



1 the First Amendment<sup>1</sup> to the Constitution when they rejected or  
2 failed to forward certain items of his mail. Plaintiff alleges  
3 Defendants acted unconstitutionally when they (1) failed to forward  
4 his second class mail; (2) rejected as undeliverable an Amnesty  
5 International catalog addressed to Plaintiff; (3) rejected as  
6 undeliverable certain magazines which were gift subscriptions; and  
7 (4) rejected as undeliverable certain applications for educational  
8 and financial aid. These acts occurred between November 14, 1993  
9 and February 9, 1994. (Tr. at 115.) Defendants include Tom Rolfs,  
10 Director of Prisons; James Spalding, former Director of Prisons;  
11 Tana Wood, Superintendent at WSP; Ron Van Boening, Associate  
12 Superintendent at WSP and Supervisor of the Mailroom; and Dennis  
13 Potts, Mailroom Supervisor at WSP. Plaintiff seeks compensatory and  
14 punitive damages and declaratory and injunctive relief.<sup>2</sup>

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16 <sup>1</sup>Plaintiff also alleges a claim under the Fourteenth Amendment  
17 to the Constitution. However, since his claims involve the actual  
18 taking of property not defined as contraband by the institution,  
19 due process is not at issue. See Sizemore v. Elliford, 829 F.2d  
20 608, 610-11 (7th Cir. 1987). Therefore, the court confines its  
21 discussion to the First Amendment claims.

22 <sup>2</sup>At the outset, the court notes Plaintiff's closing argument,  
23 submitted as a written memorandum, includes several documents not  
24 admitted as exhibits during trial. These documents will not be  
25 considered. Admitted exhibits will be referenced by the number  
26 assigned to each document at trial.

27 Plaintiff's closing argument also contains claims not raised  
28 at trial. (Ct. Rec. 58 and 59.) To the extent any claims were not

1 On July 25, 1995, the court referred the matter to the Federal  
2 Judicial Mediator, and stayed the proceedings pending the outcome  
3 of mediation efforts. (Ct. Rec. 25.) The stay was lifted on  
4 November 20, 1995, and the matter proceeded to trial before the  
5 undersigned after waiver of the right to a jury trial.<sup>3</sup> (Ct. Rec.  
6 41.) Both parties have submitted their closing arguments in the  
7 form of written memoranda. (Ct. Rec. 59 and 64.)

8 **OBJECTIONS TO EXHIBITS**

9 Post-trial, Defendants objected to certain Exhibits admitted  
10 at trial, or submitted with Plaintiff's closing argument, including  
11 Exhibit 21, WSP Administrative Bulletin, dated September 8, 1995;  
12 Exhibits 33(a), (b) and (c) and Exhibit 34 on grounds of lack of  
13 proper foundation and/or authentication; and exhibits submitted as  
14 attachments to Plaintiff's closing argument.

15 Defendants objected to the admission of Exhibit 21 during  
16 trial and the court agreed it would not be helpful to ask questions  
17 from the policy statement, but had it marked as an Exhibit. (Tr.  
18 at 58.) Because Exhibit 21 is outside the time frame of the  
19 lawsuit, it is not relevant and the objection is therefore  
20 **SUSTAINED**. However, to the extent the Administrative Bulletin has  
21 been incorporated into WSP regulations, the objection is **OVERRULED**.

22 \_\_\_\_\_  
23 addressed at trial, they are foreclosed untimely.

24 <sup>3</sup>On February 23, 1996, Defendants filed a Motion for Summary  
25 Dismissal. (Ct. Rec. 32.) The court did not consider Defendants'  
26 motion because it was filed after December 29, 1995, the  
27 dispositive motion cutoff date designated in the Scheduling Order.  
28 (Ct. Rec. 23 and 41.)

1  
2 Exhibits 33(a), (b) and (c) are copies of the grievance  
3 proceedings instituted with various mail rejections and address the  
4 Level I responses to those grievances. Defendants object these  
5 reports lack authentication in that the grievance coordinator's  
6 signature was not authenticated. No objection was raised at trial,  
7 so the objection is **OVERRULED** as untimely. (Tr. at 89.)

8 Defendants object to Exhibit 34, a letter from Superintendent  
9 Bosse of the Special Offender Center. Defendants object the letter  
10 was submitted without authentication of the signature or its  
11 contents. Defendants objected at trial and that objection was  
12 overruled. (Tr. at 89, 90.) The court will not reconsider its  
13 Motion at this time. Accordingly, Defendants' objection is  
14 **OVERRULED**.

