Legal Aspects of Patron Conduct and Access in Academic Libraries

presented for

CARLI

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Some Ground Rules!

- Anything said here is not to be taken as legal advice, if you have a legal issue, please consult appropriate counsel.

- In return, it is assumed that all questions posed are hypothetical and reflect only the musings of an informed and curious mind and not the actual problem you might have.

Patron Conduct and Access

- Forum Analysis and Constitutional Review.
- Nature of the Academic Space.
- Lessons from the Patron Conduct Cases.
- Crafting Penalties in conformity with a Liberty Interest.
- Lessons from the Meeting Room Cases.
- Display Kiosks and other Information Spaces.
- Control of Other Spaces: Websites, Entrance areas.

Levels of Constitutional Inquiry

- Factors in Forum Analysis: intent (policy), use (practice), nature of place to purpose ("compatibility with expressive activity").
- Public Forum: content based: "strict scrutiny"
  - compelling state interest,
  - narrowly tailored to that interest, and
  - no less restrictive means available.
- Public Forum: content neutral: "intermediate scrutiny"
  - subject to reasonable time, place and manner (RTPM),
  - narrowly tailored to serve a
  - significant government interest, and
  - ample alternative channels of communication still available.
- Designated Public Forum: same standards apply.

Levels of Constitutional Inquiry

- Limited Public Forum (by definition this is a content based regulation or policy):
  - Speech occurring within the limits of the forum: “intermediate scrutiny” is applied.
  - Speech occurring outside the limits of the forum: “rationale basis” is applied, the policy must also be
  - viewpoint neutral.
- Non Public Forum:
  - content based decision must only pass a reasonableness standard, but must also be
  - viewpoint neutral.

Private Academy?: Forum Analysis

- **Yes.** *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa., 1981) (private college made itself into a public forum by sponsoring a public event): "Through public advertisements, the Board of Associates assembled a public audience on the **Muhlenberg College** campus to hear F.B.I. Director Kelley present his views. In these circumstances, the college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens, exercise its right of property to invoke a standardless permit requirement and the state's defiant trespass law to prevent appellants from ***peacefully presenting*** their ***point of view*** to this indisputably relevant audience in an area of the college normally open to the public."
- **Lesson: The most likely forum would be a limited public forum: maintain viewpoint neutrality.**

Private Academy?: Forum Analysis

- **Yes.** *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780 (7th Cir. 2010): "the **University of Wisconsin** … has created a public forum where the students, not the University, decide what is to be said. And ***having created a public forum***, the University must honor the private choice…so a university ***cannot*** shape Badger Catholic's message by ***selectively funding*** the speech it approves, but not the speech it disapproves. Once it creates a public forum, a university must accept all comers within the forum's scope…"
  - "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Education Fund* , 473 U.S. 788 (1985).
- **A private institution must comply with constitutional limits when it opens space for public discourse.**

Nature of Academic Space

- **Deference to the Management of Government Soaces**, *Illinois Dunesland Preservation Society v. Illinois Dept. of Natural Resources*, 584 F.3d 719, 724 (7th Cir. 2009) (no violation speech rights by refusing to display pamphlet regarding asbestos contamination in park information racks): "But what is the relevant difference between a state theater (a 'designated public forum') and a public library, or the public-college art gallery in *Piarowski v. Illinois Community College District 515*, 759 F. 2d 625 (7th Cir. 1985)? In all three cases the ***management of a government facility has to decide*** which playwright's or author's or artist's work will be allowed to be exhibited, in view of the site's limited capacity."
  - "The materials chosen for the display racks in the Illinois Beach State Park are designed to attract people to the park, and more broadly to Illinois tourist facilities and services. The choice of materials conveys a message that is contradicted by the plaintiff's pamphlet." Id. at 725.

Nature of Academic Space

- **Public Forum**, *Roberts v. Haragan*, 346 F.Supp.2d 853, 861 (N.D. Tex. 2004): "this Court makes this preliminary assumption about the ***Texas Tech University*** campus: to the extent the campus has *park* areas, *sidewalks*, ***streets***, or other ***similar common areas***, ***these areas are public forums***, at least for the University's students, irrespective of whether the University has so designated them or not."
  - Code of Conduct and Speech Code requiring prior permissions ruled unconstitutional as it applied to campus public forum spaces.
- **Nonpublic Forum**, *Bader v. State*,15 S.W.3d 599 (Tex. App. Austin, 2000): "The ***University of Texas*** campus is ***generally a nonpublic forum***. Public school facilities and grounds have consistently been held to be ***nonpublic forums***, ***unless*** there has been an ***intentional opening*** of them for expressive activity."

Nature of Academic Library Space

- **Other Campus Spaces; Limited or Nonpublic Forum**, *Bader v. State*,15 S.W.3d 599 (Tex. App. Austin, 2000):"We ***do not hold that the entire university campus is a nonpublic forum***…some areas of campus [] are open to the public for expressive activities…appellant was in a ***television lounge in the student union*** building when first warned and in the Flawn Academic Center when subsequently warned and later charged…the lounge was restricted to students, faculty, and staff. The [] Center houses a ***library, offices, and a computer lab***. These are not traditional public forums…no evidence that the university has opened these areas to the public for the purpose of expressive activities."
  - *Spingola. v. State* , 135 S.W. 3d 330, 334-335 (Tex. App.-Houston, 2004): "A campus need not make all of its facilities equally available to students and non-students alike, nor must a university grant free access to all of its grounds or buildings." Id. at 334-335.

Nature of Academic Space

- **The Campus and its Walkways**, *Hershey v. Goldstein*, 938 F.Supp.2d 491, 511 (S.D.N.Y. 2013): "Hershey therefore does not allege facts sufficient to support his claim that the Lehman ***campus in general***, or the ***walkway in particular***, was a ***traditional or designated public forum***... Lehman's campus and walkway are thus not fairly pled to be such."
- **The Quad**, *Orin v. Barclay*, 272 F.3d 1207, 1215 (9th Cir. 2001): recognizing that college ***might or might not choose*** to designate a ***quad*** as a "public forum."
- **A Meeting Room**, *Grosjean v. Bommarito*, 302 Fed. Appx. 430, 439 (6th Cir. 2008), citing with *Widmar v. Vincent*, 454 U.S. 263, 267 (1981): "An example of a ***designated public forum*** is a ***meeting room*** on a public university "generally open" to all student groups."

Nature of Academic Library Space

- **Other Campus Spaces**, *Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007): "No matter how wonderfully suited the library lawn is to religious and other advocacy, Vincennes University could if it wanted bar access to the lawn to any outsider who wanted to use it for any purpose, just as ***it could bar outsiders from its classrooms, libraries, dining halls, and dormitories***. It wouldn't have to prove that allowing them in would disrupt its educational mission.…What is true is that a ***university that decided to permit its open spaces*** to be used by some outsiders ***could not exclude*** others just because it ***disapproved of their message***."
  - **Discretion when Inviting Speakers**, Id. at 474: "We have tried to explain why the Constitution does not commit a university that allows a faculty member or student group to invite a professor of theology to give a talk on campus also to invite Brother Jim and anyone else who would like to use, however worthily, the university's facilities as his soapbox."

