Topic:
MAIL REGULATION

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MAIL REGULATION IN JAILS

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This memorandum is an effort to answer questions raised by students in recent courses sponsored by the Jail and Detention Services of the Department of Human Resources. Realizing that those men and women and the others who staff North Carolina jails are primarily interested in how jail administrators must change their operations to conform to court decisions, I have followed the general legal discussion with a "compliance suggestion." That section states my understanding, based on court decisions thus far, of legally defensible jail-operating procedure. When, as often happens, the courts have not yet clearly answered a specific question, I have looked for a procedure that minimizes the risk of liability for jail or county officials, protects the rights of inmates (particularly pretrial detainees), and does not greatly inconvenience the jail program.

I wish to emphasize that the majority of jailers enrolled in the courses apparently find little need to censor inmate mail. While most do inspect for contraband (in some jails without opening mail), only a small minority read correspondence, and presumably even fewer refuse to deliver mail as written. Despite this memorandum's conclusion that more censorship is permissible, I do not in any sense recommend it. On the contrary, continued restraint in exercising their right to censor will benefit jail administrators through higher inmate morale and relief from the administrative inconvenience of handling mail extensively.

Legal Status of Jail Inmates

The overriding difficulty in determining any legal right of jail inmates is that while nearly all prisoners' rights cases have involved convicted prisoners, the great bulk of North Carolina jail inmates are pretrial detainees,[1] whose rights are universally acknowledged to be far more extensive than those of

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convicts. Legal authority has been unanimous on the more privileged status of pretrial detainees since at least the 1760s, when Blackstone summarized English law in his Commentaries as follows:

> Upon the whole, if the offense be not bailable or the party cannot find bail, he is to be committed to the county jail . . . there to abide till delivered by due course of law. . . . But this imprisonment, as has been said, is only for safe custody, not for punishment. Therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters or subjected to other hardships than are absolutely requisite for the purpose of confinement only.[2]

Both English and American legal theory has maintained that position consistently over two centuries. The latest restatement is the American Bar Association's (ABA) tentative draft of standards for the legal status of prisoners. Section 7.1, "Freedom of Detainees," states:

> In addition to standards applicable to prisoners generally, any restriction on the right of movement inside the institution by persons confined solely because they are awaiting trial, or on their right to communicate with free citizens should be as minimal as institutional security and order require.[3]

But the fact is that Blackstone speaks of needless fetters rather than no fetters, and the ABA standards recognize that infringements of liberty are justified when required to maintain the jail's security and order. Pretrial detainees then occupy an ambiguous status somewhere between free citizens and convicted prisoners.[4] How does the law require jailers to deal with them?

As noted earlier, the courts have decided only a few cases on the rights of detainees. When a case involving a prisoner is decided, therefore, jail officials frequently have to apply that decision to the treatment of persons detained in jail. When this occurs, the jail official can be sure only that he must give honest consideration to adopting a plan for more lenient treatment of inmates awaiting trial than the case requires for prisoners. He cannot be sure that the law would always require an actual difference in treatment, since some procedures may be justified for both groups on grounds of security or order.

Mail

Jails and prisons regulate mail to and from inmates for many reasons. Inspection prevents the passing of contraband, escape tools, and plans for escape or other criminal activity between inmates and outsiders. Officials ban certain publications, particularly pornography and racist literature, because they fear riots or an increase in violence between individuals. Letters of complaint or criticism are censored to improve the inmate's own attitude and to prevent his poisoning the attitudes of others. For similar purposes inmates may be allowed to correspond only with approved persons. Officials occasionally find that newspapers and magazines are a fire hazard in cells and can be used to clog sinks and toilets deliberately. Finally, taking away or limiting the right to send mail is a means of discipline. Some of the reasons given are

fully justified under current law. Some, such as rehabilitation, are justified for prisoners but not for pretrial detainees; others are not legally justified in either case.

The question of mail censorship during pretrial detention is still unsettled. Lower court decisions on the matter are split,[5] and the Supreme Court has not ruled on the point. Thus, it is necessary to examine the law on prison mail censorship and draw conclusions from it concerning mail regulation in jails.

In the 1974 case of Procunier v. Martinez [416 U.S. 396 (1974)], the United States Supreme Court answered significant questions about prison mail censorship. Before 1974 the majority of courts had held that prisoners have no First Amendment rights and that their mail might be censored to any extent and by any means that did not interfere with their access to the courts.[6] In the early 1970s, a few courts recognized the correspondence rights of prisoners,[7] but the federal Fourth Circuit Court of Appeals (North Carolina is included in the Fourth Circuit, and decisions of the Fourth Circuit Court, unless overruled in the U.S. Supreme Court, are binding in this state) hold the traditional viewpoint. The court stated that position in a case involving the right of a prisoner to express anti-Semitic views in letters to public officials:

> While an inmate should be allowed a reasonable and proper correspondence with members of his immediate family and, at times, with others, it is subject to censorship to be certain of its reasonableness and propriety. A broader correspondence is subject to substantial limitations or to absolute prohibitions. Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison. A propagandist has no judicially enforceable right to propagandize within the prison walls,[8] whether his propaganda be directed to other inmates or to outsiders.

