



Maryland

May 31, 2018

Stephen Moyer, Secretary
Department of Public Safety and Correctional Services
Office of the Secretary
300 East Joppa Road, Suite 1000
Towson, MD 21286
VIA EMAIL

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
MARYLAND

RE: New DPSCS Restrictions Denying Prisoners Access to Books, Institutional Bulletin # 2018-02

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Dear Secretary Moyer:

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We write in support of the thousands of people in your custody, as well as their families and other supporters, to urge you to immediately rescind Institutional Bulletin # 2018-02. Among other things, this bulletin bans third-party book orders entirely, limits individuals to books from two vendors with extremely limited offerings, and prohibits any individual from possessing more than ten books.¹

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These draconian new restrictions, in combination with the numerous other pre-existing restrictions that curtail access to books, effectively deny more than 20,000 Maryland prisoners access to the overwhelming majority of books in existence, and prevent those of us who wish to communicate with them through books from doing so. In our view, these rules clearly violate the U.S. and Maryland Constitutions, are arbitrary and irrational, and reflect stunningly poor policy choices. Indeed, the federal Bureau of Prisons rescinded a similar (but arguably less restrictive) policy only a few weeks ago. *See Ann Marimow, Federal prisons abruptly cancel policy that made it harder, costlier for inmates to get books*, Wash. Post. May 3, 2018.

Maryland should do the same.

The First Amendment encompasses the right to send and receive books

As explained by the 7th Circuit Court of Appeals:

Freedom of speech is not merely freedom to speak; it is also freedom to read. Forbid a person to read and you shut him out of the marketplace of

¹ Likewise, the DOC should rescind any facility-based directive that forbids third-party orders, limits prisoners to the two vendors, or caps possession of books to 10.

ideas and opinions that it is the purpose of the free-speech clause to protect.

King v. Federal Bureau of Prisons, 415 F.3d 634, 637 (7th Cir. 2005) (citations omitted) (reversing dismissal of prisoner’s claim that he was denied book in violation of First Amendment); *see also Keenan v. Hall*, 83 F.3 1083, 1093 n. 3 (9th Cir. 1996) (noting “the importance of reading in a civilized society.”). Inherent in this principle is the notion that freedom to read includes meaningful choice and access to a broad range of options.

Moreover, in a variety of contexts, courts have repeatedly reaffirmed the common-sense notion that there are “recognized rehabilitative benefits to permitting prisoners to receive educational reading material and maintain contact with the world outside the prison gates.” *Clement v. California Dept. of Corrections*, 220 F.Supp.2d 1098, 1109-10 (N.D. Cal. 2002). Books play an important role in transcending the inherent monotony and isolation of prison and are frequently recognized for their transformative impact when people are separated from the outside world. In the words of Reginald Dwayne Betts, who was once in the custody of the DOC and who has since become a critically-acclaimed poet and graduate of Yale Law School:

When I got locked up, I think, books became magic. Books weren't really magic when I was a child, they were just something that I [enjoyed] reading. I thought it was important, but when I got locked up it became magic, it became a means to an end. ... It became the way in which I experienced the world, but more importantly, I think, it became the way in which I learned about what it means to be human, and to be flawed and to want things that you can't have.

In 'Bastards Of The Reagan Era' A Poet Says His Generation Was 'Just Lost', NPR, Dec. 8, 2015, available at <https://www.npr.org/2015/12/08/458901392/in-bastards-of-the-reagan-era-a-poet-says-his-generation-was-just-lost>.

Restrictions of the sort at issue here implicate both the First Amendment rights of those who are incarcerated as well as the families, friends and organizations who wish to communicate with them. *Procurier v. Martinez*, 416 U.S. 396, 408–09 (1974). The First Amendment protection against “unjustified governmental interference” with communication applies to both the sender and the intended recipient. *Id.* (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965)). In communication by letter, “the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.” *Id.* It is no different with books, the gifting of which has communicative intent and effect. The same principles apply to publishers, authors or organizations who want to share books, whether to educate, entertain, rehabilitate, or help individuals survive prison. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Montcalm Publishing Co. v. Beck*, 80 F. 3d 105, 109 (4th Cir. 1996) (publishers’ First Amendment rights are implicated where they are denied the right to direct their books to prison audiences).

