depravity of the Romish Priesthood; the Iniquity of the Confessional, and the Questions Put to Females in Confession, was circulated and did fall into the hands of young people. This was the first major legal test for obscenity.[81] Henry Scott, author of the pamphlet and a Protestant zealot, appealed the seizure of his pamphlet to Benjamin Hicklin, Recorder of London. Hicklin ruled in favor of Scott, saying that the purpose of the pamphlet was good and not intended to corrupt. The case was sent

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[78]Ernst and Schwartz, Censorship, pp. 22-25.

[79]Ibid., p. 25.

[80]Regina v. Hicklin, L.R. 3Q.B. 360 (1868).

[81]Ernst and Schwartz, Censorship, p. 35.

to Justice Alexander Cockburn who reversed Hicklin's opinion on appeal.[82]

Chief Justice Cockburn delivered a verdict which became a guiding principle for judges in England and the United States:

> . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[83]

So persuasive and impressive was Justice Cockburn's decision that its influence was felt in American courts until the middle of the twentieth century.

Thus, the scene was set in the United States, a young country with a history of interference in printed material pertaining to politics and religion. Censorship of obscenity was now added to the list. The time had arrived for the community and organized groups to become interested in purifying the reading matter of the country.

The question of appropriate reading matter for school children came into question in the South before the Civil War. The South was dependent upon Northern book publishers for the majority of textbooks in the schools. Opposing philosophies

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[82]Lewis, Literature, Obscenity, and Law, p. 7.

[83]Queen v. Hicklin, L.R. 3Q.B. 360 (1869), in Edward De Grazia, Censorship Landmarks (New York: Bowker, 1969), p. 9.

in the two regions concerning slavery led to concern among Southern parents about the use of certain textbooks. Geographies presented particular anxieties since they depicted the South as inferior to the North, discussed the evils of slavery, and stressed study of the northern portion of the United States. The treatment of agriculture and education as related to the Southern states was a particular source of resentment.[84] History books were also objectionable because of their regional bias. New England settlers were glorified as moral patriots who should become models for youth, while those who settled the South were depicted in a less favorable light.[85]

Since Northern publishers could not afford to lose the market in the South, they began to publish modified versions. Some published one version for the South and another for the North, deleting objectionable passages for the Southern version.[86]

Scientific discoveries in the early nineteenth century created conflicts with the religious beliefs of both North and South. The publishing of Darwin's Origin of the Species in 1859, for example, opened the door for censorship controversies which continued into the twentieth century.[87] One of

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[84]Howard K. Beale, A History of Freedom of Teaching in American Schools. Report of the Commission on the Social Studies, part XVI (New York: Octagon Books, 1974), pp. 156-159.

[85]Ibid., pp. 160-162.

[86]Ibid., p. 164.

[87]Ibid., p. 202.

the mo famous cases, the Scopes "monkey trial" of 1927, occurred in the southern border state of Tennessee and it was not until 1970 that the last state, Mississippi, finally invalidated its anti-evolution statute.[88]

Following the Civil War, after the ruling white class regained control, protests about Northern textbooks began again. The North also made demands on textbook publishers. Interest was not in unbiased textbooks. Sectional prejudice was intertwined in the subject matter of textbooks published either in the South or in those published in the North but authored by Southerners for Southern schools. Northern schools demanded publication of texts presenting the Union point of view.[89]

Moral training was a major part of the curriculum in America from the time schools began. Religion played an important part in the early schools. Following the Civil War, religious instruction posed problems because many denominations and sects now existed in the country. Since no particular sect could control teaching in the schools, prohibition of teaching sectarian religious doctrine became law in many parts of the country. Books dealing with sectarian religion were barred from classrooms and school libraries. As new

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[88]Edward C. Bolmeier, The School in the Legal Structure (Cincinnati: W. H. Anderson, 1973), pp. 288-289.

[89]Beale, A History of Freedom, p. 196.

state constitutions were written, public aid to parochial schools was prohibited.[90]

Barriers to teaching sectarian religion were not intended to eliminate religion from schools. They were intended to permit Bible reading and the teaching of non-sectarian Protestantism in the public schools. "Men were as eager to protect children against no religion as against sectarian proselyting."[91]

In 1875 President Ulysses S. Grant proposed a federal constitutional amendment forbidding the teaching of religious tenets in school and prohibiting the use of school funds or school taxes for the benefit of any religious denomination or sect.[92] Although such an amendment was not passed by 1903, thirty-nine states had passed legislation prohibiting the teaching of sectarian religion in the public schools.[93] The issue continued into the twentieth century.

Following the Civil War, Anthony Comstock moved from Connecticut to New York. He began his career as a dry goods clerk and then as a salesman. At the age of eighteen he was a crusader against the evils of liquor. His real interest, however, was in prevention of the moral decay of the country.

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[90]Ibid., pp. 208-209.

[91]Ibid., p. 210.

[92]Ibid., p. 209.

[93]Ibid.

In 1866 the New York YMCA made a survey of vile and licentious books, magazines, and newspapers for sale in New York. The survey found New York filled with such publications. The YMCA urged the state legislature to pass a bill to suppress these publications.[94]

Comstock read about the survey and ensuing action. He had found his cause. He became a crusader, a self-appointed censor. With the help of a wealthy friend, Morris K. Jessup, he became a leader of the censorship movement in New York. Jessup was president of the YMCA and founder of the American Museum of Natural History. Together the two men founded the New York Society for the Suppression of Vice, which was designed to rid the city of moral decay and to protect the young and innocent. Comstock became its secretary in 1873, and was given power to make arrests in the name of decency. He was made a special agent of the Post Office. In that role he lobbied for a stronger Federal Obscenity Bill. He helped form the New England Society for the Suppression of Vice.[95] The Federal Obscenity Bill passed and other states throughout the nation were led to form similar laws. The Midwest formed a similar society and Boston fostered the New England Watch and Ward Society.[96]

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[94]Ernst and Schwartz, Censorship, pp. 30-33.

[95]Davis, Dealing with Censorship, p. ix.

[96]Ibid.

The term "comstockery" became a synonym for the crusading censor just as "bowdlerism" had in England. Thus, Anthony Comstock took his place in history. The laws passed under his tutelage are still known as Comstock Laws.[97]

Many librarians in the nineteenth century were influenced by various vice societies. "Harmless" literature was the type selected for the shelves of numerous libraries. Adventurous and improbable literature was criticized because it gave false notions about life. Different collections were kept in the main library and compared with those at the branches. Those who wanted "immoral" classics had to go to the main library to obtain them. Factory workers usually read books at branch libraries where "dangerous" literature was not available.[98]

Even when best sellers (the main targets for attack) were available in libraries, librarians had methods for seeing that they were circulated only to certain readers. Books by foreign authors such as Emil Zola, Rabelais, Boccaccio, and Paul de Kock were sometimes purchased only in the native language of the authors. The books were loaned exclusively to scholars and highly educated persons.[99]

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[97]Haney, Comstockery in America, p. 6.

[98]Evelyn Geller, "The Librarian as Censor," Library Journal 101 (June 1976):1255-1258.

[99]Ibid.

Frequently, reference collections contained the type of books ordinarily available in present day collections of fiction. Librarians restricted use to students and scholars, thus protecting youth and the common man from improper reading. Many librarians thus were actually censors of books and "protectors" of the populace from improper reading in the nineteenth century.[100]

Twentieth Century

The turn of the century brought with it many social and economic problems as the United States moved from an agrarian economy to an industrialized nation. Public schools in America were in the process of change. By the end of World War I, teacher training had improved to the point that public school teachers were capable of demanding more freedom in their roles than ever before. Knowledge in science was expanding rapidly. Higher institutions were giving teachers more knowledge in history, civics, economics, and sociology as well as sciences.[101]

The public developed a new and stronger patriotism as a result of the "war to end all wars". Patriotic societies and pressure groups began to spring up to support many causes.[102]

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[100] Ibid.

[101] Beale, A History of Freedom, pp. 227-239.

[102] Ibid.

Censorship was still a problem affecting the courts of the land with twelve landmark cases coming out of the courts between 1908 and 1929.[103] Public schools began to feel pressures within the community as well as from various groups concerning curricular matters and the materials used in teaching children. More literature was available for children and young people than ever before. For this reason, emphasis on review of the censorship literature in this section of the study will concern (a) literature for children in the public schools, and (b) the influence of public involvement and pressure groups in the affairs of the schools.

The reformers who ushered in the Progressive Age of the early 1900s wanted to ameliorate the human misery indigenous to poverty and squalor in an urban environment. In the early stages of the movement, the vice societies which had developed in the late 1800s were welcomed under the progressive tent. If obscene reading matter was a vice which needed to be removed to improve social conditions, then the reformers were for it. Later social reformers dropped the cause of censorship when they adopted statistical surveys and other investigative procedures. The effects of reading obscenity were difficult to prove by the new investigative approach.[104]

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[103]De Grazia, Censorship Landmarks, pp. v-vi.

[104]Paul S. Boyer, Purity in Print: The Vice Society Movement and Book Censorship in America (New York: Charles Scribner, 1968), pp. 23-27.

The early Progressive reformers, however, found documentation for their fears. The first annual report of the American Social Hygiene Association urged teachers and parents to inspire "the soul with the highest religious and family and civic ideal."[105] In so doing, the mind of the young could, hopefully, be diverted from thoughts of the obscene.[106] The probation officers of the juvenile courts of Chicago reported that many delinquent girls had been corrupted by evil literature.[107] The prominent psychologist, G. Stanley Hall, called for protection of youth from erotic reading material in his book, Adolescence, published in 1904.[108]

In 1903 the Brooklyn Public Library removed Tom Sawyer and Huckleberry Finn from the children's collection. Samuel Clemens stated in defense that he had written the two books for adults and was distressed whenever he heard that they were available to children. Mrs. Clemens then censored Huckleberry Finn by deleting profanity and many other passages. The language used in the books was the problem.[109] Non-standard English was a current concern of parents as it is today.

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[105]"Progress, 1900-1915," Social Hygiene, 11 (January 1916):40.

[106]Ibid., pp. 37-47.

[107]Boyer, Purity in Print, p. 27.

[108]Ibid.

[109]Haight, Banned Books, p. 57.

Huckleberry Finn continues to draw criticism in the public schools because of the use of the term "nigger."[110]

In 1911 a committee of Jews and Gentiles asked school officials in Meriden, Connecticut, to remove The Merchant of Venice from the study of Shakespeare in the public schools. The committee believed that Shylock, the Jewish usurer in the play, presented a false stereotype and tended to create hatred against Jewish people. The wishes of the committee were granted.[111]

Sex education in the schools has been, and still is, an inflammatory issue among parents and pressure groups. Many children in 1919 were receiving sex education from companions rather from parents, the church, or the school. Mary Ware Dennett wrote a pamphlet for the instruction of her own two sons. Rather than using the birds and bees as analogy, she wrote a frank pamphlet on human sexuality. Several religious and educational institutions were so impressed with her work that it was printed for their distribution.

In 1926 a Mrs. Miles from Virginia received through the mail a copy from the author. Mrs. Miles was an entrapper for the Post Office Department and reported the receipt of the pamphlet. The Post Office charged Mrs. Dennett with violation of the Comstock mail law. She was tried by a judge and jury,

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[110]Haney, Comstockery in America, p. 158.

[111]Jack Nelson and Gene Roberts, Jr., Censors and the Schools (Boston: Little, Brown, 1963), p. 4.

convicted, and fined $300. Mrs. Dennett ". . . told the judge that if in fact she had corrupted youth, $300 would be too light a penalty, and that she would go to jail if the conviction were sustained on appeal."[112]

The judge found the jury was not mistaken in the facts; however, he decided the case should not have been presented to a jury. The pamphlet, according to the decision, was not obscene and could not be a violation of the Federal Obscenity Law.

During the 1920s all librarians were not crusaders against censorship, nor was the American Civil Liberties Union. At the same time, liberal weeklies such as Nation and New Republic were spokesmen against censorship. As a result, both publications were banned from school libraries in Los Angeles in 1921.[113]

In the same year, the United States Commissioner of Education banned the teaching of communism and socialism from the schools. The Lusk committee of New York legislature recommended that any teacher who did not approve of the American social system should give up his teaching position.[114]

During the era of the 1920s, public utility companies decided textbooks should be rewritten so children would learn to appreciate the private enterprise system. Under the

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[112]Ernst and Schwartz, Censorship, p. 81.

[113]Blanshard, The Right to Read, p. 90.

[114]Ibid.

leadership of Samuel Insull, utilities officials formed a special committee to censor school books bearing on the utility situation. The Federal Trade Commission investigated, but by that time many textbooks had been removed from the schools or had been changed to meet the philosophy of utility companies.[115]

Two patriotic organizations to become involved in criticism of textbooks following World War I were the American Legion and the Veterans of Foreign Wars. The American Legion did not believe history textbooks instilled enough patriotism in students. Since no textbook could be found to satisfy their requirements, the Legion commissioned the writing of such a book in 1922.[116]

The Veterans of Foreign Wars were interested in eliminating un-American textbooks from public schools. The National Americanization Committee was formed for that purpose. By the late 1920s they announced that their goal had been accomplished and they were ready to concern themselves with modern European history texts.[117]

Members of the American Historical Association were offended by the post World-War-I groups who called history texts un-American. They expressed their dissatisfaction by protesting that such accusations implied historians were

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[115] Ibid., pp. 90-91.

[116] Nelson and Roberts, Censors and the Schools, p. 28.

[117] Ibid.

involved in the writing of treason. Such accusations, stated the historical association, were absurd. Their protests did not stop pressure from various groups.[118]

Anger of many groups was aimed at England, the wartime ally. Charles Grant Miller wrote a series of articles for the Hearst newspapers warning parents against "Anglicized" history textbooks.[119] He examined the books and expressed his wrath when a figure from history ". . . he disliked received more attention than one he admired."[120] Mayor John F. Hylan, of New York, hired Miller to carry out a textbook investigation.[121]

Mayor William Hart Thompson of Chicago launched a series of attacks on history textbooks in his re-election campaign in 1927 and 1928. Many of his charges were ridiculous since he claimed the King of England had "persuaded Chicago's Superintendent of Schools to remove George Washington's picture from the books."[122]

Attacks on textbooks in the 1920s led to legislation in various states. Oregon, Wisconsin, and Oklahoma passed bills stating that educators must select no book speaking slightingly of the founders of our nation or the men who preserved

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[118] Ibid., p. 23.

[119] Ibid., p. 27.

[120] Ibid.

[121] Ibid.

[122] Ibid., p. 28.

the union. Textbook investigations took place in many cities and towns throughout the country.[123]

Harold Rugg, Professor Emeritus of Education, Columbia University, published a series of social science textbooks widely used during the depression era. His books raised questions that had not been mentioned previously in school textbooks. Rugg believed that teachers and the public had been awakened to social and economic problems of the nation during the depression.[124] He ". . . suggested that society should be studied as a rapidly changing phenomenon to be reshaped from generation to generation according to changing standards of value."[125]

From 1938 to 1942 the greatest pressure group campaign ever staged against a textbook author was waged against Rugg. Conservative business groups supplied money and research while the American Legion led the publicity. The National Association of Manufacturers joined the campaign. The American Legion made a list of un-American textbooks and literature in the schools and recommended that they be removed from schools.[126]

Mrs. Elmwood J. Turner, corresponding secretary of the Daughters of Colonial Wars, wrote of Dr. Rugg in 1940 that he

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[123]Ibid., p. 29.

[124]Beale, A History of Freedom, pp. 270-271

[125]Blanshard, The Right to Read, p. 92.

[126]Ibid., pp. 92-94.

> . . . tried to give the child an unbiased viewpoint instead of teaching him real Americanism. All the old historians taught: 'My country right or wrong.' That's the point of view we want our children to adopt. We can't afford to teach them to be unbiased and let them make up their own minds.[127]

Some school systems gave in to the pressure. Others continued to use the textbooks until they became worn and out of date. Professor Rugg made a statement to the self-appointed censors:

> Censor the schools and you convict yourselves by your very acts as the most subversive enemies of democracy. Censor education and you destroy understanding . . . you instate bias . . . you give free reign to prejudice . . . finally, you create fascism. Nothing but an education in the whole of American life will build tolerant understanding of our people and guarantee the perpetuation of democracy.[128]

In 1948 The Nation was banned from an official list of accepted periodicals approved for high schools in New York City. This act of censorship was the result of a series of articles that appeared in The Nation between November 1, 1947, and June 5, 1948. Paul Blanshard was the author of the articles which concerned the Róman Catholic Church.[129]

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[127]Ibid., pp. 95-96.

[128]Harold Rugg, "A Study in Censorship: Good Concepts and Bad Words," in The First Freedom, ed. Robert B. Downs (Chicago: American Library Association, 1960), p. 349.

[129]Archibald W. Anderson, "'The Nation' Cause," in The First Freedom, ed. Robert B. Downs (Chicago: American Library Association, 1960), pp. 353-359.

There had been no protests from the Catholic Church. The Superintendent of Schools explained his action in a statement entitled, "Should Religious Beliefs Be Studied and Criticized in an American Public High School?"[130] A temporary committee composed of seventy-two well-known individuals representing thirty-four organizations was appointed. Archibald MacLeish led the oppostion. The Nation was eventually restored to New York high schools.

Censorship was not a major issue for public schools in the early 1950s although some instances did occur. The Newsletter on Intellectual Freedom of the American Library Association cited some of those that did happen.

Mrs. Myrtle G. Hance of Texas headed a group called Minute Women of America that published a list entitled, "What to Look for in the Library of Your School." First on that list was A Field of Broken Stones, by Lowel Naeve and David Wieck. The list stated that the book was filthy, immoral, and politically dangerous.[131]

The thirty-year period from 1950 through 1980 brought about many changes in American society and public schools. The federal government gave grants and aid to public schools which required schools to follow specific guidelines and meet

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[130]Ibid., p. 354.

[131]Newsletter on Intellectual Freedom 3 (January 25, 1955):3.

specific criteria which influenced curricula. There was a renewal of interest in science instruction following the Russian launching of Sputnik. The civil rights movement, the Supreme Court order to desegregate public schools, the war in Vietnam, changing life-styles, the women's movement, and laws concerning the education of handicapped children led to public school involvement in litigation and public unrest. A new religious revival made the presence or absence of religious books in the public schools a sensitive subject. The Watergate investigation, high taxes, and inflation led to public cynicism toward government which, in turn, led to attacks on the public schools.

In the early 1950s the Conference of American Small Business Organizations published Educational Reviewer, issued quarterly to evaluate educational materials. The publication issued the results of its examination of textbooks as they related to personal and economic liberty and "concealed theories of collectivism."[132] The United States House of Representatives Select Committee on Lobbying Activities investigated the activities of the organization. The Committee report concluded:

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[132]Rugg, "A Study in Censorship,", p. 343.

> We all agree, of course, that our textbooks should be American, that they should not be the vehicle for the propogation of obnoxious doctrines. Yet the review of textbooks by self-appointed experts, especially when undertaken under the aegis of an organization having a distinct legislative ax to grind, smacks too much of the book-burning orgies of Nuremberg to be accepted by thoughtful Americans without foreboding and alarm. It suggests, too that the reviewers distrust the integrity, good faith, and plain common sense of the school boards and teachers of the country. If these educators are so utterly naive and untrained as to need help from a lobbying organization in selecting proper classroom materials, then our educational system has decayed beyond all help. This proposition we cannot accept.[133]

During the McCarthy era, schools found themselves under attack sometimes in a ridiculous manner. In 1953 Mrs. Thomas J. White was a member of the Indiana Textbook Commission. She determined that Robin Hood was communistic and should be removed from the Indiana schools. She further expressed the opinion that any reference to the Quaker religion be eliminated from textbooks. She felt that since Quakers did not believe in fighting wars, they helped Communism.[134] Mrs. White lost her fight against these two areas.

Following World War II, critics looked at textbooks for any remark favorable to the Soviet Union. In at least one instance action was extreme. In 1953 Alabama passed a law forbidding the use of any textbook or other written instructional materials (except newspapers and magazines) unless the

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[133]Ibid., p. 344.

[134]Blanshard, Right to Read, pp. 83-84.

publisher or author stated that no author involved in the book was a member of any Communist group or a Marxist socialist. State public schools, trade schools, and institutions of higher learning were included. Book publishers, authors, the Alabama Education Association, and nine Alabama college presidents went to court over the issue. The court declared the law null and void under the due process clause of the Fourteenth Amendment.[135]

In 1957 it was reported that the Texas unit of Pro-America reviewed each textbook in the state so that political ideas conflicting with the United States Constitution were not presented in schools.[136] In February of that year the Associate Superintendent of the Philadelphia Schools stated that the Daughters of the American Revolution had the Board of Education's approval to inspect textbooks for subversive materials. He insisted that their evaluations would be taken seriously.[137]

In March, 1957, a newly elected school board member in Houston, Texas, objected to a tenth-grade geography book that taught "United Nations propaganda and one-worldism." She

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[135]Renick C. Kennedy, "Alabama Book Toasters," in The First Freedom, ed. Robert B. Downs (Chicago: American Library Association, 1960), pp. 375-377.

[136]Newsletters on Intellectual Freedom 6 (March 1957):7.

[137]Ibid.

also objected to ideologies in a twelfth-grade economics book. The Superintendent resigned in disgust.[138]

In Nebraska the Daughters of the American Revolution, because of the organization's objections to policies of the United Nations, asked that state educational institutions stop using any educational materials put out by the United Nations Educational, Scientific, and Cultural Organization. In 1958 the National Association of Secondary School Principals at their convention, declared that Life and Time magazines were not favorable to education. The Association sent notices to nearly twenty thousand principals suggesting that they question the circulation of these magazines.[139]

In the 1960s schools began to change. Financed in part by federal funds fostering change and innovation--open classrooms, team teaching, individualized instruction, new mathematics, and alternative curricula entered the public schools of the United States. To many parents this change brought confusion. The traditional classroom which most parents had attended had almost disappeared from public schools. Parents could not understand their children's homework in mathematics. Educational emphasis moved from teaching facts to understanding concepts. Decision making, thinking skills, and values clarification were part of the curriculum. In many cases, students decided what they wanted to learn, when, and how.

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[138]Ibid., 6 (June 1957):9.

[139]Ibid., 7 (June 1958):6.

Parents began to wonder whether their children were learning.[140]

At about the same time, literature for children and young people began to change as well. Realistic literature, based on the changes in society, began to be published. Former literature patterns, designed to be uplifting and to free the imagination of the child (the books read by parents), were changing with the times. Young readers, who had life styles different from those of their parents, had different interests. Authors began writing books about the new life styles that interested youth. Personal and social problems often became the theme of the new books.

The new realism in literature for young people and children explored topics formerly reserved for adult literature. Themes for the new realism are described in an article in Phi Delta Kappan.[141]

The first theme covered in many childrens' books is changing family patterns. This theme includes topics such as one-parent households, divorce, estranged parents, foster-home living, working mothers, living on welfare, parental

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[140]Jon Schaffarzick, "Federal Curriculum Reform: A Crucible for Value Conflicts," in Value Conflicts and Curriculum Issues: Lessons from Research and Experience, ed. Jon Schaffarzick and Gary Sykes (Berkley: McCutchan, 1979), pp. 1-24.

