

BAREFOOT IN Columbus

THE LEGACY OF *KREIMER* AND THE LEGALITY OF PUBLIC LIBRARY ACCESS POLICIES CONCERNING APPEARANCE AND HYGIENE

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Given the high cost of legal action and the growing litigiousness in American society, libraries of all types must be concerned about the possibility of a lawsuit. The American Library Association has published books on the subject, and library journal articles have discussed potential library liability at length.¹ Often, these discussions are related to professional malpractice, copyright and other intellectual property, and employment.² For public libraries, access to information and access to the library have become vital issues.

For the last ten years, the case of *Kreimer v. Bureau of Police for the Town of Morristown* stood as a landmark case in the area of library access.³ Richard Kreimer, now fifty-five years old, is suing the New Jersey transit system for ejecting him and other homeless people from train stations.⁴ Kreimer, many librarians will recall, sued the Morristown public library and police department in 1992 for ejecting him from the library on at least five occasions. In federal district court, Kreimer prevailed.

The *Kreimer* case was overturned on appeal, but the issue of public libraries ejecting patrons on the basis of their appearance or hygiene remains, largely because of the use of these public facilities by the homeless. The San Luis Obispo County (Calif.) Library, for instance, has recently enacted a rule allowing library employees to ask malodorous patrons to leave.⁵ Watchdog groups contend that these people largely have nowhere else to go and should be dealt with more compassionately. The library, however, says that people will only be asked to leave if they ruin the experience for others.⁶

This article analyzes three significant cases to examine the question of public library liability for alleged constitutional violations against patrons evicted due to their appearance or hygiene rather than for disruptive behavior. The analysis focuses on how policies should be constructed and enforced. Further, in cases where individual administrators and managers have been sued along with their libraries, the notion of qualified immunity is examined. Conclusions are reached regarding the significance of these cases and ways public libraries may be able to avoid liability and the cost of litigation entirely.

Kreimer v. Bureau of Police for Town of Morristown

While it has been discussed at length in the literature, the *Kreimer* case and its initial impact on the library profession warrant continued analysis. In 1989, the Morristown library board of trustees adopted a written policy

that said that patrons not “reading, studying, or using library materials” may be asked to leave.⁷ Further, the policy provided that patrons must respect the rights of, and not annoy, other patrons.⁸ With regard to appearance, “patron dress and personal hygiene shall conform to the standard of community public places. This shall include the repair or cleanliness of garments.”⁹ Following discussion with an attorney from the American Civil Liberties Union, these policies were amended. Included in the amendments was a new provision that barred patrons from interfering with the use of the library by other patrons or the performance of library employees’ duties.¹⁰ *Kreimer* did not dispute the constitutionality of that provision.¹¹

The revised language of the policy regarding appearance is significant:

Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is so offensive as to constitute a nuisance to other persons shall be required to leave the building.¹²

Richard Kreimer, a homeless man, sued the public library in Morristown, New Jersey, for evicting him due to his appearance and body odor. District Judge Sarokin began his opinion with broad statements about fear and discrimination that can arise in exclusion: “The danger in excluding anyone from a public building because their appearance or hygiene is obnoxious to others is self-evident. The danger becomes insidious if the conditions complained of are borne of poverty.”¹³

Sarokin goes on to idealize the public library: “The public library is one of our great symbols of democracy. It is a living embodiment of the First Amendment because it includes voices of dissent. It tolerates that which is offensive.”¹⁴ He cuts to the heart of the matter close to issues librarians have embraced: “Society has survived not banning books which it finds offensive from its libraries; it will survive not banning persons whom it likewise finds offensive from its libraries. The greatness of our country lies in tolerating speech with which we do not agree; that same toleration must extend to people, particularly where the cause of revulsion may be of our own making.”¹⁵

Sarokin’s prejudices come through before he renders any legal justification in the case. “If we wish to shield our eyes and noses from the homeless,” he says. “We should revoke their condition, not their library cards.”¹⁶ He clearly sympathized with Kreimer, and found the library’s policy, enacted specifically to evict Kreimer, abhorrent. His descrip-

tion of Kreimer as “a resident of Morristown” and “a homeless individual whose access to showers and laundry services is severely curtailed by his homeless status” implies that Kreimer is a victim of the library and society at large.¹⁷

The district court held that the policy violated Kreimer’s constitutional rights, specifically his rights to freedom of speech, due process, and equal protection under the law.¹⁸ First, it analyzed the First Amendment claim. The First Amendment applies because the freedom of speech and of the press includes the right to receive information. Thus, a policy “which conditions access to public reading materials” falls under the First Amendment.¹⁹

