

#242

# Wisconsin Prisons' Ban on Stapled and Hardcoverd Publications in Segregation\*, How It Is Illegal

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by Nate A. Lindell, created 21 Dec. 2016

It was Wisconsin Secure Program Facility (W.S.P.F.) that first decided to start denying seg. prisoners stapled publications (e.g. TIME), because WSPF was improperly<sup>①</sup> housing mentally disturbed people (e.g. Jeffery Holm) who used staples to scratch themselves.

Instead of transferring out the mentally ill/disturbed, W.S.P.F. banned stapled magazines, which prior to Jan. 1st, 2013 were allowed.<sup>②</sup>

Magazines that had staples removed were then, for a while, allowed, until WSPF deputy warden Hermans issued a 3/22/13 email that told staff to no longer allow magazines if the publisher removed the staples; Hermans contacted other wardens so they'd do the same. Then a state-wide policy — D.A.I. P+P # 303.00.02 — was enacted, which says:

"Publications that contain contraband, or pose a security risk in BH\*, shall not be delivered. Must be received without staples."

The WI Dept. of Corrections (W.D.O.C.) has long had a policy — D.A.I. P+P 309.20.03 I(c)(16)(c) — denying those in any seg. status hardcoverd books.

The U.S. Supreme Court has ruled that prison staff may only deny prisoners reading material if the denial is "rationally related to a legitimate penological interest," such as safety or rehabilitation. Beard v. Banks, 548 U.S. 521, 535 (2006), and its progeny. Our federal court of appeals, which sits over WI, IL and IN states, has rejected restrictions on reading material that seemed rationally related to legitimate concerns, but which the prisoner showed to be exaggerated responses to those concerns. E.g., King v. B.O.P., 415 F.3d 634, 638-39 (7th Cir. 2005) (Book on computer programming was denied. Prison staff claimed to fear it could be used to hack prison computers, but court found no proof prisoners were even allowed access to staff computers.); Lindell v. Frank, 377 F.3d 655, 659-60 (7th Cir. 2004) (Prison staff said they needed to deny copies of clippings because codes could be in them, but codes could more easily be in personal letters, which are allowed without restriction.)

The U.S. Supreme Court has also ruled that when publications sent to prisoners are denied, both the sender and the prisoners must be

\* In an effort to disguise what it actually is, the WDOC now refers to segregation units as "Restrictive Housing Units" (R.H.U.).

notified of the reasons for the denial & given a chance to appeal the decision. Procunier v. Martinez, 416 U.S. 396, 417 (1974) (Due Process Clause requires this notice be given). Our Circuit's Court of Appeals recognizes this right to be notified and allowed to appeal, see Munson v. Gaetz, 673 F.3d 630, 633, 638 (7th Cir. 2012), as do others, like Jacklovich v. Simmons, 392 F.3d 420, 422, 433 (10th Cir. 2004).

There are also state laws that come into play:

Wis. Admin. Code (W.A.C.) § DOC 309.05 Publications, sub. (1),

"The department shall facilitate inmate reading of publications, including books, magazines, newspapers, and pamphlets." (emphasis added)

and, W.A.C. § DOC 309.05, sub. (3),

"If a publication is not delivered pursuant to sub. (2), the department shall notify the inmate and the sender. The inmate may appeal the decision to the warden within 10 days of the decision,"

which codifies the Procunier requirement.

Regarding hardcover books, our Circuit has held that,

"Maintenance of security and discipline do not justify the wholesale prohibition of... hardbound books."

Kineaid v. Bush, 670 F.2d 737, 744 (7th Cir. 1982), and, in another case of mine, they explained I'd have a Free Speech claim,

"if the facility [i.e. WSPF, but now the whole WDOC] is using these reasons [for denying hardcover books, i.e. that they might be laced with drugs or hide contraband], not to regulate the sources of publications coming into the prison, but to exclude some publications altogether without considering alternative means of access."

Lindell v. O'Donnell, 211 Fed. Appx. 472, 475 (7th Cir. 2006). Most newly released books come only in hardcovers, take months, years to come out in softcover versions. Many art books, college dictionaries, reference books come only in hardcover versions, with content, "speech", not available in softcover versions.

