Legal Services for Prisoners with Children
4400 Market Street, Oakland, CA 94608

Regulation and Policy Management Branch
Department of Corrections and Rehabilitation
P.O. Box 942883
Sacramento, CA, 94283-0001

December 7, 2023

Re: **Public Comment on NCR 23-12**

Dear Regulation and Policy Management Branch,

INTRODUCTION

"[U]se of the mails," Justice Holmes wrote, "is almost as much a part of free speech as the right to use our tongues" *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 437 (1921) (dissent). Another great, oft-dissenting jurist, Thurgood Marshall, later opined, "A prisoner does not shed such basic First Amendment rights at the prison gate." *Procunier v. Martinez*, 416 U.S. 396, 422 (1974) (concurrence). The less illustrious, more conservative Justice Powell also got it right in declaring, for the majority, in the latter case:

> The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion. *Id.*, 416 U.S. at 418.

Not only speech but *communication* – the transmission of words or images to share notions and emotions in common or, perhaps, to establish common ground for airing out of differences: that is the value Powell's opinion stresses. The problem it seeks to address is *arbitrary*, stifling censorship by the government.

In this traditional spirit of jurisprudence protective of the right to communicate, we read the new regulations that the California Department of Corrections and Rehabilitation (CDCR; hereinafter, "Department") proposes for mail processing. Notice of Change to Regulations 23-12 (NCR 23-12), issued October 20th, clocks in at over a hundred pages, including attachments; it will not be possible to cover every detail. Though there are some good aspects within NCR 23-12, the primary focus of this Comment will, of necessity, be on negative aspects. Several salient items stand out and are treated below. First, and perhaps most importantly, is the revision to the rules regarding permission to correspond, which NCR 23-12 would radically expand to subject persons on parole to the permission requirements.[1] Additionally, changes to the definition of contraband upon which content-based mail prohibitions are predicated are treated in Parts II-IV below. The rule on negotiable instruments is treated in Part V. The basic mail privileges of indigent persons, the right to legal mail, and the disposition of disapproved but disputed mail are discussed in Part VI.

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[1] The Department presents the change as a mere cosmetic clarification; however, as explained in Part I below, it is more substantive than that.

Part I

Parole Censorship Rule: Substantive Changes to 15 C.C.R. §3139

Significant changes to **§3139** are contained in NCR 23-12. However, notice regarding these changes is inadequate and fails to comply with Government Code §§11346.4 and 11346.5. Those statutes, in combination, require an agency issuing a regulation to provide notice that includes, along with other elements of an "informative digest," a policy statement on the proposed rule "explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation[…]" Gov. Code §11346.5(a)(3)(C). The Notice component of NCR 23-12 does not mention the substantive changes to §3139 that affect *persons on parole*. Instead, the subject is framed to imply that NCR 23-12 rule changes apply to incarcerated persons alone. Notice, p. 2 (referring to "inmates" repeatedly, without reference to persons on parole).

Because this omission renders the notice fundamentally deficient, the Department is *not* in "substantial compliance" with the requirements of §11346.5; rather, it is entirely non-compliant regarding the revision of 15 C.C.R. §3139. Accordingly, the Department and the Office of Administrative Law should find the rulemaking invalid in that section. *See* Gov. Code §11346.5(c) (substantial compliance required to save the validity of notice-defective rulemaking). To find otherwise would encourage agencies to evade notice requirements by simply burying an unpopular rule change within an omnibus rulemaking package. The purpose of transparent rulemaking is defeated when notice obfuscates the issue rather than informs the public.

There is more. Because the Policy Statement Overview and the Specific Benefits Anticipated sections of the Notice (p. 1-2) have no relevance to the changes to §3139, the Department has in no way shown how the changes to that regulation are likely to be effective in achieving its objectives, let alone that it is cost-effective in doing so. Neither does the introductory section of the Initial

Statement of Reasons, nor the latter's Benefits of the Regulations section (ISOR, p. 1-2) indicate any objective that the changes to §3139 could be said to accomplish. Since, therefore, the changes to §3139 *bear no relation whatsoever* to the Department's stated purposes for NCR 23-12, the alternative consisting of eliminating the changes to that regulatory code section is presumably less burdensome to affected persons and no less effective. Furthermore, striking out §3139 altogether would be less burdensome, more cost-effective, and no less effective since (as just argued) §3139 is, per NCR 23-12, without a purpose.

The detailed explanations of each change to the text of §3139 later in the ISOR do not improve the situation. Still, no rationale is offered for why the overhaul of that section is required. Instead, the substantive nature of the change is papered over with suggestions that it is merely a cosmetic change of grammar, punctuation, and wording. But this is not the case.

