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NPP Challenges Abusive Supermax Confinement

By David C. Fathi
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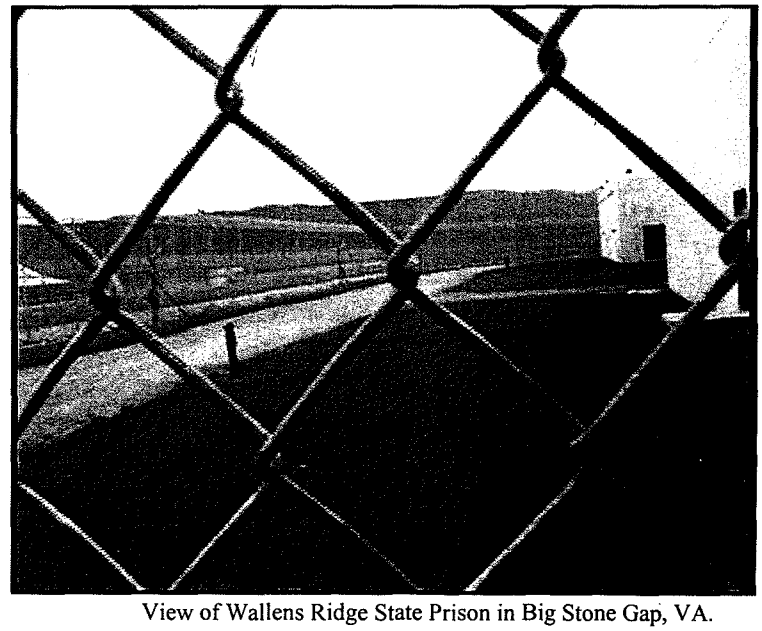
The proliferation of "supermax" prisons is the latest round in the perpetual "tough on crime" bidding war. Often against the advice of corrections professionals, politicians push for the construction of these facilities regardless of cost and in the absence of any demonstrated need. While individual facilities differ, supermax prisons typically feature almost complete social and sensory deprivation, and often a pervasive climate of excessive force. The National Prison Project has made challenging supermax confinement a top priority.

On February 7, 2001, the NPP, along with the Connecticut Civil Liberties Union, filed suit in U.S. District Court in Hartford, challenging Connecticut's decision to send prisoners to Virginia's Wallens Ridge State Prison. Approximately 200 Connecticut prisoners have been housed at WRSP since November 1999 pursuant to a contract between Connecticut and Virginia. The suit, *Joslyn v. Armstrong*, charges that Connecticut Corrections Commissioner John J. Armstrong houses prisoners at WRSP despite his knowledge that conditions there violate the Eighth Amendment's prohibition on cruel and unusual punishments.[1]

The lawsuit focuses on WRSP's indiscriminate use of five-point restraints and electroshock weapons. WRSP prisoners are routinely placed in five-point restraints for trivial offenses such as kicking a cell door. Prisoners are almost invariably left in restraints for 48 hours. Because they are allowed only infrequent opportunities to use the toilet, many prisoners urinate and defecate on themselves while tied to a restraint table.

Guards at WRSP also shock prisoners with electroshock weapons when they displease prison staff. One prisoner was shocked when he verbally insulted a staff member, another when he refused an order to kneel. Electroshock weapons inflict a powerful and painful electric shock and sometimes leave burn marks on the skin. Connecticut prisoner Lawrence Frazier died in July 2000 after being repeatedly shocked by WRSP staff.

The American Correctional Association's standard on restraints states that "Four/five point restraints should be used only in extreme instances and only when other types of restraints have proven to be ineffective." Standard 3-4183-1, 1998 Standards Supplement. Similarly, federal courts have repeatedly condemned the use of immobilizing restraints except as a last resort to control a prisoner whose behavior poses an imminent danger of harm. *See, e.g., Hope v. Pelzer*, 240 F.3d 975, 980-81 (11th Cir. 2001)



View of Wallens Ridge State Prison in Big Stone Gap, VA.

(cuffing prisoner to "hitching post" for two hours was unconstitutional; policy and practice of restraining prisoners "for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment"); *French v. Owens*, 777 F.2d 1250, 1253 (7th Cir. 1985) (describing use of restraints for 12 to 24 hours as "outmoded and inhuman" and a "catalogue of inhumanities"); *see also Williams v. Benjamin*, 77 F.3d 756, 763 (4th Cir. 1996) (noting that courts have approved "limited" use of four-point restraints "as a last resort, when other forms of prison discipline have failed").

With regard to electroshock weapons, Amnesty International has noted that "electricity has long been one of the favored tools of the world's torturers. Portable, easy to use, and with the potential to inflict severe pain without leaving substantial visible marks on the human body, electroshock stun equipment is particularly open to abuse by unscrupulous law enforcement officials." The organization has called on the United States to suspend the use of electroshock weapons by law enforcement and corrections agencies. Amnesty International, *Cruelty in Control? The Stun Belt and other Electro-shock equipment in Law Enforcement*, June 1999, at 1-3. *See also Hickey v. Reeder*, 12 F.3d 754, 757-59 (8th Cir. 1993) (using stun gun on prisoner who refused to clean his cell violated the Eighth Amendment); *Madrid v. Gomez*, 889 F. Supp. 1146, 1174-75 n. 43 (N.D. Cal. 1995) (noting that taser inflicts "significant pain" and raises "questions about significant health risks").

The ACLU is not alone in its condemnation of conditions at WRSP. In February 2001, the State of Connecticut Commission on Human Rights and Opportunities called on Commissioner Armstrong to withdraw all Connecticut prisoners from WRSP. In May, Amnesty International echoed this call, saying reports from WRSP may indicate "a persistent pattern of institutionalized abuse in Virginia's supermaximum security prisons."

Commissioner Armstrong's response to the lawsuit has been to deny all responsibility for conditions under which Connecticut prisoners are held at WRSP. He moved to have the case transferred to Virginia and to stay all discovery, but on May 16, 2001, U.S. District Judge Christopher F. Droney denied these motions, and ordered Armstrong to answer the complaint within 30 days.

In December 2000, the NPP joined the ACLU of Wisconsin and a team of Wisconsin lawyers as plaintiffs' counsel in *Jones'El v. Berge*, a challenge to the Supermax Correctional Institution (SMCI) in Boscobel, Wisconsin. Opened in 1999 in a remote part of the state, SMCI is by far Wisconsin's most expensive prison, and is designed to subject prisoners to extreme social isolation and sensory deprivation. Conditions include 24 hour illumination and "bed checks" in which prisoners are woken hourly throughout the night. Prisoners are locked in their windowless cells for all but four hours a week. They receive no outdoor exercise. All visits, except with attorneys, are conducted via video screen. Some prisoners are allowed only one 6-minute telephone call per month. On a recent visit to SMCI by the prisoners' attorneys, a staff

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member boasted that prisoners never even see the sky.

Such conditions raise serious questions under the Eighth Amendment. *See Keenan v. Hall*, 83 F.3d 1083, 1089-91 (9th Cir. 1996) (allegations of no outdoor exercise and 24 hour illumination stated Eighth Amendment claim); *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (prisoners must be allowed at least five hours of out-of-cell exercise per week); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 913 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001) (conditions in administrative segregation units violate Eighth Amendment; prisoners "suffer actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity"). Courts have also condemned the placement of mentally ill or developmentally disabled prisoners in isolated confinement; one court compared this practice to "putting an asthmatic in a place with little air to breathe." *Madrid*, 889 F. Supp. at 1265; *see also Ruiz*, 37 F.Supp.2d at 913-15; *Casey v. Lewis*, 834 F. Supp. 1477, 1548-49 (D. Ariz. 1993); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989).

Jones'El v. Berge was filed in 2000 in federal court in Madison by two SMCI prisoners acting *pro se*. U.S. District Judge Barbara Crabb appointed counsel, and on February 15, 2001, certified the case as a class action. Despite this ruling, defendants refused to allow class counsel to meet with their clients, stating that such meetings would be inconvenient for the prison. On April 10, U.S. Magistrate Judge Stephen L. Crocker ordered defendants to allow plaintiffs' counsel to meet with class members at the prison; these interviews are now ongoing.

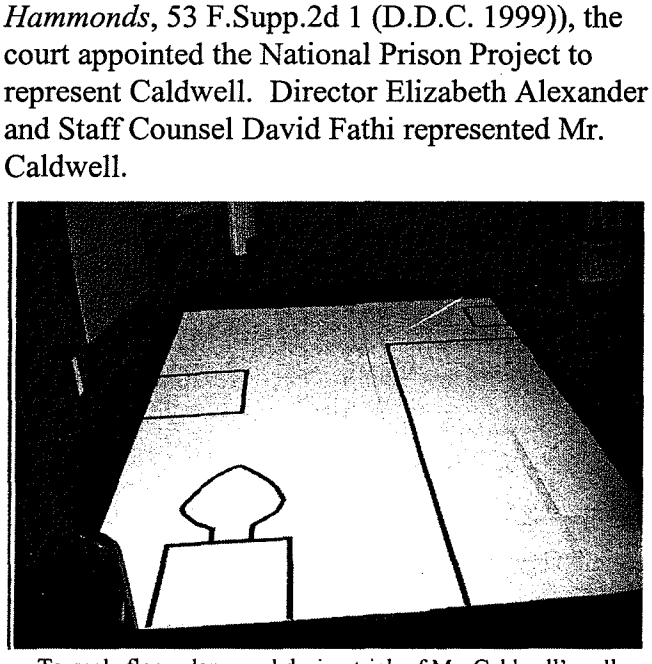
Both lawsuits have attracted significant media attention. On April 23, the Milwaukee Journal Sentinel, Wisconsin's largest newspaper, published an editorial titled "Cruel and Unusual Prison?" The editorial called conditions at SMCI "disturbing," adding that the lawsuit "raises valid points about the extreme isolation routinely practiced in supermax prisons." "At what point does this kind of isolation and sensory deprivation simply make things worse, particularly for those who are already mentally ill?" the paper asked. "That question deserves to be answered fully and publicly."

1. After a prison-building binge in the mid-1990s, Virginia has so much excess capacity at its two supermax prisons that it rents space to Connecticut, New Mexico, and the District of Columbia.

DC PRISONER WINS $175,000 IN CONDITIONS CASE

On January 25, 2001, a federal jury in Washington, D.C. awarded nearly $175,000 to DC prisoner Lawrence Caldwell in his challenge to conditions at the District of Columbia's Maximum Security Facility (MSF) in Lorton, Virginia. The award included $25,000 each in punitive damages against the Warden and Deputy Warden of MSF, where Caldwell was housed until the facility's recent closure.

Caldwell filed suit pro se in 1997, challenging the conditions of his confinement in MSF's notorious Cellblock 3. After the suit survived a motion to dismiss (*see Caldwell v. Hammonds*, 53 F.Supp.2d 1 (D.D.C. 1999)), the court appointed the National Prison Project to represent Caldwell. Director Elizabeth Alexander and Staff Counsel David Fathi represented Mr. Caldwell.