Besides deciding that prisoners can be kept from writing offensive letters to public officials, the Fourth Circuit twice upheld banning Black Muslim publications because of their racist overtones.[9] (The second time, however, the court required prison administrators to re-examine the publications and judge whether security was actually threatened.) The court went even further in support of prison officials when it stated that mail could be restricted to a reasonable degree merely to avoid the inconvenience of examining it,[10] and it had no difficulty finding that officials could prevent an inmate from allowing a magazine to publish his unflattering account of prison life.[11]

But the Fourth Circuit and lower courts within it did not allow officials complete discretion. For example, in Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966), the appeals court held that a black inmate was entitled to receive a black, nonsubversive newspaper on the same basis as white inmates received "white" newspapers; and in Worley v. Bounds, 355 F. Supp. 115 (W.D.N.C. 1973), the federal district court for western North Carolina held that refusal to allow an inmate to write to the mother of his child was impermissible, whether based on the difference in race between the two or the fact that they were not married.

Much of the law on mail censorship in the Fourth Circuit was overruled by the Supreme Court decision in Procunier v. Martinez . In that decision a five-member majority[12] of the Court refused to say whether prisoners themselves have First Amendment rights, but it did hold that unnecessary restrictions on prisoners' mail violate the First Amendment rights of prisoners' correspondents. While it struck down the California regulations under review as excessive, the Court acknowledged that some restrictions are justifiable. An acceptable prison rule must promote an important governmental interest (other than an interest in stifling expressions of opinion) and must be no more restrictive to the inmate than is necessary to achieve its purpose. The Court named the permissible goals as follows: "Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation."[13] As examples of justified refusals to send or deliver mail, the Court named letters concerning escape plans or proposing criminal activity and messages written in code.

Although unanswered questions remain, the Procunier case substantially changed the law in North Carolina. Here and in other jurisdictions where courts had viewed correspondence as a privilege to be granted or denied largely at the will of prison officials, Procunier overruled the decisions in earlier cases. After Procunier, administrative convenience was no longer a sufficient reason for limiting letters and publications,[14] and the Supreme Court clearly overruled the Fourth Circuit on the matter of criticism of prison life by its statement, above, that "officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." The Court disapproved the action of the California prison mailroom sergeant who testified that he rejected any letter belittling the staff, the judicial system, or the state department of corrections. It also set out three steps that must be taken whenever authorities decide to intercept an inmate's mail: (1) The inmate must be notified that a letter to or from him will not be delivered. (2) The letter-writer must be given a chance to protest that decision. (3) Any protest must be referred to an official other than the one who censored the letter.

Decisions in other cases have spoken to such particular problems of mail regulation as mail to and from attorneys or the court, special provisions for indigent inmates' mail, deprivation of mail as punishment, and the extent of an inmate's right to appeal of a censorship decision. An inmate's rights to legal assistance and to petition the courts are among the oldest and best-established of his rights.[15] The attorney-client privilege, a special relationship protected by our legal system, guarantees a person's right to communicate privately with his attorney in seeking advice, helping to prepare his defense, deciding on strategy and pleas, and so forth. The courts have usually prevented prison or jail officials from reading written exchanges with attorneys or listening to oral exchanges--first, on the general ground that any person's communication with his lawyer is to be entirely private,[16] and second, on the assumption that these officials may often be parties to the inmate's litigation. Even when officials themselves are not parties, the normal, proper cooperation between police, prosecution, and jail or prison authorities makes it inappropriate for confinement personnel to read inmate mail to attorneys. The same is true of

a "legal document" submitted to a court by an inmate acting on his own behalf (a legal document, of course, may be no more than a note or letter). The American Bar Association's tentative draft of correctional standards restates a widely held view, § 2.1(b)(iv), that "legal documents should not be read, censored, or altered by correctional authorities, nor should their delivery be delayed."[17] That view prevails in the western federal judicial district of North Carolina, established by a decision defining jail inmates' right of access to attorneys and courts. The case, Berch v. Stahl,[18] held that inmates must be allowed to communicate privately on legal matters by incoming and outgoing mail, by visits, and by telephone; must be given writing materials for this purpose; and must be permitted to use legal materials in their possession or otherwise accessible to them. However, the United States Supreme Court has held that the inmate's attorney-client privacy can be made to yield to institutional security. In Wolff v. McDonnell[19] the Court found that prison authorities violate no constitutional rights by opening mail to or from an attorney in the inmate's presence to inspect for contraband.

