Approved ______________________
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by CHAIRMAN MILLER at
Chairperson

1:30 a.m./p.m. on March 4, 1987 in room 526S of the Capitol.

All members were present except:

Committee staff present:

Lynda Hutfles, Secretary
Mary Galligan, Research
Mary Torrance, Revisor
Raney Gilliland, Research

Conferees appearing before the committee:

The meeting was called to order by Chairman Miller.

The Chairman called attention to the revised agenda.

Representative Sughrue made a motion, seconded by Representative Rolfs, to approve the minutes of the March 3 meeting. The motion carried.

HB2287 - Displaying materials or performances harmful to minors

The Chairman read a letter from the Attorney General which reinforced his support of the bill and stated that in his opinion HB2287 is a constitutional protection of children. See attachment A.

The chairman also explained a revised copy of the 10th District Court Case which upheld the City of Wichita ordinance concerning this issue. See attachment B.

Representative Rolfs made a motion, seconded by Representative Sughrue, to report HB2287 favorable for passage.

Representative Charlton made a substitute motion to table the bill. The motion died for lack of a second.

Representative Rolfs original motion was voted on and the motion carried.

HB2174 - Security officers at state institutions

Representative Rolfs made a motion, seconded by Representative Walker, to report HB2174 adversely. The motion carried.

HB2265 - Boating under the influence of alcohol or drugs

Representative Rolfs made a motion, seconded by Representative Eckert, to raise the fine from $30 to $100 and the individuals rights to operate a vessel be suspended for six months or both for refusing to submit to a breath test and to include the Fish & Game Commission on line 0090. The motion carried.

Representative Walker made a motion, seconded by Representative Rolfs, to report HB2265 favorably as amended. The motion carried.

The meeting was adjourned.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE 3-4

(PLEASE PRINT)

NAME	ADDRESS	WHO YOU REPRESENT
Leslie H. Greenwood	Topeka	Rep. Hassler (Intern)
Lee Ann Smith	Lawrence	Intern
John Spurgeon	"	Budget
Bill Hanzlick	Pratt	KS Fish & Game
Vern Evans	Topeka	Soldier Township
Richard Harrold	Pratt	KS. Fish & Game
Larry Hinton	Topeka	SRS/ADAS
Kevin Robertson	Topeka	KS. Consulting Eng / ITAK
Walter Klein Hellmer	Topeka	Christian Citizens
Jim Daugherty	Topeka	Christian Citizen
Donna L. Daugherty	Topeka	Christian Citizen
[illegible]	school	SHHS
[illegible]	Topeka	S.H.H.S
Steve [illegible]	Topeka	SH.HS.
Alvie Price	Topeka	KBIA
[illegible]	Topeka	Southern Baptists
Larry Schmidt	Topeka	Nazarenes
DKK TAYLOR	TOPEKA	LIFE AT BEST
Mary Chilcoat	Topeka	Concerned citizen
Shari Halloran	Tecumseh	Concerned citizen
Christopher [illegible]	Lawrence	U.D.K.
Brad Bennett	Wichita	Sedgwick Cty Chapter National Federation for Decency
Pat Goodson	~~RT~~	Right To Life
Sharon S. Meissner	2521 SE Faxon Top.	Support #2287!
Phillis Setchell	Topeka I support #2287	Citizens for Excellence in Education
Charles White	~~4102~~ NW Topeka	~~I'm a childcare~~ I'm a pre-school teacher

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

February 27, 1987

The Honorable Robert H. Miller, Chairman
House Federal and State Affairs Committee
Statehouse, Room 115S
Topeka, Kansas 66612

RE: House Bill #2287

Dear Representative Miller:

I was unable to testify in regard to my support of the above-referenced bill due to a previous commitment. Assistant Attorney General Rachel Lipman advised the committee I was in favor of the bill and I am writing to reenforce my support.

I think it is important we take every step possible to protect our children. The courts seem to look differently on legislation which protects children from obscenity and that which applies to adults. There are always legal issues involved when questions concerning the first amendment are involved, but it is my opinion, HB #2287 is a constitutional protection of children.

Very truly yours,

Robert T. Stephan

Robert T. Stephan
Attorney General

RTS:dp

Attachment A

Under this statutory design, the United States is an indispensable party in any action determining a dispute arising over the possession of allotted land by virtue of its trust relationship and state courts do not have any jurisdiction over such disputes. *McKay v. Kalyton,* 204 U.S. 458, 27 S.Ct. 346, 51 L.Ed. 566 (1907). Questions of ownership of fee title to an Indian allotment involves the application of federal law. *Wilson v. Omaha Tribe, supra.*

[9, 10] The record is clear that the Begay and Mrs. Cecil Navajo deeds of conveyance in the subject exchanges were forgeries, and that neither consented to the exchanges. Accordingly, because of the absence of consent by the allottees in the cases at bar, title remained in the United States in trust for Begay and Mrs. Cecil Navajo. Acts of Congress authorizing alienation of restricted Indian land must be construed in favor of the congressional policy to promote the welfare of the Indians as wards of the United States. *Drummond v. United States,* 131 F.2d 568 (10th Cir.1942).

25 U.S.C. § 350 provides:

> The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the [statute aforesaid], to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: *Provided,* That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eight, eighteen hundred and eighty-seven.

This statute and others heretofore referred to can only be construed as to allow the Secretary of the Interior "to permit" an Indian to surrender his or her patent for cancellation following his or her voluntary consent to selection of in lieu lands. We recognize that § 350 may not have application to land exchanges, as here, between Indian allottees and non-Indians. It does, however, just as does 25 U.S.C. § 464, which applies specifically to exchanges of trust lands, require "voluntary" exchanges. 25 U.S.C. § 464, in relevant part, provides:

> [T]he Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

25 U.S.C. § 404 also permits the Secretary of the Interior to approve the sale of allotted lands upon the petition of the allottee or the natural guardian in the case of infant allottees.

Inasmuch as neither Begay or Mrs. Cecil Navajo consented to the deeds of exchange, as required by law, the title to their allotment lands remained, as the trial court found, in the United States in trust for their use and benefit.

In *United States v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), the State of California claimed that the United States had forfeited ownership of a three-mile marginal belt along the coast by reason of the conduct of government agents which barred the United States from enforcing its rights by reason of the principles of laches, estoppel or adverse possession. The Supreme Court, in rejecting these contentions, held that, even assuming that Government agencies had been negligent in failing to assert [protect] the claims of the Government that "[T]he Government, which holds its interest . . . in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. at p. 40, 67 S.Ct. at 1669. *See also United States v. City and County of San Francisco,* 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); *Jake v. Elkins, supra; McGannon v. Straightledge,* 32 Kan. 524, 4 P. 1042 (1884); Annot., 55 ALR 2d 554; 3 Am.Jur.2d, Adverse Possession, § 205.

[11] In *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831) and *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), the Supreme Court recognized that the United States Government, out of solicitude for the welfare of its Indian wards, undertook by Treaties, statutes and executive orders to establish legal relations to protect the Indian wards described as "a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith" which relationship "resembles that of a ward to his guardian." The trust obligations of that relationship were not abided by the United States when it approved the forged deeds of exchange in the cases of Begay and Mrs. Cecil Navajo. The forgeries rendered the deeds null and void. Without the consent of Begay and Mrs. Cecil Navajo to the conveyances, there was no termination of the trust relationship between the United States and these Indian wards. Furthermore, that relationship has never been abrogated by Congress. Nevertheless, appellant Albers contends that the district court imposed an unconstitutional burden of proof upon the defendants by applying the "presumption of title" inherent in 25 U.S.C. § 194, *supra.* Specifically, Albers contends that this presumption violates the concept of equal protection of the law "by arbitrarily favoring Indians over white persons." [Brief of Appellants, No. 83–1210, p. 35]. The Congress has plenary power over Indian lands and property in the exercise of its guardianship functions and this power has always been deemed a political power not subject to control by the judicial branch of government. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

IV.