Currently, 15 C.C.R. §3139 imposes a duty on incarcerated persons; it does not directly subject persons on parole to an identical requirement. The existing regulation begins: "Inmates shall obtain written authorization[…]" from specified officials. For the sake of analysis, let's call the person subject to the rule person 1 and the person with whom they want to correspond person 2. Under the current rule, only person 1 is the subject of the rule's duty. Person 2's status comprises the set of facts that make that duty applicable, and acts by person 2 that initiate approval can impact the fulfillment of the duty, but the duty applies to person 1. After all, person 2 might not even be under the Department's jurisdiction or even be in California. For the existing regulation, the class of individuals who may fill the role of person 1 consists of persons incarcerated by the Department; persons on parole under California jurisdiction can occupy the role of person 2, as can those who fit the several other described classes. NCR 23-12 would move persons on parole under the Department's supervision into the role of person 1.

The distinction is important because it could be the basis for an allegation of rule violation if a person on parole corresponds with a correspondent in a restricted class without the prescribed authorization.

The Initial Statement obfuscates this substantive change by framing the changes to the section as simply about clarity, grammar, and diction. In a truly stunning example of evasive explanation, it is asserted that "parolees" was inserted in the opening lines of subdivision (a) because "both inmates and parolees are required to obtain authorization to send and receive mail within the context of

these subsections" (ISOR, p. 24). The explanation can be read in two ways. One: as pure tautology or question-begging. Persons on parole are required to obtain authorization . . . because the Department requires them to obtain authorization! Obviously, that does not justify the requirement. Second way: the explanation means to say that existing *practice* – or some other rule not expressly referenced by NCR 23-12 – requires that authorization, and the point of the rule change is to harmonize the regulatory Code with practice. To that explanation, the following criticisms can be lodged. Regulations, generally speaking, should govern administrative practices, not the reverse. And if the rule prescribing that authorization requirement (which rule, to repeat, is not referenced in NCR 23-12) is not a part of the Code of Regulations, is it an "underground" regulation as defined by 1 C.C.R. §250?

The Department may respond that the basis for the requirement is indeed referenced when P.C. §4570 is invoked (Proposed Text, p. 18). If that is the line the Department wants to take, they ought to analyze the constitutionality of that Penal Code section and specify how it supports the present rulemaking. For if there is anything one can say with confidence regarding the statutes of California that appear on the books, it is that large swathes (if not the entirety of the statute) of §4570 's potential sphere of applications are unconstitutional under well-established principles and precedents. There is no credible argument that Section 4570, as written, is constitutional. The regulations themselves contradict its purported requirement of universal prior restraints on communication with prisoners. Accordingly, there is much explaining to be done if that statute, languishing in desuetude, is to be relied upon by the Department.

The best way to address the difficulties we have described concerning §3139 is to repeal the entire section; the next best alternative would be to scrap the changes that NCR 23-12 would make.

Part II Prude and Prejudiced:

On the Definition of Sexually Explicit Images in *Proposed* §§3006(c)(16)) and 3135(c)(13)

The Secretary of CDCR only has authority under Penal Code §5058 to issue *lawful* regulations. Regulations are supposed to implement statutes, not subvert them. *See* Government Code §§11349 and 11349.1 (Office of Administrative Law is to review regulations for consistency, i.e., harmony and non-conflict with existing statutes). The Proposed Text document for NCR 23-12 (p. 3) duly cites P.C. §§2600 and 2601 as reference statutes for the proposed rulemaking regarding 15 C.C.R. **§3006(c)**, and P.C. §2601 is the reference (Proposed Text, p. 12-13) for the new incarnation of regulatory subsection **3135(c)(13)**. However, the Department fails to note or to explain the apparent inconsistency of the proposed regulations with the statutory law.

Under Penal Code §2601, persons incarcerated in state prison "shall have the following civil rights: […](c)(1)To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office." The paragraph continues by specifying the exceptions. "Pursuant to this section, prison authorities may exclude any of the following matter" with subparagraphs (A), (B), and (C) describing obscene, violence-inciting, and gambling-related materials, respectively. The next paragraph clarifies that the statute does not limit the "right" (i.e., power) of prison authorities to inspect packages received and to establish reasonable limits of quantity. That is all. The clear intent of the statute is to limit content-based restrictions in the domain of sexual explicitness to the "obscene" and to "information concerning […] how [to] obtai[n]" obscene material. P.C. §2601(c)(1)(A).[2] There is no basis for a general prohibition on sexually explicit images; rather, the only reasonable construction of the statute is that the specified exceptions (A)-(C) are the exclusive exceptions to the general permission of materials described in paragraph (1) of subdivision (c). This follows by applying the canon of negative implication (*expressio unius est exclusio alterius*) in light of the specific-over-general canon (*generalia specialibus non derogant*).[3] The statute leaves in place the general applicability of the rule outside of the specific exceptions defined. That means that a sexually explicit but *non-obscene* image is permitted by Penal Code §2601.

