

March 10, 2023

Dear Senators and Representatives,

I'm writing to express my opposition to SB 2360 & HB 1205 based on the versions available March 3 (when I started this letter). Of the two, SB 2360 is much more problematic in terms of restricting patron access to materials, but I believe both bills are currently unconstitutional. I'm also going out on a limb to suggest a compromise, if anyone is interested and still awake by the end of this letter.

I'm Library Director of James River Valley Library System (Jamestown), and I'm a Christian, a conservative, and a father. These are my personal thoughts. I understand that some materials in a few ND libraries are highly objectionable to many North Dakotans. I honestly wouldn't want my teenage son reading some of the materials that have prompted concern across the state.

Difficult Balancing Act

While I understand the concerns many people have about certain materials, I'm a librarian fully committed to protecting our First Amendment rights and all the other rights enshrined in our Constitution. My role is to provide fair and equitable access to information for the benefit of my community. At the same time, I try to select items with community values in mind. I ask myself the following questions:

- Is this item needed in my community?
- Will this item be widely used in my community?
- Is this item age-appropriate by contemporary community standards in Stutsman County?
- If the item probably wouldn't be considered age-appropriate, is there a way I can provide the same type of information in a manner that is broadly acceptable, and to an age level that is broadly acceptable?

If a requested item isn't broadly acceptable to be included in our physical collection, I can and will provide it through interlibrary loan or possibly in a digital format. That is my commitment as a librarian.

Some of my fellow librarians might feel these questions amount to censorship, and that's simply not the case. These are simple questions of material selection. I am not the Librarian of Congress. Our library has space and financial limitations, so we select based on which items will likely be used (hopefully frequently) in Stutsman County.

I don't judge the collection decisions made by any other librarians. They have to know their communities and provide the information needed in those communities. I completely defend their right to do so. I only evaluate information as it relates to the needs and values of people in Stutsman County, and I hope my decisions are generally correct.

Obscenity/Pornography

Some of the rhetoric from both sides of the debate on these bills has been unhelpful. Concerned citizens, Senators, and Representatives shouldn't be compared to Nazi book-burners, and neither should librarians be classified as purveyors of pornography. There is no obscenity/pornography (as currently defined in ND law, Federal law, or U.S. jurisprudence) in any school or public library in North Dakota (see my letter to the editor, *Jamestown Sun*, Feb. 4, 2023).

In 1973, the Supreme Court established the Miller Test for obscenity, and pornography falls under the definition of obscenity. Here are the three prongs of the Miller Test:

- “whether the average person applying contemporary community standards would find 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.” <https://mtsu.edu/first-amendment/article/1585/the-miller-test>

A Case Study

Let's look at how the Miller Test may apply to *Let's Talk About It*, a teen book that has been widely and inaccurately described as pornographic or obscene in legislative hearings. *Let's Talk About It* contains pictures and text describing some sexual practices that I knew nothing about, and was most comfortable knowing nothing about, until this controversy erupted.

For *Let's Talk About It* to be considered obscene or pornographic, it must violate all points of the Miller Test. The first two points are judged using the perspective of the average person under contemporary community standards. The third prong is judged by a national standard (*Pope v. Illinois* 1987) so that strongly conservative communities can't unduly restrict circulation of materials acceptable in other communities. <https://mtsu.edu/first-amendment/article/1585/the-miller-test>

When judging *Let's Talk About It*, the work must be taken as a whole. What happens if there are some good features, such as the part about consent? The Miller Test specifies that when taken as a whole, the work “lacks serious literary, artistic, political, or scientific value.” The word *lacks* means the work does not have value when applying a national standard to the overall work. Even if the work contains 1% value, then it has some value.

So does *Let's Talk About It* have some literary value? Some of the information could be well-written, and thus arguably possess at least a little literary value. Is there artistic value? Some of the illustrations are non-sexual, so arguably there could be some artistic value. What about political value? Some folks, particularly from a national perspective, probably see political value in the work. And what about scientific value? There is some information about sexual health that is scientifically important and correct no matter one's view of the rest of the material.

So is *Let's Talk About It* legally obscene or pornographic? No, because there is some value in the work, when taken as a whole.

Is *Let's Talk About It* offensive—even highly offensive—to many people? Yes, it's offensive to many people, including to me personally (but not professionally). As a librarian, I defend the right of authors to publish their views, I defend the right of public libraries to carry the material if they so choose, and I defend the right of the adult public to read or view what they choose.

My library doesn't have *Let's Talk About It* because I believe the average person in Stutsman County would consider the book inappropriate for the age level for which it was written. They don't want their children to find this book on our library shelves. However, some residents of Stutsman County want their children to be able to access materials such as *Let's Talk About It*. So how do we meet their needs? We use interlibrary loan or electronic sources to provide potentially controversial resources to those who need these materials, and we never judge someone who wants or needs any information. We also look to provide applicable alternate materials that cover the topic in a manner that is age-appropriate according to the general values of our community.