For First Amendment purposes, a public library is a designated public forum. Again, Sarokin seizes on this issue, which the library had already conceded, to proclaim that “a public library is not only a designated public forum, but also a ‘quintessential,’ ‘traditional’ public forum whose accessibility affects the bedrock of our democratic system.”²⁰ The problem with the restriction here, according to the court, is that it does not serve the stated purpose and is overly broad. The stated purpose of the policy, according to its preamble, is to allow all patrons use of the library facilities to the greatest extent possible.²¹ Citing U.S. Supreme Court precedent, the district court held restrictions of a public forum must only prohibit activity that “actually and materially interferes with the peaceful and orderly management of the public space.”²² The policy here, the court said, does not limit itself to actual disturbance.²³ Further, no alternative channels are left open for Kreimer under the policy.²⁴

The district court’s ruling stunned the library community. The *Kreimer* case seemed to disallow (or at least severely limit) public libraries from barring patrons who had not exhibited disturbing or disruptive behavior, but whose appearance or hygiene may have been disturbing to other patrons or library staff. Further, it seemed to indicate that, absent disturbing or disruptive behavior, the library could not eject someone even if the person was obviously not in the library to use library materials.

Sarokin’s opinion, however, reflects some interesting ideas and distinctions. First, Sarokin portrayed the public library as more than just a traditional public forum. Thus, the standard he applied is different from that subsequently applied by the circuit court in the appeal and in other courts. Second, and perhaps more notably, is Sarokin’s attributing to the library such a central role in democracy. Often the law is thought of as the application of disinterested logic and reason to societal problems. Here, it seems,

Sarokin applied some personal beliefs to the opinion. Kreimer, a homeless man whose appearance and hygiene disturbed the library staff, garnered Sarokin's sympathy. The library admitted enacting this policy specifically with the aim of keeping Kreimer out.²⁵ Sarokin also seemed to feel the policy was a pretense: "the library patron policy at issue in this case does not limit itself to prohibitions of actual library disturbance."²⁶

Following the ruling, the library appealed. Before the appeal was decided, however, the library settled with Kreimer for \$230,000.²⁷ The appellate court decided the policy was a reasonable restriction that served a legitimate government interest.²⁸ The appellate court's opinion notes that, while Kreimer said he would read or sit quietly, the library claimed Kreimer would stare at patrons and talk loudly to himself and others.²⁹ No mention of Kreimer's alleged disruptive behavior was discussed in Sarokin's opinion. The Third Circuit found the rule regarding bodily hygiene valid; it served the government interest of having other patrons not interfered with and maintaining the library in a clean and attractive condition.³⁰ Further, patrons who are ejected are not barred from reentry if they comply with the rules.³¹ None of the rules were held to be overbroad.

The appellate court's decision in favor of the library eased some concerns. In fact, the Third Circuit's decision in *Kreimer* has oft been cited for the notion that the First Amendment entails the right to receive information as well as speak it.³² However, the case being settled out of court left a lot of questions unanswered. Also, the discrepancy regarding whether Kreimer's behavior or his appearance and hygiene were the cause of his ouster left the matter open.

There is no doubt that a library can eject a patron for disruptive behavior. Library policies must be able to serve their purpose, and that purpose is central to the ideals of democracy and free speech. While confirming this central purpose and the First Amendment implications of library policy, *Kreimer* seemed to raise more questions than it answered. Most importantly, can a library eject a patron solely on the basis of his appearance or body odor?

Armstrong v. District of Columbia Public Library

In 2001, the question appeared to be answered "yes," when another homeless patron sued a public library following his ejection due to his appearance and hygiene. The district court in the District of Columbia relied heavily on the decision of the Third Circuit in

Kreimer.³³ However, it reached the opposite conclusion. The district court found that *Kreimer* applied two distinct standards for regulations concerning conduct and for those concerning hygiene.³⁴ A standard of "reasonableness" is applied when reviewing a regulation concerning conduct.³⁵ However, the hygiene regulation requires a "stricter, narrowly tailored" standard; otherwise, the First Amendment might be infringed on a whim or some other personal standard.³⁶

The District of Columbia Public Library's policy allowed for warnings and, ultimately, eviction for "objectionable appearance."³⁷ In parentheses following this phrase, the policy listed examples, including "barefooted, bare-chested, body odor, filthy clothing, etc."³⁸ The district court held that, despite these examples, the policy was vague and overbroad.³⁹ The term "objectionable appearance" was not objective or specific enough. The policy in *Kreimer* included the term "nuisance," a clear legal standard under New Jersey law.⁴⁰ The court rejected the library's argument that "objectionable appearance" incorporated a commonsense standard.⁴¹ "Because the regulation at issue is wholly dependent on the individual staff member's interpretation . . . its enforcement is unavoidably arbitrary."⁴²