Special provisions for indigent persons are frequent throughout the criminal justice system. In the area of inmate mail these take the form of free stamps and writing materials for some or all correspondence. Quite recently the Supreme Court noted, "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them."[20] Among 29 states that responded to an ABA survey,[23] 17 reported that they provide free mailing for indigents' official and some personal correspondence. The usual pattern is that indigent inmates are allowed unlimited free mailing of letters to courts and attorneys and one to seven free letters per week to other persons. In North Carolina (which did not respond to the questionnaire), indigent state prisoners are permitted fifteen free letters monthly.[21] My informal surveys of North Carolina jailers reveal a common practice of mailing a "reasonable" number of letters for inmates without funds. The ABA's standards committee itself recommends unlimited free postage for an indigent's letters to attorneys, courts, and public officials and to his immediate family, plus three other letters per week.[22]

Berch v. Stahl, the case challenging certain regulations of the Mecklenburg Jail, settled one point for the western district of the state that has rarely been brought before the courts. Citing a 1973 Wisconsin case,[23] the Berch court held that pretrial detainees may not have their correspondence with friends, relatives, or potential witnesses and certainly not their correspondence with attorneys limited as a punishment for breaking jail rules. Although jail officials in the middle and eastern districts of North Carolina are not bound by the case, prudence suggests that disciplinary means be used other than limiting or denying mail privileges.

The Fourth Circuit recently ruled on how much consideration is due an inmate who protests an administrative decision to censor mail. A federal district court in Maryland, interpreting the Procunier due process standards, held that after mail is censored, the inmate and his correspondent must ordinarily have the opportunity for a full hearing.[24] The hearing was to include, for both inmate and correspondent, the right to appear, contest the administration's facts, call witnesses, present documentary evidence, and cross-examine adverse witnesses. But on appeal the Fourth Circuit reversed, finding such a hearing

unnecessary under Procunier so long as an inmate may appeal a negative decision to a second institutional official.[25]

Compliance Suggestions

All packages and letters should be inspected for contraband. If letters are opened for inspection, those to or from courts and attorneys should be opened only in the inmate's presence.

An inmate should not be restricted in how many letters he may write or whom he may write to. Officials should not read or censor a letter without particular reason to believe that it contains a threat to jail security or order. Correspondence with courts and attorneys should not be read under any circumstances. In the rare instance that jail personnel feel justified in refusing to deliver mail they should:

(a) Inform the inmate and, for incoming mail, the letter-writer of the refusal;
(b) Give the inmate or the letter-writer a chance to protest;
(c) Assign a jail officer other than the one who made the first decision to consider the protest and reach a decision;
(d) Keep a written record of the incident including reasons for the rejection and the letter itself, or a copy if the letter has been delivered following a second consideration.

An indigent inmate should be given unlimited access to materials (paper, pen, stamps) for writing to attorneys and courts. He should be furnished materials for at least one other letter per week.

Except for clearly obscene or dangerous material, restrictions should not be placed on the number or kinds of publications an inmate receives. In rejecting publications, officials should deal with the inmate as in (a) through (d) above.

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1. In spring 1977, Rebecca S. Odom and Robert G. Lewis of Jail and Detention Services, Division of Facility Services, North Carolina Department of Human Resources, estimated that pretrial detainees form more than 90 per cent of the state's jail population.

2. Blackstone Commentaries 300, quoted in 14 American Criminal Law Review 565 (1977).

3. "Tentative Draft of Standards Relating to the Legal Status of Prisoners," 14 Amer. Crim. L. Rev. 405 (Winter 1977).

4. A small number of North Carolina jail inmates are convicted persons, and the number could be increased substantially by new legislation that allows the Department of Corrections to place misdemeanants serving 180 days or fewer in suitable county jails (Ch. 450, 1977 S.L.). Jail officials may choose as a matter of convenience to apply the pretrial detention standards discussed in this memorandum to all inmates, or they may use more restrictive procedures with convicts.

5. See Toal, Recent Developments in Correctional Case Law 21-22 (South Carolina Department of Corrections, 1975).

6. Sheldon Krantz, Corrections and Prisoners' Rights 109 (West Publishing Co.: St. Paul, Minn, 1976).

7. For example, Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970), and Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

8. McCloskey v. Maryland, 333 F.2d 72, 74 (4th Cir. 1964), quoted with approval in McDonough v. Director of Patuxent, 429 F.2d 1189 1193 (4th Cir. 1970).

9. Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971).

10. Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971).

11. McDonough v. Director of Patuxent, 429 F. 2d 1189 (4th Cir. 1970).

12. Three other justices who joined the majority in invalidating the regulations would have preferred to hold that prisoners do have First Amendment rights and that their mail may be opened and read only with good reason.

13. 416 U.S. 396 at 413.

14. In Hopkins v. Collins, 548 F.2d 503, 504 (1977), the Fourth Circuit found that the Procunier due process standards on censorship of correspondence apply to publications as well as letters.

15. Ex parte Hull, 312 U.S. 546 (1941); Johnson v. Avery, 393 U.S. 483 (1969).

16. Adams v. Carlson, 488 F. 2d 619 (7th Cir. 1973).

17. 14 Amer. Crim. L. Rev. 388 (1977).

18, 373 F. Supp. 412 (W.D.N.C. 1974).

19. 418 U.S. 539 (1974).

20. Bounds v. Smith, 45 L.W. 4411, 4413 (April 26, 1977).

21. 5 N.C. Admin. Code § 2D.0301(b).

22. 14 Amer. Crim. L. Rev. 397 (1977).

23. Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973).

24. Hopkins v. Collins, 411 F. Supp. 831 (1976).

25. 548 F.2d 503 (1977).