Because renumbered regulatory section §3006(c)(16) does not build an obscenity test into its definition of sexually explicit images, it contravenes P.C. §2601. On the other hand, because all *images* that might have been covered by existing §3006(c)(15) are no longer treated by that section, which under the new

[2] Or if the sexually explicit material otherwise constituted incitement to violence or pertained to gambling/lottery.
[3] Scalia and Garner, READING LAW (2012), p. 107, 183.

rules would be focused on obscene "text" alone, the prohibition of obscene images could be handled legally by restricting the scope of proposed §3006(c)(16) – and, by extension, the scope of §3135(c)(13) which incorporates its definition – to images that are legally "obscene" under the definition of Penal Code §311.

Assuming that the provision of Gov. Code §11349.1(d)(4)[4], couched in terms of conflict of regulations, applies *a fortiori* to a case of conflict with a statute, the proper remedy for the difficulty here raised is for OAL to return the regulation to the agency, rather than approve it. Of course, to pre-empt that, CDCR can, on its own initiative, re-notice this rulemaking and make amendments, and it should do so.

In addition to the problem of legal consistency, the Department should revise this section because the stated goals of the regulation can be as effectively achieved, with less burden and less cost to affected private persons, by alternative formulations of the regulations. The Initial Statement of Reasons says that the new version of the regulation of sexually explicit images "provides clarity for staff and inmates and reflects that the display of sexually explicit images contributes to a hostile atmosphere, and violates Federal Equal Employment Opportunity standards" (p.5). This aim can be achieved in a more targeted fashion by prohibiting the *display* of sexually explicit images. Instead, the regulation would prohibit receiving mail and possessing such images, no matter how discretely the images are stored and viewed. On its face, then, the rule is over-inclusive in its ban. But it is also under-inclusive as far as the rationale is concerned. For, under proposed subparagraph (B), Departmentally purchased materials (clause 1) and case-by-case approved materials such as medical reference books and even "postmodern" art may be allowed (clause 2) (Proposed Text, p. 2). However, the mere fact that a textbook or artistic work has been approved for receipt and possession does not by itself guarantee that its display won't be abused for sexual harassment purposes. Both the over-inclusiveness and under-inclusiveness reveal that the regulation is not tailored to its purpose. Though the prevention of sexual harassment, including through hostile work environments, is undoubtedly legitimate, the rule proposed is not reasonably related to it.

Moreover, the definition of sexually explicit images is faulty from another perspective. Not only does the regulation not restrict the prohibition to obscene

[4] "The proposed regulation conflicts with an existing state regulation and the agency has not identified the manner in which the conflict may be resolved."

materials, but it sweeps much broader than could be justified by a legitimate purpose. For instance, the proposed regulation §3006(c)(16)(A)1 defines as sexually explicit contraband the image, including pictures and drawings, of "[t]he fully exposed breast that appears to be female." This definition arguably has a discriminatory effect on women insofar as some manuals on women's health (re: cancer screening, breastfeeding, etc.) will be presumptively banned unless approved by the Department's discretion, pursuant to a protocol of prior restraint. It also has some manifestly absurd consequences. For instance, as is well known, classical personifications of Justice and Liberty are often depicted in the figure of a woman with an exposed breast. Under the rule, a brochure issued by the Office of the Curator of the Supreme Court of the United States would be contraband because it contains a photograph of the frieze on the west wall of the courtroom interior, which depicts a figure of Truth with breasts exposed.[5]

Lest one thinks that such cases can be dealt with on a case-by-case basis, it is well to recall that the stated purposes of the changes to the regulations on obscenity and sexually explicit images are to provide "clarity" and an "exhaustive list" of contraband items (ISOR, p.1; see also ISOR, p. 20: providing "clarity" is the reason given for the changes embodied in §3135(c)(13)). The rules do the exact opposite. Rather than an "exhaustive list," the proposed §3006(c)(16) states of its list of banned images that they "*include, but are not limited to*, the following [etc.]" (Proposed Text, p. 2, emphasis added). It is an indeterminate, open set. Clarity as to its meaning is illusory, the meaning being, in reality, a function of arbitrary application by the censors.

Part III

Obscene Ambiguity (§3006(c)(15) and 3135(c)(12))

The definition of Obscene Text in **§3006(c)(15)**, like all the enumerated categories in the subdivision, is subordinate to the scope of the language of subdivision (c) "[…] contains *or concerns* any of the following" (emphasis added) (Proposed Text, p. 1). Construed literally, this says that anything which "concerns" the listed things is prohibited. On a straightforward and plain meaning of

[5] Office of the Curator, Supreme Court of the U.S., "Self-Guide to the Building's Interior Architecture" (May 2022), p. 15. https://www.supremecourt.gov/visiting/InteriorBrochureWebVersion_FINAL_May2022.pdf

