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Prisoner Mail Legal Issues

A routine, every day task that correctional institutions have to manage is the flow of mail to and from prisoners. Such mail includes letters to and from family members and friends, to and from attorneys, courts, and governmental agencies, to and from businesses of all sorts, and to and from publishers, including copies of newspapers, magazines, and books.

Decisions from the courts, including from the United States Supreme Court, have established some important legal guidelines for the handling of such mail, and lower courts have applied those principles to myriad specific circumstances. The article that follows does not attempt to be exhaustive on this topic, but rather to serve as an introduction to the subject.

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1. Supreme Court Decisions on Prisoner Mail Issues

In [Pell v. Procunier](#), #73-918, 417 U.S. 817 (1974), the U.S. Supreme Court found that prison inmates retain First Amendment rights to the extent that they are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system. That case, however, involved contact between the prisoners and the press, such as inmate interviews, rather than having a focus on prisoner mail. The U.S. Supreme Court has, however, addressed legal issues concerning prisoner mail in a number of decisions. [Procunier v. Martinez](#), #72-1465, 416 U.S. 396 (1974), decided the same year as [Pell v. Procunier](#), addressed a California correctional practice of reading and censoring incoming

and outgoing correspondence sent and received by prisoners.

Correctional officials censored or removed mail which was critical of facility operations, or which complained of correctional conditions or discussed grievances, as well as letters dealing with or discussing religious and political issues, and letters thought to be "lewd, obscene, or defamatory." All incoming and outgoing mail prisoners sent or received was subjected to this censorship. The Supreme Court found these rules to be overbroad and unnecessary, while recognizing that there are legitimate interests in maintaining institutional order and discipline, and security interests in preventing escape and encouraging prisoners' rehabilitation. The Court found that, in order to be supportable, such regulations must further an "important or substantial governmental interest unrelated to the suppression of expression," and the limitation of First Amendment freedoms must be no greater than is "necessary or essential to the protection of the particular governmental interest involved."

One of the most important Supreme Court cases on prison regulations, establishing some very broad general principles, is [Turner v. Safley](#), No. 85-1384, 482 U.S. 78 (1987). This arose in the context of restrictions on correspondence between inmates, rather than with persons in the outside world.

In [Turner](#), Missouri inmates challenged a state prison regulation that allowed correspondence between immediate family members who are inmates at different institutions within the state correctional system, and between inmates "concerning legal matters," but which allowed other inmate correspondence only if each inmate's classification/treatment team deemed it in the "best interests" of the parties. While recognizing that prisoner correspondence implicates First Amendment rights, the Supreme Court rejected the argument that "strict scrutiny" or a very high standard of justification must be found to justify prison regulations that impinge on such prisoner constitutional rights.

Instead, the Court ruled, in a decision that applies to issues concerning prisoner mail, and to prison rules and regulations generally, that such regulations need only be "reasonably related" to "legitimate" penological interests.

To determine whether a regulation is reasonable, the Court stated, factors to be considered include:

- 1) whether there is a "valid" and rational connection between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation "arbitrary" or "irrational;"

2) whether there are alternative means of exercising the asserted constitutional right that remain open to prisoners, which alternatives, if they exist, will require a measure of judicial deference to the correctional officials' expertise;

3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to correctional officials; and

4) whether the regulation represents an "exaggerated response" to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at minimal costs to valid penological interests being evidence of unreasonableness.

This standard does not give prison officials unbridled discretion to restrict prison correspondence, but it merely requires that there be a "rational" connection to legitimate governmental interests, such as prison security, and gives considerable deference to the expertise of correctional officials in operating correctional facilities.

In Turner, the Supreme Court found, the Missouri state inmate correspondence regulation at issue was reasonable and facially valid. It was "logically related" to prison officials' legitimate security concerns, which included that mail between prisons can be used to communicate escape plans, to arrange violent acts, and to foster prison gang activities. Additionally, the regulation in question did not deprive the prisoners of all means of expression, but merely prevented communication with a limited group of people—other prisoners—with whom the officials have "particular cause to be concerned."

