

Overview of Prisoners' Rights

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Introduction

What follows is a sort of map of most of the issues concerning prison conditions and practices that are commonly litigated in federal court. Parts of it are adapted from other things I have written, so the level of detail and the extent of focus on the Second Circuit varies from section to section. Updating is more consistent for Second Circuit cases than for other circuits. Much more detail on all these subjects can be found in Boston & Manville, *Prisoners' Self-Help Litigation Manual* (4th ed., Oceana [Oxford University Press] 2010).

I. Conditions of Confinement

The primary guarantor of decent living conditions for prisoners is the Eighth Amendment's prohibition of cruel and unusual punishments.

A. The subjective element

Eighth Amendment claims require proof of a subjective element or state of mind requirement, according to the Supreme Court, because the word "punishment" necessarily implies such a requirement.¹ So far the Court has identified two different state of mind requirements in Eighth Amendment cases.

1. Conditions of confinement cases: deliberate indifference

In cases about conditions of confinement, the plaintiff must show "deliberate indifference."² Indifference to what? That's the objective prong of the Eighth Amendment standard, discussed below.

¹ Wilson v. Seiter, 501 U.S. 294, 298-99 (1991); see Farmer v. Brennan, 511 U.S. 825, 854-55 (1994) (Blackmun, J., concurring in result) (exposing fallacy of that reasoning); Coleman v. Wilson, 912 F.Supp. 1282, 1299 n. 11 (E.D.Cal. 1995) (same).

² Farmer v. Brennan, 511 U.S. at 834.

Deliberate indifference means subjective or criminal law recklessness, *i.e.*, disregard for known risks, not risks the defendant should have known about.³ On the other hand, the obviousness of a risk may support an inference of actual knowledge,⁴ as may other relevant circumstances.⁵ Courts have disagreed over whether expert testimony concerning what a defendant should have known supports an inference as to what he or she did know.⁶

³ *Farmer*, 511 U.S. at 839-43; *see* *Salahuddin v. Goord*, 467 F.3d 263, 282 (2d Cir. 2006) (holding five-month delay in hepatitis C treatment was not reasonable, but doctor could not be held liable absent evidence that he knew the risk of harm); *Cotton v. Jenne*, 326 F.3d 1352, 1358-59 (11th Cir. 2003) (holding staff members' knowledge that inmates in a unit were so mentally ill they were segregated from other prisoners, and that a prisoner who assaulted the decedent posed a risk based on prior "violent, schizophrenic" outbursts, constituted actual knowledge such that it was deliberately indifferent for staff to play computer games rather than watch the unit on their video monitor).

⁴ *Farmer*, 511 U.S. at 842-43; *see* *Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2010) ("... [F]or purposes of an obviousness analysis, a prison warden is deemed to have the general knowledge that is expected, at a minimum, of an individual performing the functions of that job."); *Vinning-El v. Long*, 482 F.3d 923, 924-25 (7th Cir. 2007) (holding jury could infer that guards working in the area knew about grossly filthy cell conditions); *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 301-02 (7th Cir. 2010) (visibly ill prisoner within plain view of officers supported finding that they knew of the risk to his health), *cert. denied*, 131 S.Ct. 643 (2010); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (holding deliberate indifference finding supported by "obvious and pervasive nature" of challenged conditions); *Lolli v. County of Orange*, 351 F.3d 410, 420 (9th Cir. 2003) (holding officers' indifference to a diabetic prisoner's extreme behavior, sickly appearance, and explicit statements about his condition could support a finding of actual knowledge of a serious risk); *Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996) (denying summary judgment to prison doctor who had been told the plaintiff received psychiatric medication in part because of suicide risk, but discontinued it based on a cursory interview without reviewing medical records); *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996); *see* *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005) (holding a jury could infer actual knowledge of a risk from a defendant's knowledge of a prisoner's condition, and could discount the defendant's claim he did not believe she was at risk). *But see* *Campbell v. Sikes*, 169 F.3d 1353 (11th Cir. 1999) (dismissing medication discontinuation case because plaintiff's condition was not so obvious that knowledge could be inferred).

⁵ *Hope v. Pelzer*, 536 U.S. 730, 738 n.8 (2002) (holding particular defendants' awareness of a risk of harm "may be evaluated in part by considering the pattern of treatment that inmates generally received" as a result of the challenged practice); *Hall v. Bennett*, 379 F.3d 462, 465 (7th Cir. 2004) (holding knowledge of the risk of working with live electrical wires without gloves could be shown by a prison rule barring working with live wires and by general safety codes that would be known to an electrical foreman); *LaMarca v. Turner*, 995 F.2d 1526, 1536 n. 21 (11th Cir. 1993) (holding warden's "supervisory role and the insular character of prison communities" supported inference of knowledge of "apparent" conditions), *cert. denied*, 510 U.S. 1164 (1994).

⁶ *Compare* *Campbell v. Sikes*, 169 F.3d 1353, 1368-73 (11th Cir. 1999) (rejecting proposition) *with* *Quigley v. Tuong Vinh Thai*, ___ F.3d ___, 2013 WL 627207, *5 (6th Cir. 2013) (holding expert evidence of a risk "well known in the psychiatric profession" supported an inference that the defendant psychiatrist knew of and disregarded it); *LeMarbe v. Wisneski*, 266 F.3d 429, 436 (6th Cir. 2001) (holding testimony as to what any medical specialist would have known raised a jury issue as to defendant

Purposefully avoiding knowledge may also amount to deliberate indifference.⁷ The defendant need not know the precise nature of the risk as long as he or she knows that a serious risk exists.⁸

A defendant need not have knowledge of a specific risk to a specific individual from a specific source; *e.g.*, in an inmate-inmate assault case, “it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.”⁹

specialist’s actual knowledge), *cert. denied*, 535 U.S. 1056 (2002); *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (stating in dictum that expert testimony may establish that a prisoner’s medical treatment deviated so far from professional standards as to constitute deliberate indifference).

⁷ *Farmer*, 511 U.S. at 843 n. 8; *see* *Goebert v. Lee County*, 510 F.3d 1312, 1327-28 (11th Cir. 2007) (jail captain had a duty to “look into” pregnant prisoner’s complaint that she was leaking fluid, her condition was worsening, and she had not seen an obstetrician); *Sanchez v. Taggart*, 144 F.3d 1154, 1156 (8th Cir. 1998) (failure to try to verify claim of medical inability to perform work assignment supported deliberate indifference finding); *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995) (holding prison officials who had information about possible asbestos contamination had a duty to inspect before sending unprotected work crews to the location).

⁸ *Velez v. Johnson*, 395 F.3d 732, 736 (7th Cir. 2005).

⁹ *Farmer*, 511 U.S. at 843; *see* *Brown v. Budz*, 398 F.3d 904, 914-15 (7th Cir. 2005) (holding deliberate indifference can be established by knowledge either of a victim’s vulnerability or of an assailant’s predatory nature; both are not required); *Pierson v. Hartley*, 391 F.3d 898, 902-03 (7th Cir. 2004) (holding that a prisoner could recover for assault by a violent prisoner assigned to a “meritorious housing” unit in violation of prison policy regardless of whether prison staff knew of the risk to the particular prisoner who was injured); *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transsexual prisoner could recover for assault by a known “predatory inmate” either because leaving her in a unit containing high-security inmates threatened her safety, or because placing that inmate in protective custody created a risk for its occupants generally); *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1028-30 (11th Cir. 2001) (*en banc*) (holding prisoners assaulted in a county jail with no functioning cell locks or audio or visual surveillance, so dilapidated that inmates made weapons from pieces of the building, stated a claim against the county; similar allegations plus lack of segregation of violent from nonviolent inmates or other classification, crowding, understaffing, lack of head counts, lack of staff surveillance in housing areas, lack of mental health screening, and lack of discipline for violent inmates stated a claim against the sheriff); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996) (affirming injunction based on generalized increase in violence attributed to random assignment of cellmates); *Hayes v. New York City Dept. of Correction*, 84 F.3d 614, 621 (2^d Cir. 1996) (prisoner’s refusal to name his enemies to prison staff was not outcome determinative if staff knew of risk to him); *LaMarca v. Turner*, 995 F.2d at 1535 (liability can be based on “general danger arising from a prison environment that both stimulated and condoned violence”); *Coleman v. Wilson*, 912 F.Supp. 1282, 1316 (E.D.Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); *Abrams v. Hunter*, 910 F.Supp. 620, 625 (M.D.Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from inmate violence), *aff’d*, 100 F.3d 971 (11th Cir. 1996); *Knowles v. New York City Dept. of Corrections*, 904 F.Supp. 217, 221 (S.D.N.Y. 1995) (prison officials’ knowledge of an ethnic “war” among inmates, that a Hispanic inmate who had been cut had been transferred to plaintiff’s jail, and that

Injunctive cases are official capacity cases and are “in all respects other than name, to be treated as a suit against the entity.”¹⁰ In them the focus may be on “the institution’s historical indifference” rather than the state of knowledge and response of a particular individual.¹¹ In an injunctive case, the knowledge necessary to support the grant of relief may come from the judicial proceeding itself.¹²

Deliberate indifference is negated if prison officials “responded reasonably to the risk, even if the harm ultimately was not averted.”¹³ However, actions that are “not adequate given the known risk” do not defeat liability.¹⁴

2. Use of force cases: malicious and sadistic treatment

A stronger showing of intent is required in use of force cases: “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated.”¹⁵ The rationale for requiring such a showing is the need to balance restoration

plaintiff was part of a group at risk because of his accent and appearance was sufficient to withstand summary judgment).

¹⁰ *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

¹¹ *LaMarca v. Turner*, 995 F.2d at 1542; *accord*, *Alberti v. Sheriff of Harris County, Tex.*, 978 F.2d 893, 894-95 (5th Cir. 1992) (deliberate indifference supported by evidence “that the state knew” that refusal to accept felons caused serious local jail crowding); *Terry v. Hill*, 232 F.Supp.2d 934, 944 (E.D.Ark. 2002).

¹² *Farmer*, 511 U.S. at 846 n.9; *Hadix v. Johnson*, 367 F.3d 513, 526 (6th Cir. 2004).

¹³ *Farmer*, 511 U.S. at 844; *accord*, *Erickson v. Holloway*, 77 F.3d 1078, 1080-81 (8th Cir. 1996) (holding officer who learned of threat and notified officer on next shift before leaving was not deliberately indifferent); *LaMarca v. Turner*, 995 F.2d at 1535 (stating “if an official attempts to remedy a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative”).

¹⁴ *Riley v. Olk-Long*, 282 F.3d 592, 597 (8th Cir. 2002); *accord*, *Benjamin v. Fraser*, 343 F.3d 35, 51-52 (2d Cir. 2003) (holding “largely ineffective” remedial efforts did not defeat liability for long-standing deficiencies; detainee case); *Jensen v. Clarke*, 94 F.3d 1191, 1200-01 (8th Cir. 1996) (holding injunction was appropriate despite defendants’ post-complaint actions); *Hayes v. New York City Dept. of Correction*, 84 F.3d 614, 621 (2d Cir. 1996) (holding official response that did not include transferring the plaintiff or issuing a timely separation order did not defeat liability as a matter of law); *Coleman v. Wilson*, 912 F.Supp. 1282, 1319 (E.D.Cal. 1995) (“... [P]atently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.”)

¹⁵ *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *accord*, *Wilkins v. Gaddy*, 559 U.S. 34, 130 S.Ct. 1175, 1178-79 (2010) (per curiam); *see Baskerville v. Mulvaney*, 411 F.3d 45, 47-48 (2d Cir. 2005) (quoting and discussing jury instructions); *Johnson v. Breeden*, 280 F.3d 1308, 1313-16 (11th Cir. 2002)

of security and order against prisoners' rights and the need to act quickly and decisively.¹⁶ However, the applicability of that standard does not turn on the existence of a genuine security need in a particular case; it applies in use of force cases even if it appears there was no genuine security need for force (as *Hudson v. McMillian* itself showed), and the malicious and sadistic standard has generally not been extended to security-related matters other than the direct and immediate use of force by staff.¹⁷ Thus, claims that supervisory officials have failed to train, supervise, investigate, discipline, or otherwise control their subordinates' use of force are subject to the deliberate indifference standard,¹⁸ as are "bystander liability" claims that staff failed to intervene in excessive force by other staff.¹⁹ The same is true of security-related policy decisions not involving the use of force²⁰ and even of uses of force that do not involve an immediate need to restore security and order.²¹ Inmate-inmate assaults that pose security risks are also governed by the deliberate indifference standard.²²

(same).

¹⁶ *Hudson*, 503 U.S. at 7.

¹⁷ See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (stating that the deliberate indifference standard is inappropriate in "one class of prison cases: when 'officials stand accused of using excessive physical force.'" (emphasis supplied).

¹⁸ *Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999); *Madrid v. Gomez*, 889 F.Supp. 1146, 1249 (N.D.Cal. 1995); see *Thomas v. McNeil*, 2009 WL 64616, *25-27 (M.D.Fla., Jan. 9, 2009) (applying deliberate indifference standard to policy of using chemical agents against prisoners with mental illness behaving disruptively because of their illness), *judgment entered*, 2009 WL 605306 (M.D.Fla., Mar. 9, 2009), *aff'd*, 614 F.3d 1288 (11th Cir. 2010).

¹⁹ *Buckner v. Hollins*, 983 F.2d 119, 122 (8th Cir. 1993).

²⁰ *Trammell v. Keane*, 338 F.3d 155, 162-63 (2d Cir. 2003) (applying deliberate indifference standard to extreme disciplinary measures imposed on a disruptive prisoner because they were "preplanned and monitored"); *Jordan v. Gardner*, 986 F.2d 1521, 1527, 1529 (9th Cir. 1993) (en banc) (holding that a search practice, even though nominally security-related, was not governed by the malicious and sadistic standard because its security justification was not legitimate, it had not been adopted under time constraints, and it routinely inflicted pain on prisoners).

²¹ *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002) (applying deliberate indifference standard to "hitching post" restraint procedure used after any immediate security risk had abated); *Thomas v. McNeil*, 2009 WL 64616 at *25-27; *Coleman v. Wilson*, 912 F.Supp. 1282, 1321-22 (E.D.Cal. 1995) (applying deliberate indifference standard to use of tasers against prisoners taking psychotropic medications because the policy itself requires deliberation before use).

²² *MacKay v. Farnsworth*, 48 F.3d 491, 493 (10th Cir. 1995) (holding district court erred in applying malicious and sadistic standard to inmate assault case even though the assault presented a security threat).

3. Calculated harassment unrelated to prison needs

The Supreme Court has held that cell searches amounting to “calculated harassment unrelated to prison needs” may constitute cruel and unusual punishment in violation of the Eighth Amendment.²³ Though the Court has not mentioned this holding in 20 years, it is still good law,²⁴ and presumably is applicable to other forms of harassing conduct besides searches.²⁵ Arguably such harassment is equivalent to malicious and sadistic conduct.²⁶

B. The objective element: “sufficiently serious”

The prisoner must show that challenged conditions are “sufficiently serious to violate the Eighth Amendment.”²⁷ In medical care cases, the Eighth Amendment is violated by deliberate indifference to “serious medical needs.”²⁸ In subsequent decisions the Supreme Court has held generally that deliberate indifference to “excessive risks to inmate health or safety” violate the Eighth Amendment.²⁹

²³ *Hudson v. Palmer*, 468 U.S. 517, 530 (1984); *see Scher v. Engelke*, 943 F.2d 921, 923-24 (8th Cir. 1991) (awarding punitive damages for repeated harassing cell searches done in retaliation for complaints about guard misconduct), *cert. denied*, 503 U.S. 952 (1992).

²⁴ *See Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) (holding allegation of frequent searches for no purpose but to harass was not frivolous).

²⁵ *But see Dobbey v. Illinois Dep’t of Corrections*, 574 F.3d 443, 444-46 (7th Cir. 2009) (holding hanging a noose in housing area, though offensive, did not violate the Eighth Amendment under circumstances where it was not a threat); *Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir.) (holding allegations that an officer continuously banged and kicked his cell door, threw food trays through the slot so hard the top came off, made aggravating remarks, insulted him about his hair length, growled and snarled through the cell window and smeared the window so he couldn’t see out, behaved in a racially prejudiced manner towards him, and jerked and pulled him unnecessarily hard when escorting him from his cell would, if true, “demonstrate shameful and utterly unprofessional behavior by [the officer], they are insufficient to establish an Eighth Amendment violation”), *cert. denied*, 543 U.S. 837 (2004). *Compare Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986) (holding that an officer’s waving of a knife in a paraplegic prisoner’s face, knife-point extortion of potato chips and cookies, incessant taunting, and failure to relay requests for medical care to the nurses violated the Eighth Amendment. The court emphasizes the plaintiff’s paraplegic condition, his dependence on the officer who was abusing him, and the resulting “significant mental anguish.”)

²⁶ *See Whitman v. Nestic*, 368 F.3d 931, 934 (7th Cir. 2004) (equating “calculated harassment” to searches “maliciously motivated, unrelated to institutional security, and hence ‘totally without penological justification’”) (citation omitted).

²⁷ *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004).

²⁸ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

²⁹ *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (addressing risk of inmate-inmate assault); *see Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding risks of future harm actionable in case involving

Recent Supreme Court decisions have focused on harm and the risk of harm, leading some courts to assume explicitly or implicitly that these are requirements of an Eighth Amendment claim.³⁰ However, these decisions have not excluded from Eighth Amendment scrutiny the “unquestioned and serious deprivations of basic human needs” or denial of the “minimal civilized measure of life’s necessities” that prior decisions had declared as standards for acceptable conditions under the Eighth Amendment, independent of proof of physical or psychiatric harm.³¹ Moreover, the Supreme Court’s holding that “calculated harassment unrelated to prison needs” may violate the Eighth Amendment,³² and several circuits’ holdings that exposure to the deranged behavior of persons with mental illness may do so as well,³³ suggest that there is a level of sheer unpleasantness that will violate the Eighth Amendment independently of harm or injury.³⁴

environmental tobacco smoke).

³⁰ See *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999); *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995).

³¹ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); accord, *Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991); *Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011) (holding “there is a substantial risk of serious harm ‘in the denial of the minimal civilized measure of life's necessities’”) (quoting *Spencer v. Bouchard*, 449 F.3d 721, 728 (6th Cir. 2006)); *Palmer v. Johnson*, 193 F.3d at 352 (having asserted a requirement of “deliberate indifference to health or safety,” court does not examine actual risk to health or safety of challenged conditions); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) (“[S]leep undoubtedly counts as one of life’s basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment.” Risk of harm not discussed.); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 810 (10th Cir. 1999) (holding infliction of psychological pain is actionable).

³² *Hudson v. Palmer*, 468 U.S. 517, 530 (1984).

³³ *Harper v. Showers*, 174 F.3d 716, 717, 720 (5th Cir. 1999) (noting plaintiff’s allegation that conditions deprived him of “cleanliness, sleep, and peace of mind”); *DeMallory v. Cullen*, 855 F.2d 442, 444-45 (7th Cir. 1988); *Nolley v. County of Erie*, 776 F.Supp. 715, 738-40 (W.D.N.Y. 1991); *Langlely v. Coughlin*, 715 F.Supp. 522, 540 (S.D.N.Y. 1989).

³⁴ See *Powers v. Snyder*, 484 F.3d 929, 932-33 (7th Cir. 2007) (suggesting that plaintiffs need not prove a serious health risk in all ETS cases; “maybe there’s a level of ambient tobacco smoke that, whether or not it creates a serious health hazard, inflicts acute discomfort amounting, especially if protracted, to punishment”); *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) (holding “the scope of eighth amendment protection is broader than the mere infliction of physical pain . . . , and evidence of fear, mental anguish, and misery inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher’s cell, could suffice as the requisite injury for an eighth amendment claim.”), *cert. denied*, 502 U.S. 952 (1992); *Mitchell v. Newryder*, 245 F.Supp.2d 200, 204 (D.Me. 2003) (holding prisoner denied access to toilet stated a valid claim that he was “purposefully subjected to dehumanizing prison conditions” regardless of risk of harm).

The Eleventh Circuit has held that “severe discomfort” resulting from exposure to hot summer temperatures did not violate the Eighth Amendment, citing *Farmer*’s and *Helling*’s references to “serious

Basic human needs identified by the courts include “food, clothing, shelter, medical care and reasonable safety”;³⁵ warmth;³⁶ exercise;³⁷ the “basic elements of hygiene”;³⁸ and sleep.³⁹

Deprivations even of these necessities will be upheld if there is a sufficient penological justification for them. Thus, the Eleventh Circuit has held that depriving “Close Management” prisoners of the two hours’ outdoor recreation they were permitted, based on acts of serious and dangerous misconduct, did not violate the Eighth Amendment, even if it inflicted pain, in light of its penological justification.⁴⁰ Similarly, the Second Circuit upheld the deprivation of all property except one pair of shorts and denial of recreation, showers, hot water and a cell bucket for about two weeks to a prisoner who persisted in misbehaving in a segregation unit. The court noted that the plaintiff’s condition was regularly monitored by a nurse and that the purpose of the measures

harm” and “serious damage to . . . future health.” *Chandler v. Crosby*, 379 F.3d 1278, 1296-97 (11th Cir. 2004). It is not clear whether *Chandler* intended to restrict the scope of the Eighth Amendment entirely to “harm” and “damage,” or whether it did so only with respect to conditions that are objected to by reason of their physical discomfort.

³⁵ *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989)).

³⁶ *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999) (holding overnight exposure to winds and cold actionable under the Eighth Amendment).

³⁷ *Wilson v. Seiter*, 501 U.S. at 304; *Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2010) (holding protracted denial of outdoor exercise violates Eighth Amendment); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of protracted denial of outdoor exercise stated a claim).

³⁸ *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (quoting *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)) (holding that deprivation of toilet facilities for inmates in a small area would violate the Eighth Amendment); *see Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011) (12-hour denial of access to toilet by reason of needless restraints contributed to violation of the Eighth Amendment) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)); *Harper v. Showers*, 174 F.3d 716, 717, 720 (5th Cir. 1999) (allegation of placement into filthy, sometimes feces-smearred cells formerly housing psychiatric patients raised a non-frivolous Eighth Amendment claim); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (holding that inability to bathe for two months resulting in a fungal infection requiring medical attention stated an Eighth Amendment claim). *But see Davis v. Scott*, 157 F.3d 1003, 1004-06 (5th Cir. 1998) (holding that confinement in cell with blood on floor and excrement on wall was not unconstitutional because it was only for three days and cleaning supplies were made available).

³⁹ *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999).

⁴⁰ *Bass v. Perrin*, 170 F.3d 1312, 1316-17 (11th Cir. 1999) (terming the deprivation “a rational, albeit debatable, response to the substantial threat posed by the plaintiffs”).

was to control ongoing misconduct by the prisoner.⁴¹ Whether such treatment would be upheld for significantly longer periods of time is questionable.⁴² The length of time for which prisoners are subjected to even the worst conditions has been held to play a significant part in the analysis of their constitutionality.⁴³

The Supreme Court has said that Eighth Amendment analysis “requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.”⁴⁴ The Court did not spell out what it meant or how that analysis should be conducted in prison conditions cases. Courts have suggested that statutes or regulations

⁴¹ Trammell v. Keane, 338 F.3d 155, 163, 165-66 (2d Cir. 2003); *see* Chappell v. Mandeville, ___ F.3d ___, 2013 WL 364203, *7-8 (9th Cir. 2013) (Bybee, J.) (holding “contraband watch” procedure in which prisoner “was taped into two pairs of underwear and jumpsuits, placed in a hot cell with no ventilation, chained to an iron bed, shackled at the ankles and waist so that he could not move his arms, and was forced to eat like a dog” for seven days did not violate clearly established rights); Rodriguez v. Briley, 403 F.3d 952, 952-53 (7th Cir. 2005) (holding that a rule requiring prisoners to stow property in a box before leaving their cells could be enforced by refusing to let them leave their cells, even if the cost was missed meals and showers).

⁴² *See* Williams v. Greifinger, 97 F.3d 699, 704-05 (2d Cir. 1996) (holding that treatment “otherwise . . . impermissible under the Eighth Amendment” is not acceptable for behavior control purposes; affirming summary judgment for prisoner denied all out-of-cell exercise, all out-of-cell activity except a ten-minute shower each week, and all visits except from attorneys, for 589 days because he refused a TB test).

⁴³ *See* Vinning-El v. Long, 482 F.3d 923, 924-25 (7th Cir. 2007) (holding six days’ confinement in cell with floor covered in water, no working plumbing, walls smeared with blood and feces, no mattress, sheets, toilet paper, or other personal hygiene items violated the Eighth Amendment); Spencer v. Bouchard, 449 F.3d 721, 728-29 (6th Cir. 2006) (noting prior holding that Eighth Amendment could be violated by failing to provide warm clothing for winter recreation periods, holding that less intense cold could be actionable where the plaintiff complained of exposure for months); Alexander v. Tippah County, 351 F.3d 626, 631 (5th Cir. 2003) (questioning whether “deplorable” sanitary conditions imposed for 24 hours violated the Eighth Amendment; citing cases), *cert. denied*, 124 U.S. 2071 (2004). Nonetheless, sufficiently serious deprivations can be unconstitutional even if imposed for relatively brief periods of time. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) (holding unconstitutional seven hours restrained to “hitching post” exposed to sun, without water and without toilet access); Surprenant v. Rivas, 424 F.3d 5, 19-20 (1st Cir. 2005) (holding three weeks in segregation under unsanitary conditions would violate detainees’ due process rights, coextensive with Eighth Amendment protections); Palmer v. Johnson, 193 F.3d 346, 352-54 (5th Cir. 1999) (holding overnight stay outdoors without blankets or warm clothing could violate the Eighth Amendment).

⁴⁴ Helling v. McKinney, 509 U.S. 25, 36 (1993); *see* Baze v. Rees, 553 U.S. 35, 53 (2008) (“it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated”; addressing lethal injection procedures).

governing civilian activities may inform that inquiry,⁴⁵ and conversely that risks that are commonplace in free society in voluntary activity may not raise an Eighth Amendment issue.⁴⁶

C. Recurring issues in medical care cases

A plaintiff in a medical care case must prove deliberate indifference to serious medical needs.⁴⁷

1. Deliberate indifference

In applying the deliberate indifference standard in medical care cases, an essential principle is that lapses and differences of medical judgment are not actionable.⁴⁸ However, that

⁴⁵ See *Atkinson v. Taylor*, 316 F.3d 257, 265 and n.7 (3d Cir. 2003) (holding that an executive order banning smoking in public buildings was some evidence of what society does not tolerate, and suggesting that a federal regulation prohibiting smoking in federal buildings and workplaces might indicate a national consensus). An unreported Second Circuit case states that evidence that a prisoner was confined in close quarters with a chain smoker for more than a month (even though he left his cell often during the day), that the prison's own policies indicate such treatment is inappropriate, and that the prison's own grievance committee so concluded, support a conclusion that the risk was "not one that today's society chooses to tolerate." *Shepherd v. Hogan*, 181 Fed.Appx. 93, 95, 2006 WL 1408332 (2d Cir. 2006) (unpublished); see *Rodriguez v. McClenning*, 399 F.Supp.2d 228, 237-38 (S.D.N.Y. 2005) (relying on trend toward statutory prohibition of sexual contact between prison employees and prisoners in holding that "any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment.").

⁴⁶ See *Christopher v. Buss*, 384 F.3d 879, 882-83 (7th Cir. 2004) (rejecting the claim of a prisoner hit in the face with a softball because of a defect in the field; speculating that such defects "doubtless exist on subpar fields across the country" and noting that softball was a voluntary activity); accord, *Betts v. New Castle Youth Development Center*, 621 F.3d 249, 258 (3d Cir. 2010) (applying *Christopher* holding to juvenile detainee injured playing tackle football without equipment), *cert. denied*, 131 S.Ct. 1614 (2011).

In *Reynolds v. Powell*, 370 F.3d 1028, 1031 (10th Cir. 2004), the court held that a prisoner who alleged that he fell in the shower because the area did not drain properly did not state an Eighth Amendment claim because slippery floors are a common risk to members of the public at large; such claims, it said, are the province of tort law. This approach proves too much, since environmental tobacco smoke, addressed in *Helling v. McKinney*, is also a risk to civilians. The concern with constitutionalizing tort law is addressed by requiring proof of deliberate indifference rather than negligence.

⁴⁷ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); see *Cotts v. Osafu*, 692 F.3d 564, 567 (7th Cir. 2012) (holding that once those elements are established, "[n]o separate showing of cruel and unusual punishment is or may be required, and the jurors here did not need to know the underlying basis of the claim to decide the case.").

⁴⁸ See *Duckworth v. Ahmad*, 532 F.3d 675, 681 (7th Cir. 2008) (failure to rule out cancer immediately in light of gross hematuria may have been malpractice but was not deliberate indifference); *McElligott v. Foley*, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to diagnose prisoner's

does not mean prison doctors' decisions are *per se* unassailable; "a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was made in the absence of professional judgment."⁴⁹ In all cases, the question is whether legitimate medical judgment is actually at issue. There are a number of common scenarios that have been acknowledged to present issues of deliberate indifference and not differences of professional opinion:

- Denial of or delay in access to medical personnel⁵⁰ or in their providing treatment.⁵¹

cancer was not deliberate indifference, though failure to treat his worsening pain might be); *Stewart v. Murphy*, 174 F.3d 530, 535 (5th Cir.), *cert. denied*, 528 U.S. 906 (1999); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999) (denial of protease inhibitor to prisoner with HIV upheld, since other treatment was provided); *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997); *Starbeck v. Linn County Jail*, 871 F.Supp. 1129, 1144-45 (N.D.Iowa 1994); *see Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (removal of plaintiff's wheelchair, done by psychologist to protect him and others, was not actionable).

⁴⁹ *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (holding that allegation that a prison doctor stopped plaintiff's Hepatitis C medication even though he had commenced a one-year treatment program and needed treatment for the disease pled an Eighth Amendment claim); *Arnett v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (refusal over ten months to provide preferred medication, or any medication, for painful rheumatoid arthritis stated a deliberate indifference claim); *Dominguez v. Correctional Medical Services*, 555 F.3d 543, 551-52 (6th Cir. 2009) (holding nurse's failure to respond promptly to prisoner with symptoms of heat stroke could support a finding of deliberate indifference); *Hayes v. Snyder*, 546 F.3d 516, 524-26 (7th Cir. 2008) (holding doctor's actions and testimony could support an inference that he was "hostile and dismissive" to plaintiff's needs and therefore deliberately indifferent); *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (holding medical staff's "obdurate refusal" to change prisoner's treatment despite his reports that his medication was not working and his condition was worsening could constitute deliberate indifference); *Farrow v. West*, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding unexplained long delay in providing dentures by a dentist familiar with prisoner's painful condition could constitute deliberate indifference); *McElligott v. Foley*, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could be deliberate indifference); *Hunt v. Uphoff*, 199 F.3d 1220, 1223-24 (10th Cir. 1999) (refusing to dismiss allegations that one doctor denied insulin prescribed by another doctor and that medically recommended procedures were not performed as mere differences of medical opinion); *Hamilton v. Endell*, 981 F.2d 1063, 1066-67 (9th Cir. 1992) (disregard of ear surgeon's direction not to transfer prisoner by airplane could constitute deliberate indifference even though officials obtained a second opinion from their own physician; "By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"). *But see Vaughan v. Lacey*, 49 F.3d 1344, 1345-46 (8th Cir. 1995) (prison authorities could rely on their own physicians and not prisoner's civilian treating physician).

⁵⁰ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *see Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 302-05 (7th Cir. 2010) (7th Cir. 2009) (upholding municipal liability where prisoner died of meningitis and record showed a widespread practice of failure to review medical requests timely; upholding liability of officers to whom the visibly ill prisoner was in plain view), *cert. denied*, 131 S.Ct.

Repeated examinations and assessments do not absolve prison staff of liability if they do not actually provide treatment.⁵² Delay is evaluated in light of the seriousness of the

643 (2010); *Goebert v. Lee County*, 510 F.3d 1312, 1327-28, 1331 (11th Cir. 2007) (holding jail captain who decided to disbelieve inmate medical complaints could be found deliberately indifferent for not getting assistance for pregnant prisoner who complained she was leaking fluid); *Estate of Carter v. City of Detroit*, 408 F.3d 304, 310, 312-13 (6th Cir. 2005) (holding a defendant who knew the plaintiff was exhibiting “the classic symptoms of a heart attack” and did not arrange transportation to a hospital could be found deliberately indifferent); *Johson v. Karnes*, 398 F.3d 868, 875-76 (6th Cir. 2005) (holding jail doctor’s failure to schedule surgery for severed tendons despite emergency room instruction to return prisoner in three to seven days could constitute deliberate indifference); *LeMarbe v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference), *cert. denied*, 535 U.S. 1056 (2002); *McElligott v. Foley*, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding repeated delays in doctor’s seeing a patient with constant severe pain could constitute deliberate indifference); *Murphy v. Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (two-month failure to get prisoner with head injury to a doctor stated a claim); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1083, 1087 (11th Cir. 1986) (isolation of injured inmate and deprivation of medical attention for three days). *But see* *Peterson v. Willie*, 81 F.3d 1033, 1038 (11th Cir. 1996) (holding delay in providing the plaintiff with medication did not constitute deliberate indifference because the medication is toxic and the defendants were waiting to get his prior medical records, and because getting the medication would not have immediately changed the plaintiff’s symptoms).

⁵¹ *Gonzalez v. Feinerman*, 663 F.3d 311, 313-14 (7th Cir. 2011) (*per curiam*) (physicians’ two-year refusal to treat painful and worsening hernia surgically when conservative treatment failed could constitute deliberate indifference); *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011) (“A delay in treating non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate’s pain.”); *Scott v. Ambani*, 577 F.3d 642, 648 (6th Cir. 2009) (holding doctor’s refusal to examine or provide pain medication to prisoner who had recently been treated for prostate cancer, had severe back and leg pain and a hard and painful testicular lump, could constitute deliberate indifference); *Edwards v. Snyder*, 478 F.3d 827, 832 (7th Cir. 2007) (holding an allegation of a doctor’s gratuitous two-day delay in treating an injury stated a deliberate indifference claim regardless of the adequacy of later treatment); *Spann v. Roper*, 453 F.3d 1007, 1008-09 (8th Cir. 2006) (holding a nurse could be found deliberately indifferent for leaving a prisoner in his cell for three hours though she knew he had taken an overdose of mental health medications intended for another prisoner); *McKenna v. Wright*, 386 F.3d 432, 437 (2^d Cir. 2004) (holding protracted delay in starting hepatitis C treatment stated a claim); *Farrow v. West*, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatuses in treatment, by a dentist familiar with prisoner’s painful condition, raised a jury question of deliberate indifference).

⁵² *McKenna v. Wright*, 386 F.3d 432, 437 (2^d Cir. 2004); *accord*, *Shomo v. City of New York*, 579 F.3d 176, 184-85 (2^d Cir. 2009) (where plaintiff alleged a policy of disregarding medical recommendations for treatment, claim was not refuted by his having frequently seen doctors who administered tests); *Sulton v. Wright*, 265 F.Supp.2d 292, 300 (S.D.N.Y. 2003) (“even if an inmate receives ‘extensive’ medical care, a claim is stated if . . . the gravamen of his problem is not addressed”); *Lavender v. Lampert*, 242 F.Supp.2d 821, 843 (D.Or. 2002) (deliberate indifference claim was supported where plaintiff was examined regularly by medical staff but “there is an ongoing pattern of ignoring, and failing to timely respond to or effectively manage, plaintiff’s chronic pain”); *Hall v. Artuz*, 954 F.Supp. 90, 94 (S.D.N.Y. 1997) (“The fact that Hall had many medical consultations concerning his knees . . .

prisoner's medical need.⁵³

- Denial of access to medical practitioners qualified to address the prisoner's problem.⁵⁴
- Failure to inquire into facts necessary to make a professional judgment.⁵⁵

does not establish that he was not denied medically necessary physical therapy.”).

⁵³ See *Kikumura v. Osagie*, 461 F.3d 1269, 1292 (10th Cir. 2006) (holding delay must be shown to have caused “substantial harm,” including pain suffered while awaiting treatment); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1425 (11th Cir. 1997) (holding that “a jail official who is aware of but ignores the dangers of acute alcohol withdrawal and waits for a manifest emergency before obtaining medical care is deliberately indifferent. . . .”); *Weyant v. Okst*, 101 F.3d 845, 856-57 (2d Cir. 1996) (delay of hours in getting medical attention for a diabetic in insulin shock raised a question of deliberate indifference); see also n.81, below.

Some courts have required “verifying medical evidence” to support a claim that delay has caused harm. See *Williams v. Liefer*, 491 F.3d 710, 714-15 (7th Cir. 2007) and cases cited. Such evidence need not comprise expert testimony in all cases. *Id.*, 491 F.3d at 715-16.

⁵⁴ *King v. Kramer*, 680 F.3d 1013, 1021-22 (7th Cir. 2012) (holding policy of changing prescribed medications to medications on jail formulary without adequate supervision by a physician could support a deliberate indifference finding); *Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008) (refusal to refer to a specialist where doctor did not know cause of reported extreme pain made no sense and could support deliberate indifference finding); *Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (holding nurse's failure to perform “gatekeeper” role by referring patient to a practitioner for symptoms of cardiac emergency could be deliberate indifference); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (holding refusal to refer prisoner to a specialist or order an endoscopy for two years despite intense abdominal pain could be deliberate indifference); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding six weeks' delay in sending prisoner to a dentist, resulting in infection and loss of teeth, raised an Eighth Amendment claim); *LeMarbe v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference), *cert. denied*, 535 U.S. 1056 (2002); *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (failure to provide access to a respiratory therapist could constitute deliberate indifference), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991); *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (damages awarded where physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir.) (non-psychiatrist was not competent to evaluate the significance of a prisoner's suicidal gesture; prison officials must “inform competent authorities” of medical or psychiatric needs) (emphasis supplied), *rehearing denied*, 880 F.2d 421 (11th Cir. 1989); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return patient to VA hospital for treatment for Agent Orange exposure); *Toussaint v. McCarthy*, 801 F.2d 1080, 1112 (9th Cir. 1986) (rendering of medical services by unqualified personnel is deliberate indifference), *cert. denied*, 481 U.S. 1069 (1987); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); *Farnam v. Walker*, 593 F.Supp.2d 1000, 1011-19 (C.D.Ill. 2009) (requiring specialist care for cystic fibrosis). *Contra*, *Duffield v. Jackson*, 545 F.3d 1234, 1239 (8th Cir. 2008) (decision to refer to a specialist is a decision about course of treatment is not an Eighth Amendment violation).

⁵⁵ *Ortiz v. Webster*, 655 F.3d 731, 735 (7th Cir. 2011) (failure to measure prisoner's vision for two

- Interference with medical judgment by non-medical factors.⁵⁶ In particular, “systemic

years after likely future need for surgery was acknowledge; “Physicians cannot escape liability simply by ‘refusing to verify underlying facts’ regarding the potential need for treatment.” (citation omitted)); *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 544 (6th Cir. 2008) (doctor’s grossly perfunctory examination in the face of nausea, vomiting, and chest pain could evince deliberate indifference); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (holding doctor could be deliberately indifferent for refusing to send prisoner to a specialist or order an endoscopy despite his complaints of severe pain; doctor could not rely on lack of “objective evidence” since often there is no objective evidence of pain); *McElligott v. Foley*, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire into, and treat, plaintiff’s severe pain, and repeated delays in doctor’s seeing the patient, could be deliberate indifference); *Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996) (denying summary judgment to prison doctor who had been told the plaintiff received psychiatric medication in part because of suicide risk, but discontinued it based on a cursory interview without reviewing medical records); *Liscio v. Warren*, 901 F.2d 274, 276-77 (2d Cir. 1990) (physician failed to inquire into the cause of an arrestee’s delirium and thus failed to diagnose alcohol withdrawal); *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them); *Tillery v. Owens*, 719 F.Supp. 1256, 1308 (W.D.Pa. 1989) (“We will defer to the informed judgment of prison officials as to an appropriate form of medical treatment. But if an informed judgment has not been made, the court may find that an eighth amendment claim has been stated.”), *aff’d*, 907 F.2d 418 (3d Cir. 1990).

⁵⁶ *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (holding evidence that defendants withheld hip replacement surgery because they wanted to avoid the expense and hoped the plaintiff would die naturally or be executed in the near future supported claim of Eighth Amendment violation); *King v. Kramer*, 680 F.3d 1013, 1021-22 (7th Cir. 2012) (holding policy of changing prescribed medications to medications on jail formulary without adequate supervision by a physician could support a deliberate indifference finding); *Cotts v. Osafo*, 692 F.3d 564, 570 (7th Cir. 2012) (holding jury could have found that defendants departed from professional judgment by following a rigid rule against surgery for reducible hernias or that the denial of surgery was related to a desire to avoid the cost); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (striking down statute forbidding hormone and surgical treatment for transgender prisoners without regard for medical needs facially unconstitutional), *cert. denied*, 132 S.Ct. 1810 (2012); *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (holding prison authorities’ “delays, poor explanations, missteps, changes in position and rigidities” supported a finding of deliberate indifference in resisting hormone treatment for transgender prisoner); *Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484, 498-99 (1st Cir. 2011) (holding evidence that physician “missed” report of high HIV viral load because of interest in avoiding expense of treatment could support a deliberate indifference finding); *Roe ex rel. Roe v. Elyea*, 631 F.3d 843, 860 (7th Cir. 2011) (policy re Hepatitis B that excluded prisoners from treatment if they had less than two years to serve, with no room for professional judgment about the individual patient, could support a deliberate indifference claim); *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (holding allegation that prisoner was “denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment” stated a deliberate indifference claim); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding that withholding of a dental referral for “nonmedical reasons—Hartsfield’s behavioral problems”—raised a factual issue as to deliberate indifference); *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (restrictions on abortion unrelated to individual treatment needs), *cert. denied*, 486

deficiencies in staffing, facilities, or procedures [which] make unnecessary suffering inevitable” may support a finding of deliberate indifference.⁵⁷ In such cases, individual defendants may not be held liable for systemic problems they cannot remedy.⁵⁸

- Failure to carry out medical orders.⁵⁹

U.S. 1066 (1988); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (budgetary restrictions); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); *Madrid v. Gomez*, 889 F.Supp. 1146, 1221 (N.D.Cal. 1995) (lack of input by mental health staff concerning housing decisions even where they impact mental health supported deliberate indifference finding); *Starbeck v. Linn County Jail*, 871 F.Supp. 1129, 1145-46 (N.D.Iowa 1994) (evidence that hernia surgery recommended by outside doctors was not performed because the county didn’t want to pay for it could establish deliberate indifference).

⁵⁷ *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (quoting *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974)); *accord*, *Brown v. Plata*, ___ U.S. ___, 131 S.Ct. 1910, 1925 n.3 (2011) (“Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to ‘substantial risk of serious harm’ and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.”); *Duvall v. Dallas County, Tex.*, 631 F.3d 203, 208-09 (5th Cir. 2011) (affirming damages against county for MRSA infection where record showed “it was feasible to control the outbreak through tracking, isolation, and improved hygiene practices, but the County was not willing to take the necessary steps or spend the money to do so”), *cert. denied*, 132 S.Ct. 111 (2011); *Shepherd v. Dallas County*, 591 F.3d 445, 453 (5th Cir. 2009) (affirming liability of county for injury that occurred because “[t]he jail’s evaluation, monitoring, and treatment of inmates with chronic illness was . . . grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel,” not because of fault on the part of particular individuals”; pre-trial detainee case); *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991); *DeGidio v. Pung*, 920 F.2d 525, 529 (8th Cir. 1990) (holding lack of “adequate organization and control in the administration of health services” supported a finding of Eighth Amendment violation); *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988) (applying “systemic deficiencies” principle to mental health care); *see Davis v. Carter*, 452 F.3d 686, 691-94 (7th Cir. 2006) (holding plaintiff’s deliberate indifference claim of a municipal policy of inordinate delay in providing methadone treatment was supported by evidence of an absence of policies and procedures to ensure timely treatment); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988) (understaffing such that psychiatric staff could only spend “minutes per month” with disturbed inmates was unconstitutional), *vacated*, 494 U.S. 1091 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); *Marcotte v. Monroe Corrections Complex*, 394 F.Supp.2d 1289, 1298 (W.D.Wash. 2005) (failure to remedy known deficient infirmary nursing procedures and other health department citations), *reconsideration denied*, 2005 WL 2978651 (W.D.Wash., Nov. 7, 2005).

⁵⁸ *Peralta v. Dillard*, ___ F.3d ___, 2013 WL 57893, *3 (9th Cir. 2013). Whether this principle was properly applied to the facts of this case was vigorously disputed by the dissenting judge, who wrote: “Brooks could have provided constitutionally acceptable care to those patients to whom he rendered care, at the cost of not assisting others who remained on the waiting list.” 2013 WL 57893, *8 (Berzon, J., dissenting).

⁵⁹ *Estelle v. Gamble*, 429 U.S. at 105 (“intentionally interfering with the treatment once prescribed”); *see Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012) (doctor’s failure to implement

- Judgment so bad that it isn't really medical, as when "deliberate indifference cause[s] an easier and less efficacious treatment to be consciously chosen by the doctors."⁶⁰ Courts have formulated this idea in various ways, *e.g.*: "Medical treatment that is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness' constitutes deliberate indifference. . . . Additionally, when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference. . . ."⁶¹ A decision granting a

his own recommendation for referral for hernia surgery); *Smith v. Smith*, 589 F.3d 736, 738-39 (4th Cir. 2009) (nurse's tearing up of medication order and refusing to provide the medication); *Brown v. District of Columbia*, 514 F.3d 1279, 1284 (D.C.Cir. 2008) (failure to transfer prisoner with gallstones immediately to hospital); *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (failure to ensure provision of prescribed glaucoma medication); *Board v. Farnham*, 394 F.3d 469, 484 (7th Cir. 2005) (failure to provide access to asthma inhaler); *Gil v. Reed*, 381 F.3d 649, 661 (7th Cir. 2004) ("angry and unexplained refusal to give Gil his prescription medication"); *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002) (disregard for follow-up care instructions for paraplegic); *Ralston v. McGovern*, 167 F.3d 1160, 1161-62 (7th Cir. 1999) (refusal to provide prescribed medication); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (denial of prescription eyeglasses sufficiently alleged deliberate indifference); *Erickson v. Holloway*, 77 F.3d 1078, 1080-81 (8th Cir. 1996) (officer's refusal of emergency room doctor's request to admit the prisoner and take x-rays); *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing change); *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (failure to act on a medical judgment that prisoners needed access to a respiratory therapist), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991); *McCorkle v. Walker*, 871 F.Supp. 555, 558 (N.D.N.Y. 1995) (failure to obey a medical order to house asthmatic prisoner on a lower tier stated a claim). *But see Williams v. O'Leary*, 55 F.3d 320 (7th Cir.) (two-year failure to provide correct osteomyelitis medication, resulting inter alia from failure to read medical records, was merely negligent), *cert. denied*, 516 U.S. 993 (1995).

⁶⁰ *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974); *see McElligott v. Foley*, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could support a finding of taking an "easier but less efficacious course of treatment"); *see also Farrow v. West*, 320 F.3d 1235, 1247-48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatuses in treatment, by a dentist familiar with prisoner's painful condition, raised a jury question of deliberate indifference).

⁶¹ *Adams v. Poag*, 61 F.3d 1537, 1543-44 (11th Cir. 1995); *see also King v. Kramer*, 680 F.3d 1013, 1019 (7th Cir. 2012) (nurse who indicated a patient was faking a seizure before she examined him, disregarded the results of tests she conducted, and then transferred the patient where he could call for help and be observed only with difficulty could be found deliberately indifferent; courts "must remain sensitive to the line between malpractice and treatment that is so far out of bounds that it was blatantly inappropriate or not even based on medical judgment"); *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances."); *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance," and "were insufficiently interested in his health to take even minimal steps to guards against the possibility that the injury was severe" could

preliminary injunction to a prisoner who was declared ineligible for a liver transplant, without which he was at risk of early death, stated: “In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the course of treatment the doctors chose was medically unacceptable in light of the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.”⁶² The failure to follow professional standards or prison medical care protocols may support a finding of deliberate indifference because the standards or protocols can be evidence of the practitioner’s knowledge of the risk posed by particular symptoms or conditions.⁶³

A related and troublesome issue is posed by cases in which prison medical personnel, having referred a prisoner to a specialist, fail to carry out the specialist’s recommendations, or those of a specialist who directed treatment before the prisoner was incarcerated. Though the law on this point is not well developed, it seems fair to say that such a scenario requires defendants to provide an explanation for their choice and not merely to label the matter as a difference of medical opinion.⁶⁴

support a finding of deliberate indifference); *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991) (“the contemporary standards and opinions of the medical profession are highly relevant in determining what constitutes deliberate indifference”), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (plaintiff should be permitted to prove that treatment “so deviated from professional standards that it amounted to deliberate indifference”); *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986).

⁶² *Rosado v. Alameida*, 349 F.Supp.2d 1340, 1344-45 (S.D.Cal. 2004).

⁶³ *Mata v. Saiz*, 427 F.3d 745, 757-58 (10th Cir. 2005); *accord*, *Quigley v. Tuong Vinh Thai*, ___ F.3d ___, 2013 WL 627207, *5 (6th Cir. 2013) (holding expert evidence that dangerous interactions of two kinds of drugs are “well known in the psychiatric profession” supported an inference that the defendant psychiatrist knew of and disregarded the danger; conflicting expert testimony does not negate that inference at summary judgment); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011) (per curiam) (citing medical literature concerning standard of care in support of view that physicians departed from professional judgment); *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 541, 543-44 (6th Cir. 2008).

⁶⁴ *See* *Snow v. McDaniel*, 681 F.3d 978, 986-87 (9th Cir. 2012) (utilization review board’s rejection of specialist recommendation for hip replacement raised an inference that defendants unreasonably relied on their non-specialized conclusions) and presented a jury question of deliberate indifference); *Arnett v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (when specialist consultant said “I would like” for plaintiff to resume a specific dosage of a specific medication once a week, “that can reasonably be inferred to be an instruction,” and failure to comply supports a deliberate indifference claim); *Gil v. Reed*, 381 F.3d 649, 664 (7th Cir. 2004) (“On summary judgment, we find that prescribing on three occasions the very medication the specialist warned against . . . while simultaneously cancelling two of the three prescribed laxatives gives rise to a genuine issue of material fact about [the prison doctor’s] state of mind”); *Jones v. Simek*, 193 F.3d 485, 490–91 (7th Cir. 1999) (failure to follow advice of specialists); *Miller v. Schoenen*, 75 F.3d 1305 (8th Cir. 1996) (expert evidence combined with recommendations from outside hospitals that were not followed supported deliberate indifference claim); *Pugliese v. Cuomo*, 911 F.Supp. 58, 63 (N.D.N.Y. 1996) (plaintiff entered prison with a recommendation

It is medical judgment with respect to *the particular patient* to which courts defer under the deliberate indifference standard. Thus, the Second Circuit held that a jury could find deliberate indifference in the application to a prisoner with hepatitis C of a statewide prison medical policy, which might well be appropriate as a general matter, denying treatment to persons with any evidence of substance abuse in the preceding two years, in the face of “the unanimous, express, and repeated recommendations of plaintiff’s treating physicians, including prison physicians,” to depart from the policy in the plaintiff’s case.⁶⁵

Under the deliberate indifference standard, prison personnel can be held liable only for serious medical needs that they know about.⁶⁶ However, the trier of fact is not bound by their denials; knowledge can be inferred from circumstances,⁶⁷ including the existence of facility

for physical therapy; one prison doctor said he would never waste the state’s money on such treatment); *Starbeck v. Linn County Jail*, 871 F.Supp. 1129, 1146-47 (N.D.Iowa 1994) (where outside doctors had recommended hernia surgery, prison officials who failed to provide the surgery could not claim a difference in medical judgment without providing an explanation of their decision).