[141]Lee Rinsky and Roman Schweikert, "In Defense of the 'New Realism' for Children and Adolescents," Phi Delta Kappan 58 (February 1977):472-475.

dating, and problems faced by families who move from place to place.[142]

A second theme seldom covered earlier in children's literature is death and dying. Whereas books written previously might cover the death of a pet, the new books cover the loss of grandparents, parents, siblings, and friends. Death is presented as an actual experience that everyone must face at one time or another.[143]

A third major theme is that of a variety of ethnic groups living in our pluralistic society. "As we grow in our realization that we are a pluralistic society, that our strengths and accomplishments flow from the diversity of our people, these books represent a new honesty."[144] Children who live in an area where a diversity of ethnic groups is limited can learn about many different people through these books. The use of non-standard English in some of the books often brings parental criticism.

A fourth theme deals with changing roles of males and females. Free to be You and Me by Marlo Thomas explores possibilities for both boys and girls in their futures. This type of book looks at changing patterns in careers as well as in life styles.[145]

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[142]Ibid., p. 473.

[143]Ibid.

[144]Ibid.

[145]Ibid., p. 474.

Fiction covers not only the themes listed above, but also topics formerly taboo in books for children and adolescents. Adolescent physical change, pregnancy, abortion, homosexuality, birth, and the use of drugs and alcohol are treated with equal honesty.[146]

Within all of these themes will be found good and bad books. Many of them use street language; some books use this device effectively and without a design for shock. Others apparently use mature themes and language for shock value rather than treating themes with human dignity, in order to sell the product.[147]

School boards, administrators, librarians, and teachers are faced with a tremendous responsibility as a result of the new literature for young people. Schools are sensitive to public pressure. Children like the new themes. The market is flooded with good and poor literature. Schools are responsible for a balanced collection that meets the needs of the school curriculum and satisfies the reading interests of the children of the school. Teachers of English teach modern literature that appeals to students.[148]

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[146]Ibid.

[147]Ibid.

[148]Ann Kalkhoff, "Innocent Children or Innocent Librarians," in Issues in Children's Book Selection: A School Library Journal/Library Journal Anthology (New York: R. R. Bowker, 1973), pp. 11-19.

Librarians, teachers, and school administrators are faced with the responsibility of preparing students for a real world filled with social change. At the same time educators need community support in accomplishing their goals. Censorship attempts and controversy have increased as social change and new themes in literature have developed.[149]

Professionals in the field of education take different positions on the selection of literature and instructional materials. These positions range from: (1) those who think any type of censorship is wrong, (2) those who believe that good selection based on community standards is necessary, and (3) those who fear to select any controversial material. Philosophies of most educators and librarians range at some point along this spectrum. Positions vary according to materials involved and current educational climate.

Publishers and authors have been caught up in the controversy. While the literature described above can be a valuable tool for teaching about our changing world, authors and publishers are warned that traditional books must also be available to students. The pendulum must not swing too far.[150]

Publishers are, of necessity, cognizant of the work of censors. They cannot afford to lose an educational market

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[149]Jenkinson, "Dirty Dictionaries," pp. 7-11.

[150]Jo M. Stanchfield, "Trends--Not Destiny," in Indoctrinate or Educate? eds. Thomas C. Hatcher and Lawrence G. Erickson (Newark, Del.: International Reading Association, 1979), p. 21.

through knowingly antagonizing an active censorship group. James J. O'Donnell, Executive Editor of Xerox Educational Publications. made the following statement,

> After all, a single hardback, four color series can represent a million-dollar investment. So when Texas, or California, or some other large state or city sets its terms, the publishers take heed.[151]

Mr. O'Donnell asked that educators maintain an honest and competent environment in selection and that successful censorship attempts come only from highly qualified and courageous censors.[152] Publishers have listened to public pressure toward conservatism. Some publishers have begun modifying the content of textbooks.[153]

Judy Blume is an author of books on many of the above stated themes. Her books are among the most popular with young people and are the subject of recent attacks.[154] In 1977 an article entitled "Old Values Surface in Blume Country"[155] attacked the author's works as ". . . racist,

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[151]James J. O'Donnell, "Censorship and the Publishers," NASSP Bulletin 59 (May 1975):59-63.

[152]Ibid., p. 63.

[153]Pham Thein Hung, "Parents Protest Textbooks," Freedom of Information Center Report No. 401 (Columbia, Mo.: School of Journalism, University of Missouri, March 1979), p. 10.

[154]Rinsky and Schwikert, "In Defense of the 'New Realism'", p. 474.

[155]"Old Values Surface in Blume Country," Bulletin of the Council on Interracial Books for Children 7 (1977):8-10.

sexist, elite, or any combination of the three." In an interview responding to the criticism,[156] Ms. Blume stated that the Council on Interracial Books for Children that published the article is trying to tell her and other authors what to write and how to write in the future. When asked whether there is value in telling young people how to act and what to do in books, she responded:

> . . . kids don't buy preaching and being preached to. There's more value in presenting real situations and real characters even if they aren't pretty. I love to see a movie or a play and then go home and think about it, to draw my own conclusions about it. In the same way, I want kids to read my books and think about them and draw their own conclusions about human nature and the human condition.[157]

Censorship has increased in the twenty-year period from 1960 through 1980. The cause may be related to reaction to societal change, new realism in literature, governmental interference in many sectors of private lives, changing patterns in education, and lack of public confidence in education.

An examination of what has been censored in public schools shows the enormity of the situation. Representative

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[156]"Some Isms' Revisited, Answers from Blume Country: An Interview with Judy Blume," Top of the News 34 (Spring 1978):233-243.

[157]Ibid., p. 235.

cases are cited as published in the Newsletter on Intellectual Freedom.[158]

In December, 1960, the National Association for the Advancement of Colored People banned an English textbook from the high school at Torrington, Connecticut. The textbook contained stories that embarrassed Negro students: Edgar Allen Poe's Gold Bug, Joel Chandler Harris's Br'er Rabbit, and Sonny's Christening by Ruth Stuart. The New York Herald Tribune wrote that in spite of sympathy for the Negro children, education would be in a sad state if only inoffensive literature were taught.[159]

In 1961 a Church of Christ minister, a member of the Committee for Fundamental Education, objected to use of forty books in the Bolsa Grand High School in Garden Grove, California.[160]

Also, in 1961 the John Birch Society leader, Robert W. Welch, Jr., told reporters anti-Communist textbooks were needed in schools. All others should be removed. He urged people in sympathy with this cause to take over the Parent-Teacher Associations to accomplish this purpose.[161]

During the same year a parent in Santa Ana, California objected to the playing of a record of Archibald MacLeish's

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[158] Newsletter on Intellectual Freedom 10 (March 1961):3.

[159] Ibid.

[160] Ibid., p. 7.

[161] Ibid., p. 3.

J.B. in the classroom. The same parent also objected to Catcher in the Rye by J. D. Salinger and any book by George Bernard Shaw and Tennessee Williams.[162]

In 1962 a high school teacher in Wrenshall, Minnesota was fired for teaching George Orwell's 1984. The teacher later regained his job. In the same year parents attempted to ban John Steinbeck's The Grapes of Wrath from a high school in Tacoma, Washington. The school board stopped the banning.[163]

In 1962 Texans for America supported by the John Birch Society, American Legion, and Daughters of the American Revolution, put pressure concerning textbooks on the Texas legislature. The legislature appointed a committee of five. Their task was to remove from Texas schools any books favorable to the New Deal, United Nations, Tennessee Valley Authority, or federal aid to almost anything. They were also to rid Texas schools of books describing the United States as a democracy rather than a republic, and any books with selections by Pete Seeger and Langston Hughes because of past Communist affiliation. Also to be removed were books containing the name of Albert Einstein, music books with Jewish songs, and a long list of books such as John Steinbeck's The Grapes of Wrath, Alfred B. Guthrie, Jr.'s Big Sky, Alduous Huxley's Brave New World, McKinley Kantor's Andersonville, Thomas

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[162]Ibid., p. 4.

[163]Ibid., p. 1.

Wolfe's Of Time and the River, and George Orwell's 1984. Needless to say, the committee was unable to accomplish the task completely.[164]

In 1970 the principal of Jordan Junior High School in Minneapolis restricted Eve Merriam's Inner City Mother Goose to use by faculty only. The Facts Committee for Equal Education said the book was obscene and advocated violence. This group was part of the Neighborhood School Committee which opposed mandatory busing.[165]

In November, 1971, William Steig's Sylvester and the Magic Pebble was removed from the shelves of the Toledo public school libraries pending review. This children's animal story had policemen pictured as pigs.[166]

In 1971 the Strongville, Ohio school board announced that they would review all textbooks for obscenities, immorality, and abuse of the deity of God. They also planned to look into whether matters presented in books were depressing or inspirational toward historical figures and to look at presentations concerning economics and politics of the country.[167]

In 1971 a parent at Holmes Junior High School in Cedar Rapids, Iowa, objected to two books highly recommended by

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[164] Newsletter on Intellectual Freedom 11 (July 1962):4-5.

[165] Newsletter on Intellectual Freedom 20 (January 1971):4.

[166] Ibid., p. 5.

[167] Newsletter on Intellectual Freedom 20 (March 1971):32-33.

School Library Journal. The superintendent announced that school librarians would screen books more carefully in the future.[168]

Citizens in Kalamazoo, Michigan, in 1971 asked for the removal of Joan Baez' autobiography, Daybreak. The American Civil Liberties Union came to the defense of the book, saying that no self-appointed censors should decide what was in the school library.[169]

In 1971 in Stayton, Oregon, there was a controversy over books in the school library. A screening committee of concerned parents was appointed because parents are taxpayers and should be involved. The committee threw away anything questionable in paperback editions after glancing at them. They discarded any book with love scenes or dirty language in it and blacked out many passages.[170]

In Clay County, Georgia, in 1971 an English teacher who had been fired was reinstated and paid five thousand dollars in damages. He was fired for using an article from Playboy and showing a surrealistic movie by Salvador Dali in the classroom.[171]

In Buncombe County, North Carolina, in 1973, a school board member, Mrs. Edna Roberts, removed Catcher in the Rye,

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[168] Ibid., p. 60.

[169] Ibid., p. 61.

[170] Ibid., p. 123.

[171] Ibid., p. 130.

by J. D. Salinger, Of Mice and Men by John Steinbeck, Andersonville by McKinley Kantor, and Learning Tree by Gordon Parks, from the high school library. She demanded that all books containing "objectionable" words be removed from school libraries. After a long battle, Mrs. Roberts lost her struggle and books were replaced on the shelves.[172]

In 1975 pressure from the Concerned Parents Committee in Randolph, New York, brought about the removal of nearly 150 books from the high school library. The books were locked in a safe until a screening committee could make a decision on their appropriateness for high school students.[173]

In the same year books were removed from the library shelves in Scituate, Rhode Island, and Waukesha, Wisconsin. Peter Benchley's Jaws, Peter Gent's North Dallas Forty, and Go Ask Alice were removed from the shelves of a Dallas, Texas, high school library. All removals were brought about by pressure from parents.[174]

In 1976 pressure from a school board member, a Baptist minister, caused the removal of James Fenimore Cooper's Drums Along the Mohawk from a required reading list in Manchester, Tennessee. The book was banned because it contains the words "hell" and "damn."[175]

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[172]Newsletter on Intellectual Freedom 22 (May 1973):52.

[173]Newsletter on Intellectual Freedom 24 (July 1975):103.

[174]Ibid.

[175]Newsletter on Intellectual Freedom 25 (November 1976): 145.

In the fall of 1978 a Thatcher, Arizona, high school librarian found all but four periodicals had been removed from the library over the summer. One thousand and one hundred volumes, involving sixty-five titles, had disappeared. No reason was given. A school board committee told her they would study the matter.[176]

In 1978 in Helena, Montana, a member of Phyllis Schlafly's Eagle Forum borrowed and refused to return the book Our Bodies, Ourselves, by the Women's Health Collective. The school district trustees removed all copies from all school libraries.[177]

The cases cited above are only a few of many that were reported by the Newsletter on Intellectual Freedom during the years from 1960 through 1978. Many cases were resolved without publicity during this period. Others which reached the courts will be reported in the following chapter.

Recent surveys indicate that censorship has been on the rise in public schools throughout the nation. As indicated in Chapter I, more accounts were received in 1977 and 1978 than in the previous twenty-five years.[178]

A survey conducted by the Intellectual Freedom Committee of the North Carolina Library Association had responses from 592 librarians. Although librarians from public, college, and

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[176]Newsletter on Intellectual Freedom 27 (November 1978): 138.

[177]Ibid.

[178]"Textbook Censors: You Can Survive Their Ire and Extinguish Their Fire," p. 26.

university, junior college, and public schools were surveyed, only responses from public school librarians will be discussed. Responses from school librarians determined that 53.8 percent had avoided purchasing material because of anticipated censorship problems, 44.7 percent had not avoided purchase, 1.5 percent failed to respond to the question.[179]

Ninety public school librarians, or 15.2 percent, reported they had received complaints which required formal action by the governing body of the library. Three hundred nineteen, or 53.8 percent, responded that they had faced censorship problems of some type. In answer to a question about whether the school had written selection policies, 84.3 percent reported they had formal written policies, 11.5 percent had no written selection policy, 3.5 percent did not know, and 0.7 percent did not answer.

What were the grounds for complaints in the North Carolina schools? Profanity was the number one complaint with 72 complaints, or 40.2 percent; sex was second with 62 complaints, or 34.6 percent; religion ranked third with 18 complaints, or 10.1 percent; race ranked fourth with 8 complaints, or 4.5 percent; violence was fifth with 5 complaints, or 2.8 percent; and the last category was listed as "other" with 14 complaints, or 7.8 percent.[180]

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[179]Unpublished survey of the Intellectual Freedom Committee of the North Carolina Library Association, April 1979. Conducted by Phil Morris and Martha E. Davis. (Typewritten.)

[180]Ibid.

Three hundred eighty-six educators were surveyed in the fall of 1974 by Curriculum Information Network, sponsored jointly by Social Education and the Social Science Education Consortium. The survey focused on controversy concerning materials and topics in education. This review concerns only reports involving materials. There were no previous comparable studies for comparison on controversial issues and their treatment.[181]

One hundred forty-seven controversial issues involving materials were classified under ten categories. Of the ten categories, sex and sex education tied with school operations for the top issue. Content and context, unspecified by the survey, ranked second. Other social issues third, and religious and philosophical issues ranked fourth. Objectionable language and political issues tied for fifth place, and racial issues ranked sixth in the survey.

The respondents were asked how well the controversies concerning materials were resolved. The results showed that six were resolved creatively and amicably, seventy-four satisfactorily, twenty-five only partially, and twenty-six were not resolved.[182]

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[181]Irving Morrissett, "Curriculum Network Fourth Report: Controversies in the Classroom." Social Education 39 (April 1975):246-252.

[182]Ibid., p. 249.

The Curriculum Information Network Survey cannot be said to be representative of the nation since the sample was small and since it represented only those who are involved in a subject area as sensitive as social studies. The survey however, shows that controversy exists in the social science areas of the school program.

Lemuel Byrd Woods has completed an extensive study on censorship of educational institutions in the United States from 1966 to 1977.[183] Dr. Woods' study included public libraries as well as public school libraries. The following table has been drawn from his work to illustrate what happened in public schools during the ten-year period. The column marked K-12 covered public school cases that did not indicate the level where the book was censored.[184]

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[183]L. B. Woods, A Decade of Censorship in America: The Threat to Classrooms and Libraries, 1966-1975 (Metuchen, New Jersey: Scarecrow Press, 1979).

[184]Ibid., p. 73.

TABLE 1

TYPES OF MATERIALS CENSORED IN SCHOOLS
IN THE UNITED STATES
1966 - 1975

	High School	Junior High	Elementary	K-12	Total
Art Works	1			3	4
Booklets			1		1
Books	767	61	222	13	1,063
Films	11	2	2	3	18
Filmstrips	1				1
Handouts	1				1
Magazines	18	5	3	11	37
Newspapers	71	1	1	5	78
Poems	2		1		3
Recordings		1	1	1	3
Slide Shows	1			1	2
Textbooks	88	29	6	176	299
Totals	961	99	237	213	1,511

SOURCE: L. B. Woods, A Decade of Censorship in America: The Threat to Classroom and Libraries, 1966-1975 (Metuchen, New Jersey: Scarecrow Press, 1979), p. 60.

Dr. Woods indicated that the number of cases reported doubled in the 1970s. He stated that this may be due to: (1) better reporting procedures by the Newsletter on Intellectual Freedom where he collected data; (2) more reports from

librarians because they were more alert to censorship: and (3) an actual rise in censorship attempts "as people became more aware and sensitive to materials they considered offensive."[185]

During the years 1970, 1974, and 1975, 114 cases were reported each year. Twenty-seven cases were reported in 1966. Seventy-three cases were reported in 1967, an increase of 172.2 percent.[186]

The District of Columbia and Rhode Island had the heaviest censorship activity between 1966 and 1975. Other areas with heavy censorship were Vermont, New Hampshire, Maryland, Virginia (in the area adjacent to District of Columbia), Oregon, Montana, and Wyoming. It must be remembered that these statistics cover other libraries as well as those in schools.[187]

Books accounted for the most censorship attempts.[188] Schools were the main target, receiving 62 percent more censorship attempts than did other educational institutions.[189] Catcher in the Rye was the most censored title in the United States.[190]

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[185]Ibid., pp. 144-145.

[186]Ibid., p. 145.

[187]Ibid., pp. 145-146.

[188]Ibid., p. 147.

[189]Ibid., p. 148.

[190]Ibid., p. 149.

Among the most active organizations at work in the United States to question school instructional materials since 1961 has been Educational Research Analysts, Inc. This non-profit, tax-exempt enterprise is headed by Mel and Norma Gabler who operate from their home in Longview, Texas. Their stated goal is to help parents through evaluation of textbooks, library books, and instructional materials used by schools in the United States, Canada, Australia, and New Zealand. The Gablers refer to their organization as the "nation's largest textbook clearinghouse." They deny being censors.[191]

The Gablers state they spend many hours poring over each detail of the books they evaluate. In addition, they send outlines to interested parents who want to participate in the operation. Ten categories are suggested to parents as they look for objectionable content:

> (1) Attacks on Values, (2) Distorted Content, (3) Negative Thinking, (4) Violence, (5) Academic Unexcellence, (6) Isms Fostered (Communism, Socialism, Internationalism), (7) Invasion of Privacy, (8) Behavioral Modification, (9) Humanism, Occult, and Other Religions Encouraged, and (10) Other Important Educational Aspects.[192]

It seems important that competent evaluators of educational material have a broad educational background with

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[191]Barbara Parker, "Your Schools May Be the Next Battlefield in the Crusade Against 'Improper' Textbooks," American School Board Journal 166 (June 1979):27.

[192]Educational Research Analysts, Inc., "Textbook Reviewing by Categories," Longview, Texas, n.d. (Mimeographed.)

expertise in one or more fields such as literature, history, or science. Such may be the case, but Mrs. Gabler describes her qualifications as a mother and housewife. Mr. Gabler is a retired Exxon clerk.[193] There is little doubt that the Gablers have influenced many parents to become arbiters of instructional materials.

An accusation brought against educators by well-organized political interests of the New and Evangelical far-right, particularly the pro-family coalition, is the claim that a "religion" called secular humanism is permeating the public schools.[194] The accusation is particularly confusing to many educators who do not understand the concept or context of the charge.

Two issues seem to be at the center of the charge: (1) the fact that public schools cannot teach religion, and (2) the humanistic philosophy of education which supports the belief that education should be sensitive to the needs of students.[195] Humanistic philosophy has different interpretations to explicate its role within the field of education and needs clarification by educational leaders.[196]

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[193]Parker, "Your Schools May Be the Next Battlefield," p. 23.

[194]J. Charles Park, "The New Right: Threat to Democracy in Education," Educational Leadership 38 (November 1980): 146-149.

[195]Ibid., p. 148.

[196]Ibid., p. 149.

Explaining and clarifying the term secular humanism as a "religion" is not an easy task. The Gabler's organization, Educational Research Analysts, defines secular humanism as a religion that ". . . believes man is God and rejects biblical standards of living."[197] The Christophers, a religious group based in New York City, explains secular humanism as a trend that ". . . places man at the center of the universe, designating him as the supreme ruler of Human destiny."[198]

The organizations, which claim that secular humanism is the "religion" of public schools, have apparently combined such dictionary definitions as:

> secular - of or pertaining to worldly things that are not regarded as religious, spiritual, or sacred; temporal. . .
>
> humanism - any system of thought or action based on the nature, dignity, interest, and ideals of man, specif., a modern, nontheistic, rationalist movement that holds that man is capable of self-fulfillment, ethical conduct, etc. without recourse to supernaturalism; the study of humanities. . . .[199]

The gratuitous compounding of the two words seems to have given rise to a new label from which certain groups have created a "religion" for public education.

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[197]Educational Research Analysts, Inc., Longview, Texas, n.d. (Untitled Mimeographed Sheet.)

[198]Christopher Ideas, The Christophers, 12 East 48th Street, New York, N. Y. n.d. (Printed sheet.)

[199]Webster's New World Dictionary of the English Language, 2d college ed. (New York: World Publishing Co., 1970).

Along with such definitions, the aforementioned groups cite a footnote in the Supreme Court case of Torcaso.[200] The case concerned a man who was refused a commission in the Office of Notary Public of Maryland because he would not declare his belief in God. The Court ruled in favor of the plaintiff, saying in part:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in religion.' Neither can constitutionally pass laws to impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[201]

The above paragraph plus footnote eleven referred to in the paragraph is the legal basis given by religious groups who state that secular humanism is a religion. Footnote eleven states:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.[202]

The same groups cite the Seeger[203] case which concerned conscientious objectors but which contains no mention of

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[200]Torcaso v. Watkins, 367 U.S. 488 (1961).

[201]Ibid., p. 495.

[202]Ibid.

[203]United States v. Seeger, 85 S.Ct. 850 (1964).

secular humanism. There seems no basis for a definition of secular humanism as presented by the New and Evangelical right.

Justice Hugo Black gave a narrow interpretation of the term God in the Torcaso decision. A broader interpretation might include a universal being or spirit and an encapsulating world order. Certain Buddists and Taoists believe in God, and Ethical Culturalists believe in a world order. The assertion that public schools are teaching a Godless form of religion known as secular humanism is not logical but is full of redundancy. As Dr. Joseph E. Bryson has said:

> Based on the definition of religion if it is Godless then it cannot be a religion. However, linguistic analyses and logical dedication do not often play a major role when people are searching for reasons to justify an action. . . . The difficult question is, 'What is Caesar's and what is God's?' or 'What is secular not protected by the First Amendment freedom of religion?' In a democracy where politics and religion have a historical connection they are difficult to separate, but they are not inseparable in logic. As a point in example democracy is moral even to those who do not believe in God, and many believers in God do not believe in a democracy.[204]

Organizations further point to Humanist Manifesto I, issued in 1933 and signed by John Dewey and Humanist

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[204]Joseph E. Bryson, Current Church-State Issues, address delivered to The Virginia School Law Conference. Virginia Polytechnic Institute, Blacksburg, Virginia, November, 1981. (Typewritten.)

