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Law of Publication Review in the Illinois Department of Corrections

Sean Hux

In January of 2019, the Illinois Department of Corrections (IDOC) removed some 200 books from its library at the Danville Correctional Center (DCC).¹ The DCC is a prison in the east-central part of Illinois run by the IDOC where, for the better part of a decade, the Education Justice Program (EJP) has taught classes to inmates on humanities centered courses.² Educational programs such as the EJP are also critical for stocking prison libraries in Illinois, where the IDOC has spent a total of \$300 on materials for libraries in over two dozen prisons across the state.³ When asked about the removal of the books, then-director of the Illinois Department of Corrections responded that “Somehow, a lot of books got into the institution without going through our review process. That was our fault [. . .] We let books in and some of them maybe shouldn’t have been, some of them are very good books.”⁴

Among those titles removed were “Up From Slavery” by Booker T. Washington, “Mapping Your Future: A Guide to Successful Reentry 2017-2018,” and “Visiting Day,” a children’s book about visiting a parent in prison by author Jacqueline Woodson.⁵ Others were “The Souls of Black Folk,” “Uncle Tom’s Cabin,” and Frederick Douglass’s Memoir.⁶ EJP Director, Rebecca Ginsburg, testified at a hearing before Illinois State Representatives that a corrections lieutenant had told program officials that the problem with the materials was that they were “racial.”⁷ At those same hearings, Ms. Ginsburg added that “without action from the legislators or [someone] very high up in state

¹ Ed Lyon, *Illinois DOC Interferes with Prisoners’ College Program by Removing Books*, PRISON LEGAL NEWS (Oct. 7, 2019) <https://www.prisonlegalnews.org/news/2019/oct/7/illinois-doc-interferes-prisoners-college-program-removing-books/>.

² *Id.*

³ *Id.*

⁴ Lee V. Gaines, *Illinois Prison Removes More than 200 Books from Prison Library*, ILLINOIS NEWSROOM, <https://illinoisnewsroom.org/2019/05/29/illinois-prison-removes-more-than-200-books-from-prison-library/> (last visited Feb. 26, 2020).

⁵ *Id.*

⁶ Peter Nickeas, *It’s the racial stuff: Illinois prison banned, removed books on black history and empowerment from inmate education program*, CHICAGO TRIBUNE (Aug. 15, 2019) <https://www.chicagotribune.com/news/ct-illinois-prison-books-removed-inmate-education-20190815-6xlrnfwmovdxnbc3ohvsx6edgu-story.html>.

⁷ *Id.*

government, we can expect this to continue to happen.”⁸ Due to the state of the statutory and administrative law surrounding the censorship of published materials in Illinois prisons, Ms. Ginsburg was, and remains, absolutely correct.

PRISON PUBLICATION REVIEW IN ILLINOIS STATUTES

The statutory law of the state of Illinois, which addresses publications in prisons, is limited to a few passages in the Illinois Unified Code of Corrections.⁹ The law surrounding the access to publications by specifically adult inmates’ is an even slimmer collection of sections between 730 ILCS 5/3-2 and 3-8.¹⁰ Other sections of the statute focus on access to publications by juveniles interred in the Illinois Correctional System.¹¹ Chapter 3, Article 2 outlines the general powers granted to the Illinois Department of Corrections by the Illinois Congress.¹² Section 3-2-2 is perhaps the largest individual section in the Unified Correctional Code. It lays out the Department of Corrections’ basic duty to “accept persons committed to it by the courts of this State for care, custody, treatment and rehabilitation. . .” as well as numerous other duties.¹³

It appears as though Section 3-2-2 was originally drafted to lay out the very core elemental duties of the department of corrections. Over time, smaller and much more specific powers were added by the legislature without much regard for compositional clarity across the whole statute.¹⁴ These dangling subsections cover a multitude of unrelated and miscellaneous powers and duties, which is the predominant reason why this section is one of the largest in the Unified Code of Corrections.¹⁵ These “miscellaneous” duties vary from administrative prerogatives relating to the transport of ‘committed persons’ and the upkeep of prison facilities to more specific programmatic powers such as “to provide educational and visitation opportunities to committed persons within its institutions through temporary access to content-controlled tablets that may be provided as a privilege to committed persons to induce or reward

⁸ Lyon, *supra* note 1.

⁹ 730 Ill. Comp. Stat. 5/3.

¹⁰ 730 Ill. Comp. Stat. 5/3-2, 3-8; 730 Ill. Comp. Stat. 5/3-10 (sections specifically related to the operation of Juvenile Correctional Facilities).

