Unprotected Speech – United States. and Oregon

What categories of speech are not protected by the U.S. Constitution?

Categories of speech that the U.S. Supreme Court has determined are not protected by the U.S. Constitution include defamation, causing panic, fighting words, sedition, obscenity, child pornography and speech that is "harmful to minors". The last three – obscenity, child pornography and "harmful to minors" are the categories most relevant to libraries since these are the basis for many challenges to library materials. It is important to understand the process by which individual printed or visual materials are determined to fall within these categories.

1. Obscene Speech. In 1973, the U.S. Supreme Court outlined basic guidelines for the **trier of fact** (jury or judge) to use to determine if a specific work is legally obscene. The guidelines are:
   (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. *(Miller v. California* 413 U.S.15 (1973)).
   https://www.law.cornell.edu/supremecourt/text/413/15%26amp

Important Factors about the legal definition of obscene speech, based on the Miller Decision

●only sexually explicit speech can be found to be obscene. "We now confine the permissible scope of such regulation to **works which depict or describe sexual conduct"**.

● "prurient" means a shameful or morbid interest in sex. Including "lust" in the definition was unconstitutionally overbroad in that it reached constitutionally protected material that merely stimulated normal sexual responses. (*Brockett v. Spokane Arcade* 472 U.S. 491, 1985)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=472&invol=491

● only a trier of fact (jury or judge) has the legal authority to determine community standards and to establish if the other two prongs of the Miller test also apply to a particular work, thus making it unprotected by the Constitution.

● there is a presumption of innocence. "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."

● while it is illegal to distribute a work that has been found obscene, it is not illegal to possess it.

2. Child Pornography. In 1982 the Court upheld a challenge to a New York law that prohibited the distribution of photographs and films depicting children engaged in sexual conduct. As a result of this decision child pornography, regardless of whether it is obscene, is not protected by the First Amendment because the production of such materials would not be possible without the abuse of children. (New York v. Ferber 458 U.S. 747 1982).
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=458&page=747

For the same reason (involving abuse of children), the possession of child pornography is also illegal.

In 1996 Congress amended the federal child pornography act expanding the definition of child pornography to include materials that appear to be a depiction of a minor engaged in sexual conduct (*Child Pornography Protection Act,* P.L. 104-208). This included computer generated images and adults portrayed as minors. This expansion of the definition of child pornography was found to be unconstitutional by the U. S. Supreme Court (Ashcroft v. Free Speech Coalition 535 U.S. 234 (2002)). http://supreme.justia.com/cases/federal/us/535/234/case.html

Congress responded by enacting the "Prosecutorial Remedies and Other Tools to End Exploitation of Children Act (PROTECT), which prohibits any virtual depiction of minors engaged in sexual acts. Computer creation and the use of adults to depict minors are affirmative defenses. This means that if the defendant proves to the satisfaction of the judge or jury that real minors were not depicted the depiction would not be found to be illegal unless it meets the standards for obscenity. https://www.congress.gov/bill/108th-congress/senate-bill/151

3. Harmful to Minors. Much of the controversy surrounding access to library materials and to the Internet concerns the legal status of children. Many people believe that minors do not have rights independent of their parents. In fact, the Supreme Court has long recognized that minors do have rights under the First Amendment. However, the Court has also ruled that state legislation **may** specify some materials that are protected for adults as "obscene" for minors. The Children's Internet Protection Act (47 USC 254 (h) (6)) is the only federal law establishing a category of materials as "harmful to minors" See:
http://www.ala.org/advocacy/intfreedom/librarybill/interpretations/minors-internet-activity

Many states have enacted "harmful to minors" statutes. In many states, these laws exclude libraries. In Oregon employees of museums, schools, law enforcement agencies, medical treatment providers, and public libraries acting within the scope of regular employment are exempt from prosecution.

In some states a federal or state court has ruled such laws to be unconstitutional because the law does not use the Miller test (as applied to minors) to define what materials may not legally be given to minors or because the state constitutional protection of free speech provides greater protection than the First Amendment.

In September 2010 the United States Court of Appeals for the Ninth Circuit held that an **Oregon** law (HB 2843, 2007) that criminalized distributing sex education and other non- obscene materials to minors was unconstitutional in violation of the First Amendment. The State of Oregon argued that the statute applied only to "hardcore pornography," but the Ninth Circuit found that they applied to much more, including "The Joy of Sex," (Albert Comfront); "Mommy Laid an Egg, or Where Do Babies Come From?" (Babette Cole); "It's Perfectly Normal," (Judy Blume); "Berserk," (Kentaro Miura); "Forever," (Robie Harris); and "A Handmaid's Tale" Margaret Atwood".

Powell's Books v. Kroger, (9th Circ., 9/20/2010)
http://www.ca9.uscourts.gov/datastore/opinions/2010/09/20/09-35153.pdf
The plaintiffs did not challenge Oregon's existing law making it a crime to contact a minor with the intent of having sexual contact**.**
https://www.oregonlegislature.gov/bills_laws/ors/ors167.html

What about violent speech and minors?
Violent speech is protected speech unless it is 1) directed to inciting or producing imminent lawless action and 2) likely to incite or produce such action (*Brandenburg v. Ohio,* 365 U.S. 444 (1969)). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0395_0444_ZO.html

A number of states and local entities (not Oregon) adopted laws or ordinances restricting minors' access to electronic games with violent content.

In June 2011 the United States Supreme Court found the California law to be unconstitutional. *Brown v. Entertainment Media Association, No.* 08–1448 U.S. Supreme Court (June 27, 2011) http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf

What about inadvertent viewing?

Usually inadvertent viewing by someone other than the intended audience does not affect the status of the material as protected speech.

*Erznoznik v. City of Jacksonville (*422 US 205 (1975), which involved a drive-in movie theater with a screen that was visible from the street, provides guidance for issues related to inadvertent viewing of potentially offensive materials by children and adults in a public place.

"The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes… Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent … narrow circumstances … the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."
https://supreme.justia.com/cases/federal/us/422/205/

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