

Law For Librarians

The First Amendment and your Library



Law *for* **Librarians**

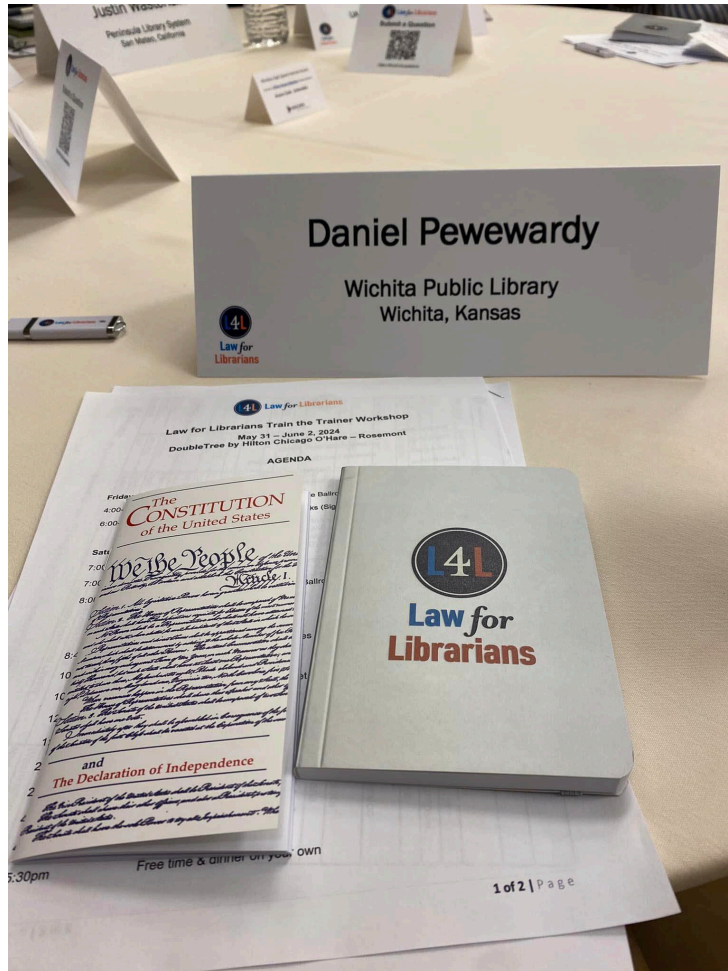
Disclaimers:

I am not an attorney, therefore what I'm sharing here is informational and not legal advice.

I'm here as a representative of the American Law for Librarians Train the Trainer's program. I've been working in public libraries since 2013 and hold a Master's in Library and Information Studies from the University of Oklahoma. While I may reference previous employers during this training, I am not representing them in any capacity.



Law For Librarians



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This Presentation Will Cover...