⁶⁵ *Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005). The prisoner had had a single urine scan that was positive for marijuana during the relevant two-year period. The court indicated that its holding is an extension of its previous holding “that a deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner’s treating physicians.” *Id.* at 404 (citing *Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987)); *see* *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006) (holding it was unreasonable to withhold Hepatitis C treatment for five months because of the possibility of parole without an individualized assessment of the inmate’s actual chances of parole). The Seventh Circuit has elaborated that while treatment protocols and guidelines are not unconstitutional in prison medical care, “such protocols must ensure that prison officials fulfill their responsibility to provide constitutionally adequate care to each individual inmate with reference to his particularized medical need. . . . With respect to an individual case, . . . prison officials still must make a determination that application of the protocols result in adequate medical care.” *Roe ex rel. Roe v. Elyea*, 631 F.3d 843, 860 (7th Cir. 2011) (citing *Johnson v. Wright*, *supra*).

⁶⁶ *Caiozzo v. Koreman*, 581 F.3d 63, 69-71 (2d Cir. 2009) (applying actual knowledge standard in pre-trial detainee case).

⁶⁷ *See* *Jones v. Muskegon County*, 625 F.3d 935, 944 (6th Cir. 2010) (failure of nurses to respond to prisoner who wrote that he had abdominal pain and suspected he had cancer, because they had concluded he was “faking it,” could support a deliberate indifference claim); *Vaughn v. Gray*, 557 F.3d 904, 909 (8th Cir. 2009) (failure to respond to prisoner who vomited through the night could support finding of deliberate indifference despite defendants’ claim that they thought the prisoner was vomiting because he had ingested shampoo; “Appellants’ self-serving contention that they did not have the requisite knowledge does not provide an automatic bar to liability in light of the objective evidence to the contrary.”); *Sciocluna v. Wells*, 345 F.3d 441, 446 (6th Cir. 2003) (doctor’s claim there was no evidence he knew a patient was present in the prison could be overcome by inference that there was an emergency treatment request and he ignored it); *Hudak v. Miller*, 28 F.Supp.2d 827, 832 (S.D.N.Y. 1998) (doctor’s self-serving statement that he believed prisoner’s headaches were caused by tension cannot defeat liability if the facts showed that the risk of a serious problem was so obvious that he must have known about it);

protocols and policies reflecting particular kinds of risk,⁶⁸ or staff members' medical training itself.⁶⁹ Prison personnel need not be shown to have known of the precise nature of the risk as long as they knew it was serious.⁷⁰

see also cases cited in nn. 4-5, above.

⁶⁸ *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 541, 543-44 (6th Cir. 2008); *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1190-91 (9th Cir. 2002) (policies concerning mentally ill prisoners showed that policymakers understood the risk presented by lack of prompt psychiatric attention for some new admissions).

⁶⁹ *Dominguez v. Correctional Medical Services*, 555 F.3d 543, 550 (6th Cir. 2009) (“As a trained medical professional, a registered nurse, Fletcher was aware or should have been aware of such dangers.”).

⁷⁰ *Conn v. City of Reno*, 591 F.3d 1081, 1096-98 (9th Cir. 2010) (police officers' statements that they did not believe an arrestee's suicide threats and gestures were serious did not entitle them to summary judgment but presented a jury question), *cert. granted, judgment vacated*, 131 S.Ct. 1812 (2011), *reinstated in pertinent part*, 658 F.3d 897 (9th Cir. 2011); *Dominguez v. Correctional Medical Services*, 555 F.3d 543, 550 (6th Cir. 2009) (holding nurse need only be shown to have known that “serious risks accompany heat-related illnesses and dehydration,” not that plaintiff could become quadriplegic as a result); *Alsina-Ortiz v. LaBoy*, 400 F.3d 77, 83 (1st Cir. 2005) (holding guard who knew of prisoner's “prolonged, manifest, and agonizing pain” and did nothing to get care for him could be found deliberately indifferent); *Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (nurse who did not assess a prisoner suffering severe chest pains could be found deliberately indifferent); *McElligott v. Foley*, 182 F.3d 1248, 1256 (11th Cir. 1999) (doctor who failed to diagnose plaintiff's cancer could still be found to have actual knowledge of a substantial risk based on his “tremendous pain and illness” which the doctor observed); *Hollenbaugh v. Maurer*, 397 F.Supp.2d 894, 904 (N.D. Ohio 2005) (“The plaintiff does not have to show that the defendants knew of the exact medical risk threatening Hollenbaugh”; the fact that he did not self-diagnose his heart attack or report his heart condition did not absolve defendants who observed ample evidence of his symptoms and complaints); *Spencer v. Sheahan*, 158 F.Supp.2d 837, 849-50 (N.D. Ill. 2001) (doctor who knew that diabetics are at risk for foot problems and require prompt wound care to prevent long-term complications, but who waited two days before examining a patient with complaints of pain and discolored skin on foot and seven more days before referring patient to appropriate specialist, could be found deliberately indifferent where patient ultimately had partial foot amputation because of gangrene and infection); *Hudak v. Miller*, 28 F.Supp.2d 827, 831 (S.D.N.Y. 1998) (“It should be noted that the knowledge which Hudak must show Dr. Miller had is not that Hudak had a brain aneurysm . . . but rather that Miller knew that Judak had some serious medical problem which bore further investigation”; plaintiff had complained for nine months of chronic headaches before receiving a CT scan).

Some decisions, in my view, take an unreasonably demanding view of who must be shown to have known what. For example, in *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805 (7th Cir. 2000), the plaintiff alleged that officers repeatedly failed to provide him with prescribed antibiotics, and as a result he suffered permanent hearing loss from an ear infection. The court held that he had failed to show that any of the defendants actually knew that he might suffer serious injury or pain from missing his medication, since he had no obvious outward symptoms and the doctors did not tell the officers that the medication had to be given regularly. *Zentmyer*, 220 F.3d at 811; *accord*, *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 18 (1st Cir. 1995) (finding that failure to administer prescription

2. Deliberate indifference and negligence

Courts have held that “repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff” may add up to deliberate indifference.⁷¹ Later, however, courts have cautioned: “It may be, as quite a large number of cases state . . . that repeated acts of negligence are some evidence of deliberate indifference. . . . The only significance of multiple acts of negligence is that they may be evidence of the magnitude of the risk created by the defendants’ conduct and the knowledge of the risk by the defendants. . . .”⁷² A finding of medical malpractice does not preclude a finding of deliberate indifference.⁷³ Whether an instance of medical neglect constitutes negligence or malpractice, or is deliberately indifferent, may be determined by other evidence including circumstantial evidence.⁷⁴

3. Serious medical needs

The most common definition of “serious medical need” is “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor’s attention.”⁷⁵ The Second Circuit’s most comprehensive statement on the subject says that the seriousness of a medical need is determined by factors including but not limited to “(1) whether a reasonable doctor or patient would perceive

medication did not constitute deliberate indifference absent evidence that prison officials knew the plaintiff would suffer serious medical consequences without medication). This then means that if you are not receiving your prescribed medication from prison staff, you have to make them aware of the harm that you could suffer from not receiving it has prescribed. We think that the only “actual knowledge” that correctional staff need to have in such a situation is that (a) medical staff have prescribed treatment, and (b) when people don’t get prescribed medical treatment, their health may be damaged.

⁷¹ *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *accord*, *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (“consistent pattern of reckless or negligent conduct” establishes deliberate indifference).

⁷² *Sellers v. Henman*, 41 F.3d 1100, 1102-03 (7th Cir. 1994); *accord*, *Brooks v. Celeste*, 39 F.3d 125, 128-29 (6th Cir. 1994).

⁷³ *Hathaway v. Coughlin*, 99 F.3d 550 (2d Cir. 1996).

⁷⁴ In *Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484 (1st Cir. 2011), the defendant physician overlooked or ignored a report showing that the HIV-positive plaintiff had a high viral load; as a result, the plaintiff did not receive certain costly medications. The court held that a jury could find deliberate indifference based on evidence that the physician had a financial interest in avoiding finding an imminent risk and need for treatment, that he had been admonished for unprofessional conduct which could be viewed as reflecting the same interest, and that he had testified he had never before “missed” a lab report. *Leavitt*, 645 F.3d at 498-99.

⁷⁵ *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008); *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (holding HIV and hepatitis were serious needs); *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir. 1994).

the medical need in question as ‘important and worthy of comment or treatment,’ (2) whether the medical condition significantly affects daily activities, and (3) ‘the existence of chronic and substantial pain.’”⁷⁶ Recent medical care decisions have given great emphasis in assessing medical needs to pain⁷⁷ and disability.⁷⁸ Drug or alcohol withdrawal is a serious medical need.⁷⁹

⁷⁶ Brock v. Wright, 315 F.3d at 162; *see also* Carnell v. Grimm, 872 F.Supp. 746, 755 (D.Haw. 1994), *appeal dismissed in part, aff’d in part*, 74 F.3d 977 (9th Cir. 1996).

The Second Circuit has at times repeated the formula, which originated in a dissenting opinion and has been enthusiastically repeated by many district courts, that a serious medical need is “a condition of urgency, one that may produce death, degeneration, or extreme pain.” Hathaway v. Coughlin, 37 F.3d 63 (2d Cir. 1994) (quoting Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). In *Brock*, however, the court actually focused on the question and explicitly rejected the notion that “only ‘extreme pain’ or a degenerative condition would suffice to meet the legal standard,” since “the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain.” Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003). More recently, the court in dictum once more repeated the “death, degeneration, or extreme pain” formula. Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005). However, the *Brock* holding would still seem to be the law of the Circuit.

⁷⁷ *See, e.g.*, Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011) (per curiam) (holding pain from untreated hernia can be a serious medical need independent of other concerns); Berry v. Peterman, 604 F.3d 435, 441 (7th Cir. 2010) (holding “a non-trivial delay in treating serious pain can be actionable even without expert medical testimony showing that the delay aggravated the underlying condition”); Hayes v. Snyder, 546 F.3d 516, 523 (7th Cir. 2008) (holding that objective evidence of pain is not necessary; self-reporting may be the only evidence); Blackmore v. Kalamazoo County, 390 F.3d 890, 899-900 (6th Cir. 2004) (holding two-day delay in treatment of appendicitis represented a serious medical condition even though the appendix did not rupture); Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (holding allegation of back condition causing pain so serious it has caused him to fall down sufficiently pled a serious need); Farrow v. West, 320 F.3d 1235, 1244-45 (11th Cir. 2003) (holding that pain, bleeding and swollen gums, and teeth slicing into gums of prisoner who needed dentures helped show serious medical need; “life-long handicap or permanent loss” not required on these facts); Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) (subjective complaints of pain from beating verified by doctor’s prescription of pain medication 48 hours later); McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992) (“chronic and substantial pain”); Boretti v. Wiscomb, 930 F.2d 1150, 1154-55 (6th Cir. 1991) (needless pain even without permanent injury); Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1989) (“significant and uncomfortable health problem”); Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989) (condition that is “medically serious or painful in nature”); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of treatments that “eliminated pain and suffering at least temporarily”); Dean v. Coughlin, 623 F.Supp. 392, 404 (S.D.N.Y. 1985) (“conditions that cause pain, discomfort, or threat to good health”); *see* McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to treat severe pain could constitute deliberate indifference).

⁷⁸ Miller v. King, 384 F.3d 1248, 1261 (11th Cir. 2004) (holding paraplegia with incontinence are serious medical needs), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (loss of vision may not be “pain” but it is “suffering”); McGuckin v. Smith, 974 F.2d at 1050, 1060 (9th Cir. 1992) (condition that “significantly affects an individual’s daily activities” is actionable); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (prison must treat a “substantial disability”); Monmouth County Correctional Institution Inmates v.

There may also be a “serious cumulative effect from the repeated denial of care with regard to even minor needs.”⁸⁰

In cases of temporary delay or interruption of treatment, the proper question may be whether the delay or interruption—not the underlying medical condition—is objectively serious enough to present an Eighth Amendment question.⁸¹

Prison officials’ “serious need list” is not dispositive,⁸² nor are non-legal catchphrases like “elective.”⁸³

4. Mental health care

Mental health care is governed by the same deliberate indifference/serious needs analysis

Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (medical need is serious if it imposes a “life-long handicap or permanent loss”), *cert. denied*, 486 U.S. 1066 (1988); Pugliese v. Cuomo, 911 F.Supp. 58 (N.D.N.Y. 1996) (denial of physical therapy for pre-existing injury held serious); Tillery v. Owens, 719 F.Supp. 1256, 1286 (W.D.Pa. 1989) (citing definition of “serious” mental illness as one “that has caused significant disruption in an inmate’s everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself”), *aff’d*, 907 F.2d 418 (3d Cir. 1990); Young v. Harris, 509 F.Supp. 1111, 1113-14 (S.D.N.Y. 1981) (failure to provide leg brace was actionable).

⁷⁹ Kelley v. County of Wayne, 325 F.Supp.2d 788, 792 (E.D.Mich. 2004).

⁸⁰ Jones v. Evans, 549 F.Supp. 769, 775 n. 4 (N.D.Ga. 1982).

⁸¹ Kikumura v. Osagie, 461 F.3d 1269, 1292, 1296 (10th Cir. 2006) (holding delay must be shown to have caused “substantial harm,” including pain suffered while awaiting treatment; two to three and a half hours delay in treating painful condition stated a claim); Spann v. Roper, 453 F.3d 1007, 1008-09 (8th Cir. 2006) (holding a jury could find a three-hour delay in addressing a medication overdose was objectively sufficiently serious, since immediate attention would have enabled medical staff to act to prevent the medication from becoming completely absorbed); Bozeman v. Orum, 422 F.3d 1265, 1273 (11th Cir. 2005) (noting that the tolerable delay for a prisoner known to be unconscious from asphyxiation is measured in minutes); Smith v. Carpenter, 316 F.3d 178, 186-89 (2d Cir. 2003) (holding brief interruptions of HIV medications, with no discernible adverse effects, did not present serious medical needs; noting that a showing of increased risk, even absent presently detectable symptoms, might be serious enough); Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1188 (11th Cir. 1994) (holding four-hour delay in getting prisoner with blood in his underwear to a hospital was not deliberate indifference); Beyerbach v. Sears, 49 F.3d 1324, 1326 (8th Cir. 1995) (broken hand can be serious, but delay of two or three hours in treating it was not).

⁸² Martin v. DeBruyn, 880 F.Supp. 610, 614 (N.D.Ind. 1995).

⁸³ Johnson v. Bowers, 884 F.2d at 1053, 1056 (8th Cir. 1989); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987), *cert. denied*, 486 U.S. 1066 (1988).

as physical health care.⁸⁴ Serious mental illness has been defined by one court as one “that has caused significant disruption in an inmate’s everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself.”⁸⁵ Immediate psychological trauma may also constitute a serious need.⁸⁶ Transsexualism or gender identity disorder (GID) is now generally recognized as a serious medical need.⁸⁷ Courts have differed over the extent of prison officials’ obligations in such cases, but the most recent decisions have given strong support to the proposition that GID treatment or denial of it must be based on medical considerations and prison officials may be required to provide hormone or surgical treatment if the record supports it.⁸⁸

⁸⁴ Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989); *accord*, Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004); Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1042-43 (11th Cir.) (holding a prison staff member who knew of the decedent’s extensive history of mental illness and suicidal behavior and talk could be held liable for taking him off close observation if she was shown to be aware of his recent self-injurious behavior), *cert. denied*, 519 U.S. 870 (1996). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367-68 (11th Cir. 1999) (holding there was no deliberate indifference in terminating patient’s medication and restraining her absent evidence that the defendant psychiatrist knew the nature of her illness).

⁸⁵ Tillery v. Owens, 719 F.Supp. 1256, 1286 (W.D.Pa. 1989), *aff’d*, 907 F.2d 418 (3d Cir. 1990).

⁸⁶ Carnell v. Grimm, 872 F.Supp. 746, 756 (D.Haw. 1994) (holding that “an officer who has reason to believe someone has been raped and then fails to seek medical *and psychological* treatment after taking her into custody manifests deliberate indifference to a serious medical need”), *appeal dismissed in part, aff’d in part*, 74 F.3d 977 (9th Cir. 1996) (emphasis supplied); *see* Nelson v. Shuffman, 603 F.3d 439, 448-49 (8th Cir. 2010) (assuming emotional trauma from sexual coercion is serious and failure to provide timely treatment could constitute deliberate indifference).

⁸⁷ Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011), *cert. denied*, 132 S.Ct. 1810 (2012); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) and cases cited.

⁸⁸ *See* De’lonta v. Johnson, ___ F.3d ___, 2013 WL 310350, *4-5 (4th Cir. 2013) (holding that complaint that officials refused to evaluate prisoner for gender reassignment surgery despite continuing compulsion to self-mutilate stated a deliberate indifference claim); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011) (striking down categorical statutory ban on hormone and surgical treatment for transgender prisoners), *cert. denied*, 132 S.Ct. 1810 (2012); Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011) (affirming injunction requiring hormone treatment); Praylor v. Texas Dep’t of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (*per curiam*) (holding denial of hormone therapy was not deliberate indifference under the circumstances; noting that system provided hormone therapy in some cases); De’Lonta v. Angelone, 330 F.3d 630, 635 (4th Cir. 2003) (holding prisoner with GID was entitled to treatment for compulsion to self-mutilate); Maggert v. Hanks, 131 F.3d 670, 671-72 (7th Cir. 1997) (stating in dictum that prison officials need not provide hormonal and surgical procedures to “cure” GID); Kosilek v. Spencer, ___ F.Supp.2d ___, 2012 WL 3799660, *9, *53-54 (D.Mass., Sept. 4, 2012) (ordering gender reassignment surgery for prisoner who showed that it was the only acceptable treatment for her condition); Brooks v. Berg, 270 F.Supp.2d 302, 310 (N.D.N.Y. 2003) (holding persons with GID entitled to some form of treatment determined by medical professionals and not by prison administrators; holding a policy to treat transsexualism only for those diagnosed before incarceration “contrary to a decided body of law”), *vacated in part on other grounds*, 289 F.Supp.2d 286 (N.D.N.Y. 2003); Kosilek v. Maloney, 221

Among the deficiencies in prison mental health care that courts have held actionable are the lack of mental health screening on intake,⁸⁹ the failure to follow up inmates with known or suspected mental disorders,⁹⁰ the failure to hospitalize inmates whose conditions cannot adequately be treated in prison,⁹¹ gross departures from professional standards in treatment,⁹² and the failure to separate severely mentally ill inmates from the mentally healthy.⁹³ (Mixing

F.Supp.2d 156 (D.Mass. 2002) (holding an individualized determination by medical professionals is required; a blanket policy denying initiation of hormone therapy in prison is impermissible); Wolfe v. Horn, 130 F.Supp.2d 648, 652-53 (E.D.Pa. 2001) (holding that refusal to continue hormone treatment commenced before incarceration may constitute deliberate indifference).

⁸⁹ *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989); *Balla v. Idaho State Bd. of Correction*, 595 F.Supp. 1558, 1577 (D.Idaho 1984); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1339 (S.D.Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Inmates of Allegheny County Jail v. Pierce*, 487 F.Supp. 638, 642, 644 (W.D.Pa. 1980); *Pugh v. Locke*, 406 F.Supp. 318, 324 (M.D.Ala. 1976), *aff'd in part and modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

⁹⁰ *Clark-Murphy v. Foreback*, 439 F.3d 280, 289-92 (6th Cir. 2006) (holding staff members were not entitled to qualified immunity for failing to get psychiatric assistance for an obviously deranged prisoner); *Terry v. Hill*, 232 F.Supp.2d 934, 943-44 (E.D.Ark. 2002) (holding lengthy delays in transferring mentally ill detainees to mental hospital were unconstitutional); *Arnold on behalf of H.B. v. Lewis*, 803 F.Supp. 246, 257 (D.Ariz. 1992).

⁹¹ *Arnold on behalf of H.B. v. Lewis*, 803 F.Supp. at 257.

⁹² *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (care that “so deviated from professional standards that it amounted to deliberate indifference” would violate the Constitution); *Waldrop v. Evans*, 871 F.2d at 1033 (“grossly incompetent or inadequate care” can constitute deliberate indifference; the prisoner’s medication was discontinued abruptly and without justification); *Greason v. Kemp*, 891 F.2d 829, 835 (11th Cir. 1990) (similar to *Waldrop*; “grossly inadequate psychiatric care” can be deliberate indifference); *Langley v. Coughlin*, 715 F.Supp. 522, 537-41 (S.D.N.Y. 1988) (“consistent and repeated failures . . . over an extended period of time” could establish deliberate indifference).

⁹³ *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560-61 (1st Cir. 1988) (transferring a mentally ill inmate to general population in a crowded jail with no psychiatric facilities constituted deliberate indifference), *cert. denied*, 488 U.S. 823 (1988); *Tillery v. Owens*, 719 F.Supp. 1256, 1303-04 (W.D.Pa. 1989) (Constitution requires separate unit for severely mentally ill, i.e., those who will not take their medication regularly, maintain normal hygienic practices, accept dietary restrictions, or report symptoms of illness), *aff'd*, 907 F.2d 418 (3^d Cir. 1990); *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989) (inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area); *Langley v. Coughlin*, 709 F.Supp. 482, 484-85 (S.D.N.Y.) (placement of mentally ill in punitive segregation resulted in conditions that might violate the Eighth Amendment), *appeal dismissed*, 888 F.2d 252 (2^d Cir. 1989); *Langley v. Coughlin*, 715 F.Supp. at 543-44 (same); *Finney v. Mabry*, 534 F.Supp. 1026, 1036-37 (E.D.Ark. 1982) (separate facility for “most severely mentally disturbed” required); *Inmates of Allegheny County Jail v. Pierce*, 487 F.Supp. at 644; *see also Morales Feliciano v. Hernandez Colon*, 697 F.Supp. 37, 48 (D.P.R. 1988) (mentally ill inmates

mentally ill inmates with those who are not mentally ill may violate the rights of both groups.⁹⁴) Courts have also held that housing mentally ill prisoners under conditions of extreme isolation is unconstitutional.⁹⁵ One recurring scenario is the seemingly baseless discontinuation of psychiatric medications, sometimes with disastrous results.⁹⁶

Many prison mental health care cases focus on the lack of adequate and qualified staff.⁹⁷

barred from a jail). *Contra*, Delgado v. Cady, 576 F.Supp. 1446, 1456 (E.D.Wis. 1983) (housing of psychotics in segregation unit upheld).

⁹⁴ DeMallory v. Cullen, 855 F.2d 442, 444-45 (7th Cir. 1988) (allegation that mentally ill inmates were knowingly housed with non-mentally ill in a high-security unit and that they caused filthy and dangerous conditions stated an Eighth Amendment claim against prison officials); Nolley v. County of Erie, 776 F.Supp. 715, 738-40 (W.D.N.Y. 1991); Tillery v. Owens, 719 F.Supp. at 1303 (citing increased tension for psychologically normal inmates and danger of retaliation against mentally ill); Langley v. Coughlin, 709 F.Supp. at 484-85; Langley v. Coughlin, 715 F.Supp. at 543-44; see Hassine v. Jeffes, 846 F.2d 169, 178 n. 5 (3d Cir. 1988) (prisoners could seek relief from the consequences of other inmates' failure to receive adequate mental health services).

⁹⁵ Jones'El v. Berge, 164 F.Supp.2d 1096, 1116-25 (W.D.Wis. 2001) (granting preliminary injunction requiring removal of seriously mentally ill from "supermax" prison); Madrid v. Gomez, Madrid v. Gomez, 889 F.Supp. 1146, 1265 (N.D.Cal. 1995) (holding retention of mentally ill prisoners in Pelican Bay isolation unit unconstitutional), *But see* Scarver v. Litscher, 434 F.3d 972, 976-77 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a psychotic prisoner under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent). *Cf.* Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 665 (7th Cir. 2012) (holding that leaving a prisoner with mental health problems in filthy conditions could violate the Eighth Amendment even if he created them himself).

⁹⁶ *See* Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) (prisoner killed himself); Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989) (prisoner blinded and castrated himself). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367-68 (11th Cir. 1999) (holding discontinuation of medication by doctor who did not know the prisoner's diagnosis, having not obtained her medical records but having read a summary, was not deliberately indifferent). *Cf.* Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999) (holding Eighth Amendment requires prison officials to provide mentally ill prisoners with a supply of medication upon release).

⁹⁷ Greason v. Kemp, 891 F.2d at 837-40 (prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a "clearly inadequate" mental health staff); Waldrop v. Evans, 871 F.2d at 1036 (physician's failure to refer a suicidal prisoner to a psychiatrist could constitute deliberate indifference); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988) (deliberate indifference was established where mental health staff could only spend "minutes per month" with disturbed inmates), *vacated*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); Tillery v. Owens, 719 F.Supp. at 1302-03 ("gross staffing deficiencies" and lack of mental health training of nurses supported finding of deliberate indifference); Inmates of Occoquan v. Barry, 717 F.Supp. at 868 ("woefully short" mental health staff supported a finding of unconstitutionality); Langley v. Coughlin, 715 F.Supp. at 540 (use of untrained or unqualified personnel with inadequate supervision by psychiatrist

Several courts have concluded that the lack of an on-site psychiatrist in a large prison is unconstitutional.⁹⁸ The failure to train correctional staff to deal with mentally ill prisoners can also constitute deliberate indifference.⁹⁹ A recent decision holds that the use of chemical agents against prisoners with mental illness engaged in disruptive behavior as a result of their illness violates the Eighth Amendment.¹⁰⁰

Prisoners have a limited substantive right to refuse psychotropic medication and a procedural right to notice and a hearing before they are involuntarily medicated.¹⁰¹ They are entitled by due process to notice and a hearing before involuntary commitment to a psychiatric hospital.¹⁰² State law may provide greater rights than the federal Constitution.

Sex offenders may be required to participate in programs of treatment for their disorders, even if part of the program requires them to admit guilt of offenses for which they have not been prosecuted and does not grant them immunity, as long as the consequences of non-participation are not so serious as to “compel” self-incrimination.¹⁰³ Denial of prison privileges has so far been held not to meet that threshold,¹⁰⁴ and decisions are in conflict over whether the loss of

supported constitutional claims); *Inmates of Allegheny County Jail v. Pierce*, 487 F.Supp. at 640-45; *Ruiz v. Estelle*, 503 F.Supp. 1265, 1339 (S.D.Tex. 1980), *aff’d in part and rev’d in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

⁹⁸ *Langley v. Coughlin*, 709 F.Supp. at 483-85; *Kendrick v. Bland*, 541 F.Supp. 21, 25-26 (W.D.Ky. 1981); *see also Sharpe v. City of Lewisburg, Tenn.*, 677 F.Supp. 1362, 1367-68 (M.D.Tenn. 1988) (failure to train police to deal with mentally disturbed individual supported damage award).

⁹⁹ *Langley v. Coughlin*, 709 F.Supp. at 483-85; *Kendrick v. Bland*, 541 F.Supp. 21, 25-26 (W.D.Ky. 1981); *see also Sharpe v. City of Lewisburg, Tenn.*, 677 F.Supp. 1362, 1367-68 (M.D.Tenn. 1988) (holding that failure to train police to deal with mentally disturbed individuals supported a damage award).

¹⁰⁰ *Thomas v. McNeil*, 2009 WL 64616, *25-27 (M.D.Fla., Jan. 9, 2009), *judgment entered*, 2009 WL 605306 (M.D.Fla., Mar. 9, 2009), *aff’d*, 614 F.3d 1288, 1307-17 (11th Cir. 2010).

¹⁰¹ *Washington v. Harper*, 494 U.S. 210 (1990); *see Green v. Dormire*, 691 F.3d 917 (8th Cir. 2012) (holding medication may be forced on a “gravely disabled” prisoner without a showing of dangerousness). Government may also medicate criminal defendants to render them competent to stand trial, but only for serious charges and on a showing that the treatment will be medically appropriate, is unlikely to have side effects undermining a fair trial, and is necessary “significantly to further important governmental trial-related interests.” *Sell v. U.S.*, 539 U.S. 166, 179 (2003).

¹⁰² *Vitek v. Jones*, 445 U.S. 480 (1980).

¹⁰³ *McKune v. Lile*, 536 U.S. 24, 35-36 (2002).

¹⁰⁴ *McKune*, 536 U.S. at 36 (“The consequences in question here—a transfer to another prison where television sets are not placed in each inmate’s cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited—are not ones that compel a prisoner to

good time constitutes compulsion.¹⁰⁵ Persons not actually convicted of sex offenses may nonetheless be found to be sex offenders based on other evidence, though due process protections must be provided.¹⁰⁶

5. Dental care

Dental care is also governed by the deliberate indifference/serious needs analysis.¹⁰⁷ The

speaking about his past crimes despite a desire to remain silent.”) The *McKune* plurality equated the threshold with the *Sandin v. Conner* “atypical and significant” test, *id.* at 37, but Justice O’Connor rejected that test while agreeing that the particular deprivations were not sufficiently serious to constitute compulsion. *Id.* at 52. See *Renchenski v. Williams*, 622 F.3d 315, 334-36 (3d Cir. 2010) (holding loss of prison employment and sanctions similar to disciplinary sanctions were not coercion), *cert. denied*, 131 S.Ct. 2100 (2011); *Wirsching v. Colorado*, 360 F.3d 1191, 1203-04 (10th Cir. 2004) (holding total denial of visiting with his children and denial of opportunity to earn good time at the usual rate was not coercion).

¹⁰⁵ In *Donhauser v. Goord*, 314 F.Supp.2d 119 (N.D.N.Y.), *preliminary injunction granted*, 314 F.Supp.2d 139 (N.D.N.Y.), *amended*, 317 F.Supp.2d 160 (N.D.N.Y. 2004), *vacated and remanded on other grounds*, 181 Fed.Appx. 11 (2d Cir. 2006), the court held that a practice of depriving prisoners of good time for refusing to participate in such a program violated the privilege against self-incrimination. *Contra*, *Gwinn v. Awmiller*, 354 F.3d 1211, 1225-26 (9th Cir.) (holding that withholding of good time is not sufficient to constitute compulsion), *cert. denied*, 543 U.S. 860 (2004); see *Entzi v. Redmann*, 485 F.3d 998, 1004 (8th Cir. 2007) (holding loss of opportunity to earn good time is not compulsion), *cert. denied*, 552 U.S. 1285 (2008). *Cf.* *Newman v. Beard*, 617 F.3d 775, 783-84 (3d Cir. 2010) (holding denial of parole to convicted sex offenders who did not admit guilt did not deny substantive or procedural due process), *cert. denied*, 131 S.Ct. 2126 (2011).

In *Hydrick v. Hunter*, 500 F.3d 978, 991-92 (9th Cir. 2007), *vacated on other grounds*, 129 S.Ct. 2431 (2009), the court stated in dictum that a requirement that civilly committed sex offenders acknowledge their illnesses on pain of never being released might violate the *First* Amendment by compelling speech. *Contra*, *Newman v. Beard*, 617 F.3d 775, 780-81 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 2126 (2011).

¹⁰⁶ *Renchenski v. Williams*, 622 F.3d 315, 326-28 (3d Cir. 2010) (holding stigmatization and intrusive mandatory psychotherapy following classification as a sex offender denies a constitutionally based liberty interest; deriving process due from Supreme Court decision in *Vitek v. Jones*), *cert. denied*, 131 S.Ct. 2100 (2011); *Gwinn v. Awmiller*, 354 F.3d at 1219-20 (upholding classification based on a statement in the plaintiff’s pre-sentence report by the victim; holding that the “process due” is the same as for prison disciplinary proceedings); see *Brown v. Montoya*, 662 F.3d 1152, 1168-69 (10th Cir. 2011) (holding probationer required to register as a sex offender based on crime that was not a sex offense stated a procedural and substantive due process claim).

¹⁰⁷ *Flanory v. Bonn*, 604 F.3d 249, 255 (6th Cir. 2010) (holding allegation of deprivation of toothpaste for 337 days, resulting in gum disease and loss of a tooth, stated an Eighth Amendment claim); *McGowan v. Hulick*, 612 F.3d 636, 640-41 (7th Cir. 2010) (holding delays of weeks and months in seeing dentist and then oral surgeon for serious and painful condition supported an Eighth Amendment claim); *Board v. Farnham*, 394 F.3d 469, 481-82 (7th Cir. 2005) (holding that breaking off teeth rather than extracting them, and denial of toothpaste for protracted periods, supported an Eighth Amendment claim); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding six weeks’ delay in seeing a

Second Circuit has held that “[a] cognizable claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, . . . the deterioration of the teeth due to a lack of treatment, . . . or the inability to engage in normal activities.”¹⁰⁸ Limiting care to pulling teeth that could be saved is unconstitutional.¹⁰⁹

D. Recurring issues in use of force cases

1. Intent requirement

As noted above, convicted prisoners must show that force was used against them with malicious and sadistic intent.¹¹⁰ The Second Circuit has held that the same standard governs pre-trial detainees’ use of force claims, even though these are asserted under the Due Process Clause.¹¹¹ Cases holding that “spontaneous, isolated” or “unprovoked” attacks are not “punishment” are no longer good law.¹¹² Malice is seldom shown by direct evidence but may be

dentist, resulting in infection and loss of teeth, raised an Eighth Amendment claim); *Farrow v. West*, 320 F.3d 1235, 1244-47 (11th Cir. 2003) (holding prisoner with only two lower teeth who suffered pain, continual bleeding and swollen gums, remaining teeth damaging gums, and weight loss had a serious medical need, and delay of 15 months and hiatuses of eight and three months by dentist with knowledge of his condition raised a factual issue concerning deliberate indifference); *Harrison v. Barkley*, 219 F.3d 132, 137-39 (2d Cir. 2000) (holding refusal to fill a cavity violated the Eighth Amendment).

¹⁰⁸ *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998)

¹⁰⁹ *Dean v. Coughlin*, 623 F.Supp. 392, 405 (S.D.N.Y. 1985); *see Chance v. Armstrong*, 143 F.3d at 703-04 (holding allegation that dentists proposed extraction rather than saving teeth for financial reasons stated an Eighth Amendment claim).

¹¹⁰ *See* § I.A.2, above.

The Second Circuit has said that “*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. . . . The Court’s use of the terms ‘maliciously and sadistically’ is, therefore, only a characterization of all ‘bad faith’ uses of force and not a limit on liability for uses of force that are otherwise in bad faith.” *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999). I have no idea what this means, and the court has not elaborated.

¹¹¹ *See U.S. v. Walsh*, 194 F.3d 37, 47-48 (2d Cir. 1999); *accord, Fennell v. Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009) (per curiam); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993).

One circuit has held that detainees’ use of force claims are governed by the Fourth Amendment standard of objective reasonableness applied to uses of force during arrest. *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003).

¹¹² *U.S. v. Walsh*, 194 F.3d at 48 (dictum); *Pelfrey v. Chambers*, 43 F.3d 1034, 1036-37 (6th Cir.), *cert. denied*, 515 U.S. 1116 (1995).

inferred from circumstances and officers' actions.¹¹³ Thus, the Second Circuit has approved charging a jury that the presence of malice should be determined based on "factors including: 1, the extent of the plaintiff's injuries; 2, the need for the application of force; 3, the correlation between the need and the amount of force used and the threat reasonably perceived by the defendants; 4, any efforts made by the defendants to temper the severity of a forceful response."¹¹⁴

Arrestees' use of force claims are governed by the Fourth Amendment, and the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."¹¹⁵ The Eleventh Circuit has held that such claims require a showing of more than *de minimis* force, at least in cases where there was probable cause for the arrest.¹¹⁶ Courts have differed over when a

¹¹³ *Cole v. Fischer*, 379 Fed.Appx. 40, 42 (2d Cir. 2010) (holding malice could be inferred from allegations that officer "simultaneously made racially and religiously derogatory remarks" and incident followed plaintiff's refusing "an offer of a corrupt deal") (unpublished); *Skrnich v. Thornton*, 280 F.3d 1295, 1301-02 (11th Cir. 2002) (holding that courts should consider the need for force, the relation between the need and the force used, the threat reasonably perceived, and efforts to temper the severity of response) (citing *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992)); *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000) (holding Eighth Amendment claim requires facts "from which it could be inferred that prison officials subjected [plaintiff] to excessive force"); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993); *Miller v. Leathers*, 913 F.2d 1085, 1088 (4th Cir. 1990) (en banc) (circumstances suggesting retaliatory intent by officer could support malice finding), *cert. denied*, 498 U.S. 1109 (1991); *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990) (testimony that a beating was completely gratuitous and that no force at all was necessary would support a finding of malice); *Lewis v. Downs*, 774 F.2d 711, 714 (6th Cir. 1985) (evidence that an officer kicked a handcuffed person who was lying on the ground showed malicious motivation); *Orwat v. Maloney*, 360 F.Supp.2d 146, 154 (D.Mass. 2005) (holding malicious intent may be inferred from the extent of injury inflicted, here a broken jaw requiring three and a half weeks in the infirmary).

¹¹⁴ *Baskerville v. Mulvaney*, 411 F.3d 45, 47-48 (2d Cir. 2005).

¹¹⁵ *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010) (Fourth Amendment use of force analysis guided by "(1) the nature and severity of the crime leading to the arrest, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight"); *Parker v. Gerrish*, 547 F.3d 1, 11 (1st Cir. 2008) (Fourth Amendment analysis of tasing incident). *But see Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir.) (holding plaintiff must show "(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable"; choking during a search is not actionable, but choking motivated by malice is), *clarified*, 186 F.3d 633 (5th Cir. 1999).

¹¹⁶ *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000) (holding an allegation that an officer grabbed the plaintiff, threw him against a van several feet away, kned him in the back and pushed his head into the side of the van, searched his groin in an uncomfortable manner, resulting in bruises to forehead, chest, and wrists, amounts only to *de minimis* force).

person ceases to be an arrestee and starts to be a detainee; the Second Circuit has drawn the line at the judicial probable cause determination,¹¹⁷ while others apply the due process standard at earlier points.¹¹⁸

2. Amount of force and justification

Any amount of force more than *de minimis* is unconstitutional if done maliciously and sadistically,¹¹⁹ including under some circumstances the proverbial push or shove.¹²⁰ Conversely,

¹¹⁷ See *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) (dictum) (applying Fourth Amendment to conduct occurring before probable cause determination); *accord*, *Aldini v. Johnson*, 609 F.3d 858, 866-67 (6th Cir. 2010) (citing Supreme Court dicta re commencement of pre-trial detention, noting lack of authority to draw the line at any other point); *Pierce v. Multnomah County, Or.*, 76 F.3d 1032, 1042-43 (9th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996); *Frohman v. Wayne*, 958 F.2d 1024, 1026-27 (10th Cir. 1992).

¹¹⁸ See *Forrest v. Prine*, 620 F.3d 739, 743 (7th Cir. 2010) (assessing use of force against arrestee in jail holding cell, apparently before arraignment, under due process standards); *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008) (due process governed force used while transporting arrestee in patrol car); *United States v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990) (assault in “booking room” treated as a due process case); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990) (arrestee’s presence in jail and completion of booking invoked due process standard); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (excessive force in questioning an arrestee is governed by due process), *cert. denied*, 493 U.S. 1026 (1990).

¹¹⁹ *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); see *Pelfrey v. Chambers*, 43 F.3d 1034, 1037 (6th Cir.) (allegation that officers forcibly cut off the plaintiff’s hair with a knife stated an Eighth Amendment claim; actions seemed “designed to frighten and degrade”), *cert. denied*, 515 U.S. 1116 (1995); *Felix v. McCarthy*, 939 F.2d 699, 701-02 (9th Cir. 1991) (throwing a prisoner across a hallway into a wall without reason violated the Eighth Amendment), *cert. denied*, 502 U.S. 1093 (1992); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (completely unjustified spraying with fire hose violated Eighth Amendment); *Jones v. Huff*, 789 F.Supp. 526, 536 (N.D.N.Y. 1992) (“unwarranted and cavalier” kicks in the buttocks violated the Eighth Amendment).

¹²⁰ *Abreu v. Nicholls*, 368 Fed.Appx. 191, 194 (2d Cir. 2010) (unpublished) (pushing a prisoner’s head halfway back with a rubber hammer, where circumstances indicated force was intended to humiliate, was not *de minimis* and supported an Eighth Amendment claim); H.C. by *Hewett v. Jarrard*, 786 F.2d 1080, 1085-86 (11th Cir. 1986) (a guard who pushed a juvenile inmate who was giggling and protesting the treatment of another inmate violated the Eighth Amendment); *Arroyo Lopez v. Nuttall*, 25 F.Supp.2d 407 (S.D.N.Y. 1998) (awarding damages against an officer who shoved a prisoner without justification while he was praying); *Winder v. Leak*, 790 F.Supp. 1403, 1407 (N.D.Ill. 1992) (pushing a disabled inmate and causing him to fall violated the Eighth Amendment).

The Supreme Court has suggested that *de minimis* force may violate the Constitution if it is “of a sort repugnant to the conscience of mankind.” *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (internal quotation marks omitted). Exactly what that means is not clear. *Cf. Baskerville v. Mulvaney*, 411 F.3d 45, 48 (2d Cir. 2005) (holding that jury need not be charged concerning actionability of repugnant *de minimis* force where the force alleged was greater than *de minimis*).

serious threats to security or safety may justify injurious or even deadly force.¹²¹ But even when some force is justified, anything doesn't go.¹²² Beating a prisoner who may have been disruptive or violent but who has already been subdued is the classic case of excessive force.¹²³ Physical abuse may not be used to extract information, either in criminal investigation or for jail security purposes.¹²⁴

Injury is “relevant to the Eighth Amendment inquiry but does not end it.”¹²⁵ Minor

¹²¹ *Whitley v. Albers*, 475 U.S. 312, 322-26 (1986); *Kinney v. Indiana Youth Center*, 950 F.2d 462, 465-66 (7th Cir. 1991), *cert. denied*, 504 U.S. 959 (1992); *Henry v. Perry*, 866 F.2d 657, 659 (3d Cir. 1989); *Brown v. Smith*, 813 F.2d 1187, 1188-89 (11th Cir.) (officer was justified in pinning a handcuffed inmate's neck against a wall with a baton where he refused to go back into his cell), *rehearing denied*, 818 F.2d 871 (11th Cir. 1987).

¹²² *Furnace v. Sullivan*, ___ F.3d ___, 2013 WL 174382, *6 (9th Cir. 2013) (noting that use of large quantity of tear gas “seems quite extensive and disproportionate relative to the disturbance posed by Furnace's fingertips on the food port”); *Giles v. Kearney*, 571 F.3d 318, 327 (3d Cir. 2009) (prisoner's resistance and striking an officer “do not provide a blank check justification” for excessive force later; blow that caused a broken rib and collapsed lung would violate Eighth Amendment if done after prisoner was subdued); *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008) (taserung a verbally abusive arrestee who was handcuffed and hobbled in a patrol car supported claim of due process denial); *Miller v. Leathers*, 913 F.2d 1085, 1089 (4th Cir. 1990) (en banc) (verbal provocations would not justify breaking a prisoner's arm with a baton), *cert. denied*, 498 U.S. 1109 (1991); *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990) (verbal provocation does not excuse a physical assault by a law enforcement officer); *Corselli v. Coughlin*, 842 F.2d 23, 26-27 (2d Cir. 1988) (jury could find for prisoner even if he had refused an order).

¹²³ *Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010) (point-blank tear-gassing of unresisting handcuffed prisoner could violate Fourth Amendment even if prior use of force was justified); *Skrtich v. Thornton*, 280 F.3d 1295, 1302 (11th Cir. 2002) (“It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct.”); *Bogan v. Stroud*, 958 F.2d 180, 185 (7th Cir. 1992); *Miller v. Glanz*, 948 F.2d 1562, 1564, 1567 (10th Cir. 1991); *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991) (Constitution may be violated “if prison officials continue to use force after the necessity for the coercive action has ceased”); *Ruble v. King*, 911 F.Supp. 1544, 1557 (N.D.Ga. 1995); *see Parker v. Gerrish*, 547 F.3d 1, 11 (1st Cir. 2008) (Fourth Amendment case).

¹²⁴ *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000) (holding Eighth Amendment claim requires facts “from which it could be inferred that prison officials subjected [plaintiff] to excessive force”); *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991); *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir. 1983); *Cohen v. Coahoma County, Miss.*, 805 F.Supp. 398, 403-04 (N.D.Miss. 1992). *But see Joos v. Ratliff*, 97 F.3d 1125, 1126-27 (8th Cir. 1996) (affirming dismissal of claim for forcible fingerprinting of arrestee); *Sanders v. Coman*, 864 F.Supp. 496, 500 (E.D.N.C. 1994) (use of force to obtain blood samples does not violate the Eighth Amendment).

¹²⁵ *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *accord, Wilkins v. Gaddy*, 559 U.S. 34, 130 S. Ct. 1175, 1178-79 (2010) (per curiam); *Wright v. Goord*, 554 F.3d 255, 269 (2d Cir. 2009); *Gomez v. Chandler*, 163 F.3d 921, 924 and n. 4 (5th Cir. 1999) (noting that non-*de minimis* standard may require only “minor” injury, leaving open possibility that *de minimis* injury might be actionable if force is

injuries are actionable where force is gratuitous or clearly excessive.¹²⁶ Courts have held that force without injury is actionable in extreme circumstances such as credible threat of death or injury or other egregious conduct.¹²⁷ Courts may not grant summary judgment based on prison medical records that minimize injury to prisoners where there are sworn allegations or other evidence of more serious injury.¹²⁸

3. Bystander, supervisory, and entity liability

When multiple defendants are involved in a use of force, courts “reject the argument that the force administered by each defendant in this collective beating must be analyzed separately to determine which of the defendants’ blows, if any, used excessive force.”¹²⁹ Officers who are present and fail to take reasonable steps to prevent excessive force may be held liable.¹³⁰ The

“repugnant to the conscience of mankind”; cuts, scrapes, contusions actionable); *see Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996) (“Although an inmate asserting an excessive force claim is thus required to meet [a] *more* demanding standard with regard to the subjective component of Eighth Amendment analysis, the objective component of an excessive force claim is *less* demanding than that necessary for conditions-of-confinement or inadequate medical care claims.”)

¹²⁶ *Wilkins v. Gaddy*, 559 U.S. 34, 130 S.Ct. 1175, 1179 (2010) (per curiam) (holding prisoner who alleged he suffered a bruised heel, lower back pain, increased blood pressure, migraine headaches, dizziness and psychological trauma when he was “punched, kicked, kneed, choked, and body slammed ‘maliciously and sadistically’ and ‘[w]ithout any provocation,’” stated an Eighth Amendment claim); *Williams v. Curtin*, 631 F.3d 380, 384 (6th Cir. 2011) (violent cell extraction with use of chemical agent causing coughing and shortage of oxygen could be actionable if shown to be unnecessary); *Brown v. Lippard*, 472 F.3d 384, 386-87 (5th Cir. 2006) (abrasions, knee pain, tenderness around thumb were more than *de minimis*); *Harris v. Chapman*, 97 F.3d 499, 505-06 (11th Cir. 1996) (where officer snapped the plaintiff’s head back in a towel, kicked him, and subjected him to racial abuse, more than *de minimis* injury was shown); *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989); *Smith v. Marcellus*, 917 F.Supp. 168, 173-74 (W.D.N.Y. 1995); *see Cole v. Fischer*, 368 Fed.Appx. 191, 194 (2d Cir. 2010) (unpublished) (holding allegation of a blow in the face, without reference to injury, should be liberally construed to state an “appreciable injury”).

¹²⁷ *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992); *Davis v. Locke*, 936 F.2d 1208, 1212 (11th Cir. 1991) (dropping a shackled inmate so he hit his head violated the Fourteenth Amendment); *Jackson v. Crews*, 873 F.2d 1105, 1108 (8th Cir. 1989); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990); *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); *Jones v. Huff*, 789 F.Supp. 526, 536 (N.D.N.Y. 1992) (ripping a prisoner’s clothes off was unconstitutional because “done maliciously with the intent to humiliate him”).

¹²⁸ *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir. 2003).

¹²⁹ *Skrnich v. Thornton*, 280 F.3d 1295, 1302 (11th Cir. 2002).

¹³⁰ *Skrnich v. Thornton*, *id.*

deliberate indifference standard is applicable to defendants who do not directly use force.¹³¹ The persistent failure to control and discipline officers who misuse force has been held to support a finding of deliberate indifference by supervisors or municipality,¹³² though this proposition may be questioned in light of recent Supreme Court authority concerning supervisory liability.¹³³

4. Sexual abuse

“[S]evere or repetitive sexual abuse” of prisoners can be serious enough to violate the Eighth Amendment, and can demonstrate a sufficiently culpable state of mind as well.¹³⁴ A district court decision holds that contemporary standards of decency have evolved in the years since the Second Circuit’s leading case such that now “any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment.”¹³⁵ Claims of supervisory or

¹³¹ See § I.A.2, above.

¹³² *Iqbal v. Hasty*, 490 F.3d 143, 170 (2d Cir. 2007) (allegation that warden knew of practice of beating administrative segregation prisoners and did not act to stop it despite his knowledge of his subordinates’ propensities stated a supervisory liability claim), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 566 U.S. 662 (2009); *Valdes v. Crosby*, 450 F.3d 1231, 1237-44 (11th Cir. 2006) (warden could be held liable for prisoner’s beating death based on evidence he was on notice of a pattern of excessive force and did not act to curb it), *cert. dismissed*, 549 U.S. 1249 (2007); *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996) (process “structured to curtail disciplinary action and stifle investigations” could support municipal liability), *cert. denied*, 519 U.S. 1151 (1997); *Vann v. City of New York*, 72 F.3d 1040, 1051 (2d Cir. 1995) (inadequate monitoring of identified “problem” officers could support liability); *Madrid v. Gomez*, 889 F.Supp. 1146, 1249 (N.D.Cal. 1995) (prison officials liable for “abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist.”).

¹³³ See *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011) (holding that Sheriff could be held liable for injuries inflicted by subordinates based on allegations of knowledge and acquiescence amounting to deliberate indifference), *rehearing en banc denied*, 659 F.3d 850 (9th Cir. 2011) (8 judges dissenting from denial of rehearing), *cert. denied*, 132 S.Ct. 2101 (2012).

¹³⁴ *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997); see *Wood v. Beauclair*, 692 F.3d 1041, 1049-50 (9th Cir. 2012) (holding sexual conduct by staff with prisoners serves no penological purpose and therefore is presumed malicious and sadistic, and is actionable under the Eighth Amendment without evidence of injury); *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (“Sexual offenses forcible or not are unlikely to cause so little harm as to be adjudged *de minimis*, that is, too trivial to justify the provision of a legal remedy. They tend rather to cause significant distress and often lasting psychological harm.”); *Smith v. Cochran*, 339 F.3d 1205, 1212-13 (10th Cir. 2003) (holding that sexual abuse or rape by staff is “malicious and sadistic” by definition); *Tafoya v. Salazar*, 516 F.3d 912 (10th Cir. 2008) (holding sheriff could be found deliberately indifferent to risk of sexual assault by staff because of deficiencies in supervision and training and failure to enforce protective policies); *Riley v. Olk-Long*, 282 F.3d 592 (8th Cir. 2002) (affirming damage award against supervisors found deliberately indifferent); *Mathie v. Fries*, 121 F.3d 808, 811-12 (2d Cir. 1997) (affirming trial court’s finding of Eighth Amendment violation).

¹³⁵ *Rodriguez v. McClenning*, 399 F.Supp.2d 228, 237038 (S.D.N.Y. 2005) (relying on trend

municipal liability for sexual abuse, as with use of force claims, are governed by the deliberate indifference standard.¹³⁶

E. Other conditions of confinement issues

1. Shelter

A prisoner must be provided with “shelter which does not cause his degeneration or threaten his mental and physical well being.”¹³⁷

2. Crowding

The constitutionality of crowding is determined by circumstances and consequences.¹³⁸ The less out-of-cell activity prisoners are permitted, the more likely it is that crowding will be found unconstitutional.¹³⁹ Crowding that is linked with violence or other safety hazards,

toward statutory prohibition of sexual contact between prison employees and prisoners).

