Agenda

Library Advisory Board Regular Meeting

Tuesday, April 15, 2025 at 5:30 PM
City Hall Cowles Council Chambers In-Person & Via Zoom Webinar

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

Zoom Webinar ID: 991 8847 0047 Password: 125016
https://cityofhomer.zoom.us
Dial: 346-248-7799 or 669-900-6833;
(Toll Free) 888-788-0099 or 877-853-5247

CALL TO ORDER, 5:30 P.M.

AGENDA APPROVAL

PUBLIC COMMENT ON MATTERS ALREADY ON THE AGENDA (3 minute time limit)

RECONSIDERATION

APPROVAL OF MINUTES

A. Unapproved Minutes- March 18, 2025 Regular Meeting

VISITORS/PRESENTATIONS

STAFF & COUNCIL REPORT/COMMITTEE REPORTS

A. Designate LAB Member to Report to Council

B. Library Director's Report- March Page 3

C. Fundraising Report

D. Legislative Report

PUBLIC HEARING

PENDING BUSINESS

A. LAB/FHL Soiree- October 5th, 2025

B. Revisions to Homer Public Library Policies Page 11

NEW BUSINESS

A. Introductions

INFORMATIONAL MATERIALS

COMMENTS OF THE AUDIENCE (3 minute time limit)

COMMENTS OF THE CITY STAFF

COMMENTS OF THE BOARD

COMMENTS OF THE BOARD

ADJOURNMENT

Next Regular Meeting is **Tuesday, May 13th, at 5:30 p.m.** All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom Webinar.

Library Director's Report

March 31, 2025

General Notes

The Homer Foundation Youth Advisory Committee (YAC) gave the library $1,000 to purchase sports equipment for checkout. Many thanks for their generosity!

As of April 1, all the Story Walk Trail posts are installed. Thanks to the City parks division for all the hard work! The western lot committee has also commissioned an informational kiosk at the western end of the trail and the carpenter has begun ordering materials. The new benches have arrived at public works and should be put out by the trail sometime during April.

The Friends of the Library are partnering with the Porcupine Theater to hold a fundraiser on April 2. The theater will show *The Wizard of Oz* and FHL will receive some of the proceeds from drink sales. Separately, the library and theater are also partnering to distribute five free movie tickets each week. Tickets can be checked out at the front desk with a limit of one ticket per library card.

The Celebration of Lifelong Learning was a smash hit—all the tickets sold out and the silent auction did extremely well. Congratulations to Carol Comfort and Beatrix McDonough for receiving the awards!

Last December, Newspapers.com made the full text of the *Homer News* available online, using digitized images from the Homer Public Library's microfilm. We're expanding that partnership to cover other local papers as well. Homer patrons currently have access to the *Daily Sitka Sentinel and Arrowhead Press, Great Lander Shopping News, Kenai Peninsula Pioneer* and the *Homer Tribune* from 1996-2006. We have shipped our holdings of the *Homer Tribune* to the company, which should extend the run from 1991-2019, and will soon send them the *Cook Inlet Courier* and a couple more reels of the *Kenai Peninsula Pioneer.*

On March 18, department heads met at City Hall to discuss preparations for the eruption of Mt. Spurr. Library staff have since developed a detailed checklist of tasks and reviewed it as a group. Ahead of the eruption, we will be wrapping nonessential equipment in plastic or storing it in lidded bins; putting away documents in filing cabinets or disposing of them altogether; prepping plastic

sheets atop bookshelves so they are ready to deploy quickly; storing more N95 masks and cleaning equipment; and so on. If ashfall over Homer becomes severe enough, we will close the building and shut off the ventilation intakes.

On March 14, Donald Trump issued an executive order that effectively dismantled the Institute of Museum and Library Services (IMLS), which is the main source of federal funds for museums and libraries all across the country. In response, the Homer City Council passed Resolution 25-024 on March 24, expressing support for the mission of the agency and urging officials at all levels of government to continue its functions. On April 1, NPR reported that all IMLS staff were placed on administrative leave. Last fiscal year, the IMLS gave $1.27 million to Alaska alone, which supported many statewide services, including the Alaska Digital Library, the SLED databases, reference and interlibrary loan services for many libraries, and a wide variety of other functions.

Staff Notes

Director's meetings:

- Staff: 5
- LAB: 1
- FHL: 5
- Council: 2
- Department Heads: 2
- Other: IT meetings, Recreation Champions, product demos, SLED committee, Mt. Spurr event planning, other library directors, Students in Transition Program, 2026 Alaska Library Association Conference planning, Alaska Library Association General Membership Meeting, Celebration of Lifelong Learning

Facility

Staff are extensively preparing for volcanic ash, including identifying how to shut down the air handler. There was one complaint about the uneven paving outside the library; I forwarded it to public works.

Library Advisory Board (LAB)

The LAB discussed revisions to the library's Policy Manual, and eventually voted to send all the revisions to the city council. Most revisions are relatively minor. The largest change concerns the addition of an appendix of case law related to materials reconsideration.

The LAB also made some comments on the City's draft Comprehensive Plan and debated celebrating some upcoming library anniversaries—2026 marks the 20th anniversary of the move into the present library building, and 2028 will be the 90th anniversary of the library's founding as well as its 50th anniversary as part of the City government.

Friends of the Homer Library (FHL)

At the FHL board meeting, the board reviewed its recent events and planned logistics for upcoming ones, particularly the Celebration of Lifelong Learning. There was also considerable discussion about the partnership with the Porcupine Theater and other ongoing projects. A committee is working on revisions to the FHL bylaws.

Ongoing Events

- Mondays, 1:30-4:30: Knitting Club
- Tuesdays, 3:30-4:30: Chess Club
- Wednesdays, 10:30-11:00: Toddler Time
- Wednesdays, 3:00-4:45: LEGO Club
- Fridays, 10:30-11:30: Preschool Storytime
- Fridays, 3:30-5:45: Live-Action Role Playing (LARP)
- Saturdays, 10:00-12:30: Alaska Japanese Club
- First Tuesday, 6:30-8:00: SPARC Radio Club
- First Thursday, 1:00-3:00: Literary Ladies
- First and Third Thursdays, 5:30-7:30: Tech Help
- Second Wednesday, 4:45-5:45: Teen Advisory Board
- Third Thursday, 10:30-11:30: Radio Storytime on KBBI
- Fourth Tuesday, 4:30-6:30: FHL/HPL Book Club
- Tuesday following the first City Council meeting of the month, 12:00-1:00: Conversations with a Councilmember (schedule may vary depending on availability)

Special Events

- **Mar. 4, 5:30-7:30: Our favorite poems.**
- Mar. 8, 1:00-4:00: Seed Library packing of seed containers.
- Mar. 11, 5:00-7:30: Food Not Bombs.
- **Mar. 12, 10:00-11:00: Virtual author talk with Dan Heath, author of *Reset.***
- **Mar. 14: An executive order effectively dismantles the Institute of Museum and Library Services (IMLS).**
- **Mar. 18, 6:00-7:30: Showing of PBS documentary *Free For All.***
- **Mar. 20, 10:00-11:00: Virtual author talk with Clara Bingham, author of *The Movement: How Women's Liberation Transformed America 1963-1973.***
- Mar. 20, 1:00-3:00: Homer OPUS.
- Mar. 20, 4:00-5:15: Crafternoon for tweens and teens.
- **Mar. 24: Homer City Council passes Resolution 25-024, endorsing the mission of the IMLS and encouraging officials at all levels of government to support its current functions.**
- Mar. 24, 10:00-1:30: KPBSD Special Education Program.
- Mar. 25, 6:00-7:00: Homer, Alaska Book Club.
- **Mar. 26, 3:00-4:00: Virtual author talk with Jennifer Weiner, author of *The Griffin Sisters' Greatest Hits* and many others.**
- Mar. 27, 4:00-5:45: Board games for teens and tweens.
- **Mar. 29, 6:30-8:30: Celebration of Lifelong Learning recognizes Carol Comfort and Beatrix McDonough for their dedication to education and community.**
- Mar. 31: Library closed for Seward's Day.
- **Apr. 1: New Story Walk posts installed along the trail. All IMLS staff placed on administrative leave.**
- Apr. 2, 5:00-6:00: Haven House Sexual Assault Awareness.
- Apr. 5, 12:00-2:00: Haven House Sexual Assault Awareness.
- **Apr. 8, 6:00-7:30: Kachemak Bay Recovery Connection Fireside Chat.**
- **Apr. 11, 1:15-3:00: Fun with bears, in collaboration with the Pratt Museum.**
- **Apr. 24, 6:00-7:30: Author visit by Lily Tuzroyluke, author of *Sivulliq,* formerly featured on the Lit Lineup and now the Alaska Reads title for 2025. Also includes a celebration of the tenth anniversary of the Lit Lineup.**
- **Apr. 28, 5:30-8:30: Defenders of Wildlife explains their bear safety program.**

- **May 9-10: Spring Book and Plant Sale.**
- **May 13, 6:00-7:30: Author visit by Linda Fritz, author of *Answering Alaska's Call.***
- **May 22, 6:00-7:30: Author visit by Aurora Hardy, author of *Windswept* and *Ghost of the Kenai.***
- May 26: Library closed for Memorial Day.