At the moment, I have a suit filed in the Eastern District of WI U.S. District Court (E.D. Wis.), Lindell v. Greff and Pollard, Case No. 16-cv-1651, which is challenging the Waupun Correctional Institution's (W.C.I.'s) ban on stapled publications and hardcover books while I was in a seg. unit there in 2013. Because the case is in the E.D. Wis. and

both my current prison (i.e. W.S.P.F.) and the W.D.O.C. headquarters are located in the W.D. Wis., my suit can not force either the W.D.O.C. or W.S.P.F. to end their ban on stapled and hardcovered publications in seg. But, if I win, if the E.D. of Wis. thoroughly rejects W.C.I.'s attempts to justify the bans, which are the same justifications used by the W.D.O.C. and W.S.P.F., especially if the E.D. Wis. rules that I'm entitled to damages (i.e. money), the W.D.O.C. will likely end all the bans in all prisons rather than face losing a tidal wave of suits by prisoners in the W.D. Wis. using the holding in my case.

Here's why both bans are illegal.

### I. Stapled Publications

#### A. Free Speech Aspect

They have a legitimate need (i.e. preventing injuries to staff and to prisoners), but what they're doing is not rationally related to that need, because:

1) staples can't seriously injure someone — they're too small, too weak;

2) we're allowed other property that can more easily be made into more dangerous weapons, which have been actually used as such,<sup>3</sup> see Lindell v. Frank, supra at id. (banning clippings due to fear they'd have codes an exaggerated response given that codes could more easily be in personal mail), such as T.V.s, eyeglasses with metal parts, radios, headphones, asthma inhalers, metal-tipped pens, hard plastic items, even paper;<sup>4</sup>

3) they created the problem by housing mentally ill people in seg,<sup>5</sup> which they're not supposed to do,<sup>6</sup> and housing sane prisoners in seg in such restrictive conditions that they know will drive them crazy,<sup>7</sup> into doing stupid + self-destructive things with whatever they can use;<sup>8</sup>

4) prisoners in seg on Administrative Confinement (A.C.) status\* typically don't do lame shit like scratch themselves with staples, but are deemed dangerous for what they might do if let around inmates +/or staff in g.p. status — staples ain't an issue for them;

5) staples were, previously, not deemed an issue, allowed in publications,

\* A.C. status is meant to house prisoners in seg, in non-punitive conditions, because the prison is scared of the prisoner. See W.A.C. § DOC 308.04(1)

with the only results being that mentally ill guys scratched themselves, superficially, which fingernails + teeth can also do,<sup>9</sup> yet fingernails + teeth are allowed, obviously. See Kindell v. Frank, supra at id.;

6) Most obviously, to a rational person who respects the right to publications, staples can simply be removed by staff + the publications can then be "safely" given to even the mentally ill people whom the WDOC likes to keep in seg. As noted at the opening of this article, W.S.P.F. once did this, then concocted an excuse not to allow this (they claimed removing the staples turned publications into "contraband" because they were "altered"), even though they'll pull staples from mail and legal doc's sent to prisoners + deliver them, they have magazines in the prison library (e.g. People, Ebony, Sports Illustrated) that seg. prisoners can request + had their staples pulled by staff, they issue and allow pamphlets containing P.R.E.A.\* guidelines and disciplinary rules + procedures that had their staples pulled. Removing the staples is a classic "obvious, easy alternative" to just censoring thousands of magazines, which reveals the ban to be an "exaggerated response" to the specious needs. See Turner v. Safley, 482 U.S. 78, 89-90 (1987);

7) there is also the probability, which we'd need to prove (do good discovery), that the motive for denying stapled publications was really to punish/torment those in seg, which, at least for those on A.C. status, is not a legitimate need. Proving this would end any further questions — the ban would be deemed unconstitutional. See Shaw v. Murphy, 532 U.S. 223, 229-30 (2001).

Because the ban on stapled publications, even if the staples are removed, acts as a "blanket ban" on well-established and -respected newsmagazines like TIME, the court should more strictly scrutinize the justifications for the ban. See, e.g., Aikens v. Jenkins, 534 F.2d 751, 756-57 (7th Cir. 1976) (Shooting down blanket ban on racially offensive lit.) and Turner v. Safley, supra at 90 (Restrictions on speech must be "operated in a neutral fashion, without regard to the content").