¹³⁶ *Cash v. County of Erie*, 654 F.3d 324, 334-39 (2d Cir. 2011) (reinstating jury verdict for prisoner; holding evidence of prior incidents of staff sexual contact with prisoners, despite state criminal law prohibition and “no-contact” policy, provided notice that additional protective measures were necessary), *cert. denied*, 132 S.Ct. 1741 (2012); *accord*, *Keith v. Koerner*, ___ F.3d ___, 2013 WL 500703, *2-3 (10th Cir. 2013) (holding allegation that warden “knew about multiple instances of sexual misconduct at TCF over a period of years, inconsistently disciplined corrections officers who engaged in prohibited sexual conduct with inmates and thus purportedly tolerated at least an informal policy which permitted sexual contact between prison staff and inmates,” as well as “policy decisions—particularly decisions not to address known problems with the vocational training program and the insufficient use of cameras to monitor inmates and staff,” sufficiently alleged liability for sexual abuse by vocational trainer).

¹³⁷ *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *see Johnson v. Lewis*, 217 F.3d 726, 732-33 (9th Cir. 2000) (holding prisoners held in prison yard for days in heat and rain provided evidence of a substantial deprivation of shelter), *cert. denied*, 532 U.S. 1065 (2001); *Carty v. Farrelly*, 957 F.Supp. 727, 736 (D.V.I. 1997) (“In particular, the state of disrepair of the facilities (including plumbing, heating, ventilation, and showers) and the effect that substandard conditions have on the inmates’ sanitation and health informs whether the prison provides an inhabitable shelter for Eighth Amendment purposes.”)

¹³⁸ *Rhodes v. Chapman*, 452 U.S. 337 (1981) (holding double celling did not violate the Eighth Amendment in a modern facility in good condition with adequate safety, shelter, and programs); *see Bell v. Wolfish*, 441 U.S. 520, 542 (1979) (holding similarly to *Rhodes* in pre-trial detainee facility).

¹³⁹ *See Brown v. Plata*, ___ U.S. ___, 131 S.Ct. 1910, 1932-34 (2011) (describing relationship of crowding to constitutionally deficient medical and mental health care); *Hubbard v. Taylor*, 538 F.3d 229, 233-34 (3d Cir. 2008) (upholding extreme crowding in cells where prisoners had access to large dayrooms 14 hours a day); *Hall v. Dalton*, 34 F.3d 648, 650 (8th Cir. 1994); *Moore v. Morgan*, 922 F.2d 1553, 1555 n.1 (11th Cir. 1991); *French v. Owens*, 777 F.2d 1250, 1252-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986).

breakdowns in security classification, food services, or medical care, or deteriorated physical plant, is also more likely to be found unconstitutional¹⁴⁰—though courts may try to remedy the consequences without remedying the crowding.¹⁴¹ (Indeed, the Prison Litigation Reform Act requires courts to take that approach.¹⁴²) Crowding that results in prisoners’ sleeping on floors, in corridors, or other non-housing areas has been found unconstitutional,¹⁴³ though the cases are far from unanimous and outcomes depend on the overall circumstances.¹⁴⁴

3. Food

Prison food must be nutritionally adequate¹⁴⁵ and “prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it.”¹⁴⁶ Contamination of drinking water may be unconstitutional,¹⁴⁷ as may deprivation

¹⁴⁰ *Tillery v. Owens*, 907 F.2d 418, 427 (3d Cir. 1990); *French v. Owens*, *id.* See *Benjamin v. Fraser*, 343 F.3d 35, 53 (2d Cir. 2003) (reversing order requiring spacing of beds to limit spread of communicable diseases absent a showing of actual or imminent harm).

¹⁴¹ See, e.g., *Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), *injunction entered*, 718 F.Supp. 1111 (S.D.N.Y. 1990), *aff’d*, 902 F.2d 2 (S.D.N.Y. 1990). In *Fisher*, the court found that crowding contributed to unconstitutional levels of violence, but did not initially grant crowding relief based on defendants’ representations that they could cure the problem without it. They didn’t, and a population cap was imposed by subsequent unreported order.

¹⁴² See 18 U.S.C. § 3626(a)(3) (restricting “prisoner release orders”). *But see Brown v. Plata*, ___ U.S. ___, 131 S.Ct. 1910 (2011) (affirming order to reduce prison population because of inability to provide adequate medical and mental health care at existing levels).

¹⁴³ *Moore v. Morgan*, 922 F.2d 1553, 1559 n. 1 (11th Cir. 1991); *Mitchell v. Cuomo*, 748 F.2d 804, 807 (2d Cir. 1984) (infirmaries, program rooms, storage areas, etc.); *LaReau v. Manson*, 651 F.2d 96, 105-08 (2d Cir. 1981) (“fishtank” dayroom, medical isolation cells); *Benjamin v. Sielaff*, 752 F.Supp. 140 (S.D.N.Y. 1990) (floors of intake pens); *Albro v. County of Onondaga, N.Y.*, 627 F.Supp. 1280, 1287 (N.D.N.Y. 1986) (corridors).

¹⁴⁴ Compare *Moore v. Morgan*, *id.*, with *Hubbard v. Taylor*, 538 F.3d 229, 233-34 (3d Cir. 2008) (upholding triple-celling with extensive use of floor mattresses); *Brown v. Crawford*, 906 F.2d 667, 672 (11th Cir. 1990) (holding sleeping on a mattress on the floor was not unconstitutional unless imposed “arbitrarily”).

¹⁴⁵ *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002). In *Graves v. Arpaio*, 623 F.3d 1043, 1050-51 (9th Cir. 2010) (affirming judgment requiring conformity with Department of Agriculture recommendations for males aged 19-30 with moderately active lifestyles, based on amount of recreation time allegedly provided and evidence of deficiencies in jail food service).

¹⁴⁶ *Ramos v. Lamm*, 639 F.2d 559, 570-71 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); see *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012) (allegation that jail’s “nutriloaf” was unhealthful as well as unpalatable and caused vomiting and other health consequences stated an Eighth Amendment claim); *Green v. Atkinson*, 623 F.3d 278, 281 (5th Cir. 2010) (“A single incident of food poisoning or finding a foreign object in food does not constitute a violation of the constitutional rights of the prisoner

of drinking water even for relatively short periods of time.¹⁴⁸

4. Clothing

Prisoners are entitled to clothing that is “at least minimally adequate for the conditions under which they are confined.”¹⁴⁹ They must be provided clean clothing or a reasonable opportunity to clean it themselves.¹⁵⁰ The extent to which prisoners can be deprived of clothing as a behavior control mechanism is unsettled.¹⁵¹

5. Safety

The Eighth Amendment requires prison officials to provide “reasonable safety” for prisoners.¹⁵² That principle encompasses protection from assault by other prisoners occasioned

affected. Evidence of frequent or regular injurious incidents of foreign objects in food, on the other hand, raises what otherwise might be merely isolated negligent behavior to the level of a constitutional violation.” (footnotes omitted); *Benjamin v. Fraser*, 343 F.3d 35, 56-57 (2d Cir. 2003) (vacating finding of no constitutional violation where some jails’ food service had “serious sanitary problems”).

¹⁴⁷ *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989).

¹⁴⁸ *Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011) (12-hour deprivation of water by reason of needless restraint contributed to Eighth Amendment violation) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)).

¹⁴⁹ *Knop v. Johnson*, 667 F.Supp. 467, 475-77 (W.D.Mich. 1987) (requiring heavy jackets, hats, gloves or mittens, and boots or heavy socks for Michigan winters), *aff’d in pertinent part*, 977 F.2d 966, 1012 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993); *accord*, *Davidson v. Coughlin*, 920 F.Supp. 305 (N.D.N.Y. 1996). *But see* *Mays v. Springborn*, 575 F.3d 643, 648-49 (7th Cir. 2009) (rejecting claim of inadequate winter clothing as no more than “the usual discomforts of winter”).

¹⁵⁰ *Divers v. Dep’t of Corrections*, 921 F.2d 191, 194 (8th Cir. 1990).

¹⁵¹ *See* *Gruenberg v. Gempeler*, 697 F.3d 573, 580 n.8 (7th Cir. 2012) (upholding five-day confinement naked and in restraints of prisoner who had swallowed a ring of keys “was not ‘punishment,’ let alone cruel and unusual punishment”; in a different setting, with a less troublesome prisoner, keeping a prisoner in near-constant restraints, naked, in a cell under continual observation might constitute cruel and unusual punishment), *pet. for cert. filed*, No. 12-8510 (Jan. 25, 2013); *Trammell v. Keane*, 338 F.3d 155, 163, 165-66 (2d Cir. 2002) (upholding deprivation of clothing other than shorts for two weeks to prisoner who defied ordinary disciplinary sanctions); *Beckford v. Portuondo*, 151 F.Supp.2d 204, 211-12 (N.D.N.Y. 2001) (deprivation of all clothing and bedding because prisoner would not cut a fingernail could be found “grossly disproportionate to the alleged infraction”); *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855, 861 (W.D.Mich. 2000) (holding deprivation of all clothing including underwear to alleged suicide risks stated Fourth and Fourteenth Amendment claims).

¹⁵² *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

by the affirmative acts of staff¹⁵³ or by the failure of staff or supervisory officials to respond to known risks of assault,¹⁵⁴ including sexual assault.¹⁵⁵ The Eighth Amendment also protects against dangerous living and working conditions, including:

¹⁵³ See *Leary v. Livingston County Jail*, 528 F.3d 438, 442 (7th Cir. 2008) (telling other prisoners that the plaintiff was charged with raping a child supported a deliberate indifference claim); *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir. 1999) (assault invited by staff member's statements to other inmates is actionable); *Fischl v. Armitage*, 128 F.3d 50 (2d Cir. 1997) (assault made possible by officer's actions is actionable); *Glover v. Alabama Department of Corrections*, 734 F.2d 691, 693-94 (11th Cir. 1984) (affirming liability of official who publicly offered a reward for assaulting the plaintiff), *cert. granted, vacated and remanded on other grounds*, 474 U.S. 806 (1985).

¹⁵⁴ *Bistran v. Levi*, 696 F.3d 352, 368-70 (3d Cir. 2012) (allegation that prisoner was placed in a recreation area with members of the gang he had informed on and who had threatened him stated a deliberate indifference claim); *Starr v. Baca*, 633 F.3d 1191, 1205 (9th Cir. 2011) (allegation that Sheriff failed to act on notice of culpable failure of subordinates to protect prisoners' safety), *rehearing en banc denied*, 659 F.3d 850 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2101 (2012); *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010) (allegation that plaintiff was attacked by a cellmate after the warden had notice of the assailant's history of assaulting cellmates stated a deliberate indifference claim); *Brown v. North Carolina Dep't of Corrections*, 612 F.3d 720, 723 (4th Cir. 2010) (allegations that one officer witnessed assault and failed to respond, and another sent assailant into plaintiff's block despite knowing of his grudge against plaintiff, stated a deliberate indifference claim); *Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009) (jury in assault case should have been instructed that defendants' failure to act, as well as acting, could support finding of deliberate indifference); *Pierson v. Hartley*, 391 F.3d 898, 902-03 (7th Cir. 2004) (holding that prison staff who knew that a prisoner with a violent history had been admitted to a "meritorious assignment" housing unit in violation of prison policy were properly found deliberately indifferent to the risk he would assault others); *Cotton v. Jenne*, 326 F.3d 1352, 1358-59 (11th Cir. 2003) (holding that allegations that a prisoner was placed in a segregated housing unit for mentally ill inmates, and strangled by a violent schizophrenic while staff played computer games rather than watching a surveillance camera, stated an Eighth Amendment claim); *Hendricks v. Coughlin*, 942 F.2d 109 (2d Cir. 1991); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27 (2d Cir. 1988). *But see Klebanowski v. Sheahan*, 540 F.3d 633, 639-40 (7th Cir. 2008) (prison staff were not liable to prisoner who told them he feared for his life but didn't say he had actually been threatened by gang members because of wasn't in a gang); *Carter v. Galloway*, 352 F.3d 1346, 1349-50 (11th Cir. 2003) (holding prison officials' knowledge that a prisoner was "acting crazy" and making ambiguous statements did not put them on notice of a risk of assault; defendants are not obliged "to read imaginatively all derogatory and argumentative statements made between prisoners to determine whether substantial risks of serious harm exist.")

Prison staff may be held liable for inmate-inmate assaults based on actual knowledge of a generalized risk of assault created by prison conditions or practices; they need not be shown to have known that the particular prisoner was at risk from a particular assailant. See n.9, above.

¹⁵⁵ *Bishop v. Hackel*, 636 F.3d 757, 766-67 (6th Cir. 2011); *Nelson v. Shuffman*, 603 F.3d 439, 447-48 (8th Cir. 2010) (holding evidence that plaintiff was assigned to a room with a prisoner with history of serious sexual and physical misconduct, who assaulted him, supported a deliberate indifference claim); *Johnson v. Johnson*, 385 F.3d 503, 527-30 (5th Cir. 2004) (holding allegation that classification officials, informed of repeated rapes of plaintiff, took no action and told him to "learn to f*** or fight" stated an Eighth Amendment claim).

Exposure to environmental tobacco smoke.¹⁵⁶

Exposure to sewage or human waste.¹⁵⁷

Exposure to other toxic substances.¹⁵⁸

Failure to correct safety hazards in living or working areas or other areas used by prisoners.¹⁵⁹

Work or living assignments inconsistent with medical condition or physical capacity.¹⁶⁰

¹⁵⁶ *Helling v. McKinney*, 509 U.S. at 35; *Powers v. Snyder*, 484 F.3d 929, 932-33 (7th Cir. 2007) (suggesting that plaintiffs need not prove a serious health risk in all ETS cases; “maybe there’s a level of ambient tobacco smoke that, whether or not it creates a serious health hazard, inflicts acute discomfort amounting, especially if protracted, to punishment”); *Talal v. White*, 403 F.3d 423, 427-28 (6th Cir. 2005); *Davis v. New York*, 316 F.3d 93 (2d Cir. 2002); *Gill v. Smith*, 283 F.Supp.2d 763 (N.D.N.Y. 2003). In an unreported opinion, the Second Circuit held that evidence that a prisoner was imprisoned in close quarters with a chain smoker for more than a month (even though he was often out of his cell during the day), that this treatment was inappropriate even under prison procedures, and that the prison grievance committee so concluded was sufficient for a reasonable jury to find a constitutional violation. *Shepherd v. Hogan*, 181 Fed.Appx. 93, 95, 2006 WL 1408332 (2d Cir. 2006) (unpublished).

¹⁵⁷ *DeSpain v. Uphoff*, 264 F.3d 965, 977 (10th Cir. 2001); *Burton v. Armontrout*, 975 F.2d 543, 545 n.2 (8th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

¹⁵⁸ *Smith v. U.S.*, 561 F.3d 1090, 1094, 1105 (10th Cir. 2009) (asbestos), *cert. denied*, 130 S.Ct. 1142 (2010); *Board v. Farnham*, 394 F.3d 469, 486 (7th Cir. 2005) (fiberglass dust and mold contaminating ventilation system); *Herman v. Holiday*, 238 F.3d 660 (5th Cir. 2001) (asbestos); *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998) (asbestos); *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (asbestos); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1045-55 (8th Cir. 1989) (pesticides); *Crawford v. Coughlin*, 43 F.Supp.2d 319 (W.D.N.Y. 1999) (dangerous chemicals in industrial shop).

¹⁵⁹ *Smith v. Peters*, 631 F.3d 418 (7th Cir. 2011) (allegations prisoners were required to “handl[e] heavy tools with gloveless hands in subzero weather” stated an Eighth Amendment claim); *Ambrose v. Young*, 474 F.3d 1070, 1078 (8th Cir. 2007) (ordering prisoner work crew to stomp out a grass fire adjacent to a downed power line); *Morgan v. Morgensen*, 465 F.3d 1041, 1045-47 (9th Cir. 2006) (forcing prisoner to work with defective equipment; the fact that the prisoner had sought the work assignment was not a defense); *Hall v. Bennett*, 379 F.3d 462, 465 (7th Cir. 2004) (failure to provide protective gloves to prisoner required to work with live electrical wires); *Gill v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987) (unsafe ladder); *Curry v. Kerik*, 163 F.Supp.2d 232 (S.D.N.Y. 2001) (hazardous shower conditions).

¹⁶⁰ *Withers v. Wexford Health Sources, Inc.*, ___ F.3d ___, 2013 WL 692719, *1 (7th Cir. 2013) (holding allegation that prisoner with scoliosis and back pain told nurse he would be unable to climb into a top bunk, and fell and was injured trying when she did not provide other sleeping arrangements); *Phillips v. Jasper County Jail*, 437 F.3d 791, 796 (8th Cir. 2006) (holding allegation that a prisoner with a known seizure disorder was housed in a top bunk and was injured falling out of bed raised a material factual issue under the Eighth Amendment); *Williams v. Norris*, Arkansas Dep’t of Corrections, 148 F.3d

Unsafe transportation conditions.¹⁶¹

Lack of fire safety.¹⁶²

6. Temperature and ventilation

Prisoners are entitled to protection from extremes of heat and cold,¹⁶³ and also to “reasonably adequate ventilation.”¹⁶⁴

193 (8th Cir. 1998); *Baumann v. Walsh*, 36 F.Supp.2d 508 (N.D.N.Y. 1999).

¹⁶¹ *Rogers v. Boatright*, ___ F.3d ___, 2013 WL 599356, *3 (5th Cir. 2013) (holding allegation that the driver of a prison van drove recklessly with knowledge that the plaintiff was shackled and without a seatbelt in a security cage stated a nonfrivolous Eighth Amendment claim); *Reynolds v. Dormire*, 636 F.3d 976, 980 (8th Cir. 2011) (requiring prisoner to exit van in restraints at location presenting a known risk of falling into a pit, and failing to assist him); *Brown v. Missouri Dep’t of Corrections*, 518 F.3d 552, 559-60 (8th Cir. 2004) (transportation officer who drove recklessly and ignored requests to slow down, after refusing a request for a safety belt from a shackled prisoner who could not secure himself, could be found deliberately indifferent). *But see* *Jabbar v. Fischer*, 683 F.3d 54 (2^d Cir. 2012) (holding lack of seatbelts in prison bus based on legitimate penological concerns was not an excessive risk and therefore could not be deliberately indifferent).

¹⁶² *Hoptowitz v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Benjamin v. Kerik*, 1998 WL 799161 (S.D.N.Y., Nov. 13, 1998).

¹⁶³ *Graves v. Arpaio*, 623 F.3d 1043, 1048-49 (9th Cir. 2010) (affirming order prohibiting holding detainees in temperatures higher than 85 degrees F. in order to protect those taking certain psychotropic drugs from heat-related illness); *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004) (affirming finding of unconstitutional heat); *Benjamin v. Fraser*, 343 F.3d 35, 52 (2^d Cir. 2003) (affirming finding of unconstitutionality based on evidence of extreme temperatures, including no heat at times during winter; detainee case); *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2^d Cir. 2001) (holding allegations of unrepaired broken windows throughout winter stated a constitutional claim); *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999). *But see* *Chandler v. Crosby*, 379 F.3d 1278, 1295-98 (11th Cir. 2004) (holding that a showing of “severe discomfort” does not meet the constitutional standard, and subjection to temperatures that only exceeded 90 degrees nine per cent of the time during the summer and exceeded 95 degrees only seven times during the summer, with an effectively functioning ventilation system, was not unconstitutional.)

¹⁶⁴ *Benjamin v. Fraser*, 161 F.Supp.2d 151, 160 (S.D.N.Y. 2001) (detainee case), *aff’d in pertinent part*, 343 F.3d 35, 52 (2^d Cir. 2003) (quoting *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)); *Jones v. City and County of San Francisco*, 976 F.Supp 896, 912-13 (N.D.Cal. 1997); *see* *Board v. Farnham*, 394 F.3d 469, 486 (7th Cir. 2005) (holding evidence that ventilation system was contaminated with fiberglass dust and mold supported an Eighth Amendment claim).

7. Exercise

Prisoners must be provided some opportunity to exercise, and denial of that right must be limited to “unusual circumstances” or those in which exercise is “impossible” for disciplinary reasons.¹⁶⁵ Most courts have held that five hours of exercise a week is required under ordinary circumstances.¹⁶⁶ Deprivations of exercise for relatively short periods are usually upheld.¹⁶⁷ The Eleventh Circuit has held that the denial to extremely high-security prisoners of even the two hours’ outdoor exercise the “Close Management” unit allowed, based on conduct involving violence, attempted escape, or weapons possession in the unit, did not constitute cruel and unusual punishment in light of the penological justification for it.¹⁶⁸

8. Sanitation and personal hygiene

“A sanitary environment is a basic human need that a penal institution must provide for all inmates.”¹⁶⁹ Prison officials must make arrangements for cleaning and sanitation of the

¹⁶⁵ *Williams v. Greifinger*, 97 F.3d 699, 704-05 (2d Cir. 1996) (holding 589 days’ denial of all out-of-cell exercise violated clearly established rights); *see Williams v. Goord*, 142 F.Supp.2d 416 (S.D.N.Y. 2001) (holding that allegation that plaintiff was shackled during exercise periods for 28 days stated a constitutional claim, albeit a “close” one); *Davidson v. Coughlin*, 968 F.Supp. 121 (S.D.N.Y. 1997) (holding occasional deprivations and repeated shortening of one-hour recreation period not unconstitutional).

¹⁶⁶ *See Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988); *accord*, *Pierce v. County of Orange*, 526 F.3d 1190, 1212 (9th Cir. 2008) (declining to terminate requirement of two hours’ exercise weekly, noting most courts have required five to seven hours), *cert. denied*, 555 U.S. 1031 (2008); *see Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010) (“If the prison allots a standard number of hours per week for exercise, the prison officials are aware that denial of this exercise for a substantial period creates an excessive risk to a prisoner’s health.”) (citation omitted).

¹⁶⁷ *See, e.g., Smith v. Harvey County Jail*, 889 F.Supp. 426, 431 (D.Kan. 1995). *But see Norwood v. Vance*, 591 F.3d 1062, 1070 (9th Cir. 2010) (officials were not liable for repeated lockdowns without exercise of three to four and a half months done in response to violent incidents), *cert. denied*, 131 S.Ct. 1465 (2011).

¹⁶⁸ *Bass v. Perrin*, 170 F.3d 1312, 1316-17 (11th Cir. 1999). The court did, however, hold that state regulations providing for two hours’ yard time created a liberty interest protected by due process. *Id.* at 1318.

¹⁶⁹ *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 665 (7th Cir. 2012) (leaving a prisoner with mental illness in filthy conditions could violate the Eighth Amendment even if he created them himself); *Toussaint v. McCarthy*, 597 F. Supp. 1397, 1411 (N.D. Cal. 1984), *aff’d in part and rev’d in part on other grounds*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *accord*, *Townsend v. Fuchs*, 522 F.3d 765, 774 (7th Cir. 2008) (wet and moldy mattress was actionable under Eighth Amendment); *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (holding confinement in filthy cell without bedding, toilet paper, or working plumbing denied “minimal civilized measure of life’s necessities”); *Alexander v. Tippah County, Miss.*, 351 F.3d 626, 630-31 (5th Cir. 2003) (citing “basic human need for sanitary living conditions”), *cert. denied*, 124 U.S. 2071 (2004); *see Benjamin v. Fraser*, 161 F.Supp.2d 151, 179-80 (S.D.N.Y. 2001), *aff’d in pertinent part*, 343 F.3d 52 (2d Cir. 2003).

prison¹⁷⁰ and must control infestations of vermin.¹⁷¹ They must also permit prisoners reasonable opportunities to maintain personal cleanliness.¹⁷² Access to sanitary toilet facilities is required.¹⁷³

9. Sleep

“. . . [S]leep undoubtedly counts as one of life’s basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment.”¹⁷⁴

10. Noise

“Excessive noise ‘inflicts pain without penological justification’ and may violate the Eighth Amendment.”¹⁷⁵

In *Alexander* the court assumed that certain “deplorable” conditions of confinement could be serious enough to violate the Eighth Amendment, but questioned whether 24 hours of them met the standard. 351 F.3d at 631.

¹⁷⁰ Gillespie v. Crawford, 833 F. 2d 47, 50 (5th Cir. 1987), *on rehearing*, 858 F. 2d 1101 5th Cir. 1988); Hoptowitz v. Spellman, 753 F. 2d 779, 784 (9th Cir. 1985) (failure to provide adequate cleaning supplies).

¹⁷¹ Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004); Gaston v. Coughlin, 249 F.3d 156, 166 (2d Cir. 2001).

¹⁷² Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991) (holding that an allegation of two-week denial of personal hygiene items stated an Eighth Amendment claim); Johnson v. Pelker, 891 F.2d 136, 139 (7th Cir. 1989) (holding three-day denial of water in filthy cell stated an Eighth Amendment claim); Tillery v. Owens, 719 F.Supp. 1256, 1272 (W.D.Pa. 1989) (holding that limiting general population prisoners to three showers a week “deprives the inmates of basic hygiene and threatens their physical and mental well-being”), *aff’d*, 907 F.2d 418 (3d Cir. 1990).

¹⁷³ Gates v. Cook, 376 F.3d 323, 341 (5th Cir. 2004) (requiring defective toilet plumbing to be corrected); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (forbidding use of “Chinese toilet”), *cert. denied*, 414 US. 878 (1973); Glisson v. Sangamon County Sheriff’s Dep’t, 408 F.Supp.2d 609, 621-22 (C.D.Ill. 2006) (holding a prisoner who was strapped into a wheelchair and left sitting in his own urine for hours stated due process and Eighth Amendment claims); Mitchell v. Newryder, 245 F.Supp.2d 200 (D.Me. 2003) (holding plaintiff who soiled himself while locked into a cell without a toilet stated an Eighth Amendment claim).

¹⁷⁴ Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999); *see* Gates v. Cook, 376 F.3d 323, 340, 343 (5th Cir. 2004) (citing sleep deprivation as factor supporting relief from vermin infestation and neglect of mentally ill).

¹⁷⁵ Benjamin v. Fraser, 161 F.Supp.2d at 185 (quoting Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)).

11. Lighting

“Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment.”¹⁷⁶ Constant illumination has been held unconstitutional.¹⁷⁷

12. Programs, activities, and idleness

In general, there is no constitutional right to educational, vocational, work, or other programs in prison,¹⁷⁸ though unjustified discrimination in access to existing programs may deny equal protection.¹⁷⁹ State law may create a property interest in an education that is protected by due process.¹⁸⁰ The federal Individuals with Disabilities Education Act,¹⁸¹ which protects rights to special education, is applicable in prisons and jails,¹⁸² and the federal disability statutes, discussed below, require prisoners with disabilities to have access to the programs that prisons offer. Idleness is not unconstitutional¹⁸³ unless it is shown to have serious consequences like mental deterioration or increased violence.¹⁸⁴ There is no federal constitutional right to

¹⁷⁶ Toussaint v. McCarthy, 597 F.Supp. 1388, 1409 (N.D.Cal. 1984) (requiring enough light for each inmate to read comfortably while seated or lying on bunk), *aff’d in part and rev’d in part on other grounds*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *accord*, Gates v. Cook, 376 F.3d 323, 341-42 (5th Cir. 2004) (requiring 20 foot-candles of light in each cell). *But see* Benjamin v. Fraser, 343 F.3d 35, 52, 54-55 (2d Cir. 2003) (affirming finding of inadequate lighting, questioning basis of 20 foot-candle remedy).

¹⁷⁷ Keenan v. Hall, 83 F.3d 1083, 1090-01 (9th Cir. 1996).

¹⁷⁸ Newman v. Alabama, 559 F.2d 283, 292 (5th Cir. 1977), *cert. denied sub nom.* Alabama v. Pugh, 438 U.S. 915 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982). Nor is there a right of convicted persons to be paid for work in prison, or to be paid at the minimum wage. Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006) (*per curiam*).

¹⁷⁹ Walker v. Gomez, 370 F.3d 969, 973-75 (9th Cir. 2004) (racial discrimination).

¹⁸⁰ Handberry v. Thompson, 446 F.3d 335, 354-55 (2d Cir. 2006) (holding state statutes created a property interest only in educational services not “wholly unsuited” to legislative purpose; affirming injunction requiring “regulatory minimum” of 15 hours of school weekly); *see* Goss v. Lopez, 419 U.S. 565, 574-76 (1975).

¹⁸¹ 20 U.S.C. § 1400 *et seq.*

¹⁸² Handberry v. Thompson, 446 F.3d 335, 347-51 (2d Cir. 2006) (affirming injunctive provisions enforcing IDEA in jail system); Alexander S. v. Boyd, 876 F.Supp. 773, 788 (D.S.C. 1995); Donnell v. Illinois State Bd. Of Educ., 829 F.Supp. 1016, 1020 (N.D.Ill. 1993).

¹⁸³ Women Prisoners of the D.C. Dep’t of Correction v. District of Columbia, 93 F.3d 910, 927 (D.C.Cir. 1996); Peterkin v. Jeffes, 855 F.2d 1021, 1029-30 (3d Cir. 1988); Toussaint v. McCarthy, 801 F.2d 1080, 1106-07 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987) and cases cited.

¹⁸⁴ Madrid v. Gomez, 889 F.Supp. 1146, 1264-65 (N.D.Cal. 1995) (holding mentally ill prisoners must be excluded from regime of idleness of isolation unit to avoid aggravating their illnesses); Knop v.

rehabilitation,¹⁸⁵ except for persons sentenced under a statute that makes the length of incarceration contingent upon it. Such prisoners have been held entitled to “a treatment program that will address their particular needs with the reasonable objective of rehabilitation,”¹⁸⁶ though later developments call that holding into question.¹⁸⁷

13. Disability rights

Prison officials’ treatment of disabled prisoners has been found to violate the Eighth Amendment on a number of occasions.¹⁸⁸

Johnson, 667 F.Supp. 512, 522-23 (E.D.Mich. 1987) (holding idleness may be remedied where it promotes violence), *aff’d in part and rev’d in part on other grounds*, 977 F.2 996 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993).

¹⁸⁵ *Women Prisoners of the D.C. Dep’t of Correction v. District of Columbia*, 93 F.3d 910, 927 (D.C.Cir. 1996); *Hoptowit v. Ray*, 682 F.2d 1237, 1254 (9th Cir. 1982).

¹⁸⁶ *Ohlinger v. Watson*, 652 F.2d 775, 777-79 (9th Cir. 1980). Similarly, one court has held that state law that requires the state to provide convicted sex offenders with a treatment program and makes parole eligibility contingent on completing it creates a liberty interest, and that failure to provide the program could “shock the conscience” for purposes of substantive due process analysis. *Beebe v. Heil*, 333 F.Supp.2d 1011, 1015-18 (D.Colo. 2004).

A district court decision holds that sex offenders who have finished their criminal sentences but remain in state prison (though they are in effect pre-trial detainees) pending proceedings for civil commitment could not properly be held in conditions significantly more restrictive than in the preceding months when they were serving criminal sentences, without any mental health treatment or counseling, and with extremely limited access to program and other activities, with no legitimate interest cited for the greater restrictions, were subjected to punishment denying due process. *Atwood v. Vilsack*, 338 F.Supp.2d 985, 1005 (S.D.Iowa 2004); *accord*, *Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir. 2007) (holding civilly detained persons are entitled to better treatment than convicts being punished, and the rights afforded prisoners at a minimum “set a floor” for them), *vacated on other grounds*, 129 S.Ct. 2431 (2009).

¹⁸⁷ *See Kansas v. Hendricks*, 521 U.S. 346, 365-66 (1997) (suggesting that incapacitation may justify civil commitment of persons with untreatable disorders).

¹⁸⁸ *See, e.g., Schaub v. VonWald*, 638 F.3d 905 (8th Cir. 2011) (affirming substantial compensatory and punitive damages against jail director for injurious neglect of paraplegic prisoner); *Lawson v. Dallas County*, 286 F.3d 257 (5th Cir. 2002) (affirming damages for medical neglect and inhumane treatment of paraplegic prisoner); *LaFaut v. Smith*, 834 F.2d 389, 392-94 (4th Cir. 1987) (holding deprivation of prescribed rehabilitation therapy and adequate toilet facilities violated Eighth Amendment); *see also Miller v. King*, 384 F.3d 1248, 1261-62 (11th Cir. 2004) (holding that allegations by wheelchair-bound paraplegic of denial of wheelchair repairs, physical therapy, medical consultations, leg braces, and orthopedic shoes, wheelchair-accessible showers and toilets, opportunity to bathe, urinary catheters, and assistance in using the toilet raised a material factual issue under the Eighth Amendment), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006); *Allah v. Goord*, 405 F.Supp.2d 265, 275-76 (S.D.N.Y. 2005) (holding an allegation by a wheelchair-using prisoner that he was strapped in too loosely in a vehicle and was injured in sudden stops stated an Eighth Amendment claim). *But see Jaros v. Illinois Dept. of Corrections*, 684 F.3d 667, 670-71 (7th Cir. 2012) (holding allegation that lack of

In addition, the federal disability statutes apply to prisoners.¹⁸⁹ Both Title II of the Americans with Disabilities Act¹⁹⁰ and Section 504 of the Rehabilitation Act¹⁹¹ prohibit discriminating against “otherwise qualified” disabled persons¹⁹² or excluding them from participation in or the benefits of the services, programs, or activities of, respectively, any public entity, and any program or activity (i.e., agency) that receives federal funding.¹⁹³ The disability statutes arguably provide a more favorable standard for prisoners than any cognate constitutional claims because they require defendants to make reasonable accommodations to prisoners’ disabilities, and reasonableness under the ADA often requires costly physical renovations or other expenditures,¹⁹⁴ as compared to the “*de minimis* cost” solutions prescribed under the reasonableness standard applied to other prisoner claims by *Turner v. Safley*.¹⁹⁵ However, some courts have held that the ADA/Rehabilitation Act standard must be interpreted consistently with the *Turner* reasonable relationship standard,¹⁹⁶ or may be informed by it.¹⁹⁷ The disability

grab bars made use of toilets and showers more difficult for disabled plaintiff did not state an Eighth Amendment claim where the plaintiff was in fact able to use them).

¹⁸⁹ *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206 (1998) (Americans with Disabilities Act); *Harris v. Thigpen*, 941 F.3d 1495, 1522 n.41 (11th Cir. 1991) (Rehabilitation Act); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (Rehabilitation Act).

¹⁹⁰ 42 U.S.C. § 12101 *et seq.*

¹⁹¹ 29 U.S.C. § 794.

¹⁹² *See* *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) (holding that persons who were statutorily eligible for parole sufficiently pled they were “otherwise qualified” for the public benefit of parole consideration); *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) (en banc) (holding prisoners with infectious diseases are “otherwise qualified” for prison jobs only if the risk of transmission of the disease will eliminate the risk), *cert. denied*, 528 U.S. 1114 (2000). The precise statutory term is “qualified individual with a disability,” which means “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).

¹⁹³ The statutes do not require complete exclusion from services, programs, or activities. *See* *Jaros v. Illinois Dept. of Corrections*, 684 F.3d 667, 672 (7th Cir. 2012) (holding refusal to accommodate that results in inability to access services “on the same basis as other inmates” states a statutory claim).

¹⁹⁴ *But see* *Olmstead v. L.C.*, 525 U.S. 1062, 527 U.S. 581, 607 (1998) (holding that state’s ADA obligations are determined “taking into account the resources available to the state”).

¹⁹⁵ *See* § II.A, below.

¹⁹⁶ *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (holding *Turner* standard applicable under ADA). *Contra*, *Amos v. Maryland Dep’t of Public Safety and Correctional Services*, 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of *Turner* as inconsistent with *Yeskey*), *dismissed as settled*, 205

statutes generally do not provide a remedy for inadequate medical care for disabilities without more.¹⁹⁸

Relief under the disability statutes has been granted to prisoners with hearing impairments,¹⁹⁹ visual impairments,²⁰⁰ mobility impairments,²⁰¹ mental illness,²⁰² and other disabilities.²⁰³ The Second Circuit has held that the statutes also protect and require accommodation for disabled persons who visit prisoners.²⁰⁴

F.3d 687 (4th Cir. 2000).

¹⁹⁷ *Onishea v. Hopper*, 171 F.3d 1289, 1300-01 (11th Cir. 1999) (en banc) (holding the *Turner* standard helpful in applying ADA), *cert. denied*, 528 U.S. 1114 (2000).

¹⁹⁸ *Burger v. Bloomberg*, 418 F.3d 882, 883 (8th Cir. 2005) (per curiam). In *Kiman v. New Hampshire Dep't of Corrections*, 451 F.3d 274, 284, 286-87 (1st Cir. 2006), the court noted the distinction between ADA claims based on negligent medical care and those based on discriminatory medical care, and held that a claim of denial of prescription medications was not a matter of medical judgment but presented a discrimination claim, i.e., of denial of access to part of the prison's program of medical services.

¹⁹⁹ *Clarkson v. Coughlin*, 898 F.Supp. 1019 (S.D.N.Y. 1995); *see Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1193-99 (10th Cir. 2007) (holding law enforcement officials were obliged to provide deaf arrestee with assistive devices if they knew of his disability and his need for accommodation); *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (holding deaf prisoner might be entitled to certified interpreter in disciplinary hearings).

²⁰⁰ *Williams v. Illinois Dep't of Corrections*, 1999 WL 1068669 (N.D. Ill. 1999).

²⁰¹ *Pierce v. County of Orange*, 526 F.3d 1190, 1217-23 (9th Cir. 2008) (reversing denial of relief on widespread jail accessibility issues), *cert. denied*, 555 U.S. 1031 (2008); *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996); *see Kiman v. New Hampshire Dep't of Corrections*, 451 F.3d 274, 286-87 (1st Cir. 2006) (holding evidence of denial of access to prescribed medications and a shower chair, handcuffing in front rather than behind the back, and denial of a bottom bunk to a prisoner with amyotrophic lateral sclerosis raised a material factual issue of ADA violation).

²⁰² *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D.W.Va. 1976).

²⁰³ *Raines v. State of Florida*, 983 F.Supp. 1362 (N.D.Fla. 1997) (various disabilities; court held their exclusion from the highest class of "incentive gain time" violated the ADA); *Armstrong v. Wilson*, 942 F.Supp. 1252 (N.D.Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997) (mobility, hearing, vision, kidney, and learning disabilities); *see Scott v. Garcia*, 370 F.Supp.2d 1056, 1074-75 (S.D.Cal. 2005) (holding that eating is a major life activity, and a plaintiff with stomach and digestive problems raised a material factual issue under the ADA where he submitted evidence that he was denied access to the prison meal service by not being given enough time to eat or the option to eat small frequent meals).

²⁰⁴ *Fulton v. Goord*, 591 F.3d 37, 41-45 (2^d Cir. 2009) (holding visitor had standing to challenge failure to accommodate her in visiting her husband; remanding for reconsideration of adequacy of her pleadings).

The Supreme Court has held that Title II of the ADA validly abrogates the states' Eleventh Amendment protection against prisoners' damage claims, at least insofar as they involve actual violations of the Constitution.²⁰⁵ The question remains open whether it is also valid as to violations of the ADA that do not independently violate any constitutional provision.²⁰⁶ There is no issue of the statute's validity as to injunctive claims.²⁰⁷

There is an unresolved question as to who are the proper defendants under the disability statutes. Most courts have held that, unlike 42 U.S.C. § 1983, they provide for official capacity, not individual capacity, liability.²⁰⁸ Some have held that governments or government agencies can be sued directly.²⁰⁹ Some have said that since agencies can be sued, individuals cannot be sued in any capacity.²¹⁰

²⁰⁵ U.S. v. Georgia, 546 U.S. 151, 157-59 (2006). Though the plaintiff alleged Eighth Amendment violations, the opinion does not restrict the constitutional violations that might be actionable under the ADA to the Eighth Amendment. 546 U.S. at 161 (concurring opinion).

Some courts seem to think, wrongly, that *U.S. v. Georgia* restricted prison ADA damages claims to those that also allege constitutional violations. See, e.g., *Nails v. Laplante*, 596 F.Supp.2d 475, 481 (D.Conn. 2009). *Georgia* reserved the question.

²⁰⁶ What appears to be the first circuit-level decision on this point—subsequently withdrawn—held that Eleventh Amendment protection is not abrogated by the ADA for a claim of discrimination in prison work and education programs, emphasizing the need to “focus on the particular application at issue” and the fact that the claims at issue invoke only rational basis scrutiny under the Equal Protection Clause. Thus its holding might not apply to claims of a type that invoke a higher level of constitutional scrutiny. However, the panel withdrew that holding and remanded the case to address pleading issues. *Hale v. King*, 624 F.3d 178, 184 (5th Cir. 2010), *withdrawn and superseded*, 642 F.3d 492 (11th Cir. 2011) (per curiam).

²⁰⁷ *Id.* at 882; *Miller v. King*, 384 F.3d 1248, 1263-67 (11th Cir. 2004), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

²⁰⁸ *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009); *Radaszewski v. Maram*, 383 F.3d 599, 606 (7th Cir. 2004); *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001).

²⁰⁹ *Everson v. Leis*, 556 F.3d at 501 n.7 (proper defendants under ADA Title II can include the “public entity *or* an official acting in his official capacity”) (emphasis supplied); *Hallett v. New York State Dept. of Correctional Services*, 109 F.Supp.2d 190, 199-200 (S.D.N.Y. 2000) (noting that the statute refers to public *entities* and not individuals). The Supreme Court confirmed this view, at least as to ADA claims that are based on conduct that would also violate the Constitution. *U.S. v. Georgia*, 546 U.S. 151, 159, 126 S.Ct. 877 (2006) (“ . . . [I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”).

²¹⁰ *Fox v. State University of New York*, 497 F.Supp.2d 446, 451 (E.D.N.Y. 2007); *Carrasquillo v. City of New York*, 324 F.Supp.2d 428, 441-42 (S.D.N.Y. 2004); *Key v. Grayson*, 163 F.Supp.2d 697,

The Eleventh Amendment defense is not available for claims under the Rehabilitation Act, which applies only to agencies that receive federal funds and rests on Congress's Spending Clause authority, and not just on its authority under section 5 of the Fourteenth Amendment. Ongoing acceptance of federal funds waives the Eleventh Amendment defense to Rehabilitation Act claims.²¹¹ Courts can bypass the Eleventh Amendment question by deciding the case under the Rehabilitation Act, since the standard of liability is essentially the same.²¹²

716 (E.D.Mich. 2001); *Hallett v. New York State Dept. of Correctional Services*, 109 F.Supp.2d 190, 199-200 (S.D.N.Y. 2000).

²¹¹ *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003).

²¹² *Jaros v. Illinois Dept. of Corrections*, 684 F.3d 667, 671-72 (7th Cir. 2012).

II. Prisoners' Civil Liberties

A. The reasonable relationship standard

“. . . [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. . . .”²¹³ The reasonableness question is answered by weighing²¹⁴ four factors:

- Whether there is a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it. . . . [A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. . . .”²¹⁵ If this requirement is not met, the regulation is unconstitutional regardless of the other factors.²¹⁶ Conversely, meeting it does not, without more, validate a challenged policy.²¹⁷ Prison policies can fail this test either because the asserted goal is not legitimate²¹⁸ or because the policy is not logically

²¹³ *Turner v. Safley*, 482 U.S. 78, 89 (1987); *accord*, *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

²¹⁴ “*Turner* does not call for placing each factor in one of two columns and tallying a numerical result. . . . *Turner* does contemplate a judgment by the court regarding the reasonableness of the defendants’ conduct under all of the circumstances reflected in the record.” *DeHart v. Horn*, 227 F.3d 47, 59 (3d Cir. 2000) (en banc); *accord*, *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) (“The real task . . . is not balancing these factors” but assessing whether the record shows a reasonable, not just logical, relationship).

²¹⁵ *Turner*, 482 U.S. at 89; *see Freeman v. Texas Dep’t of Criminal Justice*, 369 F.3d 854 (5th Cir. 2004) (holding rule classifying Church of Christ as part of the Christian non-Catholic “major faith group,” rather than recognizing it as a separate entity, was neutral because it did not target that church or favor one group over another); *Bahrampour v. Lampert*, 356 F.3d 969, 976 (9th Cir. 2004) (“These categorical restrictions [on publications] are neutral because they target the effects of the particular types of materials, rather than simply prohibiting broad selections of innocuous materials.”)

Policies must be neutral as applied, as well as facially, to pass muster under the *Turner* standard. *Mayfield v. Texas Dep’t of Criminal Justice*, 529 F.3d 599, 608-09 (5th Cir. 2008).

²¹⁶ *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001).

²¹⁷ *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) (“The real task . . . is . . . determining whether the Secretary [of Corrections] shows more than simply a logical relation, that is, whether he shows a *reasonable* relation.”) (emphasis in original).

²¹⁸ *See Turner*, 482 U.S. at 98-99 (finding ban on marriage not logically connected with asserted purpose; noting paternalism toward women is not a legitimate interest); *Hrdlicka v. Reniff*, 631 F.3d

related to it.²¹⁹ The cited goal must also have been the actual reason for the challenged restriction, and not invoked pretextually, for defendants to prevail under *Turner*.²²⁰ The

1044, 1049 (9th Cir. 2011) (holding that there is no legitimate penological interest in keeping out publications advertising bail services in order to protect the value of advertising on jail bulletin boards), *cert. denied*, 132 S.Ct. 1544 (2012); *Walker v. Sumner*, 917 F.3d 382, 387 (9th Cir. 1990) (stating that training of state health care workers would be a “highly dubious” justification for mandatory AIDS testing); *Goodwin v. Turner*, 908 F.2d 1395, 1399 n.7 (8th Cir. 1990) (stating that concerns such as decreasing welfare rolls were not legitimate penological interests); *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 342-43 (3d Cir.) (holding abortion restrictions were not justified by state’s interest in childbirth because this interest does not further rehabilitation, security, or deterrence), *cert. denied*, 486 U.S. 1066 (1987).

²¹⁹ See *Jones v. Brown*, 461 F.3d 353, 363-64 (3d Cir. 2006) (holding a policy of opening legal mail outside prisoners’ presence was not shown to be reasonably connected to protecting against anthrax attacks absent some significant risk of an anthrax attack; noting a policy that might have appeared reasonable immediately after 9/11/01 and subsequent anthrax attacks ceased to be reasonable with the passage of time), *cert. denied*, 549 U.S. 1286 (2007); *Conyers v. Abitz*, 416 F.3d 580, 585 (7th Cir. 2005) (denying summary judgment to officials based on their “rigid and unsupported” insistence on a sign-up deadline for Ramadan participation, where other categories of prisoners were excused from the deadline); *Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (ban on non-subscription bulk mail and catalogs as determined by postage rates lacked a rational relationship to reducing contraband, since contraband is more likely to appear in first class mail, and lacked a rational relationship to controlling risk of fire because the total amount of property was already restricted); *Jacklovich v. Simmons*, 392 F.3d 420, 429 (10th Cir. 2004) (questioning whether a four-month ban on receiving publications, without regard to behavior, furthers behavior management or rehabilitation, and whether a prohibition on gift publications is rationally connected with prevention of “strong-arming” when prison policy placed no limit on funds that could be deposited to a prisoner’s account and allowed canteen expenditures of \$180 a month); *Ramirez v. Pugh*, 379 F.3d 122, 128 (3d Cir. 2004) (holding the district court must “identify with particularity” the claimed interest in rehabilitation underlying the ban on delivery to prisoners of material that is “sexually explicit or contains nudity” so the parties can adduce sufficient evidence whether there is a rational connection between ends and means); *Clement v. California Dep’t of Corrections*, 364 F.3d 1148, 1152 (9th Cir. 2003) (holding that a ban on receipt of material printed from the Internet was an arbitrary way of reducing the volume of mail and had no rational relation to security risks); *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996) (questioning connection of defendants’ policy with its objectives); *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (alleged danger of inflammatory material did not justify ban on newspaper clippings in letters when entire newspapers were allowed in).

²²⁰ *Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006) (prison officials must show that they “actually had, not just could have had, a legitimate reason for burdening protected activity”); *Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir. 1998) (noting likelihood that plaintiff could show that rule was justified pretextually and its basis was public pressure rather than security concerns); *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (“Prison officials are not entitled to the deference described in *Turner* . . . if their actions are not actually motivated by legitimate penological interests at the time they act.”); *Walker v. Sumner*, 917 F.2d 382, 386-87 (9th Cir. 1990) (holding that where a prisoner alleges that a policy is enforced for a “dubious purpose” officials must demonstrate that the asserted penological interests “are the actual bases for their policies”).

Second Circuit has noted that when the challenge is to a discrete action by prison staff, as opposed to a regulation or policy, “a failure to abide by established procedures or standards can evince an improper objective.”²²¹ The Supreme Court has treated prison officials’ desire to provide incentives to difficult prisoners to behave better as a legitimate governmental interest that may without more justify the deprivation of constitutionally protected interests,²²² despite the concern, echoed by several Justices and acknowledged by the majority, that “deprivation theory does not map easily onto several of the *Turner* factors.”²²³

- “. . . [W]hether there are alternative means of exercising the right that remain open to prison inmates. . . .”²²⁴ What constitutes an alternative is debatable.²²⁵ A Supreme Court

²²¹ *Shakur v. Selsky*, 391 F.3d 106, 116 (2d Cir. 2004).

²²² *Beard v. Banks*, 548 U.S. 521, 530-31 (2006) (plurality opinion).

²²³ *Beard v. Banks*, 548 U.S. at 547 (Stevens, J., dissenting); *id.* at 540-41 (Thomas, J., concurring). These passages were quoted and cited respectively by the plurality. 548 U.S. at 532-33. Justice Stevens further stated: “This justification has no limiting principle; if sufficient, it would provide a ‘rational basis’ for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.” 548 U.S. at 546. This point is discussed further in § II.C, below.

²²⁴ *Turner*, 482 U.S. at 90; *see Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004) (holding that prisoner did not have an alternative to receiving clippings in the mail because he was in a restrictive unit and denied access to the prison library, and subscriptions were not a meaningful alternative because he would not know in advance what to subscribe to).

²²⁵ In *Fontroy v. Beard*, 559 F.3d 173 (3d Cir. 2009), the court upheld a policy requiring courts and lawyers to obtain a “control number” in order to have their mail to prisoners treated as privileged. The court said that getting a control number was an alternative even though many lawyers and all courts refused to get one. It stated: “We acknowledge that these problems make the DOC’s new mail policy a less-than-ideal means of accommodating the Inmates’ important First Amendment rights. . . . Alternatives . . . need not be ideal, . . .; they need only be available.” *Fontroy*, 559 F.3d at 180-81 (citation and internal quotation marks omitted). The court did not explain how an alternative can be “available” when the prisoner has no way of taking advantage of it.