Homer Public Library Statistical Summary for 2024 **Date: 11-Apr-25**

CIRCULATION	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Y.T.D.
TOTAL (*Included)	14,636	14,431	15,039	14,426	14,469	13,937	15,411	15,254	13,542	13,354	13,191	12,558	170,248
*Physical Print/Audio/Video	11,344	11,115	11,546	11,133	11,081	10,772	12,113	11,988	10,389	10,315	10,134	9482	131,412
*Other Physical items (n. 2)	91	90	75	83	92	96	113	106	99	101	97	109	1,152
*Alaska Digital Library	2,936	2,975	3,219	2,990	3,118	2,893	2,967	2,985	2,879	2,768	2,821	2858	35,409
*Flipster e-magazines	41	18	36	18	21	41	14	8	61	26	18	3	305
*Kanopy streaming video	224	233	163	202	157	135	204	167	114	144	121	106	1,970
INTERLIBRARY LOANS													
Incoming (Borrowed)	19	11	12	11	21	14	11	11	14	11	16	14	165
Outgoing (Lent)	28	26	24	28	28	17	20	21	18	14	9	23	256
BUILDING USE													
Gate Count	8,880	8,111	8,662	8,564	9,795	8,258	9,312	8,596	8,636	8,460	7,467	6465	101206
Study Rooms (# of group sessions)	266	238	229	206	205	180	197	234	222	241	239	211	2668
Study Rooms (# of people)	499	454	442	373	390	309	344	415	399	427	462	376	4890
Meeting Room (# of group sessions)	27	30	36	34	31	38	29	22	24	35	23	26	355
Meeting Room (# of people)	206	214	309	213	254	244	256	205	231	329	243	197	2901
INTERNET USE													
TOTAL (*Included)	2,315	3,288	3,045	3,065	2,324	2,111	2,782	3,333	2,464	2,367	1,793	1,686	30,573
*Wireless Internet sessions	1,169	2,190	1,923	1,926	1,221	1,011	1,616	2,122	1,262	1,127	885	897	17349
*Hardwired Internet sessions	1,146	1,098	1,122	1,139	1,103	1,100	1,166	1,211	1,202	1,240	908	789	13224
Website visits (sessions)	3,415	3,136	2,813	2,861	2,825	2,697	2,888	2,809	2,729	2,803	2,263	2,227	33,466
PROGRAM ATTENDANCE (n. 1)													
TOTAL (*Included)	1,205	1,101	1,223	1,216	1,436	1,196	1,415	1,064	1,231	1,214	1,021	891	14213
*Programs for Age 0-5	900	884	922	990	891	845	867	821	975	841	676	630	10242
*Programs for Age 6-11	31	47	62	24	239	171	288	74	134	135	101	82	1388
*Programs for Age 12-18	26	16	41	37	54	52	62	50	46	45	7	14	450
*Programs for Age 19+	150	134	196	131	115	84	63	119	74	108	56	36	1266
*Programs for All Ages	98	20	2	34	137	44	135	0	2	85	181	129	867
OUTREACH													
# Events	3	1	2	2	5	4	0	2	2	2	2	3	28
# People	11	9	9	9	11	18	0	20	10	20	10	4	131
NEW CARDS ISSUED													
City	38	24	20	25	17	37	45	36	36	37	33	28	376
Borough	19	28	21	20	18	17	44	19	20	17	19	12	254
Temporary	1	0	0	0	1	8	2	1	2	0	0	0	15
Reciprocal	0	0	3	1	4	2	6	6	3	1	2	1	29
VOLUNTEER HOURS													
# of people	71	75	76	90	87	84	93	81	81	105	79	72	994
# of hours	248	217	243	251	360	293	308	264	248	242	246	156	3076
MATERIALS ADDED													
Books	287	219	155	248	337	192	209	186	114	229	182	177	2535
Audio	9	9	11	25	12	9	0	5	5	10	26	6	127
Video	41	34	33	29	32	26	32	38	12	17	16	34	344
Serials	0	0	0	0	0	0	0	0	0	0	0	0	0
Electronic Resources	50	41	60	28	106	167	84	90	51	136	47	77	937
MATERIALS REMOVED													
Books	73	25	57	106	116	223	282	306	593	76	89	34	1980
Audio	21	74	4	8	0	1	1	0	0	0	3	0	112
Video	0	101	1	34	0	37	31	41	2	0	1	0	248
Serials	1	0	0	0	1	0	0	1	0	0	0	0	3
Electronic Resources	0	0	0	0	0	0	0	0	0	0	0	0	0
REVENUES DEPOSITED													
Fines/Fees/Copies	1000.00	791.00	1453.00	1405.60	932.06	1100.20	1422.15	869.31	1355.65	815.40	634.97	699.24	12,478.58
Building Fund (151-)													0.00
Library Gifts (803-)													0.00
Endowment													0.00
Grants	725.00									1829.00	11633.00		14,187.00
TOTALS	1,725.00	791.00	1,453.00	1,405.60	932.06	1,100.20	1,422.15	869.31	1,355.65	2,644.40	12,267.97	699.24	$26,665.58

Data not available yet or incomplete

Note 1: Program attendance includes all programs sponsored by the library or the Friends of the Library. It does not include meetings of community groups. Programs are sorted by the age of the target audience, but totals include all attendees (i.e. parents as well as toddlers, etc.)

Note 2: Other physical items includes electronic devices, kits, toys, board games, sports equipment and videogames.

March-25																		
		WK 1	WK 2	WK 3	WK 4	WK 5	Total	Total	Sponsor				Setting					
Target Age Group	Event Title	1-2	3-9	10-16	17-23	24-31	Sessions	People	FHL	HPL	Community	Misc	Meeting Room (Live)	Library (Live)	Offsite (Live)	Virtual (Live)	Self-Paced	
0-5	Radio Story Hour				550		1	550		x						x		
	Toddler time		45	42	35	35	4	157		x				x				
	Preschool Story time		40	28	30	41	4	139		x				x				
							0	0										
							0	0										
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6-11	Kids Chess		28	24	24	28	4	104	x				x					
	Lego		15	12	18	22	4	67		X			X					
	Forest Ecology with Pratt		6				1	6		X					X			
							0	0										
							0	0										
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12-18	Teen Advisory Board	4					1	4		x			x					
	Teen games					6				X			X					
	LARP		14	6		14	3	34	x				x					
	Crafternoon				8		1	8		X			X					
							0	0										
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19+	Literary Ladies		11				1	11			x		x					
	Knitting Club		5	8	7	6	4	26	x				x					
	FHL Bylaws Committee		5				1	5	X				X					
	Virtual author talks			17	11		2	28		x						x		
	FHL/HPL Book Club					2	1	2	x				x					
	KPBSD Special Education Dept					6	1	6			X		X					
	Homer Book Club					3	1	3			X		X					

	SPARC		8				1	8			x			x						
							0	0												
							0	0												
							0	0												
							0	0												
							0	0												
							0	0												
							0	0												
All Ages	Conversations with a Councilmember						0	0												
	Japanese Club	8	8	12		9	4	37			x			x					
	Seed Packing Party		10				1	10			X			X					
	Homer Opus				4		1	4			X			X					
	Our Favorite Poems		31				1	31	x						x					
	Free For All PBS Showing				12		1	12		X				X						
							0	0												
							0	0												
							0	0												
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							0	0												
							0	0												
							0	0												
							0	0												
TOTALS FOR ALL PROGRAMS		**12**	**226**	**149**	**699**	**172**	**43**	**1252**	**6**	**10**	**7**	**0**	**17**	**3**	**1**	**2**	**0**

Outreach **(Includes all one-on-one activities, such as homebound deliveries, tech help, tutoring, mentoring, etc.)**																				
Outreach	Homebound						0	0												
	Tech Help		1		6		2	7	X					X						
	School Visits						0	0												
	Proctored exams	2					1	2		X					X					
							0	0												
							0	0												
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TOTALS FOR OUTREACH		**2**	**1**	**0**	**6**	**0**	**3**	**9**	**1**	**1**	**0**	**0**	**1**	**1**	**0**	**0**	**0**

LAB-25-xxx

MEMORANDUM /AGENDA ITEM REPORT

Revisions to Library Policies

Item Type: Action memorandum

Prepared For: Library Advisory Board

Date: April 10, 2025

From: Dave Berry, Library Director

Through:

At its March meeting, the LAB voted to approve all the suggested revisions to the Library Policies Manual and send them on to the City Council for approval. However, the City Attorney provided some feedback that requires further consideration by the LAB. In the excerpted pages from the policy manual, the text the LAB has already approved is in black, while the attorney's suggested additions are in red.

The attorney's comments are as follows:

- The case-law appendix should include some additional citations.
- A separate appendix should describe the circumstances of the cases in more detail, plus additional cases which the attorney provided.
- Does all this material need to be included in the Policy Manual, or can it be provided to the LAB as a separate document when circumstances require?
- The existing text contains a typo where the *Miller* test is concerned. The revised test corrects this typo and the attorney also provided the complete *Miller v. California* judgement, with the relevant text highlighted in yellow on page 11.

Recommendation:

Pass a motion recommending that City Council adopt revisions to the library policies.

Attachments:

Pages Extracted from the Revised Policy Manual

Text of *Miller v. California*

RELEVANT LAWS

Homer City Code

Chapter 2.48: Public Library

Chapter 5.46: Special Events

Chapter 19.08.030: Parking or Camping Prohibited

State of Alaska Statutes

Alaska Statute 11.76.130: Interference with Rights of Physically or Mentally Challenged Person

Alaska Statute 14.56.400: Public Libraries

Alaska Statute 29.35.145: Regulation of Firearms

Alaska Statute 40.25.140: Confidentiality of Library Records

United States Constitution, Code and Statutes

First Amendment to the U.S. Constitution

Americans with Disabilities Act, Title II, Section 35.136: Service Animals

U.S. Code Title 17: Copyrights

Case Law

See the appendices on "Materials Reconsideration: Compendium of Selected Library Cases" and "Materials Reconsideration: Standard of Review" for further details on the cases below.