"concerns," are not the very regulations themselves "concern[ed]" with things like "escape" (paragraph 4) and "disrupt[ing]" "order" of an institution (para. 5)? If so, the very Code of Regulations constitutes contraband. Does not a Supreme Court decision like *Miller v. California*, 413 U.S. 15 (1973) "concern" obscenity? If so, the report of decisions would be contraband. This creates a potential conflict or tension with §3190(l)(2) regarding legal materials. It also creates a problem for the application of §3144, whereby confidential mail is inspected for contraband (Proposed Text, p. 21), which section says that inspectors "shall not read" the contents of confidential mail. How do they determine if there is obscene *text*? Since it concerns obscenity, would a legal brief discussing the *Miller* case be contraband, thus subjecting the attorney to the sanction of losing confidential mail privileges under §3144(b) (Proposed Text, p. 21-22)? Surely, the regulations do not intend that, but they should be clarified to avoid that interpretation.[6]

More concerning is the structural ambiguity of subparagraphs A and B under §3006(c)(15). The regulation does not indicate whether merely one or both are required for the text to be considered obscene. Apparently, A and B are to be read as alternatives, mutually exclusive in a given case, for one concerns the "average" reader and the other "deviant" groups. If that is so, and subparagraph B alone is sufficient, the mere fact of appeal to a so-called "deviant" group automatically renders something obscene. That is inconsistent with *Miller* and with the definition of obscenity in Penal Code §311. An alternative regulation, tracking that Penal Code section's definition would cure the defect to a great extent.

Since the §3006(c)(15)'s definition is incorporated into **§3135(c)(12)**, it governs the disapproval of mail on the pretext of its containing obscene materials. The problem about "concerns" is not replicated in §3135 because that section, as written, builds in a subtle distinction between containing and concerning, unlike the way §3006 is written. However, the structural ambiguity of subparagraphs A and B within §3006(c)(15) *is* carried over into §3135(c)(12).

The defect is serious because virtually anything could appeal to a "deviant" interest.[7] In *Miller*-based definitions like P.C. §311, the problem is controlled somewhat by the prongs requiring patent offensiveness and lack of serious literary,

[6] One is reminded of the scene in Kafka's *The Trial* where the protagonist discovers that the court's lawbooks contain pornography. Franz Kafka, *The Trial*, trans. W. and E. Muir, London: Minerva (1992), p. 61.

[7] *A footnote on censorship.* Does the existence of foot fetishes, for example, mean that any and all shoe catalogues contain obscene text, merely because they describe the size and shape of footwear? We need not multiply illustrations for the argument to be on a proper footing.

scientific (etc.) value. A rule explicitly stating that those prongs also apply to class B obscene texts would be a modest improvement over the proposed regulations. However, the definition of obscene text is only one of several vague provisions to be encountered in NCR 23-12.

Part IV The New Vague (Same As the Old Vague): Proposed §§ 3006(c)(17), 3135(a), and 3135(c)(1)

Offering a less dramatic but more precise rendition of Lord Acton's maxim[8], the legal realist Karl Llewellyn wrote: "[P]ersons in power, if freed of all restraint, grow in their good time most uncomfortably arbitrary. The individual, or the sub-group, needs not only policing by, but protection from the government." Llewellyn, The Constitution as an Institution, 34 Colum. L. R. 1, 38 (1934).

Subsection **3006(c)(17)**, as renumbered, defines as contraband "Material that is reasonably deemed to be a threat to legitimate penological interests" (Proposed Text, p. 2). The opening section of the Initial Statement touts the "clarity" provided to staff and incarcerated persons by the regulations in NCR 23-12 related to contraband, which are said to be "exhaustive" (ISOR, p.1). From one vantage point, we can indeed say that exhaustiveness is achieved by §3006(c)(17), but it accomplishes that at the cost of clarity, not in furtherance of it. One can only describe the list as exhaustive insofar as that subsection functions as a catch-all device: whatever the Department – or any of its officials purporting to be applying the rules – wants to ban, it can "deem" a threat. Lacking any standards for guidance, that rule is a recipe for arbitrary and capricious decisions. Additionally, it enables viewpoint discrimination and other forms of discrimination to be practiced under the guise of avoiding ill-defined "threats" to penological interests.

The very term "penological" is a pseudoscientific word used by courts for the convenience of conveying deference to agencies. There may sometimes be sound prudential reasons for courts to self-limit their review to defer to the agencies' supposed knowledge and experience. But it becomes another thing

[8] Lord Acton, Letter to Archbishop Creighton, April 5, 1887 ("Power tends to corrupt and absolute power corrupts absolutely"), in HISTORICAL ESSAYS AND STUDIES, eds. J.N. Figgis and R.V. Laurence, London: Macmillan (1907).

entirely when the agency itself abdicates deploying its own acquired knowledge and experience and instead offers the same meaningless term inside the rules of its self-regulation. In the present instance, through the issuance of this vague regulation, the Department has bequeathed to the whim of its staff persons a regulatory authority that should properly be rule-bound. Who will censor the censors?