15 Finally, Defendants object to all exhibits not admitted at  
16 trial but attached to Plaintiff's closing argument. Defendants'  
17 objection is **SUSTAINED**.

18 **MOTION TO DISMISS DEFENDANT SPALDING**

19 At the start of trial, Defendants moved to dismiss Defendant  
20 Spalding because he had retired from the Washington State  
21 Department of Corrections two days after the first of the mail  
22 rejections. The court reserved its ruling on the Motion. (Tr. at  
23 9.) Exhibit 25 involves a response by Defendant Spalding to a  
24 grievance filed by Plaintiff in conjunction with the mail rejection  
25 issues being litigated here. Thus, Defendants' Motion is **DENIED**.

26 **42 U.S.C. § 1983**

27 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
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1 allege (1) the violation of a right secured by the Constitution and  
2 laws of the United States, and (2) the deprivation was committed by  
3 a person acting under color of state law. Parratt v. Taylor, 451  
4 U.S. 527, 535 (1981), overruled in part on other grounds, Daniels  
5 v. Williams, 474 U.S. 327, 330-31 (1986); Leer v. Murphy, 844 F.2d  
6 628, 632-33 (9th Cir. 1988).

7 DISCUSSION

8 Since January 9, 1991, Plaintiff has been incarcerated at  
9 several institutions in the State of Washington. The civil rights  
10 claims at issue here concern Defendants' alleged unconstitutional  
11 application of WSP Field Instructions 450.100<sup>4</sup>

12 \_\_\_\_\_  
13 <sup>4</sup>WSP Field Instruction 450.100 provides in part:

14 V. FIELD INSTRUCTION: The Penitentiary encourages  
15 correspondence that is directed to socially useful goals.  
16 In an effort to promote this communication, the  
17 Institution shall provide each inmate free writing paper  
18 and envelopes. All housing Units will ensure inmates  
19 have access to writing paper and envelopes.

18 . . . .  
19 F. Inmate incoming mail shall be opened for  
20 inspection and removal of contraband.

21 . . . .  
22 K. The Associate Superintendent or designees shall  
23 inspect the Mail Room monthly to include reviewing logs  
24 concerning mail disposal, mail charges, indigent  
25 listings, mail security, timely receipt of Legal Mail and  
26 mail returned to sender.

24 VI. PROCEDURE:

25 A. Incoming Mail:

26 . . . .  
27 2. . . .Delivery of such mail will be refused  
28 when the mail meets any of the following criteria:

1 and/or 440.000<sup>5</sup> to four types of mail: forwardable second class.

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r. Catalog, pamphlet, or magazine not allowed by this instruction, i.e., the mail contains an unauthorized publication (catalog, pamphlet, or magazine)

s. Magazine, book, newspaper not mailed directly by the publisher/retailer.

t. Items not ordered and approved in advance through facility-designated channels.

L. Change of Address and Forwarding of Inmate Mail

1. Staff shall make available to an inmate upon his request appropriate change of address forms.

2. Inmates are responsible for informing their correspondents of a change of address.

3. Postage for mailing change of address cards is paid by the inmate.

4. Staff shall use all means practicable to forward Legal mail.

5. Staff shall forward inmate general 1st class and all Legal mail to the new address for a period of 30 days; after which time all mail received will be returned to the U.S. Postal Service for disposition.

<sup>5</sup>WSP Field Instruction 440.000, since amended October 8, 1995, states:

II. PURPOSE: To prescribe limitations on the volume and type of personal property to be maintained in an inmate's possession and to maintain proper safety, sanitation, control of security at Washington State Penitentiary. This order specifies what property is authorized. Anything not specified in this instruction, other than items available in the Inmate Store, is not authorized.

VII. PROCEDURE - PURCHASES

1 mail, catalogs, magazine gift subscriptions, and university and  
2 financial aid applications. Both parties agree the issue in this  
3 case is whether Defendants' actions deprived Plaintiff of his  
4 rights under the First to the Constitution.<sup>6</sup>

5 Initially, the parties agree this lawsuit does not challenge  
6 the facial validity of WSP Field Instruction 450.100 or 440.000.  
7 Notwithstanding that conclusion, Plaintiff contends the regulations  
8 have been unconstitutionally applied. Statutes may be challenged  
9 on two grounds: (1) either facially or (2) as applied. <sup>2</sup> Compassion  
10 in Dying v. State of Washington, 79 F.3d 790, 842 (9th Cir. 1996).