1. *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997)
2. *Kreimer v. Bureau of Police of the Town of Morristown,* 958 F.2d 1242, 1255 (3d Cir. 1992)
3. *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976)
4. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975)
5. *Miller v. California*, 413 U.S. 15 (1973)
6. *Case v. Unified Dist. No. 233*, 908 F.Supp. 864 (D.Kansas 1995)

7. *Pratt v. Independent School Dist. No. 18, Forest Lake, Minn.,* 670 F.2d 771 (8th Cir. 1982)
8. *Fayetteville Public Library v. Crawford County, Arkansas,* 684 F. Supp.3d 879 (W.D. Ark. 2023)
9. *Gay Guardian Newspaper v. Ohoopee Regional Library System,* 235 F.Supp.2d 1362 (S.D. Georgia 2002)
10. *Island Trees Sch. Dist. v. Pico by Pico,* 457 U.S. 853, 872 (1982)
11. *ACLU of Florida v. Miami-Dade County School Bd.,* 557 F.3d 1177, 1202 (11th Cir. 2009)
12. *Sund v. City of Wichita Falls, Texas*, 121 F. Supp. 2d 530 (N.D. Texas, 2000)
13. *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622 (1994)

MATERIALS RECONSIDERATION: COMPENDIUM OF SELECTED LIBRARY CASES

1. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

Passed into law as part of the Telecommunications Act of 1996, the Communications Decency Act (CDA) contained anti-indecency provisions which formed the basis for this case. The CDA made it a criminal act to (among other things) knowingly use a computer to send a minor images, requests, comments, or suggestions of a sexual nature and also criminalized transmitting "obscene or indecent" material to people known to be minors.

The ACLU sued the federal government, arguing that the CDA restricted the First Amendment rights of adults to access speech and material online. The Supreme Court agreed, finding that the CDA violated the First Amendment because it was overly broad and therefore abridged protected speech (*Reno* at 874). The Court further noted that "in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it" (*Id*. at 885).

2. *Kreimer v. Bureau of Police of the Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992).

Richard Kreimer was a homeless man who frequently entered his local library and disrupted patrons and staff by staring at and following them, as well as emitting a smell which drove others away. Eventually, the library instituted rules designed to prevent him from accessing the library. He sued, arguing that the library rules violated his Constitutional rights.

While Mr. Kreimer ultimately lost at the Third Circuit Court of Appeals, the opinion noted that he had a constitutional right to receive information and determined that a public library is a 'designated public forum' (*Kreimer* at 1259). Such a categorization means that any library restrictions relating to speech and other forms of expression must be content-neutral, narrowly tailored, and involve a significant government interest (*Kreimer* at 1255), while restrictions on non-speech in a public forum must be merely 'reasonable' (*Id*. at 1262, citing *U.S. v. Kokinda*, 497 U.S. 3115, 3121 (1990) (internal citations omitted)).

3. *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976).

A group of students sued their local school district after the district order that *Catch 22* and *Cat's Cradle* be removed from the school library. While the Sixth Circuit said that a school district may make

decisions regarding the books to be used in educational curriculum (*Minarcini* at 579-80), they also ruled that removal of the books from the library was unconstitutional (*Id.* at 582-83). In addition to referring to the library as "a storehouse of knowledge" (*Id.* at 581), the Sixth Circuit cited the then-recent Supreme Court case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc*., for the proposition (supported by numerous prior cases) that the First Amendment includes the right to receive information (425 U.S. 748, 756 (1976)).

4. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Jacksonville passed an ordinance banning drive-in movies from being shown if they contained nudity. The manager of a drive-in theater sued after he was charged with violating the ordinance after showing an R-rated movie.

The Supreme Court struck down the law, noting that the First Amendment limits the government's ability to stifle access to some speech while allowing other speech, and that such restrictions are not allowed when the potentially offended person can easily avoid the speech (*Erznoznik* at 209). The Court noted that the effect of the law was to prevent theaters from showing movies containing any nudity, regardless of whether the films were educational, entertaining, or innocent (*Id.* at 212), and further noted that any restrictions on children's access must be more tailored than Jacksonville's ordinance (*Id*. at 212-13).

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

Marvin Miller appealed his conviction for sending pornographic material through the mail. The Supreme Court noted that regulating expression was inherently fraught and that any statutes attempting to do so must be "carefully limited" (*Miller* at 23-24). After examining prior cases addressing obscenity statutes, the Court published its three-part test,[1] now known as the *Miller* Test, for determining whether a state can ban some type of media as obscene (*Id.* at 39).

6. *Case v. Unified Dist. No. 233*, 908 F.Supp. 864 (D.Kansas 1995).

After a Kansas school board removed a book containing a romantic relationship involving two teenage girls from local schools' libraries, students sued the district, arguing that the removal violated their First Amendment rights to access the material. After applying the test found in *Pico* (namely,

[1] See the appendix to this document, "Materials Reconsideration: Standard of Revew."

whether the actual motivation for removing the book was the school board members' personal animus toward the ideas contained in the book), the court found that the school board "intended to deny students… access to these ideas" (*Case* at 875-76). The court disallowed the school board from removing the book from the libraries.

7. *Pratt v. Independent School Dist. No. 18, Forest Lake, Minn.*, 670 F.2d 771 (8th Cir. 1982)

A school district included in its high school curriculum a movie (and its associated "trailer" version of the movie) about a fictional small town which randomly selected one person to be stoned to death annually. After the local population complained about the movie, arguing against its violence and that it existed to undermine family values and religious attitudes, the school board voted to remove the movie from the curriculum. Several students then brought suit against the decision on First Amendment grounds.

The district court determined that the removal was based on objections to the "ideological content" of the movie and was therefore improper under the First Amendment (*Pratt* at 773). The school district appealed to the Eleventh Circuit, which affirmed the district court's ruling while stating that the school board "cannot constitutionally ban the films because a majority of its members object to the films' religious and ideological content and wish to prevent the ideas contained in the material from being expressed in the school" (*Id*).

8. *Fayetteville Public Library v. Crawford County, Arkansas*, 684 F.Supp.3d 879 (W.D. Ark. 2023).

The state of Arkansas passed a law which provided criminal penalties for the new crime of "furnishing a harmful item to a minor," with the term "harmful to minors" defined in part by using the three-part *Miller* test. The law also contained a provision under which challenged books could be withdrawn from a library after they were "challenged for appropriateness." The statute did not define "appropriateness."

Librarians, booksellers, and others sued to stop the law from going into effect, arguing that the law was vague, infringing on the First Amendment right to access speech, and would have the effect of either forcing all books out of children's sections or would prompt bookstores to bar entry to minors.

The district court agreed and prevented the law from going into effect, ruling that the provision to withdraw material from library shelves would easily involve content-based restrictions on allowed

speech (*Fayetteville Public Library* at 907), and noting that content-based laws are presumed to be unconstitutional unless they are both narrowly tailored and the government can show such a law serves a compelling state interest (*Id.* at 908). The law here was neither.

9. ***Gay Guardian Newspaper v. Ohoopee Regional Library System*, 235 F.Supp.2d 1362 (S.D. Georgia 2002).**

A library had a free literature table in the lobby, on which a gay-rights advocacy newspaper was provided. After complaints from patrons regarding the newspaper's inclusion, the library closed the free literature table entirely, and the publisher of the newspaper then sued on First Amendment grounds. While all involved agreed that only censoring access to the newspaper would violate the Constitution, the court ruled that the wholesale closure of the free literature table amounted to a content-neutral restriction of the forum itself (i.e. the table) and therefore did not violate the First Amendment (*Gay Guardian Newspaper* at 1368).

The court quotes *American Library Ass'n v. U.S.* when it notes that "generally[,] the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review. In making these decisions, public libraries are generally free to adopt collection development criteria that reflect not simply patrons' demand for certain material, but also the library's evaluation of the material's quality" (201 F.Supp.2d 401, 462 (E.D.Pa. 2002)).

10. ***Island Trees Sch. Dist. v. Pico,* 457 U.S. 853, 872 (1982).**

A school board removed numerous books from school libraries and overruled a committee it had created which recommended the reinstatement of several of the books. A group of students in the district then sued, arguing that their First Amendment rights had been violated by preventing them from accessing the books.

The Supreme Court split on the outcome of the case. Four justices said that the removal violated the First Amendment, four said it did not, and one justice wrote that, for procedural reasons, evaluating the First Amendment question was unnecessary. The four justices who deemed the removal a constitutional violation wrote that, "[l]ocal school boards may not remove books from school libraries simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'" (*Pico* at 854, quoting *W. Va. Board of Ed. V. Barnette*, 319 U.S. 624, 642 (1943)).

11. *ACLU of Florida v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1202 (11th Cir. 2009).

After a parent complained that a school library book about Cuba was factually inaccurate and it was removed, another parent sued the local school board on behalf of his son. The School Board argued that they removed the book not because they disliked the ideas in the book (See *Pico*), but because the book was clearly inaccurate. The Eleventh Circuit ruled that the book could be removed because it contained numerous factual inaccuracies and misleading omissions, stating, "[t]here is no constitutional right to have books containing misstatements of objective facts shelved in a school library" (*ACLU of Florida* at 1202).

12. *Sund v. City of Wichita Falls, Texas*, 121 F. Supp. 2d 530, 547 (N.D. Texas, 2000).

A local reverend spearheaded a campaign to remove two children's books from the local library in Wichita Falls. Both books depicted children with same-sex parents. In response to community pressure, the City Council passed a resolution which mandated that a book be removed from the children's section and placed elsewhere if 300 or more library card holders signed a petition to that effect.

The court ruled that the resolution violated the First Amendment, stating that it "burden[ed] fully-protected speech on the basis of content and viewpoint and they therefore cannot stand" (*Sund* at 547). The court pointed to *Reno v. ACLU* and *Board of Education v. Pico* in noting that the First Amendment protects the right of both children and adults to receive information (*Id.*), and pointed out that, under *Pico*, government officials cannot remove books from the library simply because the books contain ideas or concepts they dislike (*Id*. at 548, quoting *Pico* at 872).