Manifesto II, issued in 1973 and signed by B. F. Skinner.[205] Since these two documents were signed by prominent educators, and since many educators follow the teachings of these two men, it follows, according to the accusers, that all public school educators embrace the philosophy of the two documents which the New and Evangelical right consider secular humanistic.

On this basis organizations such as the Heritage Foundation, Educational Research Analysts, Parents Watching the Schools, and the Moral Majority focus attacks on the public schools and their staffs.[206] The groups claim that children no longer believe in God after exposure to secular humanism.[207] Sex education, values clarification, humanities courses, and science courses emphasizing Darwin's theory of evolution are particular targets for the groups.[208]

Behind the confusing controversy of secular humanism lies the basic premise of the purpose of the American public school. The New and Evangelical right appears to view the public school as a place of indoctrination to truth and

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[205]Robert T. Rhode, "Is Secular Humanism the Religion of the Public Schools?" in Dealing with Censorship, ed. James E. Davis (Urbana: National Council of Teachers of English, 1979), pp. 122-123.

[206]Ibid., pp. 117-119.

[207]Ibid., p. 121.

[208]Ibid., p. 118.

values as viewed by the groups themselves, a place where access to information and ideas is to be suppressed or limited.[209] In order to educate children in a pluralistic, democratic society and prepare them for a diverse, changing world, it appears that educators will have to be aware of pressures which invite censorship and prevent opportunities for students to think, learn, and explore ideas.

Summary

A review of pertinent literature clearly points out that censorship is a real problem for public schools. Any level of public education may be confronted with controversy concerning library books, textbooks, films, periodicals, instructional materials, or matters involving curriculum.

The censor may be a parent, an interested member of the community, a local or national organization, a teacher, a librarian, a student, a principal, the superintendent, or even the school board. Censorship attempts may or may not be reported in the news media. They may or may not be settled to the satisfaction of the complainant or the school. Solutions may require litigation.

Controversy concerning schools is influenced by those problems generally encountered in society. Prevailing social, political, and religious trends influence community pressures on schools. Furthermore, censorship involves

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[209]Park, "The New Right," p. 149.

major legal issues such as academic freedom, students' rights, the rights of parents to direct their children's education, and the authority of school administrators and school boards.

In summation, censorship has been intertwined with mankind's destiny since earliest history. Seeds planted throughout history by philosophers such as Plato, Socrates, and Aristotle as well as various powerful political figures, were further nurtured by the work of Bowdler, Comstock, and Judge Cockburn. The result has been a profuse growth of censorship in society, including practically all media relating to education.

Those most concerned with publishing and education could well be participants in a continuing censorship "legacy" requiring court probate which may never be resolved to the satisfaction of all involved.

CHAPTER III

THE LEGAL ASPECTS OF CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIALS

Introduction

Controversy concerning public school curricular decision-making and books and materials used for its implementation is complex in nature, enmeshed in prevailing political and societal change. State legislatures and courts as well as federal courts and the United States Congress possess power and limitation over what is taught and how students are taught in public schools.

Decisions by state and federal courts as well as the United States Supreme Court have influenced curriculum, organization, or administration of schools since 1879.[1] Many decisions relate directly or indirectly to censorship of public school library and instructional materials.

Federal courts do not deal directly with educational concerns of public schools because the United States Constitution does not specifically mention education.[2] Federal jurists in

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[1]U.S. v. Bennett, 24F. 1093 (2nd Cir. 1879).

[2]John C. Hogan, The Schools, the Courts, and the Public Interest, (Lexington, Massachusetts: Lexington Books, 1974), p. 6.

rendering decisions have often stated that courts do not wish to become involved in day-to-day operations or administrative practices of public schools.[3] Since public schools are governed by boards of education, courts rarely substitute their judgement for that of representatives chosen by the people.

There are, nevertheless, two principal issues through which federal courts obtain jurisdiction in litigation involving local education: (1) alleged violation of constitutionally protected right, privilege, or immunity of an individual, and (2) questions of the validity of state or federal statutes under the United States Constitution.[4]

These two major issues have led to court involvement in controversies concerning school censorship. Constitutional questions fall into five major categories: (1) academic freedom of teachers, (2) right of students to read and receive information, (3) right of school boards to make educational decisions, (4) right of parents to oversee the education of their children, and (5) religious freedom of individuals. Controversies concerning state and local legislation mainly involve issues such as the prohibition of teaching foreign

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[3]Epperson v. Arkansas, 393 U.S. 97 (1968); Lindros v. Governing Board, 108 Cal. Reporter, 185 (1972). Cert denied, 94 S.Ct. 842 (1973); Mailloux v. Kiley, 448 F. 2d 1242 (1st Cir. 1971); and Presidents Council v. Community School Board, 409 U.S. 998 (1972).

[4]Hogan, The Schools, p. 8.

language or Darwin's theory of evolution.[5] The Supreme Court's definition of obscenity and the process through which it has evolved is presented. This is done in order to provide the legal background on which is based the Court's decisions concerning "objectionable" books and materials.

A Framework for Analyzing Legal Aspects of Censorship of Public School Library and Instructional Materials

Academic Freedom of Public School Teachers

Historically, judicial attitudes toward academic freedom tend to change with prevailing educational theory and philosophy.[6] Acceptance of academic freedom in American universities began in the late 1800s. The same acceptance of freedom to teach was not extended to elementary and secondary education.[7] The role of university education became generally accepted as one which is involved in the pursuit of learning through research, investigation, and discussion. The traditional role of public schools, on the other hand, was viewed as one which was mainly concerned with the indoctrination or transmission

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[5]Epperson v. Arkansas, 393 U.S. 97 (1968).

[6]"Academic Freedom in the Public Schools: The Right to Teach," New York University Law Review 48 (December 1978): 1176-1178.

[7]Ibid., p. 1179.

of community mores and established thought.[8]

In 1923 the Supreme Court made its first ruling concerning the curriculum in a public school system. Legislation in Nebraska prohibited the teaching of German to students below the eighth grade in public and non-public schools. The Supreme Court ruled that such legislation violated the liberty guaranteed by the Fourteenth Amendment.[9] The court further stated that such legislation interfered with the rights of teachers to pursue their profession and with the rights of parents to educate and control their children.[10]

The last two decades brought about significant changes in public schools. With these changes there has emerged a group of educators who disavow indoctrination theory. Currently many educational theorists support broad intellectual inquiry and the development of students' critical faculties as the function of elementary and secondary public schools rather than one of indoctrination.[11] Many such educators are proponents of "open" or "informal" education

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[8]Ibid.

[9]Meyer v. Nebraska, 262 U.S. 390 (1923).

[10]Ibid.

[11]Roland S. Barth, Open Education and the American School (New York: Agathon Press, 1972); John Holt, How Children Fail (New York: Dell, 1965); Herbert R. Kohl, The Open Classroom: A Practical Guide to a New Way of Teaching (New York: Random House, 1969); Neill Postman and Charles Weingartner, Teaching as a Subversive Activity (New York: Dell, 1969).

and view classrooms as a "marketplace of ideas." The central purpose of American education as stated by the Education Policies Commission is to produce ". . . a rational thinking individual, who has developed both critical and creative thinking, and who uses these intellectual abilities in becoming a useful and productive member of society."[12] Recently this philosophy has achieved some acceptance as courts have begun to explore the right to teach. In Sweezy[13] Chief Justice Earl Warren noted:

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.[14]

Although the Court spoke primarily of college faculty and students, the observation is no less applicable at elementary and secondary levels of public education.[15]

The Supreme Court has recognized that ". . . education is perhaps the most important function of state and local governments,"[16] and public school education is the primary

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[12]Educational Policies Commission. The Central Purpose of American Education. (Washington, D. C.: National Education Association, 1962), p. 12.

[13]Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[14]Ibid., p. 250.

[15]"Academic Freedom," New York University Law Review, p. 1183.

[16]Brown v. Board of Education, 347 U.S. 483 (1954), p. 493.

vehicle which exposes children to the world around them and integrates them into society.[17] Since the Brown decision courts have begun to examine the role of education in democratic society as well as the constitutional limits involved in the right to teach.

In Keyishian[18] the Supreme Court quoted United States v. Associated Press,[19] saying an education system best serves democracy when it teaches ". . . through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues rather than through any kind of authoritative selection.'"[20] The Court also expressed concern for the First Amendment freedom to create "a marketplace of ideas" in schools, thus supporting the creation of an intellectual atmosphere beneficial to teachers as well as for student inquiry.[21] Although acceptance of the public school as a "marketplace of ideas" is not unanimous,[22] the absolute control of state over teaching has been challenged.

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[17]Ibid.

[18]Keyishian v. Board of Regents, 385 U.S. (1967), p. 589.

[19]United States v. Associated Press, 326 U.S. 1 (1945).

[20]Keyishian v. Board of Regents, p. 683.

[21]Ibid., pp. 683-684.

[22]Sheldon H. Nahmod, "Controversy in the Classroom: The High School Teacher and Freedom of Expression," George Washington Law Review 39 (1971):1032.

In Albaum[23] the Federal District Court spoke to the issue:

> The considerations which militate in favor of academic freedom--our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both teacher and student operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas--are relevant to elementary and secondary schools as well as to institutions of higher learning.[24]

The landmark Tinker[25] case although dealing primarily with students' rights, has had a profound influence on the academic freedom of teachers. The court made a strong statement in favor of teacher rights:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[26]

The Court decision in Tinker[27] has established a precedent which has been followed in case law since 1969.

It seems clear that right to teach is presently a judicially cognizable right and is constitutionally based on

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[23]Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968).

[24]Ibid., p. 11.

[25]Tinker v. DesMoines, 393 U.S. 503 (1969).

[26]Ibid., p. 506.

[27]Ibid.

the First Amendment.[28] A unified legal definition of academic rights for public school teachers has still not emerged; therefore, the scope of protection available has relied on contracts and due process. Compelling interests of states in the education and welfare of children is a major consideration. Currently the trend of courts is to develop a balance between state autonomy of public education and the right to teach.[29]

Right of Student to Read and Receive Information

Rapid societal change has brought with it expanded rights to minors. The extension of constitutional rights to young people has not been an organized movement. Instead it has resulted chiefly from litigation concerning the prohibition of specific student activities by public school officials.[30] Although passage of the Twenty-sixth Amendment,[31]

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[28]Meyer v. Nebraska, 262 U.S. 390 (1923), pp. 400-401; Sweezy v. New Hampshire 354 U.S. 234 (1957), pp. 248-250; Keyishian v. Board of Regents, 385 U.S. 589 (1967), p. 603; Tinker v. DesMoines Independent Community School District 393 U.S. 503 (1969), p. 506; Parducci v. Rutland, 316 F. Supp, 352 (M.D. Ala. 1970), pp. 354-55; Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass), aff'd, 448 F. 2d 1242 (1st Cir. 1971): Moore v. Gaston County Board of Education, 357 F. Supp. 1037 (W.D.N.C. 1973); and Lindros v. Governing Board, 94 S. Ct. 842 (1973).

[29]"Academic Freedom," New York University Law Review, p. 1190.

[30]Richard Gyory, "The Constitutional Rights of Public School Pupils," Fordham Law Review 40 (1971):201.

[31]U.S. Const. amend. XXVI.

which extended the right to vote to eighteen year-old citizens, was influential in generally expanding rights, the major thrust has been through case law.[32] The primary gain in students' rights before 1969[33] was on the college and university level. Since that time a major focus has been on the rights of high school students.[34]

As early as 1879[35] a New York federal court addressed the question of students' rights to receive information. In 1923[36] the Court held that prohibition of door-to-door handbills by a city ordinance was a violation of First Amendment right of freedom of speech and the right to receive information. The Court ruled that the community had substituted its judgment over that of individuals.

Students received extention of constitutional rights through Supreme Court decisions in two cases. In 1967 the Supreme Court extended procedural due process to students of all ages.[37] Moreover, the 1975 Goss[38] decision extended to

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[32]Brown v. Board of Education, 347 U.S. 483 (1954): Kent v. U.S., 383 U.S. 541 (1966); Gault, 378 U.S. 1 (1967); Tinker v. DesMoines.

[33]Tinker v. DesMoines, 393 U.S. 503 (1969).

[34]Gyory, "Constitutional Rights," Fordham Law Review, p. 201.

[35]U.S. v. Bennett, 24 F. Cas. 1093 (N. Y. 1879).

[36]Meyer v. Nebraska, 262 U.S. 390 (1923).

[37]Gault, 387 U.S. 590 (1967).

[38]Goss v. Lopez, 419 U.S. 565 (1975).

students the right to civil procedural due process. In the 1974 Wood[39] decision the court insisted that when students' constitutional rights were violated school board members could be held liable under the Civil Rights Act of 1871.

In 1969 in Tinker[40] the Supreme Court made its first unambiguous assertion concerning First Amendment rights of school children:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[41]

Tinker was significant in extending judicial concern to areas formerly omitted from legal process.[42] Even in Tinker, caution was expressed by Justice Potter Stewart's concurring opinion which stated in part that a child does not possess the ". . . full capacity for individual choice which is the presupposition of First Amendment guarantees."[43] Nevertheless, as a result of the decision in Tinker, it is now customary for federal courts to review the constitutional rights of public school students.

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[39]Wood v. Strickland, 416 U.S. 935 (1974).

[40]Tinker v. DesMoines.

[41]Ibid., p. 506.

[42]Gyory, "Constitutional Rights," Fordham Law Review, p. 214.

[43]Tinker v. DesMoines, p. 515.

Justice Oliver Wendell Holmes identified the library as "a marketplace of ideas" as early as 1919.[44] In spite of Holmes' enlightened concept, the censorship of library materials has become increasingly important as a legal issue involving public school students' right to read, to know, to learn, and to be informed. States entrust school boards with the privilege of selecting books and materials. When this results in alleged violations of legislative and constitutional considerations, controversy results.

Students' right to know has limitations as do all constitutional rights. In recent years courts have sometimes found school board conservatism stands in the way of student rights. Since 1973, complaints of obscenity under the Miller[45] Test alone have made few materials inaccessible to students.

Three recent Supreme Court cases support the constitutional right to receive information. Although none of the cases refers specifically to minors, minors have been cited in subsequent school censorship cases. In 1972 Kleindienst[46] confirmed the First Amendment right to receive information. In Virginia State Board of Pharmacy[47] the Court relied on

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[44]Abrams v. U.S., 250 U.S. 616 (1919), p. 630.

[45]Miller v. California, 413 U.S. 15 (1973).

[46]Kleindienst v. Mandel, 408 U.S. 753 (1972), pp. 762-763.

[47]Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748 (1976).

Kleindienst[48] in saying: "We acknowledge that this court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"[49]

In 1978 Pacifica[50] introduced a new dimension into censorship of school library and instructional materials even though the case concerned the spoken rather than the written word.[51] The five to four opinion allows the Federal Communications Commission to regulate "indecent" as well as obscene broadcasts during hours when children are most likely to listen.[52]

Case law confirms that rights of minors have increased, particularly since Tinker[53] in 1969. The right to read and receive information by public school students has not been conclusively settled by the courts. Future case law concerning the right of public school students to read, to know, and to be informed will probably be dealt with in case-by-case consideration rather than by following a set pattern.[54]

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[48]Kleindienst v. Mandel.

[49]Virginia State Board of Pharmacy, p. 757.

[50]Federal Communications Commission v. Pacifica Foundation, 98 S.Ct. 3026 (1978).

[51]M. Chester Nolte, "New Pig in the Parlor: Official Constraints on Indecent Words," NOLPE School Law Journal 9 (1980):2.

[52]F.C.C. v. Pacifica, pp. 3040-3041.

[53]Tinker v. DesMoines.

[54]Gyory, "Constitutional Rights," Fordham Law Review, p. 224.

School Board Authority to Select and Remove Library and Instructional Materials

School boards are empowered through state statutes to prescribe curricula. Authority to select textbooks, library books, and other instructional materials is derived from the same source.[55] It follows that school personnel, librarians and teachers, do not have unreviewable privileges to select library and instructional materials. Within the scope of school boards is authority to approve or disapprove such action;[56] however, there are constitutional limitations on the discretion of school boards to review and remove books and materials from school libraries.

The Supreme Court has described the First Amendment as having "preferred position" over other considerations.[57] The Court also stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .[58]

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[55]Bolmeier, School in the Legal Structure, p. 100.

[56]Julia Turnquist Bradley, "Censoring the School Library: Do Students Have the Right to Read?" Connecticut Law Review 10 (Spring 1978): 757.

[57]Kovacs v. Cooper, 336 U.S. 77 (1949), p. 88.

[58]West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), p. 42.

Matters of taste and style are included in First Amendment protection,[59] while obscenity is outside review.[60] Courts have protected school boards when "unduly sensitive persons" objected to books or materials.[61]

On occasion school boards have attempted to justify their own censorship actions through statutory discretion over book selection.[62] Sometimes school boards have acted with indifference toward constitutional concerns.[63]

The decision of the Court in Tinker[64] has affected the role of school boards in litigation. Expanded constitutional rights of students have ". . . largely taken place at the expense of school administrators."[65] Since the landmark decision in 1969, school boards and school districts usually appear in court as defendants. Plaintiffs are generally pupils, teachers, parents, and taxpayers. Although Tinker did not deal directly with procedural due process, schools

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[59]Hannegan v. Esquire, Inc., 317 U.S. 146 (1946), pp. 157-158.

[60]Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 431 U.S. 115 (1973).

[61]Rosenberg v. Board of Education, 92 N.Y. S2d 344 (S.Ct. 1949), p. 346.

[62]Pico v. Board of Education, Island Tree Union Free School District, No. 77C217 (E.D. N.Y. August 2, 1979).

[63]Keefe v. Geanakos, 418 F.2d 359 (1969).

[64]Tinker v. DesMoines.

[65]Gyory, Fordham Law Review, p. 237.

have been forced to view that area more closely than in the past.

Another effect of Tinker is that school boards have been given the burden of proof to justify actions and regulations. The testimony of school officials has less relative weight than before 1969.[66] Judgmental statements by expert educators are not as easily accepted by courts as they were in the past. In other words, the trend has moved away from unquestioning acceptance of testimony by school authorities.

If courts view the traditional role of public schools as being centers of indoctrination and transmission of community mores, then schools have almost unlimited power to select and review library books and instructional materials.[67] On the other hand, if courts view the public school as a marketplace of ideas, the constitutional rights of students and teachers must then be given full consideration.[68]

Restriction of sources such as library books by school boards has been considered a serious constitutional concern.[69] Although students could obtain the same materials from another source, the Court has asserted that exercise of constitutional

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[66]Ibid., p. 235.

[67]Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971), p. 1392.

[68]Minarcini v. Strongsville City School District, 541 F. 2d 557 (6th Cir. 1976).

[69]Schneider v. State, 308 U.S. 147 (1939).

rights could not be abridged at certain times and places merely because they could be exercised at other times and places.[70]

A school library differs from a classroom in that students are not required to read particular books but may choose at will what is to be read. Libraries present a wide variety of materials and do not advocate or oppose philosophies presented by books or materials.[71]

Selection and censorship are distinguishable. Selection is a process whereby specific materials are chosen from all available materials, limited only by educational considerations, budget, and space. Censorship, on the other hand, permanently limits access to books and materials based on the value judgment or prejudice of an individual or group.[72] An article in the Connecticut Law Review states:

> . . . a case in which a school board seeks to censor library books provides the court with an ideal opportunity to apply principles of academic freedom to secondary schools, without judicially mandating a particular theory of educational purpose and without altering the traditional structure of American education.[73]

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[70]Spence v. Washington, 418 U.S. 546 (1975), p. 556.

[71]"Comment: School Boards, Schoolbooks and the Freedom to Learn," Yale Law Review 59 (1950):953-954.

[72]Bradley, "Censoring the School Library," Connecticut Law Review, p. 770.

[73]Ibid.

Recent decisions illustrate that courts have divided opinions on school board censorship. Although courts generally uphold school boards in day-to-day administration of schools, recent case law shows a trend toward upholding both academic freedom of teachers and students' right to receive information.

Parents' Right to Direct Education of Children

In the late 1800s, parents' rights to direct the education of their children was unquestionable. The state obligation was to provide tax-supported schools to which parents might entrust the education of their children.[74]

In a 1923 decision[75], the right of the child to receive an education did not stand alone. The Supreme Court ruled that the prohibition by Nebraska law to teach German to students below eighth grade was ". . . an arbitrary interference with the liberty of parents to control and educate their children. . . ."[76] Two years later in a case concerning compulsory public school attendance in Oregon,[77] the Court ruled that such legislation ". . . unreasonably interferes

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[74]Joel S. Moskowitz, "Parental Rights and State Education," Washington Law Review 50 (1975):623.

[75]Meyer v. Nebraska.

[76]Bolmeier, School in the Legal Structure, p. 10.

[77]Pierce v. Society of Sisters, 268 U.S. 510 (1925), pp. 534-535.

with the liberty of parents and guardians to direct the upbringing and education of children under their control."[78]

It was not until 1954 that focus began to change from parents' rights to the rights and welfare of children.[79] Probably no other Court decision has had a greater influence on American society than that in Brown.[80] Although the drama involved in the case emphasized equal education, it was a child-oriented decision. Richard Gyory wrote in the Fordham Law Review:

> Prior to 1954, the context in which the Court dealt with educational matters was either the claims of adults to equal access to higher education or actions which mingled the rights of parents and taxpayers.[81]

The full impact of constitutional rights to be given children was not fully realized until Tinker[82] in 1969.

A highly significant recent case involving parents' rights and public education is Yoder.[83] Amish parents claimed the compulsory attendance law of Wisconsin violated First and Fourteenth Amendment rights. School attendance after age

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[78]Ibid.

[79]Gyory, "Constitutional Rights," Fordham Law Review, p. 203.

[80]Brown v. Board of Education.

[81]Gyory, "Constitutional Rights," Fordham Law Review, p. 203.

[82]Tinker v. DesMoines.

[83]Wisconsin v. Yoder, 406 U.S. 205 (1972).

sixteen was contrary to Amish religious belief and way of life. This case weighed the right of parents to oversee the education of their children versus state control. "Thus, the Yoder Court held that the parents' common law right to direct their children's education, combined with the constitutional guarantee of freedom of religion, displaces the compulsory attendance statute."[84] In a dissenting opinion, Justice William O. Douglas stated that the child should express his desire on the subject rather than having the parents' views imposed on him.[85]

Another case which has applied a balancing test requiring schools to follow the parents' request is Glaser.[86] A parent forbade school authorities to use corporal punishment on a child. The Court ruled the school must defer to the wishes of the parent unless the decision ". . . will jeopardize the health or safety of the child, or have a potential for significant social burdens."[87]

In spite of the Yoder and Glaser decisions, the trend of courts at present seems to be toward emphasis of students' rights rather than parents' rights. After examining the legal

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[84]Joel S. Moskowitz, "Parental Rights and State Education," Washington Law Review 50 (1975):629.

