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"Quiet, Please!" Doesn't Apply!
Legal Issues Confronting Public Libraries in a Digital Age

Public Libraries, the First Amendment & the Digital Age

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I. Introduction. Having grown up as a fringe member of the Baby Boomer generation, this author's experience with public libraries likely mirrors that of many readers. The library was a place to borrow books, do research for school papers, and occasionally to "hang out." We had the luxury of a school library, and a block away we had a small village library tucked into a converted store front. Even better, a short car- or bus-ride away, we had access to a large municipal public library housed in an ornate, Victorian structure with (what then seemed like) "vast" resources. In what appears to have been a simpler age, our "Newman Club" (religious instruction for those not attending parochial school) met during the early evening at the village library. The thought of having an "adult" reading section (not in the sense of being age-related, but rather in terms of risqué content) was not even on the horizon. A computer, if one had existed then, would not have fit within the physical confines of the library.

While today's public library serves some of these same functions, its purposes, and the scope of information that is or may be available through the library, are far different, as are some of the legal issues confronting those charged with overseeing a library's operation. In April 2009, I attended a symposium sponsored by the Information Society Project at the Yale Law School. There I became acquainted with the term Library 2.0, shorthand for the second iteration of the public library – a resource in the digital age.

This "new" library was characterized by one symposium presenter as involving concepts such as:

- Exploding Universe of Works
- Supernova of Activity
- Ecology of Diversity
- Gatekeeper for Distribution
- Appeaser of User Needs
- Apologist for Chaos

However one may choose to describe the public library in the 21st century, it retains many of the basic features of the old Carnegie Library, enhanced by the socializing activities of the mid-20th century, and now focused on providing access to a host of new technologies and information available at the "click of a button."

As legal advisors seeking to guide public libraries into this new frontier of knowledge, it is essential to recall basic principles that have guided libraries in the past. To perform these tasks competently today requires an understanding of how the use of technology and digital resources

(what might be called "cyber-information") has escalated the need for an informed and somewhat revised approach to legal analysis.

Accordingly, this paper and segment of this IMLA Annual Conference Work Session is devoted to a review of some fundamental aspects of First Amendment analysis in the context of the public library and then to a review as to how these factors apply to cyber-information. Naturally, controls and limits on public libraries (which are instrumentalities of state government) arise under both state and federal constitutional applications and by requirements to comply with any number of state and federal statutes.[1] Considerations of state constitutional provisions and state and federal statutes and administrative rules, while important, necessarily are beyond the scope of this Work Session. Instead, this segment of the Work Session and these materials will focus on the First Amendment and its protections for speech, with sidelong glances at religion and assembly.

Accordingly, this paper first centers on traditional analysis of First Amendment issues arising with respect to:

- Access to the public library and use of its facilities;
- Limiting patron access to materials and resources (including access by children);
- Limiting materials, resources, and services that a library may wish to provide.

The paper and this segment will close by attempting to provide a frame of reference for applying "established" First Amendment legal principles to public libraries in a digital age.

II. First Amendment & Libraries: A Primer. At the risk of oversimplification and with apologies to those readers experienced in First Amendment law, a primer on First Amendment principles may be of value. It is hoped that these materials also may serve as a review for the more experienced reader. The following bullet points include supporting material and citations when deemed appropriate.

- The First Amendment applies to policies, rules and guidelines that affect access to and usage of a public library by virtue of the library being an instrumentality of the state to which the First Amendment applies under the Fourteenth Amendment.
- The First Amendment is the minimum protection accorded to citizens. States and political subdivisions, through their own constitutions, laws, ordinances, policies, and practices, may protect First Amendment rights to a greater degree, *State v. Henry*, 732 P.2d 9 (1987).
- The First Amendment is designed to protect the right to speak on matters of public concern, to think what one wishes, to convey thoughts to others, and to receive information from others. It extends to a broad array of expression. Regulation that restricts or prohibits speech based on the viewpoint expressed is judged under the strict scrutiny standard. (See Part IV (A), *infra*).
- The line between informing and entertaining is too elusive to separate protected speech from unprotected speech merely on the ground that speech may not be political or of

[1] Federal constitutional provisions are the "protective floor" below which policies and practices may not fall. State constitutions may impose greater restrictions and limitations upon libraries, librarians, and their governing boards. Examples of state and federal laws affecting library access and use include compliance with the Americans with Disabilities Act, equal access, and accommodation requirements for public facilities.

grave import. *Palko v. Connecticut*, 302 U.S. 319 (1937); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Winters v. New York*, 333 U.S. 507 (1948); *Island Trees Union Free School District No. 26 v. Pico*, 475 U.S. 853 (1982); *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 205 (1975).