The Court found that the regulation was entitled to deference because of the significant impact that correspondence between prisoners can have on the liberty and safety of other prisoners and prison personnel, given testimony by prison officials that such mail can facilitate the development of informal organizations that threaten safety and security at correctional institutions. The Court also noted that there was no "obvious, easy alternative" to the regulation, because monitoring correspondence between inmates would impose a considerable burden in terms of cost and the burden on staff resources needed for "item-by-item" censorship, not to mention creating a risk of missing some dangerous communications. The regulation, further, was "content neutral," and, in summary, did not unconstitutionally restrict prisoners' First Amendment rights. Federal prison regulations concerning the receipt of publications in the mail were at issue in Thornburgh v. Abbott, #87-1344, 490 U.S. 401 (1989). Regulations promulgated

by the Federal Bureau of Prisons ordinarily allow inmates to receive publications such as newspapers, books, and magazines from the "outside," but also provide specific criteria which wardens are authorized to use to reject incoming publications which are found to be "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." Wardens are not, however, to reject publications solely because of religious, philosophical, political, social, sexual, or unpopular or even "repugnant" content, or to establish a list of excluded publications, but instead are required to review each issue of a subscription separately under the regulation at issue. A class of inmates and a number of publishers challenged the regulations, both on their face, and as applied to some 46 specifically excluded publications, claiming that these actions violated their First Amendment rights.

The U.S. Supreme Court explicitly stated that regulations impacting the sending of publications to prisoners should be analyzed under the relatively deferential standard of *Turner*, and that prison officials are entitled to "considerable deference" in balancing the important interests of prison order and security and the legitimate demands of "outsiders" such as publishers who seek to enter the prison facility. A previously used less deferential standard stated in [Procurier v. Martinez](#), #72-1465, 416 U.S. 396 (1974), under which prison regulations authorizing mail censorship was required to be "generally necessary" to protect a legitimate governmental interest, was now held to be limited to regulations concerning outgoing personal mail from prisoners, since such regulations are not "centrally concerned" with the maintenance of prison order and security.

The Court also explicitly overruled *Martinez*, to the extent that it might support the drawing of a "categorical distinction" between incoming correspondence from prisoners, which *Turner* applied a "reasonableness" standard to, and incoming correspondence from non-prisoners.

In the immediate case, the Court found, the regulations were facially valid using the *Turner* standard because their objective of safeguarding prison security was "undoubtedly" legitimate and neutral as to the content of the expression regulated. The level of discretion that the regulations broadly gave to wardens, the Court reasoned, was rationally related to security interests, and prisoner still had a broad range of publications that could be sent, received, and read, even if certain publications were prohibited for security reasons. Finally, the Court noted, the plaintiffs in the case had failed to propose any alternative to the regulations that would accommodate the purported prisoners' constitutional rights claimed to be violated at a minimal cost to valid penological interests.

The principles in [Thornburgh](#) have been used by lower federal courts, as will

be illustrated later in this article, to support the exclusion of a variety of types of publications that might incite violence or otherwise threaten institutional security.

Can certain very dangerous and "recalcitrant" prisoners be denied access to newspapers, magazines, and photographs in order to provide them with incentives for improvement of their behavior?

In [Beard v. Banks](#), No. 04–1739, 126 S. Ct. 2572 (2006), a plurality of the U.S. Supreme Court reversed an appeals court ruling that a Pennsylvania prison policy denying newspapers, magazines and photographs to a group of "specially dangerous and recalcitrant inmates" violates the First Amendment to the Constitution. Four Justices, Justice Breyer, joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter, joined in the opinion. Under [Turner v. Safley](#), 482 U.S. 78 (1987), prison rules restricting a prisoner's constitutional rights, such as the [First Amendment](#) right of access to information must be "reasonably related to legitimate penological interests."

The case reached the Court after the prison officials filed a motion for summary judgment, along with a statement of undisputed facts. The plaintiff prisoner did not challenge any of the facts relied on by the prison officials, but instead filed his own motion for summary judgment, relying on the same "undisputed facts." A federal appeals court found that the prison rule was unconstitutional as a matter of law.

Justice Breyer's opinion, on behalf of himself and three other Justices, found that the correctional officials' justifications for the policy, such as the need to motivate improvements in behavior among particularly difficult prisoners to which the policy applies, were sufficient to meet the legal test in [Turner](#). Prison officials have limits on what they can deny or give to such prisoners, who already have lost most privileges, and prison officials believe that access to items such as photos, magazines, and newspapers are legitimate incentives for inmate improvement. Federal courts, the opinion noted, must give deference to the professional judgment of correctional officials.

The deprivations, under the policy, are only imposed on prisoners with the most serious behavior problems. Without further materials from the prisoner challenging prison officials' rationale for the policy, or challenging any of the facts on which the prison officials relied, the Court rejected the prisoner's essential argument, which was that the policy was improper on its face.

Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "specific facts" in the record that could "lead a rational trier of fact to find" in his favor.

Two other Justices concurred in the result of the plurality's opinion, although not with all of the reasoning. The case appears to establish the principal that limitations on the receipt of publications can be imposed as a sanction for unacceptable behavior, to be restored as an incentive for improved compliance.