To-scale floor plan, used during trial, of Mr. Caldwell's cell.

In his amended complaint, Mr. Caldwell

alleged that he was held on the mental health tier of Cellblock 3 for 3 ½ months, although the prison psychiatrist found that he was not mentally ill. Conditions on the mental health tier included nearly constant screaming and feces-throwing by severely mentally ill prisoners, as well as poor ventilation, extreme heat, and frequent fires and flooding. He was then held in other segregation units (Cellblocks 2 and 4) for over two years, and then returned to Cellblock 3 for another year. He was released to general population only after U.S. District Judge Gladys Kessler ruled that prison officials had violated the District of Columbia's Lorton Act by keeping him in segregation after the prison's Housing Board repeatedly voted to release him to population.

Caldwell also charged that prison officials had failed to treat his skin cancer and glaucoma. After a dermatologist found that he needed surgery and ordered that he return within a month, prison officials waited nearly a year before taking him back to the dermatologist. As a result, Caldwell required a more invasive and painful form of surgery to remove a cancerous growth from his face. Security staff also ignored medical orders that Mr. Caldwell be provided a broad-brimmed hat and long-sleeved shirts to protect his skin from further sun damage. The orders from his opthalmologist were also ignored.

With the exception of the claim that conditions in Cellblocks 2 and 4 violated the Eighth Amendment, after a five-day trial, the jury found for Mr. Caldwell on all of his claims: that his transfer to a mental health unit without a hearing denied him due process under *Vitek v. Jones*, 445 U.S. 480 (1980); that conditions in Cellblock 3, and defendants' failure to treat his medical conditions, violated the Eighth Amendment; and that Caldwell's case managers violated the Lorton Act by failing to schedule hearings that could have resulted in his release from segregation.

The jury awarded $1501 against Robert Wiley, the officer who placed Mr. Caldwell on the mental health tier; $116,576 against the District of Columbia, MSF Warden Adrienne Poteat and Deputy Warden Belinda Watson Barney; $5,200 against the District of Columbia and Poteat; $1.00 each against Case Managers JoAnn Williams and Rex Ihezue; $900 against the District of Columbia, Poteat, Watson Barney, and Robert Fulton, the officer who overruled Caldwell's medical orders; and $25,000 each in punitive damages against Poteat and Watson Barney.

Following the jury verdict, Elizabeth Alexander said "This case sends a message to the District of Columbia Department of Corrections that the community will not tolerate neglect and mistreatment. The conditions inflicted on Mr. Caldwell were dangerous and dehumanizing. Despite Mr. Caldwell's repeated grievances, no one from the Department of Corrections took action to clean up Cellblock 3 or to assure that his health care needs were met."

Case Law Report: Highlights of Most Important Prison Cases

By John Boston
Director, Prisoner Rights Project of the NY Legal Aid Society

U.S. Court of Appeals Cases

AIDS/Disabled/Financial Resources/Deference

Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999), *cert. denied sub nom. Davis v. Hopper*, 120 S. Ct. 931 (2000). The HIV-positive plaintiffs challenged their segregation and exclusion from recreational, religious and educational programs, under the Constitution and the Rehabilitation Act. The district court ruled for the defendants across the board.

Under *Arline*, a person who poses a significant risk of communicating an infectious disease in the workplace is not otherwise qualified for the job if reasonable accommodation will not

eliminate the risk. When the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk "significant." (1297).

Under this standard the district court was correct. It found that violence, IV drug use, and sex may cause blood-to-blood contact, and occur in unlikely and unexpected places and defy surveillance. It found that sex and drug use likely transmit the disease and that "violent exchanges of blood raise the specter of transmission." (1299)

The *Turner* standard does not in terms apply to statutory rights, but the district court was "entitled to find on this record" that the prison's requirements for program participation are determined in part by legitimate penological interests, including security and cost. So even if the district court "was not precisely correct as a matter of legal theory, determining whether penological concerns impose requirements for program participation is not error." (1300)

The district court's finding that defendants' response is not exaggerated is consistent with *Turner*, since plaintiffs' proposed "easy alternative" is to exclude from programs prisoners who might react violently to integration of HIV-positive prisoners, and the record does not support defendants' ability to assess attitudes and predict behavior.

Transfers/Federal Officials and Prisons

Wong v. Warden, FCI Raybook, 171 F.3d 148 (2d Cir. 1999). The plaintiff complained that he was denied a transfer to a Canadian prison under the Convention on the Transfer of Sentenced Persons based on his race or nationality or on his exercise of protected rights. The government argued that there is no judicial review of the Department of Justice's actions under the Convention. At 149: "It is well-established that judicial review exists over allegations of constitutional violations even when the agency decisions underlying the allegations are discretionary."

PLRA: Screening and Dismissal

Gomez v. USAA Federal Sav. Bank, 171 F.3d 794 (2d Cir. 1999). Dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim should not be without leave to amend.

PLRA: Judgment Termination, Automatic Stay

Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999) (en banc).

The PLRA judgment termination provision applies to consent decrees, since the definition of "prospective relief" includes all relief other than compensatory monetary damages, and the definition of "relief" includes consent decrees. All constitutional challenges are rejected.

The court "notes its disagreement" with the panel's view that consent decrees may remain enforceable in state courts as contracts. Termination does not mean vacatur. Past consent decrees are not to be "annulled and stripped of all past significance or collateral effect."

Immediate termination does not really mean immediate. Since the statute provides for findings that can prevent termination, plaintiffs who so request must receive an opportunity to show current and ongoing violations of their federal rights. The district court had postponed the automatic stay for 60 days consistently with the statute; these appellate proceedings followed. The stay period therefore starts to run again on the day following the issuance of the appeals court's mandate.

Publications/Deference

Herlein v. Higgins, 172 F.3d 1089 (8th Cir. 1999). A prohibition on the possession of music cassettes labelled "parental advisory--explicit lyrics" is not unconstitutional.

Protection from Inmate Assault/Pre-Trial Detainees/Municipalities/Medical Care: Standards of Liability, Deliberate Indifference/Staffing: Training, Surveillance/State, Local, and Professional Standards

Lopez v. LeMaster, 172 F.3d 756 (10th Cir. 1999). The plaintiff was attacked by other detainees, complained to jailers, and was then put back in general population, where he was attacked as a snitch. He was not taken to a hospital; he was told "you are still conscious, we don't have to take you." He was given aspirin. He was later found to have "severe contusion to the skull with post-concussion syndrome" among other injuries. There was some evidence of poor training of jailers.

The Oklahoma Department of Health jail standards require 24-hour supervision of prisoners by jailers on the floor or by video/audio surveillance, and location of posts to permit monitoring and response to calls for help, disorders, and emergencies. That evidence comprises a Jail Inspection Division report noting deficiencies in staff, backup, training, and supervision of inmates, in particular the failure to segregate sentenced from unsentenced prisoners.

There is evidence of the Sheriff's knowledge of the risk. A subsequent report on a jail suicide, though not directly probative as to this incident, contains an admission that the Sheriff knew the jail was understaffed, tried to comply with the standards, but the county commissioners had failed to provide adequate funding. The Sheriff need not have known about the specific risk to the plaintiff from his cellmates if he knew of an obvious, substantial risk to inmate safety.

The plaintiff has made a sufficient showing of an unconstitutional policy of understaffing and failing to monitor. He has also shown deliberate indifference in that the county legislature failed to provide adequate funding, or alternatively because the Sheriff is the final policymaker and failed to provide for adequate staffing and surveillance.

The evidence could support an inference that the person who told the jailer only unconscious people were taken to the hospital was the Sheriff, so factual issues precluding summary judgment exist.

Color of Law/Criminal Prosecution

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999). A police officer was convicted of violating a prisoner's civil rights and sentenced to 27 months in prison after he used his official authority to get the prisoner out of his cell. (The prisoner had made derogatory remarks about him.) At 596: "These events took place in a restricted area of the jail. Mr. Colbert was allowed to be in the area only because of his status as a police officer. On account of this same status, he obtained a key to Mr. Harshaw's cell and had the authority to remove the prisoner. He also, of course, had the authority to make arrests." The officer was therefore acting under color of law even if he was not on duty and his motivation was personal.

PLRA: Judgment Termination

Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999). The judgment termination provision doesn't violate the *Klein* rule against legislative "rules of decision" for pending cases. (This court rejected the other separation of powers arguments earlier in *Dougan v. Singletary*.)

The court also rejects the claim that the PLRA strips the courts of their ability to enforce effective remedies in constitutional litigation.

PLRA: Screening and Dismissal, Mental or Emotional Injury/Classification/Searches/ Mental Health/Administrative Segregation

Harper v. Showers, 174 F.3d 716 (5th Cir. 1999). The plaintiff's claim about being classified as an extreme security risk after a successful escape and unsuccessful attempts was frivolous. The court buys in to the idea that the mental/emotional injury provision limits damages, not claims or actions.

A claim of repeated placement in filthy cells formerly occupied by psychiatric patients, and placement near them exposing the plaintiff to screaming and various forms of deranged behavior, causing him to lose sleep, is not frivolous. At 720: ". . . [S]leep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment." Frequent searches with no

purpose but to harass also may violate the Eighth Amendment.

Medical Care: Deliberate Indifference

Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999). This is the case of the elderly prisoner who died of *bedsores* over a period of several months while medical staff did next to nothing.

A Dr. Dial treated Stewart for leg swelling, indicative of congestive heart failure, for five days and discharged him. The next day he was told that Stewart had a large decubitus ulcer on his back, which he had managed not to notice. He ordered cleaning and dressing of the area and placed him on the next sick call.

Stewart was readmitted to the prison hospital under a Dr. Kim, who took cultures from the bedsores, debrided them several times, and administered antibiotics and IV fluids. She ordered that the dressings be changed two or three times daily and that Stewart be repositioned every three hours, but acknowledged that due to staffing problems "the nurses sometimes had difficulty following all of the orders." (535) She sent him to a hospital for consultation, but upon his return did not follow the recommendation that he be transferred to another facility to receive physical therapy.

Dr. Kim did, however, find Stewart's condition serious enough to transfer his care to Dr. Knutson, who gave no consideration to transferring Stewart, but gave palliative care similar to Kim's. He did not read the nurses' notes, which indicated that Stewart had an infection from a catheter; he did not see Stewart (nor did any other doctor) for the four-day Thanksgiving weekend. When next he saw Stewart, Stewart "appeared like he was going to die," and he had him transferred to a hospital two days later. The doctor who admitted him said he had the worst bedsores she had ever seen. But the court says none of the doctors' actions amounted to deliberate indifference.