[85]Wisconsin v. Yoder, pp. 241-243.

[86]Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).

[87]Ibid., p. 559.

background, it is not surprising that public school censorship cases in the last two decades have placed more emphasis on rights of students to read, to learn, and to receive information than on the rights of parents to direct education of children. "The minor may still have to share his legal billing in the captioned credits with his parents, but there is no longer any question as to who is the star."[88]

Religious Freedom of Public School Students, Related to Use of Library and Instructional Materials

The establishment clause of the First Amendment[89] is the basis for substantive restriction on what can be taught in public schools. "Congress shall make no law respecting an establishment of religion. . ."[90] is equally applicable to states through the Fourteenth Amendment.[91]

Few Supreme Court cases based on the establishment clause have dealt directly with actual instructional practices or uses of books and materials in public schools. In 1948 religious studies programs in public schools for instruction in individual faiths were declared in violation of First Amendment

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[88]Gyory, "Constitutional Rights," Fordham Law Review, p. 206.

[89]U.S. Const. amend. I.

[90]Ibid.

[91]U.S. Const. amend. XIV.

rights.[92] Even though churches paid the salaries of teachers, tax-supported public buildings could not be used to promulgate religious doctrines to students.[93]

Most important of the cases in this area is Epperson.[94] Based on the Tennessee statute which was upheld in the famous Scopes[95] "monkey trial," Arkansas passed legislation providing criminal penalties and dismissal for any teacher presenting Darwin's theory of evolution in classrooms. The Court reaffirmed states' right to prescribe curriculum for public schools. A curriculum could clearly include teaching Bible as history or literature, but in the process of teaching, schools must remain neutral in religious matters. However, the Court declared that Arkansas' statute clearly violated First Amendment rights.[96] The statute was deemed to be in conflict since it tended to take sides with ". . . a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[97]

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[92]McCallum v. Board of Education, 68 S. Ct. 461 (1948).

[93]Ibid., pp. 463-45.

[94]Epperson v. Arkansas.

[95]Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

[96]Epperson v. Arkansas, p. 103.

[97]Ibid.

The constitutional question of Bible reading in public schools was the issue in Schempp.[98] Pennsylvania law in question required the reading of at least ten Bible verses at opening of each school day without comment by teacher in charge. After district court ruled against the statute, another sentence was added which stated children could be excused upon written request from parents.

The Pennsylvania law was declared unconstitutional by the Supreme Court since it violated the establishment clause. Justice Tom Clark held that the law preferred Christian religion since it required reading the Holy Bible. The intention of the law was to introduce a religious ceremony into public schools. In his concurring opinion Justice William J. Brennan, Jr. stated:

> . . . What the Framers meant to foreclose, and what our decision under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious means to serve governmental ends, where secular means would suffice.[99]

The Court further pointed out that ". . . objective instruction in comparative religion or the history of religion and its relationship to the advancement of civilization. . . ."[100]

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[98]Abington School District v. Schempp. 374 U.S. 203 (1963).

[99]Ibid., pp. 294-295.

[100]Ibid., p. 225.

is important and proper for an educated citizenry. The decision was also applied to Murray v. Curlett[101] and later to Chamberlain v. Dade County Board of Public Instruction.[102] The obligatory nature of the ceremonies had a great influence on the making of this important decision.

Books discussing religion and sex often promote or suppress some religious belief; however, if use is based on sound educational purpose and does not support or suppress religious views, no establishment clause violation is created.[103] Some library books and instructional materials, nevertheless, may offend religious beliefs of parents or students. Compulsory use of these materials may create constitutional issues, particularly where students cannot be excused when conflict exists with values and religion.

In West Virginia v. Barnette,[104] the Court held that Jehovah's Witnesses could not be compelled to salute the United States flag in school. The 1973 Yoder[105] case determined that Amish children could not be compelled to attend school past eighth grade because of parents' religious

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[101]Murray v. Curlett, 228 Md. 239, 179 A(2d) 698 (1962).

[102]Chamberlain v. Dade County Board of Public Instruction, 377 U.S. 402 (1964).

[103]Frederick F. Schauer, "School Books, Lesson Plans, and the Constitution," West Virginia Law Review 78 (May 1976): 308-309.

[104]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[105]Wisconsin v. Yoder.

beliefs. In both instances fundamental religious beliefs outweighed state's compelling interest in education. It follows that if school boards require students to use certain library and instructional materials without providing an alternative assignment or excuse policy, free exercise of religion may be impaired. The balancing process of courts may involve the importance of books and materials. Different considerations may compel different decisions.[106]

Compulsory sex education in New Jersey[107] was ruled to encroach on parents' right to mold children's behavior in family and religious beliefs. In New York City a group of parents requested Oliver Twist by Charles Dickens and Merchant of Venice by William Shakespeare be removed from school libraries.[108] The books, according to plaintiffs, presented a stereotype of Jews which was offensive to members of that religion. The New York Supreme Court supported the school board and the books were retained. Another case[109] was based on a complaint that Kurt Vonnegut, Jr.'s Slaughterhouse-Five made reference to religious matters and contained obscenity.

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[106]Schauer, "School Books," West Virginia Law Review, p. 313.

[107]Valent v. New Jersey State Board of Education, 114 N. J. Super. 63, 274 A(2d) 832 (1971).

[108]Rosenberg v. Board of Education, 92 N.Y.S. 2d 344 (Sup.Ct. 1949).

[109]Todd v. Rochester, 41 Mich. App. 320, 200 N.W. 2d 90 (1972).

The Michigan Court of Appeals ruled for the school board on grounds that the book was intended to teach about religion rather than to indoctrinate a religious philosophy.

Parents in Kanawha County, West Virginia, protested textbooks and supplementary instructional materials which, among other assertions, they claimed ridiculed religious beliefs and groups.[110] In this case, too, the federal district court maintained that schools could teach about religion.

The area of sex education and books and films used in such courses sometimes become religious issues. In Medeiros[111] the parents of elementary students challenged the showing of particular films as part of a sex education course on the basis that it was an invasion of privacy and violated religious freedom. Participation was not compulsory. Plaintiffs questioned whether or not ". . . parents are free to educate their offspring in the intimacies of sexual matters according to their own moral and religious beliefs without due interference from the state."[112] The Hawaii Supreme Court held for the school board saying:

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[110]Williams v. Board of Education of County of Kanawha, 388 F. Supp. 93 (S.D., W.V. 1975).

[111]Medeiros v. Kiyosaki (Hawaii), 478 P(2d) 314 (1970).

[112]Ibid., p. 315.

> Inasmuch as we have found no compulsion or coercion related to the educational program in question we find no violation of the First Amendment's Free Exercise of Religion Clause.[113]

Emerging from case law is a three-fold test providing that: (1) state educational activity have a strictly secular purpose, (2) public education neither promote nor inhibit religion, and (3) there be no governmental entanglement with religion.[114]

Evolution of Legal Definition of Obscenity

One important aspect at the center of the majority of censorship debates is whether material is obscene or contains obscenity in one or more passages. Since 1868 the United States Supreme Court has devoted myriads of hours and written thousands of words in an effort to define obscenity.

The philosophy of the courts evolved through several stages. Beginning with the Hicklin Doctrine in 1868, court decisions stated that material harmful to children and to particularly susceptible individuals was harmful to everyone. Materials were judged obscene through passages taken out of context or merely by a word or phrase found to be offensive.

The next phase in the definition of obscenity distinguished between materials harmful to children but acceptable to adults. Finally, the court set forth a test emphasizing the effect of material on the average person, application of

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[113] Ibid., p. 319.

[114] Schauer, "School Books," West Virginia Law Review 78 (May 1976):308-309.

contemporary standards, and consideration of the work as a whole to include its literary and artistic merit. The following account of legal cases highlights some important and interesting ramifications of obscenity. By their effect on the selection and use of library books and instructional materials in public schools, legal decisions concerning obscenity and other areas of censorship directly or indirectly influence the education of young people.

The legal question of censorship pertaining to the use of books and materials by minors has been an issue since the Hicklin[115] decision in 1868. This case was the first legal effort to define a test for obscenity. The English Court ruled that intent of author or publisher was not at issue in the case. Instead, the issue was ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall."[116] Thus, focus was put on "particularly susceptible individuals" such as children rather than on the public at large. The Hicklin Test was considered a justification for obscenity laws. It was welcomed by courts in the United States.

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[115]Regina v. Hicklin, L.R. 3Q.B. 360 (1868).

[116]Ibid., p. 371.

In 1913 Judge Learned Hand put forth a ruling concerning a novel about big city vice. In Kennerley[117] Judge Hand stated that his decision was based on the Hicklin Test. Since it had been used as a precedent in lower courts, he could not disregard it. He added a statement to his findings, however, which may have been the beginning of a trend away from the very precedent he used.

> I hope it is not improper for me to say that the rule as laid down, however, consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, 'obscene, lewd, or lascivious.'[118]

The ruling in Hicklin[119] tended to limit reading matter for all adults to that suitable for children and the entire population. Judge Hand's statement, a trend away from the Hicklin Test, began to show its influence in case law in a notable case in 1933.

The decision in One Book Called "Ulysses"[120] rejected Hicklin without citing any authority. The Court stated that intent of an author toward pornography, i.e. exploitation of obscenity, must be determined before his work could be

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[117] United States v. Kennerley, 209 F. 119 (1913).

[118] Ibid., p. 121.

[119] Regina v. Hicklin.

[120] United States v. One Book Called "Ulysses", 5 F.Supp. 182 (1933).

declared obscene. This decision considered the concept of an "average person." The book should be examined basically from the point of view of its literary value. It should be evaluated as a whole rather than through excerpts or mere words or phrases taken out of context. This modern test for obscenity was not accepted by all judges.

In a 1945 case involving Lillian Smith's Strange Fruit,[121] the court asserted:

> . . . we are of the opinion that an honest and reasonable judge or jury could find beyond a reasonable doubt that this book 'manifestly tends to corrupt the morals of youth.'[122]

This decision rejected the excerpt approach and judged the book as a whole; however, literary merit of the work was not considered.

In the 1948 Winters[123] case, the Supreme Court recognized for the first time that substantial First Amendment rights are involved in laws which declared that distribution of "harmful" materials is criminal. The Court also recognized that even objectionable materials may be protected by the First Amendment. During the same year in Doubleday,[124] the Court fully discussed First Amendment rights as they relate to

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[121]Commonwealth v. Isenstadt, 62 N.E. 2d. (1945).

[122]Ibid., p. 840.

[123]Winters v. New York 333 U.S. 507 (1948).

[124]Doubleday and Company v. New York, 335 U.S. 848 (1948).

obscenity laws. Since no opinion on the subject was rendered, the full impact of the discussion apparently did not carry great influence on future decisions.

In 1949 Judge Curtis Bok ruled on the obscenity of several modern novels.[125] He qualified the definition of obscenity by saying obscenity was not "mere coarseness or vulgarity." Judge Bok also considered the restriction of freedom of speech through obscenity laws. Application of such laws should be to the "sexually impure and pornographic." Even then there must be clear evidence that a crime had been or was about to be committed as a result of the publication.[126]

Four years later, Besig[127] concerned Henry Miller's Tropic of Cancer and Tropic of Capricorn. The Court, in applying the "average person" test, wrote: "Dirty word description of the sweet and sublime, especially of the mystery of sex and procreation, is the ultimate of obscenity."[128]

In 1957 Justice Felix Frankfurter in the Butler[129] decision said adults should not be prohibited from reading certain materials just because the books and materials potentially may have a harmful effect on youth.

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[125]Commonwealth v. Gordon, 166 Pa. 120 (Sup.Ct. 1949).

[126]Frederick F. Schauer, The Law of Obscenity, (Washington: Bureau of National Affairs, 1976), p. 32.

[127]Besig v. United States, 208 F. 2d. 142 (9th Cir. 1953).

[128]Ibid., p. 146.

[129]Butler v. Michigan, 352 U.S. 380 (1957).

> The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . . We have before us legislation not unreasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.[130]

The United States Supreme Court modernized the definition and test for obscenity in Roth[131] in 1957. ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[132] This was the first use of the term "contemporary community standards" by the Supreme Court. This concept was not new. It has been used in many lower court opinions such as Kennerley[133] and Isenstadt.[134]

The Roth[135] Test moved toward an external standard for obscenity rather than accepting personal views and opinions regarding what should be proscribed. This decision also moved away from judging materials on the basis of their effect on "particularly susceptible individuals." Although the Court

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[130]Ibid., p. 489.

[131]Roth v. United States, 77 S. Ct. 1304 (1957).

[132]Ibid., p. 489.

[133]United States v. Kennerley, 209 F. 119 (1913).

[134]Commonwealth v. Isenstadt, 62 N.E. 2d (1945).

[135]Roth v. United States, 77 S.Ct. 1304 (1957).

did not define the term "community," the lower court instructed the jury to judge material by its influence upon the "average person in the community. . . by present day standards."[136] The Supreme Court approved the lower court's instructions, and Chief Justice Earl Warren's concurring opinion supported the view. After Roth several lower courts adopted a local view toward "contemporary community standards."

In delivering the opinion in Roth,[137] Justice William J. Brennan, Jr. made a statement that later became highly controversial. "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[138]

As long as the Hicklin[139] Test was enforced by the Supreme Court, rulings on obscenity were fairly simple. If obscene material was harmful to minors, it should not be available to anyone. As the philosophy of the Supreme Court changed and only hard-core pornography was prohibited, the question of materials for minors gained importance.

The Supreme Court followed the ruling of Roth[140] in 1964 in Jacobellis.[141] While recognizing the necessity for prevent-

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[136]Ibid., p. 490.

[137]Ibid.

[138]Ibid., p. 492.

[139]Regina v. Hicklin, L.R. 3Q.B. 360 (1868).

[140]Roth v. United States, 77 S.Ct. 1304 (1957).

[141]Jacobellis v. Ohio, 378 U.S. 184 (1964).

ing the distribution of "material deemed harmful to children," the Court did not feel it necessitated withholding such materials from adults.[142] Justice Brennan and Chief Justice Warren disagreed on one point in the opinion. Justice Brennan envisaged a national standard for obscenity while Warren supported a community standard. The ruling in Jacobellis[143] and a 1966 ruling in Memoirs[144] supporting a three-fold test for obscenity were harbingers of five landmark cases in 1973 which have affected censorship legislation since that date.

In 1968 Ginsberg[145] provided the Court with an opportunity to speak out concerning materials that were not obscene when distributed to adults but which may be proscribed for minors. At issue was the New York state statute preventing the dissemination of "girlie" magazines to juveniles under the age of seventeen. The Supreme Court upheld the New York statute, thus distinguishing between material held not obscene for adults but harmful for minors. It must be pointed out that Ginsberg[146] required the three-fold test as decided in

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[142]Ibid., p. 195.

[143]Ibid.

[144]Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 S.Ct.975 (1966).

[145]Ginsberg v. State of New York, 390 U.S. 692 (1968).

[146]Ibid.

Roth.[147] To be declared obscene the material must be proved to be (1) appealing to the prurient interest, (2) patently offensive, and (3) lacking in redeeming social importance.[148] Objectionable material must meet the Roth Test before it could be proscribed even to minors.

The Supreme Court in Ginsberg[149] did not deal with First Amendment rights of minors, as compared with adults. The Court upheld the New York statute which prohibited sale or distribution of obscene materials to juveniles. If materials were sold to minors, they must be assessed on the basis of the influence of prurient interest on juveniles.

On June 21, 1973, the Supreme Court handed down a new set of guidelines that in effect enabled states to ban material offensive as ruled by local standards.[150] The most significant of the cases for this discussion was Miller.[151] For the first time since the 1966 Memoirs[152] case, the Supreme Court focused on the actual definition of obscenity.

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[147]Roth v. United States

[148]Ibid., p. 633.

[149]Ginsberg v. State of New York.

[150]Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 431 U.S. 115 (1973); United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); and Miller v. California, 413 U.S. 15 (1973).

[151]Miller v. California.

[152]Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General.

> This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.[153]

The five cases were all decided by a five to four margin. Chief Justice Warren Burger wrote the majority opinions and was joined by Justices Harry Blackman, Lewis F. Powell, Jr., William H. Rehnquist, and Byron R. White. The Miller[154] case established a three-fold test to determine obscenity:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious artistic, political, or scientific value.[155]

This attempt to clarify the definition of obscenity has been of little help to lower courts. The dissenting opinion of Justice William O. Douglas in Roth[156] raised the questions that have been troubling those involved in censorship litigation since the Roth and Miller[157] decisions.

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[153]Miller v. California, p. 18.

[154]Ibid.

[155]Ibid., p. 24.

[156]Roth v. United States.

[157]Ibid., p. 1322.

> Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win.[158]

Questions arising from the Miller decision have not been answered. Who is the "average person?" Who defines "contemporary community standards?" What will be the impact of the decisions? Until the jury renders a decision, the librarian cannot be sure.

Confusion has resulted for school systems as they face litigation in matters of censorship concerning school library and instructional materials. The attention of the community seems to have turned from hard-core pornography or adult book stores and toward public schools.

Legal bodies within the states are empowered with the right to establish obscenity statutes based on community standards as set forth in the Miller decision. Nothing can be declared obscene except through such legislation. It is the responsibility of juries to determine community standards in obscenity cases.

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[158] Ibid.

Censorship Cases

Cases Supporting School Board Action

Parker,[159] a probationary teacher in Prince George's County, Maryland, alleged he was dismissed and his contract was terminated in violation of First, Fifth, and Fourteenth Amendment rights.[160] The Court said, in fact, the school board had not renewed his contract. In accord with school board policy, contracts of non-tenured teachers could be terminated by written notice at end of the first or second year before tenure was acquired.

Plaintiff claimed his contract was terminated because he assigned Brave New World by Aldous Huxley in a psychology class. In the curriculum guide for the course, Brave New World was listed as optional or selected reading rather than required reading.

The school board claimed Parker's contract was not renewed because his "approach to teaching" and "method of handling students were not suitable at the senior high school level. . . ."[161] Further, plaintiff was unwilling to follow outlined procedures in assigning reading.

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[159]Parker v. Board of Education of Prince George's County, Maryland, 237 F.Supp. 222 (1965).

[160]Ibid., p. 224.

[161]Ibid.

The Court asserted that Brave New World was not an issue in the case. Even if it were, the ". . . right of free speech or expression like other First Amendment guarantees is not absolute."[162] The Court insisted the school board had the privilege of refusing to renew non-tenured teachers' contracts.

In the case of Medeiros[163] parents of fifth and sixth grade students in a public school protested the use of a film series in a newly adopted family life and sex education curriculum. Parents as plaintiffs contended the program was an invasion of privacy and a violation of religious freedom. The films consisted of fifteen lessons covering ". . . interpersonal relations, self-understanding, family structure and sex education."[164] Lessons eleven through fifteen concerned sexual development and sexuality. The films were designed for use on educational television. When the state adopted the program an "excusal system" was included. Parents or guardians who objected on moral or religious grounds could have their children excused. Thus, the program was not compulsory.

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[162]Ibid., p. 229.

[163]Medeiros v. Kiyosaki.

[164]Ibid., p. 315.

Plaintiffs cited Meyer[165] and Pierce[166] to support their invasion of privacy contention. The court held the two decisions were supportive of freedom of speech rather than privacy. The court asserted the parents' right of privacy had not been violated.

The court next addressed the issue of violation of First Amendment rights related to religious freedom. Since the program was not compulsory, the court did not find "any direct or substantial burden on their 'free exercise' of religion."[167]

Plaintiffs further argued that the program was illegal because the State Department of Education must have specific authorization from the legislature to adopt programs. The court stated the adoption of sex education programs was within the jurisdiction of the State Department of Education. The program had been adopted by the school board. The court asserted it was proper for the school district to continue the sex education program.

Presidents Council[168] was the first case concerning a local school board's authority to proscribe the use of

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[165]Meyer v. Nebraska.

[166]Pierce v. Society of Sisters.

[167]Medeiros v. Kiyosaki.

[168]Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2d Cir. 1972).

specific books deemed inappropriate for students.[169] As previously stated, federal courts have been reluctant to intervene in such matters unless constitutional issues are directly implicated.[170] The New York Legislature grants to school boards the legal privilege to select library books.[171]

In the case of Presidents Council,[172] the school board first passed a resolution requiring withdrawal of a book from junior high school libraries in the school district. Later, school board modified the resolution by retaining the book and making it available to students by direct loan to parents. Teachers were not forbidden to discuss or assign Down These Mean Streets, a book by Piri Thomas, which vividly describes life in Spanish Harlem in New York City.

Plaintiffs in the case were Presidents Council, past and present presidents of various parent-teacher associations, students, parents, teachers, a librarian, and a principal. Plaintiffs claimed that withdrawal of books in question violated First Amendment rights.[173] Relying on Ginsberg[174]

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[169]M. David Alexander, "First Amendment: Curriculum, Libraries, and Textbooks," in School Law in Contemporary Society, ed. M. A. McGhehy (Topeka, Kansas: National Organization on Legal Problems of Education, 1980), p. 155.

[170]Epperson v. Arkansas.

[171]New York Education Law, Consol. Laws, C. 16, 2590-e (3) (McKinney 1970).

[172]Presidents Council v. Community School Board.

[173]Ibid., p. 290.

[174]Ginsberg v. State of New York.

plaintiffs argued that unless books were obscene, minors have unqualified First Amendment rights to access.[175] The court did not accept plaintiffs' interpretation.

The plaintiffs did not question authority of the school board to select books; however, once a book had been selected, plaintiff argued, it could not be removed because of board's taste or dislike for its content. Shelving a book in the school library elevated the students' rights to use it to a constitutional level. The court disagreed and held that books do not receive "tenure". The same agency authorized to select was also authorized to remove books and materials from the school library.[176]

The court also rejected plaintiffs' reliance on Tinker.[177] Plaintiffs had argued that use of the book did not cause substantive or material disruption in the school. The court held that shelving and discarding books is a constant process based on educational, budgetary, and architectural considerations.

> To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of freedom of speech or thought, is a proposition we cannot accept.[178]

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[175]Presidents Council v. Community School Board, p. 292.

[176]Ibid., p. 293.

[177]Tinker v. DesMoines.

[178]Presidents Council v. Community School Board, p. 293.