2. Prisoner Legal Mail

Because of concerns over attorney-client confidentiality, the general rule is that, while incoming legal mail may be opened and inspected for contraband, it should generally be opened in front of the inmate, and it should not be read. Courts have applied similar principles to mail between legislators and public officials and prisoners. In at least one recent case, Meador v. Pleasant Valley State Prison, No. 1:05-CV-0939, 2007 U.S. Dist. Lexis 26505 (E.D. Cal.), a court found that it did not violate these principles to have opened mail from a court to an inmate outside of his presence despite it having been marked "legal mail," because it merely contained court documents which were public record, and concerning which there was no confidentiality at all. The reason for the requirement that legal mail be opened in the presence of an inmate is to help assure that it is not read.

Sometimes, of course, material may be marked "legal mail," but not actually be entitled to that privilege, even if it concerns legal matters. In Wardell v. Maggard, No. 05-1210, 2006 U.S. App. Lexis 29404 (10th Cir.), for instance, the court found that prison officials' actions in preventing a prisoner from receiving mail containing legal materials bought for him by a person with a relationship to another prisoner did not violate his rights. The restrictions imposed were justified by legitimate interests in the prevention of extortion, contraband smuggling, and unauthorized bartering among prisoners assisted by persons outside the facility.

Similarly, in an instance where a prison opened a letter from a prisoner's mother outside of his presence, despite it having been marked "legal mail," the prisoner's rights were not violated. The envelope indicated that the sender was operating under a power of attorney, and that it contained legal documents from court records. But the court noted that a power of attorney does not confer any right to represent a person in court, so there was no issue of attorney-client confidentiality, and court documents, if enclosed, were public records and not entitled to any confidentiality. Bloom v. Muckenthaler, No. 93,574, 127 P.3d 342 (Kan. App. 2005).

In Moore v. Schuetzle, No. A4-01-038, 354 F. Supp. 2d 1065 (D.N.D. 2005), the court found that even if a letter from a legal advocacy group (the "Innocence Project of Minnesota") to a prisoner was protected as "legal mail," the alleged mistaken opening of the letter outside of the presence of the prisoner was not a violation of his First Amendment rights since it was an isolated incident, and did not interfere with his right of access to the courts. The prison employee opening it

believed that the group who sent the letter did not qualify as a legal advocacy group. Additionally, correspondence from a city police department and from the North Dakota Department of Corrections was found to not be constitutionally protected legal mail.

Similarly, the opening of an incoming letter, marked "legal papers," but suspected of not being from an attorney, outside of the prisoner's presence, and inspection of it for contraband, which resulted in the finding of marijuana, did not violate the prisoner's Sixth Amendment right to counsel or his due process rights, even if it did violate a state administrative code section. State of Wisconsin v. Steffes, No. 02-1300-CR, 659 N.W.2d 445 (Wis. App. 2003).

While an "emergency" may temporarily justify an exception to the general rule concerning not opening legal mail outside of the presence of the prisoner, one case suggests that courts will not be tolerant of a "permanent" "emergency." In Jones v. Brown, No. 03-3823, 2006 U.S. App. Lexis 21601 (3rd Cir.), the court found that New Jersey failed to show that it had a reasonable basis, related to prison safety and security, in opening prisoners' legal mail outside of their presence. Inmates, the court noted, have a First Amendment interest in being present when incoming legal mail is opened by prison employees. Citing the terrorist attacks of 9/11/2001, and incidents that fall of transmission of anthrax through the mail were not sufficient, years later, to support the continuation of a policy adopted as an emergency procedure, even though the temporary adoption of different procedures during the original emergency may have been ok.

3. Non-Legal Mail

Non-legal incoming mail can be both inspected for contraband and read to prevent threats to institutional security, such as preventing communications concerning escape plans or information related to the facilitation of criminal schemes, etc.

Non-legal mail may even be censored or withheld in some instances, as illustrated by Koutnik v. Brown, No. 04-C-911, 396 F. Supp. 2d 978 (W.D. Wis. 2005), upholding the censorship of a prisoner's outgoing mail under a Wisconsin regulation on the basis that it was believed to contain "encoded" references to gang activities that did not violate his free speech rights. A discussion of the procedural mechanisms that may need to accompany such censorship or withholding of correspondence is beyond the scope of this article, but is a subject which the reader should be aware of.