The dissenting judge says: "If these appellees are guilty of nothing more than a bit of innocuous medical malpractice, then the barrier to a deliberate indifference claim has been rendered virtually impenetrable." (538)

Religion/Administrative Segregation: High Security/Class Actions: Certification of Classes/Deference/Cruel and Unusual Punishment: Proof of Harm/Negligence, Deliberate Indifference and Intent

In re Long Term Administrative Segregation, 174 F.3d 464 (4th Cir. 1999). Here, the Fourth Circuit holds that prison officials can lock up members of an arguably religious group (the Five Percenters) indefinitely, based solely on membership, until they renounce their affiliation. This was done pursuant to a "Security Threat Group" policy.

The plaintiffs dispute the underlying facts. At 470: "But to draw these inferences in the inmates' favor would turn *Turner's* command of judicial deference on its head. The question is not whether Moore's conclusion was indisputably correct, but whether his conclusion was rational and therefore entitled to deference."

The plaintiffs challenge the placement as not content neutral, since it is based on group affiliation. But it need only be "unrelated to the suppression of expression," and it is, since it "rationally furthers the neutral policy of protecting prison security and order." (471)

The restrictive conditions of administrative segregation (23-hour lockup, no radio or TV, five hours of exercise a week, exclusion from all programs) do not violate the Eighth Amendment, since they do not deprive people of a "basic human need" (food, clothing, shelter, medical care, safety), and isolation is not unconstitutional. Indefinite duration (already over three years) doesn't render it unconstitutional; length of time is "'simply one consideration among many' in the Eighth Amendment inquiry." The defendants are not deliberately indifferent, since they have procedures for periodic visits by medical personnel and referrals for mental health treatment, and there is no contention that these have not been followed.

AIDS/Privacy/Homosexuals and Transsexuals/Qualified Immunity

Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999). The plaintiff alleged that an officer disclosed that she was an HIV-positive transsexual. The gratuitous disclosure of an inmate's confidential medical information as humor or gossip--the apparent circumstance of the disclosure in this case--is *not* reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy.

The defendants are entitled to qualified immunity on the privacy claim. However, they are *not* entitled to qualified immunity on the Eighth Amendment claim.

Access to Courts: Punishment and Retaliation/Inmate Legal Assistance/Mental Health Care: Transfer and Admission to Mental Health Facilities/Food/Sanitation/ Administrative Segregation

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc). The two plaintiffs had an approved "Legal Assistance Request and Agreement" under which X would assist Bell with his legal problems. They complained that prison officials began to harass them and to try to hinder them. A badly divided court tries to address retaliation claims comprehensively.

The court rejects the view that prisoners' right of court access, like the speech rights of public employees, is protected from retaliation only if it involves matters of public concern. It also holds that the right of court access is limited to "particularized causes of action--direct appeal, collateral attack, and § 1983 civil rights actions" (392), which are always of personal concern to the prisoner.

In a retaliation claim like this, however, the harm suffered is the adverse consequences which flow from the inmate's constitutionally protected action. Instead of being *denied* access to the courts, the prisoner is penalized for actually exercising that right. Such injury is sufficient in a retaliation case to confer standing.

A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two--that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Plaintiff X's allegation that he was placed in an area where mentally ill patients are kept, where prisoners throw human waste and urine at each other and at staff, there is a constant foul odor, the prisoners repeatedly flood the gallery and bang their footlockers, some refuse to bathe or flush their toilets, and the area is cleaned only rarely, supports a retaliation claim and states an Eighth Amendment claim.

PLRA: Attorneys' Fees

Collins v. Montgomery County Board of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999) (en banc). The PLRA fees limitations (both the hourly rate and the limitation based on the size of the judgment) apply to work done after enactment.

The court en banc is equally divided on the question whether the restriction on hourly rates and fees as a percentage of the judgment deny equal protection.

At 684 n.5: There might be "difficult questions" under the "150% of the judgment" rule in a case where a prisoner "obtains extensive and important equitable relief and a modest award of damages." The limitation might not apply in that case.

PLRA: Exhaustion of Administrative Remedies

Williams v. Norris, 176 F.3d 1089 (8th Cir. 1999). The district judge erred in dismissing for non-exhaustion when the plaintiff had exhausted by the time the court *ruled*.

Grievances and Complaints about Prison/Damages: Conditions of Confinement, Punitive

Trobaugh v. Hall, 176 F.3d 1087 (8th Cir. 1999). The plaintiff filed a grievance contesting being taken to court early, which was denied; filed a grievance seeking to appeal the deputy's decision, which was denied; and filed a grievance to contest the apparent lack of an appeal process, also denied. He was then put in isolation for three days for filing "repeat grievances." The deputy conceded that this conduct violated the First Amendment right to petition for redress of grievances.

The district court awarded $1.00 in nominal damages. This was an abuse of discretion (1089). The court believes $100 a day would be about right, and the district court also ought to consider punitive damages.

PLRA: Judgment Termination, Intervention

Loyd v. Alabama Dept. of Corrections, 176 F.3d 1336 (11th Cir. 1999). The state Attorney General intervened in a jail consent decree case and moved to terminate; the AG was not a party to the decree.

It was an abuse of discretion for the district court to refuse to conduct an evidentiary hearing on current conditions. The fact that there were court monitor's reports, one only two months old, does not obviate the need for a hearing.

Use of Force: Restraints/Procedural Due Process

Key v. McKinney, 176 F.3d 1083 (8th Cir. 1999). The plaintiff was restrained in handcuffs and leg shackles for 24 hours for throwing water on a correction officer. Policy prescribed this for all prisoners caught spitting, throwing objects, or starting fires. The handcuffs and shackles are chained together but prisoners are "generally" able to take care of their basic bodily functions. Prisoners are fed "food loaf" while restrained.

The district court found that the policy was intended to "manage behavior" rather than to punish and was not malicious and sadistic. There is no liberty interest in not being shackled. 24 hours in restraints was not atypical and significant under *Sandin*.

Religion: Practices, Beards, Hair, Dress

Cofer v. Schriro, 176 F.3d 1082 (8th Cir. 1999). A Rastafarian prisoner's allegations of an intermittent, unexplained requirement that he cut his hair states a non-frivolous claim, notwithstanding decisions that security concerns might justify requiring him to cut his hair.

Mental Health Care: Psychotropic Medication/Denial of Ordered Care/Medical Care: Denial of Ordered Care/In Forma Pauperis/Appeal/Parties Defendant

Wakefield v. Thompson, 177 F.3d 1160 (9th Cir. 1999). The plaintiff, who took psychotropic medication, was not provided with it on his release, even though his prison psychiatrist had given him a prescription for two weeks worth of it. An officer said it "wasn't available" and refused to call the prison medical staff about it because he was too busy.

At 1164: "We therefore hold that the state must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he had that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply."

PLRA: Judgment Termination

Cagle v. Hutto, 177 F.3d 253 (4th Cir. 1999). The district court terminated a 1981 consent decree governing living conditions at Powhatan prison. *Plyler* resolves the statute's constitutionality. The fact that the district court had made tentative findings of unconstitutionality before entry of the consent decree in the context of a motion for a preliminary injunction doesn't help the plaintiffs, since the district court didn't make the findings required by the statute. The court rejects plaintiffs' request to remand for "post hoc findings." At 258:

Even though a district court is not required to hold an evidentiary hearing in all cases, it nevertheless may do so in appropriate circumstances. At a minimum, however, a district court must hold such a hearing when the party

opposing termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation.

PLRA: Exhaustion of Administrative Remedies

Powe v. Ennis, 177 F.3d 393 (5th Cir. 1999) (per curiam). At 394: "A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired."

Disabled/State Officials and Agencies/Deference

Amos v. Maryland Dept. of Public Safety, 178 F.3d 212 (4th Cir. 1999). The Americans with Disabilities Act is a legitimate exercise of Congress's power under Section 5 of the Fourteenth Amendment. The court declines to read the ADA standard as limited by the *Turner v. Safley* reasonableness standard. To do so would be to rewrite the statute. The court declines to strike down the Department of Justice ADA/Rehabilitation Act regulations as applied to prisons. Because Congress made an express delegation by directing the DOJ to promulgate implementing regulations, the court is ordinarily obliged to defer to DOJ's interpretation of the statute.

Protection from Inmate Assault/Municipalities/ Personal Involvement and Supervisory Liability

Giroux v. Somerset County, 178 F.3d 28 (1st Cir. 1999). The plaintiff was threatened by another inmate in his housing area. The plaintiff continued to receive threats from the same prisoner and his brother and the plaintiff asked for protective custody. He was placed on cell feed status, which employees testified was a protective measure. He was then left in the visiting waiting area with the brother of the prisoner who had initially threatened him; the brother assaulted and injured him.

The shift supervisor at the time of the assault knew that cell feed status was often protective in nature and part of his job was to review the cell block assignment roster, which indicated cell feed status, at the start of his shift. The record "supports the inference that Hartley was aware of a high probability that Giroux was vulnerable to attack from another inmate but took no action despite that awareness." (33)

Other jail employees testified it was the shift supervisor's responsibility to tell them about inmates who were being cell fed for protective purposes. The shift supervisor gave no reason why he did not or could not have done that. This record sufficiently supports a claim of deliberate indifference to withstand summary judgment.

PLRA: Judgment Termination, Prisoner Release Orders

Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999). A maximum population limit is a prisoner release order. However, a request to modify a pre-PLRA order may not be based on the prisoner release provision because the statute says "no court *shall* enter. . . ." (836)

The statute calls for "prompt" rather than "instant" decision after a termination motion is filed. By letting more than a year pass without action, and then terminating the decree without making findings under §§ (b)(2) or (b)(3), the district court erred.

The plaintiffs could ask to have the decree reinstated, the new bunks removed, and their occupants released pending decision, but all they ask for is a prompt decision on their contention that relief continues to be appropriate. They are entitled to this much--and within 30 days.

A hearing may not be needed. A monitor was appointed and perhaps information already in hand will resolve the motion. If the district judge can't resolve the matter within 30 days, he should inform the chief judge of the district court so the case can be transferred.

Medication/Food/Medical Care: Standards of Liability, Deliberate Indifference, Serious Medical Needs/Personal Involvement and Supervisory Liability

Reed v. McBride, 178 F.3d 849 (7th Cir. 1999). The plaintiff, with a panoply of illnesses, complained that every Friday for some period of time, when he returned from hospital treatment, he could not retrieve his ID until the following Monday or Tuesday and therefore could not receive food or medication.

Deprivation of food may violate the Eighth Amendment depending on the "amount and duration of the deprivation." (853) A deprivation might have had more severe repercussions for the plaintiff, allegedly already infirm, than for others. The allegation of three to five day deprivations cannot be dismissed.

Allegations that the plaintiff sent letters of complaint to the defendant warden and commissioner were sufficient to support a claim that they were aware of facts from which the risk of harm could be inferred; the risk was sufficiently obvious that they could be found to have drawn the inference.