In a statement to the press after the opinion was issued, counsel for the library said the guidelines were being reviewed even before the judge had reached his decision.⁴³ The library policy in question in *Armstrong* had been enacted in 1979, with some revisions in 1982 and 1984. The director of the library had submitted the guidelines for review by the D.C. Office of Corporation Counsel, but the office never responded.⁴⁴

This submission to counsel, however, did help in the judge's conclusion that the individuals named in the suit could claim qualified immunity. Qualified immunity is "immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."⁴⁵ In other words, this doctrine protects public officials who are performing their jobs as long as they do not clearly infringe on a person's rights. The standard for qualified immunity is not the individual person's motives, but "whether a reasonable person would have known that the . . . regulation violated a clearly established constitutional right."⁴⁶ Submission to counsel in this case demonstrated well-intentioned motives of the library officials. The library officials clearly intended to act within the law. "[T]he fact that the Director submitted the guideline at issue for review by the Office of Corporation Counsel rebuts plaintiff's claim of uncon-

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stitutional motive, even if it is not relevant to the individual defendants' claim of qualified immunity."⁴⁷

Armstrong confirmed what many librarians already believed. Libraries could eject patrons solely on the basis of objectionable appearance or hygiene. However, the criteria for ejection must be specific. In particular, the criteria should fit within a legal standard, not the subjective opinions of library staff. Submitting the policy to legal counsel in advance of implementation serves two purposes. First, it helps to ensure the policy is objective. Second, it helps establish that the library's motives are not driven by unconstitutional objectives. The standard for qualified immunity is whether a reasonable person would have believed they were violating a person's rights. Submitting the proposed policy to counsel demonstrated positive motives on the part of the library officials. While this is not the standard by which qualified immunity is gauged, it can help a judge determine that the defense is appropriate.

Neinast v. Board of Trustees of Columbus Metropolitan Library

While he is not homeless, Robert Neinast likes to walk around barefoot. Married and a father of three, Neinast is a member of the Dirty Sole Society, an organization that promotes going barefoot. According to its Web site, the Dirty Sole Society currently has about one thousand members.⁴⁸ *The Columbus Dispatch* interviewed him regarding his hobby of hiking barefoot.⁴⁹ He visits businesses without shoes, and he wears flip-flops to work only because of his employer's policies.⁵⁰

On several occasions from 1997 to 2001, Neinast visited the Columbus Metropolitan Library barefoot. On these occasions, he was asked to leave under a library regulation requiring the wearing of shoes while on the library premises. In 2001, he sued the library's board of trustees; Larry D. Black, the director of the library; and Vonzell Johnson, the assistant manager of security for the library, in federal court, alleging violations of his rights under the First, Ninth, and Fourteenth Amendments to the Constitution.⁵¹

Neither federal law nor the laws of the state of Ohio prohibit going barefoot in public. Neinast admitted to going in many public places without wearing shoes. The Columbus library's patron regulations do not prohibit using the library without shoes. However, the library's eviction procedure does allow for eviction of patrons not wearing shoes.

Neinast sued the library and the two individuals under 42 U.S.C. § 1983.⁵² The Constitution, while enumerating rights of individuals against their government, does not provide any remedy for a constitutional violation. Section 1983, in essence, provides that individuals, when acting under color of law, may be sued for violating the constitutional rights of another. Simply put, to succeed under § 1983, a claimant must show that (1) a person (2) acting under color of law (3) deprived the claimant of his or her rights secured by the U.S. Constitution or its laws.

First Amendment

In his suit, Neinast made three claims. His first claim was that the library is a public forum, and he has the right of access as well as his right of expression under the First Amendment. This claim embraces two distinct ideas—the right of access to information from the public library as a First Amendment issue and Neinast's refusal to wear shoes as a form of speech that is constitutionally protected.

Regarding the right of access to information from the public library, the Sixth Circuit recognized, as the Third Circuit did in *Kreimer*, that "the First Amendment protects the right to receive information."⁵³ However, this does not mean that the library must provide unlimited access. "The Library is obligated to permit the public to exercise rights that are consistent with the nature of the library and consistent with the government's intent. . . . Other activities need not be tolerated."⁵⁴ Reasonable restrictions on the time, place, and manner of speech, but not of the content, are allowed if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of information.