Nature of Academic Library Space

- **Library Lawn**, *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007) (holding a ***college library lawn*** [**Vincennes University**] was **not *a designated public forum*** for expressive activity where the court was "given no instance of an outsider's being permitted to do more than stroll on the lawn").
- **Library Lawn**, Id. at 474: "To call the ***library lawn*** therefore a "'limited designated public forum' is an unnecessary flourish."
- **The Library**, *Crosby v. South Orange Community College*, 172 Cal. App. 4th 433, 443 (4th Dist. 2009): recognizing that ***community college*** had **not** established its ***library*** as ***public forum***.
- **Library Internet**, Id.: ***community college library Internet access*** is **not *a traditional nor a designated public forum***.

Nature of Academic Library Space

- **Standards:** Courts use the language of Limited Public Forums (for speech falling outside the limits of the forum) or a Nonpublic Forum. ***Reasonableness*** and ***viewpoint neutral***. *Crosby v. South Orange Community College*, 172 Cal. App. 4th 433, 443 (4th Dist. 2009).
- **Use of the Library:** "[N]othing in the record suggests the District designated **Saddleback College's *library*** a public forum … the District 'may reserve the forum for its intended purposes … as long as the regulation ... is ***reasonable*** and not an effort to suppress expression merely because ***public officials oppose the speaker's view***' [citing *Perry* 460 U.S. 37, 46 (1983)] … the limitation of ***computer use*** to ***educational and employment purposes*** [] is an ***acceptable limitation***, and does not represent a public official's effort to silence opposing viewpoints." *Crosby*, 172 Cal. App. 4th at 443.

Patron Behavior Issues

- No cases involving Consitutional challenge to Codes of Conduct in Academic Libraries.

- *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992).
- *Neinast v. Board of Trustees of the Columbus Metropolitan Library*, 346 F.3d 585 (6th Cir. 2003), *cert. denied* 541 U.S. 990 (2004).
- *Armstrong v. District of Columbia Public Library*, 154 F.Supp.2d 67 (D.D.C. Aug 21, 2001).

Patron Behavior Issues

- *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992).
- "Rice, the Director of the Library from June 1, 1986, to December 19, 1990, held ***monthly staff meetings*** to discuss ***how to handle*** more effectively what she termed '***problem*** behavior' at the Library. This behavior included theft of property, smoking, use of drugs and alcohol, disruptively loud behavior, intimidation of patrons through staring and following them, and exuding of repulsive odors." Id. at 1247.
- **Red Herring: There is nothing wrong with creating a policy to address a specific person/problem and then applying it generally and consistently to all patrons.**

Patron Behavior Issues

- “However, on July 25, 1989, in an attempt to assuage the ACLU-NJ’s concerns, the Board modified provisions 1, 5, and 9, as well as the two unnumbered paragraphs following rule 9, so that they, along with rule 6, read as follows:
- 1. Patrons **shall be engaged in activities** associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials shall be required to leave the building.” 958 F.2d at 1248.

Patron Behavior Issues

- "5. Patrons **shall respect the rights of other patrons** and shall not harass or annoy others through noisy or boisterous activities, by staring at another person with the intent to annoy that person, by following another person about the building with the intent to annoy that person, by playing audio equipment so that others can hear it, by singing or talking to others or in monologues, or by behaving in a manner which reasonably can be expected to disturb other persons…
- 9. Patrons **shall not be permitted to enter** the building without a ***shirt*** or other covering of their upper bodies or without ***shoes*** or other footwear. Patrons whose bodily ***hygiene*** is ***offensive*** so as to constitute a **nuisance** to other persons shall be required to leave the building." 958 F.2d at 1248.

Patron Behavior Issues

- Forum analysis (factors): government intent, extent of use, and nature of the forum ("with expressive activity"): "In our view, an application of the Supreme Court's declarations concerning this issue, as well as an examination of the factual similarities and dissimilarities among the cases discussed above and the present one, confirm that the Library constitutes a **limited public forum**, a type ["sub-category"] of designated public fora." 958 F.2d 1259.
- Its [the public library] very purpose is to aid in the ***acquisition of knowledge through reading, writing and quiet contemplation***. Thus, the exercise of other oral and interactive First Amendment activities is antithetical to the nature of the Library. These arguably conflicting characteristics, support our conclusion…" 958 F.2d 1261.

Patron Behavior Issues

- Two categories of rules and two standards of review: restrictions that target ***conduct*** of the patron and restrictions that target the ***appearance*** or other outward manifestation of the patron (a 'personage' rule).
- Rule 1 (reading and other uses consistent with forum): "By definition, the rule [conduct] prohibits activities beyond the purpose for which the Library was opened. Accordingly, this rule is subject to the '**reasonableness**' standard of review." 958 F.2d 1262.
- "Requiring that its patrons make use of the Library in order to be permitted to remain there is a reasonable means to achieve that end. The ***Library need not be used as a lounge or a shelter***. Clearly the rule is **reasonable** and is perfectly valid." Id.

Patron Behavior Issues

- Rule 5 (use that interferes with another's forum-consistent use): "This rule similarly prohibits behavior [conduct] that tends to or is disruptive in a library setting. ***Prohibiting disruptive behavior*** is perhaps the clearest and most direct way to achieve ***maximum library use***. Accordingly, we find that this rule is **fundamentally reasonable** and we reject the attack on it." 958 F.2d 1262.
- "For example, we do not doubt that a Library ***may limit*** the ***number of books*** which a patron may borrow from it at any time, even though no request has been made by another patron for the book which the patron at his or her borrowing limit desires to withdraw. Similarly we do not doubt that the Library may limit the *length of time* during which a book may be ***borrowed***." 958 F.2d 1263.

Patron Behavior Issues

- Accord, *Madrid v. Lopez*, 1997 WL 102508 (N.D. Cal. 1997) (prison law library): "Because restrictions on ***talking and other disruptive behavior*** in a library are **fundamentally reasonable**, plaintiff cannot maintain a claim that the prison's policy of not permitting talking in the law library violates the First Amendment." Id. at *1.
- Accord, *Trosnen v. Toledo-Lucas County Public Library*, 2008 WL 2622939 (N.D. Ohio 2008) (6-month suspension, repeat offense, previous suspension, harassment of numerous female patrons): "I find the defendant's Code of Conduct in general, and particularly ¶ 13, with its prohibition against "[e]ngaging in any act, which clearly ***disrupts or prevents the normal and intended use*** of the public library by any other patrons or staff," to be "**fundamentally reasonable**." Id. at *2, quoting the library policy and *Kreimer*.

Patron Behavior Issues

- Rule 9 (intermediate scrutiny): “Because this rule would require the expulsion of a patron who might otherwise be peacefully engaged in permissible First Amendment activities [appearance] within the purposes for which the Library was opened, such as reading, writing or quiet contemplation, we must determine whether the rule is ***narrowly tailored*** to serve a ***significant government interest*** and whether it leaves ***ample alternative*** channels of communication.” 958 F.2d at 1264.