[12] Mrs. Cecil Navajo cross-appeals from the district court's denial of her claim for damages pursuant to 25 U.S.C. § 179 which provides that every person who drives or otherwise conveys any livestock to range or feed on land belonging to any Indian, without consent of the tribe, is liable to a penalty of $1 for each animal of such stock. The trial court denied this relief, finding that the predecessors of the defendants-appellants [Pruitts] were not implicated in the forgeries, that the plaintiffs had full use and benefit of the exchanged lands, and that there was no proof, with specificity, of damages allegedly suffered. We agree.

WE AFFIRM.

M.S. NEWS COMPANY a Kansas corporation, Plaintiff-Appellant,

v.

Antonio CASADO, Mayor of the City of Wichita, Kansas; Robert C. Brown, Robert Knight, Gary Porter, and Connie Peters, members of the Board of Commissioners of the City of Wichita, Kansas, Richard LaMunyon, Chief of Police of the City of Wichita, Kansas, and John Dekker, City Attorney for the City of Wichita, Kansas, Defendants-Appellees.

No. 80–2093.

United States Court of Appeals, Tenth Circuit.

Nov. 16, 1983.

Rehearing and Rehearing En Banc Denied Dec. 23, 1983.

Distributor of periodicals and publications appealed from dismissal by the United

Attachment B

States District Court for the District of Kansas, Wesley E. Brown, J., of its action for injunctive and declaratory relief against enforcement of portion of city ordinance prohibiting promotion of sexually oriented material to minors. The Court of Appeals, Holloway, Circuit Judge, held that: (1) city ordinance was not overbroad or vague; (2) classification in ordinance distinguishing between commercial enterprises and noncommercial enterprises was rationally related to legitimate state interest in stemming the tide of commercialized obscenity; and (3) ordinance did not create an impermissible prior restraint.

Affirmed.

1. Federal Civil Procedure ⟹2533

If district court considers matters outside pleadings, rule governing motion to dismiss requires court to treat motion to dismiss as one for summary judgment and to dispose of it as provided in summary judgment rule. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

2. Federal Courts ⟹766

Since district court had before it matters outside pleadings, including two affidavits in support of request by distributor of publications, which was challenging city ordinance prohibiting the promotion of sexually oriented materials to minors, for a temporary restraining order and a preliminary injunction, dismissal would be reviewed as order granting summary judgment. Fed. Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

3. Obscenity ⟹1, 1.4

To determine if material is obscene and therefore unprotected, trier of fact must inquire whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether 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.

4. Obscenity ⟹7

It was not inconsistent with decision holding that it was constitutional to proscribe sale of "girlie magazines" to minors, where magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults, to create an affirmative defense for displays that had a bona fide governmental, educational or scientific purpose.

5. Obscenity ⟹2.5

City ordinance prohibiting promotion of sexually oriented material to minors was not inconsistent with decision holding that it was constitutional to proscribe sale of "girlie magazines" to minors, where magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults, because it proscribed distribution and display of material that was not "suitable" for minors, in that ordinance approved in prior case and city's ordinance both used this term in the same context.

6. Obscenity ⟹2.5

City ordinance prohibiting promotion of sexually oriented material to minors did not unconstitutionally expand definition of obscenity to include within its proscriptions definitions which were also incongruous with the patently offensive element of obscenity and which encompassed depictions of sexual conduct which were clearly legitimate and not hard-core, in that, although ordinances proscribed dissemination of some material protected as to adults, the proscription applied only to dissemination or display to juveniles, not adults.

7. Obscenity ⟹2.5

Use of the *Miller* obscenity test in city ordinance prohibiting promotion of sexually oriented material to minors did not render ordinance overbroad or vague.

8. Obscenity ⟹2.5

Ordinance prohibiting display of materials harmful to minors when minors as part of invited general public, would be exposed to view such material, which provided that such material was not displayed if it was kept behind devices commonly known as blinder rags so that the lower two thirds of the material was not exposed to view, was not overbroad, in that, with respect to sale or distribution of materials harmful to minors, ordinance had a clear and acceptable standard that would permit sale or distribution to adults of such materials, portion of ordinance dealing with display of material was reasonably structured, restriction of viewing by adults of materials which were, as to adults, constitutionally protected was reasonable, and regulation based on content was justified by substantial governmental interest in protecting minors from exposure to harmful adult material.

9. Constitutional Law ⟹90(3)

Reasonable time, place and manner regulations of speech are permissible where regulations are necessary to further significant governmental interests, and are narrowly tailored to further the state's legitimate interest.

10. Constitutional Law ⟹82(4)

Invalidating legislation as overbroad on its face is manifestly strong medicine and is employed sparingly and only as last resort.

11. Constitutional Law ⟹90(1)

Legislation should not be held facially overbroad unless it is not readily subject to a narrowing construction, and deterrent effect on speech is real and substantial.

12. Constitutional Law ⟹90.1(8)

Portion of city ordinance proscribing display of sexually oriented material to minors was conduct plus speech because it regulated manner in which material with a particular content could be disseminated; it did not regulate pure speech itself, and thus there would have to be substantial overbreadth for the ordinance to be held overbroad on its face.

13. Constitutional Law ⟹90.1(8)

Although minors are entitled to a significant measure of First Amendment protection, a narrowly drawn ordinance restricting that access to sexually oriented material does not abridge their First Amendment rights. U.S.C.A. Const. Amend. 1.

14. Constitutional Law ⟹82(4)

In First Amendment area vague laws offend three important values, namely, they do not give individuals fair warning of what is prohibited, lack of precise standards permits arbitrary and discriminatory enforcement, and vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited. U.S.C.A. Const.Amend. 1.

15. Obscenity ⟹2.5

City ordinance prohibiting the display of sexually oriented material harmful to minors was not void for vagueness, in that ordinance provided fair warning of what was prohibited because it plainly prohibited display of material in manner so that minors would be exposed to it, common understanding and practices provided commercial establishments with sufficient notice of type of display ordinance was designed to prohibit, and whatever imprecision was present was mitigated by ordinance's scienter provision, there was no real danger of arbitrary enforcement, and ordinance would not lead citizens to forsake activity protected by the First Amendment. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⟹90.1(1)

Although it is not an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children, the 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. U.S.C.A. Const.Amend. 1.

17. Obscenity ⟹2.5

Definition of minors in city ordinance prohibiting promotion of sexually oriented material to minors to mean any unmarried person under age of 18 years was not unconstitutionally vague; moreover, ordinance made it a defense to prosecution if an

honest mistake was made to age of minor, which sufficiently protected commercial enterprises from whatever vagueness inhered in definition. U.S.C.A. Const.Amend. 1.

18. Constitutional Law ⇐250.1(2)

Classification in city ordinance prohibiting promotion of sexually oriented material to minors that distinguished between commercial enterprises and noncommercial enterprises bore a rational relationship to legitimate state interest in stemming the tide of commercialized obscenity, and thus ordinance did not violate equal protection. U.S.C.A. Const.Amends. 5, 14.

19. Constitutional Law ⇐213.1(1)

Classifications that distinguish between commercial enterprises and noncommercial enterprises are upheld if they are rationally related to legitimate state interest. U.S.C.A. Const.Amends. 5, 14.

