# PRISONER RIGHTS LITIGATION

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Because prisoners do not forfeit all civil rights upon conviction, other actions under Section 1983 also are available even to sentenced inmates. There is no distinction, incidentally, between convicted and sentenced inmates. Once convicted, the Eighth Amendment kicks in. Resnick v. Hayes, 213 F.3d 443 (9th Cir. 2000).

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turney v. Safley, 482 U.S. 78, 84 (1987). Like many areas of litigation under section 1983, prison litigation takes place in a constantly-changing legal environment. This is true partly because "[n]o static test exists that measures whether conditions of confinement are cruel and unusual, for the Eighth Amendment draws its meaning from the 'evolving standards of decency that mark the progress of a maturing society.' Rhodes v. Chapman, 452 U.S. 337, 346 (1981)." Talib v. Gilley, supra, 138 F.3d 211, 214 (5th Cir. 1998).

The breathtaking increases in the imprisonment of our fellow citizens during recent years are often commented upon. At the end of 1990, 20 of every 100,000 citizens were in federal prison and 272 were in state or local prisons. Eight years later, 38 of every 100,000 were in federal prison and 423 were in state and local prisons. On December 31, 1998, 1,302,019 citizens were imprisoned somewhere in the United States. Just six months later, the number had increased to 1,860,520. At that point, 11% of all black males, 4% of all Hispanic males, and 1.4% of all white males, in their twenties and early thirties, were prisoners. Males were 12 times more likely than females to be incarcerated. Beck, Prison and Jail Inmates at Midyear 1999 (DOJ Office of Justice Programs Bulletin No. 181643); Beck and Mumola, Prisoners in 1998 (DOJ Office of Justice Programs Bulletin No. 175687). Sixteen percent of these prisoners have been identified as mentally ill. Ditton, Mental Health and Treatment of Inmates and Probationers, (DOJ Office of Justice Programs Bulletin No. 174463). Almost 13% were receiving active mental health treatment in 2000 and 10% were receiving psychotropic medications. Mental Health Treatment in State Prisons, 2000 (Bureau of Justice Statistics, July 2001, No. NCJ 188215).

Any discussion of prisoner litigation must begin with the "Prison Litigation Reform Act" of 1996, 42 USC 1997e. Under that statute, the Section 1983 remedy has been drastically limited for all sentenced inmates in the name of toughness on crime. See

Alexander, "Prison Litigation Reform Act Raises the Bar," 16 Criminal Justice No. 4, p. 10 (ABA Section of Criminal Justice, Winter 2002).

The most significant limitation of the PLRA is its requirement that "administrative remedies" be exhausted before Section 1983 prison litigation may be brought. Although the statute limits that requirement to "prison conditions" cases, every suit a prisoner can file against prison officials is considered a "prison conditions" case and therefore the exhaustion requirement applies. Porter v. Nussle, 534 U.S. 516 (2002); Booth v. Churner, 532 U.S. 731 (2001). The authors of the statute, with exquisite Orwellian sensibility, added to that requirement the following: "The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action. ..." 42 USC 1997e(7)(a). But the Sixth Circuit, while adhering to the exhaustion requirement, has intimated that while an allegation that the administrative process is inadequate to redress the inmate's grievance is insufficient to avoid dismissal under the statute, an allegation that exhaustion of administration is precluded for some reason might avoid the bar. White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997). The Eleventh Circuit doesn't think so and imposes the requirement even when it appears that the relief available through an administrative appeal is not "plain, speedy and effective." Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998). The exhaustion requirement does not, however, extend to a requirement of pursuing the claim first through the state courts. Jenkins v. Morton, 148 F.3d 257 (3d Cir. 1998); Pozo v. McCaughtry, 286 F.3 1022 (7th Cir. 2002).

A Bivens action against federal prison officials may or may not be subject to the exhaustion requirement because the feds don't provide any form of administrative appeal to prisoners, depending on where you are. Whitley v. Hunt, 148 F.3d 882 (5th Cir. 1998), held that there is no such exhaustion requirement. Another panel of the same court has requested *en banc* reconsideration. Wright v. Hollingsworth, 201 F.3d 663, 666 (5th Cir. 2000). Three other circuits hold that the exhaustion requirement applies anyway. Wyatt v. Leonard, 193 F.3d 876, 878-79 (6th Cir. 1999); Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999); Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998). The Tenth Circuit appears to agree that the exhaustion requirement does not apply in these circumstances. Miller v. Menghini, 213 F.3d 1244 (10th Cir. 2000); Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997).

Other courts have applied this requirement of exhausting non-existent monetary damages remedies before filing federal suit in cases against state prison officials. Cruz v. Jordan, 80 F. Supp. 2d 109 (S.D.N.Y. 1999) (Hellerstein, J.); Bumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999).

The exhaustion requirement applies to suits by prisoners under what is left of the Religious Freedom Restoration Act, 42 U.S.C. § 200bb, *et seq.*, as well as to Section 1983 actions. Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001).

The courts are in agreement that the exhaustion requirement is not a jurisdictional one. It concerns only the timing of the action. Wyatt v. Leonard, 193 F.3d 876, 878-79 (6th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999); Tucker v. McAninch, 162 F.3d 1162 (6th Cir. 1998). Therefore, "district courts have some discretion in determining compliance with" the exhaustion requirement. Wyatt v. Leonard, 193 F.3d at 879. Accordingly, it is not necessarily required that the prisoner have used the particular procedural devices prescribed by state prison regulations for exhausting her administrative remedies so long as she has by some method brought her claims adequately to the attention of the appropriate officials. Hock v. Thipedeau, 238 F. Supp. 2d 446 (D. Conn. 2002) (Goettel, J.). Moreover, administrative remedies are exhausted when the officials in charge of the prison grievance system refuse to provide the inmate with the system's required grievance forms. Mitchell v. Horn, 318 F.3d 523 (3rd Cir. 2003).

Exhaustion is an affirmative defense which is waived if not asserted by the defendant. Jenkins v. Haubert, 179 F.3d 19, 28-29 (2nd Cir. 1999); Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001); Torrence v. Pesanti, 239 F. Supp. 2d 230, 231 (D. Conn. 2003).

But the courts have an obligation to raise the issue *sua sponte* if the defendants fail to do so. Brown v. Toombs, 139 F.3d 1102 (2d Cir. 1998); Curry v. Scott, 249 F.3d 493 (6th Cir. 2001). The court of course may not do so without first affording the prisoner plaintiff notice of its intention and an opportunity to be heard on the issue. Snider v. Melindez, 199 F.3d 108 (2d Cir. 1999). So what kind of affirmative defense is that?

An inmate need not wait forever to exhaust his administrative remedies. They will be deemed exhausted if a grievance has been filed and the time for responding thereto has expired without a response, Powe v. Ennis, 177 F.3d 393 (5th Cir. 1999); or if the prison has failed to provide the inmate with the required grievance forms, Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001); Mitchell v. Horn, 318 F.3d 523 (3rd Cir. 2003). In Days v. Johnson, 322 F.3d 863 (5th Cir. 2003), an inmate was excused from exhausting administrative remedies by filing a written grievance concerning failure to treat his broken hand when the broken hand made it impossible for him to write. If the inmate missed the deadline for filing, he may not sue but instead must seek permission to file an out-of-time grievance, the implication being that denial of such permission will constitute sufficient exhaustion of remedies. Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999).

The upside (and there's always an upside to the discerning eye) to the exhaustion of administrative remedies provision of the PLRA is that the statute of limitations for bringing the civil rights suit does not start to run until those remedies have been exhausted. Brown v. Morgan, 209 F.3d 595 (6th Cir. 2000); Johnson v. Rivera, 272 F.3d 519 (7th Cir. 2001).

The PLRA, however, applies only to plaintiffs who are prisoners at the time suit is filed. Those who have served their sentences and been released are not crushed under its heel. Greig v. Goord, 169 F.3d 165 (2d Cir. 1999); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000); Kerr v. Puckett, 138 F.3d 321, 322-23 (7th Cir. 1998); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998). If the suit is filed before the plaintiff is released, but he is released while the suit remains pending, the Eleventh Circuit has held that the plaintiff is covered by the PLRA's requirements because the determination of its applicability or inapplicablity is made at the moment of filing. Harris v. Garner, 216 F.3d 970 (11th Cir. 2000).

The PLRA does not apply to detainees who have been committed civilly, rather than criminally, under things like California's Sexually Violent Predators Act. Page v. Torrey, 201 F.3d 1136 (9th Cir. 2000).

Actual physical injury is a necessary predicate to prison litigation under the PLRA. 42 USC 1997(e)(7)(e). Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998); Siglar v. Hightower, 112 F.3d 191 (5th Cir. 1997) (holding a sore and bruised ear resulting from guard brutality failed to qualify); Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001). But see also Craig v. Eberly, 164 F.3d 490 (10th Cir. 1998), holding the limitation prospective only. This requirement applies only to actions for money damages, however. It does not apply to suits seeking nominal and punitive damages. Calhoun v. Detella, 319 F.3d 936, 941 (7th Cir. 2003. Nor does it apply to individual suits for injunctive relief. Thompson v. Carter, 284 F.3d 411, 418 (2nd Cir. 2002); Mitchell v. Horn, 318 F.3d 523, 533-34 (3rd Cir. 2003); Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Zehner v. Trigg, 133 F.3d 459, 462-63 (7th Cir. 1997); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 808 (10th Cir. 1999); Harris v. Garner, 216 F.3d 970 (11th Cir. 2000) (*en banc*), *cert. denied*, 532 U.S. 1065 (2001); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998). The PLRA generally so limits actions for prospective injunctive relief that courts probably will be reluctant to afford more than orders benefitting individual plaintiffs. *See* 18 U.S.C. 3626.