MATERIALS RECONSIDERATION: STANDARD OF REVIEW

In considering whether a given item should remain in the library's collection, the Library Advisory Board is guided by the following legal precedents, as of March 18, 2025.

1. The First Amendment to the United States Constitution protects the right to receive information, a right vigorously enforced in the context of public libraries. *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), and *Kreimer v. Bureau of Police,* 958 F.2d 1242, 1255 (3d Cir. 1992), *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976).

2. Speech that is neither obscene as to youths nor subject to some other legitimate prohibition cannot be suppressed by the Library solely to protect the young from ideas or images. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).

3. The standard for determining whether a book is inappropriate involves evaluating whether the content is obscene. Obscenity is defined in *Miller v. California*, 413 U.S. 15, 39 (1973). Under this test, material is considered obscene if:

   (a) whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest (an improper appeal to a sexual desire).

   (b) whether the work depicts or describes, in an offensive way, sexual conduct ~~in light of community standards~~ specifically defined by the applicable state law; and

   (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

4. This means that for a book to be banned on legal grounds, there must be a solid, objective reason for banning it. This reason must be grounded in these obscenity standards. Subjective disagreements over ideology or content (viewpoint discrimination) do not provide legal justification for the banning of books. In other words, government regulation of speech must be viewpoint neutral. The removal of content that favors one viewpoint is therefore unconstitutional. *Case v. Unified Dist. No. 233*, 908 F.Supp. 864, 875-76 (D.Kansas 1995), *Pratt v. Independent School Dist. No. 18, Forest Lake, Minn.,* 670 F.2d 771, 776-77 (8th Cir. 1982), and *Fayetteville Public Library v. Crawford County, Arkansas,* 684 F.Supp.3d 879, 906 (W.D. Ark.

2023); See *Gay Guardian Newspaper v. Ohoopee Regional Library System,* 235 F.Supp.2d 1362, 1379 (S.D. Georgia 2002).

5. Neither the Library Director nor the Library Advisory Board is permitted to remove material simply due to dislike of the ideas contained in the material. Neither the Director nor the Board may remove materials in order to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Island Trees Sch. Dist. v. Pico,* 457 U.S. 853, 872 (1982), quoting *W. Va. Board of Ed. v. Barnette,* 319 U.S. 624, 642 (1943). However, material may be removed if it contains plainly inaccurate or misleading information. *ACLU of Florida v. Miami-Dade County School Bd.,* 557 F.3d 1177, 1202 (11th Cir. 2009).

6. Limiting access to material rather than removing it from the library also impacts the First Amendment, since such restriction burdens the First Amendment right to receive information, particularly when such restriction is overly broad or based upon viewpoint discrimination. *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622 (1994), and *Sund v. City of Wichita Falls, Texas*, 121 F. Supp. 2d 530 (N.D. Texas, 2000).

93 S.Ct. 2607
Supreme Court of the United States

Marvin MILLER, Appellant,
v.
State of CALIFORNIA.

No. 70—73.
|
Argued Jan. 18—19, 1972.
|
Reargued Nov. 7, 1972.
|
Decided June 21, 1973.
|
Rehearing Denied Oct. 9, 1973.

Synopsis
See 414 U.S. 881, 94 S.Ct. 26.

Defendant was convicted of mailing unsolicited sexually explicit material in violation of a California statute and the Appellate Department, Superior Court of California, County of Orange, affirmed and defendant appealed. The Supreme Court, Mr. Chief Justice Burger, held that a work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political or scientific value. The Court also rejected the test of 'utterly without redeeming social value' as a constitutional standard.

Vacated and remanded.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Stewart and Mr. Justice Marshall joined.

West Headnotes (22)

[1] **Constitutional Law** Freedom of Speech, Expression, and Press
Constitutional Law Politics and Elections

In the area of freedom of speech and press, the courts must remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression. U.S.C.A.Const. Amend. 1.

15 Cases that cite this headnote

[2] **Constitutional Law** Lack of constitutional protection

Obscene material is unprotected by the First Amendment. U.S.C.A.Const. Amend. 1.

101 Cases that cite this headnote

[3] **Obscenity** Publications in general

State statutes designed to regulate obscene material must be carefully limited. U.S.C.A.Const. Amend. 1.

9 Cases that cite this headnote

[4] **Constitutional Law** Sexual Expression
Obscenity Publications in general

Permissible scope of regulation of any form of expression is confined to works which depict or describe sexual conduct, and that conduct must be specifically defined by the applicable state law, as written or authoritatively construed. U.S.C.A.Const. Amend. 1.

111 Cases that cite this headnote

[5] **Constitutional Law** Depictions or portrayals of sex or nudity in general
Obscenity Definitions; Test for Obscenity

Regulation of works which depict or describe sexual conduct must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. U.S.C.A.Const. Amend. 1.

766 Cases that cite this headnote

[6] **Obscenity** Definitions; Test for Obscenity

Basic guidelines for trier of fact in determining whether a work which depicts or describes sexual conduct is obscene is whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. U.S.C.A.Const. Amend. 1.

757 Cases that cite this headnote

[7] **Constitutional Law** Obscenity in General

The "utterly without redeeming social value" test is not the constitutional standard for determining whether a work which depicts or describes sexual conduct is obscene, nor is the concept of "social importance" the constitutional standard to be applied. U.S.C.A.Const. Amend. 1.

30 Cases that cite this headnote

[8] **Constitutional Law** Obscenity in general
Constitutional Law First Amendment

If a state law that regulates obscene material is limited to works which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest and which depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and which, taken as a whole, lacks serious, artistic, political, or scientific value, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. U.S.C.A.Const. Amends. 1, 14.

1053 Cases that cite this headnote

[9] **Courts** Suits involving validity or construction of state statutes

It is not function of the United States Supreme Court to propose regulatory schemes for the states with respect to obscene material.

31 Cases that cite this headnote

[10] **Obscenity** Power to regulate

A state statute may define for regulation patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. U.S.C.A.Const. Amend. 1.

149 Cases that cite this headnote

[11] **Constitutional Law** Depictions or portrayals of sex or nudity in general

States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. U.S.C.A.Const. Amend. 1.

18 Cases that cite this headnote

[12] **Constitutional Law** Obscenity in General

At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit the First Amendment protection. U.S.C.A.Const. Amend. 1.

325 Cases that cite this headnote

[13] **Constitutional Law** Obscenity in General

The mere fact juries may reach different conclusions on issues of prurient appeal and patent offensiveness as to the same material does not mean that constitutional rights are abridged. U.S.C.A.Const. Amend. 1.

11 Cases that cite this headnote

[14] **Obscenity** Sex and nudity

No one is subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. U.S.C.A.Const. Amends. 1, 14.

131 Cases that cite this headnote

[15] **Constitutional Law** Obscenity in General

Fact that fundamental First Amendment limitations on powers of the states do not vary from community to community does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." U.S.C.A.Const. Amend. 1.

112 Cases that cite this headnote

[16] **Criminal Law** Knowledge, Experience, and Skill

Police officer with many years of specialization in obscenity cases and who had conducted an extensive statewide survey and given expert evidence on 26 occasions in the year prior to defendant's trial for mailing unsolicited sexually explicit material in violation of California statute was qualified to give evidence on California "community standards." West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. Amends. 1, 14.

19 Cases that cite this headnote

[17] **Constitutional Law** Sexual Expression
Postal Service Trial and review

Neither the state's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors in trial on charge of mailing unsolicited sexually explicit material in violation of California statute. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. Amends. 1, 14.

106 Cases that cite this headnote

[18] **Commerce** Obscenity

Application of domestic state police powers in regulation of sexually explicit materials did not intrude on any congressional powers under the commerce clause in absence of any indication that the unsolicited sexually explicit materials mailed by defendant were ever distributed interstate. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a); U.S.C.A.Const. art. 1, § 8, cl. 3.

3 Cases that cite this headnote

[19] **Commerce** Obscenity

Obscene material may be validly regulated by a state in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. U.S.C.A.Const. art. 1, § 8, cl. 3.

5 Cases that cite this headnote

[20] **Obscenity** Contemporary community standards

The primary concern with requiring a jury in an obscenity case to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one. U.S.C.A.Const. Amends. 1, 14.

87 Cases that cite this headnote

[21] **Constitutional Law** Obscenity in General
Obscenity Contemporary community standards

Requirement that jury evaluate sexually explicit materials with reference to contemporary state standards serves protective purpose that material will be judged by its impact on an average person and is constitutionally adequate. U.S.C.A.Const. Amends. 1, 14.

84 Cases that cite this headnote

[22] **Criminal Law** Defenses

Contention that defendant convicted of mailing unsolicited sexually explicit material in violation of California statute was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures and that state was "collaterally estopped" from ever alleging the material to be obscene was a matter best left to the California courts and, in any event, was not a proper subject for appeal. West's Ann.Cal.Pen.Code, §§ 311, 311.2(a).

51 Cases that cite this headnote

****2610** *Syllabus*[*]

***15** Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the Memoirs plurality, it is held:

1. Obscene material is not protected by the First Amendment. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. P. 2614.

2. The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Roth supra, at 489, 77 S.Ct. at 1311, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. P. 2615.

3. The test of 'utterly without redeeming social value' articulated in Memoirs, supra, is rejected as a constitutional standard. P. 2615.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a 'national standard.' Pp. 2618—2620.

Vacated and remanded.