The Court held for the school board, finding no impingement on constitutional values in the school board's action.[179]

Certiorari was denied by the Supreme Court in Presidents Council,[180] Justices Stewart and Douglas dissenting. Justice Douglas expressed constitutional concern in his dissenting opinion:

> The First Amendment involves not only the right to speak and publish, but also the right to hear, to learn, and to know.[181]

Parent complaint against a school board brought about the case of Todd[182] in 1972. Plaintiff alleged that use of Slaughterhouse-Five[183] in an elective high school current literature course violated First and Fourteenth Amendment rights because the book made reference to religious matters.[184] Michigan trial court ruled that the book be removed from the school library. The book should not be fostered, promoted, or recommended for use in the school system. Further, court said the book should be banned from

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[179]Ibid., p. 291.

[180]Presidents Council v. Community School Board, 409 U.S. 998 (1972).

[181]Ibid., p. 999.

[182]Todd v. Rochester Community Schools, 200 N.W.2d 90 (C.A. Mich. 1972).

[183]Kurt Vonnegut, Jr., Slaughterhouse-Five (New York: Delacorte Press, Inc., 1969).

[184]Todd v. Rochester, p. 91.

the school library long enough to prevent its use as recommended or promoted reading in courses of study. After the school system ceased promotion or recommendation in courses, the book could be returned to library shelves.[185]

The Michigan trial court relied solely on Schempp[186] in reaching the decision. The Court of Appeals of Michigan, in rejecting the decision of the lower court, held that Schempp was not applicable in this case.

Although the lower court did not rule that Slaughter-house Five was obscene, it suggested the possibility.[187] The Court of Appeals held the book was clearly not obscene under constitutional test. Further, the court stated in imposing its own value judgment on citizenry, the ". . . trial court abused its discretion in entering this traditionally sacred area."[188] The court also insisted:

> Our Constitution will tolerate no supreme censor nor allow any man to superimpose his judgment on that of others so that the latter are denied freedom to decide and choose for themselves.[189]

Aside from the matter of obscenity, the court ruled that use of the novel for literary reasons did not violate the

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[185]Ibid., p. 94.

[186]Abington v. Schempp.

[187]Todd v. Rochester, p. 97.

[188]Ibid., p. 97.

[189]Ibid., p. 98.

constitutional establishment of religious clause. Although public schools may not teach religion, they may teach about religion. Plaintiff's constitutional theory was impermissible. The Court made a strong statement in favor of freedom of expression:

> If plaintiff's contention was correct, then public school students could no longer marvel at Sir Galahad's saintly quest for the Holy Grail, nor be introduced to the dangers of Hitler's Mein Kampf nor read the mellifluous poetry of John Milton and John Donne. Unhappily, Robin Hood would be forced to forage without Friar Tuck and Shakespeare would have to delete Shylock from The Merchant of Venice. Is this to be the state of our law? Our Constitution does not command ignorance; on the contrary, it assures the people that the state may not relegate them to such a status and guarantees to all the precious and unfettered freedom of pursuing one's own intellectual pleasures in one's own personal way.[190]

Judgment against the school board was reversed.

In the case of Lindros[191] in 1972, a probationary teacher brought action against the Governing Board of the Torrance Unified School District to set aside its decision not to rehire. The case was decided against Lindros in Superior Court of Los Angeles.

Lindros, the appellant, was a tenth-grade English teacher. He gave his students an assignment to write a short story which related an emotional, personal experience. Lindros

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[190]Ibid., p. 93.

[191]Lindros v. Governing Board of the Torrance Unified School District, App. 103 Cal. Reporter 188 (1972).

varied from Keefe[192] and Parducci.[193] In response to a request from some students, the teacher read to his five classes his own original composition, a short story entitled "The Funeral." The short story ended with a vulgar term. In one or more classes he read the full expression. Plaintiff contended that refusal to rehire him because he read "The Funeral" violated his academic freedom protected by the First Amendment. Appellant placed reliance on reasoning of Parducci[194] and Keefe.[195] The short story could not be deemed obscene, the slang words were common in usage and had a definite literary purpose in the story. There had been no student or parent complaints. Works with similar words could be found elsewhere in the school, and students were required to attend plays where similar words were used. No material disruption resulted in the class. "To allow a teacher not to be rehired for such teaching would chill free speech and stifle creative teaching innovation."[196]

Court ruled ". . . academic freedom does not signify the absence of all restraint." Citing Mailloux,[197] the court

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[192]Keefe v. Geanakos.

[193]Parducci v. Rutland.

[194]Ibid.

[195]Keefe v. Geanakos.

[196]Lindros v. Governing Board, p. 193.

[197]Mailloux v. Kiley.

distinguished between the secondary school and college.

> The faculty in secondary schools does not have the independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity.

In contrast to Keefe,[198] the case in that instance regarded the reading of a scholarly, thought-provoking article supplied by the department. Propriety or impropriety of offensiveness of language depends on the circumstances of its use. In Keefe the students were in twelfth grade and the use of vulgar language served a legitimate, professional purpose. In Lindros[199] the students were tenth graders. Use of vulgarity in a story used as a model ". . . substantially transcended any legitimate professional purpose and was without the pale of academic freedom."[200] His action carried with it the probability of adverse effect on the welfare of students.

The fact of the reading of "The Funeral" to classes was sufficient cause not to rehire Lindros.[201] Judgment was affirmed.

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[198] Keefe v. Geanakos.

[199] Lindros v. Governing Board.

[200] Ibid., p. 195.

[201] Ibid.

Plaintiffs in the case of Brubaker[202] were three non-tenured eighth grade teachers. Clara Brubaker taught French, John Brubaker taught industrial arts, and Ronald Sievert taught language arts. Both Brubakers had been notified their contracts would not be renewed the following year. Sievert had received notice his contract would be renewed for one year only. All three teachers were dismissed before completion of the school term for distributing in the school a promotional brochure for an "R"-rated movie, Woodstock. A A particular poem "Getting Together" contained in the brochure:

> . . . referred to apparent joys of smoking marijuana and . . . invited children to throw off discipline imposed on them by the moral environment of their homelife and enter a new world of love and freedom. . . .[203]

Parents complained the brochures were made available to eighth-grade students through two of the teachers. The third teacher had brought the material to the school.

The school board declared the materials ". . . obscene and of a suggestive nature."[204] Further, the school board said the material promoted a viewpoint to students contrary to requirements of Illinois state law. The law concerned teaching about the harmful effects of alcohol and narcotics.

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[202]Brubaker v. Board of Education, School District 149, Cook County, Ill., 502 F.2d 973 (7th Cir. 1974).

[203]Ibid., p. 973.

[204]Ibid., p. 975.

Plaintiffs complained that dismissal abridged civil rights and rights under the First and Fourteenth Amendments. They further alleged that the school board had breached contracts and had defamed them. The Brubakers and Sievert petitioned for back pay and attorneys' fees on grounds of denial of procedural due process.

The lower court affirmed dismissal and upheld the school board on all counts. The case was appealed to the Seventh Circuit Court of Appeals.

On appeal the Court insisted the school board's action was not arbitrary or capricious and was not a violation of First Amendment rights. Relying on Paris Adult Theatre,[205] the Court said expert testimony was not required when alleged obscene material was put in evidence.

Appealants argued they were not aware of the state statute concerning teaching effect of alcoholic drinks and narcotics. The Court asserted that regardless of knowledge of the law, ". . . teachers should have known better than to hand to their young students something that invited use of the described drugs."[206]

Relying on Mailloux,[207] the Court insisted:

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[205]Paris Adult Theatre I v. Slaton.

[206]Brubaker v. Board of Education, p. 984.

[207]Mailloux v. Kiley.

> . . . it did not intend . . . to do away with what, to use an old fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. . . .[208]

Consideration must also be given to educational purpose, age, and sophistication of students. The purpose and relevance of the material and the manner of presentation must also be taken into account.[209]

No violation of civil rights or First Amendment rights was determined in the case. The Court also rejected back pay and attorneys' fees for appellants since they had been dismissed for just cause.

Two school board members from Island Tree Union Free School District in New York State attended a meeting of a conservative group, Parents of New York United.[210] The meeting concerned objectionable books being used in public schools.[211] Books were labeled by P.O.N.Y.U. as anti-Christian, anti-Semitic, filthy, and irrelevant.[212] School board members checked the high school card catalog and located several of

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[208]Brubaker v. Board of Education, 984-985.

[209]Ibid., p. 985.

[210]Pico v. Board of Education, Island Tree Union Free School District, No. 77C217 (E.D.N.Y. August 2, 1979).

[211]Ibid., p. 2.

[212]Ibid., p. 3.

the "objectionable" books. Help was enlisted from school officials and other books were found in the library and in use in the school curriculum.[213]

The school board appointed a committee of professionals to review the questionable books; however, recommendations of the committee were not followed explicitly. Nine books were removed from library and classroom. The school board ruled that these nine books should not be assigned as required or optional reading although they could be discussed in class.[214]

Action by the school board resulted in Pico.[215] Plaintiffs alleged that students' First Amendment right was violated by the removal of books.[216]

A class action suit was filed by students and parents and friends of students. Court determined the case could not be maintained as class action. Students became plaintiffs. The suit was reduced to the question of whether or not the First Amendment required the court to prohibit school board removal of books from the library and curriculum.

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[213] Ibid., p. 2.

[214] Ibid., p. 16.

[215] Ibid., p. 12.

[216] Ibid.

The court rejected rulings in Minarcini,[217] Right to Read,[218] and Salvail,[219] relying instead on Presidents Council.[220] The concept of "tenure"[221] of library books and students' right to know[222] were rejected. Court ruled the school board had acted within its power and had not violated constitutional rights of students.

In 1977 five high school English teachers were plaintiffs in the case of Cary.[223] Teachers employed in Adams-Arapahoe County School District in Colorado had been using, and planned to use again, ten books which were subsequently excluded from a list of 1,275 approved textbooks. The books were not obscene in a legal sense and did not represent a specific system of thought or philosophy. A committee appointed by the school board reviewed books, recommending that nine be rejected. The school board rejected ten.[224]

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[217]Minarcini v. Strongville.

[218]Right to Read v. Chelsea.

[219]Salvail v. Nashua.

[220]Presidents Council v. Community School Board.

[221]Minarcini v. Strongville, p. 583.

[222]Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council.

[223]Cary v. Board of Education of Adams-Arapahoe School District, Slip Opinion Nos. 77-1297, 77-1298, (10th Cir. 1979).

[224]Cary v. Board of Education of Adams-Arapahoe School District, 427 F.Supp. 945 (Colo. 1977), p. 947.

Plaintiffs alleged that removal of the books was a violation of First and Fourteenth Amendment rights. Removal of the books was claimed to be a type of prior restraint.[225]

In 1977 a Federal District Court ruled that teachers' selection of books was protected by the First Amendment and their removal was offensive as a type of prior restraint.[226] Court asserted, however, that central to the case was the aspect of collective bargaining between teachers and the school district. In signing a collective bargaining agreement the teachers had surrendered individual professional rights.[227] Except for collective bargaining, teachers' rights would have prevailed.

The United States Court of Appeals, Tenth Circuit, held that lower court erred in saying collective bargaining was the central issue.[228] The collective bargaining agreement had given the school board control over curriculum in so far as it was consistent with the constitutions of Colorado and the United States. Individual constitutional rights of teachers had not been waived.

Teachers' rights must be balanced with authority of the school board. Discussion of the rejected books was not

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[225]Ibid., p. 949.

[226]Ibid., p. 953.

[227]Ibid., p. 955.

[228]Cary v. Board of Education (10th Circ. 1979), p. 8.

prohibited in classrooms, a fact considered important by the court.[229]

Plaintiffs agreed the school board had authority to prescribe curriculum; however, plaintiffs claimed that personal tastes or philosophies of school board members should not influence teachers' selection of instructional materials.[230] The court disagreed.[231]

The court decided in favor of the school board, saying a school board may select and remove instructional materials from the curriculum.[232]

A local school board was challenged in Bicknell[233] for removal of books from the high school library. The Wanderers by Richard Price was removed from the library because board members believed it was "vulgar and obscene." Dog Day Afternoon by Patrick Mann was placed in the principal's office pending establishment of a "restricted" shelf in the library. The latter book was criticized for violence as well as for vulgarity.

Plaintiffs argued that students' rights of free speech and due process of law were violated by removal and restricted

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[229]Ibid., p. 9.

[230]Ibid., p. 16.

[231]Ibid., p. 18.

[232]Ibid., p. 19.

[233]Bicknell v. Vergennes Union High School Board of Directors. Civil Action. File No. 78-233, U.S.D.C. (D. Vt. August 24, 1979).

use of the books. Although the court did not agree with the board's action, it relied on Presidents Council.[234] The court insisted that the school board's policies and action did not directly infringe on the constitutional rights of students. Distinction between Presidents Council[235] and Bicknell[236] ". . . was determined not to be constitutionally meaningful."

The court determined that due process rights of students extended only to liberty and property interest as created by state and federal law.[237] It was not found that students had a constitutional right to the use of library books. The court said students could obtain books from other libraries. Students were not forbidden to bring the books to school or to discuss them during school hours. The court supported the school board, saying that no constitutional right had been abridged.

The Indiana case of Zykan[238] in December, 1979, involved complaints filed by high school students. The school board had eliminated courses from the curriculum, removed books from the library, and prohibited the use of certain textbooks.

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[234]Presidents Council v. Community School Board.

[235]Ibid.

[236]Bicknell v. Vergennes.

[237]David Alexander, "First Amendment," in School Law in Contemporary Society, p. 169.

[238]Zykan v. Warsaw Community School Corp., (N.D. Ind. No. S79-68, December 10, 1979).

The court chose to base its decision on Brubaker.[239] The court dismissed the case for a lack of constitutionally protected rights on the part of the students, holding that school boards do have rights to determine what curriculum, library books, and textbooks should be used in the schools to support the development of students in becoming good citizens.

Cases Supporting Constitutional Rights

In September, 1969, a tenured English teacher in the public schools of Ipswich, Massachusetts, assigned an article from Atlantic Monthly magazine to a senior English class.[240] The teacher discussed the article and explained the origin and context of an offensive word contained in article. The teacher also explained the author's reason for inclusion of the word and stated that any student finding the assignment distasteful could receive an alternative one. The teacher was suspended and it was proposed that he be discharged.[241]

The case of Keefe[242] was appealed to the First Circuit Court of Appeals. The judge found the article not pornographic but "scholarly, thoughtful, and thought-provoking."[243]

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[239] Brubaker v. Board of Education.

[240] Keefe v. Geanakos, 418 F.2d 350 (1st Cir. 1969).

[241] Ibid.

[242] Ibid.

[243] Ibid.

No proper discussion of the article, said the court, could avoid consideration of the vulgar term because it was important to the development of the article's thesis.

The court stated that whether or not offensive language is protected by the Constitution depends on circumstances. Although the court agreed with defendants that obscenity standards for students could not be determined by those for adults, the ruling stated a ". . . high school senior is not devoid of all discrimination or resistance."

The ruling for the teacher, the court said:

> Hence the question in this case is whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer is that the students must be protected from such exposure we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.[244]

The decision in Keefe[245] acknowledged that academic freedom based on the First Amendment is basic to a democratic society and has judicial protection.

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[244]Ibid., pp. 361-362.

[245]Ibid.

As in the case of Keefe,[246] the court ruled in Parducci[247] that teachers' First Amendment right to use controversial material or language must be protected unless school officials can show that: (1) it is not relevant to subject matter being taught, (2) it is disruptive to school discipline, or (3) it is inappropriate for the maturity level of students.

Action was brought in 1970 by Parducci,[248] a first-year English teacher, against members of the school administration and school board of Montgomery County, Alabama. Plaintiff brought action for violation of First Amendment right to academic freedom. Parducci was dismissed for assigning Welcome to the Monkey House by Kurt Vonnegut, Jr., to her class consisting of high school juniors. The principal and associate superintendent described the story as "literary garbage," with a philosophy condoning ". . . killing off of elderly people and free sex."[249] Three students asked to be excused from the assignment and several parents complained to the principal.

The judge found nothing that would render the story obscene under Roth,[250] nor under stricter standards for minors

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[246] Ibid.

[247] Parducci v. Rutland.

[248] Ibid.

[249] Ibid., p. 353.

[250] Roth v. United States

in Ginsberg.[251] Relying on Tinker[252] the court said teachers are entitled to First Amendment freedoms. The assignment caused no disruption among students. Constitutional protection is not affected by the presence or absence of tenure under state law. The school system had not previously forbidden the use of the short story, and no person should be punished unless conduct has been proscribed in precise terms. Vague standards and lack of standards leave teachers reluctant to experiment and investigate new and different ideas. The dismissal of Parducci said the court, ". . . constituted an unwarranted invasion of her First Amendment right to academic freedom."[253]

Sterzing, a teacher in Fort Bend, Texas, was dismissed for discussing racial issues with high school students. The United States District Court for the Southern District of Texas[254] found that the teacher's First and Fourteenth Amendment rights were violated. The court ordered the school district to award the teacher $20,000 in general damages, $5,000 for attorney's fees, and to expunge from his record all references to his being discharged. The court denied the request for restoration to his former position ". . . on

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[251]Ginsberg v. State of New York.

[252]Tinker v. DesMoines.

[253]Parducci v. Rutland, p. 357.

[254]Sterzing v. Fort Bend Independent School District, 375 F.Supp. 657 (S.D. Tex. 1972), p. 657.

the grounds that his reinstatement would only revive antagonisms and that the award of monetary damages compensated Sterzing for his expectance of reemployment." Sterzing appealed to challenge the court's denial of his right to reemployment.

On appeal the Fifth Circuit Court of Appeals asserted that grounds presented by the lower court for refusal of reinstatement were impermissible. The case was remanded to the lower court for reconsideration of the remedy.[255]

In the 1976 case of Minarcini,[256] five high school students brought action through parents against the Strongsville, Ohio, City School District, the school board, and the superintendent. Plaintiffs claimed that withdrawal of books from the school library violated First and Fourteenth Amendment rights.[257] In its decision the Sixth Circuit Court of Appeals disagreed with a 1972 decision of the Second Circuit Court of Appeals.[258] Whereas the decision in Presidents Council upheld the right of school board to remove materials from school library, the court in Minarcini ruled in favor of First Amendment rights of students.

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[255]Sterzing v. Fort Bend Independent School District, Fort Bend, Texas, 469 F.2d 92 (5th Cir. 1972).

[256]Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976).

[257]Ibid., p. 584.

[258]Presidents Council v. Community School Board.

The Strongsville school board passed a resolution to remove Kurt Vonnegut, Jr.'s Cat's Cradle from libraries in the school district and to forbid its use in the classroom. At a later meeting Vonnegut's God Bless You, Mr. Rosewater and Joseph Heller's Catch 22 were also banned.[259]

The Sixth Circuit Court of Appeals separated the removal of textbooks and the banning of library books into different issues. The court affirmed the lower court's decision upholding school boards' authority over textbooks.[260]

The court stated neither state nor school board is required to establish libraries in schools. Once established a library constituted a privilege that could not be withdrawn because of political and social tastes. Library books were thus elevated to constitutional status and in effect had "tenure."[261] Withdrawal would violate First Amendment rights of students. The court stated that banning of books was a more serious violation of students' rights than was the prohibition of wearing armbands in Tinker.[262] Clearly students' rights had been violated.

The court further referred to students' rights to receive information, relying on Virginia State Board of Pharmacy in

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[259]Minarcini v. Strongsville, pp. 577-578.

[260]Ibid., p. 582.

[261]Ibid., p. 583.

[262]Tinker v. DesMoines.

which the Supreme Court said:

> We acknowledged that this court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'[263]

Once received, library books could be removed only for constitutionally allowable reasons.[264] Minarcini was the first school censorship case to uphold students' right to receive information.

During the 1973 school year, an English teacher with nine years' experience made use, in a sophomore English class, of the novel Catcher in the Rye by J. D. Salinger. The teacher had used the novel continuously over a period of years. Early in 1973 numerous parents complained about the method the teacher used in presenting the novel. Objections led to the case of Harris.[265]

The superintendent held a meeting in which Harris agreed to find a substitute for the challenged novel. A memorandum was circulated to that effect following the meeting. Harris received a copy and did not express objection to the contents.[266]

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[263]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, p. 757.

[264]Minarcini v. Strongsville, p. 583.

[265]Harris v. Mechanicsville Central School District, 394 N.Y.S.2d 302 (1977).

[266]Ibid., p. 303.

In 1974 Harris again used the novel without discussion or consent of school officials. Another meeting was held. The teacher walked out and refused to return upon request. He was suspended for insubordination and for violating the agreement. A hearing led to his dismissal.

In the case of Harris[267] the court determined that the teacher did not appeal on First Amendment right to use the novel nor to defend his teaching methods. If this had been the case the court would, in all likelihood, have held for the teacher. The issue, therefore, was insubordination. The court ruled that the penalty was harsh and should be modified.

In Chelsea, Massachusetts, a parent objected to one poem in an anthology Male and Female used in a high school. School board reviewed the poem and determined it was "filthy" and used "offensive" language.[268] The book was removed from the school library and resulted in the 1978 Right to Read[269] case. Plaintiffs were members of the Right to Read Committee who claimed that removal of the book violated First Amendment rights to students.

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[267]Ibid., p. 304.

[268]Right to Read Defense Committee v. School Committee of City of Chelsea, 454 F.Supp. 703 (D.C. Mass. 1978), p. 707.

[269]Ibid.

Court rejected the contention the poem was obscene. Further, the court rejected the defendants' reliance on Presidents Council[270] since it did not consider the book to be obsolete, irrelevant, or obscene.[271] The court insisted that school boards must consider First Amendment rights of students and teachers in removal of materials.[272]

The controlling case in this decision was Tinker.[273] When violation of constitutional rights are implicated, school boards must demonstrate some substantial and legitimate interest for a book's removal. Personal prejudice of an individual is not sufficient cause.

Court cited Red Lion[274] holding that right to learn about and react to controversial ideas is covered by the First Amendment. The concept of knowing is vital to the concept that truth should prevail. Court ruled in favor of plaintiffs.

The issue before the court in Salvail[275] was the school board's removal of Ms. magazine from a high school library. Plaintiffs were a high school student, a teacher, and taxpayers.

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[270]Presidents Council v. Community School Board.

[271]Right to Read v. School Committee, p. 714.

[272]Ibid.

[273]Tinker v. DesMoines.

[274]Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

[275]Salvail v. Nashua Board of Education, 469 F.Supp. 1269 (D.N.H. 1979).

Upon receipt of suggested guidelines from the New Hampshire State Department of Education, the Nashua school board established a committee to draft "Guidelines for Selecting Instructional Materials."[276] Interim guidelines were put into effect whereby the school board delegated the selection of instructional materials to professionals employed by the school district.

Specific procedures were set up to handle questions and complaints. An Instructional Materials Reconsideration Committee made up of librarians, the principal or his representative, the appropriate assistant superintendent, the person involved in the original selection, and the person or persons using material in the particular school involved, were to be appointed to handle complaints. The committee then was to report findings to the superintendent who would forward copies of its recommendation to the complainant. The complaining party was granted right of appeal to the superintendent. If still not satisfied, the complainant could appeal to the school board.[277]

A school board member presented a formal resolution to remove Ms. magazine from the high school library. Other school board members suggested that interim guidelines be followed, and the superintendent explained procedures for review. One

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[276]Ibid., p. 1271.