Another feature of the Prison Litigation Reform Act is the so-called "three strikes section," which bars the courthouse door even to meritorious prisoner suits if the prisoner has been misguided enough to file three prior suits that were dismissed for frivolousness or maliciousness, or unlucky enough to have three prior suits dismissed for failure to state a claim. 28 U.S.C. 1915(g). The statute does, however, have one loophole. The ban is imposed "unless the prisoner is under imminent danger of serious physical injury." See Gibbs v. Cross, 160 F.3d 962 (3d Cir. 1998) (conditions resulting from vent emitting dust and lint into cell constituted serious physical injury); Gibbs v. Roman, 16 F.3d 83 (3d Cir. 1997) (suit alleging that prison librarian permitted other inmates to read his legal papers and thereby to learn that he was a government informer) (Gibbs apparently has a lot of time on his hands); Ashley v. Dilworth, 147 F.3d 715 (8th Cir. 1998). The constitutionality of this statutory bar has been upheld. Carson v. Johnson, 112 F.3d 818 (5th Cir. 1997).

The courts vary in their approach to determining whether a given piece of unsuccessful litigation is to be counted as a "strike" for purposes of the "three strikes ban". Many courts leave that determination to the court before which the defendants are asserting the existence of the ban. In some places, however, federal judges make the "strike" or "nonstrike" assessment when dismissing a prisoner suit. If the suit is dismissed for whatever reason, these judges will make it a part of their ruling that this dismissal either is or is not to be counted as a "strike" should the prisoner sue again. Courts that do that have been required to give the prisoner plaintiff advance notice and an opportunity to be heard on that issue. Snider v. Melindez, 199 F.3d 108 (2d Cir. 1999).

The PLRA also limits Section 1988 attorney fees so severely that few unsubsidized lawyers will find the litigation affordable. See 42 U.S.C. 1997e(7)(d)(3): "No award of attorney's fees in an action described in paragraph (1) [suit brought by a confined prisoner in which attorney fees are authorized by Section 1988] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel." It is clear from the many cases that not surprisingly arose from this provision that it is within the constitutional power of congress to enact and will be applied to that portion of attorney fees earned subsequent to its enactment. Martin v. Hadix, 527 U.S. 343 (1-999); Boivin v. Black, 225 F.3d 36 (1st Cir. 2000); Chatin v. Coombe, 186 F.3d 82 (2d Cir. 1999); Collins v. Montgomery County Board of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999); Montcalm Publishing Corp. v. Commonwealth of Virginia, 199 F.3d 168 (4th Cir. 1999) (fee provisions apply to non-prisoner intervening plaintiffs as well as to prisoner plaintiffs); Madrid v. Gomez, 190 F.3d 990 (9th Cir. 1999); Beckford v. Irvin, 60 F. Supp. 2d 85 (W.D.N.Y. 1999). At least the time spent litigating the fee petition is compensable, albeit at the same low rates. Hernandez v. Kalinowski, 146 F.3d 196 (3d Cir. 1998).

If that isn't bad enough, the Fourth Circuit has held that even this minuscule fee is really a cap available only to those providing the highest-quality representation and that it applies retroactively to work done before the statute was enacted. Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997). The statute also imposes a 25% cap on contingency fees in such cases, which is to be credited against the now limited section 1988 award. At least that fee limitation is not applied retroactively. Martin v. Hadix, 527 U.S. 343 (1999); Blissett v. Casey, 147 F.3d 218 (2d Cir. 1998); Glover v. Johnson, 138 F.3d 229, 249-50 (6th Cir. 1998); Cody v. Hillard, 304 F.3d 767, 776-77 (8th Cir. 2002). Unsuccessful inmates who have exhausted their remedies and sued, but lost, will be liable for taxation of costs even if they are indigent. Singleton v. Smith, 241 F.3d 534 (6th Cir. 2001). The message in this, of course, is to wait to sue until your client is out of jail if the statute of limitations will permit you to do so. Other than waiting, consider including in the suit claims under other federal statutes which have their own attorney fee provisions. The PLRA fee limitations apply only to suits brought under Section 1983. They do not cap fees available to successful plaintiffs under the ADA or the Rehabilitation Act. Armstrong v. Davis, 318 F.3d 965 (9th Cir. 2003). However, the

Eleventh Circuit has held that the fee limitations do apply to all Section 1983 suits filed by prisoners, even if those suits do not apply to prison conditions. Jackson v. State Board of Pardons and Paroles, 331 F.3d 790 (11th Cir. 2003).

Prison conditions cases are governed by the deliberate indifference standard, which in the prison context requires actual knowledge of the risk to the inmate although that knowledge can be inferred from other facts. Farmer v. Brennan, supra; Wilson v. Seiter, 501 U.S. 294 (1991); Helling v. McKinney, 509 U.S. 25 (1993). "Because the Eighth Amendment requires a subjective standard, to demonstrate an official's deliberate indifference, a plaintiff must prove that the official possessed knowledge both of the infirm condition and of the means to cure that condition, 'so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" LaMarca v. Turner, 995 F.2d 1526, 1535-36 (11th Cir. 1993), quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985). Thus, jail officials were not liable for their otherwise unconscionable misconduct in placing a "snitch" in a cell with the prisoner on whom he had informed, because those who took that action had negligently failed to note the relationship between the two. Rangolan v. County of Nassau, 217 F.3d 77 (2d Cir. 2000).

"The appropriate test under the Eighth Amendment involves both subjective and objective elements....The subjective element is that the defendant must have had the necessary level of culpability, shown by actions characterized by 'wantonness.'...The objective element is that the injury actually inflicted must be sufficiently serious to warrant Eighth Amendment protection....With respect to the subjective element, the definition of 'wantonness' varies according to the circumstances alleged....As a general matter, it is sufficient to show that a prison official acted with 'deliberate indifference' to prisoners' health or safety....The deliberate indifference standard does not require a showing 'that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" Blyden v. Mancusi, 186 F.3d 252, 262 (2d Cir. 1999). *Cf.*, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000).

Prison brutality cases often quote the old language that the force used must have been "malicious and sadistic" under the test of Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973). Hudson v. McMillian, 503 U.S. 1, 7 (1992); Romano v. Howarth, 998 F.2d 101, 105 (2d Cir. 1993); Johnson v. Bi-State Justice Center, 12 F.3d 133 (8th Cir. 1993). But "Hudson does not limit liability to that subset of cases where 'malice' is present. Rather, Hudson simply makes clear that excessive force is defined as force not applied in a 'good-faith effort to maintain or restore discipline.' 503 U.S. at 7....The Court's use of the terms 'maliciously and sadistically' is, therefore, only a characterization of all 'bad faith' uses of force and not a limit on liability for uses of force that are otherwise in bad faith." Blyden v. Mancusi, 186 F.3d 252, 263 (2d Cir. 1999). In any event, whether the force used in any particular case is or is not excessive is a jury question. Wilkins v. Moore, 40 F.3d 954 (8th Cir. 1994).

Simply put, any unnecessary and wanton infliction of pain upon an inmate is actionable under Section 1983. Pelfrey v. Chambers, 43 F.3d 1034 (6th Cir. 1995); Aldape v. Lambert, 34 F.3d 619 (8th Cir. 1994). "[T]he law of this Circuit is that to support an Eighth Amendment excessive force claim a prisoner must have suffered from the excessive force a more than de minimis physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor." Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999).

"Deliberate indifference" in a prison conditions case, while less than intent to injure, requires actual subjective awareness of an excessive risk to the health or safety of the inmate and a failure to act despite that actual awareness. A prisoner plaintiff can make out a prima facie case by showing that the risk was obvious, but the prison official can defend by establishing that he personally was not aware of that risk despite its objective obviousness. Farmer v. Brennan, 511 U.S. 825 (1994).

An Eighth Amendment claim has both objective and subjective components. "The objective component relates to the seriousness of the injury....The subjective component relates to whether the defendants had a 'wanton' state of mind when they were engaging in the alleged misconduct." Davidson v. Flynn, 32 F.3d 27, 29-30 (2d Cir. 1994). Cf., Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996). "[W]antonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.' ...Furthermore, the wantonness of conduct does not depend upon its effect on the prisoner, but rather `upon the constraints facing the official.'" Davidson, supra, 32 F.3d at 30, fn. 2. In the case of deliberate indifference to serious medical needs, the plaintiff must demonstrate he "suffered objectively serious medical needs and...that the prison officials actually knew of but deliberately disregarded these needs." Tlamka v. Serrell, 244 F.3d 628, 633 (8th Cir. 2001).

"The standard applicable when determining whether prison officials unnecessarily and wantonly have inflicted pain, and thus have violated the Eighth Amendment, varies with the type of violation alleged....When the alleged constitutional violation is that prison officials have used excessive force, 'the core judicial inquiry is...whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'...Factors relevant to this determination include the threat the officials reasonably perceived, the need for the use of force, the efforts made to minimize the force used, the relationship between the need for using force and the amount of force used, and the degree of injury inflicted." Howard v. Barnett, 21 F.3d 868, 871 (8th Cir. 1994) (citing Hudson v. McMillian, 112 S. Ct. 995, 998 (1992)).

The brutality of American prisons requires continued litigation of issues that would have been thought to have been resolved long ago. See "Brutal Findings -- Prison Rapists Go Unpunished, Victims Go Unrepresented," ABA JOURNAL (July 2001), p. 16. Thus, Nevada jailers went all the way to the Ninth Circuit on the question

whether they should have been entitled to qualified immunity for firing buckshot at a group of inmates when only one of them was the target. Robins v. Meecham, 60 F.3d 1436 (9th Cir. 1995). And inmates in the Second and Ninth Circuits had to appeal to those courts because district judges couldn't see anything actionable when state correctional officials forced them to work without protection from exposure to asbestos. LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998); Wallis v. Baldwin, 70 F.3d 1074 (9th Cir. 1995).