- ✦ The First Amendment also protects commercial speech and rights of children to speak and hear speech, though to some lesser degree than "pure" speech, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975).
- ✦ Not all speech is protected; examples include obscenity (not pornography), "fighting" words, and libel, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *New York Times v. Sullivan, supra.* Conduct may be differentiated from speech, but expressive conduct is a form of protected speech.
- ✦ The expression of ideas may not be prohibited merely because the ideas themselves are offensive to some listeners, *Street v. New York*, 394 U.S. 576 (1969).
- ✦ Even protected "free speech" is not absolute, as government may regulate it in furtherance of a compelling interest and if the regulation is the least restrictive means to further that interest, *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989).
- ✦ First Amendment jurisprudence also scrutinizes speech regulation under "forum analysis," *Perry Educational Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983). (See Part III (B), *infra*).
- ✦ Speech may be limited by "time, place, and manner" regulations that are viewpoint-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication, *U.S. v. Grace*, 461 U.S. 171 (1983).[2] (See Part III (C), *infra).*
- ✦ The First Amendment also subjects governmental regulation to analysis as being overbroad or vague, *NAACP v. Button*, 371 U.S. 415 (1963); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). (See Part III (D), *infra*).
- ✦ Governmental policies must remain neutral in matters of "religious theory, doctrine, and practice" but also must neither endorse religion nor prohibit its free exercise, *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). (See Part IV (B), *infra*).
- ✦ Obscene speech may be easier to see or hear than to define, though legal standards do exist, *Miller v. California*, 413 U.S. 15 (1973). Though pornography is not per se exempt from protection, child pornography occupies a special niche that is subject to regulation and even prohibition in the interest of protecting children from abuse, *New York v. Thurber*, 458 U.S. 747 (1982). See Part. IV (C), *infra*).

With particular focus on public libraries, some additional general factors include:

- ✓ The public library is a place "dedicated to quiet, to knowledge and to beauty" but, at the same time, it is a "unique sanctuary of the widest possible spectrum of ideas," *Brown v. Louisiana*, 383 U.S. 131 (1966); *In the Matter of Quad/Graphics, Inc. v. Southern Adirondack Library System*, 664 N.Y.S.2d 225 (Super. Ct. Saratoga Cty. 1997).

[2] Note the difference between the strict scrutiny standard of least restrictive means and the time, place and manner standard of leaving open other adequate means of communication.

- ✓ Though use of library or other public facilities for religious services may be an open question, use of public facilities that are open for meetings of non-religious groups may not be denied to a religious group seeking use on reasonably similar terms, *Good News Club v. Milford Central School,* 533 U.S. 98 (2001).
- ✓ Libraries are also public workplaces, so that considerations of sexual and other prohibited harassment apply, including harassment of employees by patrons, *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp.2d 552 (E.D. Va. 1998).

With regard to digital communication (cyber-information), the jury is still out on certain aspects, but some direction is already evident:

- ❋ The Internet is not akin to broadcasting, but is a form of speech highly protected under the First Amendment, *Reno v. ACLU*, 521 U.S. 844 (1997).
- ❋ Though First Amendment considerations must be factored into library policies and practices, each medium of communication must be assessed for these purposes on its own. Blanket application of First Amendment precedent from other applications may not be appropriate in all circumstances, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).
- ❋ A public library need not offer Internet access, but once it chooses to do so, First Amendment considerations arise. (See part V, *infra*.)
- ❋ Libraries that open electronic means of communication, such as chat rooms or community electronic bulletin boards, also must consider requirements to comply with First Amendment protections. (See part V, *infra*.)

III. Access and Forum Analysis: May Libraries Limit the Public's Use of its Property and Facilities? How About Their Services? In true lawyer fashion, the answer is "Yes, but it depends…." The "depends" aspect of the answer relates to the nature of the limit to be imposed and the nature of the portion of the library or the facility or services that an individual or the public may seek to use. As noted in the introduction, the analysis set forth in this paper is restricted to First Amendment jurisprudence and, therefore, does not address issues such as ADA compliance or public accommodation requirements.

A threshold concern in the area of public use of library property relates to the public's right to engage in protected speech on public property or while using public facilities or services. A preliminary and essential first step is to determine if the speech (or expressive conduct, including, for example, assembly and meetings by political or religious groups) is encompassed within First Amendment protection as speech or expressive conduct. The second level of analysis involves "forum analysis." Finally, the scrutiny brought to bear on governmental control on speech is at its highest when the control (including a time, place, and manner control) is "content based" and its applicability is focused on the viewpoint expressed in that content.

(A) Protected Rights. Not all expressive conduct is insulated by the First Amendment from government control or prohibition. The perimeter of protected speech grew markedly in the 20th century to extend to commercial speech, speech by minors, speech by public employees, sexually expressive speech, and religious views. Certainly, at least some of these subjects were intended to be encompassed within the penumbra of First Amendment protection, even by the "founding

fathers." Suffice it to say that policy makers of today, and those who advise these policy makers (e.g., public entity lawyers), need, at least, to attempt to delineate some point at which expression is excluded from protected status. In some cases, that decision will best be supportable by analysis of the effects of speech rather than the content of the speech itself. For example, regulating the hours during which meetings may occur based on the hours when a library is open likely would fall within the category of permissible time, place, and manner controls. Barring a meeting or limiting the hours during which it might be held because it supports a particular view on a public issue, particularly while permitting meetings of opponents, steps into the realm of content-based controls which can be justified only under strict-scrutiny standards.