Attorneys and Law Firms

***16** Burton Marks, Beverly Hills, Cal., for appellant.

Michael R. Capizzi, Santa Ana, Cal., for appellee.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

This is one of a group of 'obscenity-pornography' cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' ****2611** Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704, 88 S.Ct. 1298, 1313, 20 L.Ed.2d 225 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called 'adult' material. After a jury trial, he was convicted of violating California Penal Code s 311.2(a), a misdemeanor, by knowingly distributing obscene matter,[1] ***17** and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically ***18** based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled 'Intercourse,' 'Man-Woman,' 'Sex Orgies Illustrated,' and 'An Illustrated History of Pornography,' and a film entitled 'Marital Intercourse.' While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women ****2612** in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] ***19** when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969); Ginsberg v. New York, 390 U.S. 629, 637—643, 88 S.Ct. 1274, 1279—1282, 20 L.Ed.2d 195 (1968); Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 690, 88 S.Ct., at 1306; Redrup v. New York, 386 U.S. 767, 769, 87 S.Ct., 1414, 1415, 18 L.Ed.2d 515 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (1964). See Rabe v. Washington, 405 U.S. 313, 317, 92 S.Ct. 993, 995, 31 L.Ed.2d 258 (1972) (Burger, C.J., concurring); United States v. Reidel, 402 U.S. 351, 360—362, 91 S.Ct. 1410, 1414—1415, 28 L.Ed.2d 813 (1971) (opinion of Marshall, J.); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952); Breard v. Alexandria, 341 U.S. 622, 644—645, 71 S.Ct. 920, 933—934, 95 L.Ed. 1233 (1951); Kovacs v. Cooper, 336 U.S. 77, 88—89, 69 S.Ct. 448, 454, 93 L.Ed. 513 (1949); Prince v. Massachusetts, 321 U.S. 158, 169—170, 64 S.Ct. 438, 443—444, 88 L.Ed. 645 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382—383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957); Public Utilities Comm'n v. Pollak,

343 U.S. 451, 464—465, 72 S.Ct. 813, 821—822, 96 L.Ed. 1068 (1952). It is in this context that we are called ***20** on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of Mr. Justice BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured ****2613** history of the Court's obscenity decisions. In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the Court sustained a conviction under a federal statute punishing the mailing of 'obscene, lewd, lascivious or filthy . . .' materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:
'All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571—572, 62 S.Ct. 766, 768—769, 86 L.Ed. 1031:

". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . .. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social ***21** value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' (Emphasis by Court in Roth opinion.)

'We hold that obscenity is not within the area of constitutionally protected speech or press.' 354 U.S., at 484—485, 77 S.Ct., 1309 (footnotes omitted).

Nine years later, in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition
'as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because if affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' Id., at 418, 86 S.Ct., at 977.

The sharpness of the break with Roth, represented by the third element of the Memoirs test and emphasized by Mr. Justice White's dissent, id., at 460—462, 86 S.Ct., at 999, was further underscored when the Memoirs plurality went on to state:
'The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value.' Id., at 419, 86 S.Ct., at 978 (emphasis in original).

While Roth presumed 'obscenity' to be 'utterly without redeeming social importance,' Memoirs required ***22** that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.' Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the 'utterly without redeeming social value' test had any meaning at all. See Memoirs v. Massachusetts, id., at 459, 86 S.Ct., at 998 (Harlan, J., dissenting). ****2614** See also id., at 461, 86 S.Ct., at 999 (White, J., dissenting); United States v. Groner, 479 F.2d 577, 579—581 (CA,5 1973).
[1] Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., Redrup v. New York, 386 U.S., at 770—771, 87 S.Ct., at 1415—1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S., at 704—705, 88 S.Ct., at 1314 (Harlan, J., concurring and dissenting) (footnote omitted).[3] This is not remarkable, for in the area ***23** of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the

California Penal Code s 311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author,[4] and no Member of the Court today supports the Memoirs formulation.

II

[2] [3] [4] [5] This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); United States v. Reidel, 402 U.S., at 354, 91 S.Ct., at 1411—1412; Roth v. United States, supra, 354 U.S., at 485, 77 S.Ct., at 1309.[5] 'The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted).' Breard v. Alexandria, 341 U.S., at 642, 71 S.Ct., at 932, and cases cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47—50, 81 S.Ct. 391, 393—395, 5 L.Ed.2d 403 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S., at 502, 72 S.Ct., at 780. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be ***24** carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682—685, 88 S.Ct., at 1302—1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe ****2615** sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

[6] [7] [8] The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of ***25** Memoirs v. Massachusetts, 383 U.S., at 419, 86 S.Ct., at 977; that concept has never commanded the adherence of more than three Justices at one time.[7] See supra, at 2613. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellante courts to conduct an independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, 408 U.S., at 232, 92 S.Ct., at 2247; Memoirs v. Massachuetts, supra, 383 U.S., at 459—460, 86 S.Ct., at 998 (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S., at 204, 84 S.Ct., at 1686 (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 284—285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); Roth v. United States, supra, 354 U.S., at 497—498, 77 S.Ct., at 1315—1316 (Harlan, J., concurring and dissenting).

[9] [10] We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

[11] [12] [13] Sex and nudity may not be exploited without limit by films or pictures ****2616** exhibited or sold in places of public accommodation any more than live sex and nudity can ***26** be exhibited or sold without limit in such public places.[8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, 408 U.S., at 230—232, 92 S.Ct., at 2246—2247; Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310; Thornhill v. Alabama, 310 U.S. 88, 101—102, 60 S.Ct. 736, 743—744, 84 L.Ed. 1093 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.[9]

Mr. Justice BRENNAN, author of the opinions of the Court, or the plurality opinions, in Roth v. United States, supra; Jacobellis v. Ohio, supra; ***27** Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 952, 16 L.Ed.2d 31 (1966); Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); and Memoiors v. Massachusetts, supra, has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (Brennan, J., dissenting). Paradoxically, Mr. Justice BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he fines the authority to distinguish between a willing 'adult' one month past the state law age of majority and a weilling 'juvenile' one month younger.

[14] Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities ****2617** may bring prosecution. See Roth v. United States, supra, 354 U.S., at 491—492, 77 S.Ct., at 1312—1313. Cf. Ginsberg v. New York, 390 U.S., at 643, 88 S.Ct., at 1282.[10] If ***28** the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends. As to Mr. Justice Douglas' position, see United States v. Thirty-seven Photographs, 402 U.S. 363, 379—380, 91 S.Ct. 1400, 1409—1410, 28 L.Ed.2d 822 (1971) (Black, J., joined by Douglas, J., dissenting); Ginzburg v. United States, supra, 383 U.S. at 476, 491—492, 86 S.Ct., at 950, 974 (Black, J., and Douglas, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 196, 84 S.Ct., at 1682 (Black, J., joined by Douglas, J., concurring); Roth, supra, 354 U.S., at 508—514, 77 S.Ct., at 1321—1324 (Douglas, J., dissenting). In this belief, however, Mr. Justice DOUGLAS now stands alone.

Mr. Justice Brennan also emphasizes 'institutional stress' in justification of his change of view. Nothing that '(t)he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court,' he quite rightly remarks that the examination of contested materials 'is hardly a source of edification to the members of this Court.' ***29** Paris Adult Theatre I v. Slaton, supra, 413 U.S., at 92, 93, 93 S.Ct., at 2652. He also notes, and we agree, that 'uncertainty of the standards creates a continuing source of tension between state and federal courts . . ..' 'The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' Id., at 93, 92, 93 S.Ct., at 2652.

It is certainly true that the absence, since Roth, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), and attempt to provide positive ****2618** guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale—an absolutist, 'anything goes' view of the First Amendment—because it will lighten our burdens.[11] 'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.' Jacobellis v. Ohio, supra, 378 U.S., at 187—188, 84 S.Ct., at 1678 (opinion of Brennan, J.). Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See Roth v. United States, supra, 354 U.S., at 482—485, 77 S.Ct., at 1307—1309. 'Our duty admits of no 'substitute for facing up ***30** to the tough individual problems of constitutional judgment involved in every obscenity case.' (Roth v. United States, supra, at 498, 77 S.Ct., at 1316); see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct., 1432, 1437, 8 L.Ed.2d 639 (opinion of Harlan, J.) (footnote omitted).' Jacobellis v. Ohio, supra, 378 U.S., at 188, 84 S.Ct., at 1678 (opinion of Brennan, J.).

III

[15] Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a 'national' standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case ***31** law. The jury, however, was explicitly instructed that, in determining whether the 'dominant theme of the material as a whole . . . appeals to the prurient interest' and in determining whether the material 'goes substantially beyond customary limits of candor and affronts contemporary community standards of decency,' it was to apply 'contemporary community standards of the State of California.'

[16] During the trial, both the prosecution and the defense assumed that the relevant 'community standards' in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on ****2619** community standards[12] or to the instructions of the trial judge on 'statewide' standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

[17] We conclude that neither the State's alleged failure to offer evidence of 'national standards,' nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter ***32** of fact. Mr. Chief Justice Warren pointedly commented in his dissent in Jacobellis v. Ohio, supra, at 200, 84 S.Ct., at 1685:

'It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . .. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.'

