Libraries, Librarians and First Amendment Freedoms

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Articles

LIBRARIES, LIBRARIANS AND FIRST AMENDMENT FREEDOMS

ROBERT M. O'NEIL*

Few professions more clearly deserve the protection of the first amendment than librarians. Yet few groups—perhaps none engaged in sensitive intellectual activity—have gained fewer constitutional safeguards. Decisions comparable to those defining the free expression of professors, teachers, reporters, theatrical performers, authors and others simply do not exist in the library field. As a consequence, professional librarians understandably fear censorship and repression—not only in “book burning” communities but in more tranquil and civilized parts of the country as well.¹ There are several reasons for this paucity of constitutional protection, which we shall review shortly. There are also some persuasive, if untested, legal bases for a new and much needed first amendment freedom. The major concern of this article will be to explore these intriguing constitutional issues.

The neglect of libraries and librarians as an object of constitutional concern can be readily demonstrated. In his seminal treatise on first amendment law,² Professor Thomas I. Emerson does not mention libraries, though he develops at length the arguments for a broad definition of free expression and inquiry. The relatively few court cases dealing with libraries have concerned such collateral matters as racial segregation or employment policies,³ and not the vital and sensitive central function for which libraries exist. In the one instance where a federal appellate court has discussed library circulation policies and access to controversial materials, the pres-


ence of a substantial first amendment issue was all but overlooked. In the one pertinent state case, now pending in the California courts, the profoundly important and delicate constitutional issue has been avoided through artful statutory construction. Thus the constitutional rights and liberties of libraries and librarians remain a virtually uncharted area of law—badly in need of attention, but curiously neglected.

I. NEGLECT OF LIBRARIES IN THE LAW—
SPELUALATIONS AND CONJECTURES

There are two possible explanations for the paucity of library safeguards. One theory, of course, is that such protection does not exist because it is not needed. This hypothesis deserves relatively little attention, in light of the very major and persistent threats to the freedom of libraries—threats reported bimonthly in the American Library Association's Newsletter on Intellectual Freedom and recounted in larger perspective at the Association's annual meeting. Few attacks on public school curricula or teaching materials fail to include or at least invite attacks upon the school libraries as well. Often the library is the first, rather than the last, object of repression in a community determined to stamp out a particular book or magazine, or all the works of a controversial author. There should be no need of elaborate refutation before we set the first hypothesis to rest. We turn instead to a subtler and more complex, but ultimately more satisfying explanation for the law's neglect of libraries and librarians.

Librarians are perhaps in the worst possible position to press their interests and assert their rights through the courts. On one hand, they lack the massive economic stake that has generated most first amendment test litigation; unlike movie distributors and exhibitors, magazine and newspaper publishers, theatrical producers, book publishers and others that have successfully asserted free press or speech claims, librarians simply cannot finance test cases as part of a commercial operation. Nor are they likely to be the

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6 See Library Parley Warns of Censorship, supra note 1.
beneficiaries of wealthy patrons, as in the case of the Oregon student editor whose criminal appeal (for refusing to disclose a source) was financed by the late Senator (and publisher) William Knowland. Book publishers may support test litigation by distributors or authors, but are far less likely to come to the aid of beleaguered librarians.

On the other hand, librarians are remote from the legal services programs that have enabled low income groups to assert their constitutional rights through test suits. Most librarians, if underpaid, are not indigent, and are thus well above the income levels for public or private legal services. Even the national civil rights and civil liberties groups have been relatively slow to respond to the plight of the librarian. Thus, the librarian is too poor to afford costly counsel or prolonged test litigation, yet not poor enough to have the costs borne by others.

A second factor explaining the lack of precedent may be the nature of the library profession. Unlike school teachers and other groups that are increasingly well organized for economic and other matters, librarians have been historically reluctant to press for redress of grievances. When the American Library Association filed an amicus curiae brief in the United States Supreme Court, seeking a rehearing of the 1973 obscenity decisions, the New York Times remarked editorially:

Professional librarians as a group are hardly known as flaming radicals. As civil servants they find themselves in the delicate position of being the guardians of much that is necessarily controversial, while their place on the totem pole of Authority gives them very little power to defend their professional opinions and their personal security.