The realm of protected speech, though, is not limited to political discourse on weighty matters. A major difficulty in relying on characterization of speech or conduct as being "unprotected" lies in both making the determination of its classification and in the procedure required to make (or contest) that determination. Censorship prior to speaking (or in First Amendment parlance, "prior restraint") is viewed with disfavor. To minimize successful challenges to government regulation that bars speech from occurring, appropriate procedures and policies might:

- Set reasonably certain standards against which speech is measured,
- Minimize the discretion of decision-makers (e.g., librarians and library trustees) to unilaterally censor speech, and
- Provide prompt review both internally and in the form of a mechanism to seek expedited judicial review.

Another measure that may serve to minimize risk of improper action is to impose restrictions on speech instead of outright prohibitions.[3]

One category requiring attention is communication described as "governmental speech" as opposed to speech by members of the public. Thus, "official" means of communication, such as newsletters and (in cyber-talk) email "blasts," may not be subject to First Amendment obligations if they truly constitute mechanisms to convey government information and only government information. When the message or medium expands to include private or quasi-governmental groups (e.g., Friends of the Library, the PTA, or the Fire Department Auxiliary), government communications are more likely to be treated as public forums or designated public forums instead of non-public forums, as reviewed in the next set of materials. In the context of the library, communications may include lobby posters, community events, displays, and electronic communications such as chat rooms and "listservs."

Libraries also must recognize that public employees now possess conditional rights to express opinions on matters of public concern.[4] Policies and practices that purport to limit public employee participation in speech about public issues are of particular concern. Similarly, speech vehicles that are open to the public (e.g.,. chat rooms) but from which public employees are barred raise similar cautionary flags.

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[3] For example, instead of blocking access to "adult" sites on all library computers, a library might install video screens or use an appropriate mechanism for allowing access by those permitted to do so under library policies. But, as noted below, blanket prohibitions against all minors accessing adult sites may be problematic. Though still unresolved at the highest judicial levels, objections also may arise when individuals must affirmatively seek permission to access restricted sites, as some view such actions as being overly restrictive and subject to discretion.

[4] *Pickering v. Board of Education,* 391 U.S. 563 (1968) and its progeny and *Garcetti v. Ceballos,* 547 U.S. 410 (2006).

(B) Forum Analysis. Once a determination is made as to whether speech falls under the protection of the First Amendment, a second level of analysis requires a review of the avenue through which the speech or conduct may occur. This review is called forum analysis with differing standards applicable based on whether the communication occurs in a public, limited, designated, or non-public forum. In the past, this analysis focused on physical locations (e.g., streets, parks, sidewalks, meeting rooms) or forms of communication (e.g., newsletters, flyers sent from schools).

Today, the media by which government and the public communicate now include the Internet, "chat rooms," web sites, blogs, social networking, and an array of other forms. The First Amendment, though, is not restricted to older forums in which traditional communication occurred, but now may apply to the exchange and availability of cyber-information.

Public forums include traditional public forums and designated forums. Public forum analysis also applies to aspects of a limited forum. Though somewhat of an incongruity in terms, certain aspects of the use of a non-public forum may receive First Amendment protection. Traditional public forums in the setting of a library have included portions of the library building and, to varying degrees, its grounds and surrounding sidewalks and other common areas. Public areas within the library that may constitute a public forum have included the lobby, meeting rooms, tables that display brochures and posters, and display cases. If a library permits no public display or use of these interior areas for conveying or exchanging information, they may not rise to the level of a public, designated or limited forum. Also, if these interior spaces are used solely for "government speech" (s*upra*), the First Amendment generally would not apply to control their use. Once the type of forum is determined, the standards governing controls over the forum apply and appropriate policies and practices may be adopted for those avenues of speech and expressive conduct.

The definitions of, and the requirements pertaining to, each type of forum are as follows:

Traditional Public Forum. A place that by tradition or by governmental action has been open to public assembly and debate is called a public forum. Traditional public forums include public streets, sidewalks, and parks. A traditional public forum exists regardless of governmental intent to create or not create it. Governmental action, intended or not, also may create a public forum, usually referred to as a designated forum (*infra*). To regulate protected First Amendment speech in a traditional public forum, a government may adopt reasonable time, place, and manner restrictions. Other controls (ranging from censorship to prohibition and presumably based to some degree on content of the speech) must pass strict scrutiny. That is, they must serve a compelling governmental interest and must be the least restrictive means to further that articulated compelling interest.[5]

Designated Public Forum. A designated forum is usually intentionally created by a public entity that dedicates or allows property (in a broad sense) to be used for expressive conduct. Though usually created intentionally, designated forums may be created inadvertently by, e.g., casual oversight of a limited forum. Once so designated, the forum is subject to the same standards as a

[5] *Sable Communications v. F.C.C., supra.*

traditional public forum in relation to protected speech[6]. Thus, reasonable time, place, and manner regulations may be adopted, but more restrictive controls and those that are content-based must meet the compelling interest standard.