The new restrictions violate the First Amendment

Although these rights may be more limited in the prison context than in free society, restrictions impinging upon Constitutional rights will be upheld only if “reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). To determine whether a regulation satisfies this standard, a court considers: (1) whether there is a valid, rational connection between the regulation and a legitimate government interest; (2) the availability of alternate means of exercising the right; (3) the impact accommodating the right would have upon prison resources; and (4) whether there are obvious, easy alternatives that accommodate the right at *de minimis* cost to valid penological interests. *Id.* at 89–91.

Based on our review of how courts have applied the *Turner* factors in other cases and our understanding of DPSCS’s rules, we do not believe that restrictions of this breadth and depth on access to books can withstand constitutional scrutiny. The rules severely and impermissibly infringe upon prisoners’ First Amendment right to read books and on the rights of third parties – families, friends, organizations, and the like –to reach prisoner audiences. *See, e.g., Crofton v. Roe*, 170 F.3d 957 (9th Cir.1999) (categorical ban on gift orders of books and other publications violated First Amendment). Among regulations affecting access to publications, “[r]egulations to be viewed with caution include those which categorically prohibit access to a broad range of materials.” *Ashker v. Schwarzenegger*, 2006 WL 648725, 4 (N.D. Cal. 2006) (citations omitted) (finding ban on hardcover books for prisoners in special housing unit unconstitutional), *aff’d* 339 Fed.Appx. 751 (9th Cir. 2009). Courts have thus more closely scrutinized book restrictions when they swallow up large swaths of reading material, *see, e.g., Ashker v. California Dep’t of Corrections*, 224 F.Supp.2d 1253 (N.D. Cal. 2002) (vendor label rule that caused plaintiff denials of access to books failed to satisfy *Turner v. Safley*); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (reversing grant of summary judgment and emphasizing likelihood of success on remand of prisoner’s claim that publisher-only rule for publications other than hardcover books violated First Amendment); *Spellman v. Hopper*, 95 F.Supp.2d 1267 (M.D. Ala. 1999) (rejecting as unconstitutional ban on subscription magazines and newspapers for individuals on administrative segregation status), as well as when they cause particular titles to be entirely unavailable. *See, e.g., Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994) (reversing grant of summary judgment in First Amendment challenge to practice of prohibiting prisoners from receipt of any foreign language book); *Figel v. Overton*, 121 Fed. Appx. 642, 645-46 (6th Cir. 2005) (reinstating challenge to denial of book because sending organization was not approved vendor was arbitrary and violation of First Amendment).

The new restrictions are irrational, arbitrary and an exaggerated response to security concerns.

It has been reported that the purpose of the new rules is to keep out contraband, specifically suboxone. Ann E. Marimow, *To cut prison drug smuggling, Maryland is restricting inmates’ access to books*, Wash. Post, May 25, 2018. We are sympathetic to

the concerns about drug abuse occurring in DOC facilities.² But, the DOC fails to see the forest for the trees.

The Division of Correction, of course, already forbids receipt of hardcover books, used books, and books from individuals or private parties. Ostensibly, the purpose of the new categorical prohibition on *all* third-party orders of books is to keep out suboxone that might be hidden in books even when sent from bona fide booksellers. This response is so broad and so excessive relative to any actual risk that it is irrational. *Cf. Jones v. Brown*, 461 F.3d 353, 361 (3rd Cir. 2006) (“[W]hile it was true that legal mail conceivably might contain such plans [to escape] and the opening of it might conceivably thwart those plans, the risk allegedly addressed was too insubstantial to justify incursion on First Amendment interests.”).