Procedural Due Process: Disciplinary Proceedings/Habeas Corpus/PLRA: Exhaustion of Administrative Remedies, Mental and Emotional Injury

Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999). The plaintiff sufficiently exhausted his administrative remedies by appealing the disciplinary sanctions imposed on him.

In *Spencer v. Kemna*, five Justices held that where habeas corpus is not available to remedy constitutional wrongs (e.g., when the petitioner is no longer in custody), § 1983 must be available. At 27: "Accordingly, we hold that a § 1983 suit by a prisoner . . . challenging the validity of a disciplinary or administrative sanction that does not affect the overall length of the prisoner's confinement is not barred by *Heck* and *Edwards*."

In dictum, the court suggests that the PLRA mental/emotional injury provision may be a defense to claims of improper disciplinary confinement.

Procedural Due Process: Disciplinary Proceedings

Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999). The plaintiff was convicted of escape at a disciplinary hearing after he said that if he weren't placed in protective custody, his only option would be to "hit the fence." There was no evidence that he escaped or made any attempt to do so. The district court concluded that there was no atypical or significant hardship under *Sandin* (he lost no good time and was not placed in segregation) but directed the expungement of his conviction on the grounds that there was no evidence against him.

The plaintiff's due process rights were violated even if no cognizable liberty interest was lost. *Superintendent v. Hill* and other cases finding an interest in avoiding arbitrary punishment only where there is a liberty interest do not apply where a conviction is totally unsupported by evidence. Expungement was the appropriate remedy for the wrong suffered by the plaintiff.

PLRA: Exhaustion of Administrative Remedies

Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999). Where a grievance procedure allowed waiver of time limits for filing a grievance based on "good cause," a prisoner whose grievance was rejected as untimely and did not apply for waiver of the time limits had not exhausted.

Procedural Due Process: Temporary Release/Damages: Due Process Violations, Punitive

Kim v. Hurston, 182 F.3d 113 (2d Cir. 1999). Removal from a work release program deprives a prisoner of liberty. *Young v. Harper* is dispositive, since the conditions of the plaintiff's work release (living at home, working at a job, reporting regularly to the work release facility) is "virtually indistinguishable from either traditional parole" or the pre-parole program in *Young*.

There is no procedural right to prior notice of physical removal from work release; learning of a positive urinalysis result constituted an emergency justifying immediate removal.

Medical Care: Standards of Liability--Deliberate Indifference

McElligott v. Foley, 182 F.3d 1248 (11th Cir. 1999). The plaintiff had had burning abdominal pains for five months before admission to jail. In jail it got worse and he was placed on a liquid diet and given Pepto-Bismol. The jail doctor, who spent three or four hours a week at the jail, did not see him for several weeks, just prescribed by telephone. When the doctor did see him, he prescribed palliative treatment. The plaintiff's complaints got worse and he continued to receive only palliative treatment, and not much of that. The doctor, who had been waiting for months for the plaintiff's records from the VA hospital, performed no further diagnostic tests, even though the plaintiff continued to complain of pain and was losing weight. After about six months, a CT scan was ordered, which showed an intestinal obstruction; he was then hospitalized, and the next day was prematurely released from the jail and discharged from the hospital without diagnosis two days later. He was then admitted to the VA Hospital and was diagnosed with terminal cancer.

The doctor cannot be held liable for failing to diagnose colon cancer; it may have been extremely negligent, but no more. However, the record could support a finding of deliberate indifference to the plaintiff's "medical need for further diagnosis of and treatment for the severe pain he was experiencing." (1256-57) The Eighth Amendment may be violated by failure to treat pain. A jury could conclude that the defendants knowingly "took an 'easier but less efficacious course of treatment'" reflecting deliberate indifference. The multiple delays in the doctor's even seeing the plaintiff could be found to be deliberate indifference, as could the failure to alleviate pain or to monitor plaintiff's condition between the time a CT scan was ordered and the arrival of the results.

Medical Care/Class Actions: Conduct of Litigation/Qualified Immunity

Rouse v. Plantier, 182 F.3d 192 (3d Cir. 1999). The plaintiff class of past, present, and future insulin-dependent diabetic prisoners sought injunctive relief and damages concerning their medical care. The district court denied summary judgment to defendants and they appealed on qualified immunity grounds.

The district court erred in "concluding on a wholesale basis" that plaintiffs had alleged an Eighth Amendment violation. Some diabetics are stable and some are unstable, and they require different levels of care. At 199: "On remand, therefore, the Court should address the specific needs of each such group. . . . Then, the District Court should consider the appropriate level of care due under the Eighth Amendment." Only after this is done should the defendants' actions with respect to each subgroup be considered under the Eighth Amendment.

The court cautions that in the unusual context of a class action for damages under the Eighth Amendment, the court must approach each defendant's liability to each plaintiff in the same manner as if the plaintiff had sued the defendant separately.

PLRA: Three Strikes Provision

Smith v. District of Columbia, 182 F.3d 25 (D.C.Cir. 1999). The plaintiff was denied IFP status under the three strikes provision. Dismissals count as strikes if the time for appeal has expired as of the time of filing of the action in which the three strikes provision is asserted.

Publications/Rehabilitation/Deference

Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999). The plaintiffs, "convicted pedophiles" held at the Adult Diagnostic and Treatment Center, which is operated solely for housing and rehabilitating sex offenders who have exhibited behavior that is "repetitive and compulsive," challenged a New Jersey statute banning "sexually oriented and obscene" materials from that facility. The district court struck down the statute.

Several weeks after appellate argument, the defendants advised the court that the state had

promulgated regulations narrowing it. They limited "associated anatomical area" to mean "exposed or unclothed genitalia or female breasts"; "sexual activity" to mean "actual or simulated ultimate sexual acts". Materials are not considered "sexually oriented" unless they are predominantly oriented to such descriptions or displays on a routine or regular basis, or the publication promotes itself based upon such depictions in the case of individual one-time issues.

The district court erred in holding the statute vague and over-broad without first considering whether it was rationally related to a legitimate penological interest. The state has a legitimate penological interest in rehabilitating dangerous and compulsive sex offenders. The district court erred in concluding from the lack of relevant legislative history that rehabilitation was not the true purpose of the statute. The statute is neutral because its goal of rehabilitation is "unrelated to the suppression of expression." The statute has a "valid, rational connection" to its goal. This standard is similar to rational basis review. The district court's finding that plaintiffs' psychological experts were more convincing than defendants' was insufficient to support relief absent a conclusion that defendants' experts' opinions were irrational or unreasonable.

Religion: Practices, Diet/Deference/Appeal/ Qualified Immunity/Magistrates/Damages: Intangible Injury

Makin v. Colorado Dept. of Correction, 183 F.3d 1205 (10th Cir. 1999). The plaintiff claimed improper interference with his ability to fast during Ramadan because of the schedule of meal delivery in punitive segregation; defendants' Ramadan procedures were not extended to segregation.

Defendants violated plaintiff's right to observe Ramadan by failing to accommodate him with their meal schedule. (The court emphasizes that the *defendants* defined the issue as the right to observe Ramadan, not some broader right of religious exercise.) He was able to fast, but only by refraining from eating two of three meals each day, thereby (as the district court put it) "substantially diminish[ing]" his "qualitative spiritual experience." (1212) This argument "is founded on the unacceptable notion that prison authorities may burden the observance of religious practices for no legitimate reason at all" and "makes the question of the legitimacy of government action dependent on the personal strength of the individual affected." (1212) The district court was justified in concluding that the burden of accommodating the plaintiff was minimal, in the absence of actual evidence concerning the difficulty of accommodating prisoners in segregation generally.

This is an unusually plaintiff-favorable application of the *Turner v. Safley* standard in that it holds prison officials to the weaknesses of their own record and arguments just like other litigants.

Mental Health Care/Pre-Trial Detainees/Negligence, Deliberate Indifference, and Intent/Municipalities

Sibley v. Lemaire, 184 F.3d 481 (5th Cir. 1999). The plaintiff engaged in floridly bizarre behavior (like reading the Bible upside down). After a doctor who noted this said that he was "on the list" at Mental Health and *really* needs to go there, he was put in leg shackles either to punish him for disruptive behavior or to protect him, then was shackled in the nude, at which point he plucked out his eyes. It took an hour for him to be taken to a hospital.

The district court should have first determined whether a specific employee had acted with deliberate indifference before reaching the question of whether the prison's policy was reasonably related to a legitimate government objective. The deputies could be found negligent, but not deliberately indifferent, for not calling for medical assistance.

Procedural Due Process: Administrative Segregation and Disciplinary Proceedings

Hatch v. District of Columbia, 184 F.3d 846 (D.C.Cir. 1999). The plaintiff spent more than seven months in segregation after

proceedings that combined elements of administrative and disciplinary segregation. His disciplinary charges were dismissed for procedural reasons, then he was retained in administrative segregation by the Housing Board, then his disciplinary charges were adjudicated notwithstanding that they had been dismissed, and he was sentenced to 14 days of "adjustment segregation"; after 60 days, the Housing Board recommended his return to general population, but that decision was not implemented for four more months.

The court does not decide whether *Sandin's* test "supplements or supplants" (853) *Hewitt's*, since the *Hewitt* state-created liberty interest test is met by regulations setting out four circumstances in which administrative segregation may be imposed.

The court held that due process is required when segregative confinement imposes an "atypical and significant hardship" on an inmate in relation to the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences. These conditions included the usual conditions of administrative segregation at Lorton. They also included more restrictive conditions at other prisons if it was likely both that inmates serving sentences similar to appellant's will actually be transferred to such prisons and that once transferred they will actually face such conditions. Length of stay must also be considered in the "atypical and significant" inquiry, as must the length of the sentence the prisoner is serving.

Pre-Trial Detainees/Medical Care: Standards of Liability, Deliberate Indifference, Serious Medical Needs

Olabisiomotosho v. City of Houston, 185 F.3d 521 (5th Cir. 1999). The plaintiff was arrested and arrived at the police station having an asthma attack. She asked to see a doctor and was told that the clinic was closed. She said she was not medically screened; the clinic assistant on duty claimed that he did screen her, even though there was no record to that effect. In court the next day, she could not stand up. The judge, on hearing her story, said the clinic was never supposed to be closed and ordered a guard to take her there for treatment. He did not; he put her in a holding cell and led her to an eating area, where she fainted, and was subsequently sent to an emergency room, where she lapsed into a coma, required a respirator, and temporarily lost her eyesight.

Under Fifth Circuit law, because this case involved an "episodic act or omission," individual liability is governed by the subjective deliberate indifference standard and municipal liability by the objective deliberate indifference standard (though only if subjective deliberate indifference is found on the part of an individual employee).

The plaintiff's medical needs were not serious at the time she told the police officer defendants she had asthma and that they were walking too fast, and she was wheezing and experiencing shortness of breath. They were serious at the time she was "coughing really bad and wheezing really loud" and asked to go to the clinic, and the time when she couldn't stand up in court.

