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Prisoners and Sexually Explicit Materials

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Introduction

The issue of prisoners receiving, possessing, and viewing sexually explicit materials has at times been hotly contested in the courts. Cases have involved the receipt of “adult” magazines through the mail, sexually explicit materials in personal correspondence, the viewing of sexually explicit movies and television shows, the possession of photographs of spouses and girlfriends, and even the question of the possession of sexually explicit materials written by prisoners themselves.

In some cases, prisoners, publishers, and others have challenged restrictions on such materials, asserting First Amendment or due process claims. This article briefly examines some of the existing caselaw. At the conclusion of the article, there is a list of relevant resources and references.

Prisoners and Sexually Explicit Materials

Outside the walls of prisons and jails, an important distinction exists between obscene and non-obscene sexually explicit materials. Obscene materials are not provided with legal protection under the First Amendment, [Miller v. California](#), #70-3, 413 U.S. 15 (1973), and therefore their sale and distribution, including dissemination through the mails, may be prosecuted. Inside prisons and jails, such materials may also be barred without running afoul of the First Amendment. The difficulty often arises in determining which materials fit within the legal definition of obscenity, and it is a determination that must be made as to each individual publication.

To be deemed obscene, under the standard set forth in [Miller](#), a publication, film, or other work, taken as a whole, must appeal “to the prurient interest in sex,” portray, “in a

patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole,” must lack “serious literary, artistic, political, or scientific value.”

In [Payne v. Commonwealth Dept. of Corrections](#), #J-83-2004, 871 A.2d 795 (Pa. 2005), the Pennsylvania Supreme Court upheld the constitutionality of regulations prohibiting prisoners from receiving incoming publications found to be obscene, as well as a statute criminalizing the importation of such publications into prisons or their possession by prisoners. The inmates’ lawsuit challenged the withholding of Penthouse magazine and several others available to the general adult public.

The prisoners argued that because the publications at issue are available to adults in the general public, they should not be prohibited from viewing them in prison. The court found these arguments to be “not persuasive.” The court noted that, unlike other censorship statutes previously struck down under Pennsylvania state law, such as a movie censorship statute struck down in 1961, the statute at issue did not establish “pre-censorship” of what could be published or distributed, but preserved, for individuals charged under the statute, the right to have a jury determine whether the material at issue fell within the definition of obscenity.

The court further noted that inmates in prison “do not enjoy the same level of constitutional protections afforded to non-incarcerated citizens,” and the section of the statute the prisoners were attacking applied only to correctional institutions. The court concluded that the statute did not violate the state constitution.

In addressing the administrative regulations the Department had enacted to carry out the policy embodied in the statute, the court agreed that the Department reasonably argued that restrictions on obscene materials advance a number of legitimate penological interests including preventing predatory behavior, preventing both consensual and non-consensual homosexual liaisons, preventing the spread of sexually transmitted disease, and protecting the safety and authority of prison staff.

Similarly, in [Cline v. Fox](#), 266 F. Supp. 2d 489 (N.D.W. Va. 2003), the court found that the refusal of West Virginia prison officials to allow a prisoner to receive or possess certain books, from the “Paper Wings” series, found to be obscene did not violate his First Amendment or due process rights. The policy applied advanced legitimate penological interests in security and rehabilitation.

After reviewing a copy of an entire “Paper Wings” book submitted by the prisoner as an exhibit to his motion for summary judgment, the court found that the defendant officials acted rationally in determining that it was obscene.

While the materials from Paper Wings are books, and contain graphic descriptions of sexual acts, including sexual intercourse, anal intercourse, fellatio, cunnilingus, bestiality, bondage/sadism and masochism, etc., the prisoner “steadfastly characterizes them” as

“sexually explicit novels,” “erotic novels,” or “erotic literature,” and implies that they are “something short of obscene.” The court found otherwise:

“A novel is a longer, complex work of prose addressing themes of human experience through a chronologically connected sequence of events. The Paper Wings book submitted by Cline [the plaintiff prisoner] resembles a novel only to the extent that it is nearly 200 printed pages of text and bound along the left edge. Otherwise, it is a collection of graphically described sexual escapades taking place between and amongst a recurring cast of characters, separated only by terse and extremely secondary plot points.”