20. Constitutional Law ⇐90.1(8)

Neither threat of criminal prosecution, substantial penalties available to prosecutor, nor the allegedly almost indefinable standards contained in city ordinance prohibiting promotion of sexually oriented material to minors combined to create an unconstitutional prior restraint on right to distribute materials, in that ordinance does not require prior approval of authorities before any materials could be distributed or displayed and there was no prior administrative determination, nor any significant risk that one could be prosecuted for engaging in protected conduct.

21. Jury ⇐23(2)

City ordinance prohibiting promotion of sexually oriented material to minors was not unconstitutional on ground that it violated Sixth Amendment right to trial by jury because prosecutions under ordinance took place before municipal court for city, where trial was to the court, and the trial occurred without any determination on obscenity by jury, which was essential since contemporary community standards must be applied, where accused has right to appeal and then case would be tried de novo in district court where trial by jury could be requested. U.S.C.A. Const.Amend. 6.

22. Jury ⇐23(2)

Even assuming that jury system might be desirable method for judging obscenity by community standards, Kansas procedure whereby accused was first tried in municipal court, where case was tried to the court, was not unconstitutional in view of right it provided for de novo jury trial on appeal to the district court. U.S.C.A. Const.Amend. 6.

Robert C. Brown of Smith, Shay, Farmer & Wetta, Wichita, Kan. (Jack Focht, Wichita, Kan., was also on brief), for plaintiff-appellant.

Stanley A. Issinghoff, Wichita, Kan. (Thomas R. Powell, Wichita, Kan., was also on brief), for defendants-appellees.

Robert T. Stephan, Atty. Gen. of Kan., and Thomas D. Haney, Deputy Atty. Gen. of Kan., Topeka, Kan., filed a brief for the State of Kan. as amicus curiae in support of defendants-appellees.

Before SETH, Chief Judge, and HOLLOWAY and McWILLIAMS, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff M.S. News Company (News), is a wholesale and retail distributor of periodicals and publications in Wichita, Kansas.[1] It appeals from dismissal of its action for injunctive and declaratory relief against enforcement of a portion of a Wichita ordinance. The ordinance, Number 36–172, amended sections 5.68.150 and 5.68.155 of the Code of the City of Wichita and created 5.68.156. This section prohibits the promotion of sexually oriented materials to minors. It is the sole portion of the ordinance

1. At the time of the filing of this action before the district court, News was a wholesale distributor of various periodicals and publications in Wichita while a co-plaintiff, Town Crier of Wichita, Inc., was a retailer of such goods. News has since acquired the assets of Town Crier of Wichita, Inc., and is a wholesale and retail distributor of periodicals and publications. Thus, News is the only plaintiff-appellant. *See* Brief of Appellant at 3–4.

at issue in this action, and it is reproduced as an appendix to this opinion.

The Wichita ordinance is designed to prevent minors from being exposed to sexually oriented materials that are harmful to them. The ordinance defines "harmful to minors" and makes it an offense to display such material to minors if, as a part of the invited general public, they will be exposed to it. It further proscribes, *inter alia,* selling, furnishing or presenting to minors any material or performance that is harmful to them.

The controlling facts are not in dispute. By early August 1979, plaintiff News became aware of the impending passage of the subject ordinance. On August 20, News brought this action against all members of the Board of Commissioners, the Chief of Police, and the City Attorney of Wichita. It sought a declaratory judgment that Section 5.68.156 "is unconstitutional on its face and as applied," and injunctive relief restraining the defendants from enforcing the section. The district judge promptly issued a temporary restraining order.

Defendants filed a motion to dismiss with a supporting brief claiming, *inter alia,* that the complaint failed to state a cause of action. News then filed a reply brief contesting the motion. The district court held a hearing to consider plaintiff's request for a permanent injunction and the defendants' motion to dismiss, heard argument, and took the matter under advisement. The judge shortly thereafter dissolved the temporary restraining order, denied the request for preliminary and permanent injunctive relief and granted defendant's motion to dismiss. Plaintiff appeals.

[1, 2] Plaintiff makes four main arguments on appeal, contending that the ordinance: (1) goes beyond the permissible scope of *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), and is overbroad and vague both on its face and as applied;[2] (2) violates the Equal Protection Clause of the Fourteenth Amendment; (3) creates a prior restraint in violation of the First Amendment; and (4) deprives defendants of their Sixth Amendment right to a jury trial. We will consider each of these contentions in turn.[3]

I

FACIAL OVERBREADTH AND VAGUENESS

Plaintiff News challenges the ordinance for overbreadth and vagueness. It essentially says that the realistic effect of the ordinance will be to limit, by its overbroad application, the access of adults, and minors approaching adulthood, to constitutionally permissible material. News further argues that the ordinance is vague in that it neither affords fair warning to those within its reach, nor provides explicit standards for those who enforce it. Brief of Appellant at 17.

Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), rejected a vagueness challenge to a New York statute similar to the Wichita ordinance. The Supreme Court there held that it is constitutional to proscribe the sale of "girlie magazines" to minors, where the magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults. The Wichita ordinance at issue is almost identical to the

2. By dismissing plaintiff's action, the district court refused to enjoin enforcement of the newly enacted ordinance. The court held that on its face the ordinance was constitutional; the district court did not decide whether the ordinance is constitutional as applied. I R. 119. In such circumstances, we consider only whether the ordinance is constitutional on its face.

3. If the district court considers matters outside the pleadings, Rule 12(b) requires the court "to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56 [Fed.R.Civ.P. 56]." *Carter v. Stanton,* 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972) (per curiam); *see Owens v. Rush,* 654 F.2d 1370, 1377 n. 9 (10th Cir.1981); 6 J. Moore & J. Wicker, *Moore's Federal Practice* (Part 2), ¶ 56.11[2] (1982). Here the district court had before it matters outside the pleadings, including two affidavits in support of News' request for a temporary restraining order and a preliminary injunction. *See* II R. 1–45. We therefore review the dismissal as an order granting summary judgment.

statute upheld in *Ginsberg*. *Ginsberg, supra,* 390 U.S. at 645–47, 88 S.Ct. at 1283–84. Plaintiff attempts to distinguish *Ginsberg* by pointing out differences between the two laws.

[3-6] There are two principal differences between the Wichita ordinance and the statute in *Ginsberg* that are relevant to the constitutionality of the Wichita ordinance on its face. First, the Wichita ordinance uses the *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), obscenity test,[4] and second, it proscribes not just the dissemination of material harmful to minors, as *Ginsberg* did, but also the display of such material.[5] We find no constitutional infirmity in the ordinance resulting from either of these changes, or in any of the prohibitions of display, sale or presentation of proscribed materials to minors.

A. *Application of the Miller test*

[7] We are unable to discern any substance to plaintiff's argument that replacing the *Memoirs* test with the *Miller* test creates either an overbreadth or vagueness problem. The ordinance in *Ginsberg* prohibited distribution to minors of material that was "harmful to minors." In defining "harmful to minors," the *Memoirs* obscenity test was adapted so that material could not be distributed to minors if it: (1) appealed to the prurient interest of minors; (2) was patently offensive to what the adult community believed was suitable for minors; and (3) was utterly without social importance for minors. *Ginsberg, supra,* 390 U.S. at 646, 88 S.Ct. at 1284. The Wichita ordinance is virtually identical to that upheld in *Ginsberg* except that the *Miller* obscenity test is used rather than the *Memoirs* test. Although the ordinance alters the *Miller* test so that it can be used for determining what material is harmful to minors, this is precisely what the ordinance in *Ginsberg* did with the old *Memoirs* test. We reject the argument that the use of the *Miller* test rendered the ordinance overbroad or vague.[6]

B. *The prohibitions of the ordinance protecting minors*

The Wichita ordinance prohibits (a) displaying material "harmful to minors," (b) selling, furnishing or presenting such material to minors; and (c) presenting to a minor any "performance" harmful to him. We feel that *Ginsberg* has already upheld all such prohibitions except that of display. We therefore focus on the overbreadth and vagueness challenges to the display prohibition.