¹¹ 730 Ill. Comp. Stat. 5/3-10.

¹² 730 Ill. Comp. Stat. 5/3-2-2.

¹³ 730 Ill. Comp. Stat. 5/3-2-2(1)(a).

¹⁴ 730 Ill. Comp. Stat. 5/3-2-2.

¹⁵ *Id.*

compliance.”¹⁶ The general ‘maintenance of facilities and programs’ subsections under section 3-2-2 are cited by the Department of Corrections as an abstract statutory authority, which they rely on to deny publications to prisoners.¹⁷ However, the sections of the Correctional Code which more specifically address inmate access to publications are found in section 3-7.¹⁸

Much like the general powers of the department outlined in section 3-2, section 3-7 gives sweeping powers to promulgate rules and regulations that the department determines to be necessary in order to fulfill its greater statutory responsibilities.¹⁹ The language of section 3-7-1 reads, “The Department shall promulgate Rules and Regulations in conformity with this Code.”²⁰ Section 3-7-2 outlines some substantive responsibilities of the department, but once again, in very broad language.²¹ In subsection (a) the statute reads, “All institutions and facilities of the Department shall provide every committed person with access to. . .a library of legal materials and published materials including newspapers and magazines approved by the Director. A committed person may not receive any materials that the Director deems pornographic.”²² There are a handful of further instructions regarding restrictions on the reception of published materials through the mail in section 3-8-7.5 and the establishment of the prisoner grievance system in section 3-8-8.²³ Beyond these, however, there is no further statutory law in Illinois that directly relates to the access to published materials in adult correctional facilities in the state. The grant of power given by the Illinois legislature to the Department of Corrections, while not absolute, is vast. As a result, the greatest concentration of law, as it relates to prisoner access to publications, falls securely into the administrative law of the Illinois Department of Corrections.

PRISON PUBLICATION REVIEW IN ILLINOIS ADMINISTRATIVE LAW

The power to grant or deny inmates access to particular publications in IDOC facilities largely rests in the discretion of a handful of correctional of-

¹⁶ 730 Ill. Comp. Stat. 5/3-2-2(1)(d-10).

¹⁷ 20 Ill. Adm. Code 525.

¹⁸ 730 Ill. Comp. Stat. 5/3-7.

¹⁹ 730 Ill. Comp. Stat. 5/3-7-1.

²⁰ *Id.*

²¹ 730 Ill. Comp. Stat. 5/3-7-2.

²² 730 Ill. Comp. Stat. 5/3-7-2(a).

²³ 730 Ill. Comp. Stat. 5/3-8-7.5 & 3-8-8.

ficers.²⁴ The rules and regulations promulgated by IDOC refer to these officers as ‘publication review officers’.²⁵ These officers are appointed by the Chief Administrative Officer of each correctional facility.²⁶ The officers’ discretion is based largely on their assessment of a number of factors in each publication they are reviewing for admission into an IDOC facility.²⁷ The first of these factors is simply the publication’s ‘obscenity’.²⁸ The regulations borrows a statutory definition of “obscenity” found in 720 ILCS 5/11-20(b), which effectively defines something as obscene “which occurs to an average person to be a depiction of sexual acts that lacks any further literary, artistic, political, or scientific value.”²⁹ The next factor is the publication’s perceived detrimental effect on “security, good order, rehabilitation, or discipline or if it might facilitate criminal activity, or be detrimental to mental health needs of an offender as determined by a mental health professional.”³⁰

While a brief review of the IDOC’s banned publication list will demonstrate that the ‘obscenity’ factor generates the greatest number of denials, it is the second detrimental factor which gives publication review officers the widest discretion.³¹ The central banned publication list, or “Statewide Publications Determination List,” is actually a relatively archaic document that was originally compiled several decades ago when IDOC publication review procedure was more centralized.³² As a result, a significant amount of the banned titles are adult entertainment magazines.³³ Mixed amongst these titles are numerous lifestyle and hobby magazines that are either entirely banned or have numerous issues in their catalogs banned. Some of these include, “American Hunter,” “Advocate,” “Illinois State Parks Magazine,” “Outdoor Life,” “JBL Pro Products for Music,” and “Prison Life.”³⁴ Other banned publications are related to extreme political ideologies, hate based or otherwise. Some of these include, “Anarchist Black Dragon,” “The Aryan Eagle,” and “Black Panthers Speak,”

²⁴ 20 Ill. Adm. Code 525.220.

²⁵ *Id.*

²⁶ *Id.*; 20 Ill. Adm. Code 525.202.