[277]Ibid.

school board member took the position they were not bound by interim guidelines. By a five to three vote the subscription to Ms. was cancelled and all issues were removed from the library.[278]

The complaint of the board member who initiated the resolution concerned advertisements about sexually oriented devices, articles dealing with witchcraft and homosexuality, and advertisements dealing with Communist materials and records. Complainant took the position that a proper test, to judge if material should be available to high school students, was ". . . whether it could be read aloud to his daughter in classroom."[279]

Plaintiffs testified that material in Ms. was used by students to research social issues from the feminist viewpoint. Experts testified the magazine was not obscene. In the meantime the school board had revised guidelines to include any member of the school board on the reconsideration committee.[280] The school board then reexamined the magazine and returned two issues to the library with advertisements removed.

Court relied on Minarcini[281] saying that the school district is not required to provide a library for students, but once having done so the school board could not put

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[278]Ibid., p. 1272.

[279]Ibid.

[280]Ibid.

[281]Minarcini v. Strongsville.

conditions on its use based solely on social or political tastes of the board. Having adopted interim guidelines, the school board was required to follow them.

Relying on Virginia Pharmacy,[282] the court asserted that school authorities ". . . must bear burden of showing substantial government interest to be served. . ." in restricting information.

The court determined that constitutional rights had been violated. The school board ". . . failed to demonstrate a substantial and legitimate government interest sufficient to warrant removal of Ms. magazine from the Nashua High School library."[283]

Summary

Three major issues have been addressed by courts as questions concerning censorship of school library and instructional materials have been litigated: (1) authority of school boards in selection, removal, or restriction of materials, (2) constitutional rights of school personnel, students, and parents in selection and use of library and instructional materials, and (3) obscenity of questioned materials.

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[282]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.

[283]Salvail v. Nashua, p. 1275.

As case-by-case consideration has been given by courts in recent decisions, the trend favors school boards. In almost every censorship case, the court has expressed reluctance to enter those areas where school boards are vested with authority. Only where constitutional questions are in question have they become involved.

All cases reaching litigation have involved conflict between school board authority and constitutional concerns relating to: (1) academic freedom of teachers, (2) students' right to read and receive information, (3) parents' right to direct their childrens' education, or (4) violation of the establishment of religion clause.

Students' rights have prevailed over parents' right to direct education of children. Parents' rights received little attention in censorship cases while students' rights stood alone. Based on the Miller[284] decision none of the objectionable materials were considered obscene.

Conflicting decisions have been received from three circuits of the United States Courts of Appeals. Decisions upholding school board authority were heard almost entirely in the Second Circuit. Cases upholding individual rights over school board authority have been received from districts within the First and Sixth Circuits of the United States Courts of Appeals.

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[284]Miller v. California.

Since most of the issues have involved the state's compelling interest in education, as opposed to a national standard, or collectivist goals as opposed to individual freedom, Supreme Court guidance appears to be needed. Further discussion of these topics will be found in Chapter Five.

CHAPTER IV

REVIEW OF COURT DECISIONS

Introduction

This chapter presents a review of landmark decisions and other significant court decisions in the five categories outlined in Chapter One. An overview is presented for each category and specific facts and judicial decisions are given. Discussion of each case is given as it pertains to the category to which it is applied. Categories and cases are listed below:

1. Academic Freedom of Public School Teachers

   Meyer v. Nebraska (1923)

   Keyishian v. Board of Regents (1967)

   Tinker v. Des Moines (1969)

   Keefe v. Geanakos (1969)

   Parducci v. Rutland (1970)

2. Students' Right to Read, Inquire, and Receive Information

   Tinker v. Des Moines (1969)

   Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976)

   Minarcini v. Strongsville City School District (1976)

   Right to Read Defense Committee of Chelsea v. School Committee of Chelsea (1978)

3. Right of School Boards to Select and Remove Library and Instructional Materials

   Meyer v. Nebraska (1923)

   Presidents Council (1972)

   Minarcini v. Strongsville School District (1976)

   Cary v. Board of Education of Adams-Arapahoe School District (1979)

4. Parents' Right to Direct the Education of Children

   Meyer v. Nebraska (1923)

   Wisconsin v. Yoder (1972)

5. Religious Freedom of Public School Students as it Relates to Use of Library and Instructional Materials

   Epperson v. Arkansas (1968)

   Medeiros v. Kiyosaki (1970)

   Todd v. Rochester (1972)

The landmark United States Supreme Court decisions were reviewed because they pertain to constitutional rights of teachers, students, and parents. Decisions in the landmark cases have established legal precedents which influence decisions related to censorship of school library and instructional materials. Other cases present decisions from various courts in the judicial system. In several cases opinions are conflicting. Some decisions uphold the authority of school boards to select and remove library and instructional materials while others place constitutional rights above school board authority in censorship cases.

Academic Freedom of Public School Teachers

Overview

The recognition of academic freedom of public school teachers has been a slow process. Meyer, Keyishian, and Tinker, the three landmark cases presented in this category, are significant in their support of academic freedom for public school teachers. These cases emphasize that compelling interest of the state in the welfare of children must be balanced against the academic freedom of teachers. The cases stress that right to teach is now a judicially cognizable right based on the First Amendment. Academic freedom has led to teachers' rights in selecting and using library and instructional materials deemed necessary by them in classroom instruction. The cases of Geanakos and Parducci are important in pointing out legal recognition of teachers' rights in censorship cases.

Meyer v. Nebraska
262 U.S. 67 L.Ed., 1042, 43 S.Ct. 625 (1923)

Facts

In 1919 the State of Nebraska enacted legislation which prohibited teaching foreign language to students below eighth grade.[1] The law applied to public, private, and parochial

[1] Neb.Laws 1919, chap. 249.

schools. On May 25, 1920, an instructor in Zion Parochial School was charged with teaching the German language to a ten year-old child who had not yet attained the level of eighth grade.[2] The intention of the statute was to foster the English language as the mother tongue for children of immigrants.

Decision

Robert T. Meyer was found guilty by the District Court of Hamilton County. The Supreme Court of Nebraska affirmed the judgment.[3]

The United States Supreme Court determined the problem was whether the statute unreasonably infringed on the liberty guarantee of the Fourteenth Amendment. The Court insisted that the legislature is subject to supervision by the courts in matters concerning the proper exercise of police power. It was evident the Nebraska legislature had materially interfered with ". . . the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[4] The Court further stated:

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[2]Meyer v. Nebraska, 262 U.S. 67 L.Ed. 1042 (1923), p. 1044.

[3]Meyer v. Nebraska, 107 Neb. 657, 187 N.W. 100 (1922).

[4]Ibid., p. 1046.

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,--to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,--a desirable end cannot be promoted by prohibited means.[5]

The statute was declared arbitrary and not in relation to any end within the power of the state. The Court reversed the judgment of the Supreme Court of Nebraska.

Discussion

This is an early example of Supreme Court recognition that public school teachers, parents, and students have constitutional rights which must be considered by the state. Liberties as set forth in the Fourteenth Amendment were in question.

The right of a teacher to pursue his occupation was reinforced by the decision of the Supreme Court. State statutes must not inhibit this right. The Court insisted in part:

> Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment . . . Evidently the legislature has attempted materially to interfere with the calling of modern language teachers. . . .[6]

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[5] Ibid.

[6] Ibid., p. 1046.

School boards and administrators must be aware that liberty afforded by the Fourteenth Amendment gives teachers the right to pursue their occupation. Rules and regulations must be made in a manner that does not hamper this right.

Keyishian v. Board of Regents
of the State of New York
89 S.Ct. 675 (1967)

Facts

Members of the faculty of the privately owned University of Buffalo became state employees when the University became part of the State University of New York. Continued employment was contingent upon compliance with a New York plan to prevent the appointment or retention of "subversive" persons in state employment. The regulation required each faculty member to sign an affidavit, called the Feinberg Certificate, stating that he was not a Communist. If the employee had ever been a Communist, he must communicate that fact to the President of the State University of New York.[7]

Three faculty members refused to sign and each received notice that refusal would lead to dismissal. A non-faculty library employee, who was not required to sign the oath but was required to write under oath an answer to the same question, was dismissed for his refusal. One faculty member

[7]Keyishian v. Board of Regents, 89 S.Ct. 675 (1967), pp. 677-678.

resigned. The other two faculty members and the former library employee became appellants in a suit alleging that New York State oath program violated the United States Constitution.[8]

Shortly before trial of this case, the Feinberg Certificate was rescinded. Nevertheless, the spirit of the certificate was maintained through a questioning process.[9]

Decision

1. Rescinding the Feinberg Certificate did not render moot the constitutional questions raised by plaintiffs threatened with discharge.[10]
2. Use of the words "seditious" and "treasonable" in the New York State statute endangered academic freedom.[11]
3. New York's interest in protecting the educational system was legitimate; however, that purpose could not be pursued by means that stifled individual constitutional liberties.[12]

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[8] Ibid.

[9] Ibid., p. 680.

[10] Ibid., p. 676.

[11] Ibid.

[12] Ibid.

4. Laws cannot be tolerated that stifle academic freedom.[13]
5. Vagueness in statutes stifles individual freedom and has a "chilling effect" upon First Amendment rights.[14]
6. The New York statute was declared in violation of the First Amendment and could no longer be applied.[15]

Discussion

This landmark decision nullified the Feinberg Law which had been determined constitutional in previous cases.

The decision is a strong statement from the Supreme Court[16] supporting academic freedom for public school teachers. It has been used as a precedent in almost all public school cases concerning academic freedom since it was handed down by the Court. The following statement from the Supreme Court expressed its philosophy concerning academic freedom:

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[13]Ibid.

[14]Ibid., p. 677.

[15]Ibid.

[16]Ibid.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'[17]

School administrators and school boards should be cognizant of First Amendment rights of teachers in making rules and regulations as well as in proscribing materials to be used in the library and classroom.

Tinker v. Des Moines
Independent Community School District
393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969)

Facts

The United States Supreme Court received this case on appeal from the Eighth Circuit Court of Appeals.[18] It involved the enforcement of a regulation prohibiting students from wearing black armbands.

A group of parents and students who met in Des Moines in 1965 determined to publicize their objections to the

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[17]Ibid., p. 683.

[18]Tinker v. Des Moines, 393 U.S. 503 (1969).

Vietnam War by fasting and wearing black armbands during the Christmas holiday season. School principals became aware of the plan. On December 14, 1965, they adopted a policy that students wearing armbands to school would be asked to remove them. If students should refuse they would be suspended until they returned to school without armbands.[19]

Three students, John and Mary Beth Tinker and Christopher Eckhardt, who were aware of the policy, wore armbands to school and were suspended. The students brought action against the school district, school board, and certain administrators as a result of their suspension.

The major constitutional questions in this case were as follows:

1. Within the free speech clause of First Amendment, can state and local public school systems forbid a symbolic act expressing certain opinions?
2. Are First Amendment rights, in the framework of a public school environment, available to teachers and students?
3. Do state and school authorities have comprehensive authority to prescribe and control conduct in schools?

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[19]Ibid., p. 735.

Legal Precedents Established

While the issue of censorship of public school library and instructional materials was not directly addressed in this case, the legal principles established are applicable to such cases. The major legal principles established in this decision are as follows:[20]

1. A symbolic act performed to express certain views is a form of free speech which is within the protection of the First Amendment.
2. Pure speech is protected under the Constitution and may not be suppressed by school authorities.
3. Teachers and students possess First Amendment rights of freedom of speech and expression even when applied in light of the special environment of schools.
4. "Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21]
5. School and state authorities have power to define and control conduct in the schools as long as it is consistent with fundamental constitutional safeguards.

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[20] Ibid., p. 733.

[21] Ibid.

6. Fear of disturbance is not sufficient reason to limit freedom of expression; material and substantial disruption must be shown before free expression can be prohibited.
7. School authorities do not possess absolute authority over students.

Keefe v. Geanakos
305 F.Supp. 1091 (1969)
418 F.2d 359 (1st Cir. 1969)

Facts

In September 1969 a tenured English teacher in the public schools of Ipswich, Massachusetts, assigned an article in Atlantic Monthly to his senior English class.[22] The teacher discussed the article with his class and explained the origin and context of an offensive word contained in the article. The teacher explained the author's reason for including the offensive word and told the students that anyone finding the assignment distasteful could receive an alternative one.[23] After parent complaints were received, the teacher was called to a meeting of the school committee. When asked if he would agree not to use the article again, he replied that in good conscience he could not so agree. The teacher was suspended, and it was proposed that he be

[22]Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), p. 361.

[23]Ibid.

discharged. The teacher had nine years' experience, was chairman of the English department, and had part-time teaching duties.[24] A hearing was set which the teacher sought to enjoin as violation of his civil rights. In order to await decision of the appeal, the hearing was not held. Plaintiff claimed:

1. As a matter of law his conduct did not warrant discipline; therefore, there were no grounds for a hearing.
2. The teacher's conduct was within his competence as a teacher, as a matter of academic freedom, whether the defendants approved or not.
3. The teacher had not been given adequate prior warning by regulations currently in force. An ex post facto ruling in the matter would oppose academic freedom.

Decision

The order of the district court denying interlocutory injunction was reversed by the First Circuit Court of Appeals. The case was remanded to the United States District Court, District of Massachusetts, for proceedings consistent with the following findings:

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[24]Ibid., p. 360.

1. The Court read the article in question and found that in its entirety it was a valuable discussion of "dissent, protest, radicalism and revolt."[25]
2. The article was in no sense pornographic. Offensiveness of language depends on circumstances, although obscenity standards for adults and students are not ". . . lacking in discrimination or resistance."[26]
3. The Court acknowledged that academic freedom based on the First Amendment is basic to a democratic society and has judicial protection.

Discussion

Academic freedom of teachers received reinforcement from this decision. The teacher's educational purpose in discussing the material was not challenged by the court.

In the determination of appropriateness the standards of the students themselves, as well as their exposure to similar language outside of the classroom, seemed to be considered. Whether the materials would be thought obscene by community standards did not appear to enter into the determination. The Court did discuss the difference in standards for adults and minors but determined that high school seniors had enough

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[25]Ibid., p. 361

[26]Ibid., p. 362.

maturity not to be harmed by the article. This decision seems consistent with Tinker.[27] Students' rights were elevated to a level that recognized their ability to cope with mature concepts.

Parducci v. Rutland
316 F.Supp. 352 (M.D. Ala., 1970)

Facts

A first-year English teacher brought action against members of the school administration and school board of Montgomery County, Alabama. The plaintiff in the case was Marilyn Parducci who was dismissed for assigning a short story, Welcome to the Monkey House by Kurt Vonnegut, Jr., to her high school junior class. The parents of some of her students had complained. Miss Parducci's teaching ability was not an issue. The principal explained that she would have received a favorable evaluation except for the single incident. The principal and associate superintendent read the short story and described it as "literary garbage."

The plaintiff asserted dismissal violated her First Amendment right to academic freedom. She sought reinstatement to her teaching position.

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[27]Tinker v. Des Moines.

Decision

The court asserted that teachers are entitled to First Amendment rights, and such constitutional protection is unaffected by the presence or absence of tenure. In order to restrict First Amendment rights, substantial or material disruption in the school must be shown. Defendants did not show that use of the short story had caused disruption. The defendants failed to prove the assignment was inappropriate for the students. The particular short story had not previously been prohibited from classroom use; therefore, the teacher could not be punished for conduct that had not been proscribed in clear and precise terms.

The court ordered:

1. Plaintiff should be reinstated for the duration of her contract, with all the rights and privileges held prior to her illegal suspension.
2. Salary should be paid to the plaintiff for both the period during her suspension and the remainder of her contract.
3. Defendants must expunge from plaintiff's employment record any reference to her suspension and dismissal.
4. Defendants must pay all court costs.

Discussion

The court decisively supported the right of academic freedom for teachers. The court also asserted that presence or absence of tenure under state law does not affect constitutional rights.

The state's interest in protecting students from inappropriate reading was balanced against academic freedom. The court determined that the short story was not obscene and was appropriate reading for juniors in high school. In making this decision the court relied on its own judgment to determine the literary and social value of the questioned material. This is in contrast to Keefe where the court reviewed and evaluated the school committee's decision in determining the value of objectional material. Further, the court was not explicit in stating whether the school board's claim that the material was "literary garbage" was arbitrary. Whether or not parents' complaints were constitutional was not addressed. This action of the court detracts from the worth of the case as a precedent toward academic freedom.

Another question arising from the decision is the matter of future assignments. The court asserted that a teacher may not be dismissed when prior notice has not been received that assignment of the material is not permissible. School authorities in this case had tried to obtain agreement from the teacher not to assign the short story in the future. The

teacher refused. Thus, the decision seems to indicate that teachers have freedom in the classroom to teach regardless of questions from school authorities and parents. The results in this case could mean courts have the power to determine the educational value of curricula.

Students' Rights to Read, Inquire, and Receive Information

Overview

Extension of constitutional rights to public school students has not been an organized movement but has resulted chiefly from case law. The landmark case of Tinker has been the principal legal influence in establishing students' rights in public schools. Decisions relating to the emerging rights of students to learn, to know, and to receive information in a free marketplace of ideas are presented in Virginia State Board of Pharmacy, Minarcini, and Right to Read.

Tinker v. Des Moines Independent Community School District
393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969)

Facts

The United States Supreme Court received this case on appeal from the Eighth Circuit Court of Appeals.[28] It involved the enforcement of a regulation prohibiting students from wearing black armbands.

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[28]Tinker v. Des Moines, 393 U.S. 503 (1969).

A group of parents and students who met in Des Moines in 1965 determined to publicize their objections to the Vietnam War by fasting and wearing black armbands during the Christmas holiday season. School principals became aware of the plan. On December 14, 1965, they adopted a policy that students wearing armbands to school would be asked to remove them. If students should refuse they would be suspended until they returned to school without armbands.[29]

Three students, John and Mary Beth Tinker and Christopher Eckhardt, who were aware of the policy, wore armbands to school and were suspended. The students brought action against the school district, school board, and certain administrators as a result of their suspension.

The major constitutional questions in this case were as follows:

1. Within the free speech clause of First Amendment, can state and local public school systems forbid a symbolic act expressing certain opinions?
2. Are First Amendment rights, in the framework of a public school environment, available to teachers and students?
3. Do state and school authorities have comprehensive authority to prescribe and control conduct in schools?

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[29]Ibid., p. 735.

Legal Precedents Established

While the issue of censorship of public school library and instructional materials was not directly addressed in this case, the legal principles established are applicable to such cases. The major legal principles established in this decision are as follows:[30]

1. A symbolic act performed to express certain views is a form of free speech which is within the protection of the First Amendment.
2. Pure speech is protected under the Constitution and may not be suppressed by school authorities.
3. Teachers and students possess First Amendment rights of freedom of speech and expression even when applied in light of the special environment of schools.
4. "Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[31]
5. School and state authorities have power to define and control conduct in the schools as long as it is consistent with fundamental constitutional safeguards.

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[30] Ibid., p. 733.

[31] Ibid.

6. Fear of disturbance is not sufficient reason to limit freedom of expression; material and substantial disruption must be shown before free expression can be prohibited.
7. School authorities do not possess absolute authority over students.

Virginia State Board of Pharmacy
v.
Virginia Citizens Consumer Council, Inc.
425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976)

Facts

A Virginia statute[32] declared that it was unprofessional conduct for a licensed pharmacist to advertise prices of prescription drugs. A citizen suffering from chronic illnesses which required her to take prescription drugs daily, the Virginia Citizen's Consumer Council, Inc., and the Virginia State American Federation of Labor and Congress of Industrial Organizations challenged the validity of the statute under both First and Fourteenth Amendments of the U. S. Constitution.

Decision

The District Court[33] declared the statute void and enjoined the Virginia State Board of Pharmacy from enforcing the regulation. On appeal to the Supreme Court the decision

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[32]Virginia Code Ann. 54-524.2(a) (1974).

[33]Virginia State Board of Pharmacy v. Virginia Consumers Council, Inc., 373 F.Supp. 683 (E.D. Virginia, 1974).

of the District Court was affirmed.

Discussion

This case is pertinent to a discussion of censoring school library and instructional materials since it has been used as an important precedent in a subsequent censorship case. The right to receive information was a central issue in the decision.

The following portions of the decision have been applied to a school censorship case:

1. First Amendment protection is enjoyed by recipients of information and not solely by those who seek to disseminate the information.[34]
2. Freedom of speech presupposes a willing speaker; where a speaker exists, the protection afforded is to the communication, as well as to both its source and its recipients.[35]

In applying this decision to Minarcini, the court did not discuss differences between the rights of minors and the rights of adults. Virginia Pharmacy concerned rights of adults. Although there may be no difference between rights of adults and students, Ginsberg[36] did find a difference.

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[34]Virginia State Board of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748 (1976), p. 757.

[35]Ibid., p. 756.

[36]Ginsberg v. New York.

Tinker,[37] on the other hand, proclaimed and upheld First Amendment rights for students.

Virginia Pharmacy[38] recognized that free speech ". . . presupposes a willing speaker. . . ." The willing speaker was not clearly identified in Minarcini.[39] Perhaps these points will be clarified by future decisions.

Another case, Salvail,[40] followed the reasoning of the court in Minarcini[41] in relying on the Virginia Pharmacy[42] decision.

Minarcini v. Strongsville City School District
384 F.Supp. 698 (N.D. Ohio, 1974),
541 F.2d 577 (6th Cir. 1976)

Facts

Five high school students brought action through their parents against the Strongsville, Ohio, City School District, the school board, and the superintendent. The school board refused to accept the faculty's recommendation to purchase

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[37]Tinker v. Des Moines.

[38]Virginia State Board of Pharmacy v. Virginia Consumers Council.

[39]Minarcini v. Strongsville; William A. Eagles, "Constitutional Law--Right of Public School Children to Receive Information--Minarcini v. Strongsville City School District," Wake Forest Law Review 13 (1977):834-841.

[40]Salvail v. Nashua.

[41]Minarcini v. Strongsville.

[42]Virginia State Board of Pharmacy v. Virginia Consumers Council.

certain novels for use in the English curriculum and in addition removed certain books from the school library.[43]

Plaintiffs claimed violation of their constitutional rights because certain novels had been disapproved for classroom use and others had been withdrawn from the school library.[44]

Decision

The District Court found no violation of constitutional rights.[45] The case was appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit Court of Appeals separated the complaint into two issues, the selection and removal of textbooks as opposed to removal of library books. The court affirmed the District Court's decision upholding the school board's authority to select and remove textbooks.[46]

The court maintained that neither state nor school board is required to establish libraries in schools. Once established, however, a library becomes a privilege that cannot be withdrawn because of political or social tastes of the school board.[47] The court further asserted that library books

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[43]Minarcini v. Strongsville, 384 F.Supp. 698 (N.D. Ohio, 1974).

[44]Ibid., p. 709.

