Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

June 16, 2014

Timothy M. Lockwood, Chief
Regulation and Policy Management Branch
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Sacramento CA 94283-0001

Re: Comment on California Code of Regulations and the Proposed Changes to Regulations Sections 3006, 3134 and 3135, titled "Obscene Material Regulations"

Dear Mr. Lockwood:

I write to comment on the proposed changes to sections 3006, 3134 and 3135 of the California Code of Regulations as they relate to the California Department of Corrections and Rehabilitation (CDCR) generally.

Our organization, Human Rights Defense Center (HRDC), publishes *Prison Legal News*, a monthly publication that has reported on criminal justice-related issues, including litigation, legislation and reform efforts, since 1990. HRDC is the foremost advocate on behalf of the free speech rights of publishers to communicate with prisoners and the right of prisoners to receive publications and communications from outside sources. Accordingly, our experience in this area leads us to make the following comments regarding the aforementioned regulations.

1. Sections 3006 and 3134 are subject to abuse and arbitrary enforcement

Upon rejection from a penal institution, the censored material is forwarded to the Division of Adult Institutions (DAI). The DAI subsequently determines what material is deemed "obscene" under Section 3006 of the regulations. If the DAI find that said material is obscene, it will be permanently included on a Centralized List of Disapproved Publications as provided for in Section 3134.

Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Rather, the First

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Amendment requires that procedures be incorporated that "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . . . insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . ." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Courts have consistently recognized that "the line between speech unconditionally guaranteed [speech] and speech which may legitimately be regulated . . . is finely drawn. . . . the separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The procedure outlined in sections 3006 and 3134 omit those "sensitive tools" essential to satisfy the requirements of the First Amendment.

A. <u>The regulations fail to provide clear criteria and other safeguards to prevent arbitrary censorship of material designated as "obscene"</u>

While Section 3134 purports to allow the publisher notice and an opportunity to appeal, the underlying process to determine if the material is "obscene" is flawed. Specifically, there is no reference to the qualifications of the persons within the DAI who make censorship decisions, how they are chosen, or who will be ultimately responsible for censorship decisions. There is also no information on the process by which the material is reviewed by the DAI. Consequently, the determination of what constitutes "obscenity" is potentially subject to arbitrary enforcement. If "prison officials censor simply by indulging their personal prejudices and opinions, while purporting to apply constitutional standards," federal courts have found this to be an unconstitutional practice. *Jones v. Caruso*, 569 F.3d 258, 267 (6th Cir. 2009)(internal quotation marks and citations omitted). Without some direction about the determinative process that must be employed, the regulation suffers from constitutional infirmity.

B. <u>The regulations are inherently contradictory and potentially risk arbitrary censorship of material not intended to be designated as "obscene"</u>

The risk of arbitrary enforcement is especially problematic given the proposed amendment to Section 3006(c)(15)(D), which reads: "Text-only material shall not be considered obscene unless designated by the Division of Adult Institutions (DAI). DAI shall then place the designated text-only material on the Centralized List of Disapproved Publications.…" This section contradicts Section 3135(b), which reads: "Disagreement with the sender's or receiver's morals, values, attitudes, veracity or choice of words will not be cause for correctional staff to disallow mail. Correctional staff shall not challenge or confront the sender or receiver with such value judgments." It is accepted that

"[i]nmates have no right to receive materials that constitute obscenity." *Miller v. California*, 413 U.S. 15, 23 (1973) (Obscene material is unprotected under the First Amendment). However, the Supreme Court has "made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997)(internal quotation and citations omitted). Accordingly, text-only material requires specific safeguards from censorship because its objectionable character may not be as readily apparent as a photograph or picture. Without specific safeguards, there is an unnecessary risk of abuse or arbitrary enforcement.

Moreover, the ban on all "obscene" materials could run afoul of the First Amendment by excluding sexually suggestive, non-explicit content. *See Aiello v. Litscher*, 104 F.Supp.2d 1068, 1081 (W.D. Wis. 2000) (prison regulation overbroad where it banned "magazines that contain the occasional advertisement showing a portion of the breast of an otherwise fully-clothed woman"). Publications that contain non-nude suggestive images in their advertising content are protected by the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997) (*quoting Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) ("[W]e have made it perfectly clear that 'sexual expression which is indecent but not obscene is protected by the First Amendment'"); *see also Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"). The regulations, however, do not provide clear guidance to jail administrators on evaluating whether an advertisement is sexually suggestive versus obscene.

For these reasons, the regulations need to be amended or modified to allow for this distinction.

2. **Section 3135(d) is overly broad in restricting prisoners from possessing materials that contain "information concerning where, how, or from whom obscene material may be obtained."**

Section 3135(d) states that **"**Inmates shall not possess or have under their control obscene material and/or mail containing information concerning where, how, or from whom obscene material may be obtained. Obscene material means catalogs, advertisements, brochures, and/or material taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest. It is material which taken as a whole, depicts or describes sexual conduct, and lacks serious literary, artistic, political, or scientific value."