Non-public Forum. A forum that is neither a traditional public forum nor a designated public forum may be a non-public forum in which the government can restrict access as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's point of view. Examples may include a local government's internal computer and email system. Any simplistic notion of a non-public forum as being totally without protection for users can be dispelled quickly. Consider, for example, a public employer that permits use of internal email or electronic bulletin boards for "acceptable" use , e.g., supportive of incumbents but unacceptable for those supporting other candidates. Stated another way, in a nonpublic forum, a government might properly[7] bar all speech on a particular issue even though this, in effect, constitutes content-based regulation. However, if the regulation bars only statements that take one side of an issue, then it is viewpoint-based and must pass the strict scrutiny test to be valid. As mentioned previously, another factor involved in non-public forum analysis is the now defined right of public employees to engage in protected speech on public issues.

Limited Public Forum. Although the terms "designated forum" and "limited forum" occasionally have been used interchangeably, a better practice distinguishes a "limited forum" from a "designated forum." In the limited forum, less stringent standards may be applied in regulating speech so long as the control does not tread into the territory of a content-based control, and so long as the regulations are reasonable in light of the purpose they seek to serve. Thus, a library might create a literary discussion group which it could limit to discussion of works on a reading list and would not be required to open the group to someone who wanted to discuss pending proposals for health insurance reform. That is not to say that total discretion would apply to limited forums as, for example, decisions to limit actions or speech within the forum's purposes premised upon content still face strict scrutiny.

One of the justifications that libraries used in the past for limiting availability of resources and access to resources may face increased scrutiny in the digital era. That justification was the need to make selections premised not upon the content of resources but, instead, on the library's very limited budget for acquiring books, videos, and other media. With today's increased access to "free" or low-cost resources, that justification may be limited and a library's exclusionary decisions may be subject to review.

(C) Time, Place and Manner Controls. To some degree in all forums, governments may establish time, place, and manner controls on the exercise of speech, including protected speech. Without some ability to exercise these controls, unfettered exercise of speech rights could rise to chaos with the result that speech would be little more than a constant rumble of undistinguishable and unintelligible noise. It should not be surprising that a government could regulate the time and place in which a parade might occur to prevent undue interference with

[6] *Perry Educ. Ass'n v. Perry Local Educators' Association*, *supra*.
[7] This assumes the control could be characterized as otherwise reasonable in the context and under the circumstances.

traffic or to limit the manner in which an assembly occurs to prevent disruption to the peace and quiet of hospital, school zone, or tranquil residential neighborhood.

Unless the time, place and manner controls are applied using content-based criteria, they are subjected to a lower standard of review under which they, if content-neutral, will be upheld when they (a) are narrowly tailored to serve a significant (not necessarily compelling) governmental interest and (b) allow ample other means of communication.[8] In particular, and in contrast to strict scrutiny, the control need not be the least restrictive but must, instead, allow for expression at adequate and reasonable other times and places and in other reasonable manners.

Hand-in-hand with this limitation is the requirement that administrators for these controls cannot be invested with unbridled discretion as to how they implement the controls. While some reasonable elements of discretion do remain for administrators, that discretion must scrupulously avoid decisions premised upon factors such as popularity or political bent of the speakers (or the targets of the speech). One test as to when discretion crosses the line is formulated as being "a close enough nexus to expression or conduct associated with expression, to pose a real and substantial threat of the identified censorship risks."[9]

Another important justification for time, place, and manner controls is to address "secondary" effects of speech. Those familiar with rules governing adult entertainment regulation will recognize the complexities associated with secondary effects justification. Suffice it to say at this point that pretext involving secondary effects will prove to be risky as the basis upon which to rest a time, place, and manner control.

(D) Vagueness and Overbreadth. As might be expected when venturing into the realm of speech and expressive conduct, First Amendment review is particularly concerned with the manner in which the law delineates permitted and prohibited conduct. Twin doctrines in this arena relate to clarity of the regulation – a.k.a., vagueness, and too broad a regulatory swath, i.e., overbreadth.