The question of alternatives often arises in religious rights cases. *Compare Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) (holding ability to worship in one’s cell using religious materials and access the chapel and lockers containing religious materials on certain days and times constituted an alternative to congregate services), *cert. denied*, 552 U.S. 1062 (2007); *Fraise v. Terhune*, 283 F.3d 506, 519 (3d Cir. 2002) (holding that Five Percenters seeking to study religious material that was banned had alternatives because the Bible and Koran are also acknowledged as “lessons” by the Five Percenters and they were allowed to “discuss[] and seek[] to achieve self-knowledge, self-respect, responsible conduct, [and] righteous living.”) *with Sutton v. Rasheed*, 323 F.3d 236, 255 (3d Cir. 2003) (holding Nation of Islam plaintiffs did not have alternatives when deprived of religious texts “which provide critical religious instruction and without which they could not practice their religion generally”; *Fraise* distinguished

plurality has recently stated that the ability of a prisoner to escape a restrictive condition by “graduating” from one level of a program to another “simply limit[s], [but does] not eliminate, the fact that there is no alternative.”²²⁶

- “. . . [T]he impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . When accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of prison officials. . . .”²²⁷

because the texts at issue there lacked the “sacrosanct and fundamental quality which the writings of the prophet, Elijah Muhammad, or the writings of Minister Farrakhan, have for members of one or another sect of the Nation of Islam.”). *Compare* *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (holding plaintiffs denied a kosher diet lacked alternative ways of maintaining a kosher diet; paying for it themselves was not an alternative because even those with some money would have to sacrifice communication with family and legal representatives to pay for the food) *with* *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 1999) (holding that a Buddhist denied a religious diet had alternatives because he was permitted to pray, to recite the Sutras, to meditate, to correspond with the City of 10,000 Buddhas, a center of Buddhist teaching, and to purchase non-leather sneakers); *accord*, *Kuperman v. Wrenn*, 645 F.3d 69, 75 (1st Cir. 2011) (“Our inquiry is not into whether a religiously-acceptable alternative to growing a full beard existed,” but whether plaintiff had other means of religious exercise); *Goff v. Graves*, 362 F.3d 543, 549-50 (8th Cir. 2004) (upholding refusal to allow food trays prepared for religious banquet to be delivered to members in segregation unit; noting that members could practice other aspects of their religion); *see* *Singer v. Raemisch*, 593 F.3d 529, 538-39 (7th Cir. 2010) (prisoner forbidden *Dungeons and Dragons*-related material could read and write other material and play other games); *Ramirez v. Pugh*, 379 F.3d 122, 131 (3d Cir. 2004) (holding that prisoners denied “sexually explicit” material have the alternative of reading something else); *Bahrampour v. Lampert*, 356 F.3d 969, 976 (9th Cir. 2004) (stating that the plaintiff can play or read about chess rather than role-playing games, and receive bodybuilding publications without the simulated sexual activity in the disputed magazines); *Morrison v. Hall*, 261 F.3d 896, 904 and n.6 (9th Cir. 2001) (prisoners challenging a ban on magazines sent by third and fourth class mail had no alternative because they could not make publishers use different mailing rates, radio and TV are not alternatives to reading, and many prisoners can’t afford higher rates anyway); *Flagner v. Wilkinson*, 241 F.3d 475, 486 (6th Cir. 2001) (holding that a Jewish prisoner required to cut his beard and sidelocks had no alternatives because no other aspects of his religion could compensate for having to violate an essential tenet); *Chriceol v. Phillips*, 169 F.3d 313 (5th Cir. 1999) (holding that the right to read other materials was an alternative for a prisoner who wanted Aryan Nations material); *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (subscriptions and interlibrary loan were not necessarily adequate alternatives to receiving newspaper clippings in correspondence); *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) (“If Giano’s right is framed as the right to graphic sexual imagery to satisfy carnal desires and expressions, commercially produced erotica and sexually graphic written notes from wives or girlfriends are adequate substitutes for semi-nude personal photographs. If, on the other hand, the right is seen as reinforcing the emotional bond between loved ones and similar affective links, conventional photographs and romantic letters would adequately satisfy this need.”)

²²⁶ *Beard v. Banks*, 548 U.S. 521, 532 (2006) (plurality opinion).

²²⁷ *Turner*, 482 U.S. at 90; *see* *Jacklovich v. Simmons*, 392 F.3d 420, 431-32 (10th Cir. 2004) (holding that delivering gift publications would not be unduly burdensome since prison officials already

- “. . . [T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”²²⁸

delivered other publications and expended significant time and effort tracking receipt of other publications); *Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004) (holding that allowing prisoners to receive clippings in the mail would not unduly burden prison staff because they already inspected the mail); *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002) (holding that ending cross-sex surveillance in bathrooms and showers would have “ripple effect” of reassignment of staff, with cost to security and gender equity of staff); *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (holding that absence of Muslims from work assignments for Jumu’ah services had no “ripple effect”; they were just marked absent but not penalized).

²²⁸ *Turner*, 482 U.S. at 90-91. Compare *Williams v. Morton*, 343 F.3d 212, 217-18 (3d Cir. 2002) (holding that there was no *de minimis* cost alternative where providing 225 Muslims with Halal food would cost \$280 a year apiece, compared with \$3650 a year per person for kosher food for a smaller number of observant Jews) with *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (holding that \$13,000 a year—0.158% of an \$8.25 million budget—for kosher food for Jewish prisoners had *de minimis* impact on the overall prison food budget); see *Shakur v. Selsky*, 391 F.3d 106, 115-16 (2d Cir. 2004) (questioning whether a ban on all materials from “unauthorized organizations” was rationally related to maintaining security, since officials had the obvious alternative of sending the materials to the already-existing Media Review Committee for individual examination pursuant to established procedures); *Nasir v. Morgan*, 350 F.3d 366, 373 (3d Cir. 2003) (holding there was no easy, obvious alternative to banning correspondence with former prisoners; prison staff would have to read the mail); *Hammons v. Saffle*, 348 F.3d 1250, 1257 (10th Cir. 2003) (holding there was no *de minimis* cost alternative to prohibiting possession of Muslim oils in cells; the lack of incident under the former permissive policy did not establish that nothing bad would happen in the future); *Morrison v. Hall*, 261 F.3d 896, 895 (9th Cir. 2001) (holding that the easy, obvious alternative to banning third and fourth class mail because of a concern for “junk mail” is to distinguish between junk mail and magazine subscriptions); *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000) (holding that adding religious names to ID cards was a *de minimis* cost alternative); *Onishea v. Hopper*, 171 F.3d 1289, 1301 (11th Cir. 1999) (en banc) (holding that excluding potentially violent prisoners rather than HIV-positive prisoners from programs was not an “easy alternative”), *cert. denied*, 528 U.S. 1114 (2000); *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) (holding there are no obvious, easy alternatives to a ban on nude or semi-nude photos of loved ones because imposing them would disregard prison officials’ judgment and they would require “difficult line-drawing”); *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992) (holding that strip searches on reasonable suspicion were not an easy, obvious alternative because foregoing random searches would affect security); *Benjamin v. Coughlin*, 905 F.2d 571, 576-77 (2d Cir. 1990) (holding that a requirement of intake haircuts for Rastafarians for purposes of ID photos was unconstitutional because taking the photo with the hair held back was a nearly costless alternative); *Williams v. Bitner*, 359 F.Supp.2d 370, 378-79 (M.D.Pa. 2005) (holding that disciplining a Muslim prisoner who refused to help prepare pork could violate the First Amendment where officials had the alternative of simply removing him from his job), *aff’d*, 455 F.3d 186 (3d Cir. 2006).

B. Scope of the standard

The *Turner* reasonableness standard applies to all claims that a prison regulation infringes on prisoners' constitutional rights.²²⁹ By that statement the Court means the substantive rights protected by the Bill of Rights and the Due Process Clause, but not Eighth Amendment or procedural due process rights.²³⁰ It has also held that the *Turner* standard is not applicable to claims of racial discrimination, though it studiously avoided saying anything about *Turner's* applicability to other kinds of equal protection claims.²³¹

The *Turner* standard applies to informal policies and individualized actions as well as regulations.²³² It may apply to some statutory claims as well as constitutional claims.²³³ It does

A particularly extreme weighing of costs and alternatives appears in *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228 (D.C.Cir.), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003), in which a statute barring prisoners' use or possession of electrical musical instruments was held justified under the first three *Turner* factors—and by implication the fourth—by the costs of electricity, storage, upkeep and supervision.

²²⁹ *Washington v. Harper*, 494 U.S. 210, 223-24 (1990). A more favorable “less restrictive alternative” standard was applied to outgoing prisoner correspondence in *Procurier v. Martinez*, 416 U.S. 396, 413-14 (1974), but the Supreme Court has subsequently restricted that standard's application to outgoing correspondence only. *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *see Jordan v. Pugh*, 504 F.Supp.2d 1109, 1119-20 (D.Colo. 2007) (applying *Procurier* standard to material submitted for outside publication), *motion to amend denied, motion for findings granted*, 2007 WL 2908931 (D.Colo., Oct. 4, 2007).

²³⁰ *See Washington v. Harper*, 494 U.S. 210 (1990) (applying *Turner* reasonableness standard to substantive due process claim, *Mathews v. Eldridge* due process standard to procedural claim); § I.A-B, above (describing Eighth Amendment standards).

One appellate decision asserts that the *Turner* standard does not apply to statutes. *Padgett v. Donald*, 401 F.3d 1273, 1281 n.7 (11th Cir. 2005), *cert. denied sub nom. Boulineau v. Donald*, 546 U.S. 820 (2005). Other circuits have applied *Turner* in assessing the constitutionality of statutes. *See Waterman v. Farmer*, 183 F.3d 208, 213-16 (3d Cir. 1999); *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999).

The Second Circuit has questioned whether the *Turner* standard applies to “a claim of constitutional protection *from* state action such as a strip search,” noting that *Turner* and its Supreme Court progeny concerned prisoners' assertion of affirmative rights to correspond, marry, organize a union and order books. *N.G. v. State*, 382 F.3d 225, 235-36 (2d Cir. 2004). *Washington v. Harper*, in which the *Turner* standard was applied to the right to refuse the involuntary administration of psychotropic medications, would appear to involve “a claim of constitutional protection *from* state action” of an intrusive character.

²³¹ *Johnson v. California*, 543 U.S. 499, 510-14 (2005); *see* § V, below, concerning equal protection claims.

²³² *Ford v. McGinnis*, 352 F.3d 582, 595 n.15 (2d Cir. 2003); *Cornwell v. Dahlberg*, 963 F.2d

not apply to claims pertaining to *outgoing* correspondence.²³⁴

At least one appellate decision holds that certain rights are “fundamentally inconsistent” with incarceration, and the *Turner* analysis is not applicable in cases involving them.²³⁵ This argument, which appears contrary to the Supreme Court’s post-*Turner* decisions, was presented to the Supreme Court in *Overton v. Bazzetta* and was not accepted, though it was not conclusively ruled out either.²³⁶ On the other hand, the Court has subsequently said that it has applied *Turner* “only to rights that are ‘inconsistent with proper incarceration.’ . . . This is because certain privileges and rights must necessarily be limited in the prison context,” a rationale the Court said was not true of freedom from racial discrimination.²³⁷ Another appellate decision initially held that *Turner* was inapplicable to a statutory prohibition on prisoners’ use or possession of electric musical instruments because these instruments impose costs, *e.g.*, the electricity to operate them, and government need not subsidize First Amendment exercise. In the face of a vigorous dissent on this point, the panel agreed to rest its decision on its alternate *Turner* analysis instead.²³⁸

C. Application of the standard

The *Turner* reasonableness standard is intended to be a “one size fits all” analysis for all prisoners’ civil liberties claims.²³⁹ Its application has mostly been *ad hoc* with little effort to systematize its method, leaving significant questions unanswered. In *Turner* itself, the Court struck down prohibition on marriage as an “exaggerated response” to security concerns and as

912, 917 (6th Cir. 1992); *Frazier v. DuBois*, 922 F.2d 560, 562 (10th Cir. 1990).

In *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004), in which a publication was seized pursuant to a disciplinary rule, the plaintiff alleged that the rule did not in fact authorize the seizure. The court noted that under *Turner* “a failure to abide by established procedures or standards can evince an improper objective.” 391 F.3d at 116 (referring to bypassing the facility Media Review Committee).

²³³ See § I.E.13, above.

²³⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989); *Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008).

²³⁵ *Gerber v. Hickman*, 291 F.3d 617, 620 (9th Cir. 2002) (en banc).

²³⁶ *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003).

²³⁷ *Johnson v. California*, 543 U.S. 499, 510 (2005).

²³⁸ *Kimberlin v. U.S. Dep’t of Justice*, 318 F.3d 228, 232-33 (D.C.Cir.), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003); *see id.*, 318 F.3d at 237-38 (concurring and dissenting opinion).

²³⁹ *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (describing it as “a unitary, deferential standard”; eschewing “special protection to particular kinds of speech based on content”).

resting on “excessive paternalism,”²⁴⁰ and it has subsequently described the standard as not “toothless.”²⁴¹ Later decisions suggest a more deferential attitude.²⁴²

The lower courts have differed with each other, and sometimes with themselves,²⁴³ over whether prison officials must provide evidence or merely assertion in support of their positions, though most have held that defendants have an evidentiary burden.²⁴⁴ The Ninth Circuit has held that prison officials initially need only assert a “common sense connection” between policy and challenged practice; if plaintiffs fail to refute that connection, it is sufficient if prison officials reasonably could have thought the policy would advance legitimate penological interests; if plaintiffs do refute the common-sense connection, prison officials must then “demonstrate that

²⁴⁰ 482 U.S. 78, 94-99 (1987).

²⁴¹ *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

²⁴² See *Overton v. Bazzetta*, 539 U.S. 126 (2003) (upholding various restrictions on prison visiting). *Overton* should be read in conjunction with the lower courts’ opinions, which reflect a thorough critique of the logic and necessity of the rules based on a fully developed record, little of which is acknowledged by the Supreme Court.

In declining to apply the *Turner* standard to a claim of racial discrimination, the Court characterized it as extremely undemanding, stating that it “would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance the goal,” and that the blanket racial segregation policy struck down in *Lee v. Washington* “might stand a chance of survival if prison officials simply asserted that it was necessary to prison management.” *Johnson v. California*, 543 U.S. 499, 514 (2005).

²⁴³ Compare *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (affirming district court’s entry of relief in part because defendants failed to substantiate their argument that their policy promoted security) with *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (affirming under *Turner* the district court’s dismissal on initial screening, with no response from defendants, of a challenge to a policy that on appeal prison officials *denied existed*).

²⁴⁴ See *Ramirez v. Pugh*, 379 F.3d 122, 130 (3d Cir. 2004) (holding that the second, third, and fourth *Turner* factors are “fact-intensive” requiring a “contextual, record-sensitive analysis,” though “[w]here the link between the regulation at issue and the legitimate government interest is sufficiently obvious, no evidence may be necessary to evaluate the other *Turner* prongs”); *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (“In order to warrant deference, prison officials must present credible evidence to support their stated penological goals.”); *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (rejecting argument that defendants who failed to justify policies in the district court could do so with arguments developed later); *Davis v. Norris*, 249 F.3d 800 (8th Cir. 2001) (holding court cannot apply *Turner* standard where defendants did not submit evidence supporting their argument); *Flagner v. Wilkinson*, 241 F.3d 475, 486 (6th Cir. 2001) (holding that defendants were not entitled to summary judgment on an as-applied challenge to a religious restriction without evidence supporting their arguments that related to the individual plaintiff); *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996) (requiring evidence and not mere assertion). But see *Fraise v. Terhune*, 283 F.3d 506, 518 (3d Cir. 2002) (holding an anecdotal report about security threats is sufficient basis to support draconian security measures).

the relationship is not so ‘remote as to render the policy arbitrary or irrational.’”²⁴⁵ Courts have also differed over the degree of critical scrutiny to be applied to the logic and consistency of prison officials’ positions,²⁴⁶ and whether prison rules must be assessed only on their face or also as applied to particular prisoners.²⁴⁷ The Second Circuit has not generalized on these points, but its decisions have mostly demonstrated an insistence on factual support and a willingness to examine the logic of official claims²⁴⁸ (with one notable exception²⁴⁹). Where the conduct

²⁴⁵ *Prison Legal News v. Cook*, 238 F.3d 1145, 1150 (9th Cir. 2001); *accord*, *Wolf v. Ashcroft*, 297 F.3d 305, 308-09 (3d Cir. 2002); *see* *Jones v. Brown*, 461 F.3d 333, 360-61 (3d Cir. 2006) (applying *Wolf v. Ashcroft* holding after *Beard v. Banks*), *cert. denied*, 549 U.S. 1286 (2007).

²⁴⁶ *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1050-55 (9th Cir. 2011) (closely scrutinizing jails’ justification for barring unsolicited distribution of periodical *Crime, Justice & America*), *cert. denied*, 132 S.Ct. 1544 (2012); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 879 (9th Cir. 2002) (emphasizing the “exaggerated response” component of the *Turner* standard, noting that some governmental interests require “a closer fit between the regulation and the purpose it serves”); *Beerheide v. Suthers*, 286 F.3d 1179, 1186-92 (10th Cir. 2002) (closely examining prison officials’ justifications for failure to provide a kosher diet); *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996) (holding once district judge had determined that restriction of prisoner’s telephone list to ten persons was rationally related to curtailing criminal activity and the harassment of judges and jurors, inquiry was over); *Hakim v. Hicks*, 223 F.3d 1244, 1248-49 (11th Cir. 2000) (affirming rejection of officials’ claim that adding religious names to ID cards would undermine order and security); *Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995) (“[D]eference does not mean abdication.”) *Compare Morrison v. Garraghty*, 239 F.3d 648, 661 (4th Cir. 2001) (rejecting defendants’ argument that certain religious items sought by plaintiff could be dangerous, since other inmates were allowed them) *with Hammons v. Saffle*, 348 F.3d 1250, 1255 (10th Cir. 2003) (upholding ban on personal possession of Muslim oils, but not other oils, because government “can, in some circumstances, implement policies that are logical but yet experiment with solutions and address problems one step at a time”).

²⁴⁷ *Pope v. Hightower*, 101 F.3d at 1384-85 (disapproving district court’s inquiry into whether a telephone rule generally valid under *Turner* was constitutional as applied to a prisoner whose family was in a distant state and who therefore relied more on the telephone for family contact than other prisoners). *Contra*, *Lindell v. Frank*, 377 F.3d 655, 659 (7th Cir. 2004) (assessing validity of rule prohibiting clippings in prisoners’ mail in light of the plaintiff’s confinement in a high security unit with no access to the prison library); *Flagner v. Wilkinson*, 241 F.3d 475, 486 (6th Cir. 2001) (holding that prison officials must support restrictions on religious practice with evidence supporting their application to the individual plaintiff).

²⁴⁸ *See Shakur v. Selsky*, 391 F.3d 106, 115-16 (2d Cir. 2004) (questioning whether a ban on all materials from “unauthorized organizations” was rationally related to maintaining security, since officials had the obvious alternative of sending the materials to the already-existing Media Review Committee for individual examination pursuant to established procedures); *Ford v. McGinnis*, 352 F.3d 582, 595-97 (2d Cir. 2003) (declining to consider *Turner* factors for the first time on appeal, remanding for development of an appropriate record); *Nicholas v. Miller*, 189 F.3d 191 (2d Cir. 1999) (*per curiam*) (finding material factual disputes concerning prison’s denial of a request to form a Prisoners’ Legal Defense Center, despite conclusory claims that permitting it would undermine safety and security); *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (rejecting justification for a ban on clippings enclosed in correspondence, since prisoners were allowed to receive entire newspapers; noting that subscriptions and inter-library loan were not

challenged is in violation of prison rules, arguably deference is less appropriate.²⁵⁰

One federal circuit has virtually pre-empted these questions by imposing a truly extraordinary burden of pleading on prisoners, most of whom bring suit without legal representation. They are required in their complaints to “plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest” and “recite[] facts that might well be unnecessary in other contexts” to surmount a

shown to be adequate alternatives); *Salahuddin v. Coughlin*, 993 F.2d 306 (2d Cir. 1993) (rejecting conclusory justifications for denying congregational religious services in newly opened prison where construction had not been completed). *Cf.* *Fromer v. Scully*, 874 F.2d 69 (2d Cir. 1989) (upholding requirement that beards be shaved for intake photograph and thereafter limited to one inch; rejecting argument that since only a complete ban would fully serve officials’ concerns, the partial ban was irrational; “We reject that approach as leading to perverse incentives for prison officials not to compromise with inmate desires. . .”).

²⁴⁹ *See* *Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) (upholding prohibition on sexually explicit photographs of prisoners’ wives and girlfriends even though commercially produced materials were permitted, based on “common sense”; “Prison officials must be given latitude to anticipate the probable consequences of certain speech. . . .”); *compare id.* at 1057-62 (dissenting opinion) (criticizing majority’s reliance on prison officials’ unsubstantiated assertions). Another odd Second Circuit outlier is *Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002), in which prison officials placed the plaintiff on a 30-day “mail watch”—which involved stopping, opening and reading his mail, with no indication that any of it was denied or censored—after he received a book titled *Blood in the Streets*. The book’s subtitle was *Investment Profits in a World Gone Mad!* and defendants did not argue it posed a security risk. The court held that “background facts” about the plaintiff justified their actions under the *Turner* standard and that even if a more thorough reading would have shown the book to be innocuous, “we find that it is generally sufficient for a prison official to base a security decision on the title alone.” 297 F.3d at 113. One suspects that the outcome might have been different had the “security decision” been to deny the plaintiff his mail entirely, or to place him in segregation, for a 30-day period because the officials did not look beyond the title (even to the subtitle!) of the book. The relative mildness of the intrusion, by prison standards, appears to have played a part in this decision, and certainly distinguishes it from many others. In *Shakur v. Selsky*, 391 F.3d 106, 117-18 (2d Cir. 2004), the court treated *Duamutef* as limited to its facts. Similarly, in *Johnson v. Goord*, 445 F.3d 532, 534-35 (2d Cir. 2006) (per curiam), the court upheld a policy providing for only one “free” (actually, advanced against future funds) stamp a month for non-legal postage for indigent prisoners in “keeplock” confinement, and prohibiting them from receiving stamps from persons outside the prison. The court found a “valid, rational connection” to security and order in light of the potential use of stamps as a form of currency in prison; but prison policy allowed those with money to purchase up to 50 first class stamps at a time and to possess up to \$20 in postage, so it is unclear why permitting receipt of similar amounts from outside had a valid, rational connection to that interest. On the other hand, prisoners could have their friends and family send money, and presumably anyone who could afford to send stamps could also afford to send money. Thus, the court likely thought that the restriction was minimal in effect.

²⁵⁰ *Stoudemire v. Michigan Dept. of Corrections*, ___ F.3d ___, 2013 WL 362828, *11 (6th Cir. 2013) (“Normally, separation of powers and federalism concerns weigh heavily in our review of prison regulations.” But in this case the defendant officer did not follow prison procedure.).

motion to dismiss.²⁵¹ The absurd consequences of this rule are illustrated by that court's recent decision upholding the denial to a prisoner of former President Jimmy Carter's *Palestine: Peace Not Apartheid*, even though the court acknowledged: "We cannot imagine how this book could have raised safety concerns or facilitated terrorist activity. Any penal justification for restricting the book under *Turner* would be questionable at best." Yet the court held that the plaintiff had insufficiently pled the denial of the because he did not allege the circumstances of the denial (e.g., "that prison officials had informed him that he could not receive the book or that he had explicitly requested it and received no response").²⁵²

The Supreme Court has addressed *Turner* analysis methodology from a different standpoint and in a quite narrow and inconclusive manner. In *Beard v. Banks*,²⁵³ the Court by a plurality upheld, over a First Amendment challenge, a policy that forbade the residents of a unit for particularly troublesome prisoners any access to newspapers, magazines, and personal photographs. The state, in its statement of undisputed facts and a deposition from a deputy superintendent of the prison, asserted that the policy was intended to motivate better behavior on the part of those prisoners and to "discourage backsliding" by prisoners who had succeeded in getting out of that unit. The plurality stated that "[t]hese statements point to evidence—namely, the views of the deputy superintendent—that the regulations do, in fact, serve the function identified."²⁵⁴ It then said that these materials, "by themselves . . . provide sufficient justification for the Policy. That is to say, *unless there is more*, they bring the Policy within *Turner's* legitimate scope."²⁵⁵ The plurality then examined the prisoners' case, emphasizing that though they had cross-moved for summary judgment they "did not offer any fact-based or expert-based refutation [of the prison officials' motion] in the manner the rules provide."²⁵⁶ In finding the prison officials' case inadequate, the lower court "placed too high an evidentiary burden" upon them by citing the lack of evidence whether the ban "was implemented in a way that could modify behavior" or whether the officials' "deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates."²⁵⁷ It also "offer[ed] too little deference to the judgment of prison officials about such matters."²⁵⁸

²⁵¹ *Gee v. Pacheco*, 627 F.3d 1178, 1185, 1188 (10th Cir. 2010).

²⁵² *Al-Owhali v. Holder*, 687 F.3d 1236, 1243 (10th Cir. 2012).

²⁵³ 548 U.S. 521 (2006).

²⁵⁴ *Beard*, 548 U.S. at 531.

²⁵⁵ *Beard*, 548 U.S. at 533 (emphasis supplied).

²⁵⁶ *Beard*, 548 U.S. at 534.

²⁵⁷ *Beard*, 548 U.S. at 535.

²⁵⁸ *Id.*

Having said all those things, the plurality made it very clear that it was rendering a summary judgment decision more than a prisoners' rights decision:

. . . [W]e do not suggest that the deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment. After all, the constitutional interest here is an important one. *Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective. A prisoner may be able to marshal substantial interest that, given the importance of the interest, the Policy is not a reasonable one. . . . And with or without the assistance that public interest law firms or clinics may provide, it is not inconceivable that a plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial. Finally, as in *Overton*, we agree that "the restriction here is severe," and "if faced with evidence that [it were] a *de facto* permanent ban . . . we might well reach a different conclusion in a challenge to a particular application of the regulation." . . . That is not, however, the case before us.

Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "specific facts" in the record that could "lead a rational trier of fact to find" in his favor.²⁵⁹

Thus the plurality upheld the challenged policy, emphasizing that the plaintiffs submitted *no* evidence in support of their position, and stating clearly that the opinions of prison officials on matters of prison management (a) are evidence, and (b) are likely to prevail under *Turner* if they go unchallenged by contrary evidence.²⁶⁰ But it made equally clear that plaintiffs who actually engage the officials' case with an evidentiary presentation may prevail on an appropriate record. If *Beard* does nothing else, it makes abundantly clear that a plaintiff who confronts *Turner* on summary judgment without his own expert presentation is likely doomed.²⁶¹ However, the Court did nothing to resolve the questions discussed above concerning the extent to which prison officials must support their claims with evidence and the degree of critical scrutiny which courts

²⁵⁹ *Beard*, 548 U.S. at 536.

²⁶⁰ Justice Stevens' dissenting opinion outlines the reasons why even on the uncontested factual record, the officials should not have prevailed on summary judgment, since the admissions contained in their own submission undermined the connection between their policy and its purposes, and thereby the logic of their position. *Beard*, 548 U.S. at 550. The plurality chose not to acknowledge these concerns in the absence of an affirmative evidentiary presentation by the prisoners.

²⁶¹ One court has emphasized that the required expertise must be in prison security if defendants raise security concerns. *Singer v. Raemisch*, 593 F.3d 529, 536 (7th Cir. 2010).

should apply to them where the evidence is in conflict.²⁶²

The other significant issue inconclusively canvassed in *Beard* is the nature of *Turner* analysis when the challenged policy is justified as a means of making confinement more unpleasant in order to motivate prisoners to behave more compliantly. Justice Stevens stated in dissent: “This justification has no limiting principle; if sufficient, it would provide a ‘rational basis’ for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.”²⁶³ Further, this “deprivation theory” is incapable of coherent analysis within the *Turner* framework, since, e.g., “there could never be a ‘ready alternative’ for furthering the government interest, because the government interest is tied directly to depriving the prisoner of the constitutional right at issue.”²⁶⁴ The plurality appears to acknowledge this point: “In fact, the second, third, and fourth factors [of the *Turner* analysis], being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor’s basic logical rationale. . . . The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation.”²⁶⁵ Thus, the plurality acknowledges that the bottom line of applying the *Turner* analysis to a defense based on “deprivation theory” is the collapse of the *Turner* analysis in favor of some overall judgment of reasonableness, reached in some unspecified manner.

So is there really no limiting principle when prison officials adopt measures avowedly to make confinement more unpleasant? On a theoretical level, none is apparent. However, the plurality suggests a fact-based limitation, noting that in *Overton v. Bazzetta*,²⁶⁶

. . . [W]e upheld a prison’s “severe” restriction on the family visitation privileges of prisoners with repeat substance abuse violations. . . .

The Policy and circumstances here are not identical, but we have not

²⁶² One recent decision emphasizes the deference prison officials should receive even when their claims are highly speculative. *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010) (upholding prohibition on all *Dungeons and Dragons*-related materials based on concerns that cooperative games “can mimic the organization of gangs and lead to the actual development thereof” and that limiting “escapist behaviors” fosters rehabilitation).

²⁶³ 548 U.S. at 546.

²⁶⁴ 548 U.S. at 547; *accord*, *Kimberlin v. U.S. Dep’t of Justice*, 318 F.3d 228, 239-40 (D.C.Cir.) (concurring and dissenting opinion), *rehearing denied*, 351 F.3d 1166 (D.C.Cir. 2003) (noting incompatibility of punitive rationale and *Turner* standard).

²⁶⁵ 548 U.S. at 522.

²⁶⁶ 539 U.S. 126 (2003).

found differences that are significant. In both cases, the deprivations at issue (all visits with close family members; all access to newspapers, magazines, and photos) have an important constitutional dimension. In both cases, prison officials have imposed the deprivation at issue only upon those with serious prison-behavior problems (here the 40 most intractable inmates in [Pennsylvania]). In both cases, prison officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives.²⁶⁷

Thus, the plurality suggests that severe constitutional deprivations intended to induce compliance with prison rules may pass muster only if imposed as a matter of considered policy and restricted to persons with the most serious records of misbehavior—or at least that their opinion should not be read as endorsing any more than that.²⁶⁸

D. Particular civil liberties issues

1. Correspondence

Prisoners’ “right to the free flow of incoming and outgoing mail is protected by the First Amendment.”²⁶⁹ Legal mail is entitled to greater protection than non-legal mail;²⁷⁰ it generally may not be read without a warrant,²⁷¹ and prisoners have the right to be present when it is opened

²⁶⁷ *Beard*, 548 U.S. at 533.

²⁶⁸ The concurring opinion of Justice Thomas, joined by Justice Scalia, is fundamentally at odds with the plurality’s approach and is not helpful in understanding where analysis under *Turner* may go in future cases. That opinion reiterates those Justices’ view that “[w]hether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law.” 548 U.S. at 537-38 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 140 (2003) (Thomas, J., concurring)). There seems little likelihood that a majority of Justices will adopt that view any time soon.

²⁶⁹ *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003). In *Simkins v. Bruce*, 406 F.3d 1239, 1242-44 (10th Cir. 2005), the court held that failure to forward legal mail per prison procedure to a prisoner temporarily held in a county jail, resulting in his failing to receive notice and to respond to a summary judgment motion, denied the right of access to court.

²⁷⁰ See *Evans v. Vare*, 402 F.Supp.2d 1188, 1194-96 (D.Nev. 2005) (holding restrictions on prisoners’ legal mail are subject to heightened scrutiny and must be no greater than necessary to serve a substantial governmental interest; relying on Second and Sixth Circuit decisions), *affirmed in part, reversed in part and remanded on other grounds*, 203 Fed.Appx. 95 (9th Cir. 2006) (unpublished).

²⁷¹ *Sallier v. Brooks*, 343 F.3d 868, 873-74 (6th Cir. 2003); *Guajardo v. Estelle*, 580 F.2d 748, 759 (5th Cir. 1978).

and inspected for contraband.²⁷² Prisoners are also entitled to notice, as a matter of due process, when officials refuse to deliver mail to them.²⁷³ Isolated incidents of mail tampering generally do not establish a constitutional violation.²⁷⁴ Prison authorities have authority to prohibit or restrict inmate-inmate correspondence.²⁷⁵ They have less authority to prohibit correspondence with relatives or others outside the prison.²⁷⁶ Reasonable restrictions on postage for indigents for non-legal correspondence are upheld.²⁷⁷

2. Reading

Prisoners' right to read²⁷⁸ may be restricted under the *Turner* reasonableness standard,²⁷⁹

²⁷² *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974); *Merriweather v. Zamora*, 569 F.3d 307, 316-17 (6th Cir. 2009) (holding requirement to be clearly established law); *Al-Amin v. Smith*, 511 F.3d 1317, 1333-34 (11th Cir. 2008), *cert. denied*, 555 U.S. 820 (2008); *Jones v. Brown*, 461 F.3d 333, 358-63 (3d Cir. 2006) (holding unconstitutional post-9/11/01 rules allowing opening of legal mail outside prisoners' presence), *cert. denied*, 549 U.S. 1286 (2007); *Davis v. Goord*, 320 F.3d at 351; *see Jones v. Caruso*, 569 F.3d 258, 268 (6th Cir. 2009) (mail to state Secretary of State asking for information about copyrighting and trademark registration was not privileged); *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982) (defining category of privileged mail); *see also U.S. v. DeFonte*, 441 F.3d 92, 95-96 (2d Cir. 2006) (*per curiam*) (holding attorney-client privilege is applicable to materials retained in a prisoner's cell that comprise or recount conversations with counsel or outline matters that the client intends to discuss with counsel). *But see Fontroy v. Beard*, 559 F.3d 173, 180-81 (3d Cir. 2009) (upholding requirement that legal correspondents obtain "control number" to retain confidentiality).

²⁷³ *Procunier v. Martinez*, 416 U.S. 396, 417 (1974); *Bonner v. Outlaw*, 552 F.3d 673, 676-79 (8th Cir. 2009) (holding notice requirement applicable to all mail, including packages).

²⁷⁴ *Davis v. Goord*, 320 F.3d 346, 351-52 (2d Cir. 2003).

²⁷⁵ *Turner v. Safley*, 482 U.S. 78, 91-93 (1987); *Purnell v. Lord*, 952 F.2d 679 (2d Cir. 1992).

²⁷⁶ *See, e.g., Perry v. Secretary, Florida Dept. of Corrections*, 664 F.3d 1359 (11th Cir. 2011); *Samford v. Dretke*, 562 F.3d 674, 680 (5th Cir. 2009) (citing *Jones v. Diamond*, 594 F.2d 997, 1014 (5th Cir. 1979)) (upholding "negative correspondence lists" to bar prisoners from corresponding with particular individuals outside prison).

²⁷⁷ *Johnson v. Goord*, 445 F.3d 532, 535 (2d Cir. 2006) (*per curiam*) (holding that a rule prohibiting prisoners from receiving stamps through the mail and providing them only one free stamp a month for personal use did not violate rights of indigent prisoners); *Davidson v. Mann*, 129 F.3d 700 (2d Cir. 2002); *Gittens v. Sullivan*, 848 F.3d 389 (2d Cir. 1988).

²⁷⁸ This right extends to an interest in receiving unsolicited literature that a publisher may wish to distribute to prisoners. Publishers and other outsiders also have a First Amendment right to send material unsolicited to prisoners. *Prison Legal News v. Livingston*, 683 F.3d 201, 213-14 (5th Cir. 2012); *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1544 (2012).

²⁷⁹ *Thornburgh v. Abbott*, 490 U.S. 401, 404-05, 414-19 (1989) (upholding regulation permitting censorship of any publication "determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity" but barring censorship "solely because [the

though some prison censorship has been struck down as overbroad.²⁸⁰ Even a valid and neutral regulation may be misapplied, so courts must review the particular instance of censorship that is challenged.²⁸¹ Prison censors must observe procedural safeguards.²⁸² There must be

publication's] content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."); *see* *Munson v. Gaetz*, 673 F.3d 630 (7th Cir. 2012) (upholding denial of personal possession of *Physician's Desk Reference* and similar volume because of prison's interest in limiting "information on drugs," even though book was available in prison library); *Kaden v. Slykhuis*, 651 F.3d 966 (8th Cir. 2011) (holding allegation that Japanese comic book *Shonen Jump* was censored on grounds of violence while magazines such as *Guns and Ammo*, *Karate*, *Football Weekly* and *Boxing* were permitted stated a First Amendment claim); *Van den Bosch v. Raemisch*, 658 F.3d 778, 788 (7th Cir. 2011) (affirming censorship of publication critical of prison and parole officials based on officials' claims that some information was erroneous and the contents, though not inciting violence, "may reasonably encourage distrust of prison staff and threaten prison security"; affirming censorship of article that, *e.g.*, drew upon statistics on prison suicide to argue that prison officials "are literally killing" prisoners in segregation), *cert. denied sub nom.* *Jones-El v. Pollard*, 132 S.Ct. 1932 (2012); *Singer v. Raemisch*, 593 F.3d 529, 538-39 (7th Cir. 2010) (upholding ban on all *Dungeons and Dragons*-related material); *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (upholding censorship of pages of *Vibe* magazine displaying gang signs); *Jones v. Salt Lake County*, 503 F.3d 1147, 1155-56 (10th Cir. 2007) (upholding bans on "sexually explicit material" (referring to photographs of breasts and genitals) and "technical publications" (those containing information on weapons, escapes, making alcohol, hiding and moving contraband)); *Bahrapour v. Lampert*, 356 F.3d 969 (9th Cir. 2004) (upholding censorship of *Muscle Elegance* magazine under regulation restricting sexually explicit materials and *White Dwarf* under regulation restricting "role-playing or similar fantasy games or materials"); *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (*en banc*), *cert. denied*, 529 U.S. 1019 (2000) (upholding restriction on sexually explicit but non-obscene materials); *Wilson v. Buss*, 370 F.Supp.2d 782, 787-88 (N.D.Ind. 2005) (upholding a rule against "blatant homosexual materials," explained as meaning "if it's obvious, it's clear, by reading it or looking at it, that it's homosexual material"); *Lyon v. Grossheim*, 803 F.Supp. 1538, 1549 (S.D.Iowa 1992) (upholding a regulation excluding material that is "likely to be disruptive or produce violence"). *Compare* *Jones v. Caruso*, 569 F.3d 258, 273-75 (6th Cir. 2009) (granting preliminary injunction against broad prohibition on Uniform Commercial Code materials which "could be used to harass or threaten" others where narrower disciplinary rules would accomplish officials' purpose) *with* *Monroe v. Beard*, 536 F.3d 198 (3d Cir. 2008) (upholding rule barring various UCC-related materials), *cert. denied*, 129 S.Ct. 1647 (2009).

²⁸⁰ *See, e.g.*, *Cline v. Fox*, 319 F.Supp.2d 685 (N.D.W.Va. 2004) (striking down policy under which officials censored *Sophie's Choice*, *Myra Breckinridge*, and works by John Updike); *see also* *Shakur v. Selsky*, 391 F.3d 106, 115-16 (2d Cir. 2004) (questioning whether ban on all materials from "unauthorized organizations" was rationally related to security, and noting that individualized review through the existing Media Review Committee appeared to be an obvious alternative).

²⁸¹ *Murphy v. Missouri Dep't of Correction*, 372 F.3d 979, 986 (8th Cir.), *cert. denied*, 543 U.S. 991 (2004); *see* *Prison Legal News v. Lehman*, 397 F.3d 692, 703 (9th Cir. 2005) (holding constitutional a "third party legal material" policy that prohibited delivery of mail, including judicial decisions and litigation documents, which could create a risk of violence or harm, but holding that its discriminatory application to suppress materials that would embarrass prison officials or educate prisoners about their rights would violate the First Amendment). *Cf.* *George v. Smith*, 507 F.3d 605, 608 (7th Cir. 2007) (holding prisoner must describe the censored publication in the complaint sufficiently for the court to

individualized decisions about particular items and not just an “excluded list” of publications.²⁸³ The sender of literature, as well as the recipient, has a First Amendment-protected interest,²⁸⁴ and should receive notice and an opportunity to be heard.²⁸⁵

Non-content-based restrictions on reading material, such as variations on the “publisher only” rule, will be upheld if reasonable.²⁸⁶ In assessing reasonableness, access to radio or

assess whether its censorship states a claim).

²⁸² *Krug v. Lutz*, 329 F.3d 692, 696-97 and n.4 (9th Cir. 2003) (holding due process for rejection of correspondence extends to receipt of publications; appeal to someone other than the censor is a due process requirement); *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999) (holding notice of withholding of publication required); *Murphy v. Missouri Dept. of Corrections*, 814 F.2d at 1258; *Hopkins v. Collins*, 548 F.2d 503, 504 (4th Cir. 1977); *see* *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (holding sender of publication is entitled to notice of nondelivery).

In *Shakur v. Selsky*, in which the prisoner had been disciplined for possessing a publication, the court held that failure to send the publication to the Media Review Committee did not deny due process because the prisoner had received a disciplinary hearing consistent with the requirements of *Wolff v. McDonnell*. 391 F.3d at 118-19. The court does not appear to have considered what process would be due where publications were censored absent a disciplinary proceeding.

²⁸³ *Shakur v. Selsky*, 391 F.3d at 115-16 (holding that a ban on all publications from “unauthorized organizations” was a “shortcut” that “greatly circumscribes the universe of reading materials accessible to inmates” and appears “not sufficiently related to any legitimate and neutral penological objective”); *Murphy v. Missouri Dep’t of Corrections*, 372 F.3d 979, 976 (8th Cir.) (“Before the prison authorities censor materials, they must review the content of each particular item received.”), *cert. denied*, 543 U.S. 991 (2004); *Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997); *Murphy v. Missouri Dept. of Corrections*, 814 F.2d 1252, 1257-58 (8th Cir. 1987) (holding Aryan Nations publications must be reviewed individually). *Cf.* *Owen v. Wille*, 117 F.3d 1235, 1237-38 (11th Cir. 1997) (noting defendants did not dispute that a blanket ban on publications with nude photos would be unconstitutional, upholding exclusion of publications after individualized review), *cert. denied*, 522 U.S. 1126 (1998).

In *Shakur*, the court relied heavily on the Supreme Court’s statement that it was “comforted” in upholding the federal prisons’ censorship regulations by the “*individualized*” determinations and the lack of “shortcuts that would lead to *needless exclusions*.” 391 F.3d at 115 (emphasis added by court) (quoting *Thornburgh v. Abbott*, 490 U.S. at 416-17).

²⁸⁴ *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1544 (2012).

²⁸⁵ *Montcalm Publishing Co. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996); *Lawson v. Dugger*, 840 F.2d 781, 786 (11th Cir. 1987), *rehearing denied*, 840 F.2d 779 (11th Cir. 1988), *vacated and remanded on other grounds*, 490 U.S. 1078 (1989).

²⁸⁶ *Bell v. Wolfish*, 441 U.S. 520, 550-52 (1979) (detainee case); *Jones v. Salt Lake County*, 503 F.3d 1147, 1157-59 (10th Cir. 2007) (upholding policy limiting donations of paperback books to the jail library and allowing them to be ordered only from the publisher with permission; upholding prohibition on catalogs). *But see* *Prison Legal News v. Lehman*, 397 F.3d 692, 700-01 (9th Cir. 2005) (striking down a prohibition on receipt of non-subscription bulk mail and catalogs); *Jacklovich v. Simmons*, 392 F.3d

television is not an adequate alternative to reading material; the question is whether a broad range of publications may be read under the challenged policy.²⁸⁷ Courts have struck down prohibitions on newspapers.²⁸⁸ Prison officials may restrict reading material in punitive segregation, although most cases upholding this practice have involved short periods of time.²⁸⁹ The Supreme Court has upheld a prohibition on magazines, newspapers, and personal photographs in a high-security administrative segregation unit housing “the 40 most intractable inmates” in a state prison system for indefinite periods.²⁹⁰

The right to read religious literature would appear to be governed by a more favorable legal standard under the Religious Land Use and Institutionalized Persons Act.²⁹¹ However, some cases involving religious literature have addressed broad categories of material rather than

420, 429-32 (10th Cir. 2004) (questioning reasonableness of prohibition on receiving any publications for the first 120 days after intake and banning the receipt of gift publications and subscriptions); *Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004) (striking down application of publisher only rule to clippings received in correspondence); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996) (holding publisher only rule may be unconstitutional where it combines with other circumstances to impose severe limits on availability of reading material); *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (denying summary judgment to prison officials who maintained a publisher only rule for newspapers and prohibited enclosure of newspaper clippings in correspondence); *see also Ashker v. California Dep’t of Corrections*, 350 F.3d 917, 923-24 (9th Cir. 2003) (striking down requirement of “approved vendor” labels which added nothing to security and obstructed receipt of reading material); *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002) (striking down prohibition on receipt of publications as gifts); *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001) (striking down prohibition on publications sent third or fourth class).

²⁸⁷ *Jacklovich v. Simmons*, 392 F.3d 420, 431 (10th Cir. 2004).

²⁸⁸ *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986); *Mann v. Smith*, 796 F.2d 79, 82-83 (5th Cir. 1986) (ban on all newspapers and magazines violated First Amendment).

²⁸⁹ *Gregory v. Auger*, 768 F.2d 287, 289-91 (8th Cir.) (inmates in disciplinary detention could be deprived of all but first class mail of a “personal, legal or religious” nature where detention was limited to 60 days), *cert. denied*, 474 U.S. 1035 (1985); *Daigre v. Maggio*, 719 F.2d 1310, 1312-13 (5th Cir. 1983) (ban on newspapers and magazines in segregation upheld as applied to an inmate who served ten days); *Pendleton v. Housewright*, 651 F.Supp. 631, 635 (D.Nev. 1986) (denial of reading materials upheld when limited to a few days at a time).

²⁹⁰ *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion). *Beard* is discussed extensively in § II.C, above.

²⁹¹ 42 U.S.C. § 2000cc-1; *see Washington v. Klem*, 497 F.3d 272, 282-86 (3d Cir. 2007) (holding officials failed to show that a ten-book limit on religious materials was the least restrictive means of serving compelling interests in safety and security); *Rowe v. Davis*, 373 F.Supp.2d 822, 825-26 (N.D.Ind. 2005) (so holding under RLUIPA); *Lawson v. Dugger*, 844 F.Supp. 1538 (S.D.Fla. 1994) (so holding under the Religious Freedom Restoration Act). *Cf. Iqbal v. Hasty*, 490 F.3d 143, 173-74 (2d Cir. 2007) (holding repeated confiscation of Koran stated a First Amendment claim), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

reviewing the content of each challenged item,²⁹² incorrectly in my view.²⁹³

3. Complaining

Prison officials may ban or restrict prisoner organizations that oppose or criticize prison policies in any organized fashion.²⁹⁴ Courts have also upheld restrictions on informal or social association by prisoners.²⁹⁵ The Second Circuit has held that petitions may be prohibited in prison.²⁹⁶

Grievances filed through an official grievance procedure are constitutionally protected,²⁹⁷

²⁹² See *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002) (affirming ban on Five Percenter literature in connection with treatment of Five Percenters as a “security risk group”). *Contra*, *Marria v. Broaddus*, 2003 WL 21782633 (S.D.N.Y., July 31, 2003), *relief entered*, 2004 WL 1724984 (S.D.N.Y., July 30, 2004).

²⁹³ And in the view of the Seventh Circuit, apparently. See *Borzzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006) (upholding censorship of supposed religious literature that advocated racial violence; declining to address alleged overbreadth of regulation, stating that “[a]nalysis under RLUIPA is specific. . .”).

²⁹⁴ *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977); *Akbar v. Borgen*, 803 F.Supp. 1479, 1485-86 (E.D.Wis. 1992) (upholding a rule forbidding “unsanctioned group activity” on its face and as applied to a prisoner seeking to form a Muslim organization); *Hudson v. Thornburgh*, 770 F.Supp. 1030, 1036 (W.D. Pa. 1991) (disbanding of Association of Lifers upheld because prison officials believed it was a security threat), *aff’d*, 980 F.2d 723 (3d Cir. 1992); *Thomas v. U.S. Secretary of Defense*, 730 F.Supp. 362, 366 (D.Kan. 1990) (white inmates could be denied the right to form a “European Heritage Club”); see *Toston v. Thurmer*, 689 F.3d 828, 830-31 (7th Cir. 2012) (finding no First Amendment violation where officials seized plaintiff’s handwritten copy of the Ten-Point Program of the Black Panther Party, copied from books in the prison library, and disciplined him, where prison officials thought he would use it to organize other prisoners). *But see* *Nicholas v. Miller*, 189 F.3d 191 (2d Cir. 1999) (per curiam) (holding prison officials were not entitled to summary judgment after prohibiting formation of Prisoners’ Legal Defense Center).

²⁹⁵ *Burnette v. Phelps*, 621 F.Supp. 1157, 1159-60 (M.D.La. 1985) (rule against speaking in dining hall did not violate First Amendment); *Dooley v. Quick*, 598 F.Supp. 607, 612 (D.R.I. 1984) (as long as there is some opportunity for human contact, “decisions about how and when inmates may see and/or contact other inmates” are up to prison officials), *aff’d*, 787 F.2d 579 (1st Cir. 1986); *State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 461 N.W.2d 816, 820-21 (Wis.App. 1990) (ban on “ritualistic greetings” including embracing and kissing upheld as a means of prohibiting “gang symbolism”).

²⁹⁶ See *Duamutef v. O’Keefe*, 98 F.3d 22, 24 (2d Cir. 1996) (holding petitions may be prohibited). *But see, e.g.*, *Bridges v. Russell*, 757 F.2d 1155, 1156-57 (11th Cir. 1985) (allegation of transfer in retaliation for a petition stated a claim). Their status may depend on whether prison officials have, in fact, enacted a rule prohibiting them. See *Gayle v. Gonyea*, 313 F.3d 677, 680 n.3 (2d Cir. 2002) (questioning whether prison rule gave notice that petitions were forbidden).

²⁹⁷ *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002). *Cf.* *Hamilton v. County of San Bernardino*, 325 F.Supp.2d 1087, 1090 (C.D.Cal. 2004) (striking down statute making it a misdemeanor

as are criticisms made in outgoing letters,²⁹⁸ communication with official agencies,²⁹⁹ orderly participation in forums designed for prisoners to express their views,³⁰⁰ complaints addressed directly to prison officials,³⁰¹ and other activities that do not threaten security.³⁰² Communications may not be protected if they involve direct confrontation with prison personnel,³⁰³ are disrespectful or abusive to or about staff,³⁰⁴ or contain advocacy or threats of

knowingly to file a false misconduct allegation against a police officer).

²⁹⁸ *Procunier v. Martinez*, 416 U.S. 396, 413-16 (1974).

²⁹⁹ *Brown v. Crowley*, 312 F.3d 782, 789-91 (6th Cir. 2002) (complaint to state police); *Meriwether v. Coughlin*, 879 F.2d 1037, 1046 (2d Cir. 1989) (correspondence with state officials and public interest organizations); *Franco v. Kelly*, 854 F.2d 584, 589-90 (2d Cir. 1988) (cooperation with Inspector General investigating staff misconduct).

³⁰⁰ *See Meriwether v. Coughlin*, 879 F.2d at 1046 (meetings with Superintendent to discuss problems in prison).

³⁰¹ *Newsom v. Morris*, 888 F.2d 371, 375-77 (6th Cir. 1989) (inmate disciplinary assistants who lost their jobs for complaining to the warden about the disciplinary board chairman were entitled to reinstatement); *Ustrak v. Fairman*, 781 F.2d 573, 577-78 (7th Cir.) (denial of transfer because of letters to warden was unconstitutional), *cert. denied*, 479 U.S. 824 (1986); *Salahuddin v. Harris*, 684 F.Supp. 1224, 1226-27 (S.D.N.Y. 1988) (letter to Superintendent and other officials protesting the discipline of another inmate was constitutionally protected).

³⁰² *Cain v. Lane*, 857 F.2d 1139, 1143 (7th Cir. 1988) (holding discipline for trying to document inmate complaints about conditions stated a First Amendment claim); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (holding rule prohibiting “spreading rumors” vague and overbroad on its face and as applied to a prisoner who told his mother he had been denied medical care, resulting in her putting the information on the Internet).

³⁰³ *See, e.g., Watkins v. Casper*, 599 F.3d 791, 797-98 (7th Cir. 2010) (holding public challenge to staff member’s directives and “confrontational, disorderly” speech was not constitutionally protected; citing *Freeman*); *Freeman v. Texas Dep’t of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) (holding public rebuke of chaplain, which caused other prisoners to walk out of service, was not “consistent with his status as a prisoner” and was not protected); *Garrido v. Coughlin*, 716 F.Supp. 98, 101 (S.D.N.Y. 1989) (“verbal confrontation” of officers over their treatment of another inmate); *Pollard v. Baskerville*, 481 F.Supp. 1157, 1160 (E.D.Va. 1979) (accusation that a guard brought in contraband), *aff’d*, 620 F.2d 294 (4th Cir. 1980); *Riggs v. Miller*, 480 F.Supp. 799, 804 (E.D.Va. 1979) (“bickering, argumentative conversation”); *Craig v. Franke*, 478 F.Supp. 19, 21 (E.D.Wis. 1979) (accusation that an officer was drunk); *Durkin v. Taylor*, 444 F.Supp. 879, 881-83 (E.D.Va. 1979) (statement that “I am tired of chickenshit rules”).