Patron Behavior Issues

- ***Significant interest***: *maximum use* of facilities.
- ***Narrowly tailored***: "The Library's goal is served by its requirement that its patrons have non-offensive bodily hygiene, as this rule prohibits one patron from *unreasonably interfering with other patrons' use and enjoyment* of the Library; it further promotes the Library's interest in maintaining its facilities in a *sanitary and attractive* condition." 958 F.2d 1264.
- ***Ample alternatives***: "[S]o long as a patron complies with the rules, he or she may use the Library's facilities. Furthermore, although the Library may eject a patron for violating this rule, we do not read the rule to bar permanently a patron from reentry to the Library once the patron complies with the requirements in the absence of pervasive abuse." Id.

Patron Behavior Issues

- Vagueness analysis of Rule 9: “Although we agree that the ‘nuisance’ standard contained in this rule is broad, in our view it is necessarily so, for it would be impossible to list all the various factual predicates of a nuisance…In this case, however, the rule’s broad sweep is not synonymous with vagueness. The determination of whether a given patron’s hygiene constitutes a ‘nuisance’ involves an **objective reasonableness test**, ***not an annoyance test***…Thus, it was appropriate for the Library to craft its rules with regard for the New Jersey law.” 958 F.2d at 1268.

Patron Behavior Issues

- Rule 9 and the Illinois law of nuisance:
- *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, (2004).
- "The Restatement definitions of public and private nuisance are consistent with Illinois law." Id. at 365.
- "[F]acts must be alleged in support of four distinct elements of a public nuisance claim: the existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury." Id. at 369.

Patron Behavior Issues

- Rule 9 and the Illinois law of nuisance:
- “Such rights [“right common to the general public”] include the rights of public health, public safety, public peace, public comfort, and public convenience. ” 213 Ill.2d at 370-371.
- **Lesson: incorporate or reference this standard into policy-making (Morristown, Rule 9):** “Patrons whose bodily hygiene is offensive so as to constitute a nuisance such that it ***substantially and unreasonably interferes*** with a public right such as public health, public safety, public peace, public comfort, or public convenience in other persons’ ***use of library facilities*** shall be required to leave the building.”

Patron Behavior Issues

- *Neinast v. Board of Trustees of the Columbus Metropolitan Library*, 190 F. Supp. 2d 1040 (S.D. Ohio 2002); affirmed 346 F.3d 585 (6th Cir. 2003), cert. denied 541 U.S. 990 (2004).
- "Although the Patron Regulations of the Library (approved by the Board) do not contain a prohibition on using the Library without shoes, the Library's Eviction Procedure (approved by the Executive Director) does provide that ***patrons not wearing shoes*** be given a warning and be 'asked to leave [the] premises to correct the problem.' 346 F.3d at 589.
- "Neinast claims that the Board's enforcement of the requirement that patrons of the Library wear shoes deprived him of his ***right to receive information*** under the First and Fourteenth Amendments." 346 F.3d at 590.

Patron Behavior Issues

- *Question*: Is going barefoot a form of speech, the exercise of which is protected in a limited public forum?
- *Answer*: No, per the *Spence* test [*Spence v. Washington*, 418 U.S. 405 (1974) (two prongs for symbolic speech: 1) intent to convey a particularized message and 2) surrounding circumstances the likelihood was great that the message would be understood by those who viewed it)] not met: first prong not met as "going barefoot … does not indicate an intent to convey a particularized message;" nor second prong met as "because his conduct occurred in a library rather than a political setting, and there is not great likelihood that other Library patrons will understand his purported message." 190 F. Supp. 2d at 1045.

Patron Behavior Issues

- "For purposes of First Amendment analysis, the Library is a **limited public forum**." 346 F.3d at 591.
- "Not all aspects of a library involve the right to receive information, however. For example, a library that consisted of a card catalog, a circulation desk, and closed stacks would be perfectly capable of allowing patrons to exercise their right to receive information, but would not be a place where patrons could read, write, and quietly contemplate." Id. (But arguably still receive information!).

Patron Behavior Issues

- "While the Library regulation at issue in this case is also **content-neutral**, it does not directly impact the right to receive information. Therefore, applying the heightened scrutiny standard of *Ward* to the Library regulation is not appropriate Instead we review the Library regulation under a **rational basis standard**." 346 F.3d at 591-592.
- "The Library regulation survives rational basis review because the regulation provides a rational means to further the ***legitimate government interests*** of protecting **public health and safety** and protecting the Library's **economic well-being** by seeking to **prevent tort claims** brought by library patrons who were injured because they were barefoot." 346 F.3d at 592.
- **Lesson: safety and tort-avoidance satisfy rationale basis standard.**

Patron Behavior Issues

- Court proceeds to apply a heightened level of scrutiny: "Specifically, in an affidavit dated August 2, 2001, Black stated that he approved the requirement that patrons of the Library wear shoes in order to protect 'the health and safety of Library patrons, who may be harmed in the Library if allowed to enter barefoot' and 'the economic well-being of the Library, by averting tort claims and litigation expenses stemming from potential claims made by barefoot patrons who could have suffered injuries that shoes could have prevented.' These concerns qualify as ***significant governmental interests***." 346 F.3d at 593.
- **Lesson: safety and tort-avoidance also satisfy intermediate scrutiny.**

Patron Behavior Issues

- ***Documentation***: "Board has provided incident reports documenting various hazards to barefoot patrons, including … feces on the floor of the restroom and in the reading area, vomit on the floor of the restroom and in the children's area, … splintered chair pieces in the children's area, drops of blood on the floor of the restroom, urine in the elevator, on the floor of the bathroom, on a chair in the reading area, and on the floor of the reading area, and broken glass in the lobby… a patron's foot went into a gap between the bottom of a door and the ground, causing a cut … a barefoot patron's toe was caught in a door, causing bleeding and requiring the assistance of paramedics… demonstrate[] the existence of a significant ***health and safety risk*** to individual barefoot patrons." 346 F.3d at 593-594.

Patron Behavior Issues

- "Close scrutiny of the record, however, reveals that hazards to barefoot patrons can be found throughout the Library buildings… In light of the fact that the Board has documented the presence of hazards throughout the Library buildings, we find the **requirement that patrons wear shoes to be narrowly tailored**." 346 F.3d at 595.
- "Finally, the requirement that patrons wear shoes leaves open **alternative channels** for communication. '[S]o long as a patron complies with the rules, he or she may use the Library's facilities.' [quoting *Kreimer*] In this case, as long as Neinast wears shoes, he may receive information in the Library. Consequently, Neinast may be prohibited from going barefoot while in the limited public forum of the Library." Id.

Patron Behavior Issues

- "Neinast asserts that the Board's enforcement of the requirement that patrons of the Library wear shoes deprived him of his **right of personal appearance** under the First, Ninth, and Fourteenth Amendments…Although the Court [*Kelly v. Johnson* , 425 U.S. 238 (1976)] went on to assume, for the purposes of the case, that a liberty interest existed, it did not affirmatively acknowledge such an interest. *Id.* [at 244.] However, a considerable body of precedent suggests the existence of a liberty interest in one's personal appearance." 346 F.3d at 595.
- "Assuming the existence of a **liberty interest in personal appearance**, we must next determine whether the Board unconstitutionally infringed upon Neinast's liberty interest by mandating that he wear shoes in the Library." Id.