Old fashioned prison guard brutality remains actionable even today. It is not necessary that the guard be the actual perpetrator of the violence for him to be liable. Because of the "deliberate indifference" standard, a guard who stands by and watches other guards beat an inmate is jointly liable, as is the warden who receives reports of the brutality and does nothing about it. Estate of Davis v. Delo, 115 F.3d 1388 (8th Cir. 1997).

A punitive diet of bread and water for one week also constitutes cruel and unusual punishment and is actionable. Phelps v. Kapnolas, 123 F.3d 91 (2d Cir. 1997). See Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998) (withholding food as a punishment may constitute cruel and unusual punishment depending upon the circumstances).

Inadequate treatment of inmates' drug and alcohol withdrawal symptoms can be actionable. Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990), involved a jail physician's failure to distinguish between heroin withdrawal and the far more life-threatening withdrawal from alcohol. Liscio, withdrawing from alcohol and suffering severe DT's, was chained to a bed and treated as though he were withdrawing from heroin. Judge Cabranes granted summary judgment to the defendants, finding this no more than a routine medical malpractice case, but the Second Circuit, noting that the fact Liscio was withdrawing from alcohol was apparent from his jail records, found the case to be an example of deliberate indifference to serious medical needs, actionable under Section 1983. See also Lancaster v. Monroe County, 116 F.3d 1419 (11th Cir. 1997) (fatal delay in providing medical care to chronic alcoholic who died of untreated DTs was actionable). Because the "deliberate indifference" test requires more than mere negligence, state law medical certification or expert witness requirements do not apply. Typically, deliberate indifference is egregious enough to be apparent to a lay jury without the help of experts. Natale v. Camden County Correctional Facility, 318 F.3d 575 (3rd Cir. 2003).

Denial of medical treatment when an inmate has serious medical needs is actionable if the necessary state of mind is present. Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998) (failure to provide adequate dental care, resulting in pain, inability to chew properly, and consequent extraction of a tooth); Koehl v. Dalsheim, 85 F.3d 86 (2d Cir. 1996) (Newman, C.J.) (denial of eyeglasses needed to treat serious eye condition); Hathaway v. Coughlin, 37 F.3d 63 (2d Cir. 1994); Austin v. Johnson, 328 F.3d 204 (5th Cir. 2003) (two-hour delay in summoning medical treatment for unconscious inmate suffering from heat stroke); Harris v. Hegmann, 198 F.3d 153 (5th

Cir. 1999) (ignoring requests for immediate treatment of broken jaw); Ralston v. McGovern, 167 F.3d 1160 (7th Cir. 1999) (guard's refusal to give inmate medication prescribed to alleviate pain caused by radiation treatment for Hodgkin's disease); Reed v. McBride, 178 F.3d 849 (7th Cir. 1999) (denial of life-sustaining medication previously prescribed by outside physician); Roberson v. Bradshaw, 198 F.3d 645 (8th Cir. 1999) (prison doctor continued to prescribe medication despite knowledge that inmate was suffering adverse reaction to it); Cooper v. Schriro, 189 F.3d 781 (8th Cir. 1999) (denial of dental treatment for painful cracked and decayed teeth); Miller v. Schoenen, 75 F.3d 1305 (8th Cir. 1996); Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (intentional interference with previously prescribed medical treatment); Wakefield v. Thompson, 177 F.3d 1160 (9th Cir. 1999) (denial to discharging inmate of a sufficient supply of prescription psychotropic medication to sustain him until he could get a new prescription on the outside); Hunt v. Uphoff, 199 F.3d 1220 (10th Cir. 1999) (inadequate treatment of diabetes and hypertension); Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995) (denial of treatment for gender dysphoria); Steele v. Shah, 87 F.3d 1266 (11th Cir. 1996); Harris v. Coweta County, 21 F.2d 388 (11th Cir. 1994); Howard v. Headly, 72 F. Supp. 2d 118 (E.D.N.Y. 1999) (Block, J.) (prison officials required inmate to perform sanitation duties despite physician's orders to the contrary). Delay in providing care -- a factor in many prison cases -- is itself actionable. Estate of Rosenberg v. Crandell, 56 F.3d 35 (8th Cir. 1995) (fatal delay in treating esophageal carcinoma); Boyd v. Knox, 47 F.3d 966 (8th Cir. 1995) (three-week delay in treating infected wisdom tooth); Patterson v. Pearson, 19 F.3d 439 (8th Cir. 1994). Placing a psychiatric prisoner in segregation and restraints without specific medical approval is actionable indifference. Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998). Treating an unconscious inmate as "a human rat" by subjecting him to treatment with experimental drugs for research rather than therapeutic purposes is an actionable violation. Johnson v. Meltzer, 134 F.3d 1393 (9th Cir. 1998).

What is a "serious medical need"? It is less than agony. "We will no more tolerate prison officials' deliberate indifference to the chronic pain of an inmate than we would a sentence that required the inmate to submit to such pain. We do not, therefore, require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one." Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2002) (refusal to treat a painful keloid scar at the site of a knife wound).

It may be easier to prevail in a prison conditions case if the defendants are state officials than if the prison is a part of the federal system. Something about looking after one's own, maybe. Deeply offensive verbal ridicule and abuse of a preoperative transsexual, accompanied by denial of estrogen treatments didn't bother the Second Circuit at all because there aren't any federal regulations prohibiting it. Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000).

The sheriff of Butler County, Alabama, had his own unique approach to medical care, which the Eleventh Circuit found constituted unconstitutional deliberate

indifference. When an injured inmate was released from the county hospital and returned to jail with instructions to provide medical care, he simply released the inmates on bond and dropped them off by the side of the nearest public highway. Marsh v. Butler County, Ala., 225 F.3d 1243, 1255-56 (11th Cir. 2000).

When sick inmates are paroled, the prison officials are obligated to provide them with adequate medications and instructions to provide for their serious medical needs during a reasonable transition period. Lugo v. Senkowski, 114 F. Supp. 2d 111 (N.D.N.Y. 2000) (Kahn, J.).

While mere medical malpractice does not alone meet the deliberate indifference test, malpractice usually is a lesser included component of a prison case based on deliberate indifference to medical needs. Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996). As a result, some courts tend to apply state law expert witness disclosure requirements unique to medical malpractice litigation to these medical deliberate indifference cases. See generally Sherrod v. Lingle, 223 F.3d 605 (7th Cir. 2000). So it's wise to be aware of these rules.

Deliberate indifference in the prison medical context involves both an objective component and a subjective component. "The objective component is met if the deprivation is 'sufficiently serious.' Farmer v. Brennan, 511 U.S. 825, 834 (1994). A medical need is sufficiently serious 'if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.' Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999)... The subjective component is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.' Farmer, 511 U.S. at 837." Sealock v. Colorado, 218 F.3d 1205 (10th Cir. 2000).

"Ordinarily, a tooth cavity is not a serious medical condition, but that is at least in part because a cavity is so easily treatable. Absent intense pain or other exigency, the treatment of a cavity (in or out of prison) can safely be delayed by the dentist's schedule or the patient's dread or neglect, can be subject to triage or the management of care, can be mitigated or repaired temporarily, and can be coordinated with other related conditions that need to be treated together. Nevertheless, a tooth cavity is a degenerative condition, and if it is left untreated indefinitely, it is likely to produce agony and to require more invasive and painful treatments, such as root canal therapy or extraction....Consequently, because a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a 'serious medical need' within the meaning of our case law." Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir. 2000) (Jacobs, J.).

The county sheriff's practice of shackling all hospitalized pretrial inmates to their beds and not taking them to court on their assigned court dates was found actionable on equal protection grounds in May v. Sheahan, 226 F.3d 876 (7th Cir. 2000).

To succeed in a constitutional claim, the inmate "must demonstrate that the medical deprivation was objectively serious and that prison officials subjectively knew about the deprivation and refused to remedy it. Drowley v. Hedgepeth, 109 F.3d 500, 502 (8th Cir. 1997). A medical need is serious if it is 'obvious to the layperson or supported by medical evidence, like a physician's diagnosis.' Aswegan v. Henry, 49 F.3d 461, 464 (8th Cir. 1995)." Moore v. Jackson, 123 F.3d 1082, 1086 (8th Cir. 1997). "The standard for establishing an Eighth Amendment violation based on deliberate indifference to a prisoner's medical needs contains both an objective and a subjective prong. 'Objectively, the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists. Subjectively, the charged official must act with a sufficiently culpable state of mind.' The required state of mind, equivalent to criminal recklessness, is that the official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Hemmings v. Gorczyk, 134 F.3d 104, 108 (2d Cir. 1998), quoting Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).

"A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990). He is entitled only to minimum care. Hudson v. McMillian, 503 U.S. 1, 9 (1992); Wellman v. Faulkner, 715 F.2d 269, 271 (7th Cir. 1983); Harris v. Thigpen, 941 F.2d 1495, 1504 (11th Cir. 1991); Jackson v. Fair, 846 F.2d 811, 817 (1st Cir. 1988)." Maggert v. Hanks, 131 F.3d 670, 671-72 (7th Cir. 1997) (Posner, C.J.). Minimum care, however, is not the same as no care at all. Thus, a four month delay in surgery for a serious medical condition has been held deliberately indifferent and so much so that qualified immunity was not available to the prison physician. Baker v. Blanchette, 186 F. Supp. 2d 100 (D. Conn. 2001). Deprivation of an inmate's dentures and deprivation of his heart medication both were deliberately indifferent under an Eighth Amendment standard. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). And in the case of ongoing deprivations of necessary medical care, the statute of limitations does not begin to run until the last day the inmate is incarcerated – thus also avoiding PLRA problems. Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001).