Now let's look at the legislation that's on the table in North Dakota.

SB 2360

I believe the sponsors and those who voted in favor of SB 2360 mean well, but there are a few important problems, and many of these problems are issues affecting constitutionality:

- Current Century Code contains a close representation of the Supreme Court's 1973 Miller Test for obscenity. The Miller Test is based on the views of the "average person." SB 2360 changes the Century Code wording from "ordinary adults," which sticks close to Miller's "average person," to "reasonable adults" (page 1, line 19), which is a different standard. So SB 2360 changes the long-established First Amendment standard, significantly narrowing the definition of obscenity.
- SB 2360 changes "principally made up" to "contains" (page 2, line 13). According to the Miller Test, a challenged work must be taken as a whole. Evaluating a work on the basis that it may contain something objectionable to some people rolls back the constitutional protections we currently enjoy.
- The inclusion of "written descriptions" in the section covering objectionable materials (page 2, line 13) will censor a vast number of books that represent constitutionally protected speech, all because minors may come to our libraries (page 2, line 10).
- The inclusion of "sexual perversion" and "sex-based classifications" (page 2, lines 27 & 28) may trigger 14th Amendment questions if these terms single out LGBTQ people for particular disapprobation.
- The removal of protections for public libraries (page 3, line 6) is a huge constitutional problem. Libraries are designed as places where speech can thrive, even if the speech

offends some people. Where can the First Amendment operate if it's not protected in public libraries?

- The section on digital materials appears to be unconstitutional because it labels materials as “obscene” or “pornography” that are clearly not in violation of the Miller Test (page 3, lines 27 & 28). In addition, since large database companies will almost certainly not implement the filters envisioned by SB 2360, North Dakotans would lose access to eBooks because the bill prohibits libraries from making our payments. Surely that isn't constitutional.

HB 1205

HB 1205 has been improved from its first draft, and I appreciate that. As with SB 2360, I know the people who have voted for HB 1205 and those who support it are trying to do the right thing by protecting our children. However, constitutional issues remain:

- HB 1205 exempts “materials used in science courses, including biology, anatomy, physiology, or sexual education classes” (page 1, lines 11 & 12). What about materials that *could be* used in these classes? The Miller Test protects all materials of scientific value, but this bill significantly narrows the sexual information a public library may carry, limiting libraries to materials actually used in classes. Is the bill's wording constitutional? I don't think so.
- The bill bans materials depicting “sexual perversion” (page 1, line 22). The first draft of the legislation added several other categories particularly applicable to LGBTQ persons, and I'm happy to see these were deleted. However, I still question whether “sexual perversion” is a catch-all for banning some LGBTQ materials. If so, the 14th Amendment could be in play.
- The bill bans libraries from maintaining “books that contain explicit sexual material” (page 2, lines 4 & 5). The Miller Test says that materials must be taken as a whole. Therefore, a work could contain something explicit but still not be obscene. Works containing explicit sexual material are protected under our Constitution. Please also note that this bill bans materials in the adult collection because it makes no differentiation between adult and children's materials.

In addition to the constitutional issues in HB 1205, the periodic review requirement is unworkable (page 2, lines 16 & 17), particularly if SB 2360 passes with its banning of “written descriptions.” Librarians read reviews; we don't read all the books and periodicals in our libraries, watch all the movies, or listen to all the music. There simply isn't time. Please consider that HB 1205, like its Senate counterpart, is unconstitutional.

What Might Be Banned?

Both library bills would result in banning certain books and other materials that have long been considered appropriate for adults in our communities. I'm sorry if the words *banned* or *censored* offend, but that's what these bills currently do. Both bills prohibit materials that *contain*

materials deemed explicit. For instance, the wording from HB 1205 says, “A public library may not maintain in its inventory books that contain explicit sexual material.” There is no exception for materials that are written for adults. Here are a few examples of adult non-fiction books that are at risk:

- *I Cried to Dream Again*, by Sara Kruzan (memoir of a victim of child sex trafficking) – SB 2360
- Biographies of stars that contain nude pictures (e.g. Marilyn Monroe, John Lennon/Yoko Ono, Janis Joplin, Madonna) – both bills
- *Unmentionable: The Victorian Lady's Guide to Sex, Marriage, and Manners*, by Therese Oneill (humorous study of old-time self-help guides, with pictures) – both bills
- Bible (story of Onan spilling his seed in Gen. 38, along with other stories) – SB 2360
- Shakespearean plays (full of sexual imagery) – SB 2360
- *Hot and Unbothered: How to Think about, Talk about, and Have the Sex You Really Want*, by Yana Tallon-Hicks – SB 2360
- *200 Words to Help You Talk about Sexuality & Gender*, by Kate Sloan – SB 2360
- *Anatomica's Body Atlas* (banned if not used in a science class) – HB 1205
- *Digital Photography: The Complete Photographer*, by Tom Ang (section on nude photography) – both bills
- *In*, by Will McPhail (non-literal, artistic representation of sex) – both bills
- *Battle Angel Alita*, by Yukito Kishiro (naked image of a humanoid) – both bills
- *An American in Provence*, by Jamie Beck (a few naked pictures, but mostly a book about scenery and food in France) – both bills
- Books about Woodstock (yeah, we all know) – both bills
- *The Art of Horror Movies*, edited by Stephen Jones – both bills
- *Graphic Horror*, by John Edgar Browning (art) – both bills
- *Enchanted: A History of Fantasy Illustration*, by Jesse Kowalski – both bills
- *The Art of the LP*, by Johnny Morgan and Ben Wardle (some of those album covers, which most of us can remember from the “good old days” depict nudity or sex) – both bills
- *The Sex Bible for People Over Fifty: The Complete Guide to Sexual Love for Mature Couples*, by Laurie Betito (pictures....) – both bills

What about fiction books written for adults? I'm going to guess that about half of fiction books in our collection have some level of sexual activity, potentially violating SB 2360.

Here's another question: What do we do with children's books that are designed to help parents have “the talk” with their kids? These books feature pictures that are currently banned. Remember, HB 1205 exempts materials used in classes, but not other materials that could be equally valid. Incidentally, my library has had one of its sex education books for kids since 2000, and there have been no complaints.

The bottom line is that many books are potentially being banned by these bills, depending on the final wording and depending on the legal advice we may receive regarding how to apply that wording.

Is Compromise Possible?

The purpose of this letter is to suggest that there may be room for compromise. I believe we could compromise the question of what materials belong in school and public libraries by strengthening and standardizing local control over challenges.

I understand that I'm a bit like the (hopefully) apocryphal fellow who couldn't pick a side in the Civil War: He wore gray pants and a blue coat, and all the king's horses and all the king's men couldn't put him together again. Thus, in arguing for a compromise, I may displease some folks on both sides, but I hope a polite conversation can take place.

A Suggestion (Finally...)

Public library collections for adults can contain anything that is legal; therefore, materials for adults should not be removed. However, it seems most of the concerns prompting the library bills are actually concerns about age-appropriateness of children's and teens' materials.

Suppose an amended bill emerged that established a *process for fair and local challenges regarding the age-appropriateness of children's items in school and public libraries*? The bill wouldn't ban anything. It would simply empower local communities to address challenges in accordance with their values.

At this time, most libraries in North Dakota have material-challenge policies established by their boards, but the policies are all different. In some cases, people who bring challenges feel their concerns aren't heard by those in authority.

A bill standardizing age-appropriate challenges to children's materials could address the following questions:

- Who can challenge items? (limit the involvement of outside groups)
- When should a challenged item be removed from the shelf? (there should be no automatic removal)
- What does due process for each side look like?
- What opportunity does the public have to comment on challenges?
- Is there a role for a special committee to review the materials? What is the composition of the committee?
- Is the school board or library board the final arbiter?
- What vote margin should be required for a decision to remove or re-catalog an item? (simple majority; supermajority?)

In public libraries, successfully challenged materials should be allowed to be re-cataloged for a more mature group. In addition, there should be no threats of misdemeanors for librarians having potentially challengeable materials in the collection.

To be clear, I'm not promoting removing items from libraries. I just think there needs to be some way for communities to be heard and materials possibly moved to a more appropriate location. It would be tragic if librarians were jailed in North Dakota, if large numbers of items were banned, or if eBook services were lost, all because no compromise was explored.

Conclusion


If the ND legislature passes a bill that outlines how children's materials can be challenged for age-appropriateness, communities would be empowered to determine whether certain items meet local standards. Instead of banning books and other materials, library legislation could provide a roadmap for how disputes can be resolved.

Librarians are stuck between opposing views of what should be included in library collections. Some folks want to ban hate speech (as they define hate). Others want to ban misinformation, which really means opinions with which they disagree. Some people want to ban books they consider racist or insensitive (even Dr. Seuss and Roald Dahl!). Others want to ban material they believe is harmful to their children, while some parents want their children to explore those same materials. If we start banning materials, where do we stop? The answer is to defend everyone's freedom to speak, read, write, and view, but to provide a mechanism whereby viewpoints can be properly categorized for age-appropriateness according to contemporary community standards.

The First Amendment guarantees several of our most important freedoms. We must protect the freedoms of others in order to preserve those freedoms for ourselves.

Thank you kindly for your consideration, and for making it to the end of this letter.

Sincerely,



Joseph Rector
Jamestown