11 As noted by Justice Scalia:

12 Statutes are ordinarily challenged, and their  
13

14 B. All purchases must be from an approved vendor or  
15 catalog outlet, approved curio sales, or the inmate  
16 store. Only authorized items NOT sold in the Inmate  
17 Store may be purchased from vendors, catalogs, or curio.

18 C. In compliance with Inmate Fund Accounts Policy  
19 (02.160), all orders must be on Institutional Order Forms  
20 and witnessed by the CUS or Counselor. All order and  
21 disbursement forms will be routed by the Counselor to  
22 Intelligence and Investigations, Special  
23 Service/Property, and Accounting.

24 D. All purchases must come from the purchasing  
25 inmate's account, and the disbursement request(s) must  
26 cover the full amount of the purchase. No payment plans,  
27 trade-ins, barter or contract arrangements will be  
28 allowed.

29 <sup>6</sup>To the extent Plaintiff claims relief under 18 U.S.C. § 1702,  
30 such a claim will not be considered, since that statute is criminal  
31 and does not provide for relief in a civil action. Sciolino v.  
32 Marine Midland Bank-Western, 463 F. Supp. 128, 131-34 (W.D.N.Y.  
33 1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 162  
34 (D.D.C. 1976).

1 constitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context but not to render it utterly inoperative. TO achieve the latter result, the plaintiff must succeed in challenging the statute "on its face." Out traditional rule has been, however, that a facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.

8 Id., citing Ada v. Guam Society of Obstetricians and Gynecologists,  
9 506 U.S. 1011 (1992) (Scalia dissenting from denial of certiorari).

10 Thus, the court examines each of Plaintiff's claims in light of the  
11 regulations and how they have been applied in those specific  
12 instances.

13 **1. Failure to Forward Second Class Mail**

14 Plaintiff first claims Defendants, through procedures used in  
15 the mailroom, failed to forward second-class mail, an omission he  
16 contends is a violation of his First Amendment rights.

17 Rights secured by the First Amendment are fundamental;  
18 convicted prisoners retain First Amendment rights not incompatible  
19 with their status as prisoners. Burton v. Nault, 902 F.2d 4 (6th  
20 Cir. 1990), cert. denied, 498 U.S. 873 (1990). In Procunier v.  
21 Martinez, 416 U.S. 396 (1974), overruled on other grounds,  
22 Thornburgh v. Abbott, 490 U.S. 401 (1989), the Supreme Court held  
23 censorship of prisoner mail is justified only when the regulation  
24 furthers "an important or substantial government interest unrelated  
25 to the suppression of expression" and that the limitation of First  
26 Amendment freedoms "must be no greater than is necessary or  
27 essential to the protection of the particular governmental

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1 interest" involved. Id. at 404. The ruling in Martinez was not.  
2 based on an analysis of prisoner rights, but on the protection of  
3 the First Amendment rights of a party outside the prison wishing to  
4 correspond with an inmate. Martinez, at 408. Here, Plaintiff does  
5 not challenge the constitutionality of the regulations at issue;  
6 rather, he claims they were unconstitutionally applied to  
7 particular pieces of mail.

8 Initially, Plaintiff was incarcerated at the Washington  
9 Corrections Center (WCC), in Shelton, Washington. At that time, he  
10 received by mail subscriptions to several different magazines.<sup>7</sup> In  
11 April 1991, Plaintiff was transferred to WSP and his subscriptions  
12 were forwarded without difficulty. (Ct. Rec. 53, Ex. A; Tr. at  
13 84.) In March 1992, Plaintiff returned to WCC. (Tr. at 83.) At  
14 that time, Plaintiff alleges Defendants failed to forward his mail  
15 to WCC in accordance with the United States postal regulations.<sup>8</sup>

16 \_\_\_\_\_  
17 <sup>7</sup>Plaintiff's subscriptions included the following: (1) The  
18 Christian Science Monitor; (2) Guideposts; (3) Metropolitan Home;  
19 (4) Mother Jones; (5) National Geographic; (6) Playboy; (7) Popular  
20 Science; (8) Reader's Digest; (9) The Rocket; and (10) Rolling  
21 Stone.