The ordinance prohibits displaying materials harmful to minors when minors "as a part of the invited general public, will be exposed to view such material." The ordinance provides that such material is not displayed if it is "kept behind devices commonly known as 'blinder racks' so that the lower two-thirds of the material is not exposed to view." We believe this provision is neither vague nor overbroad.

Although First Amendment challenges to legislation under the overbreadth and vagueness doctrines are related,[7] they are distinct. The vagueness doctrine is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments,[8] and protects against legislation lacking sufficient clarity of purpose and precision in drafting. *See Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 217–18, 95 S.Ct. at 2276–77; *Grayned v. City of Rockford,* 408 U.S. 104, 108–14 & n. 5, 92 S.Ct. 2294, 2298–302 & n. 5, 33 L.Ed.2d 222 (1972). Overbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected activity within its proscription. *See Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 212–13, 95 S.Ct. at 2274–75; *Grayned v.*

4. The ordinance in *Ginsberg* used the test approved in *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). Since then, in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) the Supreme Court has enunciated a somewhat different test. Under *Miller,* to determine if material is obscene and therefore unprotected, the trier of fact must inquire:

> (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, supra, 413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted). The Wichita ordinance and the statute approved in *Ginsberg* both adapted the current obscenity test so it could be used to determine whether material is harmful to minors.

5. Plaintiff also argues that the ordinance "exceeds the rights conferred on the Government by *Ginsberg v. New York.*" Brief of Appellant at 10. Plaintiff argues it is inconsistent with *Ginsberg* to create an affirmative defense for displays that have a bona fide governmental, educational or scientific purpose. We disagree and address the equal protection issues stemming from this later. *See infra* Part II.

Plaintiff's contention that the ordinance is inconsistent with *Ginsberg* because it proscribes distribution and display of material that is not "suitable" for minors is without merit. The ordinance approved in *Ginsberg* and Wichita's ordinance both use this term in the same context.

We similarly reject plaintiffs' contention that the Wichita ordinance unconstitutionally expands the definition of obscenity to include "within its proscriptions ... definitions which are also incongruous with the 'patently offensive' element of *Miller* and which encompass depictions of sexual conduct which are clearly legitimate and not 'hard core.'" Brief of Appellant at 13. Although the ordinance does proscribe dissemination of some material protected as to adults, the proscription applies only to dissemination or display to juveniles, not adults. Plaintiff's argument implicitly rejects the rule from *Ginsberg* that it is constitutional to proscribe dissemination of generally protected materials to juveniles when such materials are harmful to them. Later cases recognize that the state has a legitimate interest in preventing juveniles from being exposed to sexually oriented materials even when they are not obscene as to adults. *See, e.g., New York v. Ferber,* — U.S. ——, ——, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726, 748–50, 98 S.Ct. 3026, 3039–41, 57 L.Ed.2d 1073 (1978) (plurality); *Miller v. California, supra,* 413 U.S. at 19, 93 S.Ct. at 2612.

6. We are not faced with an ordinance that is overbroad because it prohibits dissemination to minors of material that is not even obscene as to them. The Wichita ordinance is limited so that only material that is obscene as to minors may not be exposed to them. When courts have found similar legislation overbroad, generally the legislation has in some way sought to regulate material that is not obscene even as to minors. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (ordinance making it an offense for outdoor drive-in theatre to exhibit film containing any nudity); *American Booksellers' Ass'n v. McAuliffe,* 533 F.Supp. 50 (N.D.Ga.1981) (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition extends to material not obscene as to minors); *Allied Artists Pictures Corp. v. Alford,* 410 F.Supp. 1348 (W.D. Tenn.1976) (ordinance overbroad because it prohibited exposing juveniles to films containing language that was not obscene as to juveniles); *American Booksellers Ass'n, Inc. v. Superior Court,* 129 Cal.App.3d 197, 181 Cal.Rptr. 33 (2d Dist.1982) (ordinance overbroad because it required sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors); *Calderon v. City of Buffalo,* 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978) (ordinance overbroad because it prohibited sale and exhibition to juveniles of material that was not obscene as to juveniles); *Oregon v. Frink,* 60 Or.App. 209, 653 P.2d 553 (1982) (statute prohibiting dissemination of all nudity to minors overbroad because it does not limit prohibition to material that is obscene as to juveniles).

Nor are we faced with an ordinance whose standard for determining whether material is obscene either to minors or adults is vague. The Wichita Ordinance uses almost the identical language approved in *Ginsberg* with the exception of using the *Miller* test. When legislation designed to protect minors from sexually oriented matters has been found to be unconstitutionally vague, the standard for evaluating whether the material was obscene as to minors has generally been the source of the vagueness. *See, e.g., Rabeck v. New York,* 391 U.S. 462, 88 S.Ct. 1716, 20 L.Ed.2d 741 (1968) (per curiam); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); *American Booksellers Ass'n v. McAuliffe,* 533 F.Supp. 50 (N.D.Ga.1981); *Hillsboro News Co. v. City of Tampa,* 451 F.Supp. 952 (M.D.Fla.1978); *Calderon v. City of Buffalo,* 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978). We are satisfied that the standard used in the Wichita ordinance is not afflicted with such vagueness.

7. *See, e.g., Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 & n. 6, 102 S.Ct. 1186, 1191 & n. 6, 71 L.Ed.2d 362 (1982) (In determining whether there is substantial overbreadth the vagueness of the enactment should be analyzed).

8. *See, e.g., Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (Fifth Amendment); *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (Fourteenth Amendment).

City of Rockford, supra, 408 U.S. at 114, 92 S.Ct. at 2302. We consider the overbreadth and vagueness issues separately.[9]

1. *Overbreadth*

As noted, plaintiff News argues that the Wichita ordinance is overbroad, restricting the access of adults and minors approaching adulthood to constitutionally permissible publications. Brief of Appellant at 17. News says that as commercial enterprises seek to avoid violating the ordinance, the natural tendency will be to limit materials available for view by anyone. *Id.* at 13.

[8] We disagree. First, as noted, with respect to the sale or distribution of materials "harmful to minors," the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials. Second, the portion of the ordinance dealing with display of material "harmful to minors" is reasonably structured. It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First Amendment.

[9] Reasonable time, place and manner regulations are permissible where the regulations are necessary to further significant governmental interests, *Young v. American Mini Theatres,* 427 U.S. 50, 63 & n. 18, 96 S.Ct. 2440, 2448 & n. 18, 49 L.Ed.2d 310 (1976) (plurality), and are narrowly tailored to further the State's legitimate interest. *Grayned v. City of Rockford, supra,* 408 U.S. at 116–17, 92 S.Ct. at 2303–04.[10] We find *Young, supra,* instructive. In *Young* the plurality held that Detroit zoning ordinances providing that an adult theatre may not be located within 1000 feet of any two other adult theatres (or other "regulated uses") or within 500 feet of a residential area, was consistent with the First and Fourteenth Amendments. The plurality recognized that this was content-based regulation but upheld it because the city had a sufficient interest in preserving the quality of urban life and the ordinance did not suppress or greatly restrict access to lawful speech. *Young, supra,* 427 U.S. at 63–72 & n. 35, 96 S.Ct. at 2448–53 & n. 35 (plurality). Similarly the display provision of the Wichita ordinance is a regulation based on content. We believe that it is likewise justified by the substantial governmental interest in protecting minors from exposure to harmful adult material.[11] *See supra* note 5.