The police officers couldn't be found deliberately indifferent, since one of them got her inhaler for her. The clinic assistant also cannot be found deliberately indifferent, since the only direct evidence of his mental state is his own affidavit, which contains no evidence that he knew of a risk to the plaintiff or deliberately disregarded a risk.

Religion: Practices/PLRA: Attorneys' Fees

Chatin v. Coombe, 186 F.3d 82 (2d Cir. 1999). The Muslim plaintiff is required to pray and perform rakat (the ritual movements of Muslim prayer) five times daily at times depending on the season. A facility memorandum forbade "demonstrative prayer" anywhere other than individual cells or designated religious areas. The plaintiff performed modified rakat in the yard in an area where no one else was present. He was then given a misbehavior report and keeplocked for praying in the yard.

The rule under which the plaintiff was disciplined states in its entirety that "[r]eligious services, speeches or addresses by inmates other than those approved by the Superintendent or designee are prohibited." The district court held the rule unconstitutionally vague, and the appeals court affirms. The correct standard is first, whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and second, whether the law provides explicit standards for those who apply it.

The rule is vague as applied because it does not provide reasonable notice that "solitary, silent, demonstrative prayer" is prohibited. The fact that there were a prison directive and a memorandum saying "no prayer in the yard" did not provide adequate notice because the plaintiff testified to his knowledge that some officers permitted silent prayer and some did not. In DOCS' administrative scheme, a facility memorandum cannot create a regulation stricter than the one promulgated by DOCS. The rule also lacks sufficiently explicit standards for those who apply it.

Negligence, Deliberate Indifference and Intent/Class Actions: Conduct of Litigation and Certification of Classes/Jury Instructions and Special Verdicts/Trial

Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999). The court reverses the jury award in the Attica rebellion class action. *Hudson* [*v. McMillian*] 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." Because decisions to use force are often made under great pressure and involve competing interests, the good-faith standard is appropriate.

Supervisors may be held liable for direct participation; for failing to remedy a wrong after learning of the violation through a report or appeal; for creating a policy or custom under which unconstitutional practices occurred; for allowing such a policy or custom to continue; or for being grossly negligent in managing subordinates who caused the unlawful condition or event.

The district court's bifurcation of the case into liability and damages phases, both to be conducted before juries, violated the Seventh Amendment because both juries were asked to determine whether the same acts constituted "reprisals." Thus the damages jury reexamined the verdict of the liability jury.

The court questioned how, with regard to this particular class, common issues of law and fact predominated over individual ones. The court directs that the case be expedited on remand.

Privacy/Rehabilitation

Doe v. Sauer, 186 F.3d 903 (8th Cir. 1999). The plaintiff was denied parole for refusing to take a sexual offender treatment program, which he did because he refuses to admit guilt concerning any act of sexual abuse, including his offense of conviction. He contended that the requirement that he admit guilt for uncharged offenses violated the Fifth Amendment right against self-incrimination.

The plaintiff provided no evidence to support his claims, and even if he had, he would lose. Prison officials may constitutionally deny benefits to a prisoner who invokes the privilege against self-incrimination to refuse to make statements necessary to his rehabilitation, as long as the officials based their denial on the prisoner's refusal to participate in rehabilitation, not the invocation of the privilege. Even if the Parole Board denied parole based on the plaintiff's program refusal (which it denied doing), the denial was based on refusal of rehabilitation and not on invocation of the privilege.

Pre-Trial Detainees/Use of Force: Chemical Agents/Suicide Prevention

Lambert v. City of Dumas, 187 F.3d 931 (8th Cir. 1999). The decedent was arrested for public intoxication; there was a fight when he was booked, resulting in his being sprayed with pepper spray or other chemical restraint. The officers

carried him to a cell and sprayed him again. Later, another officer told him to quiet down or he would "get some more," and then several officers went back to the cell "where another fight occurred" and the plaintiff was sprayed again. After that, nobody paid attention to him for the next three hours, and he hanged himself.

Actual injury is required to sustain a claim of excessive force, and is supplied by the existence of a small cut of the eyelid and small scrapes of the knee and calf. The defendants are entitled to qualified immunity for the plaintiff's suicide because there is no evidence showing that they were actually and subjectively aware of the risk of suicide.

Grievances and Complaints about Prison/Protection from Inmate Assault/PLRA: Mental or Emotional Injury/Pro Se Litigation

Jones v. Greninger, 188 F.3d 322 (5th Cir. 1999). Prisoners claiming retaliation must allege "(1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." The plaintiff alleged retaliation for his filing of grievances that limited him to five hours of law library time a week. However, such a limit does not deny court access, and the plaintiff therefore has no retaliation claim. (Wrong. Retaliation for the exercise of a constitutional right need not itself be unconstitutional, as the court itself suggests in the phrase "a retaliatory adverse act.") The district court properly dismissed with prejudice.

Pre-Trial Detainees/Publications/Deference

Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (en banc), *cert. denied*, 120 S.Ct. 1419 (2000). A jail policy forbade prisoners from possessing "sexually explicit" materials, defined as "personal photographs, drawings, and magazines and pictorials that show frontal nudity." The plaintiff was denied *Playboy* under the policy. The policy is upheld under the *Turner* standard.

The policy meets the "valid, rational connection" requirement of *Turner*. It "is expressly aimed at maintaining jail security, rehabilitating inmates and reducing sexual harassment of female detention officers." These are all legitimate goals, except for rehabilitation in connection with pre-trial detainees in this mixed population (1059 n. 1). The policy is also neutral, since it furthers important or substantial interests unrelated to the suppression of expression. Prison officials need only show that they "might reasonably have thought that the policy would advance its [sic] interests." (1060) Since prisoners have used nude photographs to draw anatomical comparisons with the significant others of other inmates, leading to fights and disturbances, and with female staff members, and to masturbate openly and otherwise sexually harass them, the connection between the policy and defendants' purposes is rational.

Protection from Inmate Assault/PLRA: Exhaustion of Administrative Remedies

Snider v. Dylag, 188 F.3d 51 (2d Cir. 1999). The plaintiff said he was assaulted by other prisoners because the defendant officer had previously announced that it was "open season" on him. At 55: "If Dylag did, in fact, declare 'open season' on Snider, indicating to other inmates that their abuse of Snider would be unimpeded by prison officials, deliberate indifference to Snider's safety would be obvious." The officer could be held liable even if he was not actually present at the assault.

Communication and Expression: Group Activity/Inmate Legal Assistance

Nicholas v. Miller, 189 F.3d 191 (2d Cir. 1999) (per curiam). The plaintiff complained of prison officials' denial of his request to form a Prisoners' Legal Defense Center to disseminate information to the public and media, to lobby state and federal government, and to provide legal assistance to selected prisoners. Initially prison officials said that this request "conflicted with an already existing group and would thus result in duplication of services." Later, an official not involved in the initial decision said that it would

"undermine the safety and security" of the prison, would "foster, and perhaps even instigate, adversarial conflicts" within the facility and "incite collective subversive activities."

Under the *Turner* standard, summary judgment for defendants was improper. The district court failed to address the *Turner* factors. The plaintiff has questioned the validity of the prison's asserted interest in avoiding duplication of services because prison officials never identified the inmate group providing the same service, and has challenged the stated security concerns as being unrelated to the denial of his application, raising genuine issues of fact. The defendants are entitled to qualified immunity against the plaintiff's damage claims.

Mootness/Transfers/Religion: Practices

Smith v. Hundley, 190 F.3d 852 (8th Cir. 1999). The plaintiff complained he was denied items needed for the practice of his Seax-Wicca faith (robe, rune set, tarot cards, pentacle, etc.). The district court ruled that defendants' denial of these based on concerns about plaintiff's possessing them in his cell did not satisfy the *Turner* standard since other prisoners were given access to similar materials in the chapel.

U.S. District Court Cases

Transportation to Court

Hawks v. Timms, 35 F.Supp.2d 464 (D.Md. 1999). The plaintiff sued over excessive force by police officers. He is at Lewisburg in Pennsylvania and wants to attend his trial in Maryland. Request granted. The plaintiff's claim will depend entirely on his own testimony and credibility; appearing by affidavit or deposition will put him at a serious disadvantage. The Marshal says that bringing him 135 miles will not be excessively burdensome. The court regularly has prisoners produced in court for criminal and civil proceedings. Since the plaintiff has completed 5 years of a 26 year sentence, a stay is not reasonable. The trial is only scheduled to take 3 days and the plaintiff need not be brought far.

Correspondence-Legal and Official/Medical Care: Staffing/Pendent and Supplemental Claims-State Law in Federal Courts

Lewis v. Sheahan, 35 F.Supp.2d 633 (N.D.Ill. 1999). At 636 n. 3: the PLRA mental/emotional injury provision does not bar the plaintiff's access to courts claim; the question is not whether there was physical injury but whether the plaintiff suffered legal injury to actual or contemplated litigation.

Judicial Disengagement/PLRA: Prospective Relief Restrictions, Judgment Termination/ Women/Equal Protection/Deference

Glover v. Johnson, 35 F.Supp.2d 1010 (E.D.Mich. 1999). On remand from the Sixth Circuit, the court decides the merits of defendants' motion to terminate the judgment in this gender discrimination case. The motion antedated the PLRA.

The "parity of treatment" standard applied in the earlier proceedings in this case is overruled by *Turner v. Safley*; the "reasonable relationship" standard now governs. The court does not reopen its prior findings of a facial gender classification or that male and female prisoners are similarly situated (rejecting the "not similarly situated" approach of *Klinger et al.* for that reason).

The court finds educational, vocational, and apprenticeship opportunities to be comparable for female prisoners. The court rejects plaintiffs' argument that it must examine the quality of the degree programs offered to male and female prisoners absent an allegation that courses offered are a sham. The court attributes its unwillingness to examine this issue to the *Turner* deference principle. There are 17 vocational programs offered to men and seven to women, but this is sufficiently comparable; the six programs most frequently offered to men are offered to all the women; enrollment rates per capita are similar. (No single men's prison offers more than six vocational programs.) The disparities are

acceptable under *Turner*, since strict comparability would mean that some of the women's facilities would have to provide more programs than they could reasonably support. As to apprenticeships, there are 12 programs for men and seven for women, but all women who seek apprenticeships get them and only a fraction of men do. A strict parity requirement would be contrary to *Turner*. For similar reasons the existence of small OJT programs for men but not women does not deny equal protection.

Use of Force/Summary Judgment

Sanders-El v. Spielman, 38 F.Supp.2d 438 (D.Md. 1999). The plaintiff said he was kicked and stomped by three officers while a fourth turned his back. The defendants said he slipped and fell. There is a factual dispute precluding summary judgment.