\* Prison Rape Elimination Act, a law, like many, which the W.D.C. does not comply with, though it receives fed. money to pretend to do so.

While WDOC officials clearly have no respect for prisoners' Free Speech rights, or their human rights,<sup>(10)</sup> it is no "minor" issue:

"The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought..." [cite omitted]

Griswold v. Connecticut, 381 U.S. 479, 482 (1965). It is one of the few freedoms prisoners retain and is proven to facilitate rehabilitation.<sup>(11)</sup>

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted."

Meyer v. Nebraska, 262 U.S. 390, 400 (1923). As WI's Supreme Court Chief Justice Shirley Abrahamson noted,

"The right to speak freely is essential to nourish democracy"

Jacobs v. Major, 139 Wis.2d 492, 531, 407 N.W.2d 832, 848 (1987).

In a suit by a W.S.P.F. prisoner, concerning a previous ban on newspapers for seg. prisoners, Chief Judge of the W.D. Wis. explained:

"Even when security interests support limitations on a prisoner's reading materials, courts scrutinize those limitations carefully, particularly in this circuit. ... [citations omitted] See also United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners (1955) [emphasis mine], cited in Estelle v. Gamble, 429 U.S. 97, 103 n.8, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications\*, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.\*)"

West v. Frank, 492 F.Supp.2d 1040, 1045 (W.D. Wis. 2007)

Clearly the law and facts, if properly presented to the court, condemn the ban on stapled publications in seg. This means a prisoner who sues about this must do thorough discovery to get the evidence that supports my forenoted 7 reasons why the ban's illegal. Then the

\* It would violate our First Amendment for WDOC to pick what news to inform us of. See T. B.S. Inc. v. F.C.C., 512 U.S. 622, 641 (1994)

prisoner must organize the evidence and present it in a summary judgement, <sup>brief</sup> with arguments citing supporting legal authority. It's work.

Publishers of stapled magazines may also sue, as their Free Speech rights are being denied too. See, e.g., Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005).

## B. Due Process Aspect

W.S.P.F. gives prisoners, but not publishers, a slip saying that a magazine was put in storage for being stapled. This probably satisfies prisoners' Due Process rights, but does not satisfy the Due Process rights of publishers. See Procunier v. Martinez, at 417; Munson v. Gaetz, at 638; Jacklovich v. Simmons, at 433, and, inter alia, Prison Legal News v. Lehman, at 701

Other W.D.O.C. prisons, such as W.C.I., don't even give a prisoner notice that a publication arrived but was not delivered due to having staples. In such cases prisoners too have a Due Process claim for being denied pre-deprivation remedies. (For clarification of what pre-deprivation remedies are, see Zinermon v. Burch, 494 U.S. 113, 132 (1990), and Higgins v. Beyer, 293 F.3d 683, 693-94 (3rd Cir. 2002), cases which concern "property interests", but the principles in which equally apply to deprivation of "liberty interests" such as Free Speech.)

## II. Hardcover Books

Kincaid v. Busk and Lindell v. O'Donnell, explained above, page 2, reveal that the W.D.O.C.'s ban on hardcoverd books is "probably" illegal. But there are more cases that establish prisoners' right to hardcover books: Bell v. Wolfish, 441 U.S. 520, 550<sup>52</sup> (1974) (Jail inmates, a Due Process claim, as I recall); and Jackson v. Elrod, 881 F.2d 441, 446 (7th Cir. 1989) (Denying qualified immunity on prisoner's suit over ban on hardcoverd books). The fact that qualified immunity (protection from having to pay damages, granted only if a right wasn't clearly established) was denied almost 30 years ago reveals how illegal the ban on hardcoverd books in seg. is!

However, to ensure the success of such a suit, this is why the justifications they give for the ban are specious, exaggerations of seemingly valid concerns (they claim that hardcoverd books can hide contraband, be used as weapons and body armor):

- 1) we're allowed softcover books, which can also hide contraband or be used as weapons - Lindell v. Frank argument;
- 2) we're allowed pads of paper, <sup>file folders,</sup> and notebooks, which have the same cardboard used in hardbound books - Lindell v. Frank argument;
- 3) we're allowed T.V.s or radios, <sup>etc.</sup> which can be used & have been used to make far-better weapons - Lindell v. Frank argument;
- 4) guys in A.C. are unlikely to do some lame shit like use a book cover as a weapon, and they have tazers, gas, pepper-ball guns, batons that cardboard won't protect a prisoner from;
- 5) we can & have/do hide contraband in mattresses, pillows, blankets, paperwork - yep, Lindell v. Frank;
- 6) stop housing mentally ill prisoners in seg and mistreating prisoners and nobody will try & stab them with cardboard.