The editorial concludes, with obvious approval, that ALA's plea for a rehearing "represents an expert judgment based on experience at the firing line." Since that time the Association has filed at least one other amicus brief in a major intellectual freedom case.

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and has mounted a major test suit of its own. But these are quite recent developments, and are in some ways out of character for librarians.

There are two other possible explanations for the paucity of library litigation. One is the lack of clarity about the nature of the librarian's constitutional claim. When a publisher is enjoined from releasing (or a dealer from selling) a book, or a producer is barred from presenting a play to a community, or a movie is seized from the hands of a distributor, the issues are starkly clear. But when a librarian is deterred from circulating a controversial volume, the source of the pressure may be much harder to pin down. Moreover, there appears to be a substantial amount of self-censorship by librarians fearful of reprimands or reprisals; however reprehensible may be the pressure that cause such behavior, they are beyond challenge in the wake of voluntary compliance or even anticipation.

Such complexities as these led the Court of Appeals for the Second Circuit several years ago to dismiss rather callously a librarian's first amendment claim:

The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.

The very issue, of course, is whether a "curtailment of freedom of speech" may be shown where external pressures distort or thwart professional judgment about circulation. But the fact that the pressures are sometimes internal, even self-generated, and that many other factors may impinge on that process, may deprive the librarian's constitutional claim of the clarity that marks comparable claims in other sectors.

It may also be less than clear how various laws affect the librarian and his functions. In the current test suit brought by the

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13 Moore v. Younger, supra note 5.
14 See Busha, Censorship and the Midwestern Public Librarian, 20 NEWSLETTER ON INTELLECTUAL FREEDOM 103 (1971).
15 Presidents Council, District 25 v. Community School Bd. No. 25, supra note 4, at 293 (footnote omitted).
American Library Association against the California "harmful to minors" statute, the state attorney general has argued that librarians need not fear prosecution because they neither "distribute" nor "exhibit" anything that could be deemed harmful matter. This is curious reasoning in two respects. For one, it is hard to see what professional librarians do if it is not distribution or exhibition of materials. Moreover, the attorney general himself had specifically brought librarians within the ambit of the "harmful matter" law, thus generating a quite reasonable apprehension of liability. Yet the later attempt to confuse the issue by taking the librarian's function out of the statute simply illustrates the difficulty of framing viable test cases.

Finally, one suspects that librarians are understandably reluctant to identify themselves publicly in the way that a test case plaintiff must do. Since most controversial volumes are suspect in the public mind—whatever may be their literary merits—their advocacy may entail certain risks. No one likes to be identified as a purveyor of pornography, although if one makes his living by peddling dirty books to susceptible customers at inflated prices, the risk is at least a calculated one. Such a public posture for a librarian is even less comfortable in the growing numbers of cases in which books are attacked for allegedly biased treatment of issues of sex and race. It is one thing to risk attack by the John Birch Society; it is quite another to run afoul of the NAACP, CORE, NOW or WEAL. The complexity of the pressures underlying book censorship, and the risks of a strong public stand against those pressures, may have deterred many potential plaintiffs from library test cases.

Whatever the cause of the current condition, the clear result has been the underdevelopment of a major branch of the law of free thought and expression. But is such a situation harmful, either to librarians or to those with whom they deal? One might rely simply upon the rapidly evolving first amendment law affecting other professional groups, and hope to reason by analogy in the case of librarians. Yet the needs and problems of librarians are quite different from those of booksellers, publishers, newsdealers, theatrical producers, professors and reporters. The whole process of deciding whether to acquire and how to catalog and circulate a contro-

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16 Moore v. Younger, supra note 5.
17 Id.
versial work—not to mention the complex challenge of new non-print formats—is simply different from the judgments required of professionals in other fields.