[18] [19] [20] [21] [22] It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[13] ***33** See Hoyt v. Minnesota, 399 U.S. 524—525, 90 S.Ct. 2241 (1970) (Blackmun, J., dissenting); ****2620** Walker v. Ohio, 398 U.S. 434, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970) (Burger, C.J., dissenting); id., at 434—435, 90 S.Ct., at 1884 (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319, 90 S.Ct. 1110, 25 L.Ed.2d 334 (1970) (Burger, C.J., dissenting); id., at 319—320, 90 S.Ct., at 1110 (Harlan, J., dissenting); United States v. Groner, 479 F.2d 577, at 581—583. O'Meara & Shaffer, Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1, 6—7 (1964). See also Memoirs v. Massachusetts, 383 U.S., at 458, 86 S.Ct., at 997 (Harlan, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 203—204, 84 S.Ct., at 1686 (Harlan, J., dissenting); Roth v. United States, supra, 354 U.S., at 505—506, 77 S.Ct., at 1319—1320 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508—509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311. Cf. the now discredited test in Regina v. Hicklin, (1868) L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to 'contemporary ***34** standards of the State of California' serves this protective purpose and is constitutionally adequate.[14]

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . ..' Breard v. Alexandria, 341 U.S., at 645, 71 S.Ct., at 934. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of ***35** political and social changes desired by the people,' ****2621** Roth v. United States, supra, 354 U.S., at 484, 77 S.Ct., at 1308 (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230—232, 92 S.Ct., at 2246—2247; Thornhill v. Alabama, 310 U.S., at 101—102, 60 S.Ct., at 743—744. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[15]

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see Roth v. United States, supra, 354 U.S., at 482—485, 77 S.Ct., at 1307—1309, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies.'[16] We do not see the harsh hand ***36** of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

Mr. Justice Brennan finds 'it is hard to see how state-ordered regimentation of our minds can ever be forestalled.' Paris Adult Theatre I v. Slaton, 413 U.S., at 110, 93 S.Ct., at 2661 (Brennan, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which Mr. Justice Brennan finds constitutionally permissible, has all the elements of 'censorship' for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See Interstate Circuit, Inc. v. Dallas, 390 U.S., at 690, 88 S.Ct., at 1306.[17] One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

****2622** In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated ***37** above, without a showing that the material is 'utterly without redeeming social value'; and (c) hold that obscenity is to be determined by applying 'contemporary community standards,' see Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, and Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311, not 'national standards.' The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

Vacated and remanded.

Mr. Justice DOUGLAS, dissenting.

I

Today we leave open the way for California[1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and

concededly has failed. In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, it ruled that '(o)bscene material is material which deals with sex in a manner appealing to prurient interest.' Id., at 487, 77 S.Ct., at 1310. Obscenity, it was said, was rejected by the First Amendment because it is 'utterly without redeeming ***38** social importance.' Id., at 484, 77 S.Ct., at 1308. The presence of a 'prurient interest' was to be determined by 'contemporary community standards.' Id., at 489, 77 S.Ct., at 1311. That test, it has been said, could not be determined by one standard here and another standard there, Jacobellis v. Ohio, 378 U.S. 184, 194, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793, but 'on the basis of a national standard.' Id., at 195, 84 S.Ct., at 1682. My brother Stewart in Jacobellis commented that the difficulty of the Court in giving content to obscenity was that it was 'faced with the task of trying to define what may be indefinable.' Id., at 197, 84 S.Ct., at 1683.

In Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1, the Roth test was elaborated to read as follows: '(T)hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'

In Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, a publisher was sent to prison, not for the kind of books and periodicals he sold, but for the manner in which the publications were advertised. The 'leer of the sensualist' was said to permeate the advertisements. Id., at 468, 86 S.Ct., at 946. The Court said, 'Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact ****2623** may be decisive in the determination of obscenity.' Id., at 470, 86 S.Ct., at 947. As Mr. Justice Black said in dissent, '. . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal.' Id., at 476, 86 S.Ct., at 950. That observation by Mr. Justice Black is underlined by the fact that the Ginzburg decision was five to four.

***39** A further refinement was added by Ginsberg v. New York, 390 U.S. 629, 641, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195, where the Court held that 'it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.'
But even those members of this Court who had created the new and changing standards of 'obscenity' could not agree on their application. And so we adopted a per curiam treatment of so-called obscene publications that seemed to pass constitutional muster under the several constitutional tests which had been formulated. See Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515. Some condemn it if its 'dominant tendency might be to 'deprave or corrupt' a reader.'[2] Others look not to the content of the book but to whether it is advertised "to appeal to the erotic interests of customers."[3] Some condemn only 'hardcore pornography'; but even then a true definition is lacking. It has indeed been said of that definition, 'I could never succeed in (defining it) intelligibly,' but 'I know it when I see it.'[4]

Today we would add a new three-pronged test: '(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

Those are the standards we ourselves have written into the Constitution.[5] Yet how under these vague tests can ***40** we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill ****2624** of Rights. And the First Amendment makes no such exception from 'the press' which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated 'obscene' publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not 'obscene.' The Court is at large because we deal with tastes and standards of literature. What shocks me may ***41** be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when

publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in Ginzburg and has all the evils of an ex post facto law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:
'The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since Roth which have held particular material obscene or not obscene would find himself in utter bewilderment.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707, 88 S.Ct. 1298, 1315, 20 L.Ed.2d 225.

In Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, we upset a conviction for remaining on property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no 'fair warning, at the time of their conduct' ***42** while on the property 'that the act for which they now stand convicted was rendered criminal' by the state statute. Id., at 355, 84 S.Ct., at 1703. The same requirement of 'fair warning' is due here, as much as in Bouie. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishers, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does[6] ****2625** and my views ***43** on the issue have been stated over and over again.[7] But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.[8]

No such protective procedure has been designed by California in this case. Obscenity—which even we cannot define with precision—is a hodge-podge. To send ***44** men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467, 72 S.Ct. 813, 823, 96 L.Ed. 1068, where I protested against making streetcar passengers a 'captive' audience. There is no 'captive audience' problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands ****2626** or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people' to anger.' Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131. The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for ***45** dispensing tranquilizers to the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the

First Amendment.[9] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some.

The standard 'offensive' is unconstitutional in yet another way. In Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves 'in a manner annoying to persons ***46** passing by.' We struck it down, saying: 'If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

'Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.' Id., at 614, 91 S.Ct., at 1688.

****2627** How we can deny Ohio the convenience of punishing people who 'annoy' others and allow California power to punish people who publish materials 'offensive' to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires ***47** that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL join, dissenting.

In my dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code s 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in Paris Adult Theatre, I, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.[*] '(T)he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'' Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972), quoting ***48** from Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965). See also Baggett v. Bullitt, 377 U.S. 360, 366, 84 S.Ct. 1316, 1319, 12 L.Ed.2d 377 (1964); Coates v. City of Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); id., at 619—620, 91 S.Ct., at 1690—1691 (White, J., dissenting); United States v. Raines, 362 U.S. 17, 21—22, 80 S.Ct. 519, 522—523, 4 L.Ed.2d 524 (1960); NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Since my view in Paris Adult Theatre I represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a 'readily apparent construction suggests itself as a vehicle for rehabilitating the (statute) in a single prosecution,' Dombrowski v. Pfister, supra, 380 U.S., at 491, 85 S.Ct., at 1123, I ****2628** would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. See Coates v. City of Cincinnati, supra, 402 U.S., at 616, 91 S.Ct., at 1689.

All Citations Rep. 1441

413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, 1 Media L.

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 At the time of the commission of the alleged offense, which was prior to June 25, 1969, ss 311.2(a) and 311 of the California Penal Code read in relevant part:

's 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

'(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . .'

's 311. Definitions

'As used in this chapter:

'(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

'(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial represention or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

'(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

'(d) 'Distribute' means to transfer possession of, whether with or without consideration.

'(e) 'Knowingly' means having knowledge that the matter is obscene.'

Section 311(e) of the California Penal Code, supra, was amended on June 25, 1969, to read as follows:

'(e) 'Knowingly' means being aware of the character of the matter.'

Cal.Amended Stats.1969, c. 249, s 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new s 311(e) was not applied ex post facto to his case, but only the old s 311(e) as construed by state decisions prior to the commission of the alleged offense. See People v. Pinkus, 256 Cal.App.2d Supp. 941, 948—950, 63 Cal.Rptr. 680, 685—686 (App.Dept., Superior Ct., Los Angeles, 1967); People v. Campise, 242 Cal.App.2d Supp. 905, 914, 51 Cal.Rptr. 815, 821 (App.Dept., Superior Ct. San Diego, 1966). Cf. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Nor did s 311.2, supra, as applied, create any 'direct, immediate burden on the performance of the postal functions,' or infringe on congressional commerce powers under Art. I, s 8, cl. 3. Roth v. United States, 354 U.S. 476, 494, 77 S.Ct. 1304, 1314, 1 L.Ed.2d 1498 (1957), quoting Railway Mail Assn. v. Corsi, 326 U.S. 88, 96, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072 (1945). See also Mishkin v. New York, 383 U.S. 502, 506, 86 S.Ct. 958, 962, 16 L.Ed.2d 56 (1966); Smith v. California, 361 U.S. 147, 150—152, 80 S.Ct. 215, 217—218, 4 L.Ed.2d 205 (1959).

2 This Court has defined 'obscene material' as 'material which deals with sex in a manner appealing to prurient interest,' Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310, but the Roth definition does not reflect the precise meaning of 'obscene'

as traditionally used in the English language. Derived from the Latin obscaenus, ob, to, plus caenum, filth, 'obscene' is defined in the Webster's Third New International Dictionary (Unabridged 1969) as '1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle.' The Oxford English Dictionary (1933 ed.) gives a similar definition, '(o)ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.'

The material we are discussing in this case is more accurately defined as 'pornography' or 'pornographic material.' 'Pornography' derives from the Greek (porne, harlot, and graphos, writing). The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a a portrayal of erotic behavior designed to cause sexual excitement.' Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language. We note, therefore, that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex.' Roth, supra, at 487, 77 S.Ct., at 1310. See also ALI Model Penal Code s 251.4(l) 'Obscene Defined.' (Official Draft, 1962.)

3 In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434—435, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970) (dissenting opinions of Burger, C.J., and Harlan, J. The Redrup procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

4 See the dissenting opinion of Mr. Justice Brennan in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973).

5 As Mr. Chief Justice Warren stated, dissenting in Jacobellis v. Ohio, 378 U.S. 184, 200, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793 (1964):

'For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we hae attempted in the Roth case to provide such a rule.'

