Librarians vs The People’s Representatives

By Paul Engel

January 28, 2025

- Who decides what’s appropriate for minors?
- Who decides what belongs in the public library?
- Should it be librarians or the people’s representatives?

Who decides what is appropriate for public libraries? That is at the heart of the case Fayetteville Public Library et. al. v. Crawford County, Arkansas et. al. The representatives of the people of Arkansas passed a law, Arkansas Act 372, which both established a crime of furnishing a harmful item to a minor and established guidelines for selection, relocation, and retention of such materials. A group of libraries, librarians, and related organizations sued Arkansas’ 28 prosecuting attorneys in the federal District Court for the Western District of Arkansas. The District Court issued a preliminary injunction, preventing the law from going into effect. Does it?

Background

In March of 2023, the Arkansas Legislature passed, and Governor Sarah Huckabee Sanders signed, Arkansas Act 372. The stated purpose of this was was:

TO AMEND THE LAW CONCERNING LIBRARIES AND OBSCENE MATERIALS; TO CREATE THE OFFENSE OF FURNISHING A HARMFUL ITEM TO A MINOR; AND TO AMEND THE LAW CONCERNING OBSCENE MATERIALS LOANED BY A LIBRARY.

Arkansas Act 372

On June 2, 2023, a group of public libraries, library organizations, professional libraries, and others sued, claiming that sections 1 and 5 of the law were unconstitutional. Specifically:

Sections 1 and 5 of the Act remain vaguely worded and susceptible to multiple meanings; Section 1 violates the due process rights of professional librarians and booksellers and the First Amendment rights of library and bookstore patrons; and Section 5 empowers local elected officials to censor library books they feel are not "appropriate" for citizens to read and allows (if not encourages) content- and viewpoint-based restrictions on protected speech without any compelling governmental purpose.

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The libraries moved for a permanent injunction, preventing the law from being enforced, which the court granted. However, that injunction, and in fact the entire case, is legally moot.

Claims of the Plaintiffs

As I quoted above, the plaintiffs claim that the law violates their due process rights. However, after reviewing their complaint, I find this claim questionable at best.

First of all, while the complaint includes three counts where plaintiffs claim the law violates the Due Process Clause of the Fourteenth Amendment there's a lot more to that story. Let's start by looking at that clause:

nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV, Section 1

So where in this law is anyone deprived of life, liberty, or property without due process of law? According to the plaintiffs:

The Availability Provision contains language purporting to describe criminalized acts which is vague and indefinite and subject to different meanings such that it fails to provide adequate notice to booksellers and librarians of violations of the Availability Provision, including the meaning of "presents," "provides," and "makes available" in Ark. Code Ann. § 5-27-212(b)(1).

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Are the terms "presents", "provides", and "makes available" vague? According to Merriam-Webster's Online Dictionary:

present:

1 : to make a gift to
2 : to give or bestow formally
3 a: to bring (something, such as a play) before the public
3 b:
(1) : to bring or introduce into the presence of someone especially of superior rank or status
(2) : to introduce socially
4 a : to offer to view : SHOW
4 b: to bring to one's attention

present – Merriam-Webster's Dictionary Online

provide:

1 a : to supply or make available (something wanted or needed) also : AFFORD curtains provide privacy
1 b : to make something available to

provide – Merriam-Webster's Dictionary Online

available:

1 : present or ready for immediate use

available — Merriam-Webster's Dictionary Online

So none of the terms the plaintiffs claim are "vague" actually are vague. Similarly, in count VI of the complaint, the plaintiffs argue that the terms "appropriateness" and "not accessible to a minor" as used in the law do not provide any definite procedural safeguards or standards. Yet Section 5 of the law specifically amends Arkansas Code for the "Establishment of guidelines for selection, removal relocation, and retention of materials." These guidelines include having written policies for the process of challenging material, addressing those challenges, standards for what can be relocated or withdrawn, and communicating decisions to the parties involved.

Other than these claims that the law does not provide any guidelines or standards, which is patently false, I did not see where the plaintiffs provided a single situation where they would be deprived of life, liberty, or property without due process of law. Their claims of due process seem to be based solely on a violation of the First Amendment. A person challenging material in the library has access to a written policy for the establishing of guidelines and for how the library will address challenged material. The county librarian forms a committee of library personnel to review the challenge, and the person challenging the material to present his or her request to the committee. It seems to me that both sides have the opportunity to present their case, and I find it odd that the librarians who are suing to stop this law are the ones who vote to determine whether or not the material should be relocated.