These differences alone would call for development of a discrete body of library law. The need to do so is underscored by the increasing specialization of other branches of first amendment law. Fifteen or twenty years ago there were simply free speech and free press cases. Today we have relatively discrete bodies of law protecting the expression of students, teachers, reporters, publishers, broadcasters, prisoners, and even rock musical producers. If the librarian fails to seek comparably specialized redress from the courts, the protection accorded other professionals may be progressively less helpful as it becomes more specialized. Thus it is no longer simply a matter of librarians seeking generalized first amendment protection; the critical need now is to develop a body of law that meets the particular needs of a distinctive group.

Against this background, it is now time to consider the prospects for the development of such a branch of first amendment law. We begin with analogies simply because we have no holdings precisely in point. The necessary starting point is the relationship between the librarian and the patron, for if the prospective reader has a constitutional right to read, it would appear that the librarian has a constitutional right (if not responsibility) to serve that interest. Apart from this derivative interest, it may be that the librarian's own professional activity—selection, classification, shelving and circulation of literary materials—warrants first amendment protection independent of the reader's interests. We will examine both branches of the law.

II. THE RIGHT TO READ AS A SOURCE OF LIBRARIANS' LIBERTIES

One would naturally expect a clear judicial declaration of any human interest as widely accepted as the right to read. Yet no such declaration exists. From time to time the Supreme Court has observed, always in dictum, that the first amendment "embraces the right to distribute literature ... and necessarily protects the right to receive it." Yet the Court has always stopped short of a clear

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holding that the right to read (or to hear) controversial messages enjoys the same constitutional protection as the right to disseminate. The best we can do is to reason by analogy from a number of cases in which the receipt of information is at least implicated, though never expressly protected.

First, there is a group of decisions involving the right to receive publications. The case most closely in point is *Lamont v. Postmaster General.*19 In holding that Congress could not require postal patrons to return address cards in order to receive mail from Communist countries, the Court strongly implied that the first amendment encompassed the receipt of controversial publications. Justices Brennan and Goldberg made the implication explicit in their separate opinion:

> [T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from constitutional abridgments those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . [T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.20

Before reading this passage too broadly, several qualifications are in order. This is only the view of two Justices, one of whom has since left the Court. The Communist publications involved in the *Lamont* case—unlike most objects of library controversy—would have been unavailable anywhere else if the addressee could not get them through the mails. Moreover, the detained publications bore the name of the individual addressees, and might be thought (in contrast to library materials or bookstore displays) the property of that addressee. Finally, *Lamont* does not say (even in the concurring opinions) that there is a right to receive particular materials in the mail, but only that Congress cannot require the postal patron to sign his name and reveal his identity as a condition of receiving any mail from particular countries. The case would be precisely on point if, for example, a public library required all patrons wishing books about homosexuality, or Communism, or explosives, to sign a special card which would then be circulated

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19 381 U.S. 301 (1965).
20 Id. at 308.
throughout the system where anyone might see it. Such a practice would almost certainly be struck down without deciding whether the patron had a right of access to particular materials; a disclosure requirement of this type would be an unconstitutional condition even if there were no clear right to read.

A second group of cases deals with the right to hear a controversial speaker. Several years ago the Supreme Court stopped short of deciding the broad issue in the case involving Belgian Marxist Ernest Mandel, who had been denied a visa and thus could not accept speaking invitations in the United States. The Court dismissed Mandel's claims on the grounds that Congress had plenary power to exclude aliens for virtually any reason, even though citizens might wish to hear him speak.\textsuperscript{31} In the course of the opinion, however, the Court strongly implied a constitutional interest on the part of potential citizen audiences. The majority rejected the government's claim that persons who wished to receive Mandel's message could buy his books, read his articles, or even listen to recordings of his speeches outside the United States. "This argument," replied Mr. Justice Blackmun, "overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning."\textsuperscript{32} Justice Marshall, in dissent, insisted that "the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process."\textsuperscript{33}