On the other side of the coin, the forcible administration of antipsychotic medication to a pretrial detainee, absent evidence that the medication was essential to safety, has been held to constitute a violation of the Sixth Amendment right to a fair trial. United States v. Weston, 206 F.3d 9 (D.C. Cir. 2000). Is it also actionable under Section 1983? No reason why not.

Denial of adequate medical care to an unconvicted pretrial inmate is actionable under a comparable test (although arguably a somewhat less harsh one) but the action is brought not under the Eighth Amendment but under the detainee's Fifth and Fourteenth Amendment due process rights. Weyant v. Okst, 101 F.3d 845 (2d Cir.

1996).

Most prison physicians seem to be private practitioners working under contract to the state. As such, while they are liable for constitutional violations, some courts have held that they have no right to the affirmative defense of qualified immunity. *E.g.*, Hinson v. Edmond, 192 F.3d 1342 (11th Cir. 1999). However, Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001), held that when a private corporation provides contract services to the federal prison system, there is no private right of action under Bivens. So this is a point at which federal and state prisoner rights apparently diverge, since private contractors performing services for state prisons are held to be acting under color of law for Section 1983 purposes. *E.g.*, Flint ex rel. Flint v. Kentucky Dept. of Corrections, 270 F.3d 340 (6th Cir. 2001).

Denying the ordinary amenities of prison life (haircuts in this instance) to prisoners because of their medical condition (HIV-positive) has been held actionable as an equal protection violation. Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) (Posner, C.J.). The Equal Protection Clause is a promising avenue for prison litigation. For example, while it is unarguable that prisoners have no right to be housed in any particular facility, they can make a viable equal protection claim if the housing conditions available to one sex are superior than those available to the other. Yates v. Stalder, 217 F.3d 332 (5th Cir. 2000).

Denial of adequate exercise is actionable, Williams v. Greifinger, 97 F.3d 699, 703-04 (2d Cir. 1996); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc); Antonelli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996); Allen v. Sakai, 48 F.3d 1082 (9th Cir. 1995); Perkins v. Kansas Department of Correction, 165 F.3d 803 (10th Cir. 1999). Refusal to do anything about lead in prison drinking water is actionable. Robinson v. Page, 170 F.3d 747 (7th Cir. 1999). Denial of toothpaste over a long enough period that gum disease and tooth decay results, is actionable. Penrod v. Zavaras, 94 F.3d 1399, 1405-06 (10th Cir. 1996). Failure to provide adequate clothing and bedding to protect an inmate from extreme cold is actionable, but poor ventilation in the summer is not. Dixon v. Godinez, 114 F.3d 640 (7th Cir. 1997). Failure to repair broken windows in the cellblock, exposing an inmate to freezing and sub-zero temperatures in the winter is an Eighth Amendment violation, as is permitting the area in front of a cell for several days to be filled with human feces, urine and sewage water. Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001).

Failure to take reasonable anti-suicide precautions when officials know of prior suicides under existing conditions can constitute actionable deliberate indifference. Thus, the plaintiff executor stated a claim when the sheriff placed a suicidal arrestee in a cell with a known significant blind spot and tie off points, and provided the inmate with a blanket and towel although a prior detainee had hanged himself in the same cell under similar circumstances. Jacobs v. West Feliciana Sheriff's Department, 228 F.3d 288 (5th Cir. 2000).

"[S]evere or repetitive sexual abuse of an inmate by a prison officer can...constitute an Eighth Amendment violation." Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (Calabresi, J.). But "a small number of incidents in which [the inmate] was verbally harassed, touched, and pressed against without his consent" may not rise to the level of the Eighth Amendment. Ibid. See also Downey v. Denton County, Texas, 119 F.3d 381 (5th Cir. 1997). Well, maybe and maybe not. A single instance of rape or attempted rape by a prison guard has been found a clear Eighth Amendment violation by other courts. Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Giron v. Corrections Corporation of America, 191 F.3d 1281 (10th Cir. 1999) (plain error to instruct a jury that, in addition to finding a rape, the jury also had to find that the guard committed the rape maliciously and for the purpose of causing harm). In fact, cases have found triable Eighth Amendment claims in much less than actual rape, sustaining inmate claims of inappropriate touching and sexual propositioning, for example. *E.g.*, Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002); Coleman v. Vasquez, 142 F. Supp. 2d 226 (D. Conn. 2001).

Twice handcuffing an inmate to a hitching post, on one occasion for seven hours without regular water or bathroom breaks, was held clearly unconstitutional by the Eleventh Circuit, but the guards who did it were granted qualified immunity because how could they have known that such behavior was illegal? Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001). Well, anyway, they'd better not do it again.

There seems to be no end to judicial blindness where prison brutality is concerned. How can it be that in the 21st century it should be necessary for the Second Circuit to reverse a judge of the Southern District for holding that a complaint which specifically described repeated beatings by prison guards, failed to state a claim? But it happened in Sims v. Artuz, 230 F.3d 14 (2d Cir. 2000).

"[The plaintiff] alleges that the conditions of his confinement have deprived him of cleanliness, sleep, and peace of mind. These conditions include housing in filthy, unsanitary cells. Such conditions, depending on the facts, might violate the Eighth Amendment....In addition, sleep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment. Furthermore, [plaintiff] alleges frequent searches with no purpose but to harass him. The Eighth Amendment 'always stands as a protection against' such 'calculated harassment unrelated to prison needs.'" Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999), quoting Hudson v. Palmer, 468 U.S. 517, 530 (1984).

"To establish a constitutional violation under the Eighth Amendment, an inmate must meet both an objective and a subjective requirement. To meet the objective requirement, the alleged violation must be 'sufficiently serious' by objective standards. ...The objective component is 'context specific, turning upon contemporary standards of decency.'...To meet the subjective requirement, the inmate must show that the prison officials involved 'had a wanton state of mind when they were engaging in the alleged misconduct.'...However, the malicious use of force to cause harm constitutes an 'Eighth

Amendment violation per se...whether or not significant injury is evident.'...This result follows because 'when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.'... Nevertheless, 'a *de minimis* use of force will rarely suffice to state a constitutional claim.'" Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999) (citations omitted). The key point in all of this is that whether the **force** used was *de minimis* is not necessarily determined by whether the **injuries** can be so categorized. As the Third Circuit has held, the nature of the injury is not constitutionally significant. It is the nature and motivation of the force used, and the circumstances under which it was used, that is determinative. The nature of the injury does nothing more than help to make the determinations that make a difference. Brooks v. Kyler, 204 F.3d 102 (3d Cir. 2000).

The refusal to allow an inmate to make copies of his court papers and the refusal to permit him the use of a pen for that purpose are First Amendment violations for which the PLRA permits prospective individual injunctive relief but not damages unless the inmate has been discharged. Allen v. Sakai, supra. Refusal to process prisoner mail on which the prisoner used his religious name is actionable under the First Amendment, Malik v. Brown, 71 F.3d 724 (9th Cir. 1995); as is the practice of opening court and other legal mail out of the prisoner's presence. Powells v. Minnehaha County Sheriff Dept., 198 F.3d 711 (8th Cir. 1999); Bieregu v. Reno, 59 F.3d 1445 (3d Cir. 1995). Prison regulations which prohibit the use of "disrespectful language" in written prisoner grievances violate the First Amendment rights of inmates. Bradley v. Hall, 64 F.3d 1276 (9th Cir. 1995). An overly broad prohibition on the possession of "sexually explicit" materials by prisoners was properly attacked on First Amendment grounds in a Section 1983 action by a prisoner. Mauro v. Arpaio, 147 F.3d 1137 (9th Cir. 1998).

Sex, of course, is far more interesting than law and therefore will occupy as much of the attention of jailers as possible. As is usual in America, concerns about the danger that someone, somewhere, may be having fun predominate the discourse. Judges are torn between their professional concern for the First Amendment and their more visceral fear that somebody may be getting more than they are. One might not initially expect that to be a big issue when dealing with prisoners, for god's sake, but here it is anyway. So the Ninth Circuit has approved prison regulations banning publications that depict sexual penetration because it might lead to an attempt at replication in the prison setting. Frost v. Symington, 197 F.3d 348 (9th Cir. 1999). A broader ban on "all magazines" did not fare so well in the Eighth Circuit. Cooper v. Schriro, 189 F.3d 781 (8th Cir. 1999). A limitation on the number of personal photographs an inmate may keep in her cell also can be an Eighth Amendment violation if the warden cannot show a legitimate penological objective for the rule. Davis v. Norris, 249 F.3d 800 (8th Cir. 2001).

The PLRA limits prisoner suits for money damages to those involving at least some element of physical injury. First Amendment violations, as most of us know and as the cases illustrate, are ubiquitous in prisons. How do we get around the PLRA and keep these suits coming? The Ninth Circuit, holding that First Amendment violations

can be redressed even if there are no damages, has held that the PLRA ban on suits exclusively "for mental or emotional injury," is inapplicable for that reason. Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998). The Third Circuit says that First Amendment prisoner suits will be treated as suits for nominal compensatory damages, thus avoiding PLRA, and that punitive damages will remain available. Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000).

"It is well settled that the First Amendment protects the flow of information to prisoners; any limitation must reasonably relate to a legitimate penological interest....We look at four factors to determine whether a regulation reasonably relates to a legitimate penological interest....First, a rational relationship must exist between the regulation and the proffered legitimate governmental interest....Second, we examine whether inmates have available alternative means of exercising their asserted rights....Third, we consider how accommodating the asserted constitutional right would affect guards, other inmates, and the allocation of prison resources....Fourth, we look at whether the prison can easily serve its interests with alternative means without infringing upon the rights of prisoners." Croston v. Roe, 170 F.3d 957, 959 (9th Cir. 1999) (striking down a flat ban on receipt of publications not ordered directly from the publisher). Citing Turner v. Safley, 482 U.S. 78 (1987).