The defendants argued that plaintiff's injuries were *de minimis* because his medical records indicated a small ecchymotic area under the eye, swelling over the left elbow, and tenderness around his ribs, wrists, and elbow, and that he complained of elbow pain almost two months later. The court distinguishes the Fourth Circuit case of *Taylor v. McDuffie* on the ground that in that case, there was clearly a reason for some force to have been used.

Pre-Trial Detainees/Work Assignments

Ford v. Nassau County Executive, 41 F.Supp.2d 392 (E.D.N.Y. 1999). The plaintiff said he was forced to serve without payment as a "food cart worker" under threat of discipline.

The court denies summary judgment to defendants on the plaintiff's claim of an official policy of making pre-trial detainees work, since it is difficult to believe that he would have been threatened with punishment if there were not a policy in place.

The forced work did not deny due process under *Wolfish* because there was no evidence of intent to punish or that the practice was excessive in relation to its legitimate purpose of getting the food served.

The plaintiff had no Thirteenth Amendment claim; such a claim requires a showing of "compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." (401, *quoting Butler v. Perry,* 240 U.S. 328, 332 (1916)) Crediting the plaintiff's claim would trivialize slavery.

Pre-Trial Detainees/Medical Care/Personal Involvement and Supervisory Liability/ Municipalities/Judicial and Prosecutorial Immunity/State Officials and Agencies

Wilson v. City of Chanute, 43 F.Supp.2d 1202 (D.Kan. 1999). The decedent was arrested. He was allowed to keep his prescription medications and took a lot of Valium in the course of his initial court proceedings. As his condition deteriorated, and was observed by police and other official personnel, they talked about taking him to a hospital but didn't do anything; rather, they contrived to release him on his own recognizance even though the judge had set bail. They sent him home and he died.

Several officers who observed the decedent's condition and did nothing could be found deliberately indifferent. Evidence of one other detainee who had been taken directly to jail from the police station without receiving medical care, and of a letter from the county sheriff to the police chief expressing concern about receiving prisoners from the police who needed medical attention, was "evidence of actual notice and acquiescence with respect to a practice of denying necessary medical care to detainees" (1213) as to the police chief, and cause for denial of summary judgment to him. The evidence of the police chief's liability "is sufficient to show notice to [the police chief] acting for the city."

Pre-Trial Detainees/Privacy/False Imprisonment/Chemical Agents/Use of Force: Restraints/Personal Involvement and Supervisory Liability/Municipalities/Pendent and Supplemental Claims; State Law in Federal Courts/Indemnification and Insurance

Moore v. Hosier, 43 F.Supp.2d 978 (N.D.Ind. 1998). The plaintiff said he was beaten by officers; the defendants said he was beaten by one officer, who was fired and recommended for criminal investigation. He was allegedly unruly, was gassed with pepper spray and then strapped into a restraint chair and carried to the shower, where he allegedly continued to struggle and was gassed again and beaten some more while in restraints.

When an officer metes out unconstitutional punishment, bystanding officers have an affirmative duty to act to prevent the violation if they have an opportunity to do so. On these facts, plaintiffs' claims against the bystanders narrowly survives their summary judgment motion.

Use of the pepper spray and the restraining chair in the bathroom were used to subdue the uncooperative plaintiff and not as punishment and are not actionable as assault and battery.

The officer who most seriously beat the plaintiff acted in an unauthorized manner, but may still have acted within the scope of his employment under Indiana law, since his attack was not "divorced in time, place, and purpose" from the use of force in subduing the plaintiff, which clearly was within the scope of officers' employment.

PLRA: Three Strikes Provision

Ayers v. Norris, 43 F.Supp.2d 1039 (E.D.Ark. 1999). This petition for habeas corpus concerning the parole process is construed as a § 1983 action by the court. The case is subject to the three strikes provision even though it was filed as a habeas petition; litigants can't escape § 1915(g) by mislabelling their pleadings. The court declines to address the claim that his prior dismissals weren't really frivolous.

Under *Lyons*, the plaintiff has standing to challenge § 1915(g) because he has less than $150 and therefore can't proceed if the statute is applied. Since his constitutional challenge is based on the right to court access, he must show actual or threatened injury. He has done this, since he is trying to vindicate a fundamental constitutional right via § 1983, and denial of IFP would actually injure him by barring him from court. The court rejects the proposition that prisoners aren't barred from court, they merely have to be frugal so they can pay their fees, since "prisoners often have little if any money, and there is no guarantee that they will have income while in prison." (1049)

"Although *in forma pauperis* status is not a right, it is a means for ensuring that an indigent prisoner is guaranteed his fundamental right of court access. . . ." For these reasons strict scrutiny is applied. It is too narrow in that it does nothing to reduce the frivolous filings of non-indigent prisoners. . . . The provision is too broad in that it may bar non-frivolous actions of indigent prisoners." The provision therefore denies equal protection.

Hazardous Conditions and Substances/ Personal Involvement and Supervisory Liability/Statutes of Limitations/Pro Se Litigation

Crawford v. Coughlin, 43 F.Supp.2d 319 (W.D.N.Y. 1999). The plaintiff complained that he was exposed to dangerous chemicals in a prison industrial shop because dust masks ran out and were not replaced, goggles were supplied only intermittently, he was never supplied with work gloves, and he wore the same clothes to work as he did in general population.

The plaintiff's alleged injury, the risk of future illness resulting from exposure to toxins, is actionable under *Helling*. The allegation that the plaintiff was never provided any safety equipment and did not receive any safety instruction concerning toxic substances raises a factual issue barring summary judgment for defendants on the question of deliberate indifference.

Classification: Race/PLRA: Mental or Emotional Injury/Damages/Summary Judgment/Personal Involvement and Supervisory Liability

Mason v. Schriro, 45 F.Supp.2d 709 (W.D.Mo. 1999). The plaintiff alleged racial segregation in cell assignments. His allegation that

this policy is outlined in written policies and procedures sufficiently alleges the personal involvement of the Directors of the Department of Corrections and the Division of Adult Institutions. Another high-ranking defendant is retained for the same reason and in addition because he responded to the plaintiff's grievance appeal and defended the policy.

The defendants failed to show that using race in housing assignments served a compelling state interest. They said that in the particular prison (a reception and diagnostic center), the large volume of cell assignments and changes and the need to make them quickly, combined with the lack of time to question prisoners about their preferences, justified using race as an indicator of compatibility. However, they did not provide specific evidence of security dangers resulting from failure to segregate or of alleviation of dangers by making same-race assignments.

Defendants moved for summary judgment under the mental/emotional injury provision of the PLRA. The court decided that it is highly unlikely Congress would have intended to foreclose a damage remedy in such cases. Such interpretation would raise "grave constitutional concerns. Even if the mental/emotional injury provision applied to the plaintiffs' claims for compensatory damages, they would not apply to the nominal damages claim. The court relies on *Carey v. Piphus* for this conclusion. The defendants argued that even if the action wasn't barred, summary judgment should be granted as to compensatory damages if the plaintiff didn't produce proof of compensable injury. The court rejects this argument because such injury isn't an essential element of an equal protection claim.

HIV/Medication/Disabled/Pre-Trial Detainees

McNally v. Prison Health Services, 46 F.Supp.2d 49 (D.Me. 1999). The HIV-positive plaintiff was arrested and jailed for three days. He repeatedly told jail personnel that he was on an HIV medication protocol, had missed doses, and needed his medications. He received none even though PHS had his records from a prior incarceration. PHS claimed that it had policies to avoid interruption of medication, but that the nurses on duty thought it could be dangerous to restart medications after missed doses.

Defendants were subjectively aware of the plaintiff's serious condition; he repeatedly requested it from arresting officers and from nurses, and PHS knew of his HIV status and his prescriptions. He was also suffering from chills, fever, night sweats, and flu-like symptoms.

This is not a disagreement over proper medical treatment. PHS said it chose to check out the plaintiff's viral load before restarting his medication. However, given his symptoms and his treating physician's advice to start the medication immediately, the fact that it wasn't clear waiting for the viral load test was actual policy, and the questions as to whether that is really the reason the medication was not immediately started, there is a material question of fact barring summary judgment.

The plaintiff's allegation that he was not provided medication for HIV while other detainees were given medication immediately for other illnesses stated a claim under the Americans with Disabilities Act.

Pre-Trial Detainees/Heat and Ventilation/Municipalities/Medical Care/Personal Involvement and Supervisory Liability/Procedural, Jurisdictional and Litigation Questions

Anton v. Sheriff of Dupage County, Ill., 47 F.Supp.2d 993 (N.D.Ill. 1999). The plaintiff tried to commit suicide and he was placed naked in a rubberized cell on suicide watch (every 15 minutes). He alleged that he got very cold and was ridiculed when he complained; he requested medical attention and received it only after two hours, after he reminded the defendant officers that failure to provide medical attention to a prisoner is a felony; a nurse arrived, found his temperature abnormally low and gave him a blanket; the officers took it away after she left, giving it back only after he started crying.

The facts pled by the plaintiff sufficiently allege a claim for deprivation of adequate shelter. Although temporary exposure to cold does not necessarily violate the Constitution, the fact that the plaintiff was naked and had no way to protect himself, that the guards responded with jeers and laughter, that his body temperature had fallen below normal, and that the guards failed to take other measures to prevent his exposure supported a finding of unconstitutionality.

Allegations that the plaintiff informed the guards of the cold and they responded with jeers and laughter could sufficiently support a finding of deliberate indifference. The guards' removal of the blanket given to the plaintiff by a nurse after she measured his body temperature below normal constituted deliberate indifference to his serious medical needs, since the defendants must have known the severity of the plaintiff's circumstances: naked, with a temperature three decrees below normal, with no other method of preventing exposure to the cold.

The guards are not entitled to qualified immunity; the right to adequate heat and medical attention is clearly established. The plaintiff's conclusory allegations of conspiracy are sufficiently supported by the totality of the facts to allege an agreement between the guards to deprive him of adequate shelter and medical treatment and overt acts in furtherance of that end.

Disabled/State Officials and Agencies/ Damages: Conditions of Confinement, Punitive/Jury Instructions and Special Verdicts

Beckford v. Irvin, 49 F.Supp.2d 170 (W.D.N.Y. 1999). The wheelchair-bound plaintiff was transferred to a prison that had a wheelchair-accessible medical unit, and was placed in the Mental Health Unit because the cell was bigger and his wheelchair fit in it. Then they took away his wheelchair. Then he performed various self-destructive acts and was moved to SHU, where he did not have access to his wheelchair. When shower time came, the guards would open his cell door, but he couldn't get to the shower without his wheelchair. This was designated a refusal to take a shower. He went without a shower for 32 days. Similarly, at recreation time, his door was opened, but he was not permitted his wheelchair. He had bedsores. At one point, he was placed in a cell where he could only reach the toilet to get water unless he had a cup, but he was not permitted a cup. He was extracted from his cell at one point to remove his wheelchair; he was then shackled hand and foot and left face down on a shower floor, with the water intermittently turned on and off, for about 20 minutes.