Earlier cases involving college and university speaker bans also imply a right to hear. In most cases of the late 1960's and early '70's, the speaker was among the plaintiffs, so the rights of the audience never came into issue.\textsuperscript{34} In one case, however, the speaker had dropped out of the suit. The court nonetheless went on to strike down the speaker ban at the behest of the prospective listeners: "[T]here is respectable authority indicating that the audience, which is, after all, a principal beneficiary of the First Amendment,

\textsuperscript{31} Kleindienst v. Mandel, 408 U.S. 753 (1972).
\textsuperscript{32} Id. at 765.
\textsuperscript{33} Id. at 775.
also has standing to seek relief against illegal censorship. . . . There is a First Amendment right to peacefully assemble to listen to the speaker of one's choice, which may not be impaired by state legislation any more than the right of the speaker may be impaired."

In the speaker ban cases, as with Lamont, several cautions are appropriate. The constitutional barrier has usually been only one of standing, with the disposition of the merits fairly clear if the court could reach them. Moreover, there are obvious differences between the speaker-audience relationship and the reader-author or reader-publisher relationship. Without an audience, there literally is no speech and no way in which the speaker can exercise his undoubted first amendment right. Also, the close concurrence between listener's and speaker's interests suggests a particular urgency here that may not be present in the reader-publisher or reader-writer context, where distinctive interests exist and can be independently recognized by the courts. Thus the analogical value of the speaker cases, though substantial, must be qualified.

Some additional support may come from recent decisions involving broadcast licensing and the "public interest." In sustaining the "personal attack" rules promulgated by the Federal Communications Commission, the Supreme Court identified a strong listener-viewer first amendment interest in the receipt of balanced material: "It is the right of the viewers and listeners, not the right of the broadcasters," observed the unanimous Court, "which is paramount." The Court spoke also of the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" as an interest of a high constitutional order. Several years later, while holding that a particular group had no constitutional right to present its message on the air, the Supreme Court reaffirmed the primacy of the listener-viewer interest in receiving information over the air. Perhaps even closer to the mark, a court of appeals has held that the format of a radio station may not be altered (e.g., from classical or education to "top forty") if such alteration would seriously deprive the com-

27 Id.
community of an important medium.\textsuperscript{79} In such cases the courts' emphasis has rested most specifically and clearly upon the listener interest, even when contrary to the broadcaster's desires.

The informational access claims of two groups have received specific attention by the courts. Nearly thirty years ago the Supreme Court recognized the interests of residents of company towns to receive material from outside sources without broad censorship by the town's owners.\textsuperscript{80} Later the Court upheld similar claims of access to shopping centers—again stressing as much the interests of persons inside who wished to receive information as of persons outside the center wishing to impart information.\textsuperscript{81} While the most recent shopping center case somewhat limits the right of access defined in the earlier decisions,\textsuperscript{82} the basic principle—a right to receive information unaffected by the private status of the enclave—remains unimpaired.

The courts have also begun to deal with access rights of prisoners to receive even controversial materials from outside prison walls. Although the issue has not yet reached the Supreme Court, lower courts have insisted that prison restrictions on reading material be narrowly drawn and may only serve the vital needs of institutional security.\textsuperscript{83} Such decisions, even more clearly than those involving company town residents or shopping center patrons, imply a right to receive information which can be curtailed only by specific and substantial governmental needs.

Also closely related is the Supreme Court's holding that a person may constitutionally possess obscene material in the privacy of his own home. In \textit{Stanley v. Georgia},\textsuperscript{84} the majority found it "now well established that the Constitution protects the right to receive information and ideas"—a right which was "fundamental to our free society."\textsuperscript{85} Of course the case dealt only with possession and not with acquisition; four years later, the Court refused to extend the implications of \textit{Stanley} to cover the dissemination of

\begin{footnotes}
\item[81] \textit{Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc.}, 391 U.S. 308, 321-23 (1968).
\item[84] 394 U.S. 557 (1969).
\item[85] \textit{Id.} at 564.
\end{footnotes}
obscene materials, thus placing the doctrine more on grounds of the privacy of the home than of freedom of expression.\textsuperscript{38}