Actionable wrongs in the prison context include verbal threats by a prison guard, Burton v. Livingston, 791 F.2d 97 (9th Cir. 1986); Gaut v. Sunn, 792 F.2d 874 (9th Cir. 1986); Chandler v. D.C. Dept. of Corrections, 145 F.3d 1355, 1360-61 (D.C. Cir. 1998) (Buckley, J.). Non-verbal threats (pointing a loaded gun at an inmate for no reason) also are actionable. Thomas v. Gomez, 143 F.3d 1246 (9th Cir. 1998).

Injuries are actionable when caused by deliberately confining an inmate with other inmates who are dangerous to him, Quinn v. Manuel, 767 F.2d 174 (5th Cir. 1985); Love v. Sheffield, 777 F.2d 1453 (11th Cir. 1985); and placing an inmate in a cell inadequately designed and supervised to prevent suicides, when the prisoner then kills himself, Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985); Lightbody v. Town of Hampton, 618 F. Supp. 6 (D.N.H. 1984). The estate of an inmate who committed suicide by hoarding medications stated a claim against prison psychiatrists for deliberate indifference when it was alleged that the psychiatrists knew of the inmate's history of such behavior and therefore should have prescribed the medication in liquid rather than tablet form so it could not be hoarded. Williams v. Mehra, 135 F.3d 1105 (6th Cir. 1998). Prison suicide cases also may involve the deliberate indifference of prison psychiatrists. Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001).

Assigning hard labor to an inmate with known medical restrictions, resulting in injury, is actionable as an Eighth Amendment violation. Williams v. Norris, 148 F.3d 983 (8th Cir. 1998).

The practice of assigning cellmates on a random basis has been shown to result in an increased risk of inmate-on-inmate violence. That being so, the practice

constitutes deliberate indifference and is actionable by the victims. Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996). Similarly, a triable issue is presented when an inmate alleges that the practice of operating racially integrated exercise yards constitutes deliberate indifference to inmate safety. Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001).

"Because '[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society," prison officials have a duty to protect inmates from violence at the hands of inmates....Yet because only cruel and unusual punishment is prohibited by the Eighth Amendment, a prisoner must satisfy two requirements in order to state a constitutional violation. He must establish first, that he is incarcerated under conditions posing a substantial risk of serious harm, and second, 'deliberate indifference' to that risk.... Deliberate indifference requires a showing that the official knew the risk existed, but disregarded it." Spruce v. Sargent, 149 F.3d 783, 785 (8th Cir. 1998) (granting relief to prisoner raped by more than twenty different inmates, one of whom infected him with HIV). Quoting Farmer v. Brennan, 511 U.S. 825, 833-34 (1994); Rhodes v. Chapman, 452 U.S. 337, 347 (1981). See also Rodriguez v. Connecticut, 169 F. Supp. 2d 39 (D. Conn. 2001) (placing inmate in cell with member of rival gang is deliberately indifferent).

Prison officials' disclosure to other inmates of confidential information in a prisoner's medical file showing that s/he was a transsexual violated the inmate's right of privacy (although until this decision the law was insufficently clear to defeat a qualified immunity claim) and, more significantly, constituted in itself a deliberate indifference to the inmate's safety egregious enough to render the responsible officials liable under the Eighth Amendment. "In our view, it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status and -- perhaps more so -- her transsexualism could place that inmate in harm's way. Accordingly, we hold that...a reasonable prison official in December of 1991 would have known that such disclosure, under certain circumstances and absent legitimate penological purposes, could constitute deliberate indifference to a substantial risk that such inmate would suffer serious harm at the hands of other inmates." Powell v. Schriver, 175 F.3d 107, 115 (2d Cir. 1999) (Jacobs, J.).

The First Amendment guarantees all prison inmates the right of "meaningful access" to the courts. Bounds v. Smith, 430 U.S. 817, 822-25 (1977); Lewis v. Casey, 518 U.S. 343 (1996). See also Johnson v. Avery, 393 U.S. 483, 484 (1969). The "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds, supra, at 828. However, "Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." Rather, it mandates providing inmates with resources necessary "to attack their sentences, directly or collaterally, and...to challenge the conditions of their confinement. Impairment of any

other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Lewis, *supra*.

Accordingly, the First Amendment prohibits seizing an inmate's *pro se* briefs and other legal materials, Morello v. James, 810 F.2d 344 (2d Cir. 1987). The seizure of *pro se* legal materials, or the legal materials of a "jailhouse lawyer," most typically is actionable as a violation of the inmate's First Amendment right of access to the courts. Newell v. Sauser, 79 F.3d 115 (9th Cir. 1996); Petrick v. Maynard, 11 F.3d 991 (10th Cir. 1993). A correction official's action in intentionally misdelivering a box of an inmate's legal and personal materials in retaliation for the inmate's communication with the press is actionable as a First Amendment violation. Crawford-El v. Britton, 523 U.S. 574 (1998).

The First Amendment may extend to formation by inmates of a "prisoners legal defense center". Nicholas v. Miller, 189 F.3d 191 (2d Cir. 1999), but only if the action is brought by the beneficiary of such a center rather than by a "paralegal" inmate running one, since inmates have no First Amendment right to assist other inmates with their litigation. Shaw v. Murphy, 532 U.S. 223 (2001).

Retaliation against a prisoner for filing an internal grievance and attempting to find inmates to represent the grievants is actionable as a First Amendment violation. Gayle v. Gonyea, 313 F.3d 677 (2d Cir. 2002); Graham v. Henderson, 89 F.3d 75 (2d Cir. 1996); Gaston v. Coughlin, 81 F. Supp. 2d 381 (N.D.N.Y. 1999). See also Thaddeus-X v. Blatter, 110 F.3d 1233 (6th Cir. 1997). "This court has held that retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under Section 1983. Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988) (prisoner alleged that false disciplinary charges were issued in retaliation for his cooperation with an investigation into inmate abuse).

"'[I]ntentional obstruction of a prisoner's right to seek redress of grievances is precisely the sort of oppression that...section 1983 [is] intended to remedy.' Id. at 589...(quoting Morello v. James, 810 F.2d 344, 347 (2d Cir. 1987). The right to petition government for redress of grievances -- in both judicial and administrative forums -- is 'among the most precious of the liberties safeguarded by the Bill of Rights.' Id. (quoting United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967))." Graham v. Henderson, supra, 89 F.3d at 80.

Retaliation for engaging in protected activities like filing complaints or grievances seems to be almost universally actionable under the First Amendment. E.g., Johnson v. Stovall, 233 F.3d 486 (7th Cir. 2000); DeWalt v. Carter, 234 F.3d 607 (7th Cir. 2000). Bringing false disciplinary charges against an inmate in retaliation for the prisoner's use of prison grievance procedures has been held actionable as a First Amendment violation. Dixon v. Brown, 38 F.3d 379 (8th Cir. 1994). Indeed, just the same as outside the walls, retaliation in any form for the filing of complaints internally or with

outside agencies has been considered actionable under Section 1983. Rivera v. Senkowski, 62 F.3d 80 (2d Cir. 1995); Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995); Jones v. Coughlin, 45 F.3d 677 (2d Cir. 1995); Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995); Babcock v. White, 102 F.3d 267 (7th Cir. 1996) (holding qualified immunity defense unavailable because the law prohibiting such retaliation was clearly established); Black v. Lane, 22 F.3d 1395 (7th Cir. 1994); Cornell v. Woods, 69 F.3d 1383 (8th Cir. 1995); Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997); Penrod v. Zavaras, 94 F.3d 1399 (10th Cir. 1996).

Transferring an inmate to a different facility within the system, or to another state under an interstate compact, in retaliation for exercising a protected First Amendment right, is actionable as a First Amendment violation even though inmates in general have no liberty interest in nontransfers sufficient to afford them a right to due process at transfer time. Davis v. Kelly, 160 F.3d 917 (2d Cir. 1998); Tajeddini v. Gluch, 942 F. Supp. 772 (D. Conn. 1996); Goff v. Burton, 91 F.3d 1188 (8th Cir. 1996); Sisneros v. Nix, 95 F.3d 749 (8th Cir. 1996).

"In order to sustain a retaliation claim, the plaintiff must demonstrate that he engaged in constitutionally protected conduct and that the 'protected conduct was a substantial or motivating factor in the prison officials' decision to discipline the plaintiff. Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996). Once the plaintiff carries his initial burden, 'the defendants must show by a preponderance of the evidence that they would have disciplined the plaintiff even in the absence of the protected conduct.'" Hynes v. Squillace, 143 F.3d 653, 657 (2d Cir. 1998), quoting, inter alia, Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977). Cf., Davidson v. Chestnut, 193 F.3d 144 (2d Cir. 1999).

The jury in such a case must be instructed, as in every First Amendment retaliation case, that the test is whether retaliation for the exercise of a protected First Amendment right was "a substantial or motivating factor" rather than the reason for the challenged action. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Failure to charge correctly on this point is plain error. Reynolds v. Green, 184 F.3d 589, 594-95 (6th Cir. 1999).

Similarly, termination from a prison employment program in retaliation for an inmate's refusal to sign away his property interest in earnings on his prison account was held actionable under Section 1983. The fact that the inmate had no right to the job did not mean that it could be taken from him in retaliation for his exercise of a constitutional right. Vignolo v. Miller, 120 F.3d 1075, 1077-78 (9th Cir. 1997).

Non-inmates whose correspondence with inmates is delayed or otherwise interfered with in violation of their First Amendment rights of association may sue responsible prison officials for such violations. Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999).