The former has as its base the recognition that First Amendment freedoms are "delicate and vulnerable"[10] as well as being held in high esteem by tradition and the Constitution. The touchstone of the vagueness doctrine is that a law or regulation seeking to exercise authority over speech or expressive conduct must "provide explicit standards for those who apply them" and must apprise individuals of the permissible scope of conduct regulated.[11]

IV. Content (Viewpoint) - Based Controls.

(A) In General. Because of the nature of the rights protected by the First Amendment, governments face highest scrutiny when controls, regulations, or other limits on speech and expressive conduct are triggered by the viewpoint of the content of the speech or expression. As noted above, that scrutiny is known as strict scrutiny and requires that the government

[8] *U.S. v. Grace*, *supra*.
[9] *Lakewood v. Plain Dealer*, 486 U.S. 750 (1988).
[10] *NAACP v. Button*, 371 U.S. 415 (1963).
[11] See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

demonstrate a compelling interest supporting the control. In addition, the control, if justified, must be the least restrictive means that will further that compelling interest.[12]

So-called "content-neutral" regulation, embodied in the concept of proper time, place, and manner controls, applies to all speech regardless of the subject matter or viewpoint expressed. A regulation that is adopted because the government disagrees with the message conveyed is not content-neutral.[13]

In the context of a public library, the content-based/content-neutral distinction can arise in numerous contexts. As free speech applies not only to the ability to convey messages but also to the ability to receive messages, one threshold consideration lies in the determination of what resources a library will acquire for the use of its patrons. These decisions are made, at least in part, on the basis of costs of acquiring resources. As libraries have seemingly always had limited budgets, decisions on books, periodical subscriptions, audio/visual materials and other media were premised largely upon balancing available appropriations with patron demands and wishes. Even so, librarians and library governing boards have been required by First Amendment considerations to establish, somehow, neutral criteria for the selection and removal of materials.[14] Of course, purely content-neutral selection is an impossible task. Instead, the selection process must be free from a political or ideological basis and may not rest on agreement or disagreement with the point of view expressed.

However, it can be argued[15] the library's traditional resources are not a public or even designated public forum in the traditional sense, but instead are a limited forum. As such, the library's written resources perhaps may be selected with a somewhat freer hand, considering, for example, patron preferences. As the library's resources have expanded into cyber-information, the availability of materials has expanded, to some degree, without a corresponding increase in costs. Of course, the "hardware" to access cyber-information is more expensive as computers cost more than book shelves (though at some point a library may need to expand physically to add more resources, thus upping the "brick and mortar" hardware cost.) Once the computers are installed, though, the universe of available resources increases exponentially. Under this scenario, the decision to allow, limit, or prohibit access to information is more likely to arise from considerations of content and message than costs. Accordingly, a library's governing board and administration must be aware of the potential for problems arising from limiting access in a manner that substantially limits the ability of its patrons to receive information premised on the message conveyed in that information. To the extent possible, then, libraries should seek to establish neutral policies for acquisition and removal of materials (and communications services) that are not based on ideological or political views and particularly not on agreement or

[12] *Sable Communications v. F.C.C., supra.*
[13] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
[14] Could it really be stated, for example, that a decision to purchase a book on how to build a log cabin instead of a treatise on the history of a remote, unknown pacific island has nothing to do with content. Contrast that decision with one that chooses to subscribe to a newsletter from one side of the political spectrum but not another (when costs are comparable). This distinction is one example of viewpoint discrimination proscribed by the First Amendment.
[15] As it successfully was in the Third Circuit, *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3rd Cir. 1992) that a library's circulating collection is not a traditional public forum, but is instead a limited forum for "communication of the written word."

disagreement with such views. One guidepost, mentioned in the Third Circuit opinion, is to recognize the library's role in the community cannot serve every interest and wish and that, consistent with its role as a limited forum, its primary purpose is to facilitate access to communication of the written word (keeping in mind that the written word now is communicated by different media).

As discussed under forum analysis, libraries, today, serve a variety of communicative, assembly, and other expressive roles in addition to what might be called a more passive role in providing access to information. Computers and electronic means of communication also permit patrons to express themselves to others. Building on prior concepts, libraries might create a limited forum whereby patrons may use computers to access information, but could not send messages via email. Whether that would meet patron demands for services is a question different from one of compliance with the First Amendment. However, limiting the use of email based on the content of messages sent surely passes the threshold requiring strict First Amendment analysis.

Libraries often have served as places for active expression including, for example, book discussion groups. Certainly First Amendment considerations apply here, as they would to electronic discussion groups such as chat rooms, blogging sites and other computer-based means of communication. To avoid chaos in the use of these resources, libraries need to set some rules. How those rules regulate communication must consider the nature of the forum in which they occur and the manner in which the regulation might affect the message.

Library websites offer additional means whereby communication is provided and facilitated. A library's web site might be considered a forum solely for "government speech" as described above. When it expands to offer information on the community, including, for example, a community calendar, someone must decide what is permissible and what is not. Keys to successful control of this vehicle lie in setting proper standards and ensuring that the administrator understands and applies discretion according to those standards.

While the public library's current and future uses have changed and will continue to change and expand, two additional functions may be explored at this point. Some of those uses are ones that pertain to assembly, expression, and religion, discussed in part (B). Another area where the nature of the cyber-information is readily evident is in the troublesome arena of sexual material, as discussed in part (C).

(B) Religious Displays, Meetings and Services. The First Amendment relates not just to speech and expression but also to assembly and religion. As to the latter, the Constitution requires that government keep to a narrow path between actions that are characterized as establishing religion and those that interfere with free exercise of religion. Full examination of issues raised by religious displays, meetings, and services in relation to public libraries is beyond the scope of this paper. A brief review, though, is in order at this point to ensure that these issues are considered in developing and implementing library policies and practices.