All but one of the chapters of the book submitted contained descriptions of sexual activities, interrupted by brief plot points, such as a husband urging a wife to dress herself so they may both attend a business dinner. The one chapter that was an exception, the court noted, was a 21-page description of masturbation, fellatio, cunnilingus, vaginal intercourse, and anal intercourse -- “uninterrupted by any distracting plot points.” The court also rejected the argument that the prison policy’s definition of obscene material as that “depicting” such activities could not be applied to the books since they contain only pure verbal descriptions and no pictures.

Materials do not need to depict actual sexual intercourse to be obscene. In [Elliott v. Cummings](#), #01-3317, 49 Fed. Appx. 220 (10th Cir. 2002), the court found that magazines sent to a prisoner through the mails were obscene despite not showing sexual penetration when they did depict simulated sexual activity and discharged sexual fluids, but factual issues remained as to whether prison mail room employees improperly censored or returned to the sender non-obscene letters and photographs sent to the inmate by an individual female correspondent and whether some materials sent to him were improperly “converted” for their “own personal use.”

The publishers of material rejected as obscene may themselves have rights they can assert. See [Montcalm Publishing Corp. v. Beck](#), #95-6190, 80 F.3d 105 (4th Cir. 1996), holding that the publisher of an “adult” magazine had a constitutional First Amendment interest in receiving notice and due process when prison officials prohibited inmate subscribers from receiving issues of the magazine deemed obscene.

One category of such materials, whose mere possession may be criminalized, both inside and outside correctional facilities, is child pornography, which is not protected under the First Amendment because of the harm its production and distribution does to child victims. [New York v. Ferber](#), #81-55, 458 U.S. 747 (1982).

Prohibiting access to such materials is additionally justifiable for the prevention of further crime and the promotion of rehabilitation. In [Stewart v. Richards](#), #C08-5275, 2008 U.S. Dist. Lexis 83586 (W.D. Wash.), the court ruled that a policy barring committed sex offenders from having access to sexual material relating to children did not violate their First Amendment rights. Possession of such material would undermine the treatment being

provided to the plaintiff, who had been convicted of crimes against children. See also [Harper v. Wallingford](#), 877 F.2d 728 (9th Cir. 1989) (withholding an inmate's mail from an organization advocating sex with juvenile males did not violate the First Amendment).

Similarly, in [Cox v. Embly](#), 784 F.Supp. 685 (E.D. Mo. 1992), the court ruled that a prisoner's rights were not violated by regulations precluding his receipt of sexually explicit material advocating felonious acts such as incest and sexual abuse of children.

What about materials that arguably are non-obscene, but sexually explicit or contain nudity? May facilities exclude such materials without running afoul of the First Amendment? In a variety of cases, courts have generally answered this question in the affirmative, provided that a rational relationship is shown to legitimate penological goals, such as security, promoting rehabilitation, or preventing sexual harassment of female correctional employees.

In [Dean v. Bowersox](#); #08-1558, 2009 U.S. App. Lexis 8477 (Unpub. 8th Cir.), a federal appeals court ruled that prison regulations providing for censorship of sexually explicit material and materials promoting violence were not facially violative of the First Amendment, as they were intended to promote legitimate governmental interests.

In [Josselyn v. Dennehy](#), #08-1095, 2009 U.S. App. Lexis 12272 (Unpub. 1st Cir.), Massachusetts inmates challenged a state regulation that banned their receipt of sexually explicit publications or publications featuring nudity, as well as a correctional policy against displaying such materials in their cells. Rejecting the plaintiffs' First Amendment claims, the federal appeals court found that there was a rational connection between legitimate governmental interests and the means used to further them. Prison security concerns supported the cell display policy, since the display of such materials could conceivably result in disruption of safety and security.

[Munro v. Tristan](#), #03-16770, 116 Fed. Appx. 820 (9th Cir. 2004), illustrates some other legitimate purposes served by policies barring sexually explicit materials from prisons. The court ruled that a California State Department of Corrections administrative bulletin banning sexually explicit materials depicting frontal nudity did not violate a prisoner's First Amendment rights. Correctional officials properly sought to reduce sexual harassment of female guards and prevent the development of a hostile work environment and also enhance prison security. Further, depriving prisoners of such sexually explicit materials did not impose an "atypical and significant hardship" in relation to the "ordinary incidents of prison life," and was therefore not a violation of due process. Additionally, the prisoner did not successfully show a violation of equal protection rights, as he did not claim that he was treated any differently than similarly situated prisoners with respect to the possession of such materials.