22 <sup>8</sup>United States Postal Service regulations provide forwarding  
23 of first-class mail for one year following a change of address and  
24 second-class mail for sixty days. Domestic Mail Manual F010.5.1  
25 and F010.5.2. Mail addressed to an inmate who has left an  
26 institution "must be redirected to the current address, if known,  
27 or endorsed appropriately and returned by the institution to the  
28 post office." Domestic Mail Manual D042.5.1.

(11)

1 After Plaintiff's subscriptions failed to arrive, he was able to  
2 contact only one publisher with his new address because he did not  
3 have the addresses of the remaining publications. (Tr. at 104.)

4 When Plaintiff returned to WSP in July 1992, Plaintiff  
5 testified he was provided with a copy of a WSP field instruction  
6 which stated the institution maintained records of undeliverable  
7 mail. (Tr. at 84.) Pursuant to that field instruction, Plaintiff  
8 requested information regarding his mail which had ~~not~~ been  
9 forwarded to him at WCC. ~~AND NOT ATTACHED~~ In response, Plaintiff was provided  
10 copies of the covers of magazines to which he had subscribed, with  
11 Postal Service Form 3579 attached, noting as Plaintiff's new  
12 address: "WASHINGTON STATE CORRECTIONS CENTER, PO BOX 900,  
13 SHELTON, WA. 98504." (Ex. 3, and Ex. 26-32.) In December 1992,  
14 Plaintiff was transferred from WSP to Clallam Bay Corrections  
15 Center (CBCC). Again, Plaintiff's magazines<sup>9</sup> were not forwarded to  
16 his new address. (Tr. at 87.)

17 Plaintiff filed several grievances concerning WSP's forwarding  
18 policy, but the WSP Grievance Coordinator refused to adopt  
19 Plaintiff's suggested remedies. ( Ex. 33(a), (b) and (c).)  
20 Plaintiff appealed WSP's refusal to change its mail forwarding  
21 policy to Defendant Spalding without success. (Ex. 25.)

22 Prisoners have a right to send and receive mail, Thornburg 490  
23 U.S. at 407, and prison authorities have a responsibility to

24 \_\_\_\_\_  
25 <sup>9</sup>Plaintiff testified he misplaced his list of subscriptions,  
26 but recalled he was receiving at that time, gift subscriptions to  
27 The Christian Science Monitor, National Geographic, Popular  
28 Science, The Rocket, and Rolling Stone. (Tr. at 87.)

(12)

1 promptly forward mail to an inmate once it has been received at the  
2 institution. ~~Bryan v. Werner~~, 516 F.2d 233, 238 (3d Cir. 1975);  
3 ~~United States ex. rel. Wolfish v. Levi~~, 439 F. Supp. 333, 345  
4 (S.D.N.Y. 1977), rev'd in part on other grounds, sub. nom., Bell v.  
5 Wolfish, 441 U.S. 520, 529 n.10 (1979) (the district court's  
6 decision with respect to mail forwarding was not appealed). An  
7 isolated incident of delay is not enough to state a cognizable  
8 claim for relief under 42 U.S.C. § 1983. ~~See Bach v. Illinois~~, 504  
9 F.2d 1100, 1102 (7th Cir.), cert. denied, 418 U.S. 910 (1974).

10 Defendant Van Boening stated when mail is delivered to the  
11 institution, it ceases being United States mail because the act of  
12 delivery has been completed. (Tr. at 60.) Mr. Potts indicated  
13 Form 3579 is placed on second, third and fourth-class mail to  
14 enable forwarding to a new address when an inmate has been  
15 transferred to another institution. The form is not used for  
16 first-class mail; rather, the new address is written directly on  
17 the first-class mail envelope and the letter is returned to the  
18 U.S. Postal Service for delivery. (Tr. at 39.)

19 The circumstances here differ from others which address the  
20 obligation of a penal institution to forward legal mail,  
21 inferentially involving access to court issues. See Wolfish. It  
22 also differs from other rulings when there were no procedures for  
23 inmates to report changes of address; here, WSP provides inmates  
24 with change of address cards and has instituted a policy of  
25 forwarding all first-class mail, either legal or not, for 30 days.  
26 With respect to second-class mail, Postal Service Form 3579 is  
27 affixed to the magazine and that form is stamped with the new

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11

1 address. (Exs. 27-32.)

2 Plaintiff alleges by affixing Form 3579, Defendants are  
3 directing the Postal Service to return the mail to sender, not to  
4 forward it to the new address. (Ex. 33(b).) Plaintiff contends  
5 the procedures used at the WSP mailroom result in the permanent  
6 loss of property.