Patron Behavior Issues

- “Sixth Circuit previously has held that personal appearance is not a fundamental right… Since the Board’s requirement that patrons of the Library wear shoes does not implicate a fundamental right, it is subject to rational basis scrutiny.” 346 F.3d at 595 (citations omitted).
- Per previous discussion (safety management and tort avoidance) the court concluded: “Consequently, the Board’s requirement that patrons of the Library wear shoes satisfies rational basis review.” Id.
- **Lesson: Dress codes based on demonstrated safety and risk avoidance pass both rationale basis and intermediate scrutiny.**

Patron Behavior Issues

- *Armstrong v. District of Columbia Public Library*, 154 F.Supp.2d 67 (D.D.C. Aug 21, 2001). Public library policy prohibited "Conduct or personal condition objectionable to other persons using the Library's facilities or which interfere with the orderly provision of library services…***Objectionable appearance*** (barefooted, bare-chested, body odor, filthy clothing, etc.)."
- "The regulation at issue allows for the denial of library access based on a patron's personal appearance. Since the effect of such a regulation is to prevent certain patrons from engaging in *any* conduct within, or use of, the library, protected First Amendment activities such as reading, writing and quiet reflection are directly limited." Id. at 75 (italics emphasis original).

Patron Behavior Issues

- "Accordingly, because plaintiff's access to the Library was restricted based upon his ***appearance***, the appropriate standard to apply in this case is the stricter, 'narrowly tailored' standard of review." 154 F.Supp.2d at 77.
- "Rather than incorporating an objective test into its regulatory language, such as the "nuisance" standard utilized in *Kreimer* [which was defined in New Jersey case law], the D.C. Library's appearance regulation depends only upon ***subjective interpretation*** of the term "**objectionable**", a characteristic which clearly distinguishes it from the regulation upheld as narrowly tailored in *Kreimer*." 154 F.Supp.2d at 77-78.

Patron Behavior Issues

- "Indeed, discovery in this case revealed the ***inherent imprecision*** of the barring regulation and the potential for unlimited ***ad hoc determinations*** of the regulation's scope by Library guards, employees, supervisors, and outside police officers. For instance, Mr. Frederick Williams, the chief of security at the Library, testified in his deposition that Library ***guards often have difficulty determining when*** a person should be barred from entering the Library under the regulation." 154 F.Supp.2d at 78.
- **Lesson: Consistent articulation in drafting, training and application! Legal Standards!**

Patron Behavior Issues

- "But, unlike *Kreimer*, the 'objectionable' nature of these conditions is ***not*** accompanied by any cognizable **legal definition** to clarify exactly what ***appearances, or degrees of filth and odor*** are meant to be prohibited. For example, whether this implicates a painter's overalls, a mechanic's shirt, a child's playclothes, or perfume or cologne is unclear. As a result, this regulation necessarily falls short of the objective standard required to survive a vagueness challenge."154 F.Supp.2d at 78.
- **Lesson: use legal standards where available.**

Patron Behavior Issues

- “Thus, without greater specificity in its language and increased guidance in its application, a ***highly subjective and discretionary regulation***, such as the one promulgated by the Library, may easily lead to prohibitions above and beyond those required to promote the government’s interest in assuring public health and welfare for Library patrons. Consequently, the Court concludes that this regulation, as written, is both **vague** and **overbroad**, thus failing to satisfy First Amendment standards. Accordingly, plaintiff is entitled to summary judgment on his First Amendment challenge.” 154 F.Supp.2d at 79

Patron Behavior Issues

- "The appearance regulation at issue lacks both explicit guidelines and an objective legal standard. Moreover, the guideline sets out very general prohibited categories with a scope of application virtually unlimited by the Guidelines' use of 'etc.'. As a result, the Court finds the Library's appearance regulation ***fails to provide fair notice*** to its patrons or to meet constitutional standards prohibiting arbitrary enforcement of government regulations. For these reasons, the regulation at issue is also in violation of the due process clause of the Fifth Amendment." 154 F.Supp.2d at 81-82 (citations omitted).
- **Lesson: avoid use of "A, B, C, etc.", use instead "including but not limited to the following …" or similar phrasing. Incorporate state legal standards!**

Patron Behavior Issues

- *People v. Taylor*, 164 Misc.2d 868, 630 N.Y.S.2d 625 (1995). ***Ban on playing games*** or similar activities not within scope of the library's purpose is **reasonable**.
- "The gist of defendant's defense at trial was not that the library's ***ban*** on *playing* board games was ***unreasonable*** or invalid. Indeed, it has already been held that a rule ***requiring library patrons not engaged in reading, studying or using library materials to leave is reasonable and perfectly valid***. Defendant's claim…that his intent was merely to use the chess board in connection with his study of a chess book. We decline to credit this claim…the testimony of the library's director that defendant neither told her that he was doing research on the game nor denied he was playing chess." Id. at 869, citing *Kreimer*.

Patron Behavior Issues

- *Hill v. Derrick*, 240 Fed. Appx. 935 (3rd Cir. 2007), patron sent "a letter ***revoking his library privileges*** at the Muncy Public Library ***until further notice***" after punching another patron. Id at 936.
- "The District Court concluded that, on its face, the rule ***prohibiting corporal punishment or physical abuse of anyone on library p***roperty did not violate Hill's First Amendment rights. For First Amendment purposes, a library is a **limited public forum** and 'is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum.' We agree that, on its face, the Muncy Public Library's Rule prohibiting corporal punishment on library property is **reasonable**. " Id., quoting *Kreimer*.

Deprivation of Access: A Liberty Interest?

- *Doyle v. Clark County Public Library* , 2077 WL 2407051, *5 (S.D. Ohio): "The right of the public to use the public library is best characterized as a protected ***liberty interest*** created directly by the ***First Amendment***. Since the right is not absolute-it can be ***lost for engaging in conduct inconsistent with the purpose of public libraries***.")
  - A ***parent*** has a ***fundamental liberty interest in the care and custody of his or her child***, requiring State to "provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
  - "Where a person's ***good name, reputation, honor, or integrity*** is at stake because of government action, ***notice and an opportunity to be heard are essential***." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

Drafting Standards: Elements

- *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976): "***due process*** generally requires consideration of three distinct factors: First, the **private interest** that will be **affected** by the official action; second, the **risk of an erroneous deprivation** of such interest through the procedures used, and the probable value, if any, of additional or substitute ***procedural safeguards***; and finally, the **Government's interest**, including the function involved and the **fiscal and administrative burdens** that the additional or substitute procedural requirement would entail."
- **Lesson:** Three elements ("a hearing closely approximating a judicial trial is necessary"): "***notice*** of the action sought, a copy of the charge, reasonable ***time*** for filing a written response, and an ***opportunity*** for an oral appearance." *Spreadbury v. Bitterroot Public Library*, 862 F.Supp.2d 1054, 1057 (D. Mont. 2012).