³⁰⁴ *Gibbs v. King*, 779 F.2d 1040, 1045-46 (5th Cir.), *cert. denied*, 476 U.S. 1117 (1986); *accord, Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (calling disciplinary hearing officer “a foul and corrupted bitch” violated rule against insolent speech and was not protected); *Hale v. Scott*, 371 F.3d 917, 918-19 (7th Cir. 2004) (holding complaint letter embellished with a statement that an officer was rumored to be “screwing a lot of the officers on the midnight shift” was not protected); *Ustrak v. Fairman*, 781

unlawful or improper action.³⁰⁵ A “threat” to take a constitutionally protected action is itself constitutionally protected.³⁰⁶ The Second Circuit has held that prisoners’ complaints are protected regardless of whether they involve matters of public, as opposed to merely personal, concern; it declined to apply the contrary rule of public employee cases.³⁰⁷

“The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech.”³⁰⁸ Such claims may be litigated by alleging and proving “a

F.2d at 580 (upholding regulation forbidding “being disrespectful” or verbally abusing employees); *Savage v. Snow*, 575 F.Supp. 828, 836 (S.D.N.Y. 1983) (prisoner could be disciplined for addressing an officer in an “abusive” manner).

³⁰⁵ *Pilgrim v. Luther*, 571 F.3d 201, 204-05 (2d Cir. 2009) (upholding discipline for pamphlet advocating work stoppage); *Chavis v. Struebel*, 317 F.Supp.2d 232, 238 (W.D.N.Y. 2004) (holding prisoner could be disciplined for complaint letter threatening to “get even with” officers who searched his cell and to “deal with” a lieutenant for being racist); *Jones v. State*, 447 N.W.2d 556, 557-58 (Iowa App. 1989) (obscenities about prison staff and threat to “get even” could be punished); *Nieves v. Coughlin*, 157 A.D.2d 945, 550 N.Y.S.2d 205, 206 (N.Y.App.Div. 1990) (statement “I’ll do a year in the box and then come out strong on you” could be punished under rule against threats).

³⁰⁶ *See Cavey v. Levine*, 435 F.Supp. 475, 481-83 (D.Md. 1977) (prisoner could not be punished for threats to write to the press about an inmate suicide), *aff’d sub nom. Cavey v. Williams*, 580 F.2d 1047 (4th Cir. 1978); *see also Hargis v. Foster*, 312 F.3d 404 (9th Cir. 2002) (holding that a disciplinary conviction for “coercion” for mentioning pending litigation to an officer presented a jury question as to reasonableness).

³⁰⁷ *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000); *accord, Watkins v. Kasper*, 599 F.3d 791, 795–96 (7th Cir. 2010); *Thaddeus-X v. Blatter*, 175 F.3d 378, 392 (6th Cir. 1999) (declining to apply public employee law to prisoner’s access to courts claim).

³⁰⁸ *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004) (holding a First Amendment claim is stated by allegations “(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.”) (citation omitted); *accord, Santiago v. Blair*, ___ F.3d ___, 2013 WL 692772, *6 (8th Cir. 2013) (holding “a reasonable jury could find that threats of death, issued by a correctional officer tasked with guarding a prisoner’s segregated cell, would chill a prisoner of ordinary firmness from engaging in the prison grievance process”); *Smith v. Levine*, 2013 WL 362905, *3 (2d Cir. Jan. 31, 2013) (holding retaliatory transfer can violate First Amendment); *Johnson v. Burge*, 2012 WL 6621308, *2 (2d Cir., Dec. 20, 2012) (unpublished) (holding retaliation claims are not limited to retaliation for formal grievances or to matters that will lead to litigation); *King v. Zamiara*, 680 F.3d 686 (6th Cir. 2012) (directing entry of judgment against officials who increased prisoner’s security classification based on his pursuit and instigation of complaints and grievances), *cert. denied*, 133 S.Ct. 985 (2013); *Watson v. Carter*, 668 F.3d 1108, 1114-17 (9th Cir. 2012) (allegation of retaliation for grievances stated a First Amendment claim); *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009); *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009) (allegation of retaliation for submitting an affidavit in a lawsuit about a prisoner’s death stated a First Amendment claim); *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003) (same); *Mitchell v. Farcass*, 112 F.3d 1483, 1485, 1490 (11th Cir. 1997) (holding allegation that plaintiff was placed in segregation after complaining to the NAACP stated a claim); *Wildberger v.*

chronology of events from which retaliation may plausibly be inferred.”³⁰⁹

4. Communication with the media.

Prisoners “have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech.”³¹⁰ However, prison officials have substantial discretion over how press contacts are made as long as they leave open adequate alternatives. Thus, they may ban interviews of prisoners by media representatives as long as prisoners are free to write letters to the press or communicate via their other visitors.³¹¹ In general, the press has no more right to enter jails or prisons than does the general public.³¹²

Prison officials may not restrict prisoners’ right to write letters to the press or to write for publication unless they have substantial reasons,³¹³ and may not retaliate for such activity.³¹⁴

Bracknell, 869 F.2d 1467, 1468 (11th Cir. 1989) (same re filing a grievance). Retaliation claims are discussed in more detail below at § IV.A.3.

³⁰⁹ Cain v. Lane, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988); *accord*, Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012); *see* Gayle v. Gonyea, 313 F.3d 677, 683 (2d Cir. 2002) (holding “temporal proximity” of alleged retaliation to grievance supported a retaliation claim).

³¹⁰ Kimberlin v. Quinlan, 774 F.Supp. 1, 3-4 (D.D.C. 1991); *accord*, Abu-Jamal v. Price, 154 F.3d 128, 135-36 (3d Cir. 1998).

³¹¹ Pell v. Procunier, 417 U.S. 817, 822-28 (1974); *see* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (reversing an injunction granting television station access to jail; no majority opinion); Hammer v. Ashcroft, 570 F.3d 798, 801-05 (7th Cir. 2009) (en banc) (upholding denial of face-to-face media interviews by prisoners in special confinement units), *cert. denied*, 130 S.Ct. 1735 (2010). *But see* Mujahid v. Sumner, 807 F.Supp. 1505, 1509-11 (D.Haw. 1992) (rule barring both visits and correspondence with members of the press was unconstitutional), *aff’d*, 996 F.2d 1226 (9th Cir. 1993).

³¹² Pell v. Procunier, 417 U.S. at 834; Saxbe v. Washington Post Co., 417 U.S. 843, 849-50 (1974).

³¹³ Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (enjoining application of rule against engaging in a business or profession to prisoner’s writing for publication); Owen v. Lash, 682 F.2d 648, 650-53 (7th Cir. 1982) (ban on correspondence with newspaper reporter was unconstitutional); Jordan v. Pugh, 504 F.Supp.2d 1109, 1118-26 (D.Colo. 2007) (striking down ban on writing under a byline for news media; holding restrictions on writing are governed by *Procunier* standard and not *Turner*), *motion to amend denied*, *motion for findings granted*, 2007 WL 2908931 (D.Colo., Oct. 4, 2007); Mujahid v. Sumner, 807 F.Supp. 1505, 1509-11 (D.Haw. 1992) (ban on correspondence with members of the press unless they had been friends before the prisoner was incarcerated was unconstitutional), *aff’d*, 996 F.2d 1226 (9th Cir. 1993); Martyr v. Mazur-Hart, 789 F.Supp. 1081, 1089 (D.Or. 1992) (enjoining interference with a mental patient’s letters to the media); Tyler v. Ciccone, 299 F.Supp. 684, 688 (W.D.Mo. 1969) (restrictions on detainee’s preparation of manuscripts struck down). *But see* Martin v. Rison, 741 F.Supp. 1406, 1410-18 (N.D.Cal. 1990) (upholding prison regulations forbidding prisoners to write for payment, act as reporters or publish under a byline in the news media, but permitting them to write letters), *vacated*

Involuntary media exposure may violate the Constitution.³¹⁵

5. Visiting

The Supreme Court has upheld a wide variety of severe restrictions on prison visiting, though it declined to hold that recognition of a constitutional right to visit was inconsistent with incarceration.³¹⁶ It has also held that there is no due process right to procedural protections when visiting is suspended unless state law creates a liberty interest,³¹⁷ and that qualification is of debatable validity in light of the Court's subsequent prison due process jurisprudence.³¹⁸

6. Telephones

Prisoners have been held to have a First Amendment right to telephone access subject to reasonable limitations.³¹⁹ I am not aware of cases holding limitations unreasonable for convicted prisoners, though there are such decisions for pre-trial detainees, reflecting the fact that jail conditions are often more restrictive than prison conditions, and the fact that persons awaiting trial generally have greater need for telephone access.³²⁰ Severe restrictions on telephone use

as moot sub nom. Chronicle Publishing Co. v. Rison, 962 F.2d 959 (9th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

³¹⁴ Spruytte v. Hoffner, 181 F.Supp.2d 736, 742 (W.D.Mich. 2001) (awarding damages to plaintiffs subjected to retaliation for letter to newspaper); Kimberlin v. Quinlan, 774 F.Supp. 1, 4 n. 6 (D.D.C. 1991) and cases cited; Cavey v. Levine, 435 F.Supp. at 483; *see also* Pratt v. Rowland, 770 F.Supp. 1399, 1406 (N.D.Cal. 1991) (defendants enjoined from threatening, harassing or punishing the plaintiff because of his media attention).

³¹⁵ Demery v. Arpaio, 378 F.3d 1020, 1029-32 (9th Cir. 2004) (striking down policy of broadcasting live images via the Internet of pre-trial detainees in non-public areas of a jail), *cert. denied*, 545 U.S. 1139 (2005); Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (holding "perp walk" violated the Fourth Amendment).

³¹⁶ Overton v. Bazzetta, 539 U.S. 126 (2003); *see* Dunn v. Castro, 621 F.3d 1196 (9th Cir. 2010) (holding right to be free from temporary interruption of visits with children was not clearly established and defendants were immune); Samford v. Dretke, 562 F.3d 674, 682 (5th Cir. 2009) (upholding exclusion of children of prisoner from visiting list where prisoner had assaulted their mother in their presence); Wirsching v. Colorado, 360 F.3d 1191, 1199-1201 (10th Cir. 2004) (upholding under *Overton* the denial to a sex offender who refused to participate in a treatment program of visits with his own children).

³¹⁷ Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460-61 (1989).

³¹⁸ *See* Sandin v. Conner, 515 U.S. 472 (1995).

³¹⁹ Johnson v. State of California, 207 F.3d 650, 656 (9th Cir. 2000); Washington v. Reno, 35 F.3d 1093, 1100-01 (6th Cir. 1994).

³²⁰ Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996); Johnson-El v. Schoemehl, 878 F.2d 1043, 1052-53 (8th Cir. 1989); Johnson by Johnson v. Brelje, 701 F.2d 1201, 1207-08 (7th Cir. 1983); *see* Carlo

have been upheld for particular prisoners to protect the safety of witnesses and prevent further criminal activity.³²¹ Surveillance of prisoners' telephone conversations usually does not violate the Omnibus Crime Control and Safe Streets Act, either because the prisoners have given implied consent to monitoring by using telephones that they have been warned are monitored,³²² or because the monitoring falls under the statute's exception for interception "by an investigative or law enforcement officer in the ordinary course of his duties. . . ."³²³ Such surveillance generally does not violate the Fourth Amendment either.³²⁴ To date, prisoners and their families have failed to find a legal handle on the exorbitant rates charged by some prison long-distance carriers, with kickbacks to the prison system.³²⁵

7. Voting

Convicted felons may be disenfranchised,³²⁶ and usually are at least while they are incarcerated depending on state law. Pre-trial detainees and misdemeanants are generally eligible to vote, and must be provided a means to do so, usually absentee ballots.³²⁷ Challenges to felon disenfranchisement measures in the Second Circuit and other courts have mostly been unsuccessful.³²⁸ Most recently, a federal appeals court has upheld the conditioning of restoring

v. *City of Chino*, 105 F.3d 493 (9th Cir. 1997) (holding that arrestees are constitutionally entitled to telephone access because being held incommunicado is a substantial deprivation of liberty).

³²¹ *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000).

³²² *See, e.g., U.S. v. Willoughby*, 860 F.2d 15, 19-20 (2d Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989).

³²³ *See, e.g., U.S. v. Friedman*, 300 F.3d 111, 122-23 (2d Cir. 2002), *cert. denied*, 538 U.S. 981 (2003).

³²⁴ *See U.S. v. Novak*, 531 F.3d 99, 101-03 (1st Cir. 2008) (O'Connor, J.) (mistaken surveillance of attorney-client calls did not violate Fourth Amendment in light of client's consent to monitoring generally; Sixth Amendment claims waived); *Friedman*, 300 F.3d at 123 (holding notice of telephone surveillance meant the prisoner had no expectation of privacy in his calls); *Willoughby*, 860 F.2d at 21 (holding surveillance of detainees' calls not unreasonable under law governing pre-trial detainees' rights).

³²⁵ *See Holloway v. Magness*, 666 F.3d 1076 (8th Cir. 2012) (holding 45% commission on prisoner telephone calls did not violate the First Amendment), *cert. denied*, 133 S.Ct. 130 (2012); *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *Johnson v. State of California*, 207 F.3d 650 (9th Cir. 2000) (holding high rates do not infringe the First Amendment unless they deny telephone access altogether).

³²⁶ *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974).

³²⁷ *O'Brien v. Skinner*, 414 U.S. 524, 530-31, 533 n.2 (1974).

³²⁸ *See Farrakhan v. Gregoire*, 623 F.3d 990, 993-94 (9th Cir. 2010) (per curiam) (en banc) (upholding felon disenfranchisement statute against Voting Rights Act challenge absent evidence of intentional discrimination); *Hayden v. Patterson*, 594 F.3d 150 (2d Cir. 2010) (rejecting Voting Rights

former felons' voting right on payment of court-ordered victim restitution and child support obligations.³²⁹

8. Religious exercise

Prisoners are constitutionally entitled to the free exercise of religion subject to the reasonable relationship test of *Turner v. Safley*.³³⁰ Prisoners' religious exercise is also protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires state or local governments that accept federal funds for their correctional programs to justify substantial burdens on prisoners' religious exercise by showing that they are the least restrictive means of serving a compelling interest.³³¹ The same standard is imposed by the Religious Freedom Restoration Act (RFRA)³³² on the federal government, that statute having been struck down by the Supreme Court as applied to state governments.³³³ Courts have held that this standard is to be applied with regard to the "special circumstances" of prison security, which is a compelling

Act challenge not decided in *Hayden v. Pataki*, below); *Simmons v. Galvin*, 575 F.3d 24, 42-45 (1st Cir. 2009) (Massachusetts constitutional amendment disqualifying prisoners from voting did not violate the Ex Post Facto Clause), *cert. denied*, 131 S.Ct. 412 (2010); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 546 U.S. 1015 (2005).

In *Hayden v. Pataki*, the court remanded for district court consideration of the question whether the counting of prisoners as residents of the communities where they are incarcerated results in dilution of minority votes in the communities where they resided. 449 F.3d at 370-71. However, plaintiffs conceded on remand that such a claim was not part of their original complaint. *Hayden v. Pataki*, 2006 WL 2242760 (S.D.N.Y., Aug. 4, 2006).

³²⁹ *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 2903 (2011). The court held *inter alia* that since felons had been lawfully stripped of their voting rights, only a rational basis need be shown to justify restrictions on their restoration.

³³⁰ 482 U.S. 78 (1987); *see O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (applying reasonable relationship standard to religious issue). *But see McCorkle v. Johnson*, 881 F.2d 993, 996 (11th Cir. 1989) (stating that Satanist practices, "*and the beliefs that encourage them*, cannot be tolerated in a prison environment since they pose security threats and are directly contrary to the goals of the institution"; denying plaintiff Satanic literature and medallion) (emphasis supplied).

Numerous free exercise cases are cited in § II.A-C, above, in connection with discussion of the *Turner* standard.

³³¹ 42 U.S.C. § 2000cc-1. Not every burden on religious exercise is actionable under RLUIPA. For example, one court has held that transfer to a prison with fewer opportunities for religious exercise, not done for the purpose of limiting religious exercise, is not actionable under RLUIPA. *Bader v. Wrenn*, 675 F.3d 95, 99 (1st Cir. 2012).

³³² 42 U.S.C. § 2000bb *et seq.*

³³³ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding RFRA applicable to federal officers and agencies).

interest,³³⁴ but there seems no question that it is intended to be more favorable to prisoners than is the *Turner* “reasonable relationship” standard applied to First Amendment claims.³³⁵ Otherwise, why bother? Notwithstanding this point, there are some decisions under RLUIPA which appear to be indistinguishable in their analytic approach from the prison First Amendment analysis that RLUIPA was intended to replace.³³⁶

Among courts (including the Second Circuit) that do treat the RLUIPA/RFRA standard as making a difference, the analytical method is well illustrated by *Warsoldier v. Woodford*,³³⁷ in which the court ruled that a Native American prisoner was entitled to an injunction against the enforcement of a three-inch limit on hair length. Though the court agreed that prison security, the

³³⁴ See *Murphy v. Missouri Dep’t of Correction*, 372 F.3d 979, 987-88 (8th Cir.) (citing legislative history indicating that, as under RFRA, courts should give “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources,” but strike down “inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations”), *cert. denied*, 543 U.S. 991 (2004); *Lawson v. Singletary*, 85 F.3d 502, 510 (11th Cir. 1996) (upholding under RFRA, as applied to religious publications, a rule censoring material that “depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption” or “otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person”).

³³⁵ *Jova v. Smith*, 582 F.3d 410, 415 (2d Cir. 2009) (“As a general matter, the RLUIPA imposes duties on prison officials that exceed those imposed by the First Amendment.”), *cert. denied*, 130 S.Ct. 2111 (2010); see *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) (“RLUIPA . . . prohibits prisons that receive federal funding from substantially burdening an inmate’s religious exercise unless the step in question is the least restrictive way to advance a compelling state interest. . . . The first amendment, by contrast, does not require the accommodation of religious practice: states may enforce neutral rules.”); *Freeman v. Texas Dep’t of Criminal Justice*, 369 F.3d 854, 858 n.1 (5th Cir. 2004) (“The RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impinge on inmates’ free exercise of religion.”); *Murphy v. Missouri Dep’t of Correction*, 372 F.3d 979, 983-85 (8th Cir.) (upholding denial of group worship services to racial separatist church under the First Amendment, but finding a triable issue under RLUIPA), *cert. denied*, 543 U.S. 991 (2004); *Kikumura v. Hurley*, 242 F.3d 950, 957-58, 960-62 (10th Cir. 2001) (upholding the exclusion of a religious adviser under *Turner/O’Lone*, but stating prisoner might prevail under the RFRA standard; advisor had been excluded because he rather than the plaintiff had initiated the contact).

³³⁶ See *Fegans v. Norris*, 537 F.3d 897, 902-06 (8th Cir. 2008) (upholding hair length restriction and prohibition on beards, rejecting usual RLUIPA requirement of religious exemptions); *Baranowski v. Hart*, 486 F.3d 112, 125-26 (5th Cir. 2007) (upholding denial of a kosher diet, holding “controlling costs” to be a compelling governmental interest), *cert. denied*, 552 U.S. 1062 (2007); *Hovenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir.) (upholding hair length restrictions, stating district court “improperly substituted its judgment for that of prison officials” in applying the least restrictive means test), *cert. denied*, 549 U.S. 875 (2006).

³³⁷ 418 F.3d 989 (9th Cir. 2005).

alleged justification for the policy, is a compelling interest,³³⁸ it held that prison officials did not show that their policy met the least restrictive alternative test, since the particular prisoner was held at a minimum security prison, and the least restrictive alternative may be different there than in a higher-security institution.³³⁹ “Moreover, even outside the context of a minimum security facility, [the prison system] cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.”³⁴⁰ This assertion contrasts sharply with the Supreme Court’s statement that its reasonable relationship standard “is not a ‘least restrictive alternative’ test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.”³⁴¹ The alternatives available in *Warsoldier* included the creation of religious exemptions, which the defendants had dismissed out of hand.³⁴² The court noted that other prison systems, including the Federal

³³⁸ *Warsoldier*, 481 F.3d at 998; *accord*, *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Jova v. Smith*, 582 F.3d 410, 416-17 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2111 (2010). In *Jova*, the court held that a prohibition on sparring and receiving martial arts training, even though these were claimed to be a religious requirement, is permissible under RLUIPA in order to further safety and institutional security.

³³⁹ This relatively searching examination of defendants’ justifications is characteristic of RLUIPA/RFRA analysis. *See, e.g.*, *Spratt v. Rhode Island Dep’t of Corrections*, 482 F.3d 33, 38-40 (1st Cir. 2007); *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (officials “must demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling interest”; refusing to assume without proof that rule against “casting of spells/curses” was necessary to avoid fights); *see also Smith v. Ozmint*, 578 F.3d 246, 252-54 (4th Cir. 2009) (requirement of short haircuts was not adequately supported by an affidavit prepared in another case for another prison of a different security level); *Shakur v. Schriro*, 514 F.3d 878, 889-90 (9th Cir. 2008) (holding affidavit from religious official, rather than food service or procurement official, which was partly based on hearsay from other prison personnel, was insufficient to establish expense of providing Halal or kosher meat to Muslims).

³⁴⁰ *Warsoldier*, 418 F.3d at 999; *accord*, *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2111 (2010); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007); *Spratt v. Rhode Island Dep’t of Corrections*, 482 F.3d 33, 40-41 (1st Cir. 2007).

³⁴¹ *Turner v. Safley*, 482 U.S. 78, 90-91 (1987).

³⁴² The availability of individual exemptions is a significant aspect of RLUIPA/RFRA analysis. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32 (2006) (requiring exemption from controlled substance statute for religious group that used a Schedule I drug sacramentally; under RFRA, government cannot merely “echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”); *Couch v. Jabe*, 679 F.3d 197, 202-03 (4th Cir. 2012) (endorsing religious exemption from prohibition on beards); *Smith v. Ozmint*, 578 F.3d 246, 252-54 (4th Cir. 2009) (prison officials failed to show why short hair requirement must be uniform); *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (prison officials failed to show that denial of Halal or kosher meat to Muslims was the least restrictive alternative where they failed to consider an exemption for the plaintiff, who had gastrointestinal problems).

Bureau of Prisons, either do not have such hair length policies or do provide religious exemptions. The court stated: “Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.”³⁴³ This statement, too, is at odds with the Supreme Court’s dismissal of such arguments under a reasonable relationship standard,³⁴⁴ as well as with *Turner*’s allocation of the burden of proof generally to plaintiffs.

The Supreme Court has upheld the constitutionality of RLUIPA against a claim that it constituted an establishment of religion,³⁴⁵ and prisoners’ knowledge and use of the statute is clearly growing. Further, the Second Circuit has held that the failure to cite a statute, or cite the correct statute, in a complaint does not affect the merits if the proper facts are pled, and has directed consideration of RLUIPA in a case where the prisoner had only explicitly raised the Constitution.³⁴⁶ A ruling for plaintiff under RFRA or RLUIPA will obviate any need for decision of a First Amendment claim on the same facts,³⁴⁷ at least in an injunctive case against state defendants. The Supreme Court has held that sovereign immunity bars awards of damages against state officials or agencies under RLUIPA.³⁴⁸

on the Muslim vegetarian diet).

³⁴³ *Warsoldier*, 418 F.3d at 1000; *accord*, *Smith v. Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009) (noting failure to explain why long hair was acceptable at women’s prison); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2111 (2010); *Spratt v. Rhode Island Dep’t of Corrections*, 482 F.3d at 42.

³⁴⁴ *See Bell v. Wolfish*, 441 U.S. 520, 554 (1979). The *Wolfish* Court, applying a reasonable relationship standard to restrictions in pre-trial detention, rejected any constitutional “‘lowest common denominator’ security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.” *Id.* While this statement does not directly contradict *Warsoldier*, it suggests a very different sort of inquiry

³⁴⁵ *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Court did not reach arguments that RLUIPA exceeds Congress’s authority under the Spending and Commerce Clauses and violates the Tenth Amendment, and the argument that “in the space between the Free Exercise and Establishment Clauses, the States’ choices are not subject to congressional oversight. 544 U.S. at 718 n.7. These arguments have been unsuccessful in the lower courts. *See, e.g., Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005) (on remand from Supreme Court, rejecting Spending Clause and Tenth Amendment arguments); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (same).

³⁴⁶ *McEachin v. McGuinnis*, 357 F.3d 197, 199 n.2, 204 (2d Cir. 2003). The court has subsequently applied that principle to a case filed before RLUIPA was enacted. *Dingle v. Zon*, 189 Fed.Appx. 8, 10, 2006 WL 1527156 (2d Cir. 2006) (unpublished).

³⁴⁷ *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008).

³⁴⁸ *Sossamon v. Texas*, ___ U.S. ___, 131 S.Ct. 1651 (2011). The Court distinguished earlier case law permitting damages against municipal defendants under other statutory schemes, noting *inter*

The measure of a prisoner's (or anyone else's) religious rights is his or her sincerely held beliefs, and not the court's or prison authorities' view of what beliefs are valid or central to a particular belief system.³⁴⁹ To enjoy First Amendment protection, beliefs need not be

alia that such defendants do not enjoy sovereign immunity. 131 S.Ct. at 1660 & n.6. It therefore may be that RLUIPA damages can be awarded against municipal defendants. Sovereign immunity is also not applicable to claims against defendants in their individual capacities, but the majority of decisions hold that RLUIPA does not support individual capacity liability of state officials. *Nelson v. Miller*, 570 F.3d 868, 886-89 (7th Cir. 2009) (rejecting individual capacity damages to avoid serious constitutional question whether Spending Clause authority extended to creating damages remedies against individuals); *Rendelman v. Rouse*, 569 F.3d 182, 187-89 (4th Cir. 2009) (holding RLUIPA did not give sufficient notice to state officials that they could be liable individually if they accepted federal funds); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009) (similar to *Nelson*), *aff'd on other grounds*, ___ U.S. ___, 131 S.Ct. 1651 (2010); *Smith v. Allen*, 502 F.3d 1255, 1276 & n.12 (11th Cir. 2007) (similar to *Nelson*); *Pugh v. Goord*, 571 F.Supp.2d 477, 506-07 (S.D.N.Y. 2008). *Contra*, *Orafan v. Goord*, 2003 WL 21972735, *9 (N.D.N.Y., Aug. 11, 2003).

³⁴⁹ *Grayson v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) (“Heretics have religious rights. . . . [A] religious believer who does more than he is strictly required to do is nevertheless exercising his religion”); *Vinning-El v. Evans*, 657 F.3d 591, 593 (7th Cir. 2011) (“A personal religious faith is entitled to as much protection as one espoused by an organized group.”); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 469 (2010); *Nelson v. Miller*, 570 F.3d 868, 878-79 (7th Cir. 2009) (requirement that prisoner show dietary practice was compelled by religion was contrary to RLUIPA and substantially burdened his religious exercise); *Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (jail official’s statement to prisoner that he too was Roman Catholic and therefore knew that a rosary and prayer book were not “vital to worship” did not by itself justify refusing them to the plaintiff); *Ford v. McGinnis*, 352 F.3d 582, 590-91 (2^d Cir. 2004); *Martinelli v. Dugger*, 817 F.2d 1499, 1504 (11th Cir. 1987) (“[T]he Supreme Court has admonished federal courts not to sit as arbiters of religious orthodoxy.”), *cert. denied*, 484 U.S. 1012 (1988); *Williams v. Bitner*, 359 F.Supp.2d 370, 375-76 (M.D.Pa. 2005) (“[F]or purposes of the RLUIPA, it matters not whether the inmate’s religious belief is shared by ten or tens of millions. All that matters is whether the inmate is sincere in his or her own views.”), *aff'd*, 455 F.3d 186 (3^d Cir. 2006); *see Colvin v. Caruso*, 605 F.3d 282, 297-98 (8th Cir. 2010) (prison officials must focus on prisoner’s sincerity of belief, not his knowledge of religious tenets).

Some courts continue to resist this proposition. In *Goff v. Graves*, 362 F.3d 543, 547 (8th Cir. 2004), the court held that plaintiffs in a free exercise case must show that the practice allegedly infringed is based on a teaching of the religion, and reversed the district court because the practice was not “grounded” in the religion’s “theology or its prescribed rituals.” The court’s view of that case may have been colored by the fact that it involved the Church of the New Song, or CONS, a religion that originated in prison and has been held to be a “masquerade” by other courts. *Id.* In any case, the holdings of *Ford*, *Martinelli*, and similar decisions are solidly based in Supreme Court precedent. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”), *quoted in Martinelli*, 817 F.2d at 1504. One federal court long persisted in the view that “a sincerely held tenet or belief that is central or fundamental to an individual’s religion is a prerequisite to a ‘substantially burdened’ claim under RLUIPA.” *Murphy v. Missouri Dep’t of Corrections*, 506 F.3d 1111, 1115 (8th Cir. 2007), *cert. denied*, 552 U.S. 1247 (2008). However, that court has finally acknowledged that this view is wrong. *Gladson v.*

traditionally theistic in nature—in fact, they may be atheistic—as long as they deal with issues of “ultimate concern” and occupy a “place parallel to that filled by . . . God in traditionally religious persons.”³⁵⁰ The question is open under the First Amendment whether plaintiffs must show a “substantial burden” on their religious rights in a free exercise case.³⁵¹ Assuming that they do, a practice need not be mandated by a plaintiff’s religion for its restriction to constitute a substantial burden, though the question is certainly relevant to a substantial burden inquiry.³⁵² Substantial burden is a necessary element of claims under RLUIPA and RFRA, and the Second Circuit has characterized it as referring to situations where “the state ‘puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.’”³⁵³

Iowa Dep’t of Corrections, 551 F.3d 825, 832-33 (2009). Unfortunately it may be popping up again elsewhere. *See* Smith v. Allen, 502 F.3d 1255, 1278-80 (11th Cir. 2007) (finding no substantial burden for RLUIPA purposes where no evidence, including the third-party religious writings plaintiff submitted, supported the centrality of the disputed practices to his religious exercise).

³⁵⁰ Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005).

³⁵¹ Ford v. McGinnis, 352 F.3d at 593; *see* McEachin v. McGuinnis, 357 F.3d 197, 202-03 (2d Cir. 2003) (noting divergent views on substantial burden question).

³⁵² Ford, *id.*

³⁵³ Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996) (quoting Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (a First Amendment case)). Other circuits have adopted a similar definition under RLUIPA. *See* Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (holding substantial burden exists where government requires participation in religiously prohibited activity, prevents participation in a religiously motivated activity, or puts substantial pressure on an adherent to act contrary to religious belief), *cert. denied*, 131 S.Ct. 469 (2010); Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (holding substantial burden exists where prisoner will lose benefits available to other prisoners by following religious precepts, or where government put substantial pressure on prisoner to substantially modify behavior and violate beliefs); Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (describing substantial burden as “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”), *cert. denied*, 543 U.S. 1146 (2005). *But see* DeMoss v. Crain, 636 F.3d 145, 152-53, 155 (5th Cir. 2011) (ban on carrying religious texts to certain locations such as yard and on medical visits did not substantially burden religious exercise; ban on standing for long periods in dayrooms did not substantially burden Muslim prayer because plaintiff had regular access to yard and cell, where restriction did not apply; practice of recording Muslim services did not substantially burden religious exercise); Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1070 (9th Cir. 2008) (the use of recycled waste water to make artificial snow in a small part of a large area considered sacred by Native Americans was not a substantial burden even if it “diminish[ed] . . . spiritual fulfillment”), *cert. denied*, 129 S.Ct. 2763 (2009); Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C.Cir. 2008) (prisoner who objected to DNA analysis, but not to taking of fluid or tissue samples, failed to identify a burden on religious observance); Smith v. Allen, 502 F.3d 1255, 1278-80 (11th Cir. 2007) (finding no substantial burden where plaintiff did not show the importance of the disputed practices to his religious exercise).

There has been a large amount of highly fact-intensive litigation about prisoners' religious rights under the *Turner* reasonableness standard, and a smaller but rapidly growing amount under RFRA and RLUIPA. The following subsections chiefly identify the main Second Circuit or other authority on several frequently litigated subjects.

a. Worship and ceremony

Prisoners have a constitutional right to participate in services, ceremonies, and celebrations of their religion,³⁵⁴ subject to the restrictions of the reasonable relationship standard.³⁵⁵ Blanket exclusion of segregated prisoners from congregational services is unlawful, but prisoners may be excluded based on case-by-case inquiry,³⁵⁶ or alternative means of participation may be provided.³⁵⁷ Purposeful interference with individual worship may be unconstitutional.³⁵⁸

³⁵⁴ *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2004); *Salahuddin v. Coughlin*, 993 F.3d 306 (2d Cir. 1993) (holding conclusory allegation that officials could not accommodate services at a prison occupied while still under construction did not entitle them to summary judgment); *see* *Salahuddin v. Goord*, 467 F.3d 263, 275-78 (2d Cir. 2006) (holding allegation that Shi'ite and Sunni Muslims were allowed only joint, not separate, Ramadan services supported constitutional and RLUIPA claims absent evidence that the claimed safety justification was actually the basis for the policy). *Cf.* *Chatin v. Coombe*, 186 F.3d 82 (2d Cir. 1999) (holding that a rule under which prisoners were disciplined for performing *rakat* (Muslim ritual prayer) in the prison yard was unconstitutionally vague as applied; not ruling on substantive restriction).

³⁵⁵ *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (upholding prison officials' refusal to release prisoners from outside work assignments to return to the prison for Jumu'ah services); *Maddox v. Love*, 655 F.3d 709 (7th Cir. 2011) (allegation that African Hebrew Israelite services were singled out for cancellation in response to budget cuts stated a First Amendment claim); *Murphy v. Missouri Dep't of Correction*, 372 F.3d 979, 983-85 (8th Cir.) (upholding denial of group worship services to Christian Separatist Church, since its racial separatist ideology presented a risk of violence), *cert. denied*, 543 U.S. 991 (2004); *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 861-63 (5th Cir. 2004) (upholding inclusion of Church of Christ in the non-Catholic Christian "faith sub-group" rather than providing separate services); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (upholding refusal to permit Rastafarian services absent an outside sponsor, given the danger that inmate-run services would be used for illicit activity or provoke conflict).

In *Murphy*, though upholding summary judgment for prison officials under the *Turner* standard, the court held there was a triable issue under RLUIPA. 372 F.3d at 988-89

³⁵⁶ *Salahuddin v. Coughlin*, 993 F.3d 306, 308 (2d Cir. 1993) (holding "keeplocked" prisoner did not lose right to attend services); *Salahuddin v. Coughlin*, 992 F.2d 447, 449 (2d Cir. 1993) (upholding exclusion of prisoner segregated for fighting); *see* *Iqbal v. Hasty*, 490 F.3d 143, 173-74 (2d Cir. 2007) (holding high-security detainee's allegation that he was excluded from Muslim Friday prayers could not be dismissed at the pleading stage notwithstanding defendants' security arguments), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³⁵⁷ *Pierce v. County of Orange*, 526 F.3d 1190, 1211 (9th Cir. 2008) (administrative segregation prisoners must be allowed religious worship unless they are disruptive or violent; they may be provided individual chapel visits or meetings with religious advisers rather than group services), *cert. denied*, 555

Prisoners may obtain more favorable outcomes under RLUIPA than under the Constitution.³⁵⁹

b. Dress and appearance

Prisoners have a right to maintain dress and appearance required by their religious beliefs, subject to restrictions meeting the reasonable relationship standard.³⁶⁰ Restrictions on hair length and facial hair, often struck down under pre-*Turner/O'Lone* law, have generally been

U.S. 1031 (2008); *Hudson v. Dennehy*, 538 F.Supp.2d 400, 412 (D.Mass. 2008) (upholding exclusion of segregation prisoners from Jumu'ah services based on compelling interests of rehabilitation and good order, but holding that denying them video participation is not the least restrictive means), *aff'd sub nom Crawford v. Clarke*, 578 F.3d 39 (1st Cir. 2009).

³⁵⁸ *Iqbal v. Hasty*, 490 F.3d 143, 173-74 (2d Cir. 2007) (holding allegation that prison guards banged on plaintiff's door when he tried to pray stated a First Amendment claim), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2003) (holding an allegation that an officer demanded a response from a prisoner while he was performing *salat*, knowing the prisoner could not respond, and then disciplining the prisoner, could not be dismissed under First Amendment).

³⁵⁹ *See Sossamon v. Lone State State of Texas*, 560 F.3d 316, 331-37 (5th Cir. 2009) (exclusion of prisoner from worshipping in chapel with cross and altar was not shown to be the least restrictive alternative where the chapel was used for many other purposes involving similar demands on officials), *aff'd on other grounds*, ___ U.S. ___, 131 S.Ct. 1651 (2010); *Greene v. Solano County Jail*, 513 F.3d 982, 987-90 (9th Cir. 2008) (under RLUIPA, officials failed to show the need for a total ban on group worship by maximum security prisoners); *Murphy v. Missouri Dep't of Correction*, 372 F.3d at 983-85, 988-89 (upholding summary judgment for defendants under *Turner* standard but finding a triable issue under RLUIPA as to right of Christian Separatist Church to group worship); *Mayweathers v. Terhune*, 328 F.Supp.2d 1086, 1096-97 (E.D.Cal. 2004) (holding defendants' refusal to excuse Muslims from work for Jumu'ah services was "doubtful" under the First Amendment and failed under RLUIPA least restrictive alternative standard).

The Second Circuit, applying RLUIPA, has upheld a requirement that congregate services be directed by a prison-affiliated chaplain or an outside sponsor, allowing inmates to serve as "facilitators" only if the religion is "known outside the institution." The court said that this policy "strikes a delicate balance between respecting inmates' demands to participate in congregational activities, while ensuring that those meetings do not serve as proxies for gang recruitment or organization." *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2111 (2010); *see Gladson v. Iowa Dep't of Corrections*, 551 F.3d 825, 834 (8th Cir. 2009) (upholding three-hour limit on Wiccan Samhita celebration in the absence of evidence why three hours was too short and eight hours was needed); *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (upholding denial of sweat lodge to Native American prisoners under RLUIPA), *cert. denied*, 129 S.Ct. 1585 (2009).

³⁶⁰ *Boles v. Neet*, 486 F.3d 1177, 1180-81 (10th Cir. 2007) (holding allegation that prisoner was forbidden to wear a yarmulke or tallit katan (fringed underwear) to an outside medical appointment stated a First Amendment claim); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (holding requirement of intake haircut for Rastafarians unconstitutional because defendants could take an equally good photograph with hair pulled back; holding "crowns" could be forbidden, though kufis and yarmulkes were permitted, because they were larger and looser-fitting and presented greater danger of contraband).

upheld under that standard.³⁶¹ Results have been mixed under RFRA and RLUIPA.³⁶²

c. Diet

“[P]rison officials must provide a prisoner a diet that is consistent with his religious scruples.”³⁶³ The outcomes of religious diet controversies have varied widely outside the Second Circuit.³⁶⁴ This area is one in which it is likely that RFRA and RLUIPA will result more

³⁶¹ *Henderson v. Terhune*, 379 F.3d 709, 713-15 (9th Cir. 2004); *Fromer v. Scully*, 874 F.2d 69 (2d Cir. 1989); *compare* *Fromer v. Scully*, 817 F.2d 227 (2d Cir. 1987) (striking rule down before *Turner v. Safley*).

³⁶² *Compare* *Couch v. Jabe*, 679 F.3d 197, 202-03 (4th Cir. 2012) (holding officials had not sufficiently justified their complete prohibition on wearing beards for religious reasons to warrant summary judgment, since it was not the least restrictive alternative in view of plaintiff’s proposal for a religious exemption to permit a one-eighth-inch beard); *Smith v. Ozmint*, 578 F.3d 246, 252-54 (4th Cir. 2009) (holding state officials had not sufficiently justified their short-hair rule, reversing summary judgment; noting that affidavit from another case about another prison was not helpful); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (striking down hair length regulation as applied to Native American prisoner); *Mayweathers v. Terhune*, 328 F.Supp.2d 1086, 1095-96 (E.D.Cal. 2004) (striking down beard prohibition under RLUIPA); *Gartrell v. Ashcroft*, 191 F.Supp.2d 23 (D.D.C. 2002) (holding prohibition of beards and long hair violated RFRA and First Amendment), *dismissed by stipulation*, 2003 WL 1873847 (D.C.Cir., Apr. 11, 2003) *with* *Kuperman v. Wrenn*, 645 F.3d 69, 79-80 (1st Cir. 2011) (upholding limitation of beards to ¼ inch under RLUIPA); *DeMoss v. Crain*, 636 F.3d 145, 152-53 (5th Cir. 2011) (upholding rule requiring prisoners to remain clean shaven and barring even ¼-inch beards); *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2006) (upholding hair length restrictions under RLUIPA), *cert. denied*, 549 U.S. 875 (2006); *Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996) (upholding hair length restriction under RFRA); *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (same). The *Warsoldier* case is discussed in § II.D.8, above.

³⁶³ *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (citations and internal quotation marks omitted); *accord*, *McEachern v. McGuinnis*, 357 F.3d 197, 203-04 (2003) (stating that subjecting a prisoner to a “food loaf” diet during Ramadan, when Muslims are required to break their fast with Halal food, stated a claim). *But see* *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (holding denial of Rastafarian Ital diet was not unconstitutional since the diet varied among individuals and sects).

Prisoners are also entitled to refrain from food service work that is contrary to their religious beliefs. *See* *Williams v. Bitner*, 359 F.Supp.2d 370, 375-79 (M.D.Pa. 2005) (holding that punishing a Muslim prisoner for refusing to touch or assist in preparing pork could violate both RLUIPA and the First Amendment), *aff’d*, 455 F.3d 186 (3d Cir. 2006).

³⁶⁴ *See, e.g.*, *Baranowski v. Hart*, 486 F.3d 112, 124-25 (5th Cir. 2007) (upholding refusal to provide kosher diet to Jewish prisoners), *cert. denied*, 552 U.S. 1062 (2007); *DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004) (upholding denial of religious diet to Buddhist prisoner); *Goff v. Graves*, 362 F.3d 543, 549-50 (8th Cir. 2004) (upholding refusal to allow food trays prepared for religious banquet to be delivered to members in segregation unit, noting that members had sent contraband to unit before); *Williams v. Morton*, 343 F.3d 212 (3d Cir. 2002) (upholding denial of Halal diet to Muslims, even though kosher food was provided for Jews); *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002) (striking down denial of kosher diet for Jews); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000) (holding unconstitutional the refusal to provide food on Saturday for consumption on Sunday per the plaintiff’s idiosyncratic “Hebrew”

favorable outcomes for prisoners.³⁶⁵

d. Names

Prisoners' right to use religious names is generally harmonized with prison officials' need for reliable identification and to keep their files manageable by allowing the use of both names.³⁶⁶

9. Establishment of religion

Requiring participation or penalizing non-participation in prison programs of a religious nature violates the Establishment Clause.³⁶⁷ The exercise of non-religious authority by prison

belief system); *Makin v. Colorado Department of Correction*, 183 F.3d 1205 (10th Cir. 1999) (holding failure to adjust meal schedule for Ramadan violated the First Amendment); *Thompson v. Vilsack*, 328 F.Supp.2d 974, 978-80 (S.D.Iowa 2004) (striking down requirement of co-payment from Jewish prisoners for kosher meals under *Turner* standard).

³⁶⁵ See *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 795-96 (5th Cir. 2012) (denying summary judgment to prison officials where Jewish prisoner was required to pay for kosher meals but non-Jewish prisoners need not pay for their meals and other Jews at other prisoners were not required to pay; there is a material issue whether requiring payment was the least restrictive alternative); *Abdulahaseeb v. Calbone*, 600 F.3d 1301, 1316-20 (10th Cir. 2010) (holding defendants not entitled to summary judgment concerning failure to provide Halal diet including meat), *cert. denied*, 131 S.Ct. 469 (2010); *Jova v. Smith*, 582 F.3d 410, 417 (2009) (upholding refusal to satisfy "highly detailed" dietary requests calling for specific foods and portions on individual days of the week, prepared by adherents of the religion, on grounds of administrative burden; holding defendants failed to justify refusal to provide vegan diet), *cert. denied*, 130 S.Ct. 2111 (2010); *Koger v. Bryan*, 523 F.3d 789, 800-02 (7th Cir. 2008) (requirement that religious diets be religiously required and verified by clergy substantially burdened plaintiff's religious exercise and was not shown to be least restrictive); *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (prison officials failed to show that denial of Halal or kosher meat to Muslims was the least restrictive alternative where they failed to consider an exemption for the plaintiff, who had gastrointestinal problems on the Muslim vegetarian diet; questioning cost justification given existence of kosher program for Jewish prisoners); *Hudson v. Dennehy*, 538 F.Supp.2d 400, 411 (D.Mass. 2008) (failure to provide Halal food to Muslim prisoners violated RLUIPA), *aff'd sub nom Crawford v. Clarke*, 578 F.3d 39 (1st Cir. 2009). In *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), the court held that denial of a non-meat diet to a prisoner who objected to eating four-footed animals was not generally a substantial burden under RLUIPA because the regular diet would still be adequate if he skipped the four-footed animals and ate the other meat. However, during the 40 days of Lent, when he ate *no* meat, the regular diet was not adequate and he was entitled to receive an adequate non-meat diet. 570 F.3d at 879-80.

³⁶⁶ See *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000) (affirming order that prison officials add religious names to ID cards), *cert. denied*, 532 U.S. 932 (2001); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996) (requiring prisoner to use both names on correspondence upheld under RFRA); *Malik v. Brown*, 71 F.3d 724 (9th Cir. 1995) (allowing prisoner to use both names on outgoing mail held required under *Turner*).

³⁶⁷ *Kerr v. Farrey*, 95 F.3d 472, 478-80 (7th Cir. 1996) (holding that a prisoner could not be

chaplains raises “significant constitutional questions” (never resolved, to my knowledge) under the Establishment Clause.³⁶⁸ Whether and to what extent prisons’ sponsorship of religious programs can violate the Establishment Clause absent an element of coercion appears to be an open question under current law.³⁶⁹ The unjustified preferential treatment of some religious views over others violates the Establishment Clause.³⁷⁰ The heightened protection afforded religious exercise by the Religious Land Use and Institutionalized Persons Act does not violate the Establishment Clause.³⁷¹

10. Searches and privacy

The Supreme Court has held that prisoners have no reasonable expectation of privacy in

required to participate in Narcotics Anonymous or have his security classification raised); *Turner v. Hickman*, 342 F.Supp.2d 887, 895-98 (E.D.Cal. 2004) (holding requirement to participate in Narcotics Anonymous to be eligible for parole violated Establishment Clause); *Clanton v. Glover*, 280 F.Supp.2d 1360, 1366 (M.D.Fla. 2003) (holding allegation that prison drug program required prayer ceremony supported an Establishment Clause claim); *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996), *cert. denied*, 519 U.S. 1054 (1997) (holding that participation in family visiting program could not be conditioned on participation in Alcoholics Anonymous); *see also Warner v. Orange County Dep’t of Probation*, 115 F.3d 1068 (2d Cir. 1997) (holding compelled attendance at Alcoholics Anonymous as a probation condition violated the Establishment Clause; county was required to make available a secular alternative).

³⁶⁸ *Therault v. A Religious Office*, 895 F.2d 104 (2d Cir. 1990).

³⁶⁹ *Compare Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880, 883-84 (7th Cir. 2003) (holding sponsorship of halfway house program operated by a religious institution did not violate the Establishment Clause since prisoners could freely choose secular alternatives, even if they weren’t as good as the religious one); *Henderson v. Berge*, 362 F.Supp.2d 1030, 1032-33 (W.D.Wis. 2005) (providing religious as well as secular channels in a prison TV system did not violate the Establishment Clause; alleviating governmental interference with religious exercise can be a secular purpose), *reconsideration denied*, 2005 WL 1261970 (W.D.Wis., May 26, 2005), *aff’d*, 190 Fed.Appx. 507, 2006 WL 2267092 (7th Cir. 2006) *with DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2d Cir. 2001) (holding that inclusion of Alcoholics Anonymous among services offered by a state-funded facility did not violate the Establishment Clause, but the participation of staff members in religious indoctrination would); *Byar v. Lee*, 336 F.Supp.2d 896, 905 (W.D.Ark. 2004) (holding that disciplinary rules modeled after the Ten Commandments violated the Establishment Clause).

³⁷⁰ *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005); *accord, Hartmann v. California Dept. of Corrections and Rehabilitation*, ___ F.3d ___, 2013 WL 600215, *8 (9th Cir. 2013) (holding allegation that a “prison administration has created staff chaplain positions for five conventional faiths, but fails to employ any neutral criteria in evaluating whether a growing membership in minority religions warrants a reallocation of resources used in accommodating inmates’ religious exercise needs” states an Establishment Clause claim).

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³⁷¹ *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

their living quarters and the Fourth Amendment does not protect against searches of them, however unreasonable or abusive they may be.³⁷² Since the Court's rationale was that prison security requires unfettered access by prison staff to search for contraband, the Second Circuit and some state courts have held that cell searches initiated by prosecutors for law enforcement purposes are governed by the Fourth Amendment.³⁷³ The Second Circuit has limited that holding to pre-trial detainees.³⁷⁴ However, it has also held that the lack of a Fourth Amendment expectation of privacy does not mean a prisoner waives the attorney-client privilege for documents retained in her cell.³⁷⁵ The Eighth Amendment does protect against searches amounting to "calculated harassment unrelated to prison needs."³⁷⁶

Under *Hudson v. Palmer*, seizures of prisoners' property will ordinarily present only questions of procedural due process, and the existence of state post-conviction remedies satisfies due process under the rule of *Parratt v. Taylor*.³⁷⁷ An allegation that confiscations are or result

³⁷² *Hudson v. Palmer*, 468 U.S. 517, 530 (1984); see *Block v. Rutherford*, 468 U.S. 576, 589-91 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555-61 (1979) (holding that detainees need not be allowed to watch cell searches). Cf. *U.S. v. Moody*, 977 F.2d 1425, 1434-35 (11th Cir. 1992) (holding electronic surveillance of a criminal defendant talking to himself in his cell was not a custodial interrogation), *cert. denied*, 507 U.S. 1052 (1993). But see *Rodriguez v. McClenning*, 399 F.Supp.2d 228, 239-40 (S.D.N.Y. 2005) (holding that a cell search was not actionable but that the retaliatory planting of contraband and disciplinary charges related to it were).

³⁷³ *U.S. v. Cohen*, 796 F.2d 20, 24 (2d Cir.), *cert. denied*, 479 U.S. 854 (1986); *Rogers v. State*, 783 So.2d 980, 992 (Fla. 2001) (holding *Hudson* did not authorize law enforcement searches of jail cell, in context of motion to disqualify State Attorney from prosecution); *Lowe v. State*, 203 Ga.App. 277, 416 S.E.2d 750, 752 (Ga.App. 1992).

³⁷⁴ *Willis v. Artuz*, 301 F.3d 65, 69 (2d Cir. 2002); *accord*, *State v. Jackson*, 321 N.J.Super. 365, 379-80, 729 A.2d 55 (1999).

³⁷⁵ *U.S. v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (per curiam). The court held that portions of a prisoner's journal that recounted conversations with her attorney were privileged, and that notes of incidents involving a prison employee who was later prosecuted, and with prosecutors, would be privileged to the extent that they comprised an outline for future consultations with an attorney. 441 F.3d at 95-96.

³⁷⁶ *Hudson v. Palmer*, 468 U.S. at 530; see *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) (holding allegation of searches for no purpose but harassment raised a non-frivolous Eighth Amendment claim); *Scher v. Engelke*, 943 F.2d 921, 923-24 (8th Cir. 1991) (affirming award of punitive damages for repeated harassing cell searches done in retaliation for a prisoner's complaints about staff misconduct), *cert. denied*, 502 U.S. 952 (1992); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986) (holding allegation that cell searches and seizures were done in retaliation for lawsuits and grievances stated a constitutional claim).