Requiring an inmate to attend religion-based narcotics rehabilitation meetings upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility violates the establishment clause of the First Amendment. Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996). A prison policy of supplying Orthodox Jewish prisoners with one frozen kosher dinner supplemented with nonkosher vegetarian or non-pork meals violates inmates' First Amendment free exercise rights. Ashelman v. Wawrzaszek, 111 F.3d 674 (9th Cir. 1997); and the state can't charge inmates a premium for complying with this constititutional mandate. Beerheide v. Suthers, 286 F.3 1179 (10th Cir. 2002). Inmates are entitled to be provided a diet which does not violate the tenets of their religious beliefs. Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999). On the other hand, a prison may constitutionally furnish cold Kosher meals to Jewish inmates while furnishing hot non-pork meals to Muslim inmates on days when pork is served. Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998). Prison officials' denial of hot meals to Muslim prisoners in segregation during Ramadan has been held a First Amendment violation. Makin v. Colorado Dept. of Corrections, 183 F.3d 1205 (10th Cir. 1999). Denial of communion wine to Catholic inmates may be a First Amendment violation. Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002). Denial of Native American religious items to an inmate solely on the ground that he was not himself Native American is an equal protection violation. Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001).

Despite the implications of some of these cases, it really is not acceptable to discriminate among religions without a legal justification. Thus, a Wisconsin prison regulation that allowed inmates to wear crosses only if they were part of a rosary was struck down by the Seventh Circuit on the ground that it discriminated against Protestants. Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999).

Although the equal protection clause does not require prisons to provide identical treatment of all faiths, it does require a good faith effort in light of practical realities. Moreover, a mere inconvenience to the practice of a particular religion is not a First Amendment violation; to be actionable, there must be a substantial burden imposed and interference with a tenet or belief which is central to the religion's doctrines. Freeman v. Arpaio, 125 F.3d 732 (9th Cir. 1997).

In determining whether a prison regulation violates an inmate's right to freedom of religion, the court must consider: "(1) whether there is a rational relationship between the regulation and the legitimate government interests asserted; (2) whether the inmates have alternative means to exercise the right; (3) the impact that accommodation of the right will have on the prison system; and (4) whether ready alternatives exist which accommodate the right and satisfy the governmental interest." Benjamin v. Coughlin, 905 F.2d 571, 574 (2d Cir. 1990). Applying this test, one court has denied summary judgment to prison officials seeking to justify their ban on the wearing of the Muslim kufi. Ali v. Szabo, 81 F. Supp. 2d 447 (S.D.N.Y. 2000).

A prison requirement that, to receive religious accommodation, an inmate must register his religious preference with prison officials has been upheld as an appropriate

precondition. Jackson-Bey v. Hanslmaier, 115 F.3d 1091 (2d Cir. 1997). Even more, the Second Circuit finds no problem with allowing the prison's official "Jewish Chaplain" to determine whether an inmate claiming to be Jewish really was Jewish, provided a similar official religious test was required for those professing other religions. Jackson v. Mann, supra. Martin Luther wouldn't have had a chance with these rules.

Prisoners whose religious beliefs may not precisely accord with the majority views of the priesthood of a mainstream religion probably would be better off picking a new name for their religion than starting their own Reformation. Then they will get the benefit of traditional American church-state separation doctrine like this: "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715 (1981). "It is not the place of the courts to deny a man the right to his religion simply because he is still struggling to assimilate the full scope of its doctrine." Love v. Reed, 216 F.3d 682, 688 (8th Cir. 2000).

At a time when budget-cutting politicians are increasingly inclined to reduce prison staffs to the point that the prisoners are left to run the institutions themselves, complicity of guards in prisoner victimizations of other inmates is a growing issue. It is actionable. Prison guards are liable for one prisoner's attack upon another if the guards acted or failed to act with the intent to inflict injury at a time when the injury was readily preventable. Pavlick v. Mifflin, 90 F.3d 205 (7th Cir. 1996); Gibbs v. Franklin, 18 F.3d 521 (7th Cir. 1994). In Scott v. Moore, 85 F.3d 230 (5th Cir. 1996) (Wisdom, J.), the court imposed liability upon a municipality for operating a jail so understaffed that a single male guard could be left alone with a female inmate when that policy was shown to have caused a rape.

Prisons, never safe places, are growing increasingly dangerous to all inmates. Department of Justice research shows that 14% of all prison inmates -- and 20% of those under age 25 -- have been assaulted while in prison. Profile of Jail Inmates 1996, April 1998, NCJ 164620, p. 13. The failure to provide a reasonably safe environment for prisoners is actionable against whomever can be shown to be responsible. Giroux v. Somerset County, 178 F.3d 28 (1st Cir. 1999) (guard placed inmate in cell with another inmate although on notice that he was in protective custody); Hayes v. New York City Dept. of Corrections, 84 F.3d 614 (2d Cir. 1996); Snider v. Dylag, 188 F.3d 51 (2d Cir. 1999) (inmate beaten by other inmates after guard declared "open season" on him); Nami v. Fauver, 82 F.3d 63 (3d Cir. 1996); Horton v. Cockrell, 70 F.3d 397 (5th Cir. 1995); Haley v. Gross, 86 F.3d 630 (7th Cir. 1996); Doe v. Washington County, 150 F.3d 920 (8th Cir. 1998) (overcrowding resulting in beatings, rapes and torture of juvenile inmate is actionable); Newman v. Holmes, 122 F.3d 650 (8th Cir. 1997) (opening door to cell of inmate in isolated confinement actionable by the other inmate he thereupon assaulted); Erickson v. Holloway, 77 F.3d 1078 (8th Cir. 1996); Smith v. Arkansas Dept. of Correction, 103 F.3d 637 (8th Cir. 1996); Marsh v. Butler

County, Alabama, 212 F.3d 1318, 1329 (11th Cir. 2000) ("prison officials have a duty to...protect prisoners from violence at the hands of other prisoners").

Accordingly, branding an inmate a "snitch" or a "rat" – universally the route to brutality by other inmates – is an actionable Eighth Amendment violation. Benefield v. McDowall, 241 F.3d 1267 (10th Cir. 2001). *See* Dawes v. Walker, 239 F.3d 489 (2d Cir. 2001) (holding such conduct is actionable only if it actually opens the inmate up to such assaults). Note that Morales v. Mackalm, 278 F.3d 126, 131 (2d Cir. 2002), incorrectly cites Dawes as holding that a guard's mere statement to other inmates is not actionable without noting that it is not actionable only if the "opening up" part is omitted.

Subjecting male inmates to routine strip searches either conducted or observed by female guards has been held an actionable violation of the inmates' right of privacy. Moore v. Carwell, 168 F.3d 234 (5th Cir. 1999); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994); Hayes v. Marriott, 70 F.3d 1144 (10th Cir. 1995). Similarly, opening an inmate's non-legal mail has been held actionable under the Fourth Amendment as an invasion of privacy. Muhammad v. Pitcher, 35 F.3d 1081 (6th Cir. 1994). Once again, it is hard to see that kind of litigation surviving the "reform" law except as an action for an injunction or for nominal and punitive damages.

The Fourth Amendment also protects prison visitors against improper searches by prison guards, for example the strip searches of female visitors so frequently litigated. E.g., Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000); Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995). These non-prisoners are unaffected by the PLRA.

Litigation for exposure to environmental cigarette smoke was all but inevitable after the Supreme Court's ruling that such confinement conditions can under appropriate circumstances be the subject of Section 1983 litigation and relief. Helling v. McKinney, 509 U.S. 25 (1993). See Warren v. Keane, 196 F.3d 330 (2d Cir. 1999) (right to be free form environmental cigarette smoke is "clearly established"); Whitley v. Hunt, 158 F.3d 882 (5th Cir. 1998); Rochon v. City of Angola, Louisiana, 122 F.3d 319 (5th Cir. 1997); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001); Weaver v. Clarke, 120 F.3d 852 (8th Cir. 1997); Scott v. District of Columbia, 139 F.3d 940 (D.C. Cir. 1998). In response, many jails are becoming "smoke free" -- but is that cruel and unusual punishment for smokers? See "New Sentence for Inmates: No Smoking," New York Times, July 7, 1996, p. 17. The Ninth Circuit doesn't think so, Webber v. Crabtree, 158 F.3d 460 (9th Cir. 1998); but wait until the Fourth Circuit gets to it. Probably both groups of inmates, so long as they remain incarcerated, will have to show some physical injury to keep claims for money damages alive in court -- but they can sue for injunctive relief at any time.

In Walker v. Bates, 23 F.3d 652 (2d Cir. 1994), the Second Circuit held that the denial of a proper request to call witnesses at an inmate disciplinary hearing was actionable and the fact that the denial later was reversed internally did not preclude the action if the inmate suffered any punitive confinement before the error was corrected.

However, in Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court limited those kinds of prisoner due process rights to cases in which the prison seeks to impose "restraint which...imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," and exempted from that category the imposition of punitive confinements which, "with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody." 115 S. Ct. at 2300-02.