Drafting Standards: Elements

- *Spreadbury v. Bitterroot Public Library*, 862 F.Supp.2d 1054, 1057 (D. Mont. 2012): "The Library provided **adequate procedural protections**… he was given ***written notice*** that he was banned from the premises and told the reason why… He was also afforded an ***opportunity to be heard***. He emailed a member of the Board of Trustees requesting permission to attend a meeting to argue that his rights should be restored, and he ***submitted a Reconsideration Request Form*** to Library staff again demanding his letter be accepted into the Library's collection…Finally, the ban furthered the government's ***significant interest*** in maintaining the ***peaceful character*** of a library."
- **Lesson: offer notice, time and opportunity to respond. Procedures should articulate the library's interest, and how the process ensures against error.**

Deprivation of Access: Liberty Interest?

- **No**: *Grisby v. City of Oakland*, 2002 WL 1298759 (N.D. Cal. 2002) (staring at patrons in public library children's room, no hearing provided before being asked to leave): "Here, as noted, plaintiff was ***unable to access the Library*** on the evening of December 30, 1999-a period of, at most, ***several hours***. This de minimus interruption of plaintiff's otherwise unrestricted access to the Library simply does **not** implicate a cognizable ***liberty interest***." Id at *3 (motion to dismiss granted).
  - *Mathews* standards: "[E]ven if plaintiff's inability to access the Library on the evening in question could be characterized as a deprivation of a liberty interest, plaintiff ***fails*** to make any argument, let alone offer evidence, ***to show*** how ***conducting a hearing prior to expulsion would reduce the risk of an erroneous decision under the circumstances presented***, nor does he discuss the Library's interest in maintaining order." Id.

Deprivation of Access: Liberty Interest?

- **No**: *Breytman v. New York Public Library, Dyckman Branch*, 296 Fed. Appx. 156, 2008 WL 4601821 (2d Cir. 2008), granting motion to dismiss for failure to state a claim upon which relief can be granted an allegation "that defendants violated his rights under the First and Fourteenth Amendments to the United States Constitution when they informed him that he would ***not be permitted to plug his laptop*** computer into an electrical outlet at the library."
- **Yes**: *Wayfield v. Town of Tisbury*, 925 F. Supp. 880 (D. Mass 1996) (***4-month suspension from public library*** without a hearing in response to a disruptive event): "this court finds that Wayfield states a sufficient claim to support a finding that the ***suspension of his access*** to the library was a ***deprivation*** of a '***liberty or property right***.'" Id. at 885.

Deprivation of Access: Penalties

- *Wayfield v. Town of Tisbury*, 925 F. Supp. 880 (D. Mass 1996) Was patron afforded due process before deprivation?
- Depravation of the liberty interest, standards: "First, the ***private interest*** that will be ***affected*** by the official action; second, the risk of an ***erroneous deprivation*** of such interest through the procedures used, and the probable value, if any, of ***additional or substitute procedural safeguards***; and finally, the ***Government's interest***, including the function involved and the ***fiscal and administrative burdens*** that the additional or substitute procedural requirement would entail." Id. Based upon *Mathew v. Eldridge*, 424 U.S. 319, 332 (1976).
- **Lesson: expulsion for longer than a week or month may be a deprivation of a liberty interest, and must meet constitutional requirements.**

Deprivation of Access: Processes

- *Wayfield v. Town of Tisbury*, 925 F. Supp. 880 (D. Mass 1996) (applying the test): "The defendants, in their moving papers, make no reference to any written or otherwise established procedure for the suspension of library privileges that existed at the time the officials of the library took action against Wayfield. Nor have the defendants proffered anything which shows what the library has done in other, similar situations, if indeed there have been any." Id. at 886-887.
- "In this case, that ***interest is significant***; other courts have found that the ***ability to use a public library implicates important First Amendment rights***." Id at 888
- "The record before the court indicates that Wayfield was ***afforded no predeprivation process***. This fact, combined with the ***lack of standards or rules*** governing the suspension of library privileges, leads the court to believe that the risks of erroneous deprivation are great." Id.

Deprivation of Access: Penalties

- *Wayfield v. Town of Tisbury*, 925 F. Supp. 880 (D. Mass 1996): “the library could undertake a number of not particularly onerous prophylactic measures that would protect the due process rights of its patrons without significantly burdening the library. For example, the library could ***send a letter*** to patrons who were threatened with potential suspensions, ***notifying*** them of the ***action pending*** against them and ***inviting*** them to argue their cases, ***in writing or in person***. The court determines that, under the three-part analysis of *Mathews v. Eldridge*, the defendants did not afford Wayfield adequate due process. Indeed, it appears from the record in this case that they afforded him no process at all.” Id. at 889.
- **Lesson: use written processes and articulate standards.**

Deprivation of Access: Drafting

- *Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993) (**permanent ban** on patron use of library in response to harassment of female library clerk). In agreement with *Kreimer*: "there is a First Amendment right to access the Freeport Public Library. That right, as is usually the case, is not without limits." Id. at *3.
- Again in agreement with *Kreimer*: "a rule which prohibits disruptive behavior in a public library is at least conceptually inoffensive to the First Amendment...the way in which any given rule is worded will have a direct effect on whether its designed purpose is effectuated with the least amount of harm to the First Amendment…the ***unwritten policy is broadly stated and lacks reasonable limitations*** as to the conduct it seeks to prevent." Id.
- **Lesson: policy should be written, precise and link conduct and response.**

Deprivation of Access: Drafting

- *Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993). "While the court cannot say that an ***unwritten rule*** is *per se* constitutionally suspect, it at the very least opens the door to justifiable concern. Unwritten rules lend themselves to a ***myriad of problems***, none the least of which is proof of its existence, both ***temporally*** and ***substantively***. Id. at *5, n.6.
- "For instance, the policy does not define the terms 'harassing' or 'intimidating.' While these words may be accorded their generally understood dictionary meanings, such meaning must be ***connected to the acceptable purpose of the policy***, that is, the prevention of disruptive behavior inconsistent with the use of a public library." Id.

Deprivation of Access: Drafting

- *Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993). "Similarly, ***harassment by looking at someone angrily should not necessarily lead to that person's discontinued use of the library***. If it does, then such conduct should provide the basis to infringe upon the actor's access to the library. If not, there is no justification for limiting his library use. Additionally, the Freeport library's policy ***fails to place geographical limitations*** on where such harassment or intimidation can occur. It ***does not seem reasonable to bar someone from the library because he or she harasses or intimidates someone***, even a library employee, miles from the library or even a few feet away." Id. at *5.

Deprivation of Access: Drafting

- *Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993). "Furthermore, the policy provides for no ***limitations on any preclusion*** from use of the library, nor does defendant offer evidence of any custom, policy or practice effectuating any such limitation. Theoretically, a person ***might be banned forever*** from using the library ***for a single instance of misconduct*** no matter how minor. Certainly, ***such a result cannot be considered*** **reasonable** in light of the First Amendment or recognized concepts of due process." Id. at *5.
- **Lesson: structure penalties with reasonable relationship to harm/offense.**

Deprivation of Access: Drafting

- *Brinkmeier v. City of Freeport*, 1993 WL 248201 (N.D. Ill. 1993). "Lastly, there is nothing in the policy, or as otherwise submitted by defendant, evidencing any ***informal or formal procedure whereby a person may challenge*** his denial of access to the library. While this court does not suggest that a policy of this nature must necessarily conform to procedural due process requirements, the conclusion that the policy is less than reasonable is bolstered by the lack of such safeguards in light of the wording of this particular policy. " Id. at *6.
- "[T]he ***unwritten policy*** applied to bar plaintiff from the library to be an ***unreasonable limitation*** on plaintiff's First Amendment right to access and use the Freeport Public Library. Accordingly, it cannot provide the basis for plaintiff's ***unconditional expulsion*** from the library." Id.