³⁷⁷ *Hudson*, 468 U.S. at 531-33 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)); see § III.F.4, below.

The Supreme Court has recently held that the "detention" of federal prisoners' property by

from an established state procedure takes the claim outside the scope of the *Parratt* rule.³⁷⁸ Allegations that seizure of property interferes with or retaliates for the exercise of other constitutional rights may state violations of those rights.³⁷⁹

Prisoners retain a limited expectation of privacy in their persons.³⁸⁰ The Second Circuit has held, consistently with most other circuits, that persons newly arrested (at least for minor offenses) may not be strip searched³⁸¹ without reasonable suspicion that the person is concealing contraband.³⁸² However, the Supreme Court has now overruled that body of law in favor of the

Bureau of Prisons staff is not actionable under the Federal Tort Claims Act. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). Whether the absence of a post-deprivation remedy means that now prisoners will be able to pursue claims of deprivation of property without due process in federal court remains to be addressed.

³⁷⁸ *Wright v. Newsome*, 795 F.2d at 967 (holding allegation that “searches and consequent confiscations are the sanctioned standard operating procedure” at the prison stated a due process claim notwithstanding state remedies).

³⁷⁹ *Wright v. Newsome*, 795 F.2d at 968 (holding that allegation of seizure of legal papers and law books stated a claim of denial of access to courts, and allegation that actions were taken in retaliation for lawsuits and grievances stated a First Amendment claim).

³⁸⁰ *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (“We are persuaded to join other circuits in recognizing a prisoner’s constitutional right to bodily privacy because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.’”) (citation omitted); *accord*, *Levine v. Roebuck*, 550 F.3d 684, 687 (8th Cir. 2008); *Peckham v. Wisconsin Dept. of Correction*, 141 F.3d 694, 696-97 (7th Cir. 1998).

³⁸¹ *See Wood v. Hancock County Sheriff’s Dep’t*, 354 F.3d 57, 63 (1st Cir. 2003) (holding that “standing naked for inspection by officers” is a strip search regardless of any other demands); *accord*, *Marriott v. County of Montgomery*, 227 F.R.D. 159, 169 (N.D.N.Y. 2005), *aff’d*, 2005 WL 3117194 (2d Cir., Nov. 22, 2005). *But see Kelsey v. County of Schoharie*, 567 F.3d 54, 64 (2d Cir. 2009) (upholding “change-out” procedure involving only “incidental observation” of the body).

³⁸² *Hartline v. Gallo*, 546 F.3d 95, 100-02 (2d Cir. 2008); *N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (citing cases); *Shain v. Ellison*, 273 F.3d 56, 62-66 (2d Cir. 2001), *cert. denied*, 537 U.S. 1083 (2002); *accord*, *Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001); *Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001) (applying same holding where detainees were placed in same institution as convicts); *Marriott v. County of Montgomery*, 227 F.R.D. at 174 (preliminarily enjoining searches); *see Way v. County of Ventura*, 445 F.3d 1157, 1161-62 (9th Cir.) (striking down blanket policy of strip searching all persons arrested for all drug offenses, including being under the influence of a drug), *cert. denied*, 549 U.S. 1052 (2006); *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000) (holding blanket intake strip search policy unconstitutional on its face, but upholding its application to a person who was carrying a pistol on arrest); *see Bynum v. District of Columbia*, 257 F.Supp.2d 1 (D.D.C. 2002) (holding that inmates strip searched upon return to the jail from court after receiving release orders, who were to be held only for brief processing before release, stated a Fourth Amendment claim).

minority position,³⁸³ but only as to searches of persons who will be admitted to the jail's general population.³⁸⁴ Thus the prior law remains in effect for searches of arrestees who will be released rather than admitted to jail, though the Supreme Court's rationale would seem applicable in those cases as well in the event the Court reviews such searches.³⁸⁵

Less intrusive searches of arrestees may be upheld.³⁸⁶ For post-admission strip searches, the Second Circuit has distinguished between jails, where strip searches must be justified by individualized reasonable suspicion, and prisons, which may conduct suspicionless strip searches as long as they bear a reasonable relationship to legitimate penological interests.³⁸⁷ Most recently, the latter holding has been extended to the claim of a person held "in a prison-like environment" and *charged* with felonies.³⁸⁸

Outside the arrest and intake context, jails may conduct routine strip searches after contact visits of detainees who have been admitted to the jail.³⁸⁹ Courts have generally upheld

³⁸³ See *Bull v. City and County of San Francisco*, 595 F.3d 964, 977 (9th Cir. 2010) (en banc); *Powell v. Barrett*, 541 F.3d 1298, 1314-15 (11th Cir. 2008) (en banc) (both overruling prior circuit authority and rejecting reasonable suspicion requirement for prisoners who would be admitted to jail).

³⁸⁴ *Florence v. Board of Chosen Freeholders of County of Burlington*, ___ U.S. ___, 132 S.Ct. 1510, 1514 (2012); see *id.* at 1522 (noting Court is not ruling "on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees"; nor is it ruling on cases where the prisoner is touched or where searches involve purposeful humiliation).

³⁸⁵ The Court went through a litany of the contraband risks that may arise in a jail intake setting, as well as the need to look for MRSA, gang tattoos, and injuries. It said correctional officials could find a reasonable suspicion standard "unworkable" because the seriousness of an offense is a poor predictor of contraband possession, and seemingly minor offenders can prove to be "the most devious and dangerous criminals." Jail personnel may not have accurate identification or access to criminal history records, which may in any case be incomplete, and even with accurate information it would be hard to apply criteria of seriousness of the offense "during the pressures of the intake process." *Florence*, 132 S.Ct. at 1520-21. During this recitation, the Court did not address the fact that many jurisdictions had been operating under a reasonable suspicion standard for as long as 25 years. *Florence*, 132 S.Ct. at 1529-30 (dissenting opinion).

³⁸⁶ *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003) (upholding requirement that arrestees change clothes, stripping only to their underwear, in the presence of a same-sex officer).

³⁸⁷ *Shain v. Ellison*, 273 F.3d 56, 65-66 (2d Cir. 2001).

³⁸⁸ *Iqbal v. Hasty*, 490 F.3d 143, 172 (2d Cir. 2007), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³⁸⁹ *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

other strip search practices for which officials presented a reasonable security rationale,³⁹⁰ including in the Second Circuit random visual body cavity searches.³⁹¹ More intrusive searches may require individualized suspicion.³⁹² Strip searches unrelated to legitimate security concerns or designed to harass may violate the Fourth Amendment or the Eighth Amendment.³⁹³ One court has recently declared that “[a] litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate’s right under the Fourth Amendment to be free from unreasonable searches.”³⁹⁴ Religious objections to body searches have rarely prevailed, either under the Constitution or the federal statutes protecting religion.³⁹⁵

³⁹⁰ See *Serna v. Goodno*, 567 F.3d 944, 949-51 (8th Cir. 2009) (upholding strip search of sex offender facility population based on evidence that someone had a cellphone), *cert. denied*, 130 S.Ct. 465 (2009); *Peckham v. Wisconsin Dep’t of Correction*, 141 F.3d 694, 695-97 (7th Cir. 1998); *Thompson v. Souza*, 111 F.3d 694, 700 (9th Cir. 1997) (upholding strip searches in connection with search for drugs); *Bruscino v. Carlson*, 854 F.2d 162, 164-66 (7th Cir. 1988) (upholding strip searches entering or leaving Marion Control Unit); *Goff v. Nix*, 803 F.2d 358, 366-71 (8th Cir. 1986) (upholding strip searches entering or leaving segregation unit).

³⁹¹ *Covino v. Patrissi*, 967 F.2d 73, 77-80 (2d Cir. 1992); *accord*, *Nunez v. Duncan*, 591 F.3d 1217, 1228 (9th Cir. 2010).

³⁹² *Vaughan v. Ricketts*, 950 F.2d 1464, 1468-69 (9th Cir. 1991) (requiring “reasonable cause” to justify digital rectal searches). In *Sanchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009), the court upheld digital rectal searches of a prisoner where there was reasonable suspicion that he was concealing a cellphone, but held that abdominal surgery under general anesthesia violated the Fourth Amendment, since by that time “the basis for believing there was a telephone was slight, several tests had indicated the absence of any such object, and additional, far less intrusive testing could easily have obviated any need for such grievous intrusion.” 590 F.3d at 44.

³⁹³ *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches “are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene,” and that they may not be used to retaliate against First Amendment-protected activity); *accord*, *Peckham v. Wisconsin Dep’t of Correction*, 141 F.3d 694, 697 (7th Cir. 1998); *see* *Friedman v. Boucher*, 580 F.3d 847, 856-57 (9th Cir. 2009) (warrantless searches of pre-trial detainees for general law enforcement, as opposed to prison security, purposes violate the Fourth Amendment).

³⁹⁴ *Byrd v. Maricopa County Sheriff’s Dep’t*, 629 F.3d 1135, 1146 (9th Cir. 2011), *cert. denied*, 131 S.Ct. 2964 (2011).

³⁹⁵ As to the Constitution, *see* *Madyun v. Franzen*, 704 F.2d 954, 957 (7th Cir. 1983); *Hill v. Blum*, 916 F.Supp. 470, 472-73 (E.D.Pa. 1996) (pat search including genitalia did not violate the First Amendment rights of a Muslim prisoner). *But see* *Show v. Patterson*, 955 F.Supp. 182, 187-91 (S.D.N.Y. 1997) (allegation that after a disturbance, Muslim prisoners were kept with others naked in a holding cell, in view of about 15 staff members, for half an hour, stated a claim under the First Amendment). As to statutes, *see* *Jova v. Smith*, 582 F.3d 410, 417 (2d Cir. 2009) (under RLUIPA, upholding refusal to respect demand of Tulukeesh adherents that they not appear nude before persons who were not followers of their religion, given the institutional necessity for strip frisks), *cert. denied*, 130 S.Ct. 2111 (2010); *May v. Baldwin*, 109 F.3d 557, 562-64 (9th Cir. 1997) (under RFRA, requiring a Rastafarian to loosen his

Even searches that are otherwise lawful must be conducted in a reasonable manner. They must not be needlessly intrusive,³⁹⁶ abusively performed,³⁹⁷ or conducted in an unnecessarily public manner.³⁹⁸ More generally, courts have held that prisoners have the right not to be viewed unnecessarily in the nude or while performing private bodily functions, especially by persons of the opposite sex.³⁹⁹ However, application of this idea to particular sets of facts and justifications

dreadlocks was a substantial burden on his religious exercise, but it was also the least restrictive means of searching for contraband); *Levinson-Roth v. Parries*, 872 F.Supp. 1439, 1542 (D.Md. 1995) (requiring the Orthodox plaintiff to remove her wig for purposes of an intake photograph did not violate the Religious Freedom Restoration Act; since she was given a towel to cover her head except for momentary exposure, the interference with religious rights was not substantial).

³⁹⁶ *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001) (holding officer was not entitled to qualified immunity for a pat search under the clothing of a female misdemeanor arrestee during which his fingertip penetrated her genitals).

³⁹⁷ *See Mays v. Springborn*, 575 F.3d at 649-50 (evidence of searches conducted with demeaning comments, dirty gloves, and in a cold room supported a constitutional claim); *Hutchins v. McDaniels*, 512 F.3d 193, 194-95 (5th Cir. 2007) (holding strip search conducted in front of numerous inmates and a female guard and requiring the prisoner to engage in humiliating acts could violate the Fourth Amendment); *Evans v. Stephens*, 407 F.3d 1272, 1281-82 (11th Cir. 2005) (en banc) (holding search in police lockup conducted in broom closet and accompanied by ridicule, threatening language, and anal penetration with an object, violated Fourth Amendment); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (holding strip searches accompanied by sexual harassment, with opposite sex staff as invited spectators, would be “designed to demean and humiliate” and would state an Eighth Amendment claim). *But see Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir.) (“To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize” the Eighth Amendment standard.), *cert. denied*, 522 U.S. 852 (1997). *Cf. Norris v. Premier Integrity Solutions, Inc.*, 641 F.3d 695, 701-02 (6th Cir. 2011) (upholding direct observation of detainees producing urine samples required for pre-trial release).

³⁹⁸ *Stoudemire v. Michigan Dept. of Corrections*, ___ F.3d ___, 2013 WL 362828, *8-11 (6th Cir. 2013) (denying summary judgment to defendant for strip search performed in view of other staff and prisoners without exigent circumstances); *Byrd v. Maricopa County Sheriff’s Dep’t*, 629 F.3d 1135, 1147 (9th Cir. 2011) (noting presence of onlookers and videotaping of search compounded the indignity of a non-emergency cross-gender strip search), *cert. denied*, 131 S.Ct. 2964 (2011); *Mays v. Springborn*, 575 F.3d at 649-50 (evidence of searches conducted publicly without reason and against prison rules supported a constitutional claim); *Farmer v. Perrill*, 288 F.3d 1254, 1260-61 (10th Cir. 2002) (affirming denial of summary judgment as to a challenge to visual strip searches en route to the recreation yard conducted in view of other inmates; government may not simply justify the searches, but must justify doing them in the open); *see Smith v. Taylor*, 149 Fed.Appx. 12, 14, 2005 WL 2019547 at *2 (2d Cir., Aug. 23, 2005) (holding that the presence of more officers at a strip search than prison rules authorized suggested a privacy violation not necessary to serve penological interests) (unpublished).

³⁹⁹ *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992), *cert. denied*, 510 U.S. 931 (1993); *see Mills v. City of Barboursville*, 389 F.3d 568, 579 (6th Cir. 2004) (stating “we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular

has yielded mixed results.⁴⁰⁰ One circuit has held that intrusive clothed pat frisks of women prisoners by male staff violated the Eighth Amendment, based on a record that many women in prison had long histories of verbal, physical, and sexual abuse by men.⁴⁰¹ A district court decision holds unconstitutional a jail's practice of depriving prisoners of all clothing when placed in administrative segregation because of uncooperative and disruptive conduct.⁴⁰²

The extraction of bodily fluids is a search.⁴⁰³ Prison officials may require prisoners to provide urine samples for drug testing either with reasonable cause or pursuant to a program that is designed to prevent selective enforcement or harassment.⁴⁰⁴ Prisoners may be compelled to provide DNA samples pursuant to state or federal statute,⁴⁰⁵ though there is a question as to

surveillance by officers of the opposite sex while naked . . . would provide the basis of a claim on which relief could be granted"); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing prisoners' right to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'") (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

⁴⁰⁰ See *Hill v. McKinley*, 311 F.3d 899, 903-05 (8th Cir. 2002) (holding both male and female staff could participate in transfer of unruly naked female prisoner, since not enough female guards were available; holding that leaving the prisoner exposed on a restraint board in male officers' presence violated the Fourth Amendment); *Oliver v. Scott*, 276 F.3d 736, 744-46 (5th Cir. 2002) (upholding under the *Turner* reasonable relationship standard a policy "permitting all guards to monitor all inmates at all times" because it "increases the overall level of surveillance" and bathrooms and showers can be the site of violence); compare *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (holding allegation of strip and body cavity searches performed by an opposite sex officer absent an emergency, at a time when same sex officers were available to conduct the search, was not frivolous, "We must balance the need for the particular search against the invasion of the prisoner's personal rights caused by the search."); *Somers v. Thurman*, 109 F.3d 614, 617-23 (9th Cir.) (finding no clearly established Fourth Amendment protection against cross-gender strip searches, dismissing Eighth Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him and made jokes about him), *cert. denied*, 522 U.S. 852 (1997); *Hayes v. Marriott*, 70 F.3d 1144, 1147-48 (10th Cir. 1995) (holding summary judgment was inappropriate given allegation that plaintiff was subjected to a body cavity search in the presence of numerous witnesses, including female correctional officers and case managers and secretaries)

⁴⁰¹ *Jordan v. Gardner*, 986 F.2d 1521, 1526-27 (9th Cir. 1993) (en banc).

⁴⁰² *Rose v. Saginaw County*, 353 F.Supp.2d 900, 919-23 (E.D.Mich. 2005).

⁴⁰³ *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 616 (1989).

⁴⁰⁴ *Thompson v. Souza*, 111 F.3d 694, 702-03 (9th Cir. 1997) (upholding urine testing of group of 124 inmates); *Lucero v. Gunter*, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding random tests); *Forbes v. Trigg*, 976 F.2d 308, 314-15 (7th Cir. 1992) (upholding urinalysis of all inmates in certain jobs), *cert. denied*, 507 U.S. 950 (1993).

⁴⁰⁵ *Hamilton v. Brown*, 630 F.3d 889, 894-96 (9th Cir. 2011) (holding state DNA collection statute applicable to all felony convicts did not violate Fourth Amendment); *Kaemmerling v. Lappin*, 553

whether that requirement may be extended to all categories of offenders.⁴⁰⁶

Prisoners retain other privacy interests, limited by the necessities of prison administration. They are entitled to privacy in their communications with attorneys and their assistants,⁴⁰⁷ to confidentiality of information about their medical condition and treatment,⁴⁰⁸ and to rights of private choice with respect to refusal of medical treatment,⁴⁰⁹ termination of

F.3d 669 (D.C.Cir. 2008) (holding federal DNA collection statute does not violate Free Exercise Clause, RFRA, privilege against self-incrimination, or equal protection); *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006); *U.S. v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied*, 544 U.S. 924 (2005); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (*per curiam*).

In *Friedman v. Boucher*, 580 F.3d 847, 852-58 (9th Cir. 2009), the court held that warrantless, suspicionless, forcible extraction of a DNA sample from a person who had served a sentence for a sex offense in another state and was held as a pre-trial detainee on unrelated charges violated clearly established Fourth Amendment rights. Later, a panel of the court strictly limited that holding and upheld a California statute requiring the collection of DNA from all felony *arrestees*. However, the court has granted rehearing *en banc* in that case. *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *rehearing en banc granted*, 686 F.3d 1121 (9th Cir. 2012).

⁴⁰⁶ See *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411, 413 n.2 (*per curiam*) (5th Cir. 2004) (noting variety of approaches); *Roe v. Marcotte*, 193 F.3d 72, 81-82 (2d Cir. 1999) (upholding statute applying to sex offenders; rejecting rationale that would extend to all offenses). *But see* *Nicholas v. Goord*, 430 F.3d at 671 (in decision upholding statute applying to assault, homicide, rape, incest, escape, attempted murder, kidnaping, arson, and burglary, suggesting its rationale applies to all convicted felons); *see also* *Banks v. U.S.*, 490 F.3d 1178, 1188-93 (10th Cir. 2007) (upholding application of sampling requirement of federal DNA Backlog Elimination Act to nonviolent felons on parole, probation, or supervised release).

⁴⁰⁷ See § II.D.1, above, and § IV.B, below.

⁴⁰⁸ *Doe v. Delie*, 257 F.3d 309, 316-17 (3d Cir. 2001) (finding a right to privacy in medical information extending to prescription medications and “particularly strong” for HIV status); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (finding a right to privacy in transsexuality); *see* *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (“Medical information in general, and information about a person’s psychiatric health and substance-abuse history in particular, is information of the most intimate kind.”) (non-prison case); *Hunnicut v. Armstrong*, 152 Fed.Appx. 34, 35-36, 2005 WL 2573525 at *1-2 (2d Cir., Oct. 13, 2005) (holding that an allegation that a prisoner’s mental health consultations occurred on a housing unit within other prisoners’ hearing stated a constitutional privacy claim) (unpublished). There is broad language in *Seaton v. Mayberg*, 610 F.3d 530, 535-36 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1534 (2011), disclaiming any right of medical privacy of prisoners on grounds of the needs of prison administration and, in the plaintiff’s case, the need to pursue a proceeding to commit him as a sexual offender. This language refers to access to medical information by prison and law enforcement authorities, not further disclosure exceeding the correctional and law enforcement needs cited.

⁴⁰⁹ *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990); *see* *Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (relying on holdings regarding prisoners’ right to refuse psychotropic medications and their liberty interest in avoiding transfer to mental hospital and unwanted

pregnancy,⁴¹⁰ and matters of family relationships such as marriage.⁴¹¹ They may not be put on view for the delectation of the media or the public.⁴¹² The federal Privacy Act provides additional protections to federal prisoners from disclosure of their prison records,⁴¹³ and state law may protect broader rights of privacy for prisoners.

behavior modification treatment in finding a general right to refuse medical treatment). *But see* Powers v. Snyder, 484 F.3d 929, 931 (7th Cir. 2007) (holding prison could require prisoner to work at a job posing a risk of Hepatitis A infection and to be vaccinated for the disease).

The right to refuse medical treatment “carries with it a concomitant right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment.” Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006); *accord*, White v. Napoleon, 897 F.2d at 113.

⁴¹⁰ Roe v. Crawford, 514 F.3d 789, 796-98 (8th Cir. 2008), *cert. denied*, 555 U.S. 821 (2008); Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1066 (1988). *But see* Bryant v. Maffucci, 923 F.2d 979, 98-84 (2d Cir.) (holding negligent denial of an abortion did not violate detainee’s rights), *cert. denied*, 502 U.S. 849 (1991).

⁴¹¹ Turner v. Safley, 482 U.S. 78 (1987).

⁴¹² Demery v. Arpaio, 378 F.3d 1020, 1029-32 (9th Cir. 2004) (striking down policy of broadcasting live images via the Internet of pre-trial detainees in non-public areas of a jail), *cert. denied*, 545 U.S. 1139 (2005); Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) (holding the “perp walk” “exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment.”)

⁴¹³ *See* Maydak v. U.S., 363 F.3d 512 (D.C.Cir. 2004) (holding that prison officials’ retention of copies of photographs made during inmate visits did not violate Privacy Act).

III. Procedural Due Process

A. Liberty in prison: *Sandin v. Conner*

In *Sandin v. Conner*,⁴¹⁴ the Supreme Court limited the due process protections of prisoners, holding that in-prison restrictions⁴¹⁵ deprive them of “liberty” within the meaning of the Due Process Clauses only if they “impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”⁴¹⁶

In so holding, the Court disapproved its prior prison cases applying “liberty interest” analysis, a rather technical doctrine which asked in each case whether “mandatory language and substantive predicates create an enforceable expectation that the state would produce a particular outcome with respect to the prisoner’s conditions of confinement.”⁴¹⁷ It also dismissed as dicta its prior statements that “solitary confinement” is a “major change in conditions of confinement,” equivalent to loss of good time.⁴¹⁸ The bottom line for the plaintiff: “Based on a comparison between inmates inside and outside disciplinary segregation, the State’s actions in placing him there for 30 days did not work a major disruption in his environment.”⁴¹⁹ Under prior law, any substantial period of punitive confinement had been held to require due process protections.⁴²⁰

⁴¹⁴ 515 U.S. 472 (1995).

⁴¹⁵ *Sandin* by its terms applies only to in-prison restrictions. The Court, after noting that the deprivation of statutory good time involved an interest of “real substance,” 515 U.S. at 478, was careful to distinguish the prisoner’s placement in segregation from actions that “inevitably affect the duration of his sentence.” *Id.* at 487. The good time issue is discussed further below.

⁴¹⁶ 515 U.S. at 484.

⁴¹⁷ *Sandin*, 515 U.S. at 481. This means, in (sort of) plain English, that courts examined whether state law or regulations limited the discretion of officials by linking a particular result with a particular finding or state of facts (“if x, then y,” or equivalent). For example, a parole statute that said an eligible prisoner “shall” be released on parole “unless” the parole board found that one of four specified circumstances (such as “substantial risk that [the prisoner] will not conform to the conditions of parole”) was present. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11-12 (1976). “Shall” is the mandatory language and the four specified circumstances are the “substantive predicates.” Similarly, a statute that said prisoners “may” be placed in administrative segregation if one of several factors were found to be present is equivalent to a statement that they “will not” be placed in segregation if those factors are not present, resulting in the same sort of limit on official discretion. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983).

⁴¹⁸ *Sandin*, 515 U.S. at 485-86 (citing *Wolff v. McDonnell*, 418 U.S. 539, 571 n. 19 (1974)).

⁴¹⁹ *Sandin*, 515 U.S. at 486 (footnote omitted).

⁴²⁰ See *McCann v. Coughlin*, 698 F.2d 112, 121 (2d Cir. 1982) (holding 14 days’ confinement requires due process).

The *Sandin* holding set off a major reevaluation of prison due process issues in the lower courts, some of which seemed disposed simply to sweep prisoners' due process rights off the board.⁴²¹ The Second Circuit has approached these questions in a somewhat different and more thoughtful and fact-based way than other circuits, so authority from other jurisdictions should be viewed skeptically.

Under *Sandin*, prisoners' liberty is protected by due process in two situations. One involves deprivations "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty," regardless of the terms of state law.⁴²² The paradigm cases are commitment of a prisoner to a mental institution or the involuntary administration of psychotropic drugs.⁴²³ Some courts have held that designation as a sex offender is comparable in severity.⁴²⁴

The second situation in which *Sandin* recognizes prisoners' liberty includes cases in which the state has—as it may "under certain circumstances"—created a liberty interest *and* deprivation of that interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."⁴²⁵ Some courts, including the Second Circuit, have thought that the "certain circumstances" under which states create liberty interests amounted to a similar analysis of statutes and regulations to that prevailing before *Sandin*.⁴²⁶ In *Wilkinson v. Austin*,⁴²⁷

⁴²¹ See *Lee v. Coughlin*, 26 F.Supp.2d 615, 634 (S.D.N.Y. 1998) (citing cases).

⁴²² *Sandin*, 515 U.S. at 497 (Breyer, J., dissenting); see *id.* at 472 (majority opinion) (conditions "exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force").

⁴²³ *Sandin*, 515 U.S. at 484 (citing cases).

⁴²⁴ *Coleman v. Dretke*, 395 F.3d 216, 222-23 (5th Cir. 2004), *cert. denied*, 546 U.S. 938 (2005); *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997); see *Kirby v. Siegelman*, 195 F.3d 1285, 1291 (11th Cir. 1999) (applying "atypical and significant" analysis (in my view erroneously) to find a liberty interest in not being labelled a sex offender pursuant to a program that did not affect prison conditions but required notification to victims and neighbors 30 days before release from prison). *But see Gwinn v. Awmiller*, 354 F.3d 1211, 1216-19 (10th Cir.) (holding damage to reputation by labelling as a sex offender does not give rise to a liberty interest, though reduction in rate of good time does), *cert. denied*, 543 U.S. 860 (2004).

⁴²⁵ *Sandin*, 515 U.S. at 484.

⁴²⁶ Thus, the Second Circuit held that a prisoner must show "both that the confinement or restraint creates an 'atypical and significant hardship' under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint." *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996); accord, *Sealey v. Giltner*, 197 F.3d 578, 584 (2d Cir. 1999); see *Tellier v. Fields*, 280 F.3d 69, 81-84 (2d Cir. 2000) (finding a liberty interest in federal administrative segregation regulations).

In *Frazier*, the court supported its conclusion by stating that "nothing in *Sandin* suggests that a

the Supreme Court stated:

We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Conner*. . . .

. . . In *Sandin*, we criticized this methodology as creating a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons. . . . For these reasons, we abrogated the methodology of parsing the language of particular regulations.

“[T]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established in and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.*, at 483-484, 115 S.Ct. 2293 (citations and footnote omitted).

After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves “in relation to the ordinary incidents of prison life.” *Id.*, at 484, 115 S.Ct. 2293.⁴²⁸

This language can be read as holding that the state’s statutes and regulations simply have no further role in prison due process analysis. However, the Second Circuit has not done so, emphasizing *Wilkinson*’s phrase “arise[s] from state policies or regulations” and ignoring *Wilkinson*’s emphasis on the abrogation of prior understandings of the significance of state policies and regulations.⁴²⁹ It does seem clear that the analysis of liberty interests turns on actual

protected liberty interest arises in the absence of a particular state regulation or statute that (under *Hewitt*) would create one,” and that *Sandin* itself noted that its decision did not require overruling of any prior precedent, including *Hewitt v. Helms*. 81 F.3d at 313 and n.5.

⁴²⁷ 545 U.S. 209 (2005).

⁴²⁸ *Wilkinson*, 545 U.S. at 222-23 (quoting *Sandin*, 515 U.S. at 484).

⁴²⁹ *Iqbal v. Hasty*, 490 F.3d 143, 162 (2d Cir. 2007) (rejecting the argument that *Wilkinson* abrogated prior Second Circuit authority applying liberty interest analysis), *aff’d in part, rev’d in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

conditions in the institution and not conditions as prescribed in prison regulations.⁴³⁰

Under any understanding of *Sandin*, due process scrutiny is now mostly limited to substantial disciplinary punishments and to similar actions taken for security reasons, such as prolonged periods of administrative segregation.

B. When prison discipline requires due process

For convicts, prison discipline requires due process when it affects the duration of imprisonment or when it “imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life.”⁴³¹

The application of this standard in the circuits varies widely.⁴³² The best-developed analysis of *Sandin* is in the Second Circuit, which after a series of cases emphasizing the need for

⁴³⁰ *Marion v. Radtke*, 641 F.3d 874, 875 (7th Cir. 2011) (citing *Marion v. Columbia Correctional Institution*, 559 F.3d 693, 699 (7th Cir. 2009)).

⁴³¹ *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Pre-trial detainees are discussed in the next section.

Insofar as state policies and regulations continue to play a part in due process analysis for convicted (see preceding section), there is little question concerning the existence of a state-created liberty interest in disciplinary cases, since the disciplinary rules themselves (“Break the rules and you’ll be punished; behave and you won’t be”) provide the necessary limit on discretion. *Sher v. Coughlin*, 739 F.2d 77, 81 (2d Cir. 1984); *accord*, *Gilbert v. Frazier*, 931 F.2d 1581, 1582 (7th Cir. 1991); *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986).

⁴³² *See Chappell v. Mandeville*, ___ F.3d ___, 2013 WL 364203, *9-10 (9th Cir. 2013) (Bybee, J.) (holding “contraband watch” procedure in which prisoner “was taped into two pairs of underwear and jumpsuits, placed in a hot cell with no ventilation, chained to an iron bed, shackled at the ankles and waist so that he could not move his arms, and was forced to eat like a dog” for seven days was not clearly established to be atypical and significant); *Rezaq v. Nalley*, 677 F.3d 1001, 1013, 1015 (10th Cir. 2012) (holding “extreme conditions in administrative segregation do not, on their own, constitute an ‘atypical and significant hardship’; stating conditions at the federal Florence ADX facility were not atypical and significant because “they are substantially similar to conditions experienced in any solitary confinement setting.” when compared to “the ordinary incidents of prison life”); *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008) (“inmates have no liberty interest in avoiding transfer to discretionary segregation—that is, segregation imposed for administrative, protective, or investigative purposes. . . . [T]here is nothing ‘atypical’ about discretionary segregation; [it] is instead an ‘ordinary incident of prison life’ that inmates should expect to experience during their time in prison.”); *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2002) (two years in segregation stated a claim under the atypical and significant standard); *Beverati v. Smith*, 120 F.3d 500, 503-04 (4th Cir. 1997) (six months under filthy and unbearably hot conditions was not atypical and significant); *Griffin v. Vaughn*, 112 F.3d 703 (3^d Cir. 1997) (15 months in segregation was not atypical and significant, because state regulations provided for administrative segregation and prescribe the conditions under which the plaintiff was kept, even though they said it was to be limited to 10 days, renewable for another 10 days).

careful fact-finding concerning the conditions of confinement,⁴³³ has adopted a presumptive guideline for determining whether placement in segregated confinement is atypical and significant: if the confinement is 101 days or less under “the normal conditions of SHU confinement in New York,” no liberty interest is at stake unless aggravating factors of some sort are shown. If the confinement is 305 days or more under “normal” SHU conditions, the plaintiff has been deprived of liberty.⁴³⁴ For periods between 101 and 305 days, the court prescribed “development of a detailed record,” which might include “evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations,” and which would be furthered by the appointment of counsel, “some latitude both in discovery and in presentation of pertinent evidence at trial,” and particularized findings by the district court.⁴³⁵ The court added that it did “not exclude the possibility that SHU confinement of less than 101 days could be shown on a record more fully developed . . . to constitute an atypical and severe hardship under *Sandin*.”⁴³⁶ (Subsequent decisions have turned that possibility into reality.⁴³⁷) The *Colon* court also noted that conditions are harsher at SHU-only facilities such as

⁴³³ See, e.g., *Wright v. Coughlin*, 132 F.3d 133 (2d Cir. 1998); *Giakoumelos v. Coughlin*, 88 F.3d 56, 62 (2d Cir. 1996); compare *Frazier v. Coughlin*, 81 F.3d at 317-18 (holding that 12 days in pre-hearing confinement is not atypical and significant based on the district court’s “extensive fact-finding”).

⁴³⁴ *Colon v. Coughlin*, 215 F.3d 227, 232 (2d Cir. 2000). The court said that “the duration of SHU confinement is a distinct factor bearing on atypicality and must be carefully considered.” *Id.* at 231. The relevant time period is the time actually served in cases where the prisoner does not serve the entire sentence. *Id.* at 231 n. 4; accord, *Hanrahan v. Doling*, 331 F.3d 93, 97 (2d Cir. 2003). But the court has later held that for purposes of analyzing the qualified immunity of the hearing officer, the focus should be on the sentence imposed by the hearing officer, regardless of whether it was later modified. *Hanrahan*, 331 F.3d at 98.

⁴³⁵ *Colon*, 215 F.3d at 232.

⁴³⁶ *Id.* at n. 5.

New York also employs the sanction of “keeplock,” which used to mean locking the prisoner in his or her own cell rather than in SHU. See *McKinnon v. Patterson*, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978). However, the distinction between keeplock and SHU has become blurred if not obliterated; now, some prisoners nominally sentenced to keeplock actually serve part or all of their time in SHU, see *Samuels v. Selsky*, 2002 WL 31040370 at *9 (S.D.N.Y., Sept. 12, 2002) (noting *de jure* punishment of keeplock and *de facto* punishment of SHU); *Rivera v. Wohlrab*, 232 F.Supp.2d 117, 122 (S.D.N.Y. 2002) (noting similar allegation), and others are placed in separate “keeplock blocks.” See *Muhammad v. Pico*, 2003 WL 21792158 at *14-15 (S.D.N.Y., Aug. 5, 2003) (alleging confinement in “long-term keeplock block”). How—or whether—the latter differ from SHUs is obscure. To date, district courts have treated keeplock the same as SHU in their *Sandin* analyses. See, e.g., *Muhammad v. Pico*, *id.* at *14-15; *Bunting v. Nagy*, 2003 WL 21305339 at *3 (S.D.N.Y., June 6, 2003).

⁴³⁷ See *Ortiz v. McBride*, 380 F.3d 649, 654-55 (2d Cir. 2004) (holding that 90-day confinement could be atypical and significant based on allegations *inter alia* of 24-hour confinement without exercise or showers during part of the period), cert. denied, 543 U.S. 1187 (2005); *Palmer v. Richards*, 364 F.3d 60, 66 (2d Cir. 2004) (holding that 77 days in SHU could be atypical and significant based on allegations of deprivation of personal clothing, grooming equipment, hygienic products and materials, reading and

Southport Correctional Facility.⁴³⁸

The kind of record *Colon* referred to is exemplified by the district court opinion in *Lee v. Coughlin*, in which the court received evidence from psychiatrist Stuart Grassian, M.D., that:

The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, inmates so confined have developed florid delirium—a confusional psychosis with intense agitation, fearfulness, and disorganization. But even those inmates who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged. . . .⁴³⁹

The court also received evidence that fewer than 5% of the prisoners under custody in a year were sentenced to SHU at all, and fewer than 1% received SHU sentences of a year or more; that most prisoners sentenced to confinement were placed in the less restrictive “keeplock” or cube confinement; that of prisoners sentenced to confinement, the proportion receiving more than a year in SHU was no higher than 2.2%, with an additional 2.9 to 3.1% sentenced to six months or more.⁴⁴⁰

writing materials, family pictures, personal correspondence, and contact with family, and being mechanically restrained whenever out of cell, raised a material factual question under the atypical and significant standard).

⁴³⁸ *Colon*, 215 F.3d at 234 n. 7 (citing *Lee v. Coughlin*, 26 F.Supp.2d 615, 632-33 (S.D.N.Y. 1998) (noting greater use of restraints, solitary exercise in restraints, limited visiting)).

⁴³⁹ 615 F.Supp.2d at 637 (footnote omitted).

Such observations are not new. A century ago, the Supreme Court observed that in solitary confinement, “[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.” *In re Medley*, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an *ex post facto* law). Similar evidence is cited in more modern prison conditions cases. *See Davenport v. DeRobertis*, 844 F.2d 1310, 1313, 1316 (7th Cir. 1988), *cert. denied*, 488 U.S. 908 (1989); *McClary v. Kelly*, 4 F.Supp.2d 195 (W.D.N.Y. 1998); *Madrid v. Gomez*, 889 F.Supp. 1146, 1235 (N.D.Cal. 1995); *Langley v. Coughlin*, 715 F.Supp. 522, 540 (S.D.N.Y. 1989); *Baraldini v. Meese*, 691 F.Supp. 432, 446-47 (D.D.C. 1988), *rev’d on other grounds*, 884 F.2d 615 (D.C.Cir. 1989); *Bono v. Saxbe*, 450 F.Supp. 934, 946 (E.D.Ill. 1978), *aff’d in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980). Several of these cases rely on the research and testimony of Dr. Grassian. *See* Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, 140 *Am.J.Psychiatry* 11 (1983); Stuart Grassian and Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 *Int’l J. of Law and Psychiatry* 49 (1986).

⁴⁴⁰ 615 F.Supp.2d at 619-23.

That said, few if any subsequent cases have been decided on that sort of record.

Deciding whether conditions impose “atypical and significant hardship . . . in relation to the ordinary incidents of prison life” requires a determination what those “ordinary incidents” are—conditions in general population or conditions in some type of segregated confinement. The Supreme Court has acknowledged this “appropriate baseline” question but did not decide it.⁴⁴¹ The Second Circuit, unlike some other courts, has compared SHU conditions to those in general population for purposes of deciding whether they are atypical and significant.⁴⁴² In *Sandin* itself, the Court noted that the segregation conditions under which the plaintiff was confined were substantially the same as those in non-punitive administrative confinement and protective custody, and not very different from those in the maximum security confinement that the prisoner had previously occupied.⁴⁴³ In New York, by contrast, there are significant differences between punitive SHU confinement and administrative and protective confinement;⁴⁴⁴ administrative confinement is infrequently used; and in any case administrative segregation in New York is not entirely discretionary, as was the case in *Sandin*.⁴⁴⁵ In fact, the Second Circuit has held that administrative segregation in New York itself involves sufficient constraints on official discretion to give rise to a state-created liberty interest, requiring courts to go on to the “atypical and significant” part of the *Sandin* analysis.⁴⁴⁶ It has acknowledged that administrative segregation of sufficient duration meets the *Sandin* standard.⁴⁴⁷

The Supreme Court’s holding that conditions in a “supermax” administrative segregation facility were atypical and significant involved conditions so draconian as to shed little light on the constitutional status of the less extreme punishments most frequently at issue in the lower courts. The Court said:

⁴⁴¹ *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (stating that the “supermax” conditions before it were atypical and significant “under any plausible baseline”).

⁴⁴² *Colon*, 215 F.3d 227, 231; *accord*, *Davis v. Barrett*, 576 F.3d 129, 135 (2d Cir. 2009).

⁴⁴³ *Sandin*, 515 U.S. at 486.

⁴⁴⁴ This may vary from prison to prison. In *McClary v. Kelly*, 4 F.Supp.2d 195, 204 (W.D.N.Y. 1998), the court found that in one of the prisons where the plaintiff was kept in administrative segregation, no attempt was made to segregate administrative segregation prisoners from disciplinary segregation prisoners.

⁴⁴⁵ *See Lee*, 26 F.Supp.2d at 633.

⁴⁴⁶ *Sealey v. Giltner*, 197 F.3d 578, 584-85 (2d Cir. 1999).

⁴⁴⁷ *See Taylor v. Rodriguez*, 238 F.3d 188, 195 (2d Cir. 2001); *Giano v. Kelly*, 2000 WL 876855 at *8 (W.D.N.Y. May 16, 2000) (“well in excess of one year”); *Hameed v. Coughlin*, 37 F.Supp.2d 133, 145 (W.D.N.Y. 1999) (20 months); *McClary v. Kelly*, 4 F.Supp.2d 195 (W.D.N.Y. 1998) (four years).

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . . While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.⁴⁴⁸

The chief significance of this holding is to validate the importance of duration of confinement to the “atypical and significant” inquiry, consistently with the Second Circuit’s decisions.

C. *Sandin* and pre-trial detainees

The *Sandin* analysis does not apply to pre-trial detainees, in the view of the Second Circuit and most courts that have actually asked the question.⁴⁴⁹ *Sandin*’s analytical starting point is that “*given a valid conviction*, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.

⁴⁴⁸ *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *see Iqbal v. Hasty*, 400 F.3d 143, 163 (2d Cir. 2007) (holding that under *Wilkinson*, alleged conditions including “solitary confinement, repeated strip and body-cavity searches, beatings, exposure to excessive heat and cold, very limited exercise, ad almost constant lighting—as well as the initially indefinite duration of confinement” sufficiently pled atypical and significant hardship), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Westefer v. Snyder*, 422 F.3d 570, 590 (7th Cir. 2005) (stating that *Wilkinson*’s liberty interest turned exclusively on the absence of parole is “far too crabbed a reading of the decision”; plaintiffs’ claim should not have been dismissed even though Illinois supermax cells have windows, the doors are mesh rather than solid steel, the exercise yard is partly outdoors, and visiting is not as limited as in *Wilkinson*).

⁴⁴⁹ *Bistrrian v. Levi*, 696 F.3d 352, 373 (3d Cir. 2012); *Iqbal v. Hasty*, 490 F.3d 143, 162-63 (2d Cir. 2007), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Surprenant v. Rivas*, 424 F.3d 5, 17 (1st Cir. 2005); *Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001); *Mitchell v. Dupnik*, 75 F.3d 517, 523-24 (9th Cir. 1995); *Zarnes v. Rhodes*, 64 F.3d 285, 292 (7th Cir. 1995). *But see Magluta v. Samples*, 375 F.3d 1269, 1278-82 (11th Cir. 2004) (applying *Sandin* in a pre-trial detainee case without asking whether it is appropriate); *see also Miller v. Dobier*, 634 F.3d 412, 414-15 (7th Cir. 2011) (holding *Sandin* applicable to case involving civil detainee, usually assessed under same standards as pre-trial detainees).

. . . Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."⁴⁵⁰ Since *Sandin* is based on "the expected perimeters of the sentence imposed by a court of law," detainees are entitled to a due process hearing before being subjected to punishment.⁴⁵¹ Decisions are in conflict as to whether a prisoner who has been convicted but not yet sentenced is to be considered a detainee or a convict for this purpose.⁴⁵²

D. Sanctions involving the fact or duration of imprisonment: good time, parole, temporary release

Prison punishments that affect the length of incarceration, such as the deprivation of good

⁴⁵⁰ *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (emphasis supplied); compare *Sandin*, 515 U.S. at 478, 483 (citing *Meachum*); see *Benjamin*, 264 F.3d at 189 (relying on *Meachum* and *Sandin*).

⁴⁵¹ *Johnston v. Maha*, 606 F.3d 39, 41 (2d Cir. 2010) (unpublished) (" . . . [P]retrial detainees can only be subjected to segregation or other heightened restraints if a pre-deprivation hearing is held to determine whether any rule has been violated."); *Iqbal v. Hasty*, 490 F.3d 143, 165 (2d Cir. 2007) (holding that detainee was entitled to procedural protections based directly upon the Due Process Clause where he was subjected to conditions so harsh as to comprise punishment, as well as under federal regulations that created a liberty interest, regardless of defendants' punitive intent), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Surprenant v. Rivas*, 424 F.3d 5, 17 (1st Cir. 2005) (holding detainees have a liberty interest in avoiding punishment); *Holly v. Woolfolk*, 415 F.3d 678, 679-80 (7th Cir. 2005) (noting holdings that "any nontrivial punishment of a person not yet convicted [is] a sufficient deprivation of liberty to entitle him to due process of law"), *cert. denied*, 546 U.S. 1151 (2006); *Mitchell v. Dupnik*, 75 F.3d 517, 523-24 (9th Cir. 1995); *Zarnes v. Rhodes*, 64 F.3d 285, 292 (7th Cir. 1995); *Adams v. Galletta*, 1999 WL 959368 at *5 (S.D.N.Y., Oct. 19, 1999) (citing cases; noting the issue has not been decided by the Second Circuit); *Butler v. New York State Correctional Dept.*, 1996 WL 438128 at *5 (S.D.N.Y., Aug. 2, 1996) (holding that pre-*Sandin* liberty interest analysis still applies to detainees). The First Circuit has held that detainees are denied due process when they are punished as a result of false charges made by staff members with the intent to cause them to be punished. *Surprenant v. Rivas*, 424 F.3d at 13-14. The Third Circuit has held: "Although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement." *Bistrrian v. Levi*, 696 F.3d 352, 375 (3d Cir. 2012) (quoting *Stevenson v. Carroll*, 495 F.3d 62, 69 (3d Cir. 2007)).

⁴⁵² Compare *Tilmon v. Prator*, 368 F.3d 521, 524 (5th Cir. 2004) (per curiam) (holding convicted but unsentenced prisoner is equivalent to a sentenced prisoner for *Sandin* purposes); *Berry v. City of Muskogee*, 900 F.2d 1489, 1493 (10th Cir. 1990) ("The critical juncture is conviction . . . at which point the state acquires the power to punish and the Eighth Amendment is implicated.") with *Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009) (state does not acquire right to punish until sentencing), *cert. denied*, 130 S.Ct. 1936 (2010); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3rd Cir. 2000) (the right to remain at liberty continues until sentencing); *Benjamin v. Malcolm*, 646 F.Supp. 1550, 1556, n. 3 (S.D. N.Y. 1986) (convicted inmates not yet sentenced to prison should be treated as detainees since they may receive suspended sentences or some outcome other than a prison term).

time, remain deprivations of liberty under the *Sandin* analysis. *Sandin* echoed *Wolff v. McDonnell*'s characterization of statutory good time as an interest of "real substance."⁴⁵³ There are two important issues of timing associated with this rule.

What if a disciplinary hearing deprives the prisoner of good time, but an administrative or state court proceeding overturns that sanction before the prisoner actually serves the additional prison time and before any federal court adjudication? The Second Circuit has not addressed the question. Several district court decisions have held that in such a case, the loss of good time is not to be considered in determining whether there has been a liberty deprivation.⁴⁵⁴ It is far from clear that these decisions are correct. *Sandin* made it very clear that it was not overruling *Wolff* but was returning to its due process principles.⁴⁵⁵ In *Wolff*, the Court explicitly acknowledged that "good time may be restored,"⁴⁵⁶ but was not therefore deterred from ruling broadly on the requirements of due process in cases in which good time was at stake. In *Edwards v. Balisok*,⁴⁵⁷ the Court held that in cases involving loss of good time, the good time must be reinstated via state proceeding or habeas corpus before a federal court may entertain a damage suit—a sequence that would become impossible if the return of the good time bars the damage suit. For these reasons, the question of due process remedies where good time has been lost and returned should be regarded as an open one.

⁴⁵³ 515 U.S. at 478; *see* *Teague v. Quarterman*, 482 F.3d 769, 777-80 (5th Cir. 2007) (holding that deprivation of any amount of good time is a liberty deprivation, rejecting argument that good time loss can be *de minimis*).

Decisions are divided as to whether a disciplinary or other action that reduces the prisoners' ability to earn good time prospectively implicates a liberty interest. The answer may depend on the characteristics of the particular good time system. *See* *Cardoso v. Calbone*, 490 F.3d 1194, 1197-98 (10th Cir. 2007) (citing *Wilson v. Jones*, 430 F.3d 1113, 1120-21, 23 (10th Cir. 2005)), *cert. denied*, 549 U.S. 943 (2006) (holding that a discretionary decision to reclassify a prisoner and reduce rate of earning good time after a disciplinary conviction did not deny a liberty interest, distinguishing earlier authority holding that a mandatory reclassification and reduction of good time did deny a liberty interest); *Montgomery v. Anderson*, 262 F.3d 641, 645 (7th Cir. 2001) (stating that loss of opportunity to earn good time does not deny liberty unless state system creates a liberty interest); *Abed v. Armstrong*, 209 F.3d 63, 66-67 (2d Cir. 2000) (holding prisoners have no liberty interest in the opportunity to earn good time where prison officials had discretion to determine eligibility for good time), *cert. denied*, 531 U.S. 97 (2000). *But see* *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237, 1242-43 (10th Cir.), *cert. denied*, 531 U.S. 962 (2000) (holding that a decision to reduce the rate at which a prisoner could earn good time based on his sex offender classification deprived him of liberty, though the court does not find that state statutes and regulations create a liberty interest in earning good time).

⁴⁵⁴ *See, e.g.,* *Wright v. Coughlin*, 31 F.Supp.2d 301, 312 (W.D.N.Y. 1998), *vacated on other grounds*, 225 F.3d 647 (2d Cir. 2000) (unpublished); *Cespedes v. Coughlin*, 956 F.Supp. 454, 473 (S.D.N.Y. 1997), *reconsideration granted on other grounds*, 969 F.Supp.2d 254 (S.D.N.Y. 1995).

⁴⁵⁵ 515 U.S. at 483.

⁴⁵⁶ 418 U.S. at 561.

⁴⁵⁷ 520 U.S. 641 (1997).

The second timing question arises from the fact that New York State disciplinary hearing dispositions only “recommend” loss of good time, with the actual final determination of good time made a few months before the prisoner’s eligibility for release. A few district court decisions have held that such a disposition is therefore not a deprivation of liberty.⁴⁵⁸ Others have disagreed and held that recommendation of loss of good time is a liberty deprivation.⁴⁵⁹ The Second Circuit has not resolved this question. As discussed below, under the *Heck/Balisok* rule, a prisoner cannot challenge a disciplinary sanction that affects the duration of confinement until and unless the sanction is overturned either in a state forum or via federal habeas corpus. Disciplinary dispositions involving a recommended loss of good time have been held to be governed by the *Heck/Balisok* rule.⁴⁶⁰ If the loss of good time has sufficient present substance to bar the prisoner’s case until remedies have been exhausted, it is hard to see why it lacks the substance to constitute a liberty deprivation.

This conclusion is supported by the characterization of the good time loss in state law and regulations, which suggest a presumption that disciplinary good time sanctions will be carried out. The regulations provide that “loss of a specified period of good behavior allowance (“good time”), subject to *restoration* as provided in Subchapter B of this Chapter.”⁴⁶¹ Further support appears in the procedural rules governing Time Allowance Committee deliberations: a prisoner is entitled to a hearing on the loss of good time “*other than* time lost as the result of a superintendent’s [disciplinary] hearing.”⁴⁶² As a practical matter, then, disciplinary good time recommendations are not reviewed *de novo*; there is no opportunity to contest the facts underlying the recommendation; it is the initial disciplinary hearing that governs.⁴⁶³ In addition,

⁴⁵⁸ See *Dawes v. Kelly*, 2005 WL 2245688, *8 (W.D.N.Y. 2005); *Marino v. Klages*, 973 F.Supp. 275, 279 (N.D.N.Y. 1997); *Brooks v. DiFasi*, 1997 WL 436750 at *4 (W.D.N.Y., July 30, 1997).

⁴⁵⁹ See *Mahotep v. DeLuca*, 3 F.Supp.2d 385, 390 (W.D.N.Y. 1998); *Burnell v. Coughlin*, 975 F.Supp. 473, 475 (W.D.N.Y., 1997).