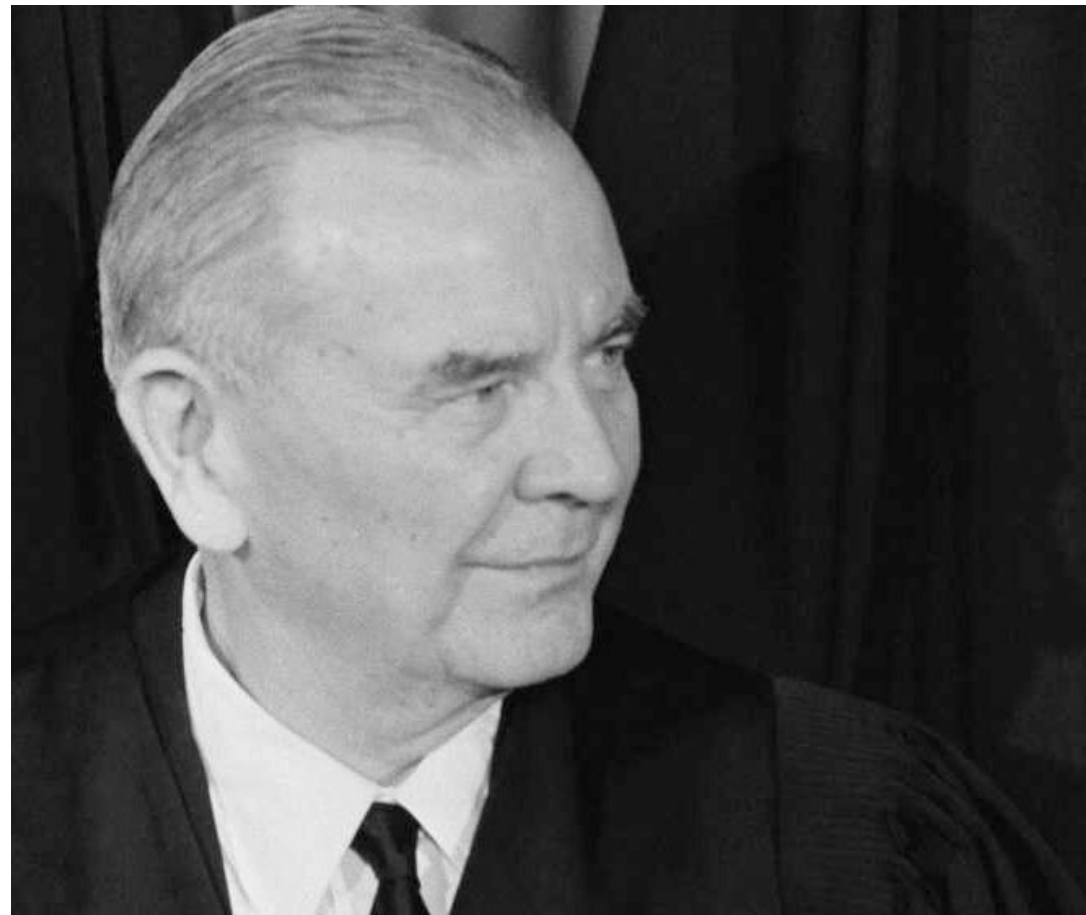
- The First Amendment As it Pertains to Libraries
- The Library As Public Forum
- The First Amendment and Meetings Rooms
- The First Amendment and Materials
- First Amendment Auditors



General First Amendment Principals

“The protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing”.

- Justice William Brennan (1965)



Types of Public Forums

- A **traditional public forum** is a place historically held for public free speech activities, such as a town square or a city sidewalk.
- A **designated public forum** is a place not traditionally used for free speech activities but where the government has created a space for **some** free speech activities for use by a part of the public or all of the public.
- A **non-public forum** is government-owned or controlled property that is not open for free speech activities by the public



Designated Or Limited Public Forum

- A designated public forum is “property that the State has opened for expressive activity by part or all of the public.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).
- A designated public forum is created by “purposeful government action.” *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666 (1998).
- Some courts have held that a “limited public forum” is a sub-category of the designated public forum, open only to certain categories of speech.



The Public Library As a Designated Public Forum

- A public library is not a traditional public forum, but a **designated limited public forum** that is open to the public.
- Library users only have rights consistent with the nature of the public library; that is, as a designated forum for access to information and other resources provided by the library.



Is the Library a Public Forum?

- Libraries are not a public forum for other expressive activities, unless those activities specifically authorized by the library.
- Libraries can establish reasonable rules governing library use, and libraries may regulate non-expressive activity designed to promote safety or efficient access to materials, resources, and library spaces.
 - Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242 (3d Cir. 1992)
<https://law.justia.com/cases/federal/appellate-courts/F2/958/1242/371694/>
 - Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F.3d 585 (6th Cir. 2003)
<https://caselaw.findlaw.com/us-6th-circuit/1370115.html>



Meeting Rooms, Display Cases, and Exhibits

- Meeting rooms and display cases can be closed to public use.
- If made available, then have created a designated public forum and cannot restrict use based on **viewpoint**.
- If restriction based **on content**, must meet strict scrutiny test.
- May have **reasonable, content-neutral time, place and manner restrictions** on use of either meeting rooms or display cases.



First Amendment Establishment Clause/ Free Exercise Clause

- The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”
- The government cannot tell you to practice a certain religion based on the Establishment Clause.
- The government cannot stop you from practicing a certain religion based on the Free Exercise Clause.



Free Speech vs. Establishment Clause

- *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993). The Court held it was unconstitutional for a church group to be denied access to a school facility on the ground that it was planning to show a film with a religious theme.
- The Court rejected the argument that permitting use of the facility by a religious group would violate the Establishment Clause: “The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.” *Id.* at 395.