We have saved until last the one decision that comes closest to recognizing a first amendment right to read. In 1962 the California Supreme Court struck down a ban on Henry Miller's *Tropic of Cancer*.\textsuperscript{37} The case had two plaintiffs—one, a bookseller who wished to sell the book, and the other a reader who wished to buy it. Had the bookseller been in court alone, the decision would doubtless have come out the same way, so there may be a superfluous quality to the reader's role. Yet the government did move to dismiss the reader's complaint, alleging a lack of standing to raise the constitutional issues. The supreme court responded:

Unless [the reader] is able to find a bookseller willing to face the possibility of criminal prosecution and the attendant . . . risks, he will be deprived of his basic constitutional right to read. Thus declaratory relief may offer the only method for vindication of this constitutional right.\textsuperscript{38}

It is true that the reader was unnecessary to the decision. It is also true that the case came up on a demurrer, though there is no indication the court felt its judgment limited by the procedural posture. At least in California, the right to read seems fairly well entrenched in the freedoms of expression and communication.

If analogies do not provide a complete answer to the constitutional question with which we began, logical analysis may give added support. The argument for recognition of a freedom to read seems at least as compelling in the case of a publicly-supported institution like a library as in the case of a company town, a shopping center, a college campus, etc. Clearly the constitutional range of access to information, any more than of expression, cannot be narrower in a public place or facility than in a comparable private entity. The Supreme Court has quite recently stressed, in holding that municipal auditoriums could not bar the controversial musical "Hair," the importance of public function and responsibility in this regard.\textsuperscript{39} It would be anomalous if courts were to hold that the

\textsuperscript{38} United States v. Orito, 413 U.S. 139 (1973).
\textsuperscript{39} Id. at 903, 383 P.2d at 155-56, 31 Cal. Rptr. at 803-04.
reader has less right to receive controversial material from a public library than from a private bookstore or lending library or from a privately-owned radio or television station. Indeed, the first amendment responsibility of a tax supported library system to its patrons would seem at least as broad as the responsibility of a company town to its residents or a broadcast licensee to its listeners. The public library is as integral a part of the public forum as the municipal park or auditorium, and access to its intellectual resources should be unfettered for similar reasons.

Before bringing this discussion to a close, one possibly troublesome question must be considered: Does not the existence of alternative channels in most communities ensure that readers will have access to controversial materials even if the library refuses to carry them or make them available? There are two quite dispositive answers.

The first is that only the public library is free, and thus constitutes the only channel within reach of many people. Few can afford to buy all the books they want to read, or rent them from a lending library—even if the range of selection were as broad in the private sector. For many people of limited means, the public library is the only source even for daily newspapers and weekly magazines, and even more clearly for such costly items as hardcover books. Thus the availability of private sector alternatives is constitutionally defective because, for many citizens, it is illusory.

There is a second and better answer. The public library has certain responsibilities simply because it is public. In the recent “Hair” case, the City of Chattanooga argued that it should not be required to open its auditorium to an abhorrent musical because there were plenty of other facilities in the community. Even if private theaters would welcome a chance to present “Hair” in Chattanooga, that would be constitutionally irrelevant: “‘[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.’”

What goes for rock musicals must apply with even greater force to libraries: the existence of private outlets (quite apart from the cost factor) seems constitutionally immaterial to the right of access to information.

40 Id. at 556, quoting Schneider v. State, 308 U.S. 147, 163 (1939).
To this point we have talked only of the right to receive materials. The librarian's rights, of course, are derivative or corollary. The author, printer, and publisher need not invoke the reader's rights because they have personal first amendment rights of dissemination. But the librarian is not directly in the channel of distribution and thus cannot invoke the same kind of interest. Instead, the argument must be that the reader cannot read if there is no material available, and that the librarian is a principal source of such material.