⁴⁶⁰ See *Jiminez v. Goord*, 205 F.3d 1323, 1999 WL 1254510 (2d Cir., Dec. 8, 1999) (unpublished); *Johnson v. Gummerson*, 201 F.3d 431, 1999 WL 1212483 at *2 (2d Cir., Dec. 15, 1999) (unpublished); *Hyman v. Holder*, 2001 WL 262665, *3 (S.D.N.Y., Mar. 15, 2001) (citing *Gomez v. Kaplan*, 2000 WL 1458804, at *7 n. 7 (S.D.N.Y., Sept. 29, 2000)). A recommended loss of good time for a New York State prisoner serving a sentence with a maximum term of life is not barred by the *Heck/Balisok* rule because such a prisoner is ineligible for good time credit. *Livingston v. Piskor*, 2005 WL 2759805 at *1 (2d Cir., Oct. 26, 2005) (unpublished).

⁴⁶¹ 7 N.Y.C.R.R. § 254.7(a)(1)(vi) (emphasis supplied).

⁴⁶² 7 N.Y.C.R.R. § 261.4(a).

⁴⁶³ See *Spence v. Senkowski*, 1997 WL 394667 at *9 (N.D.N.Y. July 3, 1997) (“It appears that the only time that a recommended loss of good time will not affect the length of the sentence is if the inmate’s subsequent behavior merits its restoration or if the hearing decision is reversed.”); *Martinez v. Coombe*, 1996 WL 596553 at *6 (N.D.N.Y., Oct. 15, 1996).

within the state court system, disciplinary hearing determinations recommending good time loss are treated as final, notwithstanding the possibility that they may be revised later. Indeed, prisoners who await the Time Allowance Committee determination to challenge a disciplinary loss of good time have had their claims dismissed as time-barred.⁴⁶⁴

Parole matters are generally unaffected by *Sandin* because they affect the length of incarceration, rather than the “incidents of prison life” addressed in *Sandin*. Parole revocation is a liberty deprivation.⁴⁶⁵ Denial of parole release is a liberty deprivation if statutes or regulations create a liberty interest.⁴⁶⁶ The Second Circuit has rejected the argument that even absent a liberty interest under the usual analysis, there is a limited liberty interest in having parole decisions made according to the state’s statutory criteria; an allegation of departure from those criteria is actionable only under state law.⁴⁶⁷ The Supreme Court has held that disqualification of an otherwise eligible prisoner from parole eligibility as a result of placement in a “supermax” facility was a factor in finding such placement “atypical and significant” under *Sandin*.⁴⁶⁸

⁴⁶⁴ See *Miranda v. Kuhlman*, 127 A.D.2d 924 (3d Dept.), *app. denied*, 69 N.Y.2d 612 (1987); *Jelich v. Smith*, 105 A.D.2d 1125 (3d Dept. 1984), *app. denied*, 64 N.Y.2d 606 (1985).

⁴⁶⁵ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord*, *Young v. Harper*, 520 U.S. 143 (1997) (holding “preparole” program involving similar degree of liberty and similar restrictions subject to *Morrissey* holding).

⁴⁶⁶ At least, that is how matters appeared after *Sandin*, which cited with approval *Board of Pardons v. Allen*, 482 U.S. 369 (1987), which followed *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979), as an example of how “States may under certain circumstances create liberty interests which are protected by the Due Process Clause.” *Sandin*, 515 U.S. at 484. However, *Wilkinson v. Austin* states in passing that *Sandin* “abrogated *Greenholtz*’s and *Hewitt*’s methodology for establishing the liberty interest,” without qualification and without mentioning that *Sandin*’s focus was on in-prison restrictions and not on release from prison. *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005). It does not appear to me that the Supreme Court intended to make any pronouncement on due process analysis as to parole matters, which were not before it. See *Crump v. Lafler*, 657 F.3d 393, 401-06 (6th Cir. 2011) (applying *Greenholtz* and *Board of Pardons v. Allen* in finding no liberty interest in Michigan parole statutes); *Ellis v. District of Columbia*, 84 F.3d 1413, 1417-18 (D.C.Cir. 1996) (stating *Greenholtz* and *Allen* are not overruled but their reasoning is suspect after *Sandin*); *compare id.* at 1425-26 (concurring and dissenting opinion) (stating *Greenholtz* and *Allen* are alive and well). Cf. *Haggard v. Curry*, 631 F.3d 931, 936-37 (9th Cir. 2010) (holding “some evidence” requirement adopted by state courts under state constitution was part of state-created liberty interest protected by federal constitution, though remedy is new hearing and not release).

⁴⁶⁷ *Graziano v. Pataki*, 689 F.3d 110, 114-17 (2d Cir. 2012). The plaintiffs alleged that there was an unofficial policy of basing parole decisions entirely on the severity of the prisoner’s crime and disregarding other statutory factors. See *Burnette v. Fahey*, 687 F.3d 171 (4th Cir. 2012) (rejecting a similar argument), *rehearing and rehearing en banc denied*, 699 F.3d 804 (4th Cir. 2012).

⁴⁶⁸ *Wilkinson v. Austin*, 509 U.S. at 224.

Most courts, including the Second Circuit, say that prisoners who are in work release or other temporary release programs have a liberty interest in staying in them, requiring due process protections when officials try to remove them, if they live in the community and not in an institutional setting; but if they continue to live in a prison, halfway house, or other institution, they do not have a liberty interest.⁴⁶⁹ Several courts have suggested (correctly, in my view) that the former outcome is dictated by the Supreme Court's 1997 decision in *Young v. Harper*⁴⁷⁰ that persons released to a "pre-parole" program in which they lived at home under conditions similar to parole were entitled to the same due process protections against revocation as are parolees.⁴⁷¹ As to the latter outcome, under *Sandin*, removal from an institutional work release program is likely to be viewed as only a change of scene in prison, so there would be no liberty interest if the prisoner was merely be returned to ordinary prison conditions.⁴⁷² (Removal to atypical and significant prison conditions would of course present a due process question even under *Sandin*.) In light of *Young* and *Sandin*, state statutes and regulations are probably of little relevance in temporary release removal cases.

⁴⁶⁹ *Anderson v. Recore*, 446 F.3d 324, 328-29 (2d Cir. 2006); *Paige v. Hudson*, 341 F.3d 642, 643-44 (7th Cir. 2003) (holding that removal from "home detention" to jail was a liberty deprivation requiring due process); *Anderson v. Recore*, 317 F.3d 194, 200 (2d Cir. 2003); *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000); *Asquith v. Department of Corrections*, 186 F.3d 407, 410-11 (3d Cir. 1999) (holding that prisoner in work release in a halfway house was still in institutional confinement and had no liberty interest); *Kim v. Hurston*, 182 F.3d 113, 117 (2d Cir. 1999); *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 668 (8th Cir. 1996) (holding a prisoner in a work release program more analogous to institutional life than parole or probation did not have a liberty interest protected by due process); *Edwards v. Lockhart*, 908 F.2d 299, 301-03 (8th Cir. 1990) (holding temporary release program in which the plaintiff lived at home and not in an institution was similar to parole and there was a constitutionally based liberty interest in avoiding termination); *Whitehorn v. Harrelson*, 758 F.2d 1416, 1421 (11th Cir. 1985) (holding prisoner held in work release center had no liberty interest because he remained institutionalized); *Wright v. Coughlin*, 31 F.Supp.2d 301, 312 (W.D.N.Y. 1998) (finding a liberty interest in remaining in an extra-institutional work release program), *vacated on other grounds*, 225 F.3d 647 (2d Cir. 2000) (unpublished); *Cespedes v. Coughlin*, 956 F.Supp. 454, 473 (S.D.N.Y. 1997) (same), *reconsideration granted on other grounds*, 969 F.Supp.2d 254 (S.D.N.Y. 1995).

⁴⁷⁰ *Young v. Harper*, 520 U.S. 143 (1997).

⁴⁷¹ *Asquith v. Department of Corrections*, 186 F.3d at 410-11; *Friedl v. City of New York*, 210 F.3d at 84; *Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999); *Paige v. Hudson*, 234 F.Supp.2d 893, 901-03 (N.D.Ind. 2002), *aff'd*, 341 F.3d 642 (7th Cir. 2003).

⁴⁷² *See Asquith v. Department of Corrections*, 186 F.3d at 409-11; *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 669 (8th Cir. 1996); *Dominique v. Weld*, 73 F.3d at 1156, 1160 (1st Cir. 1996); *McGoue v. Janecka*, 211 F.Supp.2d 627, 631 (E.D.Pa. 2002) (all holding that returning a work release participant to prison is not atypical and significant). *Contra*, *Segretti v. Gillen*, 259 F.Supp.2d 733, 737-38 (N.D.Ill. 2003); *Quartararo v. Catterson*, 917 F.Supp. 919, 940-41 (E.D.N.Y. 1996); *Roucchio v. Coughlin*, 923 F.Supp. 360, 374 (S.D.N.Y. 1996).

There is no constitutionally based liberty interest in obtaining temporary release.⁴⁷³ Can statutes and regulations create a liberty interest in obtaining temporary release, as is the case with parole?⁴⁷⁴ Before *Sandin v. Conner*, some courts had found liberty interests in admission to temporary release in statutes and regulations,⁴⁷⁵ though most had not, because in most cases the statutes and regulations left prison officials with too much discretion in granting temporary release to create a liberty interest.⁴⁷⁶ If *Sandin v. Conner*'s requirement that prisoners show "atypical and significant hardship" compared to ordinary prison conditions⁴⁷⁷ applies to admission to temporary release, prisoners do not have a liberty interest, because staying in prison is not atypical and significant compared to staying in prison.⁴⁷⁸ On the other hand, if temporary release programs in which the prisoner lives in the community are constitutionally similar to parole, as courts have said since the Supreme Court decided *Young v. Harper*,⁴⁷⁹ it would seem that statutes and regulations could create a liberty interest,⁴⁸⁰ just as some parole statutes and regulations do.

E. Prison discipline and habeas exhaustion

State prisoners seeking the return of good time, or other relief affecting the fact or

⁴⁷³ *Kitchen v. Upshaw*, 286 F.3d 179, 186-87 (4th Cir. 2002); *Lee v. Governor of State of New York*, 87 F.3d 55, 58 (2d Cir. 1996); *Mahfouz v. Lockhart*, 826 F.2d 791, 792 (8th Cir. 1987); *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 843-45 (9th Cir. 1985); *Romer v. Morgenthau*, 119 F.Supp.2d 346, 357-58 (S.D.N.Y. 2000).

⁴⁷⁴ As discussed above, *see n. 466*, statutes and regulations governing parole release can create a liberty interest if they place sufficient limits on official discretion (though most do not).

⁴⁷⁵ *See Winsett v. McGinnes*, 617 F.2d 996, 1007-08 (3d Cir. 1980) (en banc) (holding that where discretion to release is governed by certain criteria, an eligible inmate has a liberty interest that is violated by consideration of factors outside those criteria), *cert. denied sub nom. Anderson v. Winsett*, 449 U.S. 1093 (1981); *Olynick v. Taylor County*, 643 F.Supp. 1100, 1103-04 (W.D.Wis. 1986) (denial of work release that was mandated by sentencing judge denied due process); *In re Head*, 147 Cal.App.3d 1125, 195 Cal.Rptr. 593, 596-98 (Cal.App. 1983). *But see Francis v. Fox*, 838 F.2d at 1149 n. 8; *Baumann v. Arizona Dept. of Corrections*, 754 F.2d at 845-46 (both disagreeing with *Winsett v. McGinnes*).

⁴⁷⁶ *See, e.g., DeTomaso v. McGinnis*, 970 F.2d 211, 212-13 (7th Cir. 1992); *Canterino v. Wilson*, 869 F.2d 948, 953 (6th Cir. 1989); *Francis v. Fox*, 838 F.2d 1147, 1149-50 (11th Cir. 1988).

⁴⁷⁷ *See* § III.A, above.

⁴⁷⁸ *See Kitchen v. Upshaw*, 286 F.3d 179, 186-87 (4th Cir. 2002).

⁴⁷⁹ *See nn. 470-471*, above.

⁴⁸⁰ *But see Gambino v. Gerlinski*, 96 F.Supp.2d 456, 459-60 (M.D.Pa.) (holding federal work release statute did not create a liberty interest because it was not explicitly mandatory and did not contain specified substantive predicates), *aff'd*, 216 F.3d 1075 (3d Cir. 2000).

duration of imprisonment, are subject to the exhaustion requirement of the federal habeas corpus statute and must exhaust state remedies before proceeding in federal court.⁴⁸¹ There was a protracted controversy over whether this rule applied only when the return of good time, or other change in the duration of confinement, was part of the relief sought, or whether it also applied to cases where the plaintiff challenged a proceeding that affected the length of sentence without actually requesting confinement-related relief. In *Heck v. Humphrey*,⁴⁸² the court held that prisoners cannot bring actions “that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement” without first getting the conviction or sentence overturned via a state court proceeding or via a federal court writ of habeas corpus.⁴⁸³

Heck was a damage suit arising from the plaintiff’s criminal conviction. The *Heck* rule was extended to prison disciplinary proceedings involving the loss of good time in *Edwards v. Balisok*,⁴⁸⁴ which held that damage claims that would “necessarily imply the invalidity” of a challenged disciplinary proceeding affecting the fact or duration of confinement must also be preceded by exhaustion of state remedies.⁴⁸⁵ The claim is not cognizable under § 1983 until the adverse decision is overturned either in a state forum or via federal habeas corpus, and a § 1983 claim should be dismissed, not stayed, until that is accomplished.⁴⁸⁶ These rules apply only to prison disciplinary proceedings that result in deprivation of good time or otherwise affect the length of imprisonment, and not to those that result only in segregated confinement or other in-prison sanctions.⁴⁸⁷ The Second Circuit has held that if a prisoner abandons forever any challenge to loss of good time or other sanction affecting the length of confinement, the *Edwards* holding with its “favorable termination rule” does not apply and a challenge to other sanctions such as segregated confinement may go forward without habeas exhaustion.⁴⁸⁸

The Supreme Court has clarified the limits of the *Heck/Balisok* rule by reaffirming that it applies only in cases where “success in [the federal] action *would necessarily* demonstrate the invalidity of confinement or its duration.”⁴⁸⁹ Challenges to state laws, procedures, or standards

⁴⁸¹ *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973).

⁴⁸² 512 U.S. 477 (1994).

⁴⁸³ 512 U.S. at 485.

⁴⁸⁴ 520 U.S. 641 (1997).

⁴⁸⁵ *Id.*, 520 U.S. at 646.

⁴⁸⁶ *Id.* at 649.

⁴⁸⁷ *Muhammad v. Close*, 540 U.S. 709 (2004) (per curiam).

⁴⁸⁸ *Peralta v. Vasquez*, 467 F.3d 98, 104-06 (2d Cir. 2006), *cert. denied*, 551 U.S. 1145 (2007).

⁴⁸⁹ *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (emphasis supplied).

that would not *necessarily* invalidate the confinement or its duration are unaffected. Thus, prisoners who respectively challenged procedures for denial of parole eligibility and procedures for parole release decisions could proceed directly under § 1983 because success in their suits would not result in their earlier release, but only in new proceedings which *might* hasten their release.⁴⁹⁰

The limitation of the *Heck/Balisok* rule to suits that would *necessarily* imply the invalidity of the disciplinary proceeding also means that the rule is limited to suits attacking the integrity or the procedures of a state proceeding, as in *Balisok* itself, where the prisoner alleged that he was denied the right to call witnesses and the hearing officer was not impartial. A suit that merely alleges facts that are inconsistent with a disciplinary conviction (e.g., the prisoner was administratively convicted of assaulting an officer, but alleges that in reality the officer assaulted him or her) does not *necessarily* imply the invalidity of the proceeding.⁴⁹¹ A prison disciplinary proceeding that reaches the wrong result, or even one that rests on false evidence, is not invalid as long as it meets the requirements of procedural due process.⁴⁹²

The Second Circuit has held that the *Heck/Balisok* rule is not applicable to a plaintiff who is no longer “in custody” and to whom the habeas remedy is therefore no longer available, and such a plaintiff must be allowed to proceed under § 1983.⁴⁹³ This holding, based on a Supreme Court case in which four Justices assented to the proposition in a concurring opinion and a fifth did so in a dissenting opinion,⁴⁹⁴ is the subject of a conflict among circuits.⁴⁹⁵

⁴⁹⁰ *Wilkinson, id.*; see *Gipson v. Jefferson County Sheriff’s Office*, 613 F.3d 1054, 1056 (11th Cir. 2010) (allowing § 1983 action by sex offenders alleging their remand to custody for lack of a residential address, without consideration of their indigency, denied due process), *vacated as moot*, 649 F.3d 1274 (11th Cir. 2011); *Osborne v. District Attorney’s Office for the Third Judicial District*, 423 F.3d 1050, 1055 (9th Cir. 2005) (allowing § 1983 action by convict to compel release of DNA evidence for more sophisticated testing, since a ruling in his favor would not “necessarily imply” the invalidity of his conviction).

⁴⁹¹ See *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 887 (S.D.N.Y. 1998) (holding claim that defendants assaulted the plaintiff and destroyed his property in events leading up to a disciplinary hearing was not barred by *Balisok* because it did not challenge the disciplinary findings).

⁴⁹² *Freeman v. Rideout*, 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied*, 485 U.S. 982 (1988).

⁴⁹³ *Huang v. Johnson*, 251 F.3d 65, 74 (2d Cir. 2001); *accord*, *Nonnette v. Small*, 316 F.3d 872, 875-76 (9th Cir. 2002), *cert. denied*, 540 U.S. 1218 (2004).

⁴⁹⁴ See *Spencer v. Kemna*, 523 U.S. 1, 20-21, 25 n.8 (1998) (concurring and dissenting opinions), discussed in *Huang v. Johnson, id.*

⁴⁹⁵ See, e.g., *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (rejecting argument that *Spencer* limits *Heck*), *cert. denied*, 552 U.S. 1285 (2008); *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (rejecting *Huang* holding); see also *Burd v. Sessler*, 702 F.3d 429, 435-36 (7th Cir. 2012) (holding “*Heck* applies where a § 1983 plaintiff *could* have sought collateral relief at an earlier time but declined the opportunity and waited until collateral relief became unavailable before suing”).

The Second Circuit has held that habeas corpus is a proper means of seeking release from prison segregation, a conclusion it has not *directly* re-examined since recent Supreme Court decisions concerning the scope of § 1983 and habeas.⁴⁹⁶ Other courts disagree.⁴⁹⁷ The Second Circuit’s holding may not be good law after the Supreme Court’s decision in *Muhammad v. Close*.⁴⁹⁸ However, the court has reaffirmed its view, albeit tangentially and in passing, by reiterating that federal prisoners may proceed under 28 U.S.C. § 2241 in challenges to the execution (rather than the imposition) of sentence, a category it says “includes matters such as ‘the administration of parole, computation of a prisoner’s sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions.’”⁴⁹⁹

⁴⁹⁶ *Boudin v. Thomas*, 732 F.2d 1107, 1111 (2d Cir.), *reh’g denied*, 737 F.2d 261, 262 (2d Cir. 1984); *see Abdul-Hakeem v. Koehler*, 910 F.2d 66, 69-70 (2d Cir. 1990) (clarifying *Boudin*, holding that habeas or § 1983 may be used to challenge the place of confinement).

⁴⁹⁷ *Compare, e.g., Medberry v. Crosby*, 351 F.3d 1049, 1053 (11th Cir. 2003) (“it is proper for a district court to treat a petition for release from administrative segregation as a petition for a writ of habeas corpus’ because ‘[s]uch release falls into the category of “fact or duration of physical imprisonment” delineated in *Preiser v. Rodriguez*.”); *Krist v. Ricketts*, 504 F.2d 887, 887-88 (5th Cir. 1974) (per curiam) *with Cardona v. Bledsoe*, 681 F.3d 533, 536-37 (3d Cir. 2012) (holding 28 U.S.C. § 2241 habeas jurisdiction did not extend to a petition seeking release from Special Management Unit, because placement there was not specified in the sentence and therefore was not part of execution of sentence, and did not affect the duration of confinement because it had no necessary effect on good time loss), *cert. denied*, 133 S.Ct. 805 (2012); *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035-37 (10th Cir. 2012) (challenge to placement in highly restrictive ADX unit sought change in place of confinement and not immediate or earlier release, so had to be pursued via *Bivens* claim and not habeas petition); *Montgomery v. Anderson*, 262 F.3d 641, 643-44 (7th Cir. 2001) (“Disciplinary segregation affects the severity rather than duration of custody. More-restrictive custody must be challenged under § 1983, in the uncommon circumstances when it can be challenged at all.”); *Brown v. Plaut*, 131 F.3d 163, 167-68 (D.C.Cir. 1997), *cert. denied*, 524 U.S. 939 (1998); *Toussaint v. McCarthy*, 801 F.2d 1080, 1102-03 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

⁴⁹⁸ 540 U.S. 749 (2004) (per curiam). In *Muhammad*, the Court held that a suit seeking damages for placement in segregation was not governed by the rule requiring favorable termination in a state forum or via habeas corpus of a claim that if successful would be at odds with a state criminal conviction or sentence calculation. The Court stated that the plaintiff “raised no claim on which habeas relief could have been granted on any recognized theory. . . .” 540 U.S. at 755. Though the plaintiff was not actually seeking release from segregation in *Muhammad*, the quoted statement is integral to the Court’s explanation of its disposition of the case and cannot be dismissed as dictum.

⁴⁹⁹ *Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006) (quoting *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001)); *accord, Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008), *cert. denied*, 555 U.S. 1118 (2009). *Levine* involved a challenge to a Bureau of Prisons policy that limited the proportion of his sentence that the petitioner could serve in a community corrections center. The *Levine* court did not say whether a different result would obtain with respect to a state prisoner proceeding under 28 U.S.C. § 2254. It did acknowledge a disagreement with the Seventh Circuit, which had held habeas corpus jurisdiction did not lie in a challenge to the same policy because victory could not change the fact or duration of the petitioner’s custody. *Levine*, 455 F.3d at 78 n.4 (citing *Richmond v. Scibana*, 387 F.3d

Courts including the Second Circuit have heard federal court challenges to temporary release denial and revocation under the civil rights statutes and have not required that they be pursued via petition for habeas corpus after exhaustion of state judicial remedies.⁵⁰⁰

F. The process due

1. Disciplinary proceedings

Prison disciplinary proceedings are not criminal proceedings and their procedural due process requirements are accordingly limited.⁵⁰¹ The Supreme Court set out these requirements in *Wolff v. McDonnell* and said they were not “graven in stone.”⁵⁰² They have been supplemented to some degree by the lower courts.

a. Notice

Inmates must receive written notice of the charges against them at least 24 hours before

602, 605 (7th Cir. 2004)); *see also* *Robinson v. Sherrod*, 631 F.3d 839, 840-41 (7th Cir. 2011) (holding § 2241 cannot be used to challenge medical decisions or other prison conditions that do not affect the duration of imprisonment), *cert. denied*, 132 S.Ct. 397 (2011). The Third Circuit has taken the intermediate position that the execution of sentence cognizable under § 2241 extends to, but is also limited to, aspects of confinement that are addressed in the criminal judgment. *McGee v. Martinez*, 627 F.3d 933, 936-37 (3d Cir. 2010) (finding § 2241 jurisdiction to challenge prison officials’ actions under Inmate Financial Responsibility Program with regard to plaintiff’s money, which were done to implement payment of his criminal fine). The Fifth Circuit appears to take the position that habeas is a proper remedy for any matter that *could* affect the duration of confinement. *See Gallegos-Hernandez v. U.S.*, 688 F.3d 190, 194 (5th Cir. 2012) (holding habeas lies on an “execution of sentence” theory to challenge exclusion from a drug program, completion of which *can* result in up to 12 months’ reduction in sentence), *cert. denied*, 2012 WL 4462145 (2012).

⁵⁰⁰ *Kim v. Hurston*, 182 F.3d 113, 118 n.3 (2d Cir. 1999) (holding that temporary release revocation claim is about “conditions of confinement” and need not be pursued via habeas corpus); *Graham v. Broglin*, 922 F.2d 379, 381-82 (7th Cir. 1991); *Gwin v. Snow*, 870 F.2d 616, 624 (11th Cir. 1989); *Hake v. Gunter*, 824 F.2d 610, 611 (8th Cir. 1987); *Jamieson v. Robinson*, 641 F.2d at 141 (holding § 1983 an appropriate remedy); *Wright v. Cuyler*, 624 F.2d 455, 457-59 (3d Cir. 1980).

⁵⁰¹ The Second Circuit has held that prison disciplinary sanctions are civil rather than criminal, rendering the protection against double jeopardy inapplicable between criminal and disciplinary proceedings, under the Supreme Court’s current analysis. *Porter v. Coughlin*, 421 F.3d 141, 146-48 (2d Cir. 2005).

⁵⁰² 418 U.S. 539, 471-72 (1974). The *Wolff* requirements apply to disciplinary proceedings resulting in deprivation of property as well as to those resulting in deprivation of liberty under the *Sandin v. Conner* definition of liberty discussed in previous sections. *Burns v. PA Dept. of Corrections*, 642 F.3d 163, 172-73 (3d Cir. 2011).

the hearing.⁵⁰³ The purpose of the notice is “to inform [the inmate] of the charges and to enable him to marshal the facts and prepare a defense.”⁵⁰⁴ Accordingly, the prisoner must be allowed to retain possession of the notice pending the hearing.⁵⁰⁵ It must also be reasonably specific about what the prisoner is accused of doing.⁵⁰⁶ Merely listing the number or name of the rule that the prisoner allegedly violated is not enough.⁵⁰⁷ Some variation between the rule cited in the notice and the rule the prisoner is found to have broken is permissible as long as the notice described what the prisoner allegedly did.⁵⁰⁸

b. Hearings: the right to hear and to be heard

The most basic due process right is the right to be heard, and refusing even to listen denies due process.⁵⁰⁹ Prisoners also have the right to hear—*i.e.*, to be informed of the evidence in order to respond to it.⁵¹⁰ Prison officials are obligated to take the necessary steps so prisoners

⁵⁰³ Wolff v. McDonnell, 418 U.S. at 564.

⁵⁰⁴ Wolff v. McDonnell, 418 U.S. at 564; *see* Brown v. District of Columbia, 66 F.Supp.2d 41, 45 (D.D.C. 1999) (stating “plaintiff was simply not afforded the most basic process—an opportunity to know the basis on which a decision will be made and to present his views on that issue or issues.”)

⁵⁰⁵ Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993).

⁵⁰⁶ Sira v. Morton, 380 F.3d 57, 72 (2d Cir. 2004) (holding “there must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense”); Rinehart v. Brewer, 483 F.Supp. 165, 169 (S.D.Iowa 1980) (notice must contain date, general time and location of incident, a general description of the incident, citation to rules violated, and identification of other persons involved).

⁵⁰⁷ Pino v. Dalsheim, 605 F.Supp.1305, 1315 (S.D.N.Y. 1985); Powell v. Ward, 487 F.Supp. 917, 926-27 (S.D.N.Y. 1980), *aff’d as modified*, 643 F.2d 924 (2d Cir. 1981).

⁵⁰⁸ *See* Kalwasinski v. Morse, 201 F.3d 103, 108 (2d Cir. 1999) (where notice said the plaintiff had threatened to kill an officer, even if the death threat was not confirmed at the hearing, the plaintiff had had sufficient notice he was accused of making verbal threats); *compare* Sira v. Morton, 380 F.3d 57, 71 (2d Cir. 2004) (“ . . . [U]nlike *Kalwasinski*, this is not a case where one discrepancy in a misbehavior report can be excused because other details provided adequate notice of the conduct at issue.”)

⁵⁰⁹ Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989); McCann v. Coughlin, 698 F.2d 112, 123 (2d Cir. 1983) (prisoner tried to present a defense to one charge, was interrupted and told that the committee was moving on to the next charge); *see* Pino v. Dalsheim, 605 F.Supp.1305, 1318 (S.D.N.Y. 1985) (fact-finder is required to “consider in good faith the substance of the inmate’s defense”).

⁵¹⁰ Sira v. Morton, 380 F.3d 57, 74 (2d Cir. 2004) (“An inmate’s due process right to know the evidence upon which a discipline ruling is based is well established. . . . Such disclosure affords the inmate a reasonable opportunity to explain his actions and to alert officials to possible defects in the evidence.”); Francis v. Coughlin, 891 F.2d 43, 47 (2d Cir. 1989) (evidence must be disclosed at the hearing and not after it); Rosario v. Selsky, 169 A.D.2d 955, 564 N.Y.S.2d 851, 852 (N.Y.App.Div. 1991) (prisoner should have been informed of photo array from which he was identified; failure to do so

can hear and be heard.⁵¹¹

In order to hear and be heard, prisoners must be present at the hearing.⁵¹² However, because there is no right to confrontation and cross-examination, the testimony of some witnesses may be taken outside the prisoner's presence.⁵¹³ Under exceptional circumstances, an accused prisoner may be excluded entirely from the disciplinary hearing if the hearing officer "reliably concludes that his presence would unduly threaten institutional safety or undermine correctional goals."⁵¹⁴

c. Witnesses

Prisoners have the right to call witnesses when it is not "unduly hazardous to institutional safety or correctional goals."⁵¹⁵ Prison officials can decline to call witnesses if their reasons are "logically related to preventing undue hazards to 'institutional safety or correctional goals.'"⁵¹⁶ Witnesses may be denied for reasons such as "irrelevance, lack of necessity, or the hazards presented in individual cases."⁵¹⁷ But prison officials may not automatically refuse to call

deprived him of the opportunity to defend himself and denied due process).

⁵¹¹ See *Dean v. Thomas*, 933 F.Supp. 600, 604-07 (S.D.Miss. 1996) (the fact that the jail was new and officials had not "formally established" a disciplinary process or had the staff present to conduct hearings did not justify failing to give hearings for the first six months the jail was open); *Clarkson v. Coughlin*, 898 F.Supp. 1019, 1050 (S.D.N.Y. 1995) (failure to provide interpretive services for deaf and hearing-impaired prisoners at hearings denied due process); *Powell v. Ward*, 487 F.Supp. 917, 932 (S.D.N.Y. 1980) (inmates who speak only Spanish must be provided translators at the hearing), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981).

⁵¹² *Battle v. Barton*, 970 F.2d 779, 782 (11th Cir. 1992) (inmate's presence "is one of the essential due process protections afforded by the Fourteenth Amendment"), *cert. denied*, 507 U.S. 927 (1993).

⁵¹³ *Wade v. Farley*, 869 F.Supp. 1365, 1375 (N.D.Ind. 1994) (exclusion of prisoner while a staff witness was testifying did not deny due process).

⁵¹⁴ *Malik v. Tanner*, 697 F.Supp. 1294, 1302-03 (S.D.N.Y. 1988); *accord*, *Battle v. Barton*, 970 F.2d at 782-83 (upholding removal of prisoner who refused to state his name and prison number); *Payne v. Axelrod*, 871 F.Supp. 1551, 1557 (N.D.N.Y. 1995) (threats of violence justified exclusion from hearing).

⁵¹⁵ *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); see *Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (refusal to call any witnesses was "an obvious procedural defect").

⁵¹⁶ *Ponte v. Real*, 471 U.S. 491, 497 (1985).

⁵¹⁷ *Wolff v. McDonnell*, 418 U.S. at 566; see *Burns v. PA Dept. of Corrections*, 642 F.3d 163, 175-76 (3d Cir. 2011) (upholding refusal to call victim of assault, who would have risked retaliation to testify truthfully if plaintiff was indeed his assailant); *Kalwasinski v. Morse*, 201 F.3d 103, 109 (2d Cir. 1999) (upholding the exclusion of officer witnesses who were not present at the incident); *Green v. Coughlin*, 633 F.Supp. 1166, 1168-70 (S.D.N.Y. 1986) (upholding denial of witnesses who had been

multiple witnesses,⁵¹⁸ especially when a prisoner “faces a credibility problem trying to disprove the charges of a prison guard.”⁵¹⁹ The refusal to call eyewitnesses to a disputed incident is particularly likely to deny due process.⁵²⁰ Blanket policies of denying witnesses, or types of witnesses (including staff members), have generally been held unconstitutional; the reason for denying a particular witness should be related to the specific facts of the case.⁵²¹

If prison officials refuse to call requested witnesses, the burden is on them to explain their decision at least “in a limited manner.”⁵²² However, they need not explain it or write it down at the time of the hearing; they may present their explanation when sued.⁵²³ Prison officials may be required to make reasonable efforts to identify and locate witnesses that the prisoner cannot completely identify.⁵²⁴

involved in the same riot plaintiff was accused of; their written statements had been obtained).

⁵¹⁸ Fox v. Coughlin, 893 F.2d 475, 478 (2d Cir. 1990) (denial of two witnesses out of seven was not justified; they could not be assumed to be cumulative just because they signed the disciplinary report); Fox v. Dalsheim, 112 A.D.2d 368, 491 N.Y.S.2d 820, 821 (N.Y.App.Div. 1985) (where two officers had testified, two others should have been called, because their testimony might not have agreed with the others’.)

⁵¹⁹ Ramer v. Kerby, 936 F.2d 1102, 1104 (10th Cir. 1991).

⁵²⁰ Pannell v. McBride, 306 F.3d 499, 503 (7th Cir. 2002) (per curiam) (refusal to call officers present at a search where contraband was found might deny due process); Bryan v. Duckworth, 88 F.3d 431, 434 (7th Cir. 1996) (refusal to call a nurse, the only potential non-prisoner witness except the complaining officer, might deny due process); Scott v. Coughlin, 78 F.Supp.2d 299, 313 (S.D.N.Y. 2000) (the denial of witnesses who were present at the incident supported the prisoner’s due process claim); Gilbert v. Selsky, 867 F.Supp. 159, 165-66 (S.D.N.Y. 1994) (in theft case, refusal to call the officer who allegedly let the prisoner into the area where it occurred, other officers who could vouch for the his whereabouts at the time, and other inmates who had access to the stolen materials, denied due process); Vasquez v. Coughlin, 726 F.Supp. at 469-70 (where the prisoner was charged with a stabbing, the failure to call the alleged victim raised a due process issue).

⁵²¹ Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (per curiam), *cert. denied*, 540 U.S. 1114 (2004); Whitlock v. Johnson, 153 F.3d 380, 386-88 (7th Cir. 1998); Ramer v. Kerby, 936 F.2d at 1104; Dalton v. Hutto, 713 F.2d 75, 76 (4th Cir. 1983); McCann v. Coughlin, 698 F.2d 112, 122-23 (2d Cir. 1983). The Second Circuit has upheld a rule permitting mental health staff to be consulted by the hearing officer but not called as witnesses. Powell v. Coughlin, 953 F.2d 744, 749 (2d Cir. 1991).

⁵²² Ponte v. Real, 471 U.S. 491, 497 (1985); *see* Ayers v. Ryan, 152 F.3d 77, 81-82 (2d Cir. 1998) (when prison officials refuse to interview a witness, they have the burden of showing that their conduct was rational; “oversight” is not an adequate justification). Rules permitting witnesses to refuse to appear without explanation have been struck down. Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (per curiam), *cert. denied*, 540 U.S. 1114 (2004); Forbes v. Trigg, 976 F.2d at 316-18.

⁵²³ Ponte v. Real, 471 U.S. at 497.

⁵²⁴ Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2d Cir. 1991) (prisoner did not know

The Second Circuit, contrary to other courts, has held that witnesses called by the accused prisoner need not appear and testify at the hearing, but can be interviewed by prison personnel outside the prisoner's presence.⁵²⁵ In my view this holding is mistaken⁵²⁶ and witnesses should testify at the hearing, not outside it, unless there is a good correctional reason for failing to do so in a particular case.⁵²⁷ Even if there is a good reason not to "call" a witness in the prisoner's presence, the prisoner should be informed of the substance of the testimony.⁵²⁸

d. Confrontation and cross-examination

There is no constitutional right to "confrontation and cross-examination of those furnishing evidence against the inmate."⁵²⁹ Prison officials are therefore not required to present the testimony of their witnesses—staff members or inmates—at the hearing in the prisoner's presence.⁵³⁰ In the case of staff members, some courts have held that they need not personally

witnesses' names, but officials had a list of them); *Grandison v. Cuyler*, 774 F.2d 598, 604 (3d Cir. 1985) (inmate gave witness's name but got his number wrong); *Pino v. Dalsheim*, 605 F.Supp. 1305, 1317-18 (S.D.N.Y. 1985) (officials first refused to identify, then refused to interview, previous occupants of cell where contraband was found).

⁵²⁵ See *Kalwasinski v. Morse*, 201 F.3d 103, 108-09 (2d Cir. 1999); *Francis v. Coughlin*, 891 F.2d 43, 48 (2d Cir. 1989) (witnesses may be interviewed outside the hearing by the hearing officer).

⁵²⁶ Here's how the mistake happened. *Francis v. Coughlin*, *supra*, relied on a statement in a prior Second Circuit decision, which in turn relied on a Supreme Court case which actually dealt only with witnesses *against* the inmate—*i.e.*, with the right to confrontation and cross-examination, which *Wolff v. McDonnell* did not extend to prison disciplinary hearings. See *Bolden v. Alston*, 810 F.2d 353, 358 (2d Cir. 1987) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 322 (1976)). However, *Wolff v. McDonnell* treated witnesses against the inmate and witnesses called by the inmate differently, and we think *Francis v. Coughlin* was in error in failing to make that distinction.

⁵²⁷ For the best explanations of the merit of this view, see *Whitlock v. Johnson*, 153 F.3d 380, 388 (7th Cir. 1998); *Mitchell v. Dupnik*, 75 F.3d 517, 525-26 (9th Cir. 1996). *Powell v. Ward*, 487 F.Supp. 917, 928-29 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981).

⁵²⁸ *Sira v. Morton*, 380 F.3d 57, 74 (2d Cir. 2003) ("An inmate's due process right to know the evidence upon which a discipline ruling is based is well established."); *Espinoza v. Peterson*, 283 F.3d 949, 953 (8th Cir. 2002) (upholding refusal to return a transferred inmate to the prison to testify where his presence would have been a security risk and prison officials obtained a written statement from him); *Francis v. Coughlin*, 891 F.2d at 47-48.

⁵²⁹ *Wolff v. McDonnell*, 418 U.S. 539, 567-69 (1974) (emphasis supplied); *accord*, *Baxter v. Palmigiano*, 425 U.S. 308, 320-23 (1976); see also *Murphy v. Superintendent, Massachusetts Correctional Institution*, 396 Mass. 830, 489 N.E.2d 661, 662 (1986) (confrontation not required by state constitution).

⁵³⁰ *Brown-Bey v. United States*, 720 F.2d 467, 469 (7th Cir. 1983) (prisoner accused of assault could be required to leave the hearing during the victim's testimony); *United States ex rel. Speller v.*

testify or be interviewed at all, and that a written report can be sufficient evidence to convict⁵³¹ (though if the prisoner asks for witnesses who are staff members, prison officials will have to justify their refusal to call them). If witnesses are presented outside the prisoner's presence, due process requires that the prisoner be informed of what they said.⁵³²

e. Documentary and physical evidence

Documentary evidence, like witness testimony, may be presented where doing so would not be “unduly hazardous to institutional safety or correctional goals.”⁵³³ Prison officials have the discretion “to limit access to other inmates to collect statements or to compile other documentary evidence.”⁵³⁴ Numerous courts have held that there is a limited due process right to examine, or to have produced at the hearing, documents in prison officials' possession that may help determine guilt.⁵³⁵ Some courts have held that the “*Brady* rule,” which requires the disclosure of material exculpatory evidence in criminal prosecutions, also applies to prison disciplinary proceedings.⁵³⁶ Videotapes are a type of document; courts have held that disciplinary bodies must review relevant videotapes, and prisoners must be shown videotapes

Lane, 509 F.Supp. 796, 800 (S.D.Ill. 1981) (witnesses can be interviewed over the telephone).

⁵³¹ *People ex rel. Vega v. Smith*, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, 1002-04 (N.Y. 1985). In *Vega*, the court limited its ruling to written reports based on personal knowledge and properly dated and signed, and noted that the inmate would generally have the right to call the officer who wrote the report as a witness if she so chose.

To support a conviction, written reports must state with specificity what the particular inmate did that violated the rules. *Bryant v. Coughlin*, 77 N.Y.2d 642, 569 N.Y.S.2d 582, 572 N.E.2d 23, 26 (N.Y. 1991) (reports stating that “all inmates in the Messhall were actively participating in this riot” did not constitute substantial evidence of particular prisoners' guilt).

⁵³² See *Francis v. Coughlin*, 891 F.2d 43, 47-48 (2d Cir. 1989); *Powell v. Ward*, 487 F.Supp. 917, 929 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981); *Daigle v. Hall*, 387 F.Supp. 652, 660 (D.Mass. 1975) (if testimony is not presented directly by witnesses, “it nevertheless must be revealed to the inmate with sufficient detail to permit the inmate to rebut it intelligently”).

⁵³³ *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

⁵³⁴ *Id.*

⁵³⁵ *Piggie v. Cotton*, 344 F.3d 674, 678 (7th Cir. 2003) (holding “an inmate is entitled to disclosure of material, exculpatory evidence in prison disciplinary hearings unless such disclosure would unduly threaten institutional concerns.”); *Smith v. Mass. Dept. of Correction*, 936 F.2d 1390, 1401 (1st Cir. 1991) (prison officials must explain denial of “relevant and important documents central to the construction of a defense”); *Giano v. Sullivan*, 709 F.Supp. 1209, 1215 (S.D.N.Y. 1989) (unjustified refusal to produce officers' eyewitness reports of the incident denied due process).

⁵³⁶ *Piggie v. Cotton*, 344 F.3d at 678 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)); *accord*, *Jones v. Cross*, 637 F.3d 841, 847 (7th Cir. 2011); *Thompson v. Hawk*, 978 F.Supp. 1421, 1424 (D.Kan. 1997).

that are used as evidence against them, unless there is a specific security reason not to do so.⁵³⁷

Courts have suggested that there may also be a limited due process right to have physical evidence produced at the hearing when it is particularly important to determining guilt or innocence.⁵³⁸

f. Assistance with a defense

There is no constitutional right to counsel in the disciplinary process.⁵³⁹ However, if an inmate is illiterate or the issues are so complex that it is unlikely she can present her case adequately, assistance from a staff member or another inmate may be required.⁵⁴⁰ In my view prisoners with significant mental problems should also be entitled to such assistance,⁵⁴¹ since

⁵³⁷ *Burns v. PA Dept. of Corrections*, 642 F.3d 163, 173-74 (3d Cir. 2011) (“the hearing officer must independently assess whether the evidence is relevant and then determine whether there are legitimate penological reasons to deny the prisoner access to the evidence requested”; hearing officer’s refusal to view videotape of the relevant incident, based on prison officials’ denial of its relevance “turns the disciplinary proceeding into little more than the administrative equivalent of a ‘show trial.’”); *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 813-15 (7th Cir. 2007) (where plaintiff alleged that a videotape existed and would exculpate him, failure to review it denied due process); *Piggie v. Cotton*, 344 F.3d at 678-79 (“We have never approved of a blanket policy of keeping confidential security camera videotapes for safety reasons. . . .”; where is it not apparent whether the tape is exculpatory or not, “minimal due process” requires that the district court review the tape in camera); *Mayers v. Anderson*, 93 F.Supp.2d 962, 965 (N.D.Ind. 2000) (failure to review a videotape without a stated reason denied due process). *But see Scruggs v. Jordan*, 485 F.3d 934, 940 (7th Cir. 2007) (denial to prisoner of access to videotape did not deny due process where the prisoner had admitted the conduct he was charged with).

⁵³⁸ *Young v. Lynch*, 846 F.2d 960, 963 (4th Cir. 1988) (due process may require production of evidence “when it is the dispositive item of proof, it is critical to the inmate’s defense, it is in the custody of prison officials, and it could be produced without impairing institutional concerns”).

⁵³⁹ *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 569-70 (1974).

⁵⁴⁰ *Wolff v. McDonnell*, 418 U.S. at 570-71; *see Brown v. O’Keefe*, 141 A.D.2d 915, 529 N.Y.S.2d 48 (N.Y.App.Div. 1988) (accusation of drug use based on urinalysis was a “complex case” requiring assistance).

⁵⁴¹ The Supreme Court has not addressed this issue directly in the context of prison disciplinary proceedings, but it held that counsel is required when a prisoner is committed to a mental institution, observing that someone “thought to be suffering from a mental disease or defect” presumably needs help even more than an illiterate or uneducated one. *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980). This reasoning is equally applicable to disciplinary hearings. *See People ex rel. Reed v. Scully*, 140 Misc.2d 379, 531 N.Y.S.2d 196 (N.Y.Sup. 1988) (an inmate acquitted by reason of mental disease in a criminal trial should have had an assistant appointed to help present an insanity defense at his disciplinary hearing). *But see Horne v. Coughlin*, 191 F.3d 244 (2d Cir. 1999) (declining to decide whether a mentally retarded prisoner was entitled to assistance).

they too are unlikely to be able to present a defense. Common sense suggests that prisoners who do not speak English should also be entitled to assistance.⁵⁴² The Second Circuit has held that prisoners who are placed in segregation before their hearings have a right to assistance from a staff member, since an inmate who is locked up is prevented from effectively preparing her case, just like an inmate who is illiterate or one faced with extremely complex issues.⁵⁴³

The Court in *Wolff* did not spell out exactly what the role of an assistant should be. The Second Circuit has held that staff assistance must be provided “in good faith and in the best interests of the inmate.”⁵⁴⁴ In New York, the courts have held that the assistant’s job is to investigate and gather evidence, not to act like a lawyer at the hearing.⁵⁴⁵ The hearing officer cannot properly serve as the prisoner’s assistant.⁵⁴⁶

If a staff member is appointed as an assistant and then does not actually assist the prisoner, that failure to assist denies due process.⁵⁴⁷

⁵⁴² State law or prison regulations sometimes require this. See, e.g., *Rivera v. Smith*, 110 A.D.2d 1043, 489 N.Y.S.2d 131 (N.Y.App.Div. 1985).

⁵⁴³ *Eng v. Coughlin*, 858 F.2d 889, 898 (2d Cir. 1988) (requiring assistance for prisoners in pre-hearing segregation).

⁵⁴⁴ *Eng v. Coughlin*, 858 F.2d at 898.

⁵⁴⁵ *Gunn v. Ward*, 52 N.Y.2d 1017, 1018, 438 N.Y.S.2d 302, 420 N.E.2d 100 (N.Y. 1981); see *Lee v. Coughlin*, 902 F.Supp. 424, 433 (S.D.N.Y. 1995) (holding that an assistant is supposed to *prepare* a defense, not just assist after the hearing begins).

⁵⁴⁶ *Lee v. Coughlin*, 902 F.Supp. 424, 433 (S.D.N.Y. 1995) (“Were I to adopt defendants’ position that a hearing officer and an inmate assistant could be the same person, the confined inmate’s right to an assistant and an impartial hearing officer would be rendered meaningless.”); see *Ayers v. Ryan*, 152 F.3d 77, 81 (2d Cir. 1998) (prisoner did not waive the right to an assistant by agreeing to the hearing officer’s “irregular” proposal to act as an assistant).

⁵⁴⁷ *Grandison v. Cuyler*, 774 F.2d 598, 604 (3d Cir. 1985) (allowance of only five minutes consultation with an inmate assistant was inadequately justified); *McConnell v. Selsky*, 877 F.Supp. 117, 123 (S.D.N.Y. 1994) (refusal of employee assistant to interview two officers because they worked on a different shift, combined with hearing officer’s refusal to appoint another assistant or interview the officers, denied due process); *Giano v. Sullivan*, 709 F.Supp. 1209, 1215 (S.D.N.Y. 1989) (failure of assistant to help the prisoner denied due process); *Pino v. Dalsheim*, 605 F.Supp. 1305, 1318 (S.D.N.Y. 1985) (due process was violated by assistant’s failure to carry out “basic, reasonable and non-disruptive requests”); see also *Ayers v. Ryan*, 152 F.3d 77, 81 (2d Cir. 1998) (hearing officer’s statement that he would assist the plaintiff by calling witnesses, and then failure to do so, denied due process). *But see Pilgrim v. Luther*, 571 F.3d 201, 206 (2d Cir. 2009) (holding assistant’s alleged non-performance was harmless error where plaintiff failed to identify any evidence not presented as a result and where there was plenty of evidence of guilt).

g. Impartial decision-maker

Due process requires an impartial fact-finder—that is, one whose mind is not already made up and who can give the prisoner a fair hearing.⁵⁴⁸ The courts have held that prison officials in general can be sufficiently impartial,⁵⁴⁹ but “[t]he degree of impartiality required of prison officials does not rise to the level of that required of judges generally.”⁵⁵⁰ A hearing officer can be impartial even if she has previously presided over hearings involving the same prisoner.⁵⁵¹ However, someone who was involved in the current incident or the filing of charges, witnessed the incident, or investigated it is generally not considered impartial.⁵⁵² The present or prior relationship between a hearing officer and either the prisoner or staff members involved in the hearing may impair impartiality.⁵⁵³ Committees or hearing officers may also show lack of impartiality by their statements and actions at the hearings.⁵⁵⁴

⁵⁴⁸ An impartial decisionmaker “does not prejudge the evidence and . . . cannot say . . . how he would assess evidence he has not yet seen.” *Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990); *see* *Edwards v. Balisok*, 540 U.S. 641, 647 (1997) (due process requirements “are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence”); *Surprenant v. Rivas*, 424 F.3d 5, 17-18 (1st Cir. 2005) (holding that a hearing officer who refused to interview an alibi witness based on a preconceived and subjective belief the witness would lie was not impartial); *Hodges v. Scully*, 141 A.D.2d 729, 529 N.Y.S.2d 832, 834 (N.Y.App.Div. 1988) (a hearing officer who already had a written and signed disposition in front of him while he conducted the hearing committed a “patent violation” of the right to impartiality).

⁵⁴⁹ *Wolff*, 418 U.S. at 570-71. Officials may not be disqualified simply because they have security responsibilities. *Powell v. Ward*, 542 F.2d 101, 103 (2d Cir. 1976).

⁵⁵⁰ *Allen v. Cuomo*, 100 F.3d 253, 259 (2d Cir. 1996) (holding that hearing officers’ impartiality was not compromised by the perception that the \$5.00 surcharge on all disciplinary convictions might raise revenue to prevent prison staff layoffs).

⁵⁵¹ *Pannell v. McBride*, 306 F.3d 499, 502 (7th Cir. 2002) (per curiam); *Black v. Selsky*, 15 F.Supp.2d 311, 317 (W.D.N.Y. 1998) (hearing officer was not biased based on having denied the plaintiff a time cut on another charge).

⁵⁵² *Shabazz v. Bezio*, 2013 WL 406693, *3 (2d Cir., Feb. 4, 2013) (unpublished); *Diercks v. Durham*, 959 F.2d 710, 713 (8th Cir. 1992); *Merritt v. De Los Santos*, 721 F.2d 598, 600-01 (7th Cir. 1983); *Rhodes v. Robinson*, 612 F.2d 677, 773 (3d Cir. 1979); *Powell v. Ward*, 487 F.Supp. 917, 931 (S.D.N.Y. 1980), *aff’d as modified*, 643 F.2d 924 (2d Cir. 1981).

⁵⁵³ *See* *Eads v. Hanks*, 380 F.3d 728, 729 (7th Cir. 2002) (stating in dictum that the spouse or “significant other” of a witness might not be impartial); *Malek v. Camp*, 822 F.2d 812, 815-16 (8th Cir. 1987) (allegation that a hearing officer knew the plaintiff had helped another inmate sue him stated a due process claim).

⁵⁵⁴ *Edwards v. Balisok*, 540 U.S. 641, 647 (1997) (decision of a “biased hearing officer who dishonestly suppresses evidence of innocence” cannot stand); *Francis v. Coughlin*, 891 F.2d 43, 46-47 (2d Cir. 1989) (allegations that hearing officer suppressed evidence, distorted testimony, and never informed the plaintiff of evidence against him raised a material issue of lack of impartiality); *Farid v. Goord*, 200

h. Standards of proof and evidence

Due process requires that a prison disciplinary conviction be supported by “some evidence.”⁵⁵⁵ That is the standard a reviewing court applies to the proceeding and the record. The question of burden of proof—the standard that the fact-finder must apply—is entirely different. In *Goff v. Dailey*, the first federal appeals court to consider the question held that “some evidence” is the burden of proof, as well as the standard of review, in disciplinary proceedings⁵⁵⁶—that is, if there is *any* evidence that the prisoner is guilty, the fact-finder can convict, even if there is overwhelming evidence of innocence.