7 With respect to the use of Form 3579, and in response to a  
8 grievance filed by Plaintiff on this issue, Sgt. Warneka, WSP mail  
9 room supervisor, noted:

10 I find that WSP Mail Room procedures reflect the advice  
11 of local postal authorities. Because WSP is an  
12 institution, and its employees act as agents of those  
13 individuals incarcerated here, PS form 3579 is used to  
14 notify the senders of Second Class, Third Class and  
Fourth Class mail where to send future mailings. In the  
long run, an inmate will receive his future mailings  
faster, with fewer delays for forwarding.

15 (Ex. 33(b).)

16 Sgt. Warneka's statement is supported by postal service  
17 regulations and practices. Under postal service regulations,  
18 undeliverable second-class mail is forwarded by the U.S. Postal  
19 Service for 60 days at no expense if a change of address is filed,  
20 even if the copies show a request for return by the sender.  
21 Domestic Mail Manual (DMM), Issue 40, 09-01-95, 5.2. || However,  
22 since the second-class mail in this instance has been addressed to  
23 an institution, the mail is considered delivered under postal  
24 regulations when it reaches the institution. DMM Issue 49, 09-01-  
25 95, D042.2.51. This rule would also apply to mail delivered to  
26 group homes, law offices, hospitals or other addresses with  
27 multiple addressees.

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1 DO42.2.51 further provides "[i]f the addressee is no longer at  
2 that address, the mail must be redirected to the current address,  
3 if known, or endorsed appropriately and returned by the institution  
4 to the post office." However, when a change of address is affixed  
5 to a particular piece of mail delivered to an institution,  
6 additional postage is required for it to reenter the postal stream,  
7 because the article is considered to have been delivered. There is  
8 no evidence Plaintiff offered to affix additional postage to his  
9 second-class mail. The mail room's reliance on Form 3579 and the  
10 return of the item to the sender ensures that the publisher is  
11 ultimately informed of the change of address and constitutes  
12 compliance with the second portion of DO42.2.51. Although the  
13 court recognizes a minimum of one issue of the publication will not  
14 be delivered to the inmate (the issue with Form 3579 affixed), the  
15 remaining issues should reach the inmate at the new address. Any  
16 failure to do so would be the fault of the publisher, not the  
17 institution. Moreover, the decision by WSP to forward mail for 10,  
18 30,<sup>10</sup> 60, or 90 days is within its discretion since postal  
19 regulations do not apply to inter- or intra-institutional delivery.  
20 The mail forwarding practices and procedures of the WSP mailroom,  
21 as applied to Plaintiff's mail, are reasonable and in compliance  
22 with postal regulations. Moreover, they are a reasonable response

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24 <sup>10</sup>In Ex. 33(c), it is noted WSP's policy of forwarding mail for  
25 30 days is reasonable because it is expected within that time frame  
26 the inmate's change of address card will have gone into effect in  
27 the Post Office. Thus, the Post Office would do all subsequent  
28 forwarding.

1 to a legitimate penological goal, and are constitutional as  
2 applied. See Turner, 482 U.S. at 78. Accordingly, judgment is for  
3 Defendants and the claim is **DISMISSED WITH PREJUDICE**.

4 **2. Catalogs**

5 On November 4, 1993, Plaintiff wrote a letter to Amnesty  
6 International inquiring about literature on the effects of  
7 long-term sensory deprivation. (Ex. 37.) In response, a company  
8 representative mailed Plaintiff a catalog and an unsigned note  
9 explaining lack of familiarity with other publications on that  
10 subject. (Ex. 37.) Defendant Potts rejected the catalog; later,  
11 Plaintiff requested the catalog be forwarded to Mia Means. (Ex.  
12 4.) Ms. Means photocopied the catalog and mailed the photocopy,  
13 along with a note, to Plaintiff. Defendant Potts rejected the  
14 photocopy. (Ex. 5.)

15 WSP Field Instruction 450.100 (IV) (B) (a) specifically defines  
16 an authorized catalog as "[o]ne offering hobby craft or curio items  
17 for receipt by an inmate with a current and authorized curio  
18 permit." The Amnesty catalog does not meet this exception to the  
19 rule. Although it is slender and comprised of a svelte fourteen  
20 pages, it falls within WSP's definition of a catalog or pamphlet.  
21 See WSP FI 450.100 (IV) (M). (Ex. 1.) Whether an item is a catalog  
22 or a pamphlet, it is not authorized mail. WSP Field Instruction  
23 450.100 (V) (r).