See also, [Snow v. Woodford](#), #D043702, 2005 Cal. App. Lexis 565 (Cal. App. 4th Dist. 2005), finding that a California prison regulation barring inmates from possessing sexually

explicit materials did not violate either the U.S. or California Constitutions or a state statute.

The regulation prohibits California prisoners from possessing or receiving materials showing the frontal nudity of either gender, defining frontal nudity as “including either the exposed female breast(s) and/or genitalia of either gender.” It allows for sexually explicit material contained in departmentally purchased or acquired educational, medical, scientific, or artistic materials, including books purchased for inclusion in institution libraries or educational areas, or similar materials, such as anatomy medical reference books, [National Geographic](#), or artistic reference materials purchased or possessed by inmates and approved by the institution head or their designee on a case-by-case basis.

In [Mauro v. Arpaio](#), #97-16021, 188 F.3d 1054 (9th Cir. 1999), a federal appeals court ruled that an Arizona county jail system’s policy prohibiting the possession of all material depicting nudity, including such magazines as [Playboy](#) was reasonably related to legitimate penological interests in protecting employees and inmates against sexual harassment or assault.

Courts have at times been wary of overbroad prohibitions on nudity that have included material of significant artistic or educational value within the category of prohibited matter. See [Aiello v. Litscher](#), 104 F. Supp. 2d 1068 (W.D. Wis. 2000), in which a federal trial court denied summary judgment to Wisconsin prison officials in a lawsuit over a regulation under which a picture of the Sistine Chapel and various other magazines and correspondence was withheld from prisoners because of depicted nudity or discussion of sex.

Publications may sometimes be objectionable because of advertising as opposed to main content, as in [Bahrapour v. Lamper](#), #02-3519, 356 F.3d 969 (9th Cir. 2004), in which a court upheld the rejection of magazines with sexual ads or “role-playing content.”

The appeals court found that prison officials were entitled to deference so long as their regulations were reasonably related to legitimate penological interests. It found that there was ample evidence to support the legitimate penological interest of reducing prohibited behaviors such as sexual aggression and maintaining respect for legitimate authority. The regulations at issue prohibited the receipt of materials that contained any amount of sexually explicit or role-playing or fantasy content.

The appeals court found that the rejected issues of *Muscle Elegance* and *White Dwarf* did contain such content. *Muscle Elegance* contained ads for sexually explicit videotapes including aggressive or violent sexual acts involving domination. *White Dwarf* magazine “simulates violent battles in an imaginary fantasy world in which the roll of dice determines which leaders have the power to crush their enemies.”

A federal statute, the Ensign Amendment, originally enacted as part of the Omnibus Consolidated Appropriations Act of 1997, prohibits the use of funds appropriated for the

Federal [Bureau of Prisons](#) (BOP) to “distribute or make available any commercially published information or material to a prisoner . . . [when] such information or material is sexually explicit or features nudity.” Pub. L. No. 104-208, § 614, 110 Stat. 3009-66 (1996). The amendment has been codified at [28 U.S.C. § 530C\(b\)\(6\)](#).

A BOP implementing regulation defines the key terms of the amendment as follows:

“‘sexually explicit’ means ‘a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation’; ‘features’ means that the publication in question ‘contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues’; and ‘nudity’ means ‘a pictorial depiction where genitalia or female breasts are exposed.’” [28 C.F.R. § 540.72\(b\)](#).

In [Jordan v. Sosa](#), #05-cv-01283, 2008 U.S. Dist. Lexis 53006 (D. Colo.), the court ruled that a federal prisoner failed to show that the Ensign Amendment violated his First Amendment rights in restricting his access to sexually explicit publications, specifically certain magazines and a book that were sent to him. Restricting such materials was reasonably related to legitimate penological interests in security and rehabilitation.

A federal appeals court rejected a First Amendment challenge to the Ensign Amendment and its implementing regulation in [Amatel v. Reno](#), #97-5293, 156 F.3d 192 (D.C. Cir. 1998), [cert. denied](#), 119 S. Ct. 2365 (1999), finding the restriction on the distribution of sexually explicit material to be reasonably related to the asserted penological interest of prisoner rehabilitation. That court saw no need for an evidentiary record to support that finding, arguing that its own “common sense” was sufficient to verify the rational connection between the Ensign Amendment’s ban on sexually explicit publications and the asserted goal of rehabilitation. That court still did, however, cite a number of scholarly studies supporting the proposition that “pornography leads to male objectification of women, and that certain types of pornography can lead to male aggression and desensitize viewers to violence and rape.”