Prison transfer and disciplinary hearings sometimes, but not always, must be conducted in a manner which comports with at least the rudiments of due process. Sandin v. Conner, 515 U.S. 472 (1995). If the discipline imposed is atypical and a significant hardship on the inmate, then the inmate is entitled to procedural due process at his disciplinary or transfer hearing. Brooks v. Difasi, 112 F.3d 46 (2d Cir. 1997); Miller v. Selsky, 111 F.3d 7 (2d Cir. 1997). As the court held in Keenan v. Hall, 83 F.3d 1083 (9th Cir. 1996) (Fletcher, J.), whether the conditions in the transferee prison are atypical or impose a significant hardship is a question of fact for trial. Cf., Hemphill v. Delo, 105 F.3d 391 (8th Cir. 1997). The testimony of the inmate alone may be sufficient to establish this point, especially since it is both the conditions of confinement and the duration thereof which must be evaluated in making the termination. It is for the jury, not for the judge, to assess the credibility of the inmate's claims. Sealey v. Giltner, 197 F.3d 578 (2d Cir. 1999). But whether the facts meet the legal test is a question of law. Colon v. Howard, 215 F.3d 227 (2d Cir. 2000). What does that mean? In deciding whether the inmate's circumstances meet that test, the court should consider factors including "(1) the effect of disciplinary action on the length of prison confinement; (2) the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions; and (3) the duration of the disciplinary segregation imposed compared to discretionary confinement." Wright v. Coughlin, 132 F.3d 133, 136 (2d Cir. 1998); Hanrahan v. Doling, 331 F.3d 93 (2nd Cir. 2003). "[I]n conducting the Sandin analysis to determine whether a disciplinary sentence 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,' ... courts should consider the degree and duration of the sentence actually imposed in the hearing and not the maximum sentence that might have been imposed." Scott v. Albury, 156 F.3d 283, 287-88 (2d Cir. 1998). Such punishment does not violate the Eighth Amendment unless it is "totally without penological justification, grossly disproportionate, or involve[s] the unnecessary and wanton infliction of pain." Horne v. Coughlin, 155 F.3d 26, 31 (2d Cir. 1998), quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984). Judges must continue to engage in fact-intensive hearings and then make their factual and legal determinations with a sensitive eye to the realities and nuances of prison life. Ramirez v. McGinnis, 75 F. Supp. 2d 147 (S.D.N.Y. 1999) (Carter, J.).

That test was met in Simmons v. Cook, 154 F.3d 805 (8th Cir. 1998), where paraplegic inmates were placed in solitary confinement cells without consideration of the fact that they were paraplegics and with the result that they often were unable to eat because their wheelchairs could not reach the food slots quickly enough and that they

were unable to move their bowels because of the prison's failure to provide the necessary supplies or assistance. 154 F.3d at 808. It also is met whenever the result of a classification program is to brand an inmate or ex-inmate as a sex predator. Chambers v. Colorado Dept. of Corrections, 205 F.3d 1237 (10th Cir. 2000). In the eyes of some judges (who presumably never have had the experience themselves) the "mere" placement of a pretrial detainee in the segregation unit of a special prison doesn't cut it, however. Valentin v. Murphy, 95 F. Supp. 2d 99 (D. Conn. 2000) (Fitzsimmons, USMJ).

When the punishment imposed after a defective disciplinary hearing is a loss of good time credits, the correct remedy may or not be first to go to state court and obtain restoration of the time in a habeas corpus action. The accomplishment of that objective *starts* the statute of limitations running on the damages action for denial of due process. Johnson v. Coombe, 156 F.2d 273 (S.D.N.Y. 2001). However, when the plaintiff already has fully served the period of his additional incarceration, any habeas petition would be dismissed for lack of a case or controversy. In that instance, it is not necessary first to bring the habeas corpus action. Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002).

In Colon v. Howard, 215 F.3d 227 (2d Cir. 2000), the judges wrestled with Judge Newman's desire to establish a "bright line rule" as to how long a period of confinement meets the standard of an "atypical, significant deprivation" under Sandin and Judge Walker's desire to stay loose about it and decide each case on its own facts. Judge Newman proposed 180 days as the "bright line" but the judges couldn't agree. Judge Walker, concurring in the judgment in that case, observed that he "would not be surprised if the ultimate rule in this circuit for the duration of SHU incarceration that triggers due process...is something close to 180 days [as Judge Newman advocates]. At present, 101 days in the SHU does not trigger due process protection, see Seeley v. Giltner, 197 F.3d 578 (2d Cir. 1999), while, with this case, 305 days does. The gap will soon narrow and a rule will emerge...." 215 F.3d at 237. Actually, some Second Circuit cases already had narrowed it. Thus, in Welch v. Bartlett, 196 F.3d 389, 391 (2d Cir. 1999), the court thought 90 days in that case was enough. And in Kalwasinski v. Morse, 201 F.3d 103 (2d Cir. 1999), the court found that 180 days was sufficient. But see Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), holding that whether confinement in administrative detention for 514 days was or was not an Eighth Amendment violation would have to be decided by a jury.

More is involved than just the length of time, however. It is the fact-specific nature of the confinement that ultimately governs. Once a long period of time in some sort of close confinement is established, the plaintiff would seem to have made out at least a prima facie case; but the ultimate resolution of the case still demands a factual analysis of the precise nature of the confinement involved. Tellier v. Fields, 230 F.3d 502 (2d Cir. 2000).

Denial of due process in prison disciplinary or transfer hearings apparently will

remain an area for litigation. See Sealey v. Giltner, 116 F.3d 47 (2d Cir. 1997); Black v. Coughlin, 76 F.3d 72 (2d Cir. 1996); Howard v. Grinage, 82 F.3d 1343 (6th Cir. 1996); Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995). But see Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997) (Posner, C.J.) (holding that prison transfer cases almost never rise to constitutional dimensions because the standard of comparison is not conditions of confinement within a particular prison but rather within the entire state prison system including its harshest facility). This Seventh Circuit test, however, has not been adopted everywhere. The Second Circuit, for example, holds that "whether the conditions of a segregation amount to an 'atypical and significant hardship' turns on the duration of the segregation and a comparison with the conditions in the general population and in other categories of segregation." Arce v. Walker, 139 F.3d 329, 336 (2d Cir. 1998). This language seems to refer to the one prison with which the particular plaintiff is involved.

"In evaluating whether [the inmate] had a liberty interest in avoiding adjustment segregation, the district court should begin by determining the usual conditions of administrative segregation at [the specific prison where this plaintiff is confined]. It should treat those conditions as the baseline for evaluating whether [the plaintiff's punishment] was an 'atypical and significant hardship.' If using that comparison the court finds that his adjustment segregation was 'atypical and significant,' it should then take into account the possibility that [the plaintiff] will be transferred to other prisons. The district court should redefine the comparative baseline by reference to more restrictive conditions at other prisons if it finds that it is likely both that inmates serving sentences similar to [plaintiff's] will actually be transferred to such prisons and that once transferred they will actually face such conditions. The term 'likely,' as we use it here, means not that the combination of events must be more probable than not, but that there must be a substantial chance of its occurrence." Hatch v. District of Columbia, 184 F.3d 846, 858 (D.C. Cir. 1999).

There also are cases in which the liberty interest has been created by internal regulation. In those cases, the foregoing analysis is unnecessary and the right to due process protections is assumed. Tellier v. Scott, 49 F. Supp. 2d 607 (S.D.N.Y. 1998) (Wood, J.), aff'd, 230 F.3d 502 (2d Cir. 2000). See also, e.g., Giano v. Selsky, 238 F.3d 223 (2d Cir. 2001). Examples of liberty interests created by administrative regulation are temporary release programs or temporary work release programs. Removal from such a program after having been placed in it requires procedural due process because the regulations have created such a liberty interest. Anderson v. Recore, 317 F.3d 194 (2d Cir. 2003); Quartararo v. Hoy, 113 F. Supp. 2d 405 (E.D.N.Y. 2000) (Seybert, J.).

What are the procedural due process protections to which an inmate is entitled under these circumstances? For one thing, there must be a meaningful notice to the prisoner of what he's charged with and its basis; for another, there must be "some evidence" at the disciplinary hearing to support the action taken. "Minimum requirements, we think, include a notice that is something more than a mere

formality....The effect of the notice should be to compel 'the charging officer to be [sufficiently] specific as to the misconduct with which the inmate is charged' to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges set out in a misbehavior report." In this case, the allegations that segregation was to be based on "past admission to outside law enforcement about involvement with Latin Kings," "recent tension in B-Unit involving gang activity," and "statements by independent confidential informants" were held too vague to enable the inmate to respond and defend himself. Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001).

"Although the hearing requirement for placement in administrative segregation may be met by an 'informal, nonadversary' proceeding..., it is a bedrock requirement of due process that such hearing be held 'at a meaningful time and in a meaningful manner,' Mathews v. Eldridge, 424 U.S. 319, 333 (1976). A hearing is not 'meaningful' if a prisoner is given inadequate information about the basis of the charges against him. A prisoner should not...have to guess what conduct forms the basis for the charges against him." Taylor v. Rodriguez, supra, at 193.

The Second Circuit, after Walker v. Bates, continues to permit suits for damages against prison hearing officers who fail to provide assistance, including help in obtaining favorable testimony, to inmates facing disciplinary hearings. Ayers v. Ryan, 152 F.3d 77, 80-81 (2d Cir. 1998). There comes some point at which the utter absence of due process may become actionable even if the punishment imposed on the inmate is itself no big deal. Thus, in Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999), the court held that a hearing at which "no shred of evidence of the inmate's guilt was presented" was so grossly lacking in due process that it didn't matter that no cognizable liberty interest was affected by the result. In keeping with the lesser injury, however, the remedy also was minimal -- expungement of the adverse record rather than money.

The Second Circuit has held repeatedly "that a prisoner has a protected liberty interest in continuing in a work release program." Kim v. Hurston, 182 F.3d 113, 117 (2d Cir. 1999); Tracy v. Salamack, 572 F.2d 393, 395-96 (2d Cir. 1978); Severino v. Negron, 996 F.2d 1439, 1441 (2d Cir. 1993). In Kim, the court noted that, while Sandin may have appeared to cast doubt on the rationale of cases finding that a liberty interest can be created by departmental regulation, the subsequent ruling in Young v. Harper, 520 U.S. 143, 152-53 (1997), held that a "preparole conditional supervision program" was similar enough to parole to invoke the procedural protections of Morrissey v. Brewer, 408 U.S. 471 (1972). The Kim court found that work release programs cannot be distinguished in any meaningful way from the kind of program found protected in Young. 182 F.3d at 117-18.