[45]Minarcini v. Strongsville, 541 F.2d 577 (6th Cir. 1976) p. 582.

[46]Ibid.

[47]Ibid., p. 583.

can be removed only for constitutionally allowable reasons.[48] The court determined that withdrawal of library books had violated students' First Amendment rights to receive information. The Supreme Court refused to review the case.

Discussion

A significant factor about this decision is the unquestionable extension of First Amendment rights to school children. The decision rejected the indoctrination theory of education in which schools exist in loco parentis. Instead, the court supported students' rights within the philosophical context that the school is a marketplace of ideas. The court asserted that removal of library books violated students' constitutional right to know and receive information.[49] In contrast, the court contended that school board action did not significantly hamper teachers' expression.

Guidelines set forth in Minarcini may not be helpful to school administrators since there was no discussion as to the equality of rights of children and adults in receiving information. Where this case has been accepted as a precedent, however, students' rights have been accepted as equal to those of adults.

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[48]Ibid., p. 582.

[49]Ibid., p. 584.

Right to Read Defense Committee of Chelsea

v.

School Committee of Chelsea

454 F.Supp. 703 (D. Mass. 1978)

Facts

The school committee of Chelsea, Massachusetts, removed an anthology entitled Male and Female from the high school library. The action was prompted by a parent's objection to one poem selection in the book, "The City to a Young Girl," written by a high school student from New York City. After reading the poem the Chelsea School Committee determined it was "filthy" and used "offensive" language.[50] After reading the poem the principal removed the poem and kept the book in his office.

Plaintiffs in the case were the Right to Read Committee, made up of parents, students, teachers, and a librarian.[51] The plaintiffs sought an order requiring the book to be returned to the library intact. They complained that removal of the book violated First Amendment rights of students, faculty, and library staff.[52]

Defendants, the school board, claimed complete authority to remove books from the library.[53] The school board was not

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[50]Right to Read v. School Committee, 454 F.Supp. 703 (D. Mass. 1978), p. 707.

[51]Ibid., p. 705.

[52]Ibid.

[53]Ibid.

required to buy the book, they claimed; therefore, they could remove the book.

Decision

The court determined that removal of the book infringed on First Amendment rights of the students and faculty of Chelsea High School. The court insisted:

> . . . a school should be a readily accessible warehouse of ideas. . . . the First Amendment is not merely a mantle which students and faculty must doff when they take their places in the classroom.[54]

The court asserted that the ". . . student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment."[55] Exposure to a variety of ideas and philosophies is not dangerous. "The danger is in mind control."[56]

An order was issued to return the book to the library intact. The school board was ordered to pay plaintiffs' legal fees.

Discussion

The court identified the underlying conflict as tension between necessary administrative powers of the school board

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[54]Ibid.

[55]Ibid., p. 715.

[56]Ibid.

and First Amendment rights of those within the school system. The court asserted that local school boards must continue to be the policy makers in public schools and do have the authority to select books. At the same time, their authority, in the area of book selection and removal, does not cover the school library if such book removal violates the First Amendment rights of others.

The court took issue with the defendants' reliance on Presidents Council.[57] That decision was not appropriate, according to the court, because the book did not meet the standards of irrelevancy, obsolescence, or obscenity as defined in Presidents Council. There was no substantial governmental interest demonstrated to justify removal of the book.

This case came out of a federal district court of the First Circuit Court of Appeals. It followed the trend of other decisions in that Circuit.

Right of School Boards to Select and Remove Library and Instructional Materials

Overview

School boards are impowered through state authority to prescribe curriculum and to select library books and other instructional materials. This authority must be balanced with the constitutional rights of teachers, students, and

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[57]Presidents Council v. Community School Board.

parents. Cases presented in this category reveal the courts' line of reasoning as they have sought to bring about such a balance when censorship is involved.

Meyer v. Nebraska
262 U.S. 67 L.Ed., 1042, 43 S.Ct. 625 (1923)

Facts

In 1919 the State of Nebraska enacted legislation which prohibited teaching foreign language to students below eighth grade.[58] The law applied to public, private, and parochial schools. On May 25, 1920, an instructor in Zion Parochial School was charged with teaching the German language to a ten year-old child who had not yet attained the level of eighth grade.[59] The intention of the statute was to foster the English language as the mother tongue for children of immigrants.

Decision

Meyer was found guilty by the District Court of Hamilton County. The Supreme Court of Nebraska affirmed the judgment.[60]

The United States Supreme Court determined the problem was whether the statute unreasonably infringed on the liberty guarantee of the Fourteenth Amendment. The Court insisted

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[58]Meyer v. Nebraska, 262 U.S. 67 L.Ed. 1042 (1923), p. 1044.

[59]Meyer v. Nebraska, 107 Neb. 657, 187 N.W. 100 (1922).

[60]Ibid., p. 1046.

that the legislature is subject to supervision by the courts in matters concerning the proper exercise of police power. It was evident the Nebraska legislature had materially interfered with ". . . the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[61] The Court further stated:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,--to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,--a desirable end cannot be promoted by prohibited means.[62]

The statute was declared arbitrary and not in relation to any end within the power of the state. The Court reversed the judgment of the Supreme Court of Nebraska.

Discussion

This decision is noteworthy as an early case addressing state authority to legislate school curricula. The legislation passed by the State of Nebraska to prohibit the

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[61] Ibid., p. 1046.

[62] Ibid.

teaching of foreign languages before the eighth grade involved public, private, and parochial schools.[63]

The Supreme Court acknowledged the intention of the legislature to be worthy in its purpose to help each student develop English as a mother tongue since immigrants had been educating their children in their native language. The Court also affirmed that states have authority to prescribe curriculum. State authority, however, must be limited by the constitutional rights of parents, teachers, and students.

Presidents Council, District 25,
v.
Community School Board No. 25
457 F.2d 289 (2d Cir. 1972)
409 U.S. 998 (1972)

Facts

On March 31, 1971, Community School Board No. 25, Queens, New York, removed all copies of Down These Mean Streets, a novel by Piri Thomas, from all junior high school libraries in the school district.[64] In June of that year the school board passed a unanimous motion to retain the book in schools which had previously had the book in their libraries; however, it was made available only on direct loan to parents of

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[63]Ibid., p. 1044.

[64]Presidents Council v. Community School Board, 457 F.2d 289 (2d Cir. 1972), p. 290.

students in the school.[65] The teacher was allowed to discuss the book in class and assign it for outside reading. The librarian was not penalized.[66]

Plaintiffs in the appeal were the Presidents Council, District 25, an organization of current and past presidents of various parent-teacher groups, three junior high school students, parents and guardians of students, two teachers, a librarian, and a junior high school principal. The appellants alleged that removal of the book violated their First Amendment rights.

Decision

The New York legislature delegated authority to select materials in public school libraries to community school boards. The court determined that limiting access to the book did not violate the First Amendment. The court did not consider it appropriate to review the determination of the board.

Discussion

This was the first judicial decision which found that a local school board had the authority to limit access to a specific book considered inappropriate for students. The Second Circuit Court of Appeals found no violation of First

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[65] Ibid.

[66] Ibid., p. 292.

Amendment rights and, therefore, did not consider it necessary to review the decision of the school board. The court stated that administrative procedures were available in New York to review the decisions of school boards.

The court insisted ". . . we do not consider it appropriate for this court to review either the wisdom or efficacy of the determinations of the board."[67] The court made no distinction between the school board's authority to select library books as opposed to its authority to remove a book because of social or political tastes of the school board. At approximately the same time the Sixth Circuit Court of Appeals in Minarcini took an opposing view, saying that removal of a book constituted a violation of First Amendment rights.

The Supreme Court denied certiorari[68] with Justices Stewart and Douglas dissenting. In his dissenting opinion Justice Douglas stated:

> At school the children are allowed to discuss the contents of the book and social problems it portrays. They can do everything but read it. This in my mind lessens somewhat the contention that the subject matter of the book is not proper.[69]

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[67] Ibid., p. 291.

[68] Presidents Council v. Community School Board, 409 U.S. 988 (1972).

[69] Ibid., p. 999.

He further contended the First Amendment is a preferred right upholding the ". . . right to hear, to learn, to know."[70]

Right to Read[71] and Salvail[72] from the Federal District Courts in the First Circuit Court of Appeals did not allow removal of censored materials.

The opposing standards from the First, Second, and Sixth Circuit Courts of Appeals may require Supreme Court guidance for a resolution.

Minarcini v. Strongsville City School District
384 F.Supp. 698 (N.D. Ohio, 1974),
541 F.2d 577 (6th Cir. 1976)

Facts

Five high school students brought action through their parents against the Strongsville, Ohio, City School District, the school board, and the superintendent. The school board refused to accept the faculty's recommendation to purchase certain novels for use in the English curriculum and in addition removed certain books from the school library.[73]

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[70]Ibid.

[71]Right to Read v. School Committee.

[72]Salvail v. Nashua Board of Education.

[73]Minarcini v. Strongsville, 384 F.Supp. 698 (N.D. Ohio, 1974).

Plaintiffs claimed violation of their constitutional rights because certain novels had been disapproved for classroom use and others had been withdrawn from the school library.[74]

Decision

The District Court found no violation of constitutional rights.[75] The case was appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit Court of Appeals separated the complaint into two issues, the selection and removal of textbooks as opposed to removal of library books. The court affirmed the District Court's decision upholding the school board's authority to select and remove textbooks.[76]

The court maintained that neither state nor school board is required to establish libraries in schools. Once established, however, a library becomes a privilege that cannot be withdrawn because of political or social tastes of the school board.[77] The court further asserted that library books can be removed only for constitutionally allowable reasons.[78]

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[74]Ibid., p. 709.

[75]Minarcini v. Strongsville, 541 F.2d 577 (6th Cir. 1976), p. 582.

[76]Ibid.

[77]Ibid., p. 583.

[78]Ibid., p. 582.

The court determined that withdrawal of library books had violated students' First Amendment rights to receive information. The Supreme Court refused to review the case.

Discussion

This decision is unique in that it differentiates between a school board's authority to select and remove textbooks and its same authority to remove library books. The court declared that school boards may not remove library books merely because of social or political tastes. This interpretation established a type of "tenure" for library books.[79]

Prior to this case the only litigation which had addressed school board censorship of books already existing in the library was Presidents Council.[80] In contrast to Minarcini, Presidents Council supported the school board's authority to limit access to library books which students formerly had used freely in the school library. The decision in Minarcini asserted that removal of library books violated students' constitutional right to know.[81]

Unequal treatment of textbooks and library books may limit the value of this decision for use by school administrators.

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[79]Ibid., p. 583.

[80]Presidents Council v. Community School Board.

[81]Minarcini v. Strongsville.

Cary v. Board of Education of Adams-Arapahoe School District

Slip Opinion Nos. 77-1297, 77-1298, (10th Cir. 1979)

Facts

Five high school English teachers, who taught elective courses in contemporary literature, had been using and planned again to use certain novels and books of poetry in their classes.[82] The courses involved were "Contemporary Literature," "Contemporary Poetry," and "American Masters."

The school board appointed a committee made up of school board members, teachers, students, and parents to review materials in current use as well as new materials under consideration. The committee reviewed the materials and solicited comments from other members of the community. In the resulting recommendation, 1,285 books were approved and one was rejected. The recommendation was not unanimous--a minority report rejected nine books. The school board received the report and rejected ten additional books,[83] approving 1,275 altogether. The school board refused to purchase the ten books they had rejected, and stated that the books should not be used for assignments nor credit given to students reading the books. A previously unwritten policy was formally approved, saying

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[82]Cary v. Board of Education of Adams-Arapahoe School District, 427 F.Supp. 945 (D.Colo., 1977), p. 947.

[83]Ibid.

that if a student or parent objected to an assignment, an alternative could be given.

The five English teachers became plaintiffs in a suit claiming that refusal to allow them to use the books violated their constitutional right to academic freedom. The school board contended there was no constitutional right at issue. Courses and the materials used in them were subject to their control as elected officials.

The teachers were members of the Aurora Education Association which acted as representatives of all teachers in the school district in conducting professional negotiations. Under their contract, final authority for determining ". . . the processes, techniques, methods and means of teaching any and all subjects. . ." rested with school board.

Decision

The court gave a lengthy review of court decisions concerning academic freedom. The court insisted:

> Academic freedom as the protection of open communication in the processes of teaching does not restrict the public authority to control the educational program and the place where it occurs. We will have such schools operating at such times and place with such curricula as the elected representatives of the people shall determine; but involuntary restrictions on the individual liberty of teachers and students to communicate, directly and indirectly, where such open expression is consistent with the attained level of educational development, are matters of constitutional concern.[84]

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[84]Ibid., p. 952.

The court determined, however, that academic freedom was not the central question in the case. Rather, the collective bargaining agreement was. The collective bargaining agreement, in the opinion of the court, changed the controversy from one of academic freedom to a commitment to the collective bargaining agreement. The court asserted that had it not been for the collective bargaining agreement, the academic freedom of teachers would have prevailed. "The plaintiffs are bound by that commitment and they may not now seek to avoid it by calling upon a constitutional freedom to act independently and individually."[85] The court, therefore, ruled in favor of the school board.

The case was then heard by the United States Court of Appeals, Tenth Circuit.[86] The court determined that the lower court had been in error when it said the collective bargaining agreement was the central issue in the case.

> We thus construe the contract as giving control over textual material to the school board insofar as it can be done consistent with the federal and Colorado Constitutions. We do not construe it to call for waiver of teachers' individual constitutional rights.[87]

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[85] Ibid., p. 954.

[86] Cary v. Board of Education of Adams-Arapahoe, Slip Opinion Nos. 77-1297, 77-1298 (10th Cir. 1979).

[87] Ibid., p. 8.

The school board set forth a clarification of their regulation concerning use of the books. Teachers could comment on, discuss, or recommend any of the ten books. Outside of class, teachers could meet anywhere and at anytime to discuss the books. Students were not prohibited from reading the books except for class credit. Class discussion of the books was not prohibited except when it took excessive time from the objectives of the class. "In short, the proscription relates only to activities which in substance, if not form, would reinstate the nonselected work on the reading list from which it was deliberately removed."[88]

The court considered the clarification of school board regulation of great importance. It recognized that academic freedom and free expression were important rights for teachers, but they insisted such rights have limits and must be balanced against the authority of the state.

The court further insisted that since the school board had authority to prescribe curriculum and select materials, it also had the authority to exclude materials. The Court of Appeals, Tenth Circuit, therefore, ruled in favor of the school board.

Discussion

This case is different from other cases previously discussed because it deals with the authority of the school

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[88]Ibid., p. 16.

board to proscribe the use of modern novels and poetry in the classroom rather than in the library. No mention was made as to whether the same books were in the school library.

School boards, according to this decision, can remove or prohibit the selection of books because of social or political tastes. Clarification of the school board's position concerning the use of books outside of class and free discussion in class was a determining factor in the decision. Constitutional rights of teachers could not prevail when the school board exercised its authority as permitted by state legislation.

Parents' Right to Direct Education of Children

Overview

The two landmark cases presented in this category support parents' rights to direct the education of their children. Recent censorship cases have placed more emphasis on the rights of students than on rights of parents. The exception is in the case of religious questions pertaining to censorship. Decisions related to such questions are presented in the final category. The cases of Todd and Medeiros in the next category concern parental objections to instructional materials. In both cases the authority of the school board received judicial approval over the rights of parents.

Meyer v. Nebraska
262 U.S. 67 L.Ed., 1042, 43 S.Ct. 625 (1923)

Facts

In 1919 the State of Nebraska enacted legislation which prohibited teaching foreign language to students below eighth grade.[89] The law applied to public, private, and parochial schools. On May 25, 1920, an instructor in Zion Parochial School was charged with teaching the German language to a ten year-old child who had not yet attained the level of eighth grade.[90] The intention of the statute was to foster the English language as the mother tongue for children of immigrants.

Decision

Robert T. Meyer was found guilty by the District Court of Hamilton County. The Supreme Court of Nebraska affirmed the judgment.[91]

The United States Supreme Court determined the problem was whether the statute unreasonably infringed on the liberty guarantee of the Fourteenth Amendment. The Court insisted that the legislature is subject to supervision by the courts in matters concerning the proper exercise of police power. It was evident the Nebraska legislature had materially interfered with ". . . the calling of modern language teachers,

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[89]Meyer v. Nebraska, 262 U.S. 67 L.Ed. 1042 (1923), p. 1044.

[90]Meyer v. Nebraska, 107 Neb. 657, 187 N.W. 100 (1922).

[91]Ibid., p. 1046.

with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[92] The Court further stated:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,--to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,--a desirable end cannot be promoted by prohibited means.[93]

The statute was declared arbitrary and did not serve any compelling state interest in education. The Court reversed the judgment of the Supreme Court of Nebraska.

Discussion

This case is an early example of Supreme Court recognition that public school teachers, parents, and students have constitutional rights which must be recognized by the state. Liberties as set forth in the Fourteenth Amendment were in question.

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[92] Ibid., p. 1046

[93] Ibid.

> Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. . . . Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.[94]

The Court insisted that limiting the teaching of foreign language interfered with rights of parents who might want children instructed in foreign language at an early age. Their rights were as important as the concept of teaching English as the mother tongue to the children of immigrant parents.

This decision has been used as a precedent in many cases concerned with parents' rights to direct the education of their children. States and school boards should always be cognizant of parents' rights when prescribing or proscribing curricula and the materials used in its implementation.

Wisconsin v. Yoder
405 U.S. 205, 32 L.Ed. 2d 15, 92 S.Ct. 1926 (1972)

Facts

Parents, who were members of the Old Order Amish religion and the Conservative Amish Mennonite Church, refused to send their fourteen-and fifteen-year-old children to school.

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[94]Ibid.

The children had completed the eighth grade. The parents were convicted of violating Wisconsin's compulsory attendance law which required children to attend school until the age of sixteen.

The Amish people provided continuing vocational education to their children to prepare them for life in the rural community in which they lived. The parents believed high school attendance was contrary to their religion and way of life. They also believed that such attendance would endanger both their own salvation and that of their children.

Decision

The Wisconsin Supreme Court sustained the defendants' claims that their First Amendment Right to free exercise of religion had been violated.[95] On certiorari, the United States Supreme Court affirmed the decision.

Chief Justice Warren Burger expressed the opinion of six members of the Court:

1. Secondary schooling was opposed to sincere religious beliefs of the Amish people who did not believe in exposing their children to worldly influences ". . . in terms of attitudes, goals, and values....[96] Such exposure would substantially interfere with the child's integration into the life and faith of the

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[95]Wisconsin v. Yoder, 49 2d 430, 182 N.W.2d 539 (1972).

[96]Wisconsin v. Yoder, 32 L.Ed.2d 15 (1972), p. 15.

Amish Community at the time the child was at the crucial adolescent stage of development.

2. Foregoing one or two years of compulsory education would not (a) impair the physical or mental health of the student, (b) result in the inability to be self-supporting, (c) prevent the child from discharging the duties and responsibilities of a citizen, nor (d) materially detract from the welfare of society in general. For these reasons the state's interest in compulsory education did not outweigh the established practices of the Amish religion.[97]
3. Parents had been prosecuted because their children had not attended school. The record did not show that non-attendance was against the children's desires. It was the parent's right of exercise of religion which was the determining factor in the decision.

Discussion

This decision is important in upholding parents' rights to direct the education of their children. The Court emphasized that the state's compelling interest in education did not override the fundamental right of religious freedom. The clear implication is that teachers and administrators should heed this decision so that alternative assignments are

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[97]Ibid.

available for students when parents object to reading matter offensive to their religious convictions.

Religious Freedom of Public School Students As it Relates to Use of Library and Instructional Materials

Overview

The landmark case of Epperson sets forth the Supreme Court's philosophy concerning the study of religion in public schools. This landmark decision has been cited by courts in nearly all censorship cases as the legal basis for their reluctance to intervene in the daily operation of public schools.

Medieros and Todd follow the reasoning of the Court in Epperson in dealing with complaints concerning library and instructional materials in the area of the religious establishment clause.

Epperson v. Arkansas
393 U.S. 97 (1968)

Overview

This landmark case held that statutory prohibition of teaching the theory of evolution was unconstitutional. It is referred to in almost every judicial decision concerning violations of the establishment clause of the First Amendment and of free communication as guaranteed by the First Amendment.

Facts

A public school biology teacher in Arkansas instituted action against a statute prohibiting any teacher in state supported schools or universities from teaching Darwin's theory of evolution. The adoption of any textbook teaching the theory was also prohibited. The new textbook which the teacher was to use contained a chapter concerning the theory. Violation was a misdemeanor and violators were subject to dismissal. The teacher was joined by a parent in the action.

Plaintiffs challenged the constitutionality of the anti-evolution statute which was based on the Tennessee "monkey law" adopted in 1925. The Chancery Court of Arkansas[98] declared the statute violated the Fourteenth Amendment of the Constitution. On appeal to the Supreme Court of Arkansas[99] the decision was reversed. The statute was sustained as being an exercise of the State's authority to prescribe curriculum in public schools. Appeal was carried to the United States Supreme Court.

Legal Precedents Established

Justice Abe Fortas delivered the opinion, expressing the views of seven members of the Court. The Court asserted the Arkansas statute was in violation of the First and Fourteenth

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[98]Epperson v. Arkansas, p. 266.

[99]Epperson v. Arkansas, 242 Ark. 922, 416 S.W.2d 322.

Amendments and that it conflicted with the constitution by prohibiting the free exercise thereof.

1. Neutrality in matters of religious theory, doctrine, and practice must be maintained by state and national governments. Government may not aid, foster, or promote one religion or religious theory over another. It may neither oppose any religion nor advocate non-religion.
2. Courts cannot interfere with the daily operation of public schools unless the violation of basic constitutional values is implicated. "Laws that cast a pall of orthodoxy over the classroom" are a violation of the freedom-of-religion provision of the First Amendment and therefore they cannot be tolerated.
3. Invasion of academic freedom is a concern of the United States Supreme Court.
4. Study of religions and the Bible from an historical and literary point of view is part of the secular program of education. States cannot adopt programs or practices which foster or oppose any religion. This prohibition under the First Amendment is absolute.
5. Authority of the state to prescribe curricula does not permit prohibiting, on pain of criminal penalty,

the teaching of scientific theory or doctrine if such prohibition is based on reasons which are in violation of the First Amendment.

Medeiros v. Kiyosaki
478 P.2d 314 (S.C. Hawaii, 1970)

Facts

A family life and sex education program was adopted by the State of Hawaii.[100] The Superintendent of Education, upon recommendation from the staff of the Department of Education, selected a film series, "Time of Your Life", to be used with the curriculum.[101] The film series was developed for educational television and had been used in San Francisco. The films consisted of fifteen lessons, covering interpersonal relationships, self-understanding, family structure, and sex education. Lessons eleven through fifteen covered sexuality and sexual development and was a supplement to lessons planned by the teacher to be used in the classroom for fifth-and sixth-grade students.[102] Parents could request that children be excused from the lessons.