The argument needs to be developed a bit more fully. First, it seems clear that a librarian cannot be required to violate the constitutional rights of readers by withholding materials to which the first amendment ensures them access. The California Supreme Court has held that a social worker may not be compelled to violate the privacy rights of his clients by conducting unannounced predawn raids. In other settings it seems clear that the public employee may not be forced to choose between losing his job and violating the rights of others. The same principle should apply no less to the librarian faced with a threat or demand to abridge a patron's right to read. Quite apart from the broad constitutional principle, there is a practical risk of civil liability for depriving the patron of his rights. Surely, then, the desire to respect the first amendment interests of persons whom he serves should protect the librarian against reprisal. If the right to read enjoys the constitutional status we have suggested it should, the librarian is surely a most appropriate, if indirect, beneficiary.

This constitutional claim is, however, a derivative one. The question remains whether the librarian enjoys personal first amendment rights. Although no court has so held, it would be surprising if the sensitive intellectual work of the librarian could not claim constitutional protection. Yet here again we must reason by analogy.

The most obvious and apposite analogy is to academic freedom. A substantial body of case law now protects freedom of expression and association of professors and researchers. Clearly this freedom encompasses more than simply classroom instruction. Also included are political activity and association off campus, participation in

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labor organizations, writing letters to the local press, and of course academic relationships with students and colleagues. Over the last twenty years or so, the courts have struck down a broad range of invasions of academic freedom that chill free thought and inquiry even though they do not directly stifle discussion in the classroom.  

The relevance of libraries and librarians to academic freedom should be obvious. Professors cannot pursue controversial issues or invite student research on the frontiers of human knowledge unless the university library is free to order and circulate all relevant materials. Indeed, a free and unfettered university library may well be the cornerstone of academic freedom. Thus the college or university librarian is engaged in a pursuit which seems no less deserving of direct first amendment protection, within the academic community, than the teaching and research of the professor.  

The relevance of academic freedom to the public school or community library is less obvious. Yet the public library shares with the university a responsibility for the gathering and transmission of knowledge from one generation to another. Effective participation in the political process requires ready access to the shelves of the library. Censorship of the acquisition and circulation of controversial materials by the public library cannot help but constrict the total intellectual and political environment of the community. If librarians are not free to gather and disseminate a broad range of materials, then the civic life of the community and the vigor of political debate are bound to suffer. Thus the function of the public library—and the need for constitutional protection of that function—relate closely to the mission of the college or university from which academic freedom springs.  

There is still a missing step, however, by which to bring the librarian’s professional activity under the purview of the first amendment. What is needed is a new concept of free expression which would encompass the librarian’s intellectual and creative processes. Such a concept should not be difficult to fashion. In fact, some of the librarian’s functions are “speech” in the narrowest and most traditional sense. Yet it would hardly do to stop there—that is, to tell the librarian that he may order any book he wishes (because that involves “speech” in the technical sense) but that he

43 See generally T. EMERSON, supra note 2, at 593-626.
may not catalog, shelve, or circulate the work since these functions are not traditionally within the first amendment. Rather than parsing the librarian's work in this arcane fashion, we need a much broader concept which will include all the elements vital to the exercise of a librarian's professional judgment and responsibility.

Such an extension of the traditional concept of free expression hardly seems radical or novel. The Supreme Court has already recognized the concept of "symbolic speech"—notably in the case of a student wearing a black armband in protest against the Vietnam war. A lawyer's freedom of expression necessarily involves the solicitation of clients. An architect's "speech" must include drawing blueprints and the designing of buildings, as well as verbal descriptions of these works. For the sculptor and painter, the only meaningful concept of expression includes the tangible artistic work which results from the creative process, even though the only traditional "speech" involved may be the title or the catalog. Most recently the Supreme Court has brought within the protection of the first amendment the performance of a rock musical, whatever might be the Justices' views of the literary merits of the particular work.

In this setting the professional activity of the librarian seems to merit comparable constitutional protection. When the librarian speaks or writes words of his own, the first amendment unmistakably applies, but simply does not go far enough. Most of what the librarian does is to review, select and disseminate the words of others. Yet the preparation of acquisition lists, cataloging and shelving and circulating books all require a measure of judgment and intellectual evaluation comparable to those required of other protected professions. Moreover, the courts have never had difficulty bringing under the first amendment the bookseller, the newsdealer or the movie exhibitor, all of whom disseminate the words and works of others rather than their own. Surely the librarian, who performs a similar function in a noncommercial context, should not enjoy a lower level of constitutional protection.