6 See, e.g., Oregon Laws 1971, c. 743, Art. 29, ss 255—262, and Hawaii Penal Code, Tit. 37, ss 1210—1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126—129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as Mr. Justice BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12 200-ft. Reels of Super 8 mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

7 'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . .' Kois v. Wisconsin, 408 U.S., 229, 231, 92 S.Ct. 2245, 2246, 33 L.Ed.2d 312 (1972). See Memoirs v. Massachusetts, 383 U.S. 413, 461, 86 S.Ct. 975, 999, 16 L.Ed.2d 1 (1966) (White, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of

'social importance.' See id., at 462, 86 S.Ct., at 999 (White, J., dissenting).

8 Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' See California v. LaRue, 409 U.S. 109, 117—118, 93 S.Ct. 390, 396—397, 34 L.Ed.2d 342 (1972).

9 The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, 354 U.S., at 492 n. 30, 77 S.Ct., at 1313 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. Dunlop v. United States 486, 499-500.'

10 As Mr. Justice Brennan stated for the Court in Roth v. United States, supra, 354 U.S., at 491—492, 77 S.Ct., at 1312—1313:

'Many decisions have recognized that these terms of obscenity statutes are not precise. (Footnote omitted.) This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . (T)he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7—8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to fairly administer the law . . .. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id., 332 U.S. at page 7, 67 S.Ct., at page 1542. See also United States v. Harriss, 347 U.S. 612, 624, n. 15, 14 S.Ct. 808, 815, 98 L.Ed. 989; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367; United States v. Ragen, 314 U.S. 513, 523—524, 62 S.Ct. 374, 378, 86 L.Ed. 383; United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508; Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402; Fox. v. Washington, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573; Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

11 We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

12 The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California 'community standards.' The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. Cf. United States v. Augenblick, 393 U.S. 348, 356, 89 S.Ct. 528, 533, 21 L.Ed.2d 537 (1969).

13 In Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), two Justices argued that application of 'local' community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. Id., at 194—195, 84 S.Ct., at 1681—1682 (opinion of Brennan, J., joined by Goldberg, J.). The use of 'national' standards, however, necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nation-wide

standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See Roth v. United States, 354 U.S., at 506, 77 S.Ct., at 1320.

Appellant also argues that adherence to a 'national standard' is necessary 'in order to avoid unconscionable burdens on the free flow of interstate commerce.' As noted supra, at 2611 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, s 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, e.g., Head v. New Mexcio Board, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949); Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935); Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835 (1915).

14 Appellant's jurisdictional statement contends that he was subjected to 'double jeopardy' because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is 'collaterally estopped' from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a 'double jeopardy' claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, a least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See Mishkin v. New York, 383 U.S. 502, 512—514, 86 S.Ct. 958, 965—966, 16 L.Ed.2d 56 (1966).

15 In the apt words of Mr. Chief Justice Warren, the appellant in this case was 'plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.' Roth v. United States, supra, 354 U.S., at 496, 77 S.Ct., at 1315 (concurring opinion).

16 See 2 V. Parrington, Main Currents in American Thought ix et seq. (1930). As to the latter part of the 19th century, Parrington observed 'A new age had come and other dreams—the age and the dreams of middle-class sovereignty . . .. From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War.' Id., at 474. Cf. 2 Morison, H. Commager & W. Leuchtenburg, The Growth of the American Republic 197—233 (6th ed. 1969); Paths of American Thought 123—166, 203—290 (A. Schlesinger & M. White ed. 1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, Society and Thought in Modern America 337—386 (1952).

17 '(W)e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. Ginsberg v. New York, . . . (390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)).' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690, 88 S.Ct. 1298, at 1306, 20 L.Ed.2d 225 (1968) (footnote omitted).

1 California defines 'obscene matter' as 'matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is

matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.' Calif.Penal Code s 311(a).

2 Roth v. United States, 354 U.S. 476, 502, 77 S.Ct. 1304, 1318, 1 L.Ed.2d 1498 (opinion of Harlan, J.).

3 Ginzburg v. United States, 383 U.S. 463, 467, 86 S.Ct. 942, 945, 16 L.Ed.2d 31.

4 Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (Stewart, J., concurring).

5 At the conclusion of a two-year study, the U.S. Commission on Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials:

'Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinction made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.' Report of the Commission on Obscenity and Pornography 53 (1970).

6 It is said that 'obscene' publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, Sugar Institute v. United States, 297 U.S. 553, 597, 56 S.Ct. 629, 641, 89 L.Ed. 859, or communications respecting the sale of spurious or fraudulent securities. Hall v. Geiger-Jones Co., 242 U.S. 539, 549, 37 S.Ct. 217, 220, 61 L.Ed. 480; Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 567, 37 S.Ct. 224, 226, 61 L.Ed. 493; Merrick v. Halsey & Co., 242 U.S. 568, 584, 37 S.Ct. 227, 230, 61 L.Ed. 498. The First Amendment answer is that whenever speech and conduct are brigaded—as they are when one shouts 'Fire' in a crowded theater—speech can be outlawed. Mr. Justice Black, writing for a unanimous Court in Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, stated that labor unions court be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Mr. Justice Black said: 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.' Id., at 498, 69 S.Ct., at 688.

7 See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513; Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312; Byrne v. Karalexis, 396 U.S. 976, 977, 90 S.Ct. 469, 470, 24 L.Ed.2d 447; Ginsberg v. New York, 390 U.S. 629, 650, 88 S.Ct. 1274, 1286, 20 L.Ed.2d 195; Jacobs v. New York, 388 U.S. 431, 436, 87 S.Ct. 2098, 2101, 18 L.Ed.2d 1294; Ginzburg v. United States, 383 U.S. 463, 482, 86 S.Ct. 942, 953, 16 L.Ed.2d 31; Memoirs v. Massachusetts, 383 U.S. 413, 424, 86 S.Ct. 975, 980, 16 L.Ed.2d 1; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72, 83 S.Ct. 631, 640, 9 L.Ed.2d 584; Times Film Corp. v. City of Chicago, 365 U.S. 43, 78, 81 S.Ct. 391, 410, 5 L.Ed.2d 403; Smith v. California, 361 U.S. 147, 167, 80 S.Ct. 215, 226, 4 L.Ed.2d 205; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 697, 79 S.Ct. 1362, 1369, 3 L.Ed.2d 1512; Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498; Kingsley Books, Inc. v. Brown, 354 U.S. 436, 446, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469; Superior Films, Inc. v. Department of Education, 346 U.S. 587, 588, 74 S.Ct. 286, 98 L.Ed. 329; Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359.

8 The Commission on Obscenity and Pornography has advocated such a procedure:

'The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions . . ..

'A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material.' Report of the Commission on Obscenity and Pornography 63 (1970).

9 Obscenity law has had a capricious history:

'The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's Queen Mab and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime.' Z. Chafee, Free Speech in the United States 151 (1942).

* Cal. Penal Code s 311.2(a) provides that 'Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.'

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LIBRARY ADVISORY BOARD
2025 Calendar

	AGENDA DEADLINE	MEETING	CITY COUNCIL MEETING FOR REPORT*	ANNUAL TOPICS/EVENTS
JANUARY	Wednesday 1/15 5:00 p.m.	Tuesday 1/21 5:30 p.m.	Monday 1/27 6:00 p.m.	
FEBRUARY	Wednesday 2/12 5:00 p.m.	Tuesday 2/18 5:30 p.m.	Monday 2/24 6:00 p.m.	• Annual Review of Library Fees, Policies, Rules & Regulations • Annual Review of Board's Bylaws • Celebration of Lifelong Learning • Strategic Plan & Goals
MARCH	Wednesday 3/12 5:00 p.m.	Tuesday 3/18 5:30 p.m.	Monday 3/24 6:00 p.m.	• Reappointment Notices Sent Out
APRIL	Wednesday 4/09 5:00 p.m.	Tuesday 4/15 5:30 p.m.	Monday 4/28 6:00 p.m.	• Terms Expire April 1st • National Library Week, Library Workers Day, & Library Legislative Day
MAY	Wednesday 5/14 5:00 p.m.	Tuesday 5/20 5:30 p.m.	Tuesday 5/27 6:00 p.m.	• Advisory Body Training Worksession • Election of LAB Officers
JUNE	No Regular Meeting			
JULY	No Regular Meeting			
AUGUST	Wednesday 8/13 5:00 p.m.	Tuesday 8/19 5:30 p.m.	Monday 8/25 6:00 p.m.	• Library Budget Review *may not be applicable during non-budget years • Library Policies Revision • CIP Draft Recommendations
SEPTEMBER	Wednesday 9/10 5:00 p.m.	Tuesday 9/16 5:30 p.m.	Monday 9/22 6:00 p.m.	• Library Card Sign-up Month
OCTOBER	Wednesday 10/15 5:00 p.m.	Tuesday 10/21 5:30 p.m.	Monday 10/27 6:00 p.m.	• Approve Meeting Schedule for Upcoming Year
NOVEMBER	Wednesday 11/12 5:00 p.m.	Tuesday 11/18 5:30 p.m.	Monday 11/24 6:00 p.m.	• National Friends of Libraries Week
DECEMBER	Wednesday 12/10 5:00 p.m.	Tuesday 12/16 5:30 p.m.	1/12/2025 6:00 p.m.	• Annual Review of Strategic Plan/LAB Goals

*The Board's opportunity to give their report to City Council is scheduled for the Council's regular meeting following the Board's regular meeting, under Agenda Item 8 – Announcements/ Presentations/ Borough Report/Commission Reports.