A jury returned a verdict of $0 in compensatory damages on the Eighth Amendment claim, $125,000 in compensatory damages on the ADA claim, and $25,000 in punitive damages on the Eighth Amendment claim against two defendants.

The plaintiff sufficiently showed deliberate indifference on the part of the Deputy Superintendent for Administration and the Superintendent through testimony from himself and various prison officials; a prisoner's testimony that he filed grievances on the plaintiff's behalf; a former PLS lawyer's testimony that he saw plaintiff's bedsores and reported them to prison staff; medical records showing that he was recommended for physical therapy and might be able to walk if fitted with leg braces and assistive devices, which he never received; he was also denied mental health medications.

Punitive damages can be awarded without an award of compensatory damages. The jury did not award nominal damages on the Eighth Amendment claim, but the court can and does do so. Compensatory damages of $125,000 for the ADA violation are not excessive. They fall under the statutory ceiling of $300,000, and are not inconsistent with ADA awards in other cases. The award of punitive damages was clearly proper.

Jury instructions concerning damages are quoted.

AIDS/Medical Care/Municipalities

Murphy v. Bray, 51 F.Supp.2d 877 (S.D.Ohio 1999). The plaintiff, diagnosed for five years with full-blown AIDS, was arrested and

charged with "importuning." He informed jail officials that he was HIV-positive and was taking several drugs (in addition to anti-retrovirals, medications for thrush, meningitis, herpes, and depression). They notified the medical provider, Correctional Medical Systems, who obtained a full medical profile and agreed that his medications could be brought from home. However, correctional staff wouldn't let them in, and CMS and the jail have written policies prohibiting bringing in prescription medications. He then sent a form to CMS to complain about this, but it was returned to him for unexplained reasons. He did not get his medications during the nine days he was in jail.

Plaintiff alleged evidence that the defendants knew that there was a custom in direct contradiction to the written policy but that practice was not uniform regarding allowing medications to be brought from home. That evidence raised a genuine issue of material fact whether the Sheriff (sued here in his official capacity) knew of and disregarded an excessive risk of harm.

Medical Care: Standards of Liability, Deliberate Indifference, Serious Medical Needs/Personal Involvement and Supervisory Liability

Petrichko v. Kurtz, 52 F.Supp.2d 503 (E.D.Pa. 1999). The plaintiff alleged that another prisoner pushed him into a steel pole, dislocating his shoulder; the officer on duty said they didn't have staff to take him to the hospital, and instructed another prisoner to "relocate" his shoulder. The plaintiff's multiple requests to see a doctor were ignored for two weeks. He suffered additional medical neglect during the succeeding two months, during which he was transferred twice. When he arrived at state prison, he was told that the delay in treatment had caused a permanent injury to his shoulder.

The plaintiff alleged a serious medical need in that he claims that he has suffered a permanent injury. The officer who refused to have the plaintiff taken to the hospital and who directed another prisoner to "relocate" the plaintiff's shoulder could be held liable. An allegation that the warden ignored the plaintiff's written requests for medical treatment for non-medical reasons sufficiently alleged deliberate indifference, since that conduct denied the plaintiff access to a physician capable of evaluating the need for treatment (509), and he alleged knowledge. The deputy warden who allegedly denied the plaintiff ice for his injury because the ice machine was broken could be held liable, since this is an allegation of delay of treatment for non-medical reasons. The plaintiff sufficiently alleged supervisory liability by stating that conscious inadequacies in the supervisors' training of the officer led to the actionable medical treatment decisions by the officer.

AIDS/Disabled/Medication/Cruel and Unusual Punishment: Proof of Harm/Medical Care

McNally v. Prison Health Services, 52 F.Supp.2d 147 (D.Me. 1999). The plaintiff alleged that he was deprived of his HIV medication for three days while jailed. He sufficiently alleged injury resulting from deliberate indifference. Although his expert can't say that "more probably than not" his symptoms resulted from the deprivation, "the evidence shows that Plaintiff suffered from fever, chills, and flu-like symptoms that possibly were caused" by the interruption of medication. In addition, the interruption "possibly caused some mutational changes" which would help cause drug resistance in the future. Summary judgment is therefore denied.

PLRA: Judgment Termination/Judicial Disengagement/Mental Health Care/Rehabilitation

King v. Greenblatt, 53 F.Supp.2d 117 (D.Mass. 1999). The Massachusetts Treatment Center for Sexually Dangerous Persons is not a "prison" and persons civilly committed to it are not "prisoners" for purposes of the PLRA judgment termination provisions. Persons committed to it received indeterminate sentences of one day to life to participate in an intensive

treatment program. However, in 1990 civil commitment was abolished and the facility was subsequently transferred to the control of the Department of Correction.

Sanitation/Transfer and Admission to Mental Health Facilities/Classification: Race/ Hazardous Substances and Conditions/Denial of Ordered Care/Municipalities

Caldwell v. Hammonds, 53 F.Supp.2d 1 (D.D.C. 1999). The court rejects the proposition that only the Mayor, the City Council, and the Director of the Department of Correction can be final policymakers with respect to prison conditions. The verified complaint "alleges facts from which a jury might easily conclude that the unsanitary and unhealthy conditions . . . (including fires, floods, feces and urine contaminating the cells, and secondhand tobacco smoke) existed for such a long time and were so obvious to any observer that the policymakers for the Department of Corrections either acquiesced in those conditions or abandoned their responsibilities as policymakers to [lower-level officials]." In addition, the plaintiff showed that he had submitted an administrative appeal concerning these conditions to the Director. These allegations stated an Eighth Amendment claim.

The plaintiff alleged that prescribed treatment for skin cancer was delayed, resulting in the cancer spreading. He also alleged continuous exposure to second-hand tobacco smoke and smoke from fires. These allegations "state a claim for 'deliberate indifference' by failing to provide a place of confinement free from harmful contaminants." (9) Defendants' citation to their no-smoking policy is unavailing, since their own commissary list shows tobacco products for sale, and the plaintiff alleged that correctional officers permitted smoking in the cell block. At 9: "Governments can not adopt a 'policy' that is plainly ignored and then claim that violations are not officially sanctioned and therefore not sanctionable."

The plaintiff's allegation that he was transferred to a block with unacceptable conditions, inhabited by mentally ill persons whose behavior caused further intolerable conditions, because of his race, stated a claim. At 10: "A housing transfer based only on the race of the individual certainly would violate clearly established constitutional law, as any reasonable correctional officer or prison psychologist knew or should have known."

PLRA: Exhaustion of Administrative Remedies/Procedural Due Process: Visiting/Rehabilitation

Cooper v. Garcia, 55 F.Supp.2d 1090 (S.D.Cal. 1999). The presence of unexhausted claims does not require the dismissal of exhausted claims under the PLRA, by contrast with habeas corpus. Plaintiff gets 60 days to amend to demonstrate exhaustion of unexhausted claims on pain of dismissal *with prejudice* of these claims without further leave to amend. (This is not explained. Dismissal for non-exhaustion is usually without prejudice.)

PLRA: Prospective Relief Restrictions/Punitive Segregation/Recreation and Exercise/Mental Health Care

Goff v. Harper, 59 F.Supp.2d 910 (S.D.Iowa 1999). The court, in a 1997 opinion that is for some reason unreported, found (a) a substantive due process violation resulting from extraordinarily long lockup sentences; (b) an Eighth Amendment violation resulting from inadequate mental health treatment; (c) an Eighth Amendment violation resulting from deprivation of exercise during the winter months; and (d) an Eighth Amendment violation resulting from "the pandemonium and bedlam the mentally-stable inmates must suffer" from confinement with mentally ill inmates who can't or don't control their behavior. Defendants submitted a series of remedial plans but even their fourth version, reviewed in this opinion, doesn't quite cut the mustard. The court directs changes as follows and makes the PLRA need/narrowness/intrusiveness findings about them.

Long lockup sentences: Before, prisoners could only get 30 days for a single incident (though some of them accumulated as much as 50 years from multiple incidents); now, they can get up to one year for a single incident and two years total, though officials have taken measures to expedite getting people out (*e.g.*, more general population cells, a "reintegration unit"). The court declines plaintiff's request to limit disciplinary detention periods to 30 days, but does require a two-day "break" every 30 days in which the prisoner will be allowed property, telephone calls and other privileges. The court also directs the Director or his designee from outside the particular prison to meet with three representatives of the plaintiff class, once a month for six months, face to face or by teleconferencing, to discuss problems with the implementation of the defendants' plan.

Mental health treatment: defendants are moving in the right direction setting up a 200-bed special needs unit, but court directs them to maintain and fill three psychologist positions (they have only one filled) in the next four months, or to contract with a third-party provider; if anybody resigns, defendants have six months to hire or contract to replace them.

Exercise: Defendants are on the right track in creating exercise facilities long-term and converting a couple of cells short-term. No relief is necessary to protect outdoor areas from the rain. Defendants are directed to provide exercise equipment consistent with security.

Sexual Abuse/Women/Staffing: Surveillance/Municipalities

Newby v. District of Columbia, 59 F.Supp.2d 35 (D.D.C. 1997). The plaintiff was forced by guards to participate in strip shows and exotic dancing on three occasions, and engaged in a sexual relationship with a staff member, which is *per se* illegal under D.C. law. There were no supervisory personnel present during the shows.

Although the District of Columbia had been found liable previously for permitting a pattern of sexual harassment in its jails, they had done nothing except issue a policy and add training; they did not institute a meaningful system of supervision, and have not done so even to this date, whether by placement of surveillance cameras or requiring supervisors' presence when staff make their rounds. The court grants judgment as a matter of law on liability against the District after trial; damages remain for the jury to decide.

Disabled/Denial of Ordered Care/Cruel and Unusual Punishment/Pendent and Supplemental Claims; State Law in Federal Courts

Schmidt v. Odell, 64 F.Supp.2d 1014 (D.Kan. 1999). The plaintiff, whose legs had been amputated below the knee, was jailed for drunk driving. He had his prosthetic legs, but one got damaged and they were hard for him to use, and later he was injured and was unable to use them or be fitted for new ones. He asked for a wheelchair, but his request was denied. The plaintiff therefore got around on his knees. They gave him kneepads.

The refusal to provide a wheelchair was not unconstitutional in itself. However, "the ability of the plaintiff to move himself about the jail in an appropriate manner was a basic need that the defendants were obligated to help provide under the Eighth Amendment." He was also denied the use of a wheelchair entering and leaving the jail, requiring him to crawl into the parking lot and onto the van at the jail, and repeat the process at the courthouse. Defendants also refused to provide a shower chair for six or seven months, requiring him to crawl in the shower. Offering to put the plaintiff in housing units where a shower was closer to his cell did not meet defendants' Eighth Amendment obligations.