The regulation in this case is not content-based. The regulation requiring shoes on the premises does

not impact the content of any speech within the library. Further, the reason for the regulation serves a significant government interest—the government does have an interest in patron safety and in not getting sued for injuries from barefoot patrons. To persuade the court of this potential safety issue, the library submitted incident reports to the court of hazards that barefoot patrons might encounter. These included feces; vomit; broken ceiling tiles; splintered chair pieces; and drops of blood and urine on the floor of various areas, including the restrooms, elevators, children's area, and reading areas. Further reports documented a patron who had scraped an arm on a staple in the carpet, and a patron whose toe was caught in a door. To require shoes on library premises, the court held, is a narrow restriction designed to serve this interest.

Neinast also claimed his barefootedness served as symbolic speech. As a member of the Dirty Sole Society, Neinast believes his barefootedness conveys a message that it is not illegal under state or federal law nor is it disruptive to the library but is protected under the Constitution. For conduct to be speech protected by the First Amendment, (1) there must be “an intent to convey a particularized message”; and (2) “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁵⁵ For example, the wearing of black arm bands by students to protest the Vietnam War is protected symbolic speech.⁵⁶

Artwork by Jim Lange Design



Neinast's claim fails under both prongs of this analysis. First, Neinast's going barefoot does not convey a particularized message of a political, ideological, or religious nature. Second, no one in the library is likely to ask him about his barefootedness, and there is not much likelihood that people will understand the message he intends to convey. In the library, people are unlikely to ask him about his agenda or to see the letters he carries with him from state and federal agencies stating that there are no regulations against going barefoot. The library is “a nonpolitical environment,” and Neinast's arguments do not touch on matters of public concern—matters “relating to any matter of political, social, or other concern to the community.”⁵⁷

This first argument of Neinast's holds many important legal considerations for libraries. First, for constitutional purposes, the public library is a limited or designated public forum. As such, libraries may enforce reasonable time, place, and manner restrictions on library access as long as they are narrowly tailored to serve a significant government interest. One would expect the library could restrict patrons if their conduct or behavior is disruptive. Such conduct, it seems, may extend beyond the physically or verbally abusive and may entail appearance or hygiene that others may find distracting.

By implication, the court's logic indicates the library would have a difficult time removing a patron for wearing (or not wearing) an article of clothing that conveyed a legitimate message about a matter of public concern, whether or not it was disturbing to other patrons. While safety and being protected against lawsuits are legitimate concerns of the library, restricting someone based on their appearance is usually unlikely to meet those or other government objectives without running afoul of the First Amendment, as the *Kreimer* case ultimately held.

Due Process under the Fourteenth Amendment (Discrimination)

Neinast's second cause of action alleged that he has a right of personal appearance, a liberty interest protected under the due process clause of the Fourteenth Amendment. Under due process precedent, if the infringement is on a fundamental or protected right, such as the right to marry or raise a family, the court applies strict scrutiny, a rigid test that only the most narrowly tailored rule will withstand, and then only if it serves a compelling government interest. On the other hand, if the infringement does not involve a fundamental or protected right, the court applies a rational basis test. The rational basis test is a much more lenient standard. It only

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requires that the rules be narrowly tailored to serve a legitimate government interest.

The district court in *Neinast* found that a right of personal appearance is a liberty interest protected by the Constitution. However, the right of personal appearance is not a fundamental right. Therefore, the rational basis test applies. "Under such scrutiny, the court will not overturn the Library's regulation unless it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the Library's policy was irrational."⁵⁸

Because the library is a limited public forum, it "need not allow all modes of speech simply because it promotes some modes of speech."⁵⁹ Further, it did not matter that *Neinast* had been admitted to other public places, including government buildings, without footwear; "he is not guaranteed the same access at the Library if he chooses to ignore its shoe requirement."⁶⁰

Procedural Due Process

Neinast's third cause of action alleged that the library's policies were not properly administered by the named individual defendants and thus he was denied procedural due process. In other words, the board of trustees did not have the authority to institute such a regulation because state law did not require shoes, and the trustees are not experts on health and safety. He also argued that Black and Johnson improperly used the regulation in evicting *Neinast* for one full day. The court found that no procedural due process rights exist in the general rule-making of political subdivisions or agencies. Thus, *Neinast*'s procedural due process rights have not been violated by this rule.

In this third allegation, *Neinast* also claimed he was denied equal protection because the shoe regulation discriminates against one group of people—those who choose to go barefoot—over another. Discrimination claims are analyzed in a manner similar to that of the due process described above. If the discrimination is based on a suspect class (for

example, a class for which discrimination is unlikely to ever serve a valid purpose) such as race or alienage, the court applies strict scrutiny. On the other hand, if the discrimination does not involve a suspect class, the court again applies a rational basis test.