Moreover, the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them.[12] The

9. In *Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–95, 102 S.Ct. 1186, 1191–92, 71 L.Ed.2d 362 (1982), the Court indicated that in considering a facial challenge to the constitutionality of a statute for overbreadth and vagueness, a court should first consider the overbreadth question and then the vagueness question.

10. One member of the plurality in *Young v. American Mini Theatres, supra,* would require that the regulation be no more intrusive than necessary to achieve the governmental purpose. *Young, supra,* 427 U.S. at 79–80, 96 S.Ct. at 2456–57 (Powell, J., concurring). The other four members of the plurality implied that the zoning ordinances might not be upheld but for the district court's finding that there were myriad locations where such theatres could be opened. *Young, supra,* 427 U.S. at 71–72 n. 35, 96 S.Ct. at 2452–53 n. 35 ("The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech.").

11. Other courts have similarly viewed restrictions on displaying sexually oriented materials to minors as time, place or manner regulations. *See, e.g., American Booksellers Ass'n, Inc. v. Superior Court,* 129 Cal.App.3d 197, 181 Cal. Rptr. 33 (1982) (ordinance requiring any material whose "primary purpose" was "sexual arousal" to be sealed was held overbroad because it restricted adults' access to materials they had right to obtain); *Dover News, Inc. v. City of Dover,* 117 N.H. 1066, 381 A.2d 752 (1977) (per curiam) (In dicta, court approves of a regulation requiring material harmful to minors to be displayed no lower than sixty inches).

12. Legislation whose purpose was to protect minors from exposure to sexually oriented materials has been stricken as overbroad when it unnecessarily restricted adults' access to the material. *See, e.g., Butler v. Michigan,* 352 U.S. 380, 381, 383, 77 S.Ct. 524, 524, 525, 1 L.Ed.2d 412 (1957) (statute proscribing sale of any book "manifestly tending to the corruption of the morals of youth" "not reasonably restricted to evil with which it is said to deal" because it reduces adult population "to reading only what is fit for children."); *Home Box Office, Inc. v. Wilkinson,* 531 F.Supp. 987, 997 (D.Utah 1982) (despite asserted child protection justification, statute proscribing distribution of indecent material by wire or cable held overbroad because it proscribes distribution to homes having no children); *see also Community Television of Utah, Inc. v. Roy City,* 555 F.Supp. 1164, 1166 n. 8, 1172–73 (D.Utah 1982) (ordinance analogous to statute in *Wilkinson, supra,* held overbroad, following reasoning of *Wilkinson*).

ordinance permits the "display" of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to materials not obscene as to them, and they may purchase such material.

[10, 11] In considering News's claim of overbreadth,[13] we must remember that invalidating legislation as overbroad on its face is "manifestly strong medicine" and is employed sparingly and "only as a last resort." *New York v. Ferber,* 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982); *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). In *Ferber,* the court implied that when conduct plus speech is involved, the overbreadth "'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber, supra,* 458 U.S. at 770, 102 S.Ct. at 3362 (*quoting Broadrick v. Oklahoma, supra,* 413 U.S. at 615, 93 S.Ct. at 2917). Moreover, legislation should not be held facially overbroad unless it is not readily subject to a narrowing construction, and the deterrent effect on speech is real and substantial. *Young v. American Mini Theatres, supra,* 427 U.S. at 60, 96 S.Ct. at 2447; *Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 216, 95 S.Ct. at 2276.[14]

[12, 13] The portion of the Wichita ordinance proscribing display to minors is conduct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself. Thus, there must be substantial overbreadth for the ordinance to be held overbroad on its face. We find no such infirmity. As noted, the display portion of the ordinance does not restrict minors' access to materials which they have a constitutional right to obtain. *See Ginsberg, supra,* 390 U.S. at 634–43, 88 S.Ct. at 1277–82. The ordinance only prohibits displaying material "harmful to minors," and this term is defined to include only material that is obscene as to minors under the *Miller* test as adapted to evaluate whether material is harmful to minors. Although minors are entitled to a significant measure of First Amendment protection, *Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 212–13, 95 S.Ct. at 2274–75; *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), a narrowly drawn ordinance restricting their access to sexually oriented material does not abridge their First Amendment rights. *See Ginsberg, supra,* 390 U.S. at 634–43, 88 S.Ct. at 1277–82.

We therefore hold that the display provision of the ordinance is not overbroad on its face.

13. It is not clear if plaintiff argues that the ordinance is overbroad merely because it regulates the distribution of materials that are constitutionally protected as to adults, or whether the display provision itself is overbroad. *See* Brief of Appellant at 17, 20. We have already rejected the former argument, and we address the latter because we believe plaintiff raises the argument at least implicitly.

14. The Supreme Court has said "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" *New York v. Ferber, supra,* 458 U.S. at 770 n. 25, 102 S.Ct. at 3362 n. 25 (legislation prohibiting sale of pornography in which children are engaged in explicit sexual acts); *Parker v. Levy,* 417 U.S. 733, 760, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974) (military articles prohibiting, *inter alia,* disobeying a lawful command from a superior) (quoting *CSC v. Letter Carriers,* 413 U.S. 548, 580–81, 93 S.Ct. 2880, 2897–98, 37 L.Ed.2d 796 (1973)).

2. *Vagueness*

[14] If a law threatens to inhibit First Amendment freedoms a more stringent vagueness test is used. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 U.S. at 499, 102 S.Ct. at 1193; *Hynes v. Mayor of Oradell,* 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). In the First Amendment area vague laws offend three important values. First, they do not give individuals fair warning of what is prohibited. Second, lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited.[15] *Grayned v. City of Rockford, supra,* 408 U.S. at 108–09, 92 S.Ct. at 2298–99; *see Hynes v. Mayor of Oradell, supra,* 425 U.S. at 620–22, 96 S.Ct. at 1760–61; *see also General Stores, Inc. v. Bingaman,* 695 F.2d 502, 503 (10th Cir.1982). *Hejira Corp. v. MacFarlane,* 660 F.2d 1356, 1365 (10th Cir. 1981).

[15, 16] We find no vagueness defect in the Wichita ordinance. First, the ordinance provides fair warning of what is prohibited. It plainly prohibits displaying material harmful to minors in a manner so that minors will be exposed to it. Although it is not "an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children," *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 689, 88 S.Ct. 1298, 1306, 20 L.Ed.2d 225 (1968), "'. . . the 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 . . . .'" *Roth v. United States,* 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957) (quoting *United States v. Petrillo,* 332 U.S. 1, 7–8, 67 S.Ct. 1538, 1541–42, (1947)). We believe that the ordinance does this. The obscenity standard as to minors is clearly defined. Common understanding and practices provide commercial establishments with sufficient notice of the type of display the ordinance is designed to prohibit. *See Broadrick v. Oklahoma, supra,* 413 U.S. at 608, 93 S.Ct. at 2913; *Miller, supra,* 413 U.S. at 27, 93 S.Ct. at 2616.