Unfettered discretion in the definition of contraband is bad enough. However, the situation is worse than that in the mailroom. Revised subsection **3135(a)** would remove any discretion *not* to censor, removing discretion only if it would be exercised in the direction of leniency. The word "may" is replaced by "shall" (Proposed Text, p. 12). No reason is offered why this change is needed. The Initial Statement merely declares that the relevant material "must be disapproved" (ISOR, p. 19). The Statement thus reflects the arbitrariness of the proposed rule itself. For it remains arbitrary, and apparently discretionary, as to what constitutes "danger, or a threat of danger" under the regulation (§3135(a)).

Another provision infected by vagueness is the rule bearing on incitement. Proposed **§3135(c)(1)** would extend to electronic communications the categorical disapproval of mail "of a character tending to incite" violence. This language tracks Penal Code §2601(c)(1)(B). Certainly, material meeting the legal definition of incitement can constitutionally be proscribed. However, this regulation and the statute do not follow the definition of incitement. They stretch it beyond recognition with a vague reference to *tendency*. Criteria for counting as a tendency are unlimited. Are very remote tendencies[9] to count? Better clarity, less arbitrariness, and less risk of discriminatory treatment would be achieved if an alternative rule is adopted: limit the prohibition to actual or *imminent* incitement.[10] Whether a piece of writing creates an imminent risk of violence may still vary within the prison context viz. what would be expected outside the institution. Thus, an incitement standard still allows for flexibility in rule application by prison administrators and does not amount to a uniform practice of free expression identical to non-carceral settings. Instead, it would prevent the concept of incitement from providing a blank check for prison administrators' censorship of controversial topics.

[9] *Cf.* K. N. Llewellyn, Free Speech in Time of Peace, 29 Yale L.J. 337, 339 (1920).
[10] Brandenburg v. Ohio, 395 U.S. 444 (1969).

At any rate, some qualifier of the proximity of the tendency to the actual danger is needed to give the rule a purchase on dangers, not merely imagined.

Part V

Checks and Balances: Regarding Negotiable Instruments (§3140)

The reason for revising this section is repeatedly given as "clarity" in the Initial Statement of Reasons (p.29-31). Clarity would be better achieved by explicitly framing a definition of "negotiable instrument" *for the purposes of this section.* Not having done so – and, to the contrary, stating at least as to subsection (c) that it is supposed to apply to "all negotiable instruments" (ISOR, p. 30) – certain perplexities ensue.

First perplexity. The term "negotiable instruments" applies to all negotiable instruments as defined by the Commercial Code, Division 3 (Comm. Code §§3101-3605). Then, it would apply not merely to the receipt of things like checks – and not merely to instruments for receiving payment, i.e., drafts – but also to "notes," e.g., promissory notes. However, that reading, though most defensible in terms of the literal meaning and the canon of general terms, is not very harmonious with a contextual construction in light of the items specially listed in 15 C.C.R. §3140(a) (all "drafts" under Comm. Code §3104) and in light of the section heading[11] "Funds Enclosed in Mail" (Proposed Text, p. 18).

Second perplexity. The time frame for storing negotiable instruments in the Trust Office safe is a mere thirty days (proposed §3140(a)(2)). The same subsection as proposed calls for notification via the revised Form 1819. However, in its revised version, that Form speaks of sixty days. This is confusion, not clarity. Is this a mistake in drafting the regulation, or does the Department intend to set up a distinct time frame applicable to negotiable instruments? If so, why? One might think that given the valuable character of the possession of such instruments – which, among other things, motivates putting them *in a safe* – they should have as long or considerably longer a timeframe for disposition. Presuppositions about the usual duration of instruments' validity are out of place here; various instruments will have various lives. The Commercial Code is replete with provisions bearing

[11] Existing §3140's heading says "Correspondence" rather than "Mail."

on time (§§3108 and 3304, notably). Sometimes, these will mean that an instrument has a lifetime measured in years or decades. Establishing a shorter timeframe than that allowed for other disapproved mail is arbitrary.

Third perplexity. The regulation presupposes that the negotiable instruments it deals with are the personal property of the incarcerated person. The basis for this assumption is not given. Probably most are. Even if *most* negotiable instruments sent by mail to persons inside were sent with the intent to deliver the draft to the incarcerated person as payee or as holder, this is not necessarily the case in every instance. Hypothetical example: "Enclosed, please find Junior's promissory note for his college loan. Would you review it and see whether he's getting a fair deal and return it to us ASAP? Yours, Mary." In this example, the negotiable instrument is Junior's or the lender's property, not the incarcerated persons receiving the mailing. Yet the regulations would give the incarcerated person the power to order the Department to destroy Junior's or the lender's property, and they would seem to require the Department to execute that command (new §3140(a)(2); Proposed Text, p. 18). Would this constitute a taking under the Fifth Amendment? A seizure under the Fourth? Deprivation of property *sans* due process of law under the Fourteenth?