24 The court finds Defendants' policy regarding catalogs and/or  
25 pamphlets, as applied in this instance, was a reasonable response  
26 to WSP's legitimate penological concerns of preventing fraudulent  
27 behavior, concealing contraband, and keeping cells sanitary and  
28

1 free of fire hazards. (Tr. at 24.) Additionally, catalog materials.  
2 are available through the curio program if they are an authorized  
3 curio, the chapel (for religious material) or the prison library.  
4 (Tr. at 24, 61.) Accordingly, as to Plaintiff's claim regarding  
5 Defendants' rejection of the Amnesty International catalog,  
6 judgment is for Defendants and the claim is **DISMISSED WITH**  
7 **PREJUDICE.**

### 8 3. Magazine Gift Subscriptions

9 Defendants Rolfs and Potts<sup>11</sup> rejected numerous issues of  
10 Guidepost magazine, citing WSP Field Instruction 450.100 and/or  
11 440.000. (Ex. 7, 8, 9, 10, 22 and Tr. at 45.) Defendants Van  
12 Boening and Spalding affirmed the rejections. Initially, the court  
13 notes the rejection is "source" based, rather than "content" based,  
14 because the magazine was a gift to Plaintiff and there is no  
15 contention it was rejected because of its content.

16 WSP regulations require that all inmate purchases be made  
17 through facility-designated channels. WSP Field Instruction  
18 450.100(VI) (A) (2) (t). According to Defendants' interpretation of  
19 this policy, inmates may receive magazine subscriptions only if  
20 purchased by the inmate, pre-approved by the inmate's counselor and  
21 paid with funds from the inmate's account. (Tr. at 30.) Defendant  
22 Wood stated she did not know which field instruction addressed the  
23 issue of magazine subscription purchases, but admitted it was  
24 "readily known." (Tr. at 30.) The policy is necessary, as  
25

26 <sup>11</sup>Ex. 35 and 36 indicate gift subscription notices were  
27 rejected by mail room employee N. Frost, not a party to this  
28 action.

1 explained by Defendant Wood, to facilitate WSP's ability to control  
2 payment for the subscription and the content of the magazine. (Tr.  
3 at 32.) She also stated the policy prevents strong arming and  
4 payoffs among inmates and their families outside the institution.  
5 (Tr. at 32, 33.)

6 Despite this policy, Plaintiff testified and Defendant did not  
7 dispute he received numerous gift subscriptions to several  
8 magazines through the years while at WSP. (Tr. at 107.) The  
9 evidence infers and the court finds a rejection of a gift magazine  
10 subscription occurs only when a gift subscription notification is  
11 mailed to the inmate. (Tr. at 43.) Inferentially, if no such  
12 notification is sent, there would be no rejection. Thus, the  
13 application of the policy depends, in large part if not  
14 exclusively, upon the publisher's practice with respect to  
15 acknowledging gift subscriptions.

16 The court first questions whether a "policy" exists. WSP  
17 Field Instruction 450.100(E)(1), which addresses the receipt of  
18 magazines, does not address the facility-designated channel  
19 requirement:

20 1. Conditions for Receipt: Inmates may receive a  
21 reasonable number of books, newspapers, magazines, and  
22 other publications directly from the publisher provided  
23 they do not constitute a threat to the order and security  
of the institution or meet the obscenity or sexually  
explicit definitions of this instruction or DOP or DOC  
policy.

24 Rather, the regulation confines restrictions to content  
25 requirements. There is no allegation by Defendants the gift  
26 subscriptions met the definition of security threat or obscene or  
27 sexually explicit materials. There is also no language in this  
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1 field instruction which addresses an inmate's right to receive a  
2 gift subscription. Rather, the inmate must read this section in  
3 conjunction with the section allowing purchases only through  
4 facility designated channels.

5 WSP Field Instruction 440.000(VII)(A), since superseded by  
6 Administrative Bulletin dated September 8, 1995, effective October  
7 8, 1995, addresses only "purchases." Furthermore, the record  
8 discloses Defendants' inability to locate a gift subscription  
9 restriction in WSP Field Instruction 450.100. (Tr. at 31, 45, and  
10 69.) In response to Plaintiff's grievance, Defendant Rolfs stated  
11 WSP Field Instruction 450.100 "very clearly states that all  
12 magazines will be prepaid and will be preauthorized by the  
13 authorities at Washington State Penitentiary." (Ex. 22.) However,  
14 at trial, Defendant Rolfs testified WSP Field Instruction 450.100  
15 "alludes" to the prohibition of gift subscriptions. Similarly,  
16 Defendant Wood was unable to quote the particular section of the  
17 field instruction which applied, stating only that it was "readily  
18 known." (Tr. at 30, 69-70.)