Parents of fifth-and sixth-grade students claimed that showing the films interfered with parents' rights to educate

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[100]Medeiros v. Kiyosaki, 478 P.2d 314 (S.C. Hawaii, 1970) p. 314.

[101]Ibid., p. 315.

[102]Ibid.

their children in matters of sex and thus was a violation of their right to privacy and religious freedom.[103]

Decision

The Circuit Court, the First Circuit, City and County of Honolulu dismissed the complaint,[104] and it was appealed to the Supreme Court of Hawaii.

The court affirmed the lower court, saying:

1. Fifth-and sixth-grade students could be excused from participation in the film series upon parent request; therefore, parents' constitutional right to privacy was not violated.[105]
2. Because of the excuse feature included in the plan there was no violation of the constitutional guarantee of free exercise of religion.[106]
3. State boards of education have broad discretionary powers in establishing curricula and instituting educational programs in the state's public schools.[107]
4. The film series of family life and sex education had been properly adopted by the administrative board of education.[108]

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[103]Ibid., pp. 315-316.

[104]Ibid., p. 314.

[105]Ibid., p. 317.

[106]Ibid., p. 319.

[107]Ibid., p. 320.

[108]Ibid.

Discussion

This decision is important for school administrators in that the excuse feature was central to the decision. In the very sensitive areas of family life and sex education it is essential to set up safeguards against parent complaints concerning violation of constitutional rights to privacy and the free exercise of religion.

The case also points out that proper methods of selection should be carefully followed in adopting supplementary instructional materials, particularly when they fall into a sensitive area of the curriculum.

Todd v. Rochester Community Schools
200 N.W. 2d 90 (C.A. Michigan, 1972)

Facts

The parent of a high school student complained that use of the novel Slaughterhouse-Five, by Kurt Vonnegut, Jr., in an elective high school current literature course violated First and Fourteenth Amendment rights. The complaint stated the book made reference to religious matters and violated constitutional proscription against the establishment of religion.[109]

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[109]Todd v. Rochester Community Schools, 200 N.W.2d 90 (C.A. Mich., 1972), p. 91.

The Michigan trial court ruled the book should be removed from the school library. Further, it should not be fostered, promoted, or recommended for use in the school system. The trial court also insisted that the book should be banned from the school library long enough to prevent its use as recommended or promoted reading in courses of study.[110]

Decision

The Court of Appeals of Michigan rejected the decision of the lower court. The lower court had relied solely on Schempp[111] in reaching the decision, and the Court of Appeals said Schempp[112] was not applicable. Although the trial court did not rule the book obscene, it suggested the possibility.[113] The Court of Appeals insisted the book was clearly not obscene under the constitutional test, and that in imposing its own judgment on the citizenry, the trial court had abused its discretion by entering a traditionally sacred area.[114]

The court asserted that use of the novel for religious reasons did not violate the constitutional religious clauses. Although public schools may not teach religion, they may teach about religions.

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[110] Ibid., p. 94.

[111] Abington v. Schempp.

[112] Ibid.

[113] Todd v. Rochester, p. 97.

[114] Ibid.

The court ruled in favor of the school board saying,

> It is for the lawfully elected school board, its supervisory personnel and its teachers to determine a local public schools' curriculum; the judicial censors are persona non grata in formation of public education.[115]

Discussion

This decision points out that most courts will stand behind school board decisions. Courts are reluctant to intervene in the day-to-day operation of schools. Although they may not teach religion, schools may use literature that discusses religion.

The book was not judged obscene. In this case, as in most censorship cases, courts have ruled that obscenity was not an issue. Parents' personal opinions, based on religious views or personal tastes, do not create a constitutional issue.

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[115] Ibid., p. 90.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Throughout the history of American public education, censorship of school library and instructional materials has been a continuous issue for school boards, school administrators, teachers, and librarians. Based on an analysis of the research presented by this study, it is apparent that censorship as it involves public schools is a growing concern. Any level of public education may be confronted with controversy concerning library books, films, periodicals, instructional materials, or matters involving curricula.

Prevailing social, political, moral, and religious trends influence community pressures on schools which may lead to censorship controversy. The censor may be a parent, a member of the community, a local or national organization, a student, a teacher, a librarian, a principal, a superintendent, or even a school board. Censorship attempts may or may not be settled to the satisfaction of the complainant, the community or the school board. After appeal has been exhausted through the local school board, solutions may require litigation.

Censorship involves major constitutional issues such as academic freedom, students' rights, parents' right to direct the education of children, religious freedom, and the

authority of school administrators and school boards. Therefore, school officials should have access to appropriate information concerning both the educational and legal issues related to censorship in order to make sound educational and legal decisions. The comprehensive summaries of recent studies regarding censorship and identification of potentially litigious educational issues provided by this research may assist school officials in making sound educational decisions where censorship is concerned.

Summary

The introductory material in Chapter One identified the historical fact that censorship is an ancient problem. However, public schools have been faced with more censorship problems and litigation concerning censorship in the past two decades than ever before in the history of the United States. The current political, social, and moral climate is central to understanding the basis for censorship of school library and instructional materials. Citizens' dissatisfaction with forced desegregation, busing, taxes, foreign policy, and government in general has caused them to strike out at public schools. Propinquity and familiarity make the school an easier target than federal, state, or local governments. Well-organized groups, some conservative, some liberal, have been formed to lead various school censorship movements.

Reiterating a statement made in the overview of Chapter Two, "Review of Related Literature," no attempt was made to include an exhaustive review of censorship. Instead, an historical perspective was presented to give the reader background and a world overview of the subject. Selected key studies were presented in an effort to clarify the complexity of the basic judicial considerations contained in the court cases presented in Chapters Three and Four.

As a guide to the educational and legal research, several questions were formulated and listed in Chapter One of this study. While the review of the literature provided answers to some of these questions, most of the answers were contained in Chapters Three and Four. The answers to these questions comprise the major portion of a set of legal guidelines which school administrators and other educational decision makers can refer to when making decisions related to censorship.

The first question listed in Chapter One was: Under what circumstances will constitutional rights of students, teachers, or parents be involved when a school district is faced with a censorship problem?

I. Constitutional rights of students become involved in censorship problems:

A. when there is removal of or limited access to library and instructional materials, thus inhibiting the students' right to read, to learn, or to receive information

B. when assignments to use specific books and materials are deemed to conflict with any student's moral or religious values, particularly when no provision has been made for an alternative assignment or excuse policy

II. Constitutional rights of teachers become involved:

A. when library books or instructional materials are proscribed in violation of professional constitutionally based academic freedoms

B. when teachers are suspended or dismissed because of using controversial materials, thus violating First Amendment rights to academic freedom or Fourteenth Amendment rights to hold a position

III. Constitutional rights of parents become involved in censorship:

A. when students receive assignments, without an alternative assignment or excuse policy, deemed to interfere with:

1. the parents' right to direct the education of their children
2. the moral and religious beliefs of the parents
3. the privacy of the family

The second question posed in the introductory chapter was related to identifying the major educational issues involved in censorship of library and instructional materials.

The major educational issues are:

I. conflict between the "indoctrination" theory of education, fostering the transmission of traditional values and community mores, as opposed to the contemporary educational view of the school as a marketplace of ideas

II. ultraconservative pressures on schools which oppose teaching young people everything from various political or economic theories, scientific theories, world religions, or information concerning ethnic groups, to teaching them the new themes in modern literature

III. pressure groups which demand that schools prohibit any type of "sexism" or "racism" in teaching or literature

IV. emerging students' rights from case law decisions, based on the Constitution, which give students more decision-making opportunities in their own education

V. teachers' increasing rights to academic freedom which allow them to make more decisions concerning classroom instruction and the books and materials used to carry out this role, as opposed to authority of school boards to prescribe curricula and select instructional material

VI. the determination of wise selection procedures in the choice of library and instructional materials which will meet the educational needs of students without unduly antagonizing parents, the community, or pressure groups

VII. organization and governance of schools by school boards and administrators who have sound educational philosophies, objectives, and policies and are willing to support such beliefs under fire from a variety of pressure groups

VIII. the use of family life and sex education programs in public schools

IX. the ability of school systems to win and hold community support in the task of educating the young people in their charge

The third question listed in Chapter One concerns the pressure groups chiefly responsible for censorship. The main group of censors consists of parents. Librarians, school administrators, and school boards also become censors as the result of parent and community pressure.

Many parents who become censors assume the role from genuine personal concern based on moral, religious, and political convictions. Others are influenced by a large number of highly organized national and local groups formed for the explicit purpose of "cleansing" the public schools.

These groups have large mailing lists through which they circulate information concerning "objectionable" textbooks, library books, and other instructional materials. The same organizations also send out information protesting specific school programs such as family life and sex education curricula, humanities programs, the teaching of Darwin's theory of evolution, and values clarification. These groups seem motivated mainly from moral and religious convictions. As a result of these groups and the ideology, many "Christian" schools have emerged where children can obtain religious training not available to them in public schools.

Ultraconservative political groups sometimes consist of a blending of fundamentally religious and politically conservative members. These groups may oppose federal legislation such as abortion laws, the Equal Rights Amendment, school integration, the high cost of school programs, and similar issues. Moreover, they often excoriate specific educational philosophies of public schools. All individuals and pressure groups have concerns, the amelioration of which requires capable school administrators who can respond effectively to individual and organized pressure. The ability to mold public opinion by the use of honest, effective tools and strategies is an essential skill for current school administrators and school boards.

The fourth guide question from Chapter One concerned specific trends from analysis of court cases relating to

censorship. The final guide question related to legally acceptable criteria, based on landmark cases, most likely to assist school districts in preventing legal action and/or poor public relations in the event of censorship cases. The answers to these two questions, as revealed by an analysis of the literature and court decisions, provide the framework for the "Conclusions" and "Recommendations" sections of this study.

Conclusions

Even when legal issues appear to be similar or the same as those in cases already decided by the courts, a different set of circumstances can produce an entirely different decision. Thus, drawing specific conclusions from legal research is difficult. However, based on an analysis of cases, the following general conclusions can be made concerning the legal aspects of censorship of school library and instructional materials.

1. Courts will intervene in the educational decision-making prerogatives of local school officials only if an individual's constitutionally protected right has allegedly been denied because of censorship action.

2. Determining what is encompassed in the concept of constitutionally protected rights will continue to be a growing legal issue for courts to expand upon and to encapsulate in their decisions.

3. Definition of the role of public schools below the college and university level as places for the indoctrination of community mores, as opposed to their being a "marketplace of ideas", will continue as a legal issue to be grappled with by courts.

4. The scope of academic freedom for elementary and secondary public school teachers will continue to be an issue for exploration and investigation by courts.

5. The direction and extent of students' rights to receive information in elementary and secondary public schools will likely be a protacted area of investigation for the judiciary.

6. School boards' authority to remove library and instructional materials, as opposed to the selection of such materials, will probably continue to be scrutinized by courts.

7. Parents' constitutional rights to direct the education of their children, as opposed to school board authority to prescribe curricula, will likely continue to be examined by the judicial system.

8. With the current renewal of fundamentalist religious philosophies and traditional moralism, questions relating to the use of various library and instructional materials will be issues for judicial determination.

9. Conflicting findings in at least three Circuit Courts, the First, Second, and Sixth Federal Courts, may

require the United States Supreme Court to make a definitive decision dealing with censorship in the public schools.

10. None of the library and instructional materials questioned in any of the cases studied, were declared legally obscene when evaluated within the conceptual framework of the Miller Test.

11. The judicial trend has always been in favor of school boards especially when sound policies have been formed and explicitly followed.

Recommendations

The stated purpose of this study was to provide educational decision makers with appropriate information regarding the legal aspects of censorship of school library and instructional materials so that they might be able to make educationally and legally sound decisions concerning the issue.

The current political and religious climate seems to point toward a trend for continued examination and criticism of public school library and instructional materials. Capable and skilled educators will be required in order to gain community support and to withstand pressure from a variety of citizens and national and local organizations. Citizens within our society have the right to express views concerning public education. Educators must develop

strategies and tools which will keep the public informed about school and win public support.

These same educators should continue to be informed and keep up to date on constitutional issues and legal developments affecting schools. Lack of legal knowledge is no longer an acceptable legal excuse for arbitrary or capricious regulations. Special caution should be taken to prevent violation of constitutionally protected rights of teachers, students, school employees, and parents. School board policies must be legally formulated, adopted, and implemented. A carefully designed, written plan for selection of library books and instructional materials should be adopted and explicitly followed. The same is true for the handling of complaints concerning such materials.

Once policies have been adopted by the school board, thorough staff development should be provided for all members of the school staff and school board to develop a thorough understanding of the policy as well as censorship pressures. Any school board giving in to censorship by a particular pressure group must face the possibility that such capitulation could result in encouragement of pressure from other groups, thus leading to confusion and interference in the educational process. These cautionary practices should assist school boards in avoiding litigation and improving community relationships.

Based on the results of this study, the following guidelines concerning censorship of school library and instructional materials have been formulated. These guidelines are based on the legal principles established by the United States Supreme Court landmark decisions and on discernible trends revealed by the numerous lower federal court decisions in cases related to these practices. While these appear to be legally acceptable criteria to follow, school officials need to remember that individuals who feel their constitutional rights have been abridged may still initiate judicial grievances.

Guidelines for a Policy Concerning Selection and Withdrawal of School Library and Instructional Materials

I. All school board policies concerning selection and/or removal of library and instructional materials should have formal approval of the school board. Some suggestions follow:

   A. A written plan which includes a philosophy and objectives of the libraries of the school district as well as a detailed plan for handling complaints should have school board approval.

   B. The policy should begin with a statement that the school board intends to protect the constitutional rights of students, parents, and school personnel in every circumstance.

C. The development of the statement should be done in conjunction with librarians, teachers, administrators, students, and knowledgeable parents.

D. The policy statement should include an expansion of the legislative idea that all rules of the school board are intended to be fair, reasonable, and for the good of schools and students.

E. The policy should state clearly that while the board has the right and duty to make policies, such policies are not absolute.

F. The executive dimension of the policy statement should be clear with its intent to apply policies and rules equally to everyone and that no discrimination nor application inconsistent with the policy will be tolerated.

II. These additional topics should be covered by the school board policy:

A. The most fundamental concept in formulating the school board policy is the selection or removal of library and instructional materials at the school level. For this reason the policy should state clearly procedures to be followed in the selection and removal process at the school level. The following are suggestions:

1. A school library/media selection committee should be established in each school. It should be composed of the principal or his designee, the librarian or a professional member of the library staff, a member of the supervisory staff, teachers representing the different areas of the curriculum, qualified parents, and, if the maturity level is appropriate, students.
2. The school library/media selection committee should adopt a philosophy and objectives consistent with that of the school and the school district.
3. Criteria for judging books and materials should be established.
4. Specific procedures and selection aids should be designated for use in the selecting process, covering the broad areas to be served by the curriculum, the objectives of the school, and the needs and interests of students. Selection aids should be professionally prepared, unbiased, and reputable. Materials should be examined first-hand whenever possible.
5. A procedure for accepting gifts of books and materials should be included so that they meet the same criteria as other materials selected for the library collection.

6. Guidelines for discarding worn, obsolete, or damaged books and materials should be included.
7. A plan concerning the replacement of worn, missing, or damaged materials should be developed.

B. Procedures for reconsideration of materials and handling complaints should be carefully drawn. These should apply equally to all complaints whether they be from school personnel, parents, students, or other citizens.

1. Whenever possible complaints should be initiated at the particular school or library where the complaint has been received. In other words, a complaint received by a school board member or superintendent should be referred to the particular school whenever possible. The school library/media selection committee should constitute the first level of appeal.
2. Prepare a form to be filled out by any complainant. The form should be readily accessible in the library or principal's office at all times.
3. Inform the complainant of selection procedures. Make no comments or commitments concerning the materials to which there is objection.
4. Invite the complainant to complete the form in writing so that it may be formally reviewed.

C. If the problem is not satisfactorily settled at the school level, the superintendent should appoint a review committee made up of professional educators in the school district, representatives of school/library selection committee where the complaint was initiated, and other appropriate citizens. Review by this committee should constitute the second level of appeal. The responsibilities of this committee should be clearly stated.

   1. The challenged material should be examined.
   2. Evaluations of challenged material should be surveyed in professional reviewing sources.
   3. Determine the extent to which the material supports the curriculum and the philosophy and objectives of the school district.
   4. Weigh merits against alleged faults in order to form opinions based on the material as a whole rather than through passages isolated from context.
   5. Prepare a written recommendation to the superintendent and school board.

D. If the controversy is not settled at the review committee level, the school board should be the third and final level of appeal through the school district.

Concluding Statement

If a school district becomes involved in censorship controversy, a conscientious attempt should be made to resolve the problem through school board policy. If such procedure is not successful, a high probability exists that some kind of legal action will be initiated either by an individual student, a group of students, teachers, parents, or concerned citizens. Courts will not usually hear censorship cases unless local appeal procedures have been exhausted.

If the complainant can establish that school administrators arbitrarily deprived him of a constitutional right, he may be able to receive financial remuneration from the individual school administrator and school board members.

No school board policy or guidelines will ensure against litigation by individuals or groups who ascertain their rights have been violated. School boards and school administrators can reduce the probability of having school practices and individual financial liability invalidated by formulating, implementing, and explictly following a set of guidelines governing the selection and removal of library and instructional materials.

RECOMMENDED SCHOOL BOARD POLICY FOR SELECTION OF LIBRARY AND INSTRUCTIONAL MATERIALS

I. STATEMENT OF POLICY

The Board of Education of the _____ School District has been authorized by the State Legislature of _____, (Statute No.) with the responsibility for providing library and instructional materials for the school district. In this, as in all other endeavors, the Board of Education strives to meet the educational needs of students and the instructional needs of the staff fairly, reasonably, and judiciously, with the best interests of students and the schools as first priority. The intent of the school board is to protect the constitutional rights of students, parents, and school personnel in every circumstance. Policies apply equally to all persons involved. No discrimination nor inconsistent application will be tolerated. The Board of Education has the authority and the duty to make policies; however, policies may be revised, added, or eliminated when circumstances necessitate such action.

II. RESPONSIBILITY FOR SELECTION OF MATERIALS

The Board of Education delegates autnority for selection of library and instructional materials through the Superintendent of Schools to school library/media selection committees under the guidance of professionally trained librarians and the Coordinator of School Libraries. The following procedures shall be followed:

A. Each school shall establish a library/media selection committee appointed by the principal and composed of (1) the school principal or his designee, (2) the school librarian as chairman of the committee, and (3) teachers representing all areas of the curriculum and/or grade levels. The principal may also appoint one or more community representatives, and, if the maturity level is appropriate, students.

B. Under leadership of the library/media personnel the selection committee shall set priorities for acquisition of materials based on school-wide objectives, the strengths and weaknesses of the existing collection, and budget allocations.

III. OBJECTIVES FOR SELECTION

The primary objective of the school library/media program is to support, enrich, and help implement the instructional program of the school. It is the duty of the professional staff to make available a wide range of materials of varying levels of difficulty, with a diversity of appeal, and the presentation of different points of view. To this end, the _____ Board of Education in keeping with ideas expressed in the LIBRARY BILL OF RIGHTS, asserts that the responsibility of its professional staff is:

A. To provide materials that will enrich and support the curriculum, taking into consideration individual needs and varied interests, abilities, learning styles, and maturity levels of the students served

B. To provide materials that stimulate growth in factual knowledge, literary appreciation, aesthetic values, and ethical standards

C. To provide materials on various sides of controversial issues so that young citizens may have an opportunity to develop, under guidance, the practice of critical analysis and to make informed judgements in their daily lives

D. To provide materials representative of the many religious, ethnic, and cultural groups in our nation and the contributions of these groups to our American heritage and the world community

E. To place principle above personal opinion and reason above prejudice in selection of materials of the highest quality in order to assure a comprehensive collection appropriate to the school, the community, and the students who use the library

IV. PROCEDURES FOR SELECTION OF MATERIALS

A. Instructional materials shall support and be consistent with the general educational goals of the state, the school district, and the aims and objectives of individual schools and specific courses. All materials selected shall meet high standards of quality as outlined in the Manual of Policies and Procedures for School Libraries in the _____ School District. The sources to be consulted are bibliographies and reviewing aids as outlined in the Manual of Policies and Procedures. Whenever possible materials should be examined firsthand.

B. Gift materials should be evaluated through the same criteria as any new materials selected for the collection. The right is reserved to include only those materials which meet these specified criteria.

V. DISCARDING, WEEDING, AND REPLACING MATERIALS IN THE COLLECTION

A. Worn, obsolete, and inoperable materials should be continuously discarded from the collection.

B. Worn, damaged, or missing materials basic to the collection should be replaced as soon as possible.

VI. PROCEDURES FOR RECONSIDERATION OF MATERIALS

Occasional objections to some materials may be voiced despite the care taken in selection and the qualification of personnel selecting materials. The following procedures apply equally to all complaints whether they be from students, parents, school personnel, or other citizens.

A. Complaints should be presented to the principal or librarian at the school from which the material was received.

B. The complainant will be asked to fill out a form entitled, REQUEST FOR RECONSIDERATION OF EDUCATIONAL MATERIALS.

C. The challenged material will be placed on a reserve shelf where it may be checked out by students with parent permission until a decision is made.

D. The school library/media selection committee will review the material and present a written report to the superintendent. The superintendent may accept the report and present it to the complainant. This constitutes the first level of appeal.

E. The superintendent or the complainant may reject the report of the school library/media committee and move to the second level of appeal. In such case the superintendent, with approval of the school board, should appoint a review committee made of professional educators in the school district, representatives of the school library/media selection committee where the complaint originated, and other appropriate citizens. The superintendent will present it to the complainant in writing. This constitutes the second level of appeal.

F. The complainant has the right to appeal any decision to the Board of Education for final review. This constitutes the third and final level of appeal through the school district.

Portions of the policy are based on sample policies from the American Library Association and the Division of Educational Media, North Carolina State Department of Education.

REQUEST FOR RECONSIDERATION OF EDUCATIONAL MATERIALS

Name of complainant_____

Address of complainant_____

Telephone Number_____

In which school was the material to which you object located?

_____

Specify type of material_____
book, film, filmstrip, recording, etc.

Author, composer, etc._____

Publisher or Producer (if known)_____

Who do you represent?_____
yourself, name of organization or

_____
identity of group

Have you read, viewed, or listened to the entire item?_____
yes or no

Did you find anything good about the item? If so, please state:

_____

Why do you object to the item?_____

_____

_____

What do you feel might be the result of reading, viewing, or listening to the item?_____

_____

Are you aware of the evaluation of this item by authoritative sources?_____
yes or no

Please cite specific pages, passages, or themes you find objectionable:_____

_____

Would you recommend this item for any particular age group? If so please state:_____

What would you like your school to do about the item?

_____Do not assign to my child

_____Do not assign to any student

_____Refer to the media review committee for evaluation

_____Withdraw (ban) it from use in the school system

_____ _____
Signature Date

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