Fourth perplexity. Under that same proposed subsection, the "sender's" name and address must appear on the face of the instrument; otherwise, the instrument is labeled as contraband (new §3140(a)(2)). The picture presupposed to form the backdrop of this regulation appears to be a case of a check drawn from the mail correspondent's account. In that scenario, the "sender" refers unambiguously to that person. Who is the "sender" in my hypothetical concerning Junior's college loan? Mary is the sender of the mail, but she sends no funds to speak of. So Mary has to write her name and address on Junior's promissory note,[12] or else the instrument is contraband. Note also that the concept of a "negotiable" instrument – as traditionally distinguished from a non-negotiable one – is premised on the notion that multiple holders may transfer the instrument. *See* Comm. Code §§3201-3207. Therefore, the sender of the mail and the issuer of the instrument might be totally different persons having no direct dealings with one another. NCR 23-12 does not indicate how its drafters thought through all these aspects of the field of law. It just asserts, without explanation, that it is "necessary

[12] Let's assume for sake of discussion that the loan is exclusively Junior's debt and that Junior is an adult.

to identify who is sending funds to the inmate" (ISOR, p. 29). Though the emphasis on all "senders" is stressed, ISOR p. 30-31, what a "sender" is, is not.

Fifth perplexity. What the drafters did focus on appears to be the danger of "illicit" transactions being conducted with negotiable instruments. This is the rationale for why, under subsection 3140(a)(2), the instrument must be disposed of after thirty days. The rationale in that context is incoherent. We're supposed to believe that an instrument "if not destroyed or returned to sender may be used to conduct illicit inmate business transactions within the institution" (ISOR, p. 29) – while it's *in the Trust Office safe*. Though vague, the rationale for identifying senders is more coherent: "funds from unidentified sources present a security issue" (Ibid.).

Sixth and final perplexity. Although not articulated clearly, the Department is concerned that incarcerated persons will use negotiable instruments for transactions that pose threats to the security and discipline of the institution. Very well; that's a credible administrative goal. But is it a legitimate interest? Apparently not, because the legislature has ruled it out. Penal Code §2601 governs the matter. That provision reads:

> (a) Except as provided in Section 2225 of the Civil Code, to inherit, own, sell, or convey real or personal property, including all written and artistic material produced or created by the person during the period of imprisonment. However, to the extent authorized in Section 2600, the Department of Corrections may restrict or prohibit sales or conveyances that are made for business purposes.

Above (in the "Third Perplexity" passage), we pointed out that some negotiable instruments may not be (or be intended to become) the personal property of the incarcerated person. However, many are. Those instruments that are personal property (as well as those that may be necessary incidents to the ownership of real property) fall squarely within the ambit of P.C. §2601(a). NCR 23-12 duly references that Penal Code Section but does not explain how its regulation is consistent with it. Arguably, the statute's explicit authorization of the Department's restriction of sales and conveyances for business purposes implies, by negative implication, that transfers of negotiable instruments that do not constitute "sales or conveyances for business purposes" are *not* within the Department's regulatory authority. So, for instance, a personal gift would be presumptively within the scope of the civil right to property protected under

§2601(a).[13] Moreover, the Department's regulation, which appears to be in tension with that right, requires an explanation to comply with the Government Code. Yet even in the case of business transactions, the Department needs to offer a justification under P.C. §2600. That statute is no blank check for administrative control. Simply saying "security" does not present a reasonable relationship to legitimate interests.

The negotiable instruments law of this state represents a half millennium of legal development within commercial and imperialist history. The 1890s saw a major first attempt at modernization in a multistate code, broadly adopted[14], then revised as part of the Uniform Commercial Code in the mid Twentieth Century; California's last extensive refinements, in the 1990s, still were largely in the U.C.C. vein. NCR 23-12 would treat the issue of negotiable instruments as though devoid of a wealth of context to draw upon.

In sum, despite the promise of clarity, upon thoroughly checking whether its implications can be cashed out, the section's scheme appears bankrupt; to be in order, it requires redrafting.

Part VI

Grievance, Indigence, Confidence (§§ 3137, 3138(h), and 3141)

Lastly, I discuss three sections that contain welcome improvements but do not quite go far enough in the direction of their promise.

Subsection **3138(h),** as revised, would afford indigent incarcerated persons "free and unlimited mail" to a "public defender's office, or the Office of the State Public Defender" in addition to the courts and (state) Attorney General's Office, as currently mandated. "This change is necessary," the ISOR explains (p.24), "to ensure due process is afforded to indigent inmates, by ensuring they have the ability to correspond with the legal system for active court cases." That is an important goal, and the change would partially serve the goal. However, an

[13] And the involuntary trust situation described by Civil Code §2225 is only applicable to the cases of proceeds and profits of a criminal offense; that would at most be relevant to a tiny fraction of cases of negotiable instruments sent via prison mail.