An inmate has a protected liberty interest in good time credits already earned. Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974). An inmate does not have a liberty interest in earning such credits, however, so that excluding an inmate from good time credit eligibility for just about any reason does not create a constitutional problem and

there is no right to procedural due process on that issue. Abed v. Armstrong, 209 F.3d 63 (2d Cir. 2000).

Once the right to due process is found, the issue then becomes the old one of "how much process is due". Traditional concepts seem to apply. Thus, in Quaratararo v. Catterson, 73 F. Supp. 2d 279 (E.D.N.Y. 1999) (Seybert, J.), failure to provide the prisoner with 24 hours advance notice of the hearing concerning his removal from a work release program and removal from the program solely on the basis of a parole hold each separately was found to have denied due process. In McClary v. Coughlin, 87 F. Supp. 2d 205 (W.D.N.Y. 2000), a jury found the defendant correctional officers liable for failing to provide a segregated inmate with meaningful "periodic review" of his segregation status. The court reduced the $660,000 verdict to $237,500 or $175 per day for each day of unconstitutional segregation. 87 F. Supp. 2d at 218-19. I wonder which one of these judges would sign on for administrative segregation in a New York prison for $175 per day.

A debate has arisen whether Heck v. Humphrey, 512 U.S. 477 (1994), applies to bar damages actions based upon due process denials at prison disciplinary hearings when the result of a successful suit would call into question the validity of the punishment imposed if that punishment could have been challenged in collateral state proceedings. See, e.g., Black v. Coughlin, 76 F.3d 72, 73 (2d Cir. 1996). There would seem to be two issues here: (1) Does the suit call into question the validity of the punishment imposed? If so, and if there is a means of collateral attack, suit is barred. Edwards v. Balisok, 520 U.S. 641 (1997); Clarke v. Stalder, 154 F.3d 186 (5th Cir. 1998). (2) Is there a means of collaterally attacking the punishment imposed other than through the section 1983 action?

A related question is whether in any event the section 1983 action can be brought to redress injuries inflicted by the hearing after the punishment has been completed and there is no other means of challenging it. Thus, in Spencer v. Kemna, 523 U.S. 1 (1998), a majority of the court expressed the view that when there is no other remedy available, Heck does not bar the section 1983 action.

In a like vein, the Second Circuit has held that when the prisoner has been discharged from custody, so that his challenge to the disciplinary hearing will have no effect on the duration of his sentence, there is no need to show a favorable termination of the proceeding in the administrative phase and the plaintiff can go directly to the issue of compensatory damages. Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999). In an Eighth Circuit case, Ellis v. Bolin, 208 F.3d 1068 (8th Cir. 2000), the prisoner was never notified of the disciplinary hearing and thus was unable to attend it. He avoided the Heck v. Humprey problem by seeking only damages for denial of the right to attend, not challenging the outcome of the hearing he missed.

An action for denial of due process in connection with an administrative hearing is complete in itself and need not await the outcome of that hearing. However, if the

outcome of the hearing is a removal of good time credits, thus lengthening the prison stay, the court may refuse to entertain a Section 1983 action and hold that the proper remedy is a state habeas corpus action. See Clayton-El v. Fisher, 96 F.3d 236 (7th Cir. 1996). That "may" probably became a "must" when the Supreme Court decided Edwards v. Balisok, 520 U.S. 641 (1997), and held that when the punishment imposed at a procedurally defective disciplinary hearing is a loss of good time credits, a section 1983 action for damages is not the proper remedy because it necessarily implies the invalidity of the underlying hearing's result -- which must be attacked successfully first. But if the inmate challenges not the duration of his confinement but only the more harsh conditions thereof resulting from the procedurally defective hearing, he may go directly with Section 1983 and skip the habeas. Brown v. Plaut, 131 F.3d 163 (D.C. Cir. 1997). Habeas corpus is required only when relief, if granted, necessarily implies or automatically results in a speedier release from confinement. Anyanwutaku v. Moore, 151 F.3d 1053 (D.C. Cir. 1998); Boyce v. Ashcroft, 251 F.3d 911 (10th Cir. 2001).

Personal participation by a defendant in inflicting the injury upon an inmate is unnecessary so long as the defendant implicitly authorized, approved or knowingly acquiesced in the actions or inactions at issue. Hicks v. Frey, 992 F.2d 1450 (6th Cir. 1993). "We have construed personal involvement...to mean direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates." Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996) (Kearse, J.). "We have long recognized that supervisors may be 'personally involved' in the constitutional torts of their supervisees if: (1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event." Spencer v. Doe, 139 F.3d 107, 112 (2d Cir. 1998), citing Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

"Multiple tortfeasors who concurrently cause an indivisible injury are jointly and severally liable; each can be held liable for the entire injury. It is not essential that all persons who concurrently caused the harm be joined as defendants. ...Consequently, a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the entire harm....Persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned." Northington v. Marin, 102 F.3d 1564, 1569 (10th Cir. 1996).

For me, the most inspiring demonstration of the law of possibly unintended consequences was the widespread application of the Religious Freedom Restoration Act, 42 USC 2000bb, in prisoner rights litigation -- often successfully. E.g., Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996); Small v. Lehman, 98 F.3d 762 (3d Cir. 1996); Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996); Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996); Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996); Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995). That source of endless amusement to the unchurched was

limited when the Supreme Court threw out the statute as applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997). But see In re Young, 141 F.3d 855 (8th Cir. 1998), holding that the RFRA remains applicable to federal defendants -- thus, presumably, in suits against federal prison officials. The concept has made a comeback, anyway, in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(b)(1), which conditions the receipt of federal funds for prisons upon the guarantee of just such wide-ranging religious freedom to inmates. See Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), upholding the new statute's constitutionality.

Another issue often presented at the drafting stage of prisoner litigation is whether the action should be one for damages under Section 1983 or a habeas corpus petition. Sometimes the issue is a complicated one. The rule of thumb, such as it is, asks whether the prisoner challenges the "fact or duration" of confinement (habeas corpus is necessary) or "conditions" of confinement (Section 1983). See Edwards v. Balisok, 520 U.S. 641 (1997); Cook v. Texas Dept. of Criminal Justice, 37 F.3d 166 (5th Cir. 1994). In another formulation, the Fifth Circuit held that if a favorable determination of the litigation would not automatically entitle the prisoner to accelerated release, he should sue under Section 1983, but if it would do so he should bring a habeas petition. Clarke v. Stalder, 121 F.3d 222 (5th Cir. 1997).

One of the obvious and intractable problems of prisoner litigation is the extent to which the defendants control all information, witnesses and access. In Anderson v. Romero, 42 F.3d 1121 (7th Cir. 1994), the plaintiff died before trial and his lawyer did not know the identity of the next of kin or how to contact them. The Illinois Attorney General was delighted and declined to supply the information. Chief Judge Posner, writing for the Seventh Circuit, held that the All Writs Act, 28 USC 1651(a), empowered the court to order the Attorney General -- a non-party -- to provide the information so the litigation could proceed.

Yet another obvious problem in prisoner litigation is what a jury may consider to be the somewhat unappetizing nature of many of the plaintiffs. The Ninth Circuit has provided a touch of relief by restraining the extent to which the nature of the inmate's underlying convictions can be shown to the jury. Scott v. Lawrence, 36 F.3d 871 (9th Cir. 1994).

Not surprisingly, the excuse for closing the courthouse door to prisoners with legislation like the PLRA -- the stated fear that prisoner petitions will prevent the courts from handling other business -- is a bogus one. While the number of prisoner petitions filed in federal court by state and federal inmates did indeed triple between 1980 and 1996, the rate at which prisoners filed these petitions actually decreased by 17%. The increased number of petitions, therefore, is explained entirely by the exponential growth of the prison population, caused by the very same politicians who now would deny them access to the courts to redress their grievances. Scalia, Prisoner Petitions in the Federal Courts, 1980-96, October 1997, NCJ 164615 (U.S. Dept. of Justice, Bureau of

Justice Statistics). See also, e.g., Prison and Jail Inmates at Midyear 1998, March 1999, NCJ 173414 (Ibid.); Prisoners in 1997, August 1998 NCJ 170014 (Ibid.); Correctional Populations in the United States, March 1999 NCJ 171684 (Ibid.)

In many ways, prison law can be applied to the involuntary occupants of other state institutions, like mental hospitals -- except that, presumably, these inmates are more like pretrial detainees than sentenced inmates. See, *e.g.*, Davis v. Rennie, 264 F.3d 86, 97-98 (1st Cir. 2001); Terrance v. Northville Regional Psychiatric Hospital, 286 F.3d 834 (6th Cir. 2002); Noble v. Schmitt, 87 F.3d 157 (6th Cir. 1996) (involuntarily committed psychiatric patients stated valid claim against psychiatric aides for restraint and forcible medicating without justification and for restriction of privileges in retaliation for exercise of First Amendment rights); Kennedy v. Schafer, 71 F.3d 292 (8th Cir. 1995) (failure to provide a safe and humane environment, leading to suicide of voluntary patient); Neely v. Feinstein, 50 F.3d 1502 (9th Cir. 1995) (failure to protect patient from sexual abuse by psychiatric aide); Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) (holding evidence insufficient to prove that placement of homicidal patient in general patient population constituted deliberate indifference sufficient to impose liability when he murdered another patient); Dolihite v. Maughon, 74 F.3d 1027 (11th Cir. 1996) (hospital social worker's failure to take appropriate steps to ward off known suicidal behavior of adolescent patient). But see Stevens v. Umsted, 131 F.3d 697 (7th Cir. 1997) (holding that a student at a state school for the disabled was not "in custody"). So far, the "prison reform" pols have not yet taken a shot at these victims.