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(f) 907-235-3148

Memorandum

TO: Mayor Lord and Homer City Council

FROM: Melissa Jacobsen, City Manager

DATE: March 19, 2025

SUBJECT: City Manager's Report for March 24, 2025 Council Meeting

City of Homer FY25 RAISE Grant Update

On March 11, 2025, the U.S. Department of Transportation (DOT) directed Federal Department of Transportation agencies to conduct a review of all competitive grant programs and awards, including a project-by-project review of competitive award selections made in FY 2022 – FY 2025 without grant agreements or partially obligated grant agreements. This impacts the City's FY25 RAISE grant award which has not been obligated.

Under the directive, agencies will identify programs with priorities counter to the Trump Administration's Executive Orders and likely deny awards to projects that are solely focused on any of the following elements: "equity activities, Diversity, Equity, and Inclusion (DEI) activities, climate change activities, environmental justice (EJ) activities, gender-specific activities, when the primary purpose is bicycle infrastructure (i.e., recreational trails and shared-use paths, etc.), electric vehicles (EV), and EV charging infrastructure." View the DOT Guidance here.

Projects with elements of these activities in the scope will be flagged for potential removal, including:

- project activities such as equity analysis, green infrastructure, bicycle infrastructure, EV and/or EV charging infrastructure.

Based on their review, agencies must recommend to the Office of the Secretary which project selections should:

- continue in their current form with no change;
- be revised with a reduced or modified scope; or
- be canceled entirely.

The scope of the City's unobligated FY25 RAISE grant award primarily addresses planning and design for sidewalks to promote pedestrian safety on Homer's heavily-traveled streets currently lacking sidewalk facilities. However, it includes an equity analysis, mentions the potential for shared bicycle-pedestrian pathways and mentions the equity and climate benefits of not needing to be reliant on vehicles for safe travel.

Staff is consulting with HDR to more fully understand the Federal process; we are prepared to advocate for these important funds by emphasizing the benefits of the project, and stand ready to revise the project's scope should we get the opportunity.

HVFD Worksession

City Council held a worksession on March 17th at the request of the City Manager to address some matters that had been raised by the public, look at positive steps in process and looking ahead. Priorities of the Fire Chief that he hoped to share but ran out of time during comments include:

- Complete the independent assessment of the services provided
- Develop a 5-10 year strategic plan
- Develop a volunteer recruitment and retention plan
- Complete New Member Task Book (already in process)
- Take steps to replace aged and obsolete fleet, including a financial plan for the future
- Work with the City Manager on sustainable budgeting
- Station Replacement Plan (current budget request)
- Update Fire Department Disaster Preparedness and Response Plans

Staff is working to compile some historical information, including a structural analysis that was completed in 2014/15 for the building, and independent studies done on volunteerism. I will also prepare a memo with some next steps for the April 14th City Manager's report.

City Manager Meetings and Events:

- KBNERR Open House and Community Council Meeting
- Property Owner in Charles Way/Bunnell Ave Special Assessment District
- Presentation to Homer Rotary
- Homer Harbor Expansion event
- USCG Naushon Decommissioning Ceremony and meeting with Rear Admiral Dean
- Ongoing weekly meetings with Departments, Mayor and Councilmembers, and City Attorney

Attachments:

- DOT Guidance Memo
- KPEDD Industry Outlook Forum Invitation

Attention: Heads of Secretarial Offices and Operating Administrations (OA)

Overview: The Office of the Assistant Secretary for Transportation Policy (OST-P) is providing guidance on competitive award selections made after January 20, 2021, that do NOT have fully obligated grant agreements or cooperative agreements in place.

Projects with executed grant agreements in place that are fully obligated are not subject to the guidance below. For selections with partially obligated grant agreements, the same review should take place before awarding subsequent phases or adding additional funds to an existing grant agreement. Additional guidance will be provided regarding revisions to standard terms and conditions appearing in draft grant agreements or templates.

Summary: All competitive grant and cooperative agreement award selections must comply with current Administration priorities and Executive Orders (EO) that address energy, climate change, diversity and gender, and economic analysis, and other priorities. Applicable Executive Orders and Memoranda include:

- Executive Order 14148, Initial Rescissions of Harmful Executive Orders and Actions;
- Executive Order 14154, Unleashing American Energy
- Executive Order 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing
- Executive Order 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- Secretarial Order 2100.7, Ensuring Reliance Upon Sound Economic Analysis in Department of Transportation Policies, Programs, and Activities
- Secretarial Memorandum on Implementation of Executive Orders Addressing Energy, Climate Change, Diversity, and Gender

This guidance provides direction for identifying award selections without fully obligated grant agreements that do not comply with these priorities.

ACTION: For projects announced from FY 2022 through FY 2025, review all award selections without grant agreements and partially obligated grant agreements. The focus of this review is to identify project scope and activities that are allocating funding to advance climate, equity, and other priorities counter to the Administration's Executive Orders.

Step 1: Program Identification. Identify Programs for which award selections may have included any of the following elements: equity activities, Diversity, Equity, and Inclusion (DEI) activities, climate change activities, environmental justice (EJ) activities, gender-

specific activities, when the primary purpose is bicycle infrastructure (i.e., recreational trails and shared-use paths, etc.), electric vehicles (EV), and EV charging infrastructure. Additionally, project-by-project review of selections to identify any project scope elements for potential removal are required for any Programs that meet the criteria below:

- Statutory language includes equity requirements, climate considerations, or bicycle infrastructure.
- NOFO mandatory evaluation criteria includes equity and/or climate requirements.
- Eligible activities included bicycle infrastructure, EV and/or EV charging infrastructure.

Programs that do not meet the criteria above should be shared with the OA Administrator or equivalent OST leadership for concurrence/confirmation. Following OA Administrator or equivalent OST leadership concurrence, the OST Office of Policy (OST-P) and Office of the General Counsel (OGC) will provide final confirmation on whether a program is required to conduct a project-by-project review. If OST-P and OGC confirm that a project-by-project review is not required, offices may proceed with negotiating and finalizing grant agreements. If OST-P and OGC confirm that project-by-project review is required, offices should proceed to Step 2. Please submit review requests to the OST Policy Board at OSTPolicyBoard@dot.gov.

Step 2: Project-by Project Review. Programs that require further review shall have Program Teams examine each individual project to identify those award selections that have project scopes that include any of the project elements listed in Step 1 (i.e. equity activities, DEI activities climate change activities, etc.). Those Teams should document their project-by-project examination and flag any project scope elements or activities for potential removal, including:

- Project activities such as equity analysis, green infrastructure, bicycle infrastructure, EV and/or EV charging infrastructure.
- Project purpose or primary project benefits include equity and/or climate such as- projects that purposefully improve the condition for EJ communities or actively reduce GHG emissions.

Note: If project scope elements are based in statute, program offices should consult with applicable legal counsel, and following legal concurrence, raise any proposed scope changes to OA leadership.

OA leadership shall review the findings from the Team review, and recommend to OST-P and OGC which project selections should:

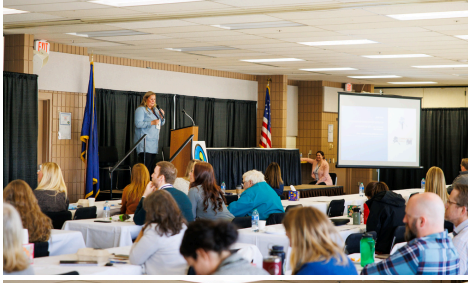
a. Continue in their current form with no change;
b. Be revised with a reduced or modified scope; or
c. Be canceled entirely.

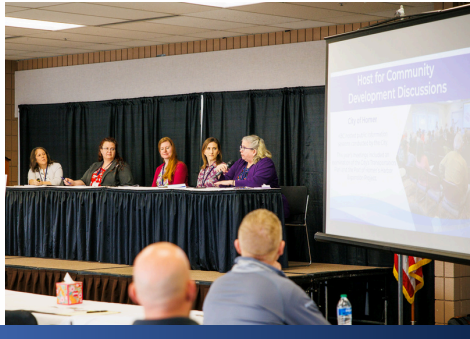
Step 3: Project Scope Revision. Award selections identified in Step 2.b must update project scopes to eliminate flagged activities, and where possible replace identified elements with relevant elements that align with program statute, the scope of the application submission, and current Administration EOs.

Where the scope of the project includes elements noted above, Teams should negotiate with project sponsors to update project scopes to eliminate and, where possible, replace those identified elements with relevant elements that align with the program statute, the original scope of the application submission, and current Administration EOs.

a. If the project sponsor agrees to proceed with scope changes, proceed to grant agreement formulation and execution. The project sponsor may propose alternative project elements to substitute for the redline elements that should be removed as long as they 1) align with the program statute, 2) are consistent with the purposes of the original scope of the application submission, and 3) align with current Administration EOs.

b. If the project sponsor does not agree to remove project elements noted in Step 2 and replace with acceptable alternative scope, then the Team should proceed with a reduced award that removes the flagged scope and activities.





YOU'RE INVITED!

Please join us on

Thursday, April 24th

for our Annual

Industry Overview Forum!

If you are [47] e to make it in person, please co to register to be sent a link to the live YouTube.

THE KENAI PENINSULA ECONOMIC DEVELOPMENT DISTRICT

2025 IOF

INDUSTRY OVERVIEW FORUM

Location:
Kenai Chamber of Commerce

24 APRIL
THURSDAY

9:00 AM CHECK IN & REGISTRATION
9:30 AM START
4:00 PM END

SCAN TO REGISTER FOR IN-PERSON OR VIRTUALLY BY APRIL 18th

INDUSTRY TOPICS & HIGHLIGHTS:

- COOK INLET ENERGY RESOURCES AND DEVELOPMENT
- WORKFORCE DEVELOPMENT STRATEGIES AND RESOURCES
- KENAI PENINSULA ECONOMIC PROSPECTUS REPORT
- KENAI PENINSULA BOROUGH UPDATE
- LOCAL AND RE… HEA… RE SER… ND UPDATES
- KENAI PENINSULA COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY KICKOFF