Deprivation of Access: Drafting

- Compare, *Doyle v. Clark County Public Library*, 2007 WL 2902211 (S.D. Ohio) (motion to appeal denied): "Plaintiff is a patron of the Clark County Public Library who was barred for sexual harassment of a female patron… only hearsay evidence… ***hearing at which he had the opportunity to rebut the charge*** and he did not successfully do so… Plaintiff was not denied either substantive or procedural due process by the bar order and he never produced any evidence of discrimination on the basis of race or religion." Id. at *2.
- **Lesson: offer notice and opportunity to rebut.**

Liberty Interests: Academic Library

- **Liberty Interest? No** , *Petrossian v. Collins*, 479 Fed. Appx. 409, 410 (3d Cir. 2012): 14th Amendment "claim—that he has a protected ***liberty interest*** in access to the MSU [**Montclair State University**] library—is ***conclusory and without any legal support*** [] we agree with the District Court that Petrossian failed to allege any violations of any protected rights."
- **Penalties**, : "Library user's ***note to state university librarian complaining about reference librarian was not protected activity under First Amendment***, and thus librarian's decision to ban user from library because of insulting language in note did not violate user's free speech rights." ***Retaliation claim*** (for exercise of First Amendment rights) ***rejected***. Id.

Liberty Interests: Academic Library

- **Liberty Interest? No**, *Pan v. State*, 2014 WL 1022355 (Tex.App.-Dallas, 2014) (unpublished): "Defendant was not expelled from the university. He was merely ***warned that entering the library*** between the hours of 6:00 a.m. and 6:00 p.m. Monday through Friday was forbidden. Defendant was not prevented from using the library at other times or prevented from attending any of his classes...interest in his graduate education was not implicated by the trespass warning. Thus, the ***liberty interest*** recognized in *Than* was **not** infringed upon in this case."
  - Referencing, *University of Texas medical School at Houston v. Than*, 901 S.W. 926 (Tex. 1995) (concluding that student had a constitutionally ***protected liberty interest in his graduate education*** that must be afforded procedural due process).

Nature of Academic Meeting Space

- **Designated Public Forum:** "Examples of **designated public fora** include: ***state university meeting facilities*** expressly made available for use by students." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1130 (10th Cir. 2012), at n. 5, citing, *Widmar v. Vincent*, 454 U.S. 263, 267-269 (1981).
  - Concluding that the public library was a designated public forum: "The City does not contend that its public libraries offer anything less than general access to the public, without any need for pre-approval. Accordingly, this factor indicates that the City's libraries are designated public fora." Id. at 1130-1131.
- **Designated Public Forum:** "An example of a **designated public forum** is a ***meeting room*** on ***a public university*** 'generally open' to all student groups." *Grosjean v. Bommarito*, 302 Fed.Appx. 430, 439 (6th Cir. 2008), also citing *Widmar*.
- **Meeting Room as a Limited Public Forum is possible.**

Meeting Room Policy and Practice

- *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989). [Not covered in slides.]
- *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253 (E.D. Wis. 2000).
- *Faith Center Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006), amended [no substantive change to original opinion] and rehearing en banc denied [dissenting opinion filed] by 480 F.3d 891 (9th Cir. 2007), cert. denied 128 S. Ct. 143 (U.S. Oct. 1, 2007).
- Public school classrooms as after-school meeting rooms.
- *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trustees*, 2008 WL 3843579 (S.D. Ohio 2008) (unpublished).
- *Faith Center Church Evangelistic Ministries v. Glover*, 2009 WL 1765974 (N.D. Cal. 2009) (unpublished).

Patron Use of Meeting Rooms

- *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253 (E.D. Wis. 2000).
- **Exclusions:** "Religious services or instructions" from Meeting Room. Id. at 1256.
- However, "the Library's ***practice***, like its ***policy***, reflected its intent to encourage many diverse groups to use the Constitution Room." Id. at 1264.
- **Forum Conclusion:** the Constitution Room is a "designated public forum for nonprofit organizations." Id. at 1266.
- **Legal Standard: *Strict Scrutiny*** applies. "Defendant does not advance any compelling state interest or, for that matter, any reason at all for the exclusion." Id. at 1267.

Patron Use of Meeting Rooms

- "[T]he Establishment Clause of the Federal Constitution, which provides the legal basis for the ***separation of church and state***, ***does not justify*** the Library's ban on religious instruction." 91 F. Supp. 2d at 1266.
- Does ruling "requir[e] it [the library]to open the Room to commercial sales activity … The concern about commercialism, however, seems unfounded, both because the forum remains restricted to nonprofit organizations and because commercial speech is subject to a lower level of First Amendment protection than noncommercial expression." 91 F. Supp. 2d at 1267.
- **Lesson: avoid disconnect between policy and practice; courts will judge forum on the basis of practice.**

Patron Use of Meeting Rooms

- *Faith Center Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006).
- "This appeal from the grant of a preliminary injunction involves an evangelical Christian church seeking access to a public library meeting room to conduct, among other activities, religious worship services." Id. at 1198.
- "Pursuant to the County's **library meeting room policy**, '[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations' ***may use*** the meeting room space for 'meetings, programs, or activities of educational, cultural or community interest.' … [S]chools ***may not*** utilize a meeting room 'for instructional purposes as a regular part of the curriculum… the library meeting room '***shall not*** be used for religious services.'" Id.

Patron Use of Meeting Rooms

- Legal Classification: “We therefore hold that the Antioch Library meeting room is a ***limited public forum*** whose restrictions to access may be ‘based on subject matter ... so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’” Id. at 1205-1206 (quoting *Cornelius v. NAACP Legal Defense* Fund, 473 U.S. 788, 800 (1985).
- “The County’s policy regulates use of the meeting room to preserve the character of the forum as a common meeting space, an alternative to the community **lecture hall**, the corporate **board-room**, or the **local Starbucks**.” Id. at 1206.

Patron Use of Meeting Rooms

- "The library policy, for example, **prohibits** schools from using the meeting room as a ***regular part*** of the school's ***curriculum***. The County's exclusion of schools is ***reasonable*** in light of its purpose. To allow the meeting room to be converted into a classroom would transform the character of the forum from a community meeting room to a public school." Id. at 1206.
- "By the same token, the County's decision to **exclude** Faith Center's ***religious worship services*** from the meeting room is ***reasonable*** in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship." Id.