The regulation here does discriminate against those not wearing shoes, but they are not a suspect class. Therefore, the rational basis test applies. Again, this regulation is narrowly tailored to serve the legitimate interest of the health and safety of library patrons. It also serves to protect the library from liability.

Qualified Immunity

After dispensing with *Neinast*'s three causes of action, the district court examined the individual defendants' claims that they were shielded from liability under the principle of qualified immunity. In the words of the court, "[t]he affirmative defense of qualified, or good faith, immunity shields 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"⁶² Claims of immunity are examined on a case-by-case basis; the standard is whether a reasonable official in a similar position could have believed his conduct was lawful. Here the defendants did not violate a "clearly established" right of *Neinast*. The defendants also submitted a statement from the county prosecutor's office stating their actions were lawful. The court thus held that Black and Johnson were entitled to defense of qualified immunity.

The defense of qualified immunity is very important for librarians to consider in enacting and enforcing policy. Librarians are unlikely to act unlawfully or to deliberately violate a patron's constitutional rights. Thus, the defense will likely apply to their actions. As the library here did, by consulting the county prosecutor's office, libraries should consult with counsel when creating or enforcing rules that could result in patron ejection. Unfortunately, this will not prevent the initial filing of a lawsuit and having to defend against

it. However, it is available for summary judgment; a judge will decide whether the doctrine applies and, if a motion for summary judgment is successful, the case will not go through the time and expense of trial.

Neinast appealed the district court's decision, but the Sixth Circuit affirmed summary judgment in favor of the defendants.⁶³ The Sixth Circuit has jurisdiction over Michigan, Ohio, Kentucky, and Tennessee. The holdings of this decision thus are binding law over those states and are at least persuasive authority in other circuits. Neinast also tried to appeal to the U.S. Supreme Court, but was denied.⁶⁴ Despite its initial seemingly frivolous and silly premise, the *Neinast* case thus serves to reinforce and recognize several important legal ideas for libraries.

The first of these is that the library is a limited or designated public forum, resulting in First Amendment implications. It has been clearly established that the First Amendment embodies the right to receive information as well as transmit messages. While a public library would run into serious constitutional problems attempting to restrict the content of messages patrons wish to express, it does have authority to restrict the time, place, and manner of dispensing those messages.⁶⁵

The second important legal idea to be drawn from the *Neinast* case is the qualified immunity for the director and manager of security. Again, this would not protect the library from being forced to defend itself against a suit, but it would prevent the time and expense of trial. In this case, the library was insured, and the insurance covered the majority of the litigation costs; however, the library was forced to expend at least \$35,000 to defend itself.⁶⁶

Conclusions

Public libraries today confront the problem of homeless people coming in and using the library as a daytime refuge from the elements and the streets rather than for its intended means. This can bring the homeless into direct conflict with library directors, staff, and other patrons. All libraries must put regulations into place that serve the library's function and ensure that all patrons are handled fairly and legally.

The cases discussed reach certain common conclusions regarding such rules. The library is a designated public forum, and the First Amendment does apply to library access as the right to receive information is as much a part of the freedom of speech as the right to convey messages. To bar someone on the basis of a political message or other matter of social concern will run afoul of the First Amendment. However, someone

who wishes to speak out about matters of merely personal concern may be restricted if the restrictions are reasonable with regard to time, place, and manner; serve a significant government interest, such as health and safety; and leave open alternative channels.

Clearly, disruptive behavior may be barred. Barring someone based on personal appearance or hygiene is possible and constitutional, provided that the standards, such as those in *Kreimer* and *Neinast*, and unlike those in *Armstrong*, are clear, reasonable, and objective. Consultation with counsel regarding enacting and enforcing rules for ejection is always advisable and recommended.

Library counsel and staff must be aware of these rules when enacting and enforcing policies regarding access to patrons who, based on their appearance or hygiene, may be disturbing to other patrons or staff. While *Kreimer* was settled more than a decade ago, *Neinast* and *Armstrong* are more recent, and show that this issue is still relevant and timely. These cases reflect the litigious nature of our society, but also the growing concern over the homeless using public libraries and other public facilities. Because of the increasing cost of litigation and shrinking budgets, libraries and their staff must be aware of how to defend themselves from liability. The doctrine of qualified immunity protects against liability for individuals acting reasonably, but, unfortunately, will not protect against lawsuits from being brought in the first place. ■

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