In all but the rarest of cases, attempts to send books or obtain books are innocuous, genuine attempts at making available books that are otherwise actually or practically unavailable to people in your custody. Nearly none of them will contain suboxone. Indeed, for large institutional sellers like Amazon, which sells literally millions of books per year, there would be no feasible way for someone outside the prison to know which employees would handle any particular order for a particular prisoner such that they could be induced to introduce contraband into the book or package. For reasons such as these, courts confronted with categorical prohibitions on gift books have rejected them on First Amendment grounds. *See Crofton v. Roe*, 170 F.3d 957 (9th Cir.1999) (categorical ban on gift orders of books and other publications violated First Amendment); *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004) (reversing grant of summary judgment in case involving categorical ban on gift publications).

Likewise, prohibiting prisoners from ordering books from *all* sources other than one of two private vendors with extremely limited selections is equally arbitrary. In the most simplistic sense, eliminating opportunities for communications and goods from outside prison walls, whether from vendors, families, or staff, can be said to decrease opportunities for contraband to be introduced. But this kind of formalistic argument is not sufficient. *See, e.g., Beard v. Banks*, 548 U.S. 521, 535 (2006) (“*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective.”). To the extent there is some tiny fraction of cases in which attempts are made to imitate legitimate sellers, we caution the Department against making policy based on the rare and exceptional case. *Cf. Prison Legal News v. County of Ventura*, 2014 WL 2736103, 5 (C.D. Cal. 2014) (concluding that rather than “rational” relationship between postcard-only policy and reducing contraband, policy smacked of “arbitrariness and irrationality” because concerns were largely theoretical and “no inspection system is foolproof”). More to the point, there is absolutely no basis for asserting that a package from one of the two vendors selected by DOC is particularly less susceptible to tampering than any other bookseller.

² We observe, however, that the Department has done almost nothing to address the *demand* for substances, for example by making meaningful substance abuse treatment available consistent with standards of community care. Indeed, recent legislation has made it harder for individuals in DOC custody to obtain such treatment, even by order of a court.

In contrast, the restrictions enacted to prevent the remote possibility of suboxone entering a prison through books mailed by legitimate booksellers effectively eliminate access to the vast majority of books ever written. Under the new rules, the only way people in DOC custody can obtain books of their own is by ordering them from one of two vendors, Edward Hamilton Books and Books n Things, whose selections of books are extremely limited. By way of example, we list a small sampling of books that we could not locate in paperback format from either vendor:

To Kill a Mockingbird by Harper Lee
Catcher in the Rye by J.D. Salinger
Native Son by Richard Wright
Invisible Man by Ralph Ellison
The Souls of Black Folk by W.E.B. DuBois
Anything written by Langston Hughes
Any Harry Potter books
Brave New World, Aldous Huxley
For Whom the Bell Tolls by Ernest Hemingway
Civil Disobedience and Other Essays by Henry David Thoreau
Any book written by Dr. Martin Luther King Jr.
The Autobiography of Malcolm X by Alex Haley
I Know Why the Caged Bird Sings by Maya Angelou
Between the World and Me by Ta-Nehisi Coates

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The limited selections at DOC prison libraries and the challenges prisoners face in accessing what *is* available in their respective libraries fail to come close to compensating for this extraordinary loss of access to the broader world of books. Nor is access to a library book – which is time-limited, must be returned, and can't be marked-up – equivalent to possessing it.

Moreover, the 10-book limit, which appears to have been selected out of thin air, is also completely arbitrary. *DOC rules already limit the amount of paper property any individual can possess, including books.* There is no rational reason to further limit books in this way. All this accomplishes is to turn books into *contraband*. Surely, the state prison system can do better.

Any arguable security benefit is offset by the new risks the rules create. Depriving prisoners of opportunities to read and limiting their ability to do so is fundamentally at odds with the rehabilitative ideal. Education is widely recognized as one of the most powerful deterrents of institutional misconduct and recidivism, as are familial and other community connections. The DOC is creating *greater* threats to institutional security each time it further isolates prisoners from the outside world—as it has, repeatedly, by prohibiting greeting cards, by forbidding embraces at the beginning of any visit, and the like. Programming is extremely limited. Reading and staying in touch with the outside world are one of the few ways individuals can occupy their time in positive and self-directed ways at virtually no cost to the DOC. Heavy-handed policies that make it impossible to hire staff, that force staff to enforce arbitrary and senseless rules, and that dehumanize prisoners and their families create conditions that increase tension and distrust to the detriment of institutional security.