[17] Furthermore, whatever imprecision is present is mitigated by the ordinance's scienter provision. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 U.S. at 499, 102 S.Ct. at 1193 ("[S]cienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.") (footnote omitted). The ordinance defines knowingly in terms almost identical to the definition approved in *Ginsberg. See Ginsberg, supra,* 390 U.S. at 646, 88 S.Ct. at 1284. In addition to the degree of scienter that the Constitution requires be shown to obtain a conviction for violating obscenity laws,[16] the Wichita ordinance, as *Ginsberg* did, makes it an excuse from liability if one makes an honest mistake as to a minor's age.[17]

15. As *Grayned* noted, this third value is related to the first two. *Grayned, supra,* 408 U.S. at 109, 92 S.Ct. at 2299. Concern for this third value is unique to laws which seek to regulate First Amendment rights. The first two values are offended by any vague law. *See, e.g., United States v. Salazar,* 720 F.2d 1482 (10th Cir. 1983) (considering the first two values from *Grayned* and holding that law prohibiting illegal possession of food stamps is not unconstitutionally vague).

16. To satisfy the scienter requirement, the prosecution must show that the defendant knew the contents of the material and its nature and character. *E.g., Hamling v. United States,* 418 U.S. 87, 123–24, 94 S.Ct. 2887, 2910–11, 41 L.Ed.2d 590 (1974); *Hunt v. State of Oklahoma,* 683 F.2d 1305, 1308 (10th Cir. 1982); *United States v. Sherwin,* 572 F.2d 196, 201–02 (9th Cir.1977), *cert. denied,* 437 U.S. 909, 98 S.Ct. 3101, 57 L.Ed.2d 1140 (1978).

17. Plaintiff also argues that the term minors is vague. We reject this contention. The Wichita ordinance defines minor to mean "any unmarried person under the age of eighteen (18) years." The *Ginsberg* Court upheld a statute defining minor to be "any person under the age of seventeen years." *Ginsberg, supra,* 390 U.S. at 645, 88 S.Ct. at 1283. We see no difference of constitutional magnitude between these two definitions.

Moreover, the Wichita ordinance makes it a defense to a prosecution if an honest mistake was made as to the age of the minor. This sufficiently protects commercial enterprises from whatever vagueness inheres in the definition of minor.

Second, we do not perceive any real danger of arbitrary enforcement. To violate the ordinance, one must display material which, taken as a whole, must fail the *Miller* test as applied to minors. This sufficiently constrains the discretion of the authorities. The ordinance adopts the correct standard for evaluating whether material is harmful to minors and we will not assume that the authorities will act in bad faith.

Third, we are not persuaded that the ordinance will lead citizens to forsake activity protected by the First Amendment. The ordinance is narrowly drawn within the confines of the *Miller* and *Ginsberg* standards. It provides fair warning of what is prohibited, and sufficiently constrains the discretion of the authorities. In such circumstances we do not believe it chills the exercise of First Amendment rights.

In sum, we are not persuaded to hold the Wichita ordinance invalid for vagueness.

II

EQUAL PROTECTION

The Wichita ordinance provides that it is an affirmative defense if the material or performance was "displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and [if this was done] for a bona fide governmental, educational or scientific purpose." Plaintiff News argues that the ordinance is violative of the Equal Protection Clause of the Fourteenth Amendment because only commercial establishments are subject to its sanctions.

[18, 19] We disagree. The ordinance creates a classification that distinguishes between commercial enterprises and non-commercial enterprises. Such classifications are upheld if they are rationally related to a legitimate state interest. *See New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976) (per curiam); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 810–14, 96 S.Ct. 2488, 2498–500, 49 L.Ed.2d 220 (1976); *Hart Book Stores, Inc. v. Edminsten,* 612 F.2d 821, 831 (4th Cir.1979), *cert. denied,* 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980).[18] *See also Schilb v. Kuebel,* 404 U.S. 357, 364, 92 S.Ct. 479, 484, 30 L.Ed.2d 502 (1971) ("[C]lassifications will be set aside only if no grounds can be conceived to justify them . . . .").

We rejected a similar argument in *Piepenburg v. Cutler,* 649 F.2d 783 (10th Cir. 1981). In *Piepenberg* a state statute prohibited exhibiting pornographic films and created an affirmative defense if their distribution "was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for possessing pornographic material." *Id.* at 785. We rejected the argument that this violated the Equal Protection Clause, reasoning that it was possible to conceive of justifications for the classification.

We likewise believe that the Wichita ordinance's classification must be upheld. Distinguishing between commercial and non-commercial institutions bears a rational relationship to a legitimate state interest. The Supreme Court has recognized that there are "legitimate state interests at stake in stemming the tide of commercialized obscenity. . . ." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 57, 93 S.Ct. 2628, 2635, 37 L.Ed.2d 446 (1973); *see also Young v. American Mini Theatres, supra,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (upholding zoning ordinances applicable to adult theatres or similar establishments). Commer-

18. We note that in *Ginsberg, supra,* 390 U.S. at 641, 88 S.Ct. at 1281, the Court said that "[t]o sustain state power to exclude material defined as obscenity by § 484–h requires only that we be able to say that *it was not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors." (emphasis added).

cial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence, making a distinction between commercial and non-commercial enterprises is sufficiently grounded in a legitimate state interest.

We conclude that the ordinance does not violate the Equal Protection Clause.

III

PRIOR RESTRAINT

Plaintiff argues that the ordinance creates an impermissible prior restraint. It contends that the threat of criminal prosecution, the substantial penalties available to a prosecutor, and the almost indefinable standards combine to create an unconstitutional prior restraint on the right to distribute their materials. Brief of Appellant at 34. We disagree.

[20] The ordinance creates a penalty for violating its terms. It does not require prior approval of the authorities before any material can be distributed or displayed. "[T]here is a world of difference between a government statement that one cannot speak at all and a statement that one can speak out at some risk of paying a specified cost." Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton,* 67 Cornell L.Rev. 283, 293 (1982).

The Supreme Court has expressed a preference for subsequent punishment over prior restraint. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558–59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975); *Carroll v. Princess Anne,* 393 U.S. 175, 180–81, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968); *see also Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 589, 96 S.Ct. 2791, 2817, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring); *New York Times Co. v. United States,* 403 U.S. 713, 733–37, 91 S.Ct. 2140, 2151–53, 29 L.Ed.2d 822 (1971) (White, J., concurring). The Court has suggested that although the Government may not be able to restrain an individual from expressing himself, it does not follow that he cannot be punished if he abuses his rights. *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. 558–59, 95 S.Ct. 1246.

We are mindful that the Supreme Court has held that a system of prior administrative notice of a determination of obscenity as to particular publications, with subsequent criminal prosecution for distribution possible, violated constitutional rights protected by the Fourteenth Amendment. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70–71, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).[19] Such a conclusion is not justified here, however, because there is no such prior administrative determination, nor any significant risk that one may be prosecuted for engaging in protected conduct. We cannot say that on its face the Wichita ordinance has the infirmities of a prior restraint. The standard by which materials are to be judged is neither overbroad nor vague and there have been no threats of bad faith enforcement.