[14] K.N. Llewellyn, Meet Negotiable Instruments, 44 Colum. L.R. 299 (1944); James Barr Ames, The Negotiable Instruments Law, 14 Harvard L.R. 241 (1900).

alternative would be more effective in achieving the same purpose by expanding the list of eligible recipients of free, unlimited mail from incarcerated persons experiencing the condition of indigence. We propose revising the language further by adding to it the following: ***or any legal aid organization, legal services provider, legal support center, or private attorney providing*** **pro bono** ***services, representation, or consultation to the indigent incarcerated person.*** Such an alternative would be more effective in achieving the due process and access to justice aims of the regulation; it would also be less burdensome and more cost-effective for private persons, as the correspondents within those categories would be able more efficiently and more economically to communicate with the incarcerated individual.

The additions to **§3141** of several categories of expressly authorized correspondents with whom incarcerated persons can correspond confidentially are welcome (Proposed Text, p. 19-20). However, the authorized list of senders/receivers of confidential mail does not extend far enough. First, the existing and proposed rules do not comport with the requirements of Penal Code §2601. It is telling that the References given for the regulation include P.C. §2600 but omit express reference to §2601. The statute provides that there is a civil right "To correspond, confidentially, with any member of the State Bar or *holder of public office* […]" (P.C. §2601(b) (emphasis added). The statute is not limited to the categories of public officials described by the regulation. For instance, the regulation refers to "All state […] officials appointed by the governor" (15 C.C.R. §3141(c)(2)). The statute explicitly says all "holder[s] of public office," which is a wider class than those appointed by the Governor.[15] This incompatibility between the regulation and the statute must be disclosed for the rulemaking to comply with the Government Code.[16] To reconcile the regulation to the law, the alternative is obvious: express build into the rule the authorization's applicability to all holders of public office as the incarcerated person's correspondents. Including all public officials would largely obviate the need to list out each category, but if having such a planned redundancy serves the function of clear instructions, some additional categories should be included. As foreign consular officials are already included in

[15] *Cf*. Cal. Const. Art VII, §§1 and 4. Civil service includes officers of the State not exempted (Art VII, §1(a)); one of the exempt categories is "State officers directly appointed by the Governor[…]" (Art. VII, §4(f)). The necessary logical inference from these constitutional provisions is that may exist state officers not appointed by the Governor.

[16] Gov. Code §§11349 and 11349.1. The discussion, *supra.* Part II, regarding statutory and regulatory consistency applies here as well, *mutatis mutandis*.

the list (§3141(c)(7)), it makes sense that United Nations officials and officials of international human rights treaty bodies and other organizations created by international legal treaties – at least those to which the United States is a party – should be mentioned.

The addition of "rape crisis centers and sexual victim advocacy groups" in new subsection §3141(c)(11) is welcome. Its rationale (ISOR, p. 32), in part, refers to the "confidential nature of the subject matter" of such communications. That purpose would be served with greater effectiveness if the subsection were expanded to include all confidential communications with physicians, psychiatrists, and psychotherapists under health privacy laws and norms. That alternative would also be less burdensome and more cost-effective to private persons affected since those health personnel would be able to communicate with their patients or prospective patients honestly and more securely.

It must be observed additionally that the regulation of "outgoing" confidential mail in §3142 appears to be inconsistent with Penal Code §2601(b) regarding legal mail and mail to public officials. The statute contains a proviso: "provided that the prison authorities may open and inspect *incoming* mail to search for contraband" (emphasis added). By the canon of negative implication, *outgoing* mail is not subject to that proviso and thus remains protected from inspection.[17] Now, it might be the case that it would have been wiser for the legislature to include outgoing mail within that proviso. Still, it didn't do so; it is not the proper role for the Department to usurp undelegated legislative power by doing so in the legislature's place.

Another regulatory change that offers a welcome improvement is the change from 30 to 60 days as the deadline for initiating the postponement of mail disposition pending grievance processing in **§3137**. The change is also reflected in the revised Form 1819. So far, so good. The change helps to prevent the disputed mail's precipitous destruction, but the time frame should be extended even longer.

[17] The reasoning of *In re Jordan*, 12 Cal.3d 575, 580 (1974) may also provide an apt analogy: "As examination of printed enclosures *would not significantly enhance prison security*, it seems doubtful that the Legislature intended to undermine the policy favoring the confidentiality of attorney-client communications by permitting unrestricted examination of such materials" (emphasis added). Just as incoming printed enclosures such as "Xeroxed cases and law review articles" (*In re Jordan*, 12 Cal.3d at 579) do not pose a "serious threat to prison security" The Court's footnote 5 (Ibid.) contrasts such printed materials with the "importation" of weapons, explosives, liquor, narcotics, which items *do* pose a threat to the prison. The threat described is one applicable to incoming mail.

Why rush to the bonfire? If 60 days ensures a workable procedure and better results than 30, why not 90? Or 120? These are obvious alternatives, yet NCR 23-12 gives no adequate rationale to support the selection of 60 days rather than a longer period. The Initial Statement, p. 22, explains that the 60-day period is selected to align this section with the 15 C.C.R. §3482 grievance timeline. This does not add up, though. Granted that the period in §3137 cannot be shorter than that of §3482, that does not explain why it shouldn't be longer.