What about correspondence in a foreign language? In Ortiz v. Fort Dodge Correctional Facility, 03-1868, 2004 U.S. App. Lexis 10200 (8th Cir.), the court found that a prison did not violate an inmate's rights by limiting his ability to

correspond with family members in Spanish, when the prisoner was fluent in English and was allowed to correspond in Spanish with a family member who only knew that language. The rule limiting correspondence in foreign languages, which was subsequently abandoned, had been reasonably related to legitimate security concerns. See also Sisneros v. Nix, 884 F. Supp. 1313 (S.D. Iowa 1995), finding that prohibiting a prisoner from corresponding with relatives in Spanish and Apache languages did not violate his rights. The court found that the English-only rule was based on legitimate security concerns and that hiring interpreters to translate mail would have been unduly burdensome.

The mere fact that correspondence about prison conditions or related issues is unfavorable will not justify punishment or other adverse action when there is no threat to institutional security. In Gandy v. Ortiz, No. 04-1225, 122 Fed. Appx. 421 (10th Cir. 2005), the court found that prison officials could not punish an inmate for writing a letter to a private company informing them of what he believed to be an illegal program planned at the prison that would damage its business as a supplier to the facility. The statements, while critical or unflattering, did not damage institutional security, and punishing him for their content would violate the First Amendment.

Correctional facilities have adopted a variety of procedural requirements from time to time, with the announced intention of helping to prevent the introduction of contraband into prisons. Such rules have sometimes been upheld, but they must be thought through and rationally applied. In one case a federal appeals court ruled that a prison's requirement that books received from vendors have special shipping labels attached or else not be delivered to prisoners unduly burdened inmates' First Amendment rights. The policy was found to be unreasonable and arbitrary, as it was applied to packages of books and other publications but not to other packages that could just as easily contain contraband. Ashker v. California Department of Corrections, #02-17077, 350 F.3d 917 (9th Cir. 2003).

4. Excludable Material

As indicated in the discussion of U.S. Supreme Court cases on prisoner mail, prison authorities may be able to bar receipt of publications that endanger institutional security, such as those that incite racial or religious hatred and violence, for instance, but the court decisions are clear that such actions cannot be taken for arbitrary or irrational reasons.

In Jesus Christ Prison Ministry v. Calif. Dept. of Corrections, No. CIV-S-05-0440, 2006 U.S. Dist. Lexis 73813 (E.D. Cal), for instance, a court found that correctional officials offered "no evidence" showing any legitimate penological interest to support a policy of preventing prisoners from receiving free, softbound

religious materials from a religious organization.

Similarly, in [Prison Legal News v. Lehman](#), No. 03-35608, 397 F.3d 692 (9th Cir. 2005), the court found that a ban on non-subscription bulk mail and catalogs was not rationally related to a legitimate penological interest and therefore violated the First Amendment, although correctional officials were entitled to qualified immunity from liability since the law on the subject was not previously clearly established.

On the other hand, in [Munro v. Tristan](#), 03-16770, 116 Fed. Appx. 820 (9th Cir. 2004), a federal appeals court upheld a California State Department of Corrections administrative bulletin banning sexually explicit materials depicting frontal nudity. Correctional officials, the court found, properly sought to reduce sexual harassment of female guards and prevent the development of a hostile work environment, and also enhance prison security. See also, *Cline v. Fox*, 266 F. Supp. 2d 489 (N.D. W.Va. 2003), upholding the refusal of West Virginia prison officials to allow a prisoner to receive or possess certain books found to be obscene, since the policy applied advanced legitimate penological interests in security and rehabilitation.

In [Mauro v. Arpaio](#), #97-16021, 188 F.3d 1054(9th Cir. 1999), the court found 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.

In [Chriceol v. Phillips](#), No. 98-30380, 169 F.3d 313 (5th Cir. 1999), the court upheld a prison rule banning the receipt of mail which advocated racial or religious hatred in a manner which created a serious danger of violence (Aryan Nations material). See also [Shabazz v. Parsons](#), 127 F.3d 1246 (10th Cir. 1997), ruling that prison officials did not violate a Muslim prisoner's free speech or religious freedom rights by denying him receipt of entire issues of "Muhammad Speaks" magazine which were determined to create a danger of violence "by advocating racial, religious, or national hatred." The prisoner's suggestion that offending articles instead could be cut out was not a reasonable alternative in light of what it would cost to implement.

In [Lindell v. McCaughtry](#), No. 03-4094, 115 Fed. Appx. 872 (7th Cir. 2004), the court found that denying a prisoner receipt and possession of a racist magazine, *Pagan Revival*, which the inmate himself admitted contained "hatred," did not violate his First Amendment rights. Censorship of such publications, the court ruled, was reasonably related to legitimate penological interests in institutional order and security.

5. Some Useful Resources

The Federal Bureau of Prisons has adopted regulations, found in [28 C.F.R. 540](#), concerning the handling of prisoner mail, which articulates a good number of legitimate rationales for imposing restrictions. Also of interest is the [BOP's Mail Management Manual](#).

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