Religious Groups in the Library

- *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989). Public library refused access to auditorium to a prayer group. The appellate court held the exclusion was unconstitutional.
- The court held that “[t]here is no evidence that CWA’s meeting would disrupt or interfere with the general use of the library” and that “[s]hould the contrary prove to be true, library officials may respond by imposing reasonable time, place or manner restrictions on access to the auditorium, provided any regulations are justified without reference to the content of the regulated speech.” *Id.*



Religious Services- Contra Costa I

- Faith Center Church Evangelistic Ministries, et al. v. Glover, et al., 462 F.3d 1194 (9th Cir. 2006), *reversing* 2005 W.L. 1220947 (N.D. Cal.), *cert. denied*, 2007 WL 1668585. A patron group was excluded from the library meeting room on the ground that it was conducting a “religious service,” which the district court found to be unconstitutional.
- The Ninth Circuit reversed holding that the group had advertised itself as a group holding a **religious service** and thus could be excluded. The Ninth Circuit held that the library cannot prohibit religious groups from using meeting rooms for the following activities: reading, Bible discussions, Bible instruction, praying, singing hymns, sharing testimony and discussing political or social issues.



Unprotected Categories of Speech

- Obscenity
- Harmful to Minors
- Child Pornography
- False Advertising
- Defamation
- True Threats
- Fighting Words



Obscenity



Obscenity is defined as:

- Prurient interest: The average person, using contemporary community standards, would find that the work appeals to a shameful or morbid interest in sex, rather than normal, healthy sexual desires
- Offensive depiction: The work depicts or describes sexual conduct in a patently offensive way
- Lack of value: The work lacks serious literary, artistic, political, or scientific value (**Roth v. United States, 354 U.S. 476 (1957)**)



Obscenity

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

- The materials must meet **all three parts** of the legal test established by the Supreme Court to be found obscene by a **court of law**:
 - Whether the work depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law,
 - Whether the average person, **applying contemporary community standards** would find the work **as a whole** appeals to the *prurient interest*, and
 - Whether the work, **taken as a whole**, *lacks serious literary, artistic, political or scientific value*.



The “Serious Value” Test

- Only a **court** – with a finding by either a judge or jury -- can determine that material is harmful to minors after examining the material “**as a whole.**”
- The Supreme Court held that the **literary, artistic, political, and scientific value of material** does not vary from community to community. If a “reasonable person“ would conclude that the work has “value” it will be protected expression under the First Amendment. *Pope v. Illinois*, 481 U.S. 497 (1987).



21-6401. Promotion Obscenity ; Promoting Obscenity to Minors:

(1) Any material or performance is "obscene" if:

- (A) The average person applying contemporary community standards would find that the material or performance, taken as a whole, appeals to the prurient interest;
- (B) the average person applying contemporary community standards would find that the material or performance has patently offensive representations or descriptions of:
 - (i) Ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy; or
 - (ii) masturbation, excretory functions, sadomasochistic abuse or lewd exhibition of the genitals; and
- (C) taken as a whole, a reasonable person would find that the material or performance lacks serious literary, educational, artistic, political or scientific value;



21-6401. Promotion Obscenity ; Promoting Obscenity to Minors:

It shall be a defense to a prosecution for promoting obscenity and promoting obscenity to minors that the:

- (1) Persons to whom the allegedly obscene material or obscene device was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational or governmental justification for possessing or viewing the same;
- (2) defendant is an officer, director, trustee or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body; or
- (3) allegedly obscene material or obscene device was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material or device was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incidental to an approved course or program of instruction at such school.
- (h) Notwithstanding the provisions of K.S.A. 2012 Supp. 21-5204, and amendments thereto, to the contrary, it shall be an affirmative defense to any prosecution for promoting obscenity to minors that:
 - (1) The defendant had reasonable cause to believe that the minor involved was 18 years old or over, and such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 18 years old or more; or
 - (2) an exhibition in a state of nudity is for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.



21-6402. Promotion to minors of material harmful to minors:

That portion of the material that was actually exposed to the view of minors, has the following characteristics:

- (A) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;
- (B) the average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and
- (C) a reasonable person would find that the material or performance lacks serious literary, scientific, educational, artistic or political value for minors;



Public Library Censorship Test

Once it is established that there is a right to receive information and that the library is a designated public forum, governmental entity must establish that the removal of material based on content meets strict scrutiny.