What about the regulation of explicit content on television and in movies in prisons?

In [Jewell v. Gonzales](#), #97-408, 420 F. Supp. 2d 406 (W.D. Pa. 2006), a First Amendment challenge by a class of prisoners to a federal Bureau of Prisons program statement and institutional policy barring the showing of unedited R-rated movies to inmates was rejected. The prohibition was rationally related to legitimate governmental interests in promoting the rehabilitation of prisoners. Prisoners had adequate alternative means to exercise their First Amendment rights, including access to G, PG, and PG-13 rated films, as well as R-rated films that had been edited for television. See also, [Herlein v. Higgins](#), #98-2271, 172 F.3d 1089 (8th Cir. 1999), finding that a prison policy banning inmate possession of music tapes with a “parental warning” label concerning explicit lyrics did not violate prisoners’ First Amendment rights.

What about written sexually explicit materials created by prisoners themselves? In [Lee v. Carlson](#), #07-4093, 2008 U.S. App. Lexis 1572 (10th Cir.), the court held that prison officials were entitled to qualified immunity in seizing, from a prisoner's cell, his written manuscripts, including novels, short stories, and artwork. The prisoner himself agreed that the officials had properly seized one of his stories as forbidden material under prison regulations because of its sexually explicit nature. While there were material issues of fact as to whether the defendants were justified in seizing the remaining materials, or whether that seizure violated the prisoner's First Amendment rights, since some of it was not sexually explicit, this was not clear to the defendants at the time of the seizure. Their actions, therefore, could constitute a reasonable mistake, which is inevitable in the context of limited resources and serious security concerns.

In [Frink v. Arnold](#), 842 F.Supp. 1184 (S.D. Iowa 1994), the court ruled that prohibiting a prisoner enrolled in a therapeutic sexual offender treatment program from retaining sexually explicit fiction that he wrote did not violate his First Amendment rights, but rather was based on a legitimate goal of rehabilitation.

A number of courts that have allowed inmates to have some access to explicit materials have been concerned primarily with attempting to prevent fights and disputes that such material might lead to. See [Giano v. Senkowski](#), 54 F.3d 1050 (2d Cir. 1995), upholding a prison policy allowing receipt and possession of commercially produced erotic literature, but barring receipt and possession of nude or semi-nude photographs of inmates' wives and girlfriends. See also, [Hunter v. Koehler](#), 618 F.Supp. 13 (D.C. Mich. 1984), finding commercial nude photos permissible, but not home snap-shots.

In summary, courts have usually upheld bans on sexually explicit materials in prisons that cite legitimate reasons, such as safety and security, prevention of crime, rehabilitation, prevention of sexual harassment and assault, discipline, recidivism and treatment, or institutional order. Additionally, it is always legitimate to bar the distribution of material that is otherwise illegal, such as obscene material or child pornography.

Resources and References

The following are a few useful resources and references related to the topic of this article.

Resources:

- The Federal Bureau of Prisons regulations, [28 C.F.R. 540](#), concerning the handling of prisoner mail, which articulates a good number of legitimate rationales for imposing restrictions.
- BOP [Program Statement 5266.10](#) Incoming Publications, including procedures for

rejecting sexually explicit publications.

- [28 U.S.C. § 530C\(b\)\(6\)](#), the Ensign Amendment, barring the use of federal prison funds to distribute publications containing nudity or sexually explicit material to prisoners.
- State of Delaware Dept. of Corrections [Policy on incoming publications](#).
- Massachusetts Department of Corrections [Inmate Mail Policy](#).

Related AELE Monthly Law Journal Article:

- [Prisoner Mail Legal Issues](#), 2007 (6) AELE Mo. L.J. 301.

References (chronological):

- National Prison Project, ACLU, [Know Your Rights: Publications Sent by Mail](#), August 14, 2009.
- Richard Tewksbury and Matthew DeMichele, [Porn in Prison: How Does It Get In? Who Receives It?](#), 42 Journal of Offender Rehabilitation no. 2, pgs. 35-48 (2005). Abstract online.

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