Patron Use of Meeting Rooms

- "We see nothing wrong with the County excluding certain subject matter or activities that it deems inconsistent with the forum's purpose, ***so long as the County does not discriminate against a speaker's viewpoint***." Id. at 1206.
- "Here too, the County has a legitimate interest in screening applications and excluding meeting room activities that may interfere with the ***library's primary function*** as a **sanctuary** for reading, writing, and quiet contemplation." Id.
- "[T]he morning workshop was devoted to the ***topic of communication*** and how to communicate effectively with one's God." Id. at 1210.

Patron Use of Meeting Rooms

- "The County reasonably could conclude that the ***controversy*** and ***distraction*** of religious worship within the Antioch Library meeting room may **alienate patrons** and **undermine the library's purpose** of making itself available to the whole community. We therefore conclude that the County's ***prohibition on religious worship services is*** **reasonable** in light of the purpose served by the Library meeting room." Id at 1206. (citation omitted).
- "***Religious worship***, on the other hand, is ***not a viewpoint*** but a **category of discussion** within which many different religious perspectives abound. If the County had, for example, excluded from its forum religious worship services by Mennonites, then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech." Id. at 1211.

Patron Use of Meeting Rooms

- "Faith Center argues that the government and courts are not competent to identify when certain expressive activity is religious worship. To enforce such a distinction would foster an **excessive government entanglement with religion**." Id. at 1213 (Establishment Clause issue).
- "That distinction, however, was already ***made by Faith Center*** itself when it separated its afternoon religious worship service from its morning activities. Faith Center admits that it occupied the Antioch forum in the afternoon of May 29, 2004 expressly for 'praise and worship.' The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did." Id. at 1214.
- **Lesson: Allow the applicant to delineate between speech about religion and an actual worship service.**

Use of School Rooms for Meetings

- *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).
- **ISSUE:** "That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the **critical question whether it discriminates on the basis of viewpoint** to permit school property to be used for the presentation of all views about ***family issues and child rearing*** except those dealing with the subject matter from a ***religious standpoint***. " Id. at 393.

Use of School Rooms for Meetings

- *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).
- **Rule:** "fears of an Establishment Clause violation are unfounded. The … film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members… repeatedly been used by a wide variety of private organizations… no realistic danger that the community would think that the District was ***endorsing religion*** or any particular creed, and any ***benefit*** to religion or to the Church would have been ***no more than incidental***." Id. at 395.

Use of School Rooms for Meetings

- *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
- **ISSUE:** "The first question is whether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause." Id. at 102.
  - "[T]he Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a ***religious standpoint***. " Id. at 109.

Use of School Rooms for Meetings

- *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
- **RULE:** "The only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live ***storytelling and prayer***, whereas Lamb's Chapel taught lessons through ***films***. This distinction is inconsequential. Both ***modes of speech use a religious viewpoint***. Thus, the exclusion of the Good News Club's activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination. " Id. at 109-110.

Use of School Rooms for Meetings

- *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
- **RULE:** "[W]e conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination." Id. at 112.
- **RULE:** "The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups… allowing the Club to speak …would ensure neutrality, not threaten it … uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club." Id. at 114.

Patron Use of Meeting Rooms

- *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trustees*, 2008 WL 3843579 (S.D. Ohio 2008) (unpublished).
- The meeting room **policy** (**goals**: "As an institution of education for democratic living, the library welcomes the use of its meeting rooms for ***cultural activities and discussion of public questions and social issues***." Id. at *1.
- The meeting room **policy** (**exclusions**): "The use of the meeting rooms for ***commercial, religious or political campaign meetings*** is not permitted. However, committees affiliated with a church (such as a church board of trustees) will be allowed to use the meeting rooms provided no religious services are involved." Id.

Patron Use of Meeting Rooms

- Content of the meeting room event included: “A time of ***prayer*** petitioning God for guidance on the Church’s proper role in the political process; and a time of singing praise and giving thanks to God for the freedom we have in this country to participate in the political process.” Id. at *2.
- “The Library has not defined ‘religious worship services,’ but, as evidenced in the instant case, it is the Library’s practice to ***sever out and prohibit those portions*** of a proposed event that the Library concludes are ‘inherent elements of a religious service,’ and to label those elements as ‘religious worship services.’” Id. at *6.

Patron Use of Meeting Rooms

- Severance "cannot be reconciled with the *Good News Club* Court's conclusion that activities that are 'quintessentially religious' or 'decidedly religious in nature' can also constitute speech with a religious viewpoint." Id. at *11.
- "The court [Ninth Circuit] emphasized that its holding was based upon Faith Center Church's own characterization of its event …[here] the Library …made that distinction and attached those labels to the prayer and singing activities. " Id. at *12.
- "[P]rayer and singing elements … are indistinguishable from those activities [] conveying a religious perspective on otherwise permissible subject matter." Id.
- **Lesson: "pure religious worship" can be excluded, but religious speech, e.g., prayers or songs cannot.**

Patron Use of Meeting Rooms

- *Faith Center Church Evangelistic Ministries v. Glover*, 2009 WL 1765974 (N.D. Cal. 2009) (on remand with expanded record) (unpublished).
- **Content of the Use:** 2004 "Praise and Worship" session: includes "discussions about the Bible, teaching, sermons, singing, praying, sharing testimonies, taking communion and other similar activities…May 29 meeting consisted of opening and closing prayers…Center also **sang two songs** during the afternoon session, *When I See Jesus* and *Amazing Grace.*" Id. at *3.
- **Library Processes:** "At some point during the [May 29] meeting, Library personnel advised Faith Center that the meeting violated the Religious Use restriction then in force and advised Faith Center that it could not hold its July 31 event in the Meeting Room." Id.

Patron Use of Meeting Rooms

- Faith Center challenged the denial: *Faith Center Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006), amended [no substantive change to original opinion] and rehearing en banc denied [dissenting opinion filed] by 480 F.3d 891 (9th Cir. 2007), cert. denied 128 S. Ct. 143 (U.S. Oct. 1, 2007).
- **Library approved the application** with the caveat that ***Faith Center is responsible for distinguishing*** between religious worship services from other forms of religious speech.
- Faith Center responds that it cannot make that distinction.
- Court concludes that the Religious Use Restrictions violates the ***Establishment Clause***. (Court does not reach the Free Exercise Clause or Equal Protection analysis.

Patron Use of Meeting Rooms

- **Establishment Clause Issue:** *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (policy must have a secular purpose, not advance or inhibit religion, not "foster excessive an excessive entanglement with religion").
- Based on previous case law: "official and continuing surveillance." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970).
- **Library processes in practice?:** "[L]ikelihood that the County would be called upon to inquire into religious doctrine in order to determine whether a particular activity qualified as a religious service." Id. at *9.
- "Accordingly, the Court concludes that the Religious Use restriction fails the third prong of the *Lemon* test." Id. at *10.
- **Lesson: Have patrons self-select if meeting includes religious services, do not monitor or investigate.**

Patrons and the Library Web Space

- *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000). Reversing the district court decision granting summary judgment to the city and remanding to the district court for trial on the hypertext link issue: "As noted above, the structure of the forum, as established by Cookeville, does not allow free and open dialogue between users; it primarily serves to convey information to the reader. This structure is consistent with the city's stated goals for the Web site, and is a further indication that the **forum in question should not be considered a designated public forum**… Therefore, we conclude that the **city's Web Site**, which established links to other Web sites, **is a nonpublic forum** under the First Amendment." Id at 844 (emphasis added).