Strict scrutiny test:

1. compelling interest;
2. narrowly tailored to achieve compelling interest; and
3. no less restrictive alternative.

If the material is not obscene, harmful to minors, or child pornography, what other compelling interest could the governmental entity have to restrict material based on its content?



Harmful to Minors

- Ginsberg v. New York, 390 U.S. 629 (1968)
- The "harmful to minors" or "obscene as to minors" test parallels the obscenity test set forth in Miller, but the considerations are in the context of offensiveness and serious value for minors.
- The material must be viewed from the perspective of the oldest minor. American Booksellers Assn. v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989) and American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990).



Child Pornography

- New York v. Ferber, 458 U.S. 747 (1982) (visual depictions of actual children engaged in actual sexual activity).
- Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (Ferber does not extend to “virtual” depictions).



Book Removal in Public Schools:

- Board of Education v. Pico, 457 U.S. 853 (1982). The Court considered whether a local school board violated the Constitution by removing books from a school library and held that “[i]f petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioner’s decision, then petitioners have exercised their discretion in violation of the Constitution.” *Id.* at 871 (emphasis added)



When is a book's removal unconstitutional?

- Case v. Unified School Dist., 908 F. Supp. 864 (D. Kan. 1995). A high school in Olathe, Kansas removed *Annie On My Mind* from the school library even though it had been in the general collection of the library since the early 1980's. The school board argued that the book was educationally unsuitable.
- The district court held that the school board's action was unconstitutional because the "substantial motivation" in their removal decision was "their own disagreement with the ideas expressed in the book."
- The district court also held that the board's failure to consider other less restrictive alternatives to complete removal and their disregard of their own established review policies were further evidence of improper motivation. *Id.* at 874-876.



Factual Inaccuracy

- *ACLU v. Miami-Dade School Board*, 557 F.3d 1177 (11th Cir. 2009) (appellate court upheld removal of book from school library based on its “factual inaccuracy”).
- Factors to consider regarding claims of “factual accuracy” -- particularly in the context of a public library.



School Library Removal Test

- School boards have broad discretion over curriculum issues, but less discretion over the contents of a school library collection or extra curricular speech.
- • **Unconstitutional**: removal of material because the school board disagrees with the content.
- • **Constitutional**: material is educationally unsuitable or pervasively vulgar.
- • **How proven**: educational suitability will often require expert testimony; disagreement with content is a fact question.



Book Removal Public Libraries

- *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) (court held that removal of *Heather Has Two Mommies* and *Daddy's Roommate* from children's section to adult section was unconstitutional).
- *Leila Green, et al. v. Llano County, et al.*, Case No. 1:22-CV-424-RP (W.D. Tex. 2023)(on appeal to the 5th Cir. Court of Appeals) (court held that removal of books based on viewpoint was unconstitutional).
- *Fayetteville Public Library v. Crawford County*, Case No. 23-5086, 2023 WL 4845636 (W.D. Ark. July 29, 2023) (challenge procedure that would allow removal of books based on "appropriateness" to section "inaccessible to minors" likely unconstitutional and preliminary injunction granted).



Public Library Scrutiny Test

- Once it is established that there is a right to receive information and that the library is a designated public forum, governmental entity must establish that the removal of material based on content meets strict scrutiny.
- **Strict scrutiny test:** (1) compelling interest; (2) narrowly tailored to achieve compelling interest; and (3) no less restrictive alternative.
- If the material is not obscene, harmful to minors, or child pornography, what other compelling interest could the governmental entity have to restrict material based on its content?



Threats of Prosecution

- In addition to calls for censorship of materials, there have been requests to prosecute library staff for books in their collections.
- To date, no jurisdiction has taken the step of prosecuting library staff and law enforcement officials have articulated the reasons why such prosecutions are not supported by law.