The foregoing facts could also support an ADA claim. At 1033: "The fact that plaintiff was actually able to use most of the jail services does not preclude his claim in light of the fact that he was able to do so only by virtue of exceptional and painful exertion which was contrary to a physician's instructions concerning his disability."

The foregoing facts could also support a claim for the intentional infliction of emotional distress.

Sexual Abuse/Use of Force/Staffing: Sex/Municipalities/Damages: Punitive/Pendent and Supplemental Claims; State Law in Federal Courts

Cain v. Rock, 67 F.Supp.2d 544 (D.Md. 1999). The plaintiff alleged that a male officer had engaged in sex with her, taking advantage of her mental and physical state. The officer was fired and entered an *Alford* plea to criminal charges.

A policy of "cross-gender guarding" is not unconstitutional, and the municipality cannot be held liable for it. Nor is there evidence of deliberate indifference, since the County does protect prisoners against mistreatment, e.g., by having a policy against male guards' strip-searching females absent emergency.

The plaintiff had no excessive force claim against the officer, since there was no evidence that his actions were "motivated by malice or the will to pain." (551) Nor did she have an Eighth Amendment claim, since a random sexual assault is not "punishment." (The court cites *Johnson v. Glick*, long since abandoned elsewhere.) However, the allegations of sexual activity while the plaintiff was mentally incapacitated "shock the judicial conscience" in light of officers' power over prisoners, and therefore state a Fourteenth Amendment claim under the deliberate indifference standard. (552)

PLRA: Attorneys' Fees

Ilick v. Miller, 68 F.Supp.2d 1169 (D.Nev. 1999). The court previously found that the plaintiffs' suit was a catalyst in making prison officials change their use of force policy. At 1173 n. 1: "To the extent that the court is obliged to find that the post-PLRA fees were 'directly and reasonably' incurred in proving a violation of a prisoner's rights, the court does so here. *See* 42 U.S.C. § 1997e(d). All of the evidence provided by plaintiffs shows there were violations of prisoner's constitutional right on an ongoing basis at ESP, and that this litigation caused those injurious practices to cease."

At 1174: PLRA fees are to be paid at the rate set by the Judicial Conference (up to $75), rather than the statutory figure of $60, even though the former has not actually been funded, because the statute calls for the rates "established" by the CJA and not those "paid" or "awarded."

The CJA rate established and paid for Washington, D.C. is $75 per hour, thus making the PLRA rate $112.50 per hour." (The relevant community is Washington, D.C. where the National Prison Project is located.)

At 1179: The PLRA doesn't say what to do about fees for paralegals and law clerks. Leaving them at pre-PLRA rates would be disproportionate. In light of the clear congressional intent behind the fee caps, the court reduces paralegal time by 40%, proportional to the reduction in attorneys' fees resulting from the PLRA.

Pre-Trial Detainees/Use of Force: Restraints/Class Action: Certification of Classes/State and Local Officials/Standing/Injunctive Relief: Preliminary/Municipalities

Von Colln v. County of Ventura, 189 F.R.D. 583 (C.D.Cal. 1999). The plaintiffs complained of abuse of restraint chairs, e.g., being strapped into them for asking questions and not being let out to go to the bathroom.

The plaintiffs had standing to seek an injunction concerning the use of restraint chairs because they had damage claims concerning them. This standing rule is unique to the Ninth Circuit. The existence of a policy authorizing use of a restraint chair and evidence from the defendants showing a pattern or practice of abuse of the chair sufficed to establish sufficient likelihood of recurrence. The possibility of recurrence ceases to be speculative when actual repeated incidents are documented.

Evidence that 377 arrestees in a year were put in the restraint chair is sufficient to establish

numerosity, especially since the plaintiffs sought to represent persons who had been or will be subjected to it. The class met the commonality and typicality requirements, notwithstanding the County's argument that not everybody defecated and urinated on themselves in the chair. The fact that plaintiffs sought damages individually did not preclude certification of a class for injunctive relief only.

The court grants a preliminary injunction. Here there is a policy which forbids the use of the chair as punishment, but doesn't define the term, allowing lower-level supervisors discretion to do as they will; the policy doesn't put a time limit on use of the chair; and it has no provisions for allowing them out to urinate or defecate. The court doesn't want to get into the day-to-day operation of the jail; so it enjoins all use of the chair pending trial.

National Prison Project Publications

The publications listed below are available, prepaid, from the NPP. Orders may be sent with check or money-order to 733 15th Street, NW, Suite 620, Washington, DC 20005.

The National Prison Project *Journal* is a biannual newsletter featuring articles, reports, legal analysis, legislative news, and other developments in prisoners' rights. An annual subscription is $30 or $2 for prisoners.

The PLRA: A Guide for Prisoners is part of a special issue of the NPP *Journal* still available to prisoners for $2 a copy. Written by John Boston, Director of the Prisoners' Rights Project of the NY Legal Aid Society, it provides a comprehensive explanation of the Prisoners' Litigation Reform Act.

The Prisoners' Assistance Directory lists and describes local, state, national and international organizations that provide services to inmates, ex-offenders and their families. Latest edition was published in 1998. The directory is available for $30. **[New edition will be available soon.]**

1998 AIDS in Prison Bibliography catalogues resource materials on AIDS in prison available at the NPP or at other locales. It references corrections' policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. It also provides a listing of "prisoner friendly" AIDS organizations. The bibliography is available for $10.

Play It Safer, written for prisoners, describes sexually transmitted diseases, the signs of disease, the importance of safer sex, and the need for treatment. Eleven of the most common STDs are explained, from Chancroid to Trichomoniasis. The 27 page booklet also includes a national resource list for prisoners. Booklet bulk rates are 100 copies for $35.00, 500 copies for $150.00, 1,000 copies for $280.00. Send order requests to Jackie Walker at NPP.

Women in Prison Bibliography, Volume II contains annotated bibliographies for NPP's collection of materials on women's incarceration. This 59 page resource focuses on materials published in the last 10 years and includes sections on battered women and crime, capital punishment, girls in the juvenile justice system, sexual assault of female prisoners and more. Documents listed in the bibliography, but not available from publishers or libraries, are available from NPP for 15 cents per page. Copies of the bibliography are available for $10.

Anti-Privatization Bill Reintroduced

In May, Congressman Ted Strickland of Ohio and Senator Russell Feingold of Wisconsin reintroduced the Public Safety Act, H.R. 1764 and S. 842. The legislation is nearly identical to the bill introduced in the House of Representatives last session and the ACLU has again chosen to endorse this important act. The bill prohibits placement of federal prisoners in private prisons and denies federal grants to states and localities that contract with private correctional facilities.

Congressman Strickland is the original sponsor of the legislation and first introduced the Public Safety Act in 1999. The bill stalled in committee last year and no companion bill was ever introduced in the Senate. Fortunately, this year identical bills were introduced in the House and Senate on the same day and the House version has already garnered 32 co-sponsors. When Senator Feingold introduced the bill on the Senate floor he noted, "The result [of private prisons] is that prisoners are deprived of the rehabilitation, education, and training that make it less likely that they will commit more crimes after they have served their time. This drive to keep 'beds filled' is especially troubling because it adversely affects our nation's African American community, which is already over-represented in the prison system."

The National Prison Project bases its opposition to the private prison industry on America's sad national experience. Over the years, serious constitutional violations have developed all over the country in private prisons. In facilities in New Mexico, riots resulted in several injuries and extensive facility damage. One riot occurred only a few months after two attempted cover-ups of correctional officers' excessive use of force and two prisoner stabbing deaths. In 1998, a juvenile correctional facility run by a for-profit company in Tallulah, Louisiana was taken over by the State after a Justice Department investigation found that the juveniles housed there were routinely beaten. Just two years later, another Justice investigation of another Louisiana juvenile facility, owned and operated by Wackenhut Corrections Corporation, found that "[the facility] fails to provide reasonable safety, improperly uses chemical restraints, and provides inadequate mental health, medical and dental care for the approximately 276 adolescent boys." Dr. Nancy Ray, an expert evaluating conditions there, concluded that at least some of the problems were linked to Wackenhut's reluctance to spend enough money to provide care for the youth.

Ending these conditions and the profit motive in corrections is of utmost importance for the NPP. As a result, we are very excited about the reintroduction of this legislation and look forward to assisting in its passage.

New Report Released on Prison Rape

In April, Human Rights Watch released *No Escape: Male Rape in U.S. Prisons*, the first national survey of prisoner on prisoner rape. The report found rape to be a horrifically predictable consequence of confinement because of corrections and prosecutorial indifference.

No reliable national data exists regarding the extent of the problem because many states do not track the number of incidents, but academic studies find that in some states 21 percent of prisoners have encountered at least one instance of forced or pressured sex. In addition, numerous state departments of correction, surveyed in the study, underscored the prevalence of this violent behavior. New Mexico prison officials reported to HRW that their facilities had no incidents of rape over the last few years.

The report also provides dramatic testimony from prisoner correspondence collected over a three year period. One prisoner wrote, "I have seen or heard of rapes on a weekly basis at the least. Mostly it is a daily occurrence. Rapes are a very common occurrence due to the fact of coercion being "played" on ignorant first timers. Once someone is violated sexually and there is no consequences on the perpetrators, that person who was violated then becomes a mark or marked. That means he's fair game."

Editor's Note

Dear Loyal Subscriber,

The National Prison Project ***Journal*** was first published in the fall of 1984 with a cover article written by then staff attorney Elizabeth Alexander. Seventeen years later, Ms. Alexander still works for the Project, but now serves as its director. Since our first issue, many things about the National Prison Project and the *Journal* have changed, but many things have also stayed the same.

The National Prison Project has decided to make the *Journal* a biannual publication. This change finally recognizes our practice in recent years of combining issues and doubling the size of each issue. This formal change is necessary because of the extra cost and staff time required to publish four issues a year. We hope that finally changing the publication schedule to twice a year will reduce reader confusion. Because in the future each issue will be a double issue, like this one, the cost of a yearly subscription for prisoners and non-prisoners will also remain the same.

With this change, I want to assure all of our subscribers that the *Journal*'s commitment to share our views, concerns and expertise on prisoner rights and criminal justice reform will remain and so will our loyalty to you and to the NPP's mission, stated so well by NPP's former executive director, Alvin Bronstein, in our inaugural edition.

> "We must devote even more of our efforts toward the goal of a uniform acceptance by all branches of government, as well as the media and the public, of the principle that prisoners must be afforded certain fundamental rights if we are to regard ourselves as a civilized society. Those rights must include: personal safety, decent care, personal dignity, work, self-improvement, the vote, and the right to a future. We should do no less if we believe that the Bill of Rights applies to all persons, and if we expect prisoners to return to society as lawful and productive citizens."

We continue to hope the *Journal* will broaden this discussion and promote these goals.

Thank you for your understanding and support.

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