19 A gift is not a purchase by an inmate. Rather, it involves the  
20 rights of those outside the institution to provide a source of  
21 enrichment for inmates. Conceivably, quarterly gift packages may  
22 lawfully contain magazines not purchased by the inmate. WSP Field  
23 Instruction 450.100(F). The content of those magazines is examined  
24 at the time the quarterly package is inspected. The content of any  
25 gift subscription also would be examined when it is received at the  
26 institution. The only remaining rationale for rejecting a gift  
27 subscription is to prevent strongarming among inmates and family

28

NOT ON POINT

1 members.

2 Avoidance of strong arming is a legitimate penological  
3 interest, see, e.g., Mann v. Adams, 846 F.2d 589, 591 (9th Cir.),  
4 cert. denied, 488 U.S. 898 (1988). However, Defendants'  
5 application of this "policy" is inconsistent. Defendant Potts  
6 admitted he knew Plaintiff's subscriptions were gifts because he  
7 saw the publisher's notification on behalf of the donor. (Tr. at  
8 43.) Defendants describe no other steps taken by mail room  
9 officials to prevent inmates from receiving publications paid for  
10 by others. For example, if WSP cross-checked their inmate accounts  
11 to determine whether an inmate had paid for an incoming  
12 publication, Defendants' argument would be more persuasive.  
13 However, inmates easily can have family members or friends direct  
14 a publisher not to send the notice of gift subscription, depriving  
15 WSP officials of their basis on which to reject the publication.

16 The court's review of WSP Field Instruction 450.100 reveals no  
17 requirement magazines be ordered by an inmate. As to the  
18 strongarming rationale, no evidence was presented other than  
19 Defendant Woods' conclusory statement, that inmates will attempt to  
20 coerce third parties outside the institution to provide gift  
21 magazine subscriptions in exchange for favors among inmates. This  
22 argument is not persuasive as the institution permits gift packages  
23 on a quarterly basis and, surely, the same strongarming tactics  
24 could be imposed. The court concludes the application of this  
25 policy is inconsistent; furthermore, there is no legitimate  
26 penological interest at stake here. Accordingly, Plaintiff has met  
27 his burden on this claim against Defendants Rolfs, Potts, Van

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1 Boening and Spalding.

2 **QUALIFIED IMMUNITY**

3 Defendants argue they are entitled to qualified immunity from  
4 any damages which may be awarded. They contend Plaintiff has not  
5 met his burden with respect to demonstrating a clearly established  
6 law that their actions were unconstitutional in this instance, or  
7 in the absence of such law, that their actions were unreasonable.

8 A prison official is not absolutely immune from suit, but  
9 rather, only "insofar as his or her conduct does not violate  
10 clearly established statutory or constitutional rights of which a  
11 reasonable person would have known." Harlow v. Fitzgerald, 457  
12 U.S. 800, 818 (1982). Qualified immunity protects "all but the  
13 plainly incompetent or those who knowingly violate the law."  
14 Malley v. Briggs, 475 U.S. 335, 341 (1986). The test for  
15 determining whether a law enforcement officer is entitled to  
16 qualified immunity consists of two parts: "(1) Was the law  
17 governing the official's conduct clearly established? (2) Under  
18 the law, could a reasonable officer have believed the conduct was  
19 lawful?" Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir.  
20 1993.) The second part of this test is an objective inquiry; the  
21 subjective belief of the official as to the lawfulness of his or  
22 her conduct is not relevant. Anderson v. Creighton, 483 U.S. 635,  
23 641 (1987).

4 The determination of qualified immunity should be made by the  
5 factfinder if it involves facts which are genuinely in dispute.  
6 Barlow v. Ground, 943 F.2d 1132, 1139 (9th Cir.), cert. denied, 505  
7 U.S. 1206 (1992). That line of cases was questioned in Sloman v.