Campbell County, Wyoming

- Criminal complaint was filed alleging that Campbell County public librarians were engaged in criminal activity by making certain books available to young library users
- The **claim was dismissed** as the special prosecutor determined that the books in question were not obscene and no evidence existed to support any other criminal charges.
- “The books in question do not, when applying contemporary community standards, criminally describe sexual conduct in a patently offensive manner and they may have scientific value. Accordingly, since these materials are not ‘obscene’ as defined by Wyoming Law, the State of Wyoming could not commence criminal charges. ”

Virginia Beach, VA

- A Civil petition was filed in Virginia Beach court asking the court to declare that the books *Gender Queer* and *A Court of Mist and Fury* are obscene for minors and should be removed from libraries and schools pursuant to a Virginia statute allowing courts to declare that a books is obscene.
- The Petition was **dismissed** by the court and the **statute found unconstitutional**.
- “The Petitions do not allege facts sufficient to support a finding, under the terms of Virginia Code §18.2-384, that the Books are obscene...The Constitutions of the United States and the Commonwealth of Virginia operate as a restraint on the pleading of a claim of obscenity as to adults and as to materials that is inappropriate for distribution for minors, and the Petitions fail to meet the requirements of the governing constitutional rules.”



What is a First Amendment Auditor?

- Someone who visits government buildings and records their interactions with public servants.
- YouTube and social media personalities
- Mobile/traveling
- Knowledge of the Bill of Rights
- Some consider themselves to be:
 - Activists/Activism journalists
 - Sovereign citizens



First Amendment Auditors

- Does a person have an absolute right to film in any public space?
- Can public libraries prohibit or regulate photography or video recording in their public spaces?
 - *Andrew B. Sheets v. City of Punta Gorda, Florida* (M.D. Florida, November 23, 2019)
<https://casetext.com/case/sheets-v-city-of-punta-gorda>
 - *Jordan Kushner v., Troy Buhta, et al.*, Case No. 16-cv-2646 (SRN/SER), April 18, 2018)
<https://casetext.com/case/kushner-v-buhta-1>



Library Access and Patron Behavior

- Libraries are not a public forum for other expressive activities, unless those activities specifically authorized by the library.
- Libraries can establish reasonable rules governing library use, and libraries may regulate non-expressive activity designed to promote safety or efficient access to materials, resources, and library spaces.
 - Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242 (3d Cir. 1992)
<https://law.justia.com/cases/federal/appellate-courts/F2/958/1242/371694/>
 - Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F.3d 585 (6th Cir. 2003)
<https://caselaw.findlaw.com/us-6th-circuit/1370115.html>



Filming and Photography Policy (WichitaLibrary.org)

- Filming and photography are allowed as described below only to the extent that it does not interfere with the delivery of library services and is consistent with the Library's mission. All parties involved in filming and photography are expected to follow the [Customer Code of Conduct](#) (CUS-001).
- For the safety and privacy of customers using the library, the person(s) filming or taking photos inside the library have sole responsibility for obtaining all necessary releases and permissions from persons who are filmed or photographed.
- The Library undertakes no responsibility for obtaining these releases.
- Failure to obtain releases and permissions from persons being filmed or photographed will be deemed unacceptable behavior regarding the Library's Customer Code of Conduct.
- Library staff may temporarily or permanently dismiss any photo session that goes against the Customer Code of Conduct, Library policies or appears to compromise public safety or security.
- The Library is a limited, or designated public forum, and reasonable time, place and manner regulations are permissible.



Say YAAAS to Reading!

Juju Noir



Divinity Masters



Starla Nyte



TUES | SEPT. 25 | 6:30PM
@ ADVANCED LEARNING LIBRARY



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LOCAL

Wichita library's drag queen event was months ago, but the debate rages on

BY SUZANNE PEREZ TOBIAS

UPDATED DECEMBER 14, 2018 4:29 PM

 NBC NEWS

WATCH LIVE  

OUT POP CULTURE

From Brooklyn to Wichita, public libraries create LGBTQ-affirming spaces

Drag queens reading children's books and puppets talking about gender identity are examples of the unique programming libraries are using to foster acceptance.

LOCAL

Program backlash leads to policy consideration at Wichita Public Library

by: [Krystle Sherrell](#)

Posted: Dec 18, 2018 / 12:41 AM CST

Updated: Dec 18, 2018 / 12:41 AM CST



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Creating and Enforcing Written Policies

- Consult legal counsel.
- Review state and local laws.
- Review American Library Association policies.
- Use your Library Mission Statement.
- Use objective and defined language.
- Provide an appeal process.
- Provide notice of the policies.
- Conduct staff training.
- Apply and enforce policies consistently.

Resources:

- [American Library Association \(ALA\) - Office for Intellectual Freedom](#)
- [American Library Association \(ALA\) - Library Bill of Rights](#)
- [ACLU of Kansas](#)
- [Kansas Legal Services](#)