Especially is ample time a concern since the rule and the form do not seem to give identical instructions. The proposed rule[18] says that the "submittal of a grievance within 60 calendar days of a notice" "shall" postpone the disposition (Proposed Text, p. 14). The triggering event of postponement, then, is the grievance, pursuant to §3482. However, the form indicates that the incarcerated individual's "response" on Form 1819 will decide the "HOLD PENDING INMATE GRIEVANCE/APPEAL." The complicated scheme of color-coded copies in quintuplicate, as described in Distributions A and B, suggests that transmission of the Goldenrod and Pink copies of the form by the incarcerated individual (which, by the time it reaches her, is in triplicate) suffices to trigger the postponement. That is how anyone able to decipher the language of Form 1819, on its face, would understand the consequences of the "response" it solicits. For that reason, the form is inconsistent with the regulation and so misleads the user – because the regulation seems to say that the *grievance* (i.e., one that, if the proper protocol is followed, would be issued on Form 602-1 per §3482) is necessary to trigger the postponement; both the indication on Form 1819 *and* the actual grievance submission are, apparently, required (Proposed Text, p. 3137). This should be clarified to avoid confusion for both staff and incarcerated persons. We recommend that the clarification allow either one or the other (or both) of Form 1819 and Form 602-1 to suffice for the purpose of the postponement pending further proceedings.

It is important to recognize that parties with grievances and other claims against the Department for censoring the mail include those not under its jurisdiction. As the current regulation provides, "persons other than" the incarcerated individual "should"[19] submit complaints to the Director of the Division of Adult Institutions (DAI) or to the Warden or Associate Director of a specific institution, depending on the issue (§3137(c)). No timeline for the

[18] And the existing rule says that grievance submittal "will" postpone disposition. 15 C.C.R. §3137(b).
[19] NCR 23-12 would change the *should*'s to *may*'s. Proposed Text, p. 14.

disposition of the mail is set out for these complaints, apart from the deadlines for Department replies and responses to appeals (Proposed Text, p.14). So it could be that the disputed item is destroyed after 60 days due to inaction (or selection of destruction) by the incarcerated person, who may not even have been aware of the other person's complaint, while a complaint or appeal by that other person is still pending. Likewise, while section 3134.1 outlines a more or less elaborate system for dealing with publishers, and subsection 3134.1(e) provides for an *updated Notice* to the incarcerated person of DAI determinations of disapproval/approval, the regulations would not appear to prevent the following hypothetical scenario. Notice to the publisher of a temporarily disapproved publication is sent to the publisher, while the incarcerated person and the DAI are also informed, all just barely within the corresponding fifteen-day deadlines (proposed §3134.1(d)(1)-(3)). The incarcerated person submits a response on the *green* form (perhaps irregularly, perhaps not; Form 1819 instructs that the response is to come via Goldenrod/Pink, but nowhere is it explained what happens if a response is transmitted via the green copy), checking the DESTROY option[20] or the RETURN TO SENDER option but without sufficient funds to cover the return. Meanwhile, the publisher submits a complaint, contesting the disapproval. Meanwhile, the DAI reverses the decision at the tail end of its thirty-day window (proposed §3134.1(d)(3)). It informs the incarcerated person at the end of the fifteen-day re-notification deadline (proposed §3134.1(e)). The mail under dispute may already have been disposed of. Even without the hypothetically supposed response via the green form, if the incarcerated person has not yet issued any response, she may have no time left since, under this scenario, *the Department Processing* uses the 60 days to do so. Accordingly, it makes sense to have an automatic hold on disapproved items that last longer than 60 days – at least when the disapproved item consists of expressive material censored based on content. Such actions of disapproval are particularly apt to be disputed upon free speech or free press grounds. Not destroying the item before such disputes have a fair opportunity to be heard is essential to ensuring that the First Amendment is respected. It would also lessen the burdens and costs imposed on affected private persons, including publishers who might otherwise be obliged to replace the prematurely destroyed material or risk harm to their business reputation.

[20] Let's assume, for the sake of the example, that the incarcerated persons puts misplaced trust in the ability of censors to properly identify truly banned items, in a situation when there is a strong case to be made that the item in question is not properly subject to the ban.

Granted, the Department need not store books in perpetuity; not even the Library of Alexandria could accomplish that feat. Some alternative period longer than 60 days is called for. Given the various levels of Departmental processing (institutional mail room and DAI) and the dual (or more) nature of contesting the Department's action (Form 1819 as well as Form 602-1 and/or other complaints), 120 days seems like a reasonable minimum.

CONCLUSION

The issues of notice and irregularity of administrative procedure are significant and render portions of this rulemaking of dubious legality. The mismatch between the contents of the Notice and the Proposed Text is perhaps outdone by the mismatch between the *end of clarity* of the *rule of confusion* pervading NCR 23-12.

Respectfully,

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LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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