Concerns with display of religious materials in a governmental setting are not novel or limited to the library property. Of course, objection to a library's resources may be premised upon the objector's religious views. Governmental decisions as to a library's resources, like other

decisions in this realm, practically cannot meet a test that allows no discretion or application of standards. Though not universally accepted as the key to successfully navigating First Amendment waters, the "Lemon Test"[16] requires that a governmental enactment or practice (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion or religious practice, and (3) not foster an excessive entanglement with religion.

As to religious displays upon or within library property, current case law is involved, complicated, and evolving, though certain principles seem to be evident. Government sponsorship of an overt religious display is problematic unless accompanied by other, non-religious displays.[17] Suffice it to say at this point, and for purposes of this Work Session, that displays in a public library with potential religious overtones (e.g., holiday displays), whether placed by the library or private displays allowed to be placed in the library, must not be seen as advancing a particular religious viewpoint or dogma. As such, displays that depict different religious experiences as part of our heritage or that seek to educate viewers about comparative religious traditions might pass the rather incongruous requirement of secular purpose expected of permissible religious displays.[18]

The use of library property for meetings by a religious group or for religious purposes or for religious services is an area to which attention now may be turned. As to the former, so long as a religious group seeks to use public property available for use by the public generally (i.e., a public or designated forum) on the same or similar conditions as a non-religious group, governments will face strict scrutiny in attempting to bar that use or to impose substantially different conditions on the use.[19] To avoid the "Lemon scent" that government is supporting religious exercise, a wise course of action would be to post notice to the effect that postings on bulletin boards and use of library facilities, such as meeting rooms or forums, should not be construed as public support of these actions or endorsement of any message or content. Such posting should be used generally and not limited to displays involving only potentially controversial uses.

While the use of a public forum for religious purposes or by a religious group seems fairly well settled, at least when that use is to be made on comparable terms to that applicable to secular groups, issues associated with the use of public property for religious services might be less certain. It is not rare, at least in this writer's experience, for public school auditoriums to be rented for use for religious services.[20] Public libraries may have meeting rooms, auditoriums, or other facilities that might accommodate religious services. While challenges to the use of public property for services still may arise premised upon establishment arguments, proper postings and

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[16] Derived from *Lemon v. Kurtzman, supra.*

[17] Thus, a crèche on public property might be tolerated if accompanied by other religious symbols of the season along with non-religious displays such as reindeer. Other displays, e.g., the Ten Commandments, might be acceptable if used in a historical context when displayed with depictions of other traditional sources of legal and moral principles.

[18] See, e.g., *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) and the varying views expressed in the opinions of the justices.

[19] *Good News Club v. Milford, supra;* see also *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 385 (1993).

[20] The traditional white New England Town Hall in which Town Meetings are held is a direct descendant from religious meeting halls used for conducting all manner of public business.

disclaimers would seemingly deflect such concerns. Issues regarding how decisions are made to select which religious uses are allowed require that there be some objective basis other than viewpoint discrimination. That leaves as a remaining concern, unresolved at the highest levels at this point, the question of whether a governmental denial of the use of property for religious services can be upheld, particularly where nonreligious, outside organization use of a library facility is permitted on reasonably comparable terms. Justification for a distinction from the cases requiring availability of use for religious discussion would likely be premised upon needs to avoid appearance of government entanglement with religion in violation of the establishment clause.[21]

(C) The Special Problem of "Adult Material" and Child Protection. Libraries have a long tradition of serving children as a prime group of patrons. Libraries, of course, also serve adults, and adults bring with them varying sensibilities as to what materials are acceptable or offensive. The problem a library faces in fulfilling the needs and expectations of patrons is never an easy one to solve. The problem is heightened when the topic involves sex.[22]

Book-burning may no longer be in vogue, but its functional relative in a modern library may lie in the use of content filters or other attempts to control patron access to Internet sites with sexual content. At the outset of this discussion, the distinction between obscenity and pornography must be noted. The former is not protected speech, the latter is, at least in some contexts. As difficult as that concept may be for some to grasp, an even more difficult task, for library policy makers, may be to define the difference.[23]

Once the threshold of trying to weed out protected from non-protected sexual expression is passed, the problems for libraries seeking to control access to materials with sexual content can become even more complex, as sexual expression, even that which can be considered indecent but not obscene, receives First Amendment protection.[24]

While attention to community standards and the likes or dislikes of adult patrons are relevant concerns, the library's special position as an attraction to and resource for children is perhaps the signal element in developing policies and practices for access to information involving sexual content and expression. As noted below, concerns for materials that are harmful to minors and prevention of child pornography and abuse are all valid elements in developing user policies. But libraries should not view themselves as censors who replace parents in deciding materials to which children may be exposed. These general concerns are magnified when the Internet is brought into play.