47 Southeastern Promotions, Ltd. v. Conrad, supra note 39.
III. ASSERTING THE LIBRARIANS' RIGHTS

The current state of affairs is anomalous. We have a plausible basis for a new constitutional right, but no court decisions recognizing it. Librarians ought to be protected, but in fact they are not. The next critical step is to take measures which will bridge the gap between constitutional theory and practical application. What measures might be appropriate?

The first and most obvious step is test litigation. Already underway in the California courts the suit challenging the "harmful to minors" law. The result in the first round was favorable to the librarian-plaintiff's interests but on so narrow and nonconstitutional a ground that they, along with the state, have appealed. The California appellate courts may well render the first clear constitutional decision on the rights and liberties of librarians. Should this case fail to produce a constitutional judgment, then undoubtedly other suits will be brought under the auspices of the American Library Association. Once librarians have begun to assert their legal interests, they are not likely to back away simply because the first suit stops short of the constitutional issue—especially when, as in the California case, the narrow decision is favorable to their position.

Litigation should not be the only approach, however. Much can be done through legislation. Recently representatives of state library associations have become much more active in opposing obscenity and other censorship legislation, and in pressing for protection for librarians. (A number of states have adopted exemptions which either expressly or by implication spare librarians from liability for good faith circulation of obscene materials.) If properly organized, and working together with publishers, authors and distributors groups, librarians could become a far more effective political force for intellectual freedom than they have been to date.

The third approach lies through education. Most citizens know far too little either about the incidence or the risks of censorship, especially as it affects libraries. It is raids on pornographic book stores and seizure of X-rated movies that capture the headlines—not the slow undermining or erosion of a librarian's will or con-

48 Moore v. Younger, supra note 5.
50 E.g., Ohio Rev. Code § 2907.31(C) (1975).
science. Ways must be found to dramatize the plight of the beleaguered librarian in a repressive community. The ALA’s superb News-letter on Intellectual Freedom has begun to do this in a most effective way, but to a circulation list of 3000 (less than 10% of the total ALA membership). The newspapers pay far too little attention to developments affecting libraries. Throughout the Kanawha County, West Virginia school textbook crisis in the Fall and Winter of 1974, little was written about the potential and actual threats to school libraries; all the attention in the press was given to school classrooms, school board meetings, bombings and the like. (Happily the Director of the ALA Office of Intellectual Freedom was asked by the National Education Association to serve, and did serve, as a member of the panel investigating the West Virginia situation.) Much more needs to be done simply to make the public aware both of the dangers of library censorship, and of steps that can be taken to combat such repression.\(^{31}\)

Finally, there is a need for more and better professional education on the subject of library freedom and librarians’ rights. The simple fact is that professionals in the field often do not fight back because they are not fully cognizant of their legal rights. Every university that has both a law school and a library school should offer at least one course on the legal rights of librarians (as well as the more frequently taught legal liabilities and obligations). There should be casebooks and other teaching materials dealing with librarians’ rights, and a host of paper topics for students who wish to pursue the subject in depth. Collaboration between lawyers and library specialists offers a most promising prospect both for teaching and for research. The wonder is that such collaboration has been so limited to date.

IV. CONCLUSION

The constitutional rights and liberties of professional librarians seems to be a constitutional concept in search of a decision. If the California suit does not provide the vehicle for judicial recognition of this vital set of first amendment interests, another case will do so before long. Meanwhile, the risks of repression and censorship—

\(^{31}\)See the account of the American Library Association’s program to defend intellectual freedom, in D. Berninghausen, supra note 7, at 128-38.
the stifling of a major artery of free inquiry and public debate—cannot be minimized simply because adequate precedent is lacking. If the problem exists, and surely it does, the courts will get to it soon enough.