²⁷ 20 Ill. Adm. Code 525.230.

²⁸ 20 Ill. Adm. Code 525.230(a)(1).

²⁹ 20 Ill. Adm. Code 525.202.

³⁰ 20 Ill. Adm. Code 525.230(a)(2).

³¹ Ill. Dept. of Corr., *Illinois Banned Books List*, BOOKS TO PRISONERS (May 29, 2019), <http://www.bookstoprisoners.net/wp-content/uploads/2019/06/Illinois-banned-books-list.pdf>.

³² Telephone Interview with Alan Mills, Director, Uptown People’s Law Center (Apr. 1, 2020).

³³ *Id.*

³⁴ Ill. Dept. of Corr., *supra* note 31.

and “Klan Krusader.”³⁵ Unexpected disapproved publications include Diana Gabeldon’s novel “Fiery Cross,” “DuPont Company Material,” “Pilot’s Handbook of Weather,” and a handful of publications from the National Association for the Advancement of Colored Peoples.³⁶ The list of disapproved publications does not include any rationale for the disapproval of any of the publications listed, so curious parties are required to speculate why particular works were denied.

As a result of the decentralization of the publication review process over the years, books and magazines which were denied by individual facilities were no longer being placed on the central disapproved publications list.³⁷ Under this system, if a publication was denied to prisoners at an IDOC facility, it still wouldn’t be added to the central disapproval list.³⁸ Most of the titles that were denied at the Danville Correctional Facility in February, 2019, for example, cannot be found on the central disapproved publications list.³⁹

IDOC regulations require that publication review officers must notify an inmate who requested a particular work of both the work’s subjection to the review process and its denial.⁴⁰ The inmate is allowed to submit a supportive statement or other documentation within seven days of the notice to prevent a finding of disapproval, while the publisher of the work is allowed 21 days from the date of the notice.⁴¹ If a publication review officer wishes for a publication to be disapproved, he or she will forward the recommendation for denial to the Chief Administrative Officer of the facility with an explanation.⁴² If the Chief Administrative Officer concurs with the recommendation, the publication shall be disapproved.⁴³ Up until November of 2019, this was where the publication review process ended within the IDOC and from there the denial would have to be challenged in a court of appropriate jurisdiction.⁴⁴

After the media and popular outrage in response to the IDOC’s actions pulling books from the shelves of the Danville prison library, the new director of the IDOC as well as the Illinois Lieutenant Governor’s office responded in

³⁵ *Id.*

³⁶ *Id.*

³⁷ Mills, *supra* note 32.

³⁸ *Id.*

³⁹ Lyon, *supra* note 1; Ill. Dept. of Corr., *supra* note 31.

⁴⁰ 20 Ill. Adm. Code 525.230(c).

⁴¹ *Id.*

⁴² 20 Ill. Adm. Code 525.230(d).

⁴³ *Id.*

⁴⁴ Mills, *supra* note 32.

an attempt to change the process by which publications are admitted or denied in to prisoners in IDOC facilities.⁴⁵ The acting IDOC director at the time, Rob Jeffreys, issued a new internal administrative directive that took effect on November 1st, 2019, but has not been published since.⁴⁶ A copy of the directive was provided to the Public Interest Law Reporter by Alan Mills, director of the Uptown People's Law Center, as part of an interview on the topic of this article.⁴⁷ The directive makes a handful of important additions to the existing procedure for IDOC publication review.⁴⁸ The new IDOC procedure effectively maintains the old system of initial review in prisons by having mail room staff examine received materials to see if they violate the department's standards for admissible publications.⁴⁹ If these staff members find the material to be violative, then the initial discretion of admission or denial falls again to the Publication Review Officer where their decision is then forwarded to the Chief Administrative Officer at the facility.⁵⁰

The primary procedural innovation of the directive is the creation of the Central Publications Review Committee that operates on a departmental level, above the individual IDOC facilities.⁵¹ The committee represents a mechanism which might be able to centralize the standards of publication review across the IDOC.⁵² This would help to prevent each prison from operating under different interpretations and applications of the same bare statutory and regulatory standard, resulting in uneven decisions where an inmate in one prison might have access to a publication while an inmate in another prison might not.⁵³ Further, it might allow for the re-adoption of the use of the centralized IDOC disapproved publications list.⁵⁴ Hopefully, this could give the public more access to the publication denial decisions of the department which, in turn, could facilitate greater public oversight.

The directive makes a few other important changes to both the procedure and the standard of publication review in IDOC facilities. One of these changes is the use of the Educational Facility Administrator at each prison as

⁴⁵ Lyon, *supra* note 1.