## Conclusion

The bans on stapled and hardcovered publications are an example of the WDOC screaming lions, tigers & bears in order to justify making prisoners miserable. If properly litigated, both publishers and prisoners could end these bans and be paid monetary damages for the violation of their rights.

Please provide the postage I need to reply, item # 8039, from [JLMarcusWisconsin.com](http://JLMarcusWisconsin.com), or to help me.

For further info/help, contact:

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[betweenthebars.org/blogs/540/](http://betweenthebars.org/blogs/540/)  
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## Notes:

1. As part of its settlement of the Jones-el v. Berge class-action suit, W.S.P.F. agreed to not house mentally ill prisoners in seg. What happened was some mentally ill prisoners were merely transferred to seg units in other prisons and others the staff pretended were not mentally ill. One guy, Nikko Krohn, was kept here after repeated, outrageously self-destructive behavior, like run<sup>ning</sup> full speed into his steel door, head first, 'til he couldn't walk, punching himself in the face. Jeremiah Felton used to do everything possible with his shit, piss on the floor & sleep in it, etc. Both were deemed sane and kept here for years.

2. This is <sup>noted</sup> in a 7/16/12 memo from WSPF deputy warden Hermans.

3. Around 2002, Kyle Boer at WSPF stabbed an inmate with a knife made out of his T.V. Around 2013, Alejandro Rivera did the same. Daniel Thompson #547478 has repeatedly made weapons from his T.V.s during 2015 and 2016, and staff have given him new T.V.s. Jacob Baker stabbed a guard with the bow from his eyeglasses and a sharpened screw around 2008, after his supposed co-conspirator (forget his name) told staff about Baker's metal knife and one made from rolled up laminated paper. On 9/12/16, Robert Collins #84404 was issued Conduct Report (C.R.) #2821696 for having shivs made from his eyeglasses + rolled-up paper.

4. Recently C.O. II Friedrich here at W.S.P.F., in response to my request for the addresses in withheld stapled magazines (so I could cancel subscriptions), sent me the info stapled to my request. Shows how dangerous staples aren't. I filed Complaint # WSPF-2016-28048 about this.

5. See note 1, above.

6. See note 1, above.

7. There's a heap of cases, an editorial by Barack Obama and studies in various fields that reveal, as Justice Kennedy said in his concurring opinion in Davis v. Ayala, 135 S.Ct. 2107, 2008 (2015), "The human toll wrought by extended terms of isolation long has been understood..." and Justice Breyer explained in p.20 of his dissent in Glossip v. Gross, No. 14-7955, decided 29 June 2015, the same. 135 S.Ct. 2726, 2765

8. See note 1, above. I watched Jeff Holm repeatedly scratch himself with staples + pen tips, cuss out staff, yell racial slurs, frustrated into the behavior. For a couple weeks I kept him calm by having him do art with dye I extracted from my Tums; then guards took the ersatz paint + Holm went back to it, to the joy of guards. A psych. here told me he likes to see guys degrade themselves.

9. Here at WSPF, in 2002, I saw James Kittinger bite a piece out of his hand and spit it at C.O.s. At W.C.I. in 2013, my neighbor Tony Allen Peters repeatedly ripped out his toe + fingernails, dried 'em + severely cut himself with them.

10. See the various posts on my blog - [betweenthebars.org/blogs/5401](http://betweenthebars.org/blogs/5401) - for examples of WDOC staff's outrageous abuse/torture of prisoners.

11. Although the WDOC deleted it from the law computers we use, the Note for §DOC 309.05 specifically states that allowing prisoners access to publications promotes good behavior, community ties, etc., same as the code (§DOC 309.04) that guarantees prisoners can correspond with anyone. For a criminal to change his ways he needs to be enlightened, educated, which requires access to reading materials.