Federal and state legislative bodies, along with local governments and library governing bodies, have sought to protect children from the seemingly endless and readily available sources of "adult" content on the Internet. Courts also have recognized the need to protect children from

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[21] Not discussed here are potential concerns with land use decisions under RFRA, RLUIPA, or other laws that Congress or state legislatures may enact.

[22] Described in one U.S. Supreme Court decision as "a great and mysterious motive force in human life . . . and one of the vital problems of human interest and concern," *Roth v. U.S.*, 354 U.S. 476 (1957) at 487.

[23] A full discussion of definitions is omitted here, but readers may wish to consult *Miller v. California*, *supra*, and the numerous court rulings attempting to clarify and implement the so-called *Miller* Test.

[24] *Sable Communications, supra*.

abuse, and controls that are triggered by harmful-to-minors standards and prevention of child abuse and child pornography have fared well in court tests. However, restrictions and prohibitions on access to non-obscene information may sweep too broadly by restricting adult access to information to which they are deemed to have a right of access.

For example, the United States Supreme Court invalidated[25] portions of the 1996 Child Pornography Prevention Act (CPPA).

> Characterizing its opinion as addressed to that universe of speech that was neither obscenity as defined by *Miller* nor child pornography depicting real children, (the Court) struck down as overbroad the definitions of "child pornography" (in portions of the Act). By so doing, the Court effectively made (two sections of the Act) indistinguishable, in that both are now limited to prosecutions involving visual images produced with and depicting real minors. Thus, (the case) returned Congress to where it began in its efforts to regulate online child pornography."
>
> 7 A.L.R. Fed. 2d 1 at 3.

As is evident from the *Free Speech Coalition* case just cited, a notable exception is carved out from the protected status of pornography for child pornography. Thus, the Supreme Court has:

> recognized a distinction between pornography produced using adults and that which might be produced using children, holding that child pornography, even if not obscene under *Miller*, could still be prohibited in accordance with the First Amendment. That is, child pornography may be banned without regard to whether it depicts matter of social value, because the government has a compelling interest in regulating pornography that can be created only as a result of the sexual exploitation of children. *Ibid.* at 2.

The difficulty that remains is how a library will treat non-obscene materials that do not involve child pornography. In this aspect of providing services to patrons, a library likely will be viewed as a public forum, so that the full panoply of First Amendment issues will arise. Content-neutral time, place and manner controls may be applied, but when applied solely to adult materials, are they truly content neutral? Similarly, issues of overbreadth and vagueness may doom controls. Concerns with overly broad administrative discretion and prior restraint may loom over the imposition of procedural requirements such as seeking a library attendant's approval to use an adult computer terminal.

As a result, libraries may seek to isolate areas where access to adult materials are provided in an attempt to shield minors and those who object to them. Some civil rights advocates assert that these protections may invalidly single out and stigmatize users. Another form of protection that will focus on shielding non-users from seeing adult sites are privacy screens, though their use will not effectively control access by children.

One alternate form of control may seek to limit access to persons over a delineated age. But "adults-only" restrictions premised upon the chronological age of users have been found to unreasonably bar access by, e.g., more mature youths under the age of eighteen. Such blanket

[25] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

rules may be easy to administer, but they have been found to be arbitrary and to impose too impervious a barrier.

Another control is the use of filters on designated terminals that restrict access to "adult sites." However, filters can be problematic as they technologically, at least as of now, cannot identify and restrict materials that are limited to unprotected classes of speech. Examples are legion and can be exemplified by practical difficulties such as those encountered when the self-insurance risk pool, where this writer was formerly employed, attempted to institute on-line sexual harassment prevention training for the employees of its local government entities. Though most members had no difficulty in using the on-line training, access by some employees was blocked by school system filters that prohibited access to a site described as having sexual content (a necessary component of sexual harassment training).

Even so, Congress has required that libraries take action using filters to limit children's access to objectionable sites in the form of the *Children's Internet Protection Act.*[26] The United States Supreme Court upheld[27] the Act, which seeks to protect children from harmful Internet content. It requires that public libraries receiving federal funds to provide Internet access must install software that blocks obscene and pornographic images. The Court found this requirement to be not unduly burdensome on First Amendment free speech.

As software advances and as technology improves over time, libraries may find the task of limiting access to be somewhat less taxing, though still difficult. As seems to be the case with any "advance" in this cyber-arena, those who wish to avoid the reach of prohibitions seem capable of creating a work-around or otherwise protecting their turf.

V. Libraries in the Digital Age: Discussion and, Perhaps, Some Guidance. The First Amendment principles and standards outlined in this paper are, of course, readily applicable to libraries as institutions of local government and arms of the state. Those principles also apply to expression, communication, and receipt of information involving computers and the Internet.

When this thing called the Internet came along, it was not unusual to hear predictions of the demise of the public library, since anyone could access just about anything from anywhere without having to go through the bother of going to the library, finding resources, checking them out, returning them late, and having to pay fines for late return. To the contrary, the Internet and digital resources seemingly have made libraries an even greater and more useful resource for many members of the community – albeit in very different form than the traditional books and shelves of the old library.