⁴⁶ Ill. Dept. of Corr., Administrative Directive 04.01.108: Publication Reviews (2019).

⁴⁷ Telephone Interview with Alan Mills, Director, Uptown People's Law Center (Apr. 1, 2020).

⁴⁸ Ill. Dept. of Corr., Administrative Directive 04.01.108: Publication Reviews, II.F (2019).

⁴⁹ *Id.* at II.F.5.

⁵⁰ *Id.* at II.F.5(a)(2).

⁵¹ *Id.* at II.H.

⁵² Mills, *supra* note 32.

⁵³ *Id.*

⁵⁴ Mills, *supra* note 32.

the arbiter of the admission standard in cases where one of the prison educational programs is trying to admit the publication in question.⁵⁵ This does not extend to requests made by individual inmates, however, it still gives primary discretion to Publication Review Officers.⁵⁶

Finally, the standard of review of publications that are requested to be admitted to a facility has been expanded to some degree, including more specific language prohibiting publications which ‘facilitates unauthorized organizational activity’ or ‘overtly advocates or encourages violence, hatred or group disruption.’⁵⁷ Nonetheless, the directive still includes the broadly written ‘detrimental to the security or good order of the facility’ clause, which continues Publication Review Officers and individual facilities broad discretion in the review process.⁵⁸ The result of this directive, then, is not a total overhaul of the publication review system in Illinois prisons. Rather, it is simply a reigning in of the total discretion of individual facilities to deny and censor publications to prisoners. Instead, it places that power in the hands of the publicly unaccountable Central Publications Review Committee and the Director of the IDOC.

THE IMPORTANCE OF FURTHER REFORM

Further administrative and statutory reform is still required for several reasons. First among these reasons is the incredibly deferential case law standard currently employed by both Federal and State courts reviewing the decisions of prison officials under the Supreme Court decision *Turner v. Safely*.⁵⁹ Under this standard, “correctional officials have done everything from prohibiting President Obama’s book as a national security threat; to using hobby knives to excise Bible passages from letters; to forbidding all nonreligious publications; to banning Ulysses, John Updike, Maimonides, case law, and cat pictures.”⁶⁰ This is the standard awaiting inmates who challenge their jailors’ publication decisions, if they are even able to file a suit in a court of law in the first place.

There are many obstacles a prisoner faces when attempting to challenge a publication denial in federal or state court. Amongst these, the Illinois Administrative Procedure Act precludes the IDOC from appeal review on the basis of

⁵⁵ Ill. Dept. of Corr., *supra* note 50, at II.F.5(b).

⁵⁶ *Id.* at II.J.3(c) & II.J.4.

⁵⁷ *Id.* at II.G.2(d), (e).

⁵⁸ *Id.* at II.G.2(k).

⁵⁹ David Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975-76 (2016).

⁶⁰ *Id.* at 1026-27.

their administrative decisions.⁶¹ As a result, the defendant cannot plead a violation of their rights on the basis of the department's *own* standard, but are required instead to make a constitutional claim which will base the decision off of the standard of *Turner v. Safely*.⁶² Another significant obstacle is the Prison Litigation Reform Act, which requires inmates to exhaust their administrative remedies, namely the IDOC appeal process, before being able to appeal a denial.⁶³ If a prisoner does manage to win their case, any injunction they could have ordered by the court would be statutorily limited to 2 years or else require another suit to keep it in force.⁶⁴ Furthermore, prisoners are prevented from collecting damages unless physical injury occurs and, if they can manage to retain one, their attorney's fees are statutorily capped.⁶⁵ Due to these realities, it is significantly easier to bring suit as a publisher of a book or magazine, even though these suits are exceptionally rare.⁶⁶

Because of all this, continued reforms within the IDOC publication review process and Illinois statutes are critical. The director's November 1, 2019 directive might improve upon the oversight exercised within the department, but it is a far cry from providing a sensible standard of review that allows prisoners the access to literature that should very well be protected by their First Amendment right to free speech.

As for Rebecca Ginsburg and the Education Justice Program (EJP) at the Danville prison, neither the inmates nor the program teachers had received their confiscated books by October, 2019.⁶⁷ Ms. Ginsburg had received an email from IDOC stating that the confiscated books had been returned to the facility, but that officials at the facility insisted on reviewing the materials before releasing them to the library and the prisoners.⁶⁸

⁶¹ Mills, *supra* note 32.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Lyon, *supra* note 1.

⁶⁸ *Id.*