Patrons and the Library Web Space

- *Putnam Pit, Inc. v. City of Cookeville*, 76 Fed. Appx. 607, 2003 WL 22000304 (6th Cir. 2000) (unpublished). "The jury concluded that *The Putnam Pit* website did not meet Cookeville's ***eligibility criteria***" of ***promotion of economic welfare, commerce, and tourism*** in the Cookeville area. Id. at 612, **5. From the substantial evidence of what the subject matter of the *The Putnam Pit* included, the jury was free to conclude, as it did, that *The Putnam Pit* did not promote economic welfare, commerce, and tourism of the Cookeville area." Id. at 614, **6.
- **Implications for the public library:** posts and links must be consistent with library mission and purpose, i.e., no viewpoint discrimination.

Patrons and the Library Web Space

- *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133 (2d Cir. 2004). "The ***government can reasonably exclude expression that undermines the purpose served by a nonpublic forum***… common reason for such an exclusion is that the excluded expression is **distracting or disruptive**… Avoiding **other negative effects of expression** can also justify limits on speech in nonpublic fora… where allowing private expression in a nonpublic forum **may imply government endorsement** of that expression, limiting or excluding speakers may be reasonable." Id. at 148.
  - *Law*: "Whether a restriction is reasonable must be determined with reference to the **disruption or distraction** that would result ***if all groups*** like the group at issue ***sought access***." Id.

Patrons and the Library Web Space

- *In re Davidian* (Shorewood Public Library Board decision, June 13, 2005).
- Creating the implication of **government endorsement**: *Facts*: Mr. Davidian's web site is identified by the URL shorewoodvillage.com, in spite of the fact that the "Village of Shorewood" has indeed trademarked its name (Wisconsin trademark registration number 26096 (July 13, 1978), the mark was renewed as recently as May 27, 1998, the registration form lists the ***Village of Shorewood***, as owner of the mark).
  - *Argument*: Allowing a link from a government entity, in this instance the web page of the library could implicate of endorsement of the private web page as indeed affiliated with the city itself which it is not.

Content Control in Entrance Areas

- *Gay Guardian Newspaper v. Ohoopee Regional Library System*, 235 F. Supp. 2d 1362 (S.D.Ga. 2002).
- **Discretion (again!) in collections:** "In other words, why can't community libraries cater to *community* taste? And what right does an 'unwanted-speech' speaker have to tell a librarian what to acquire and how to present it? Could swastika-bannered hate groups who had similarly exploited the Library's 'free-lit' lobby table now similarly demand the same judicial relief? How about 'swingers' or other pro-hedonism publications?" Id. at 1366.
  - "For argument's sake assume the worst here—that an **impermissibly censorious motive** figured into the Library's **forum closing**. Is that legally relevant? Absent any evidence that a facially neutral closure (or partial closure) policy bears the *effect* (in contrast to intent) of singling out an 'unwanted' speaker, this Court holds that it is not." Id. at 1375.

Content Control in Entrance Areas

- Concluding that ***forum elimination is not unconstitutional but observing***: "It nevertheless is important to emphasize the limits of this ruling. It ***does not reach the authority of librarians to prevent library patrons from reading what they want***. Nor does it address *what rights patrons or content providers may have* to constrain librarians to ***carry or not carry a given publication***." 235 F. Supp. 2d at 1379.
- **Lesson: Library may close forum. Motive of controversy avoidance acceptable? (remember *Pico*: "decisive factor test?)**
- **Implications: Limited patron input into collection building/weeding. Patrons can read their own (constitutionally protected?) material without limit?**

Patron Use of Display Cases?

- No library cases reported as of June 4, 2014. So apply the same legal principles to patron use of Display cases. Ask these questions…
- What is the nature of the forum, i.e., what does your policy state: Designated, limited or nonpublic forum?
- If patrons can make use of the display case, to what extent if any is the content restricted? Are there other restrictions in place?
- If content is restricted, is practice consistent with policy?
- Apply proper forum tests, e.g., viewpoint neutrality. If patrons can make use of the display case request and content is restricted, do not deny application for use on basis of viewpoint.
  - If a patron could display a collection of major party campaign memorabilia, a patron with a collection of socialist or green party “stuff” should also have the opportunity to display.

Display Cases in Public Places

- **Advertising display cases:** *Air Line Pilots Association, International v. Department of Aviation of City of Chicago*, 45 F.3d 1144, 1152 (7th Cir. 1995) ("Here, it is undisputed that the [advertising] display cases ***fail to qualify as a traditional public forum***. The parties do contest, however, whether the government has dedicated the display cases for expressive uses as a ***designated public forum***.").
- **Advertising display cases:** *Park Shuttle N Fly, Inc. v. Norfolk Airport Authority*, 352 F.Supp.2d 688, 706 (E.D. Va. 2004) ("The Court concludes that the advertisement space is a ***non-public forum***.").
  - "The regulation in question here prohibits the Plaintiff, and similar competing businesses from advertising in the airport terminal. The distinction is therefore made based upon the ***identity of the speakers***." Id. at 706.

Display Cases in Public Places

- **Location of display case in public places:** *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (policy prohibited political advertising): "the managerial decision to ***limit car card space*** to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, ***display cases*** in ***public*** hospitals, ***libraries***, office buildings, military compounds, and other public facilities immediately ***would become Hyde Parks open to every would-be pamphleteer and politician***…No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to ***minimize chances of abuse***, the appearance of *favoritism*, and the risk of imposing upon a **captive audience**."

Display Cases in Public Places

- **University department display cases:** *Burnham v. Ianni*, 119 F.3d 668, 686-687 (8th Cir. 1997) ("Plaintiffs… assert a violation of their First Amendment right to use the display case as a means 'to publicize some of the areas of expertise and interest of the History Department's faculty [**University of Minnesota at Duluth**], while at the same time portraying the faculty in an informal, somewhat humorous way.' In analyzing this claim, we agree with the district court's conclusion that the ***history department display case*** was a ***nonpublic forum***."
  - Factors: 1) display case was under university control, 2) campus allowed members of the history club to use it upon request, and 3) display case dedicated to use of the history department for disseminating information about the department. Id. at 687.

Public Library Display Cases Summary

- **Is the display case a limited or a nonpublic forum.**
  - **If a limited public forum, does the policy define the limits: apply intermediate scrutiny or rationale basis**
  - **If a nonpublic forum, apply reasonableness.**
  - **Both must be viewpoint neutral.**
- **Where is the case located: is it a captive audience?**
- **The reasonableness of a nonpublic forum can be demonstrated by a policy that attempts to *minimize chances of abuse*, *remove the appearance of favoritism*, *and avoid imposition of imposing upon a captive audience*.”**
- **Consistency again! Are policies regarding the display case, bulletin board, information table or Kiosk and other similar stations consistent?**

Questions and Answers
now or later . . .
Your one free phone call!

THANK YOU!

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(after 10/01/14 , Dean of the UW-Milwaukee *i*School)