There are easy alternatives to DOC's virtual book ban that have minimal impact on prison resources

If a prison regulation fails to satisfy first *Turner* standard, as we believe is the case here, no additional analysis required. *See, e.g., Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011) (“The first *Turner* factor is a *sine qua non*: If the prison fails to show that the regulation is rationally related to a legitimate penological objective, we do not consider the other factors.”) (citation and quotations omitted). But even assuming for the sake of argument that some rational relationship exists between the book restrictions and legitimate penological interests, the new restrictions fail *Turner*'s remaining considerations.

Because of their breadth and the lack of alternatives, the rules adopted in IB # 2018-02 vastly reduce book availability by making most books nearly impossible to obtain. When book restrictions have been upheld, courts have given great weight to the availability of alternative means of obtaining a range of books, as well as whether the restrictions were temporary in nature. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 551-52 (1979) (Emphasizing that ruling decided “narrow” question of constitutionality of rule prohibiting receipt of hardback books unless they came from any bookstore, book club or publisher, noting all other books were permitted and stays at the jail in question were limited to fewer than 60 days). Courts have also been clear that “alternatives” in this context must be genuine substitutes for the content of the prohibited material. *See, e.g., Ashker v. Schwarzenegger*, 2006 WL 648725, 5 (N.D. Cal. 2006) (In concluding that prohibition on hardcover books was unconstitutional, observing that “While Defendant states that millions of books are available in paperback, Defendant does not refute that, as noted in declarations submitted by Plaintiffs and other inmates, many books are not available in paperback, especially educational, legal and resource books.”); *see also Koger v. Dart*, 114 F.Supp.3d 572, 580-81 (N.D. Ill. 2015) (In finding prohibition of newspapers violative of First Amendment, noting that books and correspondence were not properly characterized as “alternative” to newspapers due to distinctions in nature and type of content.).

The new restrictions reduce Maryland prisoners' access on an extraordinarily significant scale – from the millions of books available in paperback through bookstores and publishers to the mere thousands of quite random books available from the two chosen vendors. As noted above, selections in DOC libraries are extremely limited, outdated, and difficult to access. Moreover, DOC rules forbid prisoners from sharing books with each other, further limiting access to books. *Cf. Keenan v. Hall, supra*, 83 F.3d at 1093 (instructing trial court to consider “no-passing” rule prohibiting book-sharing in determining First Amendment violation and availability of reading material).

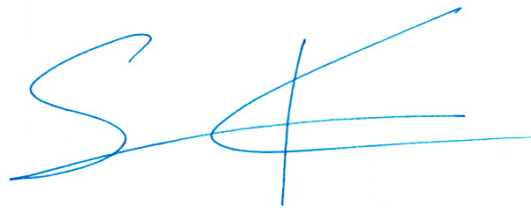
The Department already forbids individuals from receiving used books, hardcover books, free books from book clubs, and also has adopted numerous content-based restrictions. Prisoners who work in the Division of Correction earn as little as 90 cents per day. From this income they must pay for their calls, their postage above the allotted amount, and personal hygiene items and additional food. Further limiting their ability to procure free or reduced cost books has real impact on the right to read.

And, most critically, the new rules leave family or community members wishing to communicate through books – to send a loved one a book about grief after the passing of a family member, to send a self-help book to repair a relationship, or to share the experience of reading a novel together, or any other number of ways in which people communicate and associate through books – without any alternative at all.

The DOC's senseless and harsh new restrictions on books are utterly inconsistent with the First Amendment and reflect poor policy. They render Maryland an outlier in corrections systems in the degree to which our state limits access to books and the ability to provide prisoners with books. Given the critical importance of these issues, we urge you to immediately rescind IB #2018-02. Please respond by Monday, June 11, 2018.

Sincerely,

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