First Amendment Violation?

With the single exception of the question of procedural

safeguards and standards, the Fourteenth Amendment and its Due Process Clause is always referred to with a violation of the First Amendment. However, this law cannot violate the First Amendment for one simple reason: It was not created by Congress.

Congress shall make no law … abridging the freedom of speech, or of the press;

U.S. Constitution, Amendment I

Since Congress did not make this law, it cannot violate the First Amendment. I can assume that the attorney's for the plaintiffs believe the lie promulgated by the Supreme Court that somehow the Fourteenth Amendment rewrote the First Amendment, but it did not. Which brings up an interesting question. If this law cannot violate the First Amendment, did the District Court have jurisdiction?

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U.S. Constitution, Article III, Section 2, Clause 1

Although the plaintiffs claim a First Amendment violation, it patently is not. And since none of the plaintiffs articulated a reasonable claim under the Fourteenth Amendment, the claim the District Court made was wrong.

the Court found that at least one plaintiff had standing to challenge the constitutionality of Sections 1 and 5 of Act 372 and that such challenges were ripe.

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Recommendations for Arkansas

If the District Court does not have jurisdiction, then the injunction ordered by the court is invalid. And if the injunction is invalid, there's no reason why Governor Huckabee-Sanders or the rest of the government of Arkansas should recognize and follow it. I know, it sounds radical, even anarchistic, but it is the law. The Supreme Court cannot rewrite the Constitution, so their claims that the Fourteenth Amendment rewrites the First is unconstitutional, invalid, and void. Furthermore, the rationale the judge used involved violations of free speech, attempting to apply the First Amendment to state law, which is unconstitutional.

First, it is overbroad because it regulates substantially more speech than the Constitution allows and therefore violates the First Amendment rights of Arkansans.

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As I've shown, this cannot violate the First Amendment rights of Arkansans since Congress did not make this, so this argument is invalid and void. Lastly, the "vagueness" argument is just plain foolish.

Second, its terms are so vague that they fail to provide librarians and booksellers with adequate notice of what conduct is prohibited, thus violating their due process rights.

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But the terms are not vague, and the prohibited conduct is quite obvious. From Arkansas Act 372:

(b) A person commits furnishing a harmful item to a minor if, knowing the character of the item involved, the person knowingly:

(1) Furnishes, presents, provides, makes available, gives, lends, shows, advertises, or distributes to a minor an item that is harmful to minors; or
(2) Transmits or sends to a person that he or she believes to be a minor by means of electronic mail, personal messaging, or any other direct internet communication an item that is harmful to minors when the person knows or believes at the time of the transmission that a minor in this state will receive the item.

Arkansas Act 372

Prohibited conduct is stated plainly in the law. If librarians and booksellers know that something has been found to be harmful to minors and knowingly makes it available to minors, then and only then is it "furnishing a harmful item to a minor".

The Court observes that in a factually similar case, Virginia v. American Booksellers Ass'n, the Supreme Court held that booksellers in Virginia had standing to sue the Commonwealth to enjoin a law that would criminalize the commercial display of materials deemed "harmful to juveniles."

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There is, however, a major difference between the Booksellers Association case and this one. The Bookseller Association represents private book sellers.

Conclusion

There is one area where I think the law can be improved. This law amends existing law to add "loans at a library" to this list of those liable for the possession, sale, or distribution of harmful material. Yet the law states that a person commits "furnishing a harmful item" if they knowingly does so. If it's supposed to apply to libraries, why doesn't the law

specifically say so? Also, there is the question of "knowingly." Say you work in a book store, library, or some other venue that provides material to minors. How is someone to know if a specific item has been found to be harmful to minors? Is it up to the owner to remove or segregate harmful material? Or if it's up to the sales person, how are they to know?

More disturbing is the fact that a District Court judge either cannot read plain English or doesn't care about their oath of office. Which brings me to the next question: If the court got the question of standing so badly wrong, is the State of Arkansas required to abide by the order? Sure, Arkansas can appeal the judges decision to the Circuit Court, and that might be the safer answer, but is it the most just answer? How many children will be exposed to harmful content because a judge cannot read or a group of unelected librarians think they have the right to distribute such content to them?

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