In many respects, the nature of the "old" library created a natural limit on access to resources by application of two very practical factors: the cost to acquire resources and the limited space available to house the resources. Even if space were available, additional limiting factors included the ability of a public library's chronically underfunded status to provide staff to assist patrons in locating and using resources.

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[26] *Children's Internet Protection Act*, 20 U.S.C.A. § 9134(f) and 47 U.S.C.A. § 254(h)(6).

[27] See *U.S. v. American Library Ass'n, Inc., supra,* and *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. Fed. 2d 1.

Computer access to the vast storehouse of information via the Internet expands the resources available to public libraries by uncounted magnitudes. In effect, the old "bookmobile" has been replaced by computer terminals that open up to patrons information far beyond the walls of even those pooled library resources. In turn, one role of the librarian and library trustees is changing from considerations of how to obtain more library resources within the budget to why and how to limit and control the resources available via library computers.

Libraries, as noted, have also become one means of providing electronic communications. Communications involve not only patrons but may also involve employees. The intersection of privacy rights and public rights of access to governmental information provides another potential snare in which governmental policies and controls are subject to review.[28] Thus, even a customary non-public forum such as employee email may raise numerous issues in addition to that of First Amendment compliance. One "legal" solution to such concerns would be to adopt policies that clearly state there can be no expectation of privacy in any use (by patrons or employees) of the email/computer use system of a public library. That "legal" solution, however, may involve an array of practical objections from users.

At this point, it may be advisable to turn back to page 1 of this paper and consider again the words of one presenter at the Information Society Project Symposium on Library 2.0 and to reflect on how the First Amendment and library policies and practices may peacefully coexist when today's libraries:

- Have access to so much material;
- Serve as community centers and hubs of electronic communication;
- Serve patrons from the entire spectrum of the community's population and even those from outside the community's boundaries;
- Still must allocate and distribute the use of traditional and new resources;
- Must consider (if not address) individuals who object to libraries allowing certain resources and uses; and
- Manage all of the above in some semblance of order.

Pure free speech advocates at this point may well posit the question, "Why limit resources at all?" At the other end of the spectrum, others may ask, "Why should not those in control of a library determine what resources will be made available? If someone wants to access information not available in the library, it should be quite easy to do so without using the public's computers."[29]

Aside from the basic ideological issues of what a library should be and what services it should provide (which realistically cannot be addressed in this paper), there are issues regarding First

[28] The Wisconsin Supreme Court has accepted for review a case to determine if governmental employee personal emails sent using the government's email system, but unrelated to the conduct of governmental business, are subject to the state's right-to-know law. See report on State Bar of Wisconsin "Inside Track" web page at: http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=85154.

[29] A rigorous debate at many a local Town Meeting or City Council meeting may be expected when funding for libraries is discussed, with one side arguing against public funding of Internet access when it can so "easily" be obtained via personal home computers.

Amendment protections that need to be addressed in considering the manner in which public libraries operate in this new era. To that end, this paper has sought to bring attention to at least some of those factors.

VI. Conclusion . As noted in the annotation on child internet protection (7 A.L.R. Fed 2d 1):

> "[n]ew technologies create interesting challenges to long established legal concepts," and the Internet represents new technology over which a body of existing law regulating obscenity and child pornography has been superimposed. The Internet has also spawned new legislation that specifically addresses obscenity and child pornography transmitted over, received from, produced for, and possessed as a result of perusal of the Internet. This blend of old and new legislation is woven together by a strand of significant cases.

Of course, the need to analyze and adapt traditional First Amendment legal principles in regard to cyber-information and public libraries is not limited to child pornography and adult material, and this paper has looked at some such as religious use, community forums, blogging, and electronic billboards.

In conclusion, then, establishing a "Use Policy" to allow some, but not unrestricted, public use of library property and facilities is a key component to successfully manage public libraries, and the policy should factor in the overall nature and capacity of the library facility, the needs of the community, the ideas and perspectives of the library's trustees or other policy-making body, and the need to comply with the First Amendment and State Constitutions and laws.

To properly formulate policy, it is suggested that steps include:

- ✓ Analysis of speech to conceptually differentiate protected and non-protected speech.
- ✓ Review of library facilities, equipment, and services (e.g., meeting rooms, display areas, billboards, chat rooms, and computer terminals) using forum analysis.
- ✓ Development of time, place and manner controls appropriate to the forum and premised upon analysis of the nature of the medium of communication used in that forum.
- ✓ Review of regulations and establishment of new rules that seek to apply without regard to content or viewpoint of messages or messengers, coupled with the understanding that controls on messages and messengers are not necessarily barred in entirety, but must be capable of passing strict scrutiny.
- ✓ Continuing and regular review of policies and practices in light of the status of legislation and court decisions refining First Amendment jurisprudence in the digital age.

Bibliography and Resources

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