19. *See, e.g., Bantam Books v. Sullivan, supra,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (State Commission notified book distributors that it has found publications objectionable and that it would recommend prosecution of distribution thereof because the Commission believed books were tending to the corruption of the youth); *see also Entertainment Concepts, Inc., III v. Maciejewski,* 631 F.2d 497 (7th Cir.1980), *cert. denied,* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981) ("penalty of suspension or revocation [of theatre's license on finding it had shown obscene film] is an unconstitutional prior restraint" because decision that movie is obscene is made and license is revoked before opportunity to have a court determine if movie is obscene); *Penthouse Internat'l Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir.), *cert. dismissed,* 447 U.S. 931, 100 S.Ct. 3031, 65 L.Ed.2d 1131 (1980) (where authorities embarked on program of arresting everyone who distributed certain publications and made this action public, causing retailers in county to cease selling publications, the conduct amounted to an informal system of prior restraint); *Drive In Theatres, Inc. v. Huskey,* 435 F.2d 228 (4th Cir.1970) (County Sheriff announced he would prosecute anyone showing a movie rated "R" or "X" because he believed they were obscene); *Bee See Books Inc. v. Leary,* 291 F.Supp. 622 (S.D. N.Y.1968) (Stationing police officers in bookstores indicated to patrons that material sold was illegal and this constituted advance censorship).

We conclude that the ordinance imposes no unlawful prior restraint.

IV

TRIAL BY JURY

News also contends that the ordinance is unconstitutional because it violates the Sixth Amendment right to trial by jury. More specifically, it argues that prosecutions under the ordinance take place before the Municipal Court for the City of Wichita where trial is to the court,[20] and the trial occurs without any determination on obscenity by a jury, which is essential since contemporary community standards must be applied.

Relying on *Miller, supra,* 413 U.S. at 26, 30, 33–34, 93 S.Ct. at 2616, 2618, 2619–20, News says "that the only manner in which the facts can be found so as to determine the prevailing standards in the adult community is through the decision of a jury." Brief of Appellant at 24. News reasons that the obscenity test "requires the participation of the community wherein the action is brought." *Id.* at 25, 93 S.Ct. at 2615. Likewise, News points to statements in *Hamling v. United States,* 418 U.S. 87, 105, 94 S.Ct. 2887, 2901, 41 L.Ed.2d 590 (1974), that a juror is permitted "to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination ...." News also relies on statements in *Ballew v. Georgia,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), as support for its position that a jury trial is constitutionally required in the first instance in obscenity cases.[21]

The defendants respond to the jury trial argument, *inter alia,* by pointing to the right to a jury trial *de novo* on appeal in such cases. Kansas, like numerous states, has a two-tier system for adjudicating specific cases. In Kansas, "[t]he municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city." Kan. Stat.Ann. § 12–4104 (1982). Some states provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to by-pass the first; and still others do not allow an accused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second. *See Ludwig v. Massachusetts,* 427 U.S. 618, 620, 96 S.Ct. 2781, 2783, 49 L.Ed.2d 732 (1976).

[21] Under the Kansas procedure, on a plea of no contest a finding of guilty may be adjudged. Kan.Stat.Ann. § 12–4406(b) (1982). If an accused pleads guilty, the municipal judge may hear evidence touching on the nature of the case, otherwise ascertain the facts, and then may refuse or accept the plea, assess punishment and enter the proper judgment. Kan.Stat.Ann. § 12–4407. All trials in the municipal court are to the municipal judge or the municipal judge pro tem. Kan.Stat.Ann. § 12–4502. However, the accused has the right to appeal and then the case is tried *de novo* in the district court where trial by jury may be requested.[22]

20. Section 12–4502 provides:

> Trial. All trials in municipal court shall be to the municipal judge or the municipal judge pro tem.

Kan.Stat.Ann. § 12–4502 (1982).

21. News cites the following statement in *Ballew, supra,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234:

> We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. *See Miller v. California,* 413 U.S. 15 [93 S.Ct. 2607, 37 L.Ed.2d 419] (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled a misdemeanor and the robbery a felony.

Id. at 241 n. 33, 98 S.Ct. at 1039 n. 33.

22. Three Kansas statutes delineate this procedure. Section 22–3610, Kan.Stat.Ann. (1981), provides:

The Supreme Court has said that such a procedure affords an accused "the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution." *Ludwig v. Massachusetts, supra,* 427 U.S. at 625, 96 S.Ct. at 2785. Moreover, it provides him a clean slate. *Colten v. Kentucky,* 407 U.S. 104, 112–19, 92 S.Ct. 1953, 1958–61, 32 L.Ed.2d 584 (1972).[23] Hence we cannot agree that the decisions of the Supreme Court, considered together, call for a holding that this Kansas procedure for obscenity prosecutions is invalid. The Court's decisions in *Ludwig* and *Colten* have upheld the two-tier systems and the earlier *Callan* decision is distinguishable, as we have explained. See note 23 *supra.*

We must now consider whether the reference to "the average person, applying contemporary community standards" in the First Amendment obscenity test, *see Roth v. United States,* 354 U.S. 476, 479, 77 S.Ct. 1304, 1305, 1 L.Ed.2d 1498 (1957), as well as the numerous references to the jury system which the Court has made while construing and defining this test, constitutionally mandate a jury trial in the *first* instance. News cites state court decisions holding that in obscenity cases an accused must have a jury trial at the first tier. *See City of Kansas City v. Darby,* 544 S.W.2d 529, 532 (Mo.

22–3610. Hearing on appeal. When a case is appealed to the district court, such court shall hear and determine the cause on the original complaint, unless the complaint shall be found defective, in which case the court may order a new complaint to be filed and the case shall proceed as if the original complaint had not been set aside. *The case shall be tried de novo in the district court.*

(emphasis added).

Section 12–4601, Kan.Stat.Ann. (1982), provides:

> Appeal; stay of proceedings. *An appeal may be taken to the district court in the county in which said municipal court is located:*
>
> (a) *by the accused person in all cases;* and
>
> (b) By the city upon questions of law. *The appeal shall stay all further proceedings upon the judgment appealed from.*

(emphasis added).

Section 22–3609(5), Kan.Stat.Ann. (1981), provides

> that in such appeals from municipal courts, *trial by jury may be requested.*

(emphasis added).

23. Plaintiff News relies, *inter alia,* on *Callan v. Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). In *Ludwig, supra,* 427 U.S. at 629–30, 96 S.Ct. at 2787–88, the Supreme Court pointed out that *Callan* recognized that the sources of the right to jury trial in the federal courts are several and include Art. III, § 2, cl. 3, of the Constitution which requires that "[t]he trial of all Crimes ... shall be by Jury." That language was said to be capable of being read as prohibiting, in the absence of a defendant's consent, a federal trial without a jury; and the court noted that the provision is not applicable to the States. 427 U.S. at 630, 96 S.Ct. at 2788. The right of trial by jury in state court as a matter of federal constitutional law derives from the Sixth Amendment as applied to the States through the Fourteenth Amendment. *Duncan v. Louisiana,* 391 U.S. 145, 149–50, 88 S.Ct. 1444, 1447–48, 20 L.Ed.2d 491 (1968).

Furthermore, *Ludwig* also noted that to the extent that *Callan* may have rested on a determination that the right to a second tier jury trial was unduly burdened by a requirement that an accused be "fully tried" without a jury at the first tier, *Callan* was not controlling in a Massachusetts case like *Ludwig* because the defendant was able to circumvent trial in the Massachusetts first tier by "admitting to sufficient findings of fact." 427 U.S. at 630, 96 S.Ct. at 2788.