However, this section further states that "Material subject to the test of the above includes, but is not limited to, pictures or images that depict: (1) *Sexually explicit*

materials, which are defined as materials that show frontal nudity including personal photographs, drawings, and magazines and pictorials that show frontal nudity." (emphasis added). Thus, Section 3135(d), which purports to restrict prisoners' access to information concerning where *obscene* materials may be obtained, conflates obscene materials with *sexually explicit* materials. As such, this section makes no exclusions for publications, as discussed *supra*, which contain ads for material that may be considered sexually explicit or obscene when such ads are incidental to the overall content of the publication. Comparably, many publications contain ads for things that are forbidden in prisons, such as advertisements for cigarettes, alcohol, guns, cars, etc. That does not, of course, justify the unilateral censorship of such publications.

3. **Section 3006(c)(19) disallowing prisoners to possess or have under their control material associated with a Security Threat Group (STG) seeks to exclude an entire class of person(s) from exercising their First Amendment rights without confirming that said speech actually threatens the safety and security of the penal institution.**

Subsection 3006(c)(19) reads as follows:

> Written materials or photographs that indicate an association with validated STG members or associates, as described in subsections 3378(c)(8)(C)-(D).

The section excludes any person from possessing material associated with an STG. The text of Section 3378, subdivision (c)(4), moreover, provides: "An associate is an inmate/parolee or any person who is involved periodically or regularly with members or associates of a gang." It further lists thirteen (13) different categories of source items indicative of association with validated gang affiliates, including an inmate's admission of involvement with the gang, tattoos and symbols distinctive to the gang, written material or communications evidencing gang activity, the inmate's association with validated gang affiliates, and offenses reflecting gang affiliation. See Section 3378(c)(8). This potentially encompasses any prisoner who, regardless of intellectual curiosity or other non-threatening reason, possesses a publication that has even a tangential association with an STG – including, for example, biographical works on historical figures such as Malcolm X (e.g., *The Autobiography of Malcolm X: As Told to Alex Haley*).

A restriction that furthers a legitimate interest may still be unconstitutional if the restriction is an "exaggerated response" to that interest. *Turner v. Safley*, 482 U.S. 78, 87 (1987). Here, it is an exaggerated response to deny a prisoner any material that includes a reference to an alleged STG absent a particularized finding that the material poses an actual security threat. To impose a censorship regime under which any written materials referencing an STG are prohibited is an overly broad restriction that is not constitutionally permissible. *Thornburgh v. Abbott*, 490 U.S. 401, 403 n.1 (1989)

(upholding prison policy that permitted censorship of publications "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity"). *See also Shakur v. Selsky*, 391 F.3d 106, 115 (2d Cir. 2004) (reversing decision dismissing case for failure to state claim, stating, "we are not sure how a complete ban on the materials of 'unauthorized organizations' is rationally related to that goal [of prison security]. The district court articulated no such relationship, and none appears to us on the face of the regulation").

Admittedly, the importance of suppressing gang activity, which ostensibly falls within the gambit of "STG," within a prison, is obvious. *See e.g., Wilkinson v. Austin*, 545 U.S. 209, 227 (2005). However, STG, which replaces the word "gang," is a loaded term. Although courts generally defer to the reasoned judgment of prison officials on gang-related matters, prison officials cannot avoid scrutiny for restricting prisoners' constitutional rights simply by incanting the word "gang." "[D]eference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Officials must support their policies with facts, not conjecture. The invocation of the term gang or STG in this context would result in an actual constitutional deprivation – the receipt of a publication. Accordingly, a blanket ban against receipt of any material that mentions an STG is an exaggerated response and will not survive constitutional muster, absent a particularized finding that the material constitutes an actual security threat. Despite the claim that the regulations seek to prohibit materials or publications that "indicate an association with groups that are oppositional to authority and society," the practical effect will be a ban on publications containing political speech and/or speech that in any way questions or criticizes the California prison system. *See* Initial Statement of Reasons; Obscene Material Regulations ("ISOR") 3-25-14 at 4.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84 (1987), nor do they bar others "from exercising their own constitutional rights by reaching out to those on the 'inside,'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). A publisher's right to send publications and other correspondence is clearly established. "[T]here is no question that publishers who wish to communicate with those who…willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408. The Ninth Circuit recently affirmed this principle. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011) ("We have repeatedly recognized that publishers and inmates have a First Amendment interest in communicating with each other."). PLN's speech covers topics of great public concern and therefore "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted); *see also Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) ("[T]he conditions in this Nation's prisons are a matter that is both

newsworthy and of great public importance"). Thus, under this regulatory scheme, *Prison Legal News* could be impermissibly banned from within California state prison system.

Thank you for your time and attention in considering our comments concerning the proposed changes to sections 3006, 3134 and 3135 of the California Code of Regulations. Please feel free to contact us should you require any additional information.

Very Truly Yours,

HUMAN RIGHTS DEFENSE CENTER

By: Lance T. Weber
General Counsel