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1 only, a regulation which has not been challenged by Plaintiff as  
2 being unconstitutional on its face. Defendants' rejection of the  
3 gift subscriptions was not unreasonable. Consequently, the court  
4 finds Defendants are entitled to qualified immunity with respect to  
5 Plaintiff's prayer for damages. However, proof of this defense  
6 does not prevent the court from imposing permanent injunctive  
7 relief, preventing further interference by WSP personnel with  
8 Plaintiff's right to receive gift subscription magazines, which  
9 meet the requirements of content and storage, under institutional  
10 regulations which are currently in effect.

11 **4. College and Financial Aid Applications**

12 In April 1993, while incarcerated at SOC, Plaintiff enrolled  
13 in a correspondence program administered by Ohio University, taking  
14 15 credits of classes. The tuition charges (\$715) were advanced by  
15 his mother on the condition she would be repaid after Plaintiff  
16 received a Pell grant. (Tr. at 94.) To qualify for that grant,  
17 Plaintiff, with the approval of SOC, completed an application.  
18 (Ex. 18.) After submitting his application, Plaintiff was  
19 transferred to WSP in June 1993. Some time after his transfer, the  
20 agency sent Plaintiff a copy of his completed application to ensure  
21 the information he had provided was accurate. (Ex. 17.) Defendant  
22 Potts rejected the application as unauthorized mail under WSP Field  
23 Instruction 450.100. (Ex. 11.) Plaintiff also received an  
24 application to enroll in a correspondence course offered through  
25 Ohio University. Defendant Potts rejected this application, under  
26 WSP Field Instruction 450.100. (Ex. 13.)

27 Plaintiff appealed the mail rejection on December 15, 1993,  
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1 requesting his mail from the federal student aid agency. (Ex. 14.).  
2 Defendant Van Boening responded and suggested Plaintiff contact his  
3 counselor. (Ex. 15.)

4 Prisoners do not have a liberty interest in education under  
5 the due process clause, Rizzo v. Dawson, 778 F.2d 527, 530 (9th  
6 Cir. 1985); or under Washington law. See Hernandez v. Johnston,  
7 833 F.2d 1316, 1318 (9th Cir. 1987). Moreover, limitations on  
8 educational opportunities do not constitute punishment within the  
9 meaning of the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337,  
10 348 (1981); Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (1982).

11 Defendants assert the restrictions imposed by WSP Field  
12 Instruction 450.100 provide inmates access to educational programs,  
13 while protecting the legitimate concern of the institution to  
14 prevent fraud. (Tr. at 22.) Defendants claim any application  
15 process provides inmates with an opportunity to commit fraud. It  
16 is for these reasons Defendants contend WSP Field Instruction  
17 450.100 is necessary and constitutional.

18 The court agrees Defendants' policy, although different from  
19 other penal institutions within the state, balances both the  
20 institution's concerns to protect the public from fraud and the  
21 inmates' access to higher education. Defendant Wood testified an  
22 inmate's education is fully funded; under unusual circumstances  
23 when a grant is required, the inmate may work through the counselor  
24 and education director to secure that grant. Plaintiff admitted he  
25 had not inquired of his counselor or the education director  
26 regarding the availability of a student grant. (Tr. at 34, 112.)  
27 Thus, judgment is for Defendants on this claim. Accordingly,

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**IT IS ORDERED:**

1. Judgment for injunctive relief shall be entered against Defendants Rolfs, Potts, Van Boening, and Spalding on Plaintiff's claim involving the rejection of his gift magazine subscriptions. However, as to Plaintiff's request for a damages remedy, Defendants are entitled to qualified immunity from damages. **DEFENDANTS ARE PERMANENTLY ENJOINED, UNDER THE REGULATIONS WHICH ARE CURRENTLY IN EFFECT, FROM REJECTING THE DELIVERY OF PLAINTIFF'S GIFT SUBSCRIPTIONS TO MAGAZINES UPON THEIR DELIVERY BY THE POSTAL SERVICE TO THE WSP MAILROOM, SO LONG AS THE CONTENT OF THOSE MAGAZINES MEETS INSTITUTIONAL REGULATIONS AND THE BULK OF THOSE MAGAZINES MEETS STORAGE REQUIREMENTS.**

2. Judgment shall be entered for Defendants on all other claims at issue, and Plaintiff's complaint and those claims are **DISMISSED WITH PREJUDICE.**

3. The Clerk is directed to enter this Order and provide a copy to Plaintiff and counsel for Defendants. Each party shall bear its own costs.

DATED this 23<sup>rd</sup> day of May, 1996.



CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE

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