We believe that the instant Kansas case is distinguishable from *Callan,* as was the Massachusetts case in *Ludwig.* The Kansas two-tier system also permits a defendant to avoid being "fully tried" at the first tier. In a Kansas municipal court a defendant can plead guilty or no contest, Kan.Stat.Ann. § 12–4406 (1982), and sentence must be imposed without unreasonable delay. *Id.* § 12–4507. The defendant then can appeal to the district court where he "has an absolute right to a trial *de novo* ...," *State v. Parker,* 213 Kan. 229, 516 P.2d 153, 158 (1973), and the appeal stays "all further proceedings upon the judgment appealed from." Kan.Stat.Ann. § 22–3609(1) (1981); *see also Id.* § 12–4601 (1982). The defendant is entitled to "a trial *de novo* ... regardless of lack of error or *the nature of his plea* in the lower court." *State v. Parker, supra,* 516 P.2d at 157 (emphasis added). "The defendant's right to a new trial is unrestricted in that all he is required to do to obtain it is to appeal." *Id.,* 516 P.2d at 158.

We feel that both grounds used in *Ludwig* to distinguish *Callan* apply here and that the Kansas procedure is supported by *Ludwig.*

1976) *appeal dismissed,* 431 U.S. 935, 97 S.Ct. 2644, 53 L.Ed.2d 252 (1977); *cf. City of Duluth v. Sarette,* 283 N.W.2d 533, 537–38 (Minn.1979). The *Darby* case, which relied on the above-mentioned portions of *Miller* and *Hamling,* capsulizes plaintiff's point, stating that it held "*in obscenity cases only,* that a trial by jury is required in the first instance and that a trial by jury after appeal to circuit court 'does not satisfy the requirements of the Constitution.'" (quoting *Callan v. Wilson,* 127 U.S. 540, 557, 8 S.Ct. 1301, 1307, 32 L.Ed. 223 (1888)). (emphasis in original).

We are not persuaded to follow these decisions. The Supreme Court has not held that the trier of fact in cases applying the obscenity test must, *ipso facto,* be a jury. The Court has recognized that there is no constitutional right to a trial by jury in state civil proceedings to determine what is obscene material. *Alexander v. Virginia,* 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973). Indeed it has been held by some courts that criminal prosecutions for obscenity need not be by jury trials. *See Coble v. City of Birmingham,* 389 So.2d 527, 533 (Ala.Cr.App.1980); *Holderfield v. City of Birmingham,* 380 So.2d 990, 991–93 (Ala. Cr.App.1979), *cert. denied,* 449 U.S. 888, 101 S.Ct. 245, 66 L.Ed.2d 114.

[22] And even assuming that the jury system may be the desirable method for judging obscenity by community standards, the Kansas procedure is not unconstitutional in view of the right it provides for a *de novo* jury trial on appeal. *Commonwealth v. Rich,* 63 Pa.Commw. 30, 437 A.2d 516, 520–21 (1981); *Manns v. Commonwealth,* 213 Va. 322, 191 S.E.2d 810, (1972); *Walker v. Dillard,* 363 F.Supp. 921 (W.D.Va.1973), *rev'd on other grounds,* 523 F.2d 3 (4th Cir.), *cert. denied,* 423 U.S. 906, 96 S.Ct. 208, 46 L.Ed.2d 136 (1975). In the *de novo* jury trial the accused has a clean slate. *Colten v. Kentucky, supra,* 407 U.S. at 119, 92 S.Ct. at 1961. Moreover the appeal stays "all further proceedings upon the judgment appealed from," Kan.Stat.Ann. § 12–4601 (1982).[24]

We find no violation of plaintiff News's constitutional rights under the First or Sixth Amendments in the procedure laid out for prosecution of violations of the ordinance.

V

In sum, we are not convinced that there is any substantive or procedural infirmity demonstrated in the Wichita ordinance. Accordingly the judgment is

AFFIRMED.

APPENDIX

Section 5.68.156 to ordinance number 36–172 of the Code of the City of Wichita, Kansas, provides as follows:

Displaying material harmful to minors.

(1) *Definitions.* Minor means any unmarried person under the age of eighteen (18) years.

24. As amicus curiae, the State of Kansas argues that there can be no violation of the Sixth Amendment right to a jury trial because a violation of the ordinance is a petty offense. The amicus points out that the maximum penalty under the ordinance is a fine of not more than five hundred dollars and a jail term not to exceed one month. Although we recognize that a petty offense is "usually defined by reference to the maximum punishment that might be imposed ...," *Ludwig v. Massachusetts,* 427 U.S. 618, 624–25, 96 S.Ct. 2781, 2785, 49 L.Ed.2d 732 (1976), and that a maximum one month sentence and five hundred dollar fine might be light enough to be a petty offense, *see Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (plurality); *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), we do not rest our decision on this ground.

The ordinance is uniquely subject to repetitive violation, creating the threat of substantial penalties. Under the ordinance, "[e]ach day that any violation of [the ordinance] occurs or continues shall constitute a separate offense [, and] [e]very act, thing, or transaction prohibited by [the ordinance] shall constitute a separate offense as to each item, issue or title involved...." In such circumstances, we are not inclined to rely on the "ill-defined, if not ambulatory" boundaries of the petty offense category. *Duncan v. Louisiana, supra,* 391 U.S. at 160, 88 S.Ct. at 1453. It is on the other grounds discussed that we uphold the ordinance.

APPENDIX—Continued

'Harmful to Minors' means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when the material or performance, taken as a whole, has the following characteristics:

(a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and

(b) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.

'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, or recording tape, video tape.

'Performance' means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and content of any material or performance which is reasonably susceptible of examination by the defendant, and

(b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

'Person' means any individual, partnership, association, corporation, or other legal entity of any kind.

'A reasonable bona fide attempt' means an attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate or other governmental or educational identification card or paper and not relying solely on the oral allegations or apparent age of the minor.

(2) *Offenses.* No person having custody, control or supervision of any commercial establishment shall knowingly:

(a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material is not exposed to view.

(b) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors; or

(c) Present to a minor or participate in presenting to a minor, with or without consideration, any performance which is harmful to a minor.

(3) *Defenses.* It shall be an affirmative defense to any prosecution under this ordinance that:

The material or performance involved was displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and persons acting in their capacity as employees or agents of such persons or organizations, and which institution displays, presents or disseminates such material or performance for a bona fide governmental, educational or scientific purpose.

(4) *Penalties.* Any person who shall be convicted of violating any provision of this section is guilty of a misdemeanor and shall be fined a sum not exceeding Five Hundred Dollars ($500.00) and may be confined in jail for a definite term which shall be fixed by the court and shall not exceed one (1) month. Each day that any violation of this section occurs or continues shall constitute a separate offense and shall be punishable as a separate violation. Every act, thing, or transaction prohibited by this section shall constitute a separate offense as to each item, issue or title involved and shall be punishable as such. For the purpose of this section, multiple copies of the same identical title, monthly issue, volume and number issue or other such identical material shall constitute a single offense.

John BROZ, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary of Health & Human Services, A Department of the United States Government, Defendant-Appellant.

Richard D. HOLMES, Plaintiff-Appellee,

v.

Margaret M. HECKLER, The Secretary of Health and Human Services, Defendant-Appellant.

Corrine LITTLE, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary of the Department of Health and Human Services, Defendant-Appellant.

Thomas O. JONES, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary, Department of Health & Human Services, Defendant-Appellant.

Fred SOESBE, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary of Health and Human Services, Defendant-Appellant.

Nos. 81-7140, 81-7143, 81-7336, 81-7370 and 81-7466.

United States Court of Appeals, Eleventh Circuit.

Dec. 8, 1983.

In each of five cases, denial of social security disability benefits was reversed by the United States District Court. The Secretary of Health and Human Services appealed, and appeals were consolidated. The Court of Appeals, 677 F.2d 1351, affirmed in part, vacated in part and remanded. Following remand, 103 Sup.Ct. 2421, the Court of Appeals, 711 F.2d 957, affirmed in part, vacated in part and remanded. On