The Vermont Supreme Court has found the *Goff* decision “unpersuasive” and held—correctly in my view—that due process requires the burden of proof to be the “preponderance of the evidence.”⁵⁵⁷ The “some evidence” test, while useful in reviewing a decision that has already been made, is simply not designed for the initial fact-finding. As the Vermont court observed, the Supreme Court in *Superintendent v. Hill*

stated that its “some evidence” standard “does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.” . . . We find incredible the suggestion that a *de novo* proceeding intended to determine the guilt or innocence of any individual could dispense with

F.Supp.2d 220, 243-44 (W.D.N.Y. 2002) (refusal of hearing officer to recuse himself despite some evidence of bias against Muslims supported a due process claim); *Giano v. Sullivan*, 709 F.Supp. 1209, 1217 (S.D.N.Y. 1989) (continued presence of staff witnesses, including the lieutenant who drafted the misbehavior report, who interrupted the prisoner while he testified and stayed with the hearing officer while he drafted his findings, created an “unacceptable risk of unfairness”); *see Surprenant v. Rivas*, 424 F.3d 5, 17-18 (1st Cir. 2005) (holding that a hearing officer who rushed to impose punishment despite a request from officials to await the results of an investigation could be found to lack impartiality)..

⁵⁵⁵ *Superintendent v. Hill*, 472 U.S. 445, 457 (1985); *see Denny v. Schultz*, ___ F.3d ___, 2013 WL 563347, *3 (3d Cir. 2013) (stating “the ‘some evidence’ standard is a standard of appellate review and not a burden of proof”); *Brown v. Fauver*, 819 F.2d 395, 398-99 (3d Cir. 1987) (distinguishing burden of proof from standard of review); *LaFaso v. Patrissi*, 633 A.2d 695, 697 (Vt. 1993) (noting that *Superintendent v. Hill* addressed the standard of review and not the standard of proof).

⁵⁵⁶ *Goff v. Dailey*, 991 F.2d 1437, 1440-43 (8th Cir. 1993). The Supreme Court of Iowa, the state where *Goff* originated, has agreed with *Goff*. *Backstrom v. Iowa District Ct. for Jones County*, 508 N.W.2d 705 (Iowa 1993). Later, several judges of that court realized that *Goff* and *Backstrom* were wrongly decided, but they did not persuade the court majority. *Marshall v. State*, 524 N.W.2d 150, 152-53 (Iowa 1994).

⁵⁵⁷ *LaFaso v. Patrissi*, 633 A.2d at 699-700; *see also Brown v. Fauver*, 819 F.2d at 399 n.4 (expressing doubt whether a “some evidence” burden of proof meets due process standards). The preponderance standard “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (citation omitted).

these procedures and retain a semblance of “fundamental fairness.”⁵⁵⁸

As the lower court in *Goff* pointed out, and the Vermont court agreed, the accepted due process “balancing test” supports the use of a higher standard than “some evidence.” “. . . [T]he inmate’s interest in not being erroneously disciplined is an important one; the risk of error with use of a ‘some evidence’ standard is high; and the state’s interest in swift and certain punishment is not impeded by the use of the preponderance standard of proof.” In addition, the state has no interest in treating innocent people as if they were guilty.⁵⁵⁹

As a standard of judicial review, the “some evidence” standard is the lowest possible. Under it, courts will not make an “independent assessment of the credibility of witnesses”⁵⁶⁰ or otherwise get involved in weighing the evidence or second-guessing the disciplinary committee’s finding of guilt.⁵⁶¹ The courts will intervene only if there is no evidence at all to support the charge,⁵⁶² or an essential element of the charge.⁵⁶³ (As the footnoted cases show, most “no

⁵⁵⁸ *LaFaso v. Patrissi*, 633 A.2d at 698; *see Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994) (noting that a “some credible evidence” standard “does not require the factfinder to weigh conflicting evidence”).

⁵⁵⁹ *Goff v. Dailey*, 991 F.2d at 1444 (dissenting opinion) (citations omitted); *accord*, *LaFaso v. Patrissi*, 633 A.2d at 698-700 (“We conclude there is a very significant risk of erroneous discipline of an innocent inmate under a ‘some evidence’ standard of proof.”).

⁵⁶⁰ *Superintendent v. Hill*, 472 U.S. at 455.

⁵⁶¹ *Hudson v. Johnson*, 242 F.3d 534, 537 (5th Cir. 2001); *Cummings v. Dunn*, 630 F.2d 649, 650 (8th Cir. 1980); *Walsh v. Finn*, 865 F.Supp. 126, 129 (S.D.N.Y. 1994) (under the “some evidence” standard, “[o]nce the court determines that the evidence is reliable, its inquiry ends—it should not look further to see whether other evidence in the record may have suggested a contrary conclusion.”); *see Denny v. Schultz*, ___ F.3d ___, 2013 WL 563347, *3-5 (3d Cir. 2013) (approving “collective guilt” standard in case of prison contraband found in a cell with multiple occupants); *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 812 (7th Cir. 2007) (holding finding of contraband in prisoner’s property met “some evidence” standard notwithstanding the argument that other prisoners had access to his property, which had been stored while he was in segregation).

⁵⁶² *See, e.g., Moton v. Cowart*, 631 F.3d 1337, 1342 (11th Cir. 2011) (holding fact that grievance was written in large capital letters could not by itself violate a rule against disrespect); *Burnsworth v. Gunderson*, 179 F.3d 771, 772-74 (9th Cir. 1999) (there was no evidence that a prisoner who said that if he did not get protective custody, his only option would be to “hit the fence,” actually escaped or attempted to escape); *Lenea v. Lane*, 882 F.2d 1171, 1175-76 (7th Cir. 1989) (there was no evidence that the prisoner had aided an escape based on the facts that he knew the escapees, had spoken to one on the day of the escape, was legitimately in the general area when they escaped, and was found to be “deceptive” during a polygraph test); *Cerda v. O’Leary*, 746 F.Supp. 820, 825 (N.D.Ill. 1990) (evidence discrediting the prisoner’s alibi but not affirmatively supporting his guilt was not any evidence of the infraction); *Adams v. Wolff*, 624 F.Supp. 1036, 1040 (D.Nev. 1985) (stab wounds alone did not constitute evidence of fighting); *Edwards v. White*, 501 F.Supp. 8, 11 (M.D.Pa. 1979) (possession of a petition with no signatures was no evidence of a “conspiracy to disrupt prison routine”), *aff’d*, 633 F.2d 209 (3d Cir. 1980); *United States ex rel. Smith v. Robinson*, 495 F.Supp. 696, 701 (E.D.Pa. 1980) (contraband charge

evidence” cases have some evidence of something, but the evidence lacks sufficient logical connection with the charge against the prisoner.) Restitution orders must be supported by evidence of the amount of money required for restitution.⁵⁶⁴

The “some evidence” standard has been made a bit more rigorous by the Second Circuit, which, like some other courts, has cautioned that “the ‘some evidence’ standard requires some ‘reliable evidence.’”⁵⁶⁵ One court has said that if “‘some evidence’ is to be distinguished from ‘no evidence,’ it must possess at least some minimal probative value . . . to satisfy the requirement of the Due Process Clause that the decisions of prison administrators must have some basis in fact.” Evidence may be “rendered so suspect by the manner and circumstances in which given as to fall short of constituting a basis in fact” for imposing discipline. The “some

was not supported by any evidence that seized items were really contraband); *Harper v. State*, 463 N.W.2d 418, 420-21 (Iowa 1990) (the fact that an inmate broke a minor rule was no evidence that he disobeyed a lawful order); *Matter of Reismiller*, 101 Wash.2d 291, 678 P.2d 323, 326 (Wash. 1984) (no evidence was produced linking the prisoner with the contraband).

⁵⁶³ *Teague v. Quarterman*, 482 F.3d 769, 780 (5th Cir. 2007) (invalidating disciplinary conviction for a “trafficking and trading” offense where there was no evidence the prisoner knew that another prisoner had deposited money into his account; refusing to interpret disciplinary rule as one of strict liability); *Morgan v. Dretke*, 433 F.3d 455, 458 (5th Cir. 2005) (holding that a disciplinary conviction of assault inflicting non-serious injury could not stand absent any evidence of injury); *Wilson v. Jones*, 430 F.3d 1113, 1124 (10th Cir. 2005) (finding no evidence to support a conviction of obtaining money under false pretenses where the prisoner requested a disbursement for legal copying from his release account and state statute allowed such disbursements), *cert. denied*, 549 U.S. 943 (2006); *Gamble v. Calbone*, 375 F.3d 1021, 1032 (10th Cir. 2004) (holding that a disciplinary proceeding for violating a criminal offense required some evidence of the intent required to commit that criminal offense).

⁵⁶⁴ *Keeling v. Schaefer*, 181 F.Supp.2d 1206, 1224-25 (D.Kan. 2001); *Dawes v. Carpenter*, 899 F.Supp. 892, 898 (N.D.N.Y. 1995) (a standardized schedule of costs would meet the some evidence standard); *Artway v. Scheidemantel*, 671 F.Supp. 330 (D.N.J. 1987) (an inmate could not be sentenced to restitution for destruction of property where the hearing did not address the value of the property).

⁵⁶⁵ *Sira v. Morton*, 380 F.3d 57, 69 (2d Cir. 2004); *accord*, *Luna v. Pico*, 356 F.3d 481, 489 (2d Cir. 2004) (holding due process violated when a prisoner “is punished solely on the basis of a victim’s hearsay accusation without any indication in the record as to why the victim should be credited”; accuser had refused to confirm his allegation and there was no other evidence or assessment of credibility); *Moore v. Plaster*, 266 F.3d 928, 931-32 (8th Cir. 2001) (conclusory statements were not some evidence); *Broussard v. Johnson*, 253 F.3d 874, 877 (5th Cir. 2001) (holding that after unreliable informant evidence was eliminated, the presence of bolt cutters in an area where 100 inmate had access was not “some evidence” possessing escape contraband); *Zavaro v. Coughlin*, 970 F.2d 1148, 1153-54 (2d Cir. 1992) (statements that “every inmate” out of 100 in the messhall participated in a disturbance were so “blatantly implausible” that they did not constitute some evidence of a particular inmate’s guilt); *Gilbert v. Selsky*, 867 F.Supp. 159, 165 (S.D.N.Y. 1994) (similar to *Broussard*); *Hayes v. McBride*, 965 F.Supp. 1186, 1189-90 (N.D.Ind. 1997) (officer said the prisoner admitted a substance was an intoxicant, the prisoner denied it; without any other evidence that the substance was an intoxicant, the “some evidence” standard was not met).

evidence” standard does not “require that credence be given to that evidence which common sense and experience suggest is incredible.”⁵⁶⁶ Although conflicts in evidence do not preclude a disciplinary conviction as long as there is evidence against the prisoner, some courts have held that exculpatory evidence may be more significant when it “directly undercuts the reliability of the evidence on which the disciplinary authority relied or there are other extra-ordinary circumstances.”⁵⁶⁷ In such cases there must be sufficient evidence of the reliability of the evidence against the prisoner, and an explanation of why the exculpatory evidence is rejected.⁵⁶⁸

The Supreme Court has held that a prisoner’s silence at a hearing can be used as evidence of guilt without violating the Fifth Amendment’s privilege against self-incrimination, in a case where there was other evidence of guilt.⁵⁶⁹ Can a prisoner’s silence therefore constitute “some evidence” all by itself? The Second Circuit has said that a prisoner’s refusal to testify “created such a strong adverse presumption as to render further testimony irrelevant.”⁵⁷⁰ However, since the decision does not make clear whether there was other evidence in the record independent of the witnesses who were not called, it is not clear whether the court actually ruled that silence meets the “some evidence” requirement. The notion that refusal to testify, without more, establishes guilt appears inconsistent with decisions, just discussed, holding that some *reliable* evidence is required.

“Evidence” is defined broadly, and prison hearings need not follow the rules of evidence applied in courts. Testimony need not be under oath,⁵⁷¹ and hearsay is admissible.⁵⁷² In

⁵⁶⁶ Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996) (holding the some evidence standard was not met where a confidential informant gave hearsay testimony and no staff member spoke with the source of the hearsay, and the victim of the alleged assault made inconsistent statements, never testified under oath, did not appear at the disciplinary hearing, and gave statements in response to leading questions and the promise of a transfer to a more desirable prison).

⁵⁶⁷ Viens v. Daniels, 871 F.2d 1328, 1335 (7th Cir. 1989).

⁵⁶⁸ Meeks v. McBride, 81 F.3d 717, 720-21 (7th Cir. 1996) (toxicology report of drug use did not meet the “some evidence” standard because there were two instances of unreliable identifying information in the report and the plaintiff showed there was another inmate with the same name who had been confused with him in prior disciplinary proceedings, and the defendants submitted no evidence bolstering the reliability of the report).

⁵⁶⁹ Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976).

⁵⁷⁰ Scott v. Kelly, 962 F.2d 145, 147 (2^d Cir. 1992).

⁵⁷¹ Ruley v. Nevada Bd. of Prison Comm’rs, 628 F.Supp. 108, 111-12 (D.Nev. 1986).

⁵⁷² Rodgers v. Thomas, 879 F.2d 380, 383 (8th Cir. 1989) (hearsay verified by the disciplinary committee did not deny due process); Rudd v. Sargent, 866 F.2d 260, 262 (8th Cir. 1989); Moore v. Selsky, 900 F.Supp. 670, 674-75 (S.D.N.Y. 1995) (letter from a drug test manufacturer, which stated that no drugs or diseases had been identified which produce a false positive reaction for cocaine or cannabinoids, was hearsay but was “some evidence”).

particular, written reports by prison staff—a type of hearsay—can be sufficient evidence to prove a disciplinary violation,⁵⁷³ at least as long as they are based on personal knowledge and properly signed and dated.⁵⁷⁴ However, courts have cautioned that hearsay that is completely uncorroborated and has no other indications of reliability does not constitute some evidence.⁵⁷⁵ The determination whether there was some evidence to support a disciplinary conviction must be limited to evidence in the administrative record.⁵⁷⁶

i. Urinalysis, polygraphy, and other scientific tests

Prison officials may use various kinds of scientific tests in disciplinary proceedings, but they are not required to do so. Most courts have held that prisoners may be convicted of drug use based on results of the EMIT (“Enzyme Multiple Immunoassay Test”) urinalysis test or other reliable test, confirmed by a second test; no additional evidence is required.⁵⁷⁷

A “reasonably reliable chain of custody” for urine samples must be maintained.⁵⁷⁸

⁵⁷³ *McPherson v. McBride*, 188 F.3d 784, 786 (7th Cir. 1999) (report was sufficient to support disciplinary conviction, despite its brevity, where it described the infraction in sufficient detail and the conduct clearly violated prison rules); *Carter v. Kane*, 938 F.Supp. 282, 287 (E.D.Pa. 1996) (holding a misbehavior report by an officer who witnessed the misconduct can support a disciplinary conviction).

⁵⁷⁴ *People ex rel. Vega v. Smith*, 485 N.E.2d at 1002-04; *see Walsh v. Finn*, 865 F.Supp. 126, 129-30 (S.D.N.Y. 1994) (a misbehavior report written by an officer who did not actually see the alleged misconduct is not some evidence); *Rodriguez v. Coughlin*, 176 A.D.2d 1234, 577 N.Y.S.2d 190, 191 (N.Y.App.Div. 1991) (misbehavior reports not based on personal knowledge were not substantial evidence).

⁵⁷⁵ *Luna v. Pico*, 356 F.3d 481, 489 (2d Cir. 2004); *Young v. Kann*, 926 F.2d 1396, 1402 (3d Cir. 1991) (reliance on a prison employee’s oral summary of an allegedly threatening letter, without reading the letter, may deny due process); *Howard v. Wilkerson*, 768 F.Supp. 1002, 1008 (S.D.N.Y. 1991) (hearsay information with no evidence supporting its credibility was not “some evidence”); *Parker v. State*, 597 So.2d 753, 754 (Ala.Cr.App. 1992) (staff member’s report based on what other inmates told him was not “some evidence”).

⁵⁷⁶ *Riggins v. Walter*, 279 F.3d 422, 428-29 (7th Cir. 1995).

⁵⁷⁷ *Higgs v. Bland*, 888 F.2d 443, 448-49 (6th Cir. 1989); *Peranzo v. Coughlin*, 850 F.2d 125 (2d Cir. 1988) (per curiam); *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986); *Wade v. Farley*, 869 F.Supp. 1365, 1370 (N.D.Ind. 1994); *Pella v. Adams*, 702 F.Supp. 244, 247 (D.Nev. 1988) and cases cited.

⁵⁷⁸ *Soto v. Lord*, 693 F.Supp. 8, 17-20 (S.D.N.Y. 1988); *accord, Madera v. Goord*, 103 F.Supp.2d 536, 540 (N.D.N.Y. 2000); *Thomas v. McBride*, 3 F.Supp.2d 989, 993-94 (N.D.Ind. 1998); *Wykoff v. Resig*, 613 F.Supp. 1504, 1513 (N.D.Ind. 1985). *Contra, Thompson v. Owens*, 889 F.2d 500, 501-02 (3d Cir. 1989) (stating that requiring a chain of custody would be an “independent assessment” of evidence not permitted under the “some evidence” standard).

The failure to perform scientific tests to establish facts in a disciplinary proceeding does not deny due process if there is enough other evidence to support the conviction.⁵⁷⁹ The use of polygraph testing as an investigative matter is within the discretion of prison officials.⁵⁸⁰ Although most courts hold that polygraph evidence is admissible in disciplinary hearings,⁵⁸¹ a polygraph that shows only that the prisoner is not truthful is not evidence of the underlying charge; it is only evidence of lack of credibility.⁵⁸²

j. Written disposition

Prisoners are entitled to a “written statement by the factfinders as to the evidence relied on and the reasons’ for the disciplinary action.”⁵⁸³ The Supreme Court added: “It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission.”⁵⁸⁴

Several courts have held that the written statement must be reasonably specific about the

⁵⁷⁹ Griffin v. Spratt, 969 F.2d 16, 22 (3d Cir. 1992) (officer’s testimony that he believed material was fermented could support a conviction); Okocci v. Klein, C.O., 270 F.Supp.2d 603, 611 (E.D.Pa. 2003) (weapon need not be examined for fingerprints), *aff’d*, 100 Fed.Appx. 127 (3rd Cir. 2004), *cert. denied*, 543 U.S. 1061 (2005); Spaulding v. Collins, 867 F.Supp. 499, 509 (S.D.Tex. 1993) (handwriting analysis of documents not required).

⁵⁸⁰ Hester v. McBride, 966 F.Supp. 765, 773 (N.D.Ind. 1997); Wright v. Caspari, 779 F.Supp. 1025, 1028-29 (E.D.Mo. 1992); Losee v. State, 374 N.W.2d 402, 404-05 (Iowa 1985); Pruitt v. State, 274 S.C. 565, 266 S.E.2d 779, 782 (S.C. 1980); *cf.* United States ex rel. Wilson v. DeRobertis, 508 F.Supp. 360, 362 (N.D.Ill. 1981) (polygraph might sometimes be necessary to ensure fairness, but not under the circumstances of this case).

⁵⁸¹ Lenea v. Lane, 882 F.2d 1171, 1174 (7th Cir. 1989) and cases cited; *see* Wiggett v. Oregon State Penitentiary, 85 Or.App. 635, 738 P.2d 580, 583 (Or.App. 1987) (polygraph evidence admissible when obtained by a state certified and licensed examiner), *review denied*, 304 Or. 186, 743 P.2d 736 (Or. 1987).

⁵⁸² Lenea v. Lane, 882 F.2d at 1176; Parker v. Oregon State Correctional Institution, 87 Or.App. 354, 742 P.2d 617 (Or.App. 1987); *see* Brown v. Smith, 828 F.2d 1493, 1495 (10th Cir. 1987) (one “inconclusive” polygraph test, plus a second one interpreted as showing that the prisoner was withholding information, did not support a conviction for assault); *see also* Johnson v. State, 576 So.2d 1289, 1290 (Ala.Crim.App. 1991) (polygraph supporting the hearsay statement of a witness who was not produced was not “some evidence” of guilt).

⁵⁸³ Wolff v. McDonnell, 418 U.S. 539, 565 (1974) (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)); *accord*, Lewis v. Smith, 855 F.2d 736, 737-38 (11th Cir. 1988) (awarding damages for violation).

⁵⁸⁴ Wolff v. McDonnell, 418 U.S. at 565.

reasons for the decision.⁵⁸⁵ Other courts have been less demanding.⁵⁸⁶ One decision stated that “the kind of statements that will satisfy the constitutional minimum will vary from case to case depending on the severity of the charges and the complexity of the factual circumstances and proof offered by both sides. . . .”⁵⁸⁷ The Second Circuit appears not to have taken a position on this question.

In my view, specificity—including explanation of credibility judgments—should be required in all statements of reasons because it will encourage fairer decisions. In prison and elsewhere, “[a] reasons requirement promotes thought by the decision-maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded upon impermissible or erroneous considerations.”⁵⁸⁸ In prison, it is all too easy for a factfinder simply to assume that officers are always telling the truth and inmates are always lying, and to issue rubber-stamp decisions on that basis without giving each case serious and individualized attention.⁵⁸⁹ The very lenient “some evidence” standard of judicial review makes it easy for

⁵⁸⁵ See, e.g., *Scruggs v. Jordan*, 485 F.3d 934, 941 (7th Cir. 2007) (“We have repeatedly upheld the sufficiency of written statements that indicate only what evidence was relied on to make the decision, *and why*.”) (emphasis supplied); *Whitford v. Boglino*, 63 F.3d 527, 536-37 (7th Cir. 1995) (holding failure to explain credibility judgment supports a due process claim); *Dyson v. Kocik*, 689 F.2d 466, 467-68 (3d Cir. 1982) (holding statement may not simply adopt the officer’s report, e.g., “Inmate is guilty of misconduct as written”); *King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985) (stating “each item of evidence relied on by the hearing officer should be included in the report unless safety concerns dictate otherwise”); *Chavis v. Rowe*, 643 F.2d 1281, 1286-87 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981); *Robinson v. Young*, 674 F.Supp. 1356, 1368 (W.D.Wis. 1987) (stating the disposition should point out facts, mention evidence, and explain credibility judgments).

⁵⁸⁶ *Hensley v. Wilson*, 850 F.2d 269, 278 (6th Cir. 1988) (holding credibility judgments need not be explained); *Brown v. Frey*, 807 F.2d 1407, 1409-13 (8th Cir. 1986) (holding that as long as the officers’ reports are not so long or so contradictory or ambiguous that one can’t tell what the fact-finder relied on, the disposition can merely incorporate them by reference); *Mujahid v. Apao*, 795 F.Supp. 1020, 1027 (D.Haw. 1992).

⁵⁸⁷ *Culbert v. Young*, 834 F.2d 624, 630-31 (7th Cir. 1987). This court held that in a case where there was substantial evidence that the prisoner was innocent, and in a complex case involving severe punishment, dispositions that merely adopted the officer’s and investigator’s reports did not meet due process standards. However, it held that in a simple case where the only issue is the relative credibility of an inmate and an officer, the disciplinary committee may merely refer to the officer’s report.

⁵⁸⁸ *Jackson v. Ward*, 458 F.Supp. 546, 565 (W.D.N.Y. 1978) and cases cited; *accord*, *State ex rel. Meeks v. Gagnon*, 289 N.W.2d at 363; see *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975) (same conclusion in a non-constitutional case). An example of this point is *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981), in which a prisoner was convicted of assault and put in segregation for five months before a review board cleared him. The court observed that if the committee had made detailed findings in the first place, the prisoner might never have been wrongfully punished.

⁵⁸⁹ The Supreme Court has acknowledged that credibility judgments in prison disciplinary hearings are often between inmates and the committee’s co-workers and that fact-finders “thus are under

prison officials to get away with such a practice. In my view, especially where the only issue, or the main issue, is who is telling the truth, prison disciplinary committees should be required to explain themselves clearly and fully.

k. Confidential informants

Prison officials sometimes rely on information from informants whom they do not produce or identify, and whose allegations they sometimes do not disclose in any detail,⁵⁹⁰ a practice that “invites disciplinary sanctions on the basis of trumped up charges.”⁵⁹¹ Courts allow such proceedings because they understand that there may be a risk of violence and retaliation in connection with disciplinary proceedings.⁵⁹² The Second Circuit, like other courts, has held that even in a confidential informant case, the prisoner must receive notice with “sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense.” Even if some details are not known to prison officials, “an inmate can at least be given any general information regarding the relevant time and place that is known to the authorities” and a statement that other facts are unknown.⁵⁹³ At the hearing itself, the “due process right to know the evidence upon which a discipline ruling is based”⁵⁹⁴ may have to be compromised, but prison officials who do so “must offer a reasonable

obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.” *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985).

⁵⁹⁰ For example, in *Smith v. Rabalais*, 659 F.2d 539, 541-44 (5th Cir. 1980), *cert. denied*, 455 U.S. 992 (1982), the court upheld a disciplinary conviction in which the prisoner was accused of selling an unspecified amount of drugs, which were not described, to unidentified persons at an undisclosed number of undisclosed times and places.

⁵⁹¹ *Helms v. Hewitt*, 655 F.2d 487, 502 (3d Cir. 1981), *rev’d on other grounds sub nom. Hewitt v. Helms*, 459 U.S. 460 (1983); *see also McCollum v. Miller*, 695 F.2d 1044, 1049 (7th Cir. 1982) (noting danger of use of disciplinary hearings for “schemes of revenge”).

⁵⁹² *Sira v. Morton*, 380 F.2d 57, 78 (2d Cir. 2004).

⁵⁹³ *Sira v. Morton*, 380 F.3d at 72; *see Dible v. Scholl*, 506 F.3d 1106, 1109-1111 (8th Cir. 2007) (holding notice stating only that confidential information indicated that plaintiff “threatened and choked a citizen of the State of Iowa” was insufficient where no justification was given for withholding time, place, or identity of victim); *Rinehart v. Brewer*, 483 F.Supp. 165, 169 (S.D.Iowa 1980) (holding that prison officials should usually give notice of the date, “general time” and place of the incident, a general description of the incident, and the identity of other persons involved, deleting from the notice only those specific facts that would cause security problems if disclosed, and giving the inmate notice that certain types of facts were deleted). *But see Freitas v. Auger*, 837 F.2d 806, 809 (8th Cir. 1988) (holding notice sufficient where it generally described the accused prisoner’s conduct without giving dates, places, or the identities of others involved); *Zimmerlee v. Keeney*, 831 F.2d 183, 188 (9th Cir. 1987) (notice was sufficient that charged the prisoner with smuggling marijuana and amphetamines with members of a prison club at some time during a five-month period).

⁵⁹⁴ *Sira v. Morton*, 380 F.3d at 74.

justification for their actions, if not contemporaneously, then when challenged in a court action.”⁵⁹⁵

At the hearing, courts have recognized that if the usual due process safeguards are bypassed, other safeguards become more necessary.⁵⁹⁶ Due process therefore requires that prison officials independently establish the reliability of confidential informants.⁵⁹⁷ “A bald assertion by an unidentified person, without more, cannot constitute some evidence of guilt.”⁵⁹⁸ The Second Circuit has held that hearing officers cannot determine reliability simply by reference to the informant’s past record for credibility, but must consider the totality of the circumstances:

For example, a hearing officer may consider the identity and reputation of the original declarant, his motive for making the statements at issue, whether he is willing to testify and, if not, the reasons informing that decision, and the consequences he faces if his disclosures prove false. Where the original declarant’s identity is unknown or not disclosed, the hearing officer may nevertheless consider such factors as the specificity of the information, the circumstances under which it was disclosed, and the degree to which it is corroborated by other evidence.⁵⁹⁹

⁵⁹⁵ *Sira*, 380 F.3d at 75 (citing *Ponte v. Real*, 471 U.S. 491, 498 (1985)). In *Sira*, the court noted that it appeared from the record that much of the evidence withheld from the plaintiff could have been disclosed without identifying the informants.

⁵⁹⁶ *Sira v. Morton*, 380 F.3d at 78; *McCollum v. Miller*, 695 F.2d at 1048-49.

⁵⁹⁷ *Sira v. Morton*, 380 F.3d at 77-78; *Whitford v. Boglino*, 63 F.3d 527, 535-36 (7th Cir. 1995) (holding that the use of confidential informant testimony without some evidence of reliability would deny due process, and defendants’ failure to come forward with such evidence amounted to an admission they did not meet legal requirements); *Williams v. Fountain*, 77 F.3d 372, 375 (11th Cir.), *cert. denied*, 519 U.S. 952 (1996); *Zavaro v. Coughlin*, 970 F.2d 1148, 1153-54 and n. 1 (2d Cir. 1992); *Taylor v. Wallace*, 931 F.2d 698, 702 (10th Cir. 1991); *Hensley v. Wilson*, 850 F.2d 269, 276 (6th Cir. 1988).

One circuit has held that if there is sufficient evidence to support the conviction independently of unsupported informant information, due process is satisfied. *Williams v. Fountain*, 77 F.3d at 375. That seems wrong. The question should be not whether the fact-finder *could* have convicted without the due process violation but whether it *would* have done so.

⁵⁹⁸ *Freitas v. Auger*, 837 F.2d at 810; *accord*, *Broussard v. Johnson*, 253 F.3d 874, 876 (5th Cir. 2001) (holding reliability was not established where the investigating officer testified only to what the warden had told him about the informant and the hearing officer did not receive any other evidence of reliability); *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987) (hearsay provided via a confidential informant who was later polygraphed inconclusively did not meet the “some evidence” test); *Cerda v. O’Leary*, 746 F.Supp. 820, 825 (N.D.Ill. 1990).

⁵⁹⁹ *Sira v. Morton*, 380 F.3d at 78; *accord*, *Williams v. Fountain*, 77 F.3d at 375 (holding there must be support for “the credibility of confidential informants *and* the reliability of the information provided by them,” suggesting that there must be some corroboration for the current information and not

The Second Circuit appears somewhat more restrictive in this regard than other courts, which have allowed determination of reliability based only on past record.⁶⁰⁰

The evidence establishing the reliability of informants need not be disclosed to the accused prisoner at the hearing or in the statement of reasons because it would risk disclosing the informant's identity.⁶⁰¹ Courts have disagreed whether that information must be documented at the time of the hearing or whether it can be reconstructed after the fact.⁶⁰²

In my view, a case relying on confidential informants is a complex case in which the prisoner should have the right to a staff assistant who can examine the informant evidence and the alleged basis for its reliability. So far, the courts have not adopted this position.⁶⁰³

just a finding that the informant has provided correct information in the past) (emphasis supplied).

⁶⁰⁰ One court has suggested several ways that reliability may be established:

(1) the oath of the investigating officer as to the truth of his report containing confidential information and his appearance before the disciplinary committee . . . ; (2) corroborating testimony . . . ; (3) a statement on the record by the chairman of the disciplinary committee that, "he had firsthand knowledge of the sources of information and considered them reliable on the basis of 'their past record of reliability'," . . . ; or (4) in camera[] review of material documenting the investigator's assessment of the credibility of the confidential informant.

Mendoza v. Miller, 779 F.2d 1287, 1293 (7th Cir. 1985); *accord*, *Hensley v. Wilson*, 850 F.2d at 277 (committee may rely on an investigator's report if it states that the informant "has proved reliable in specific past instances *or* that the informant's story has been independently corroborated on specific material points.") (emphasis supplied).

⁶⁰¹ *Hensley v. Wilson*, 850 F.2d at 279.

⁶⁰² *Compare* *Williams v. Fountain*, 77 F.3d 372, 375 (11th Cir. 1996) (use of confidential informants requires documentation in the record of some good faith investigation and findings as to their credibility and the reliability of their information), *cert. denied*, 519 U.S. 952 (1996); *Hensley v. Wilson*, 850 F.2d at 280-83 (stating a contemporaneous documentation requirement "eliminates the possibility that officials might later search around for evidence which would have warranted a committee in deeming an informant reliable"); *Freitas v. Auger*, 837 F.2d at 811 n. 11 (quoting *Rinehart v. Brewer*, 483 F.Supp. 165, 170 (S.D. Iowa 1980)) *with* *Taylor v. Wallace*, 931 F.2d at 702; *Riggins v. Walter*, 279 F.3d 422, 429 n.11 (7th Cir. 1995) (holding reliability may be established after the fact and not just from the administrative record); *Broussard v. Johnson*, 253 F.3d 874, 876-77 (5th Cir. 2001) (giving information to the magistrate judge *in camera* did not establish reliability; the question is what evidence was presented *to the disciplinary board*.)

The Supreme Court in *Ponte v. Real*, 471 U.S. 491 (1985), held that a refusal to call witnesses need not be explained or documented at the time of the hearing. The court in *Hensley v. Wilson* explains at length why that holding is not applicable to documentation of the reliability of confidential informants.

⁶⁰³ *See* *Hudson v. Hedgepeth*, 92 F.3d 748, 751 (8th Cir. 1996); *Sauls v. State*, 467 N.W.2d 1, 3 (Iowa App. 1990).

I. False charges

False or unfounded charges do not deny due process as long as prison officials go through the required procedural motions⁶⁰⁴ and as long as there is some evidence to support the charges.⁶⁰⁵ However, disciplinary charges brought in retaliation for filing grievances, making complaints, pursuing lawsuits, or engaging in other activities protected by the Constitution violate the substantive constitutional right in question.⁶⁰⁶

m. Discipline and mental health

The courts have not fully explored the constitutional issues involved in disciplining prisoners who have mental disorders. The New York courts have held that in a “disciplinary proceeding in which a prisoner’s mental state is at issue, a hearing officer is required to consider evidence regarding the prisoner’s mental condition.”⁶⁰⁷ One court has stated that a prisoner found insane in a criminal trial should be able to present an insanity defense when charged with a disciplinary offense for the same actions.⁶⁰⁸ Some courts have held that the Constitution forbids punishment for behavior caused or influenced by mental illness.⁶⁰⁹

Courts have also condemned the housing of mentally disturbed inmates in punitive

⁶⁰⁴ *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989); *Freeman v. Rideout*, 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied*, 485 U.S. 982 (1988); *Hanrahan v. Lane*, 747 F.2d 1137, 1140-41 (7th Cir. 1984). If a prisoner is punished based on false allegations *without* receiving procedural due process, however, due process is violated. *Surprenant v. Rivas*, 424 F.3d 5, 13-14 (1st Cir. 2005) (pre-trial detainee case).

⁶⁰⁵ See § III.F.h, above, on the “some evidence” standard.

⁶⁰⁶ See § IV.A.3, below, for a discussion of retaliation claims.

⁶⁰⁷ *Matter of Huggins v. Coughlin*, 76 N.Y.2d 904, 561 N.Y.S.2d 910, 563 N.E.2d 281, 282 (N.Y. 1990); see *Rosado v. Kuhlmann*, 164 A.D.2d 199, 563 N.Y.S.2d 295, 297 (N.Y.App.Div. 1990) (evidence of mental condition should have been considered in a case in which the prisoner assaulted staff in the course of an emergency referral to the psychiatric unit). *But see Zamakshari v. Dvoskin*, 899 F.Supp. 1097, 1107 (S.D.N.Y. 1994) (the failure to consider mental health status did not violate clearly established law as of 1988). *Cf. Powell v. Coughlin*, 953 F.2d 744, 749 (2d Cir. 1991) (upholding a policy permitting mental health staff to be consulted by the hearing officer but not called as witnesses).

⁶⁰⁸ *People ex rel. Reed v. Scully*, 140 Misc.2d 379, 531 N.Y.S.2d 196 (N.Y.Sup. 1988).

⁶⁰⁹ See *Arnold on behalf of H.B. v. Lewis*, 803 F.Supp. 246, 256 (D.Ariz. 1992) (placement in lockdown “as punishment for the symptoms of [the plaintiff’s] mental illness and as an alternative to providing mental health care” violated the Eighth Amendment); *Cameron v. Tomes*, 783 F.Supp. 1511, 1524-25 (D.Mass. 1992) (application of standard disciplinary procedures to a sex offender in a “Treatment Center for the Sexually Dangerous” amounted to punishing him for his psychological problems and, when done without consultation with mental health staff, violated the “professional judgment” standard applied to civilly committed persons), *aff’d as modified*, 990 F.2d 14, 21 (1st Cir. 1993).

segregation units.⁶¹⁰ Placing mentally ill inmates in punitive segregation may constitute cruel and unusual punishment in some cases,⁶¹¹ and at a minimum such inmates must be screened by qualified mental health staff before they are placed in segregation.

Prisoners with significant mental problems facing disciplinary proceedings should also be entitled to assistance from a counsel substitute, in my view.⁶¹²

n. Punishment

The Due Process Clause does not limit prison punishments, but physical abuse and foul and degrading conditions of punitive confinement constitute cruel and unusual punishment.⁶¹³ Punishments may also be held to be cruel and unusual if they are grossly disproportionate to the offense,⁶¹⁴ but courts are “extremely reluctant” to find prison punishments to be disproportionate.⁶¹⁵ The Supreme Court upheld a 30-day limit on punitive segregation in one

⁶¹⁰ See *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989); *Langley v. Coughlin*, 715 F.Supp. 522, 543-44 (S.D.N.Y. 1989); *Langley v. Coughlin*, 709 F.Supp. 482, 484-85 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989).

⁶¹¹ See *Arnold on behalf of H.B. v. Lewis*, 803 F.Supp. at 256. *But see Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a psychotic prisoner under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent).

⁶¹² See § III.F.1.f, above.

⁶¹³ See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (restraining prisoners to “hitching post” held unconstitutional); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (use of the “strap” held unconstitutional). *But see Trammell v. Keane*, 338 F.3d 155, 162, 165-66 (2d Cir. 2003) (upholding “deprivation order” denying recreation, showers, hot water, and all property except for one pair of shorts to a prisoner who persistently misbehaved in punitive segregation).

⁶¹⁴ *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (stating that court “continue[s] to recognize” norm of proportionality); *Adams v. Carlson*, 368 F.Supp. 1050, 1053 (E.D.Ill.) (sixteen months’ segregation excessive for involvement in a work stoppage), *on remand from* 488 F.2d 619 (7th Cir. 1973); *Black v. Brown*, 524 F.Supp. 856, 858 (N.D.Ill. 1981) (eighteen months’ segregation excessive for running in the yard), *aff’d in part and rev’d in part*, 688 F.2d 841 (7th Cir. 1982); *Hardwick v. Ault*, 447 F.Supp. 116, 125-26 (M.D.Ga. 1978); (indefinite segregation held per se disproportionate); *Fulwood v. Clemmer*, 206 F.Supp. 370, 379 (D.D.C. 1962) (two years’ segregation excessive for disruptive preaching).

⁶¹⁵ *Savage v. Snow*, 575 F.Supp. 828, 836 (S.D.N.Y. 1983) (upholding 90 days’ loss of good time and confinement in segregation for abuse of correspondence privileges); see *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (upholding four consecutive 90-day sentences to loss of yard time for a segregation prisoner based on assaulting an officer, setting a fire, spitting in an officer’s face, and throwing a broom and “bodily fluids” on a staff member); *Grady v. Wilken*, 735 F.2d 303, 305 (8th Cir. 1984) (upholding six months’ segregation for extortion); *Dixon v. Goord*, 224 F.Supp.2d 739, 748 (S.D.N.Y. 2002) (upholding ten months for assaulting an officer).

case, but that decision was based mostly on the extremely bad conditions of confinement.⁶¹⁶ The Eleventh Circuit has held that twelve years and counting in *administrative* segregation after an escape and several escape attempts, but with no significant misconduct in the preceding ten years, raised serious constitutional questions, especially in light of the allegation that the confinement was in fact punitive.⁶¹⁷

Monetary restitution for property damage or other offenses that cost the prison money is a legitimate form of punishment.⁶¹⁸ Restitution orders must be supported by evidence of the value of the items that the prisoner is alleged to have destroyed or damaged.⁶¹⁹

o. Disciplinary rules

Many things can be forbidden in prison that could not be forbidden in the “free world.”⁶²⁰ It is very hard to get a prison disciplinary rule struck down as unconstitutional on its face unless it severely restricts basic constitutional rights.⁶²¹ Courts are somewhat more willing to strike down particular applications of rules, chiefly when they appear to punish conduct protected by the First Amendment.⁶²²

⁶¹⁶ *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). *Compare Sostre v. McGinnis*, 442 F.2d 178, 192-93 (2d Cir. 1971) (refusing to impose a limit on segregation time).

⁶¹⁷ *Sheley v. Dugger*, 833 F.3d 1420, 1429 (11th Cir. 1987).

⁶¹⁸ *Longmire v. Guste*, 921 F.2d 620, 623-24 (5th Cir. 1991) (upholding state statute providing for restitution); *Campbell v. Miller*, 787 F.2d 217, 224-25 (7th Cir. 1986) (upholding impoundment of prisoner’s account pending compliance with \$1,445 restitution order imposed after a *Wolff* hearing).

⁶¹⁹ *Keeling v. Schaefer*, 181 F.Supp.2d 1206, 1224-25 (D.Kan. 2001) (restitution order must be supported by evidence of the amount required for restitution); *Quick v. Jones*, 754 F.2d 1521 (9th Cir. 1985) (inmate could not be sentenced to restitution for destroying property without findings that he destroyed it); *Artway v. Scheidemantel*, 671 F.Supp. 330 (D.N.J. 1987) (inmate could not be sentenced to restitution without a hearing that addressed the value of the property); *see Burns v. Pa. Dep’t of Correction*, 544 F.3d 279, 291 (3^d Cir. 2008) (assessment of prisoner account for restitution after disciplinary conviction was a deprivation of property requiring due process).

⁶²⁰ *See, e.g., Scruggs v. Jordan*, 485 F.3d 934, 938-39 (7th Cir. 2007) (officials can prohibit inmates from using violence to defend themselves or others, and can discipline them for doing so); *Pedraza v. Meyer*, 919 F.2d 318, 320 (5th Cir. 1990) (prisoner could be disciplined for violating a rule against writing to other prisoners even though the other prisoner was his wife); *Withrow v. Bartlett*, 15 F.Supp.2d 292, 296-99 (W.D.N.Y. 1998) (prisoner could be disciplined for demonstrative praying in the yard contrary to prison rules); *Leitzsey v. Coombe*, 998 F.Supp. 282, 287 (W.D.N.Y. 1998) (upholding a rule prohibiting materials concerning any organization not approved by the Commissioner as applied to the prisoner’s own organization).

⁶²¹ *But see Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down rule forbidding “spreading rumors” as vague and overbroad on its face).

⁶²² *See, e.g., Moton v. Cowart*, 631 F.3d 1337, 1342-43 (11th Cir. 2011) (“We conclude as a

“Due process requires that inmates receive fair notice of a rule before they can be sanctioned for its violation.”⁶²³ This rule does not apply if the conduct in question also violates criminal statutes.⁶²⁴

A prison rule that is so vague that people of ordinary intelligence must guess at its meaning denies due process.⁶²⁵ A rule may be vague “on its face,” meaning that under no circumstances can it be applied constitutionally.⁶²⁶ It may also be vague “as applied,” meaning that it does not give adequate notice that it prohibits the conduct with which a particular prisoner is charged.⁶²⁷

matter of law that an inmate’s statement that he wants or plans to contact his attorney does not constitute a punishable ‘spoken threat.’ A contrary rule would chill the invocation and exercise of inmates’ constitutional rights.”); *Hargis v. Foster*, 312 F.3d 404, 406 (9th Cir. 2002) (rule prohibiting “involvement in any disorderly conduct by coercing or attempting to coerce official action” is not unconstitutional on its face, but as applied to a statement that an officer’s actions could come up in pending litigation, it raised a material question whether it had a rational connection with security concerns or was an “exaggerated response”); *Bradley v. Hall*, 64 F.3d 1276, 1279-81 (9th Cir. 1995) (rule against “disrespect” could not be applied to statements in written grievances); *Hancock v. Thalacker*, 933 F.Supp. 1449, 1487-90 (N.D.Iowa 1996) (prisoners could be punished for false statements in grievances and other complaints to prison officials only if the statements were shown by a preponderance of the evidence to have been made with knowledge they were false).

⁶²³ *Forbes v. Trigg*, 976 F.2d 308, 314 (7th Cir. 1992), *cert. denied*, 507 U.S. 950 (1993); *accord*, *Coffman v. Trickey*, 884 F.2d 1057, 1060 (8th Cir. 1989) (conviction for “knowingly failing to abide by any published institutional rule” denied due process where no institutional rule actually forbade the prisoner’s conduct); *Meis v. Gunter*, 906 F.2d 364, 367 (8th Cir. 1990) (dictum); *Frazier v. Coughlin*, 850 F.2d 129, 130 (2^d Cir. 1988); *Robles v. Coughlin*, 725 F.2d 12, 16 (2^d Cir. 1983) and cases cited.

⁶²⁴ *Frazier v. Coughlin*, 850 F.2d at 130.

⁶²⁵ *Rios v. Lane*, 812 F.2d 1032, 1038 (7th Cir.); *Soto v. City of Sacramento*, 567 F.Supp. 662, 684-85 (E.D.Calif. 1983) and cases cited.

⁶²⁶ *Noren v. Straw*, 578 F.Supp. 1, 6 (D.Mont. 1982) (rule requiring inmates to act in an “orderly, decent manner with respect for the rights of the other inmates” was vague; new rules required); *Jenkins v. Werger*, 564 F.Supp. 806, 807-08 (D.Wyo. 1983) (statute barring “unruly or disorderly” conduct was void for vagueness).

⁶²⁷ *Farid v. Ellen*, 593 F.3d 233, 241–44 (2^d Cir. 2010) (holding a rule against contraband was vague as applied where charges required prisoner to interpret the rule to include violation of internal rules of a prisoner organization); *Gayle v. Gonyea*, 313 F.3d 677, 680 n.3 (2^d Cir. 2002) (questioning whether a rule forbidding work stoppages, sit-ins, lock-ins or “other actions which may be detrimental to the order of the facility” gave adequate notice that circulating petitions or encouraging others to file grievances is barred); *Chatin v. Coombe*, 186 F.3d 82, 86-87 (2^d Cir. 1999) (holding that rule against unauthorized religious services was vague as applied to performing silent prayer in the prison yard); *Newell v. Sauser*, 79 F.3d 115, 118 (9th Cir. 1995) (rule against possessing anything not authorized or issued by the facility could not be applied to law librarian in possession of legal work prepared for other inmates, since as law

Courts tolerate a greater degree of vagueness in prison rules than in criminal statutes.⁶²⁸ For example, one court upheld a rule banning “derogatory or degrading remarks” against employees, “insults, unwarranted and uncalled for remarks, or other clearly intrusive verbal behavior” against employees on duty, and “unsolicited, non-threatening, abusive conversation, correspondence or phone calls” to employees.⁶²⁹

2. Administrative segregation⁶³⁰

The lower courts have held after *Sandin* that administrative segregation requires due process protections if it causes an “atypical and significant hardship” and if state statutes and regulations create a liberty interest, either in staying out of it⁶³¹ or in avoiding prolonged retention in it.⁶³² The Supreme Court’s decision concerning “supermax” confinement can be

librarian he was authorized to possess it); *Wolfel v. Morris*, 972 F.2d 712, 717-18 (6th Cir. 1992) (rule barring unauthorized group organizing was vague as applied to circulating a petition); *Rios v. Lane*, 812 F.2d at 1038-39 (“gang activity” rule was vague as applied to plaintiff’s conduct); *Smith v. Rowe*, 761 F.2d 360, 364 (7th Cir. 1985) (contraband rule vague as applied); *Adams v. Gunnell*, 729 F.2d 362, 369 (5th Cir. 1984) (rule prohibiting “disruptive conduct” did not give adequate notice as applied); *Gee v. Ruettgers*, 872 F.Supp. 915, 920 (D.Wyo. 1994) (prohibition on providing “false information to any official, court, news media, penitentiary employee, or the general public” is not unconstitutionally vague on its face, but was vague as applied to letters to a prisoner’s immediate family).

⁶²⁸ *Fichtner v. Iowa State Penitentiary*, 285 N.W.2d 751, 759 (Iowa 1979). *But see Chatin v. Coombe*, 186 F.3d 82, 86-87 (2d Cir. 1999) (holding that a prison rule carried penalties “more akin to criminal rather than civil penalties,” calling for close scrutiny of rule for vagueness).

⁶²⁹ *Gibbs v. King*, 779 F.2d 1040, 1045-46 (5th Cir. 1986); *see Gaston v. Taylor*, 946 F.2d 340, 342 (4th Cir. 1991) (en banc) (rule barring possession of “anything not specifically approved for the specific inmate who has possession of the item” was not unconstitutional); *Landman v. Royster*, 333 F.Supp. 621, 655-56 (E.D.Va. 1971) (striking down rules against “misbehavior,” “misconduct,” and “agitation,” but upholding rules against insolence, harassment, and insubordination).

⁶³⁰ Administrative segregation is used here to mean segregation that is supposedly not punitive but is imposed pending investigation of misconduct charges, to prevent future misconduct or other violations of security and order, or to protect the person who is segregated, or while a prisoner is awaiting transfer or classification. Sometimes different names are used: “maximum security,” “involuntary protective admission,” “close custody,” etc. To compound the confusion, in some systems, administrative segregation is used to denote disciplinary segregation.

⁶³¹ *See* § III.B, above; *Magluta v. Samples*, 375 F.3d 1269, 1279-83 (11th Cir. 2004) (holding federal prisoner who allegedly spent more than 500 days under “extremely harsh” segregation conditions had a liberty interest in avoiding them under federal regulations).

⁶³² *See Tellier v. Fields*, 280 F.3d 69, 82 (2d Cir. 2000) (finding liberty interest under federal prison regulations in avoiding protracted administrative segregation); *accord*, *Iqbal v. Hasty*, 490 F.3d 143, 161-62 (2d Cir. 2007) (holding *Tellier* is not abrogated by *Wilkinson v. Austin*), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

viewed as meaning that state statutes and regulations no longer play a part in the analysis, meaning that atypical and significant hardship by itself gives rise to a liberty interest,⁶³³ though the Second Circuit has not gone so far.⁶³⁴

The Supreme Court said in *Hewitt v. Helms* that less procedural protection is required for administrative segregation than for disciplinary hearings, in part because the Court thought it was not “of great consequence” because the prisoner is already in a restricted environment in prison, there was no “stigma of wrongdoing or misconduct” involved, and there was no indication it would affect parole opportunities.⁶³⁵ Also, putting someone in administrative segregation “turns largely on ‘purely subjective evaluations and on predictions of future behavior’” and on “intuitive judgments” that “would not be appreciably fostered by the trial-type procedural safeguards” of disciplinary hearings.⁶³⁶ So, it held, due process requires only “an informal nonadversary review of the information supporting [the prisoner’s] administrative confinement.”⁶³⁷

The Supreme Court revisited the question of the process due for administrative confinement in *Wilkinson v. Austin*,⁶³⁸ which involved placement in a “supermax” facility. *Wilkinson* neither treated *Hewitt*’s procedural holdings as governing authority nor overruled or modified them; rather, it engaged in an independent “process due” analysis under *Mathews v. Eldridge*. It did not dismiss supermax confinement as “not . . . of great consequence” as in *Hewitt*, but said that “[t]he private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties.”⁶³⁹ Conversely, it held that the State’s interest was “a dominant consideration. . . . The State’s first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.”⁶⁴⁰ It also gave weight to scarce resources and the high cost of incarceration, stating that “courts must give substantial deference to prison management

⁶³³ *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005).

⁶³⁴ *Iqbal v. Hasty*, 490 F.3d at 162 (citing *Wilkinson*’s statement that liberty interests “arise from state policies or regulations,” not explaining how or whether *Wilkinson* changed the analysis). This issue is discussed further at nn. 426-429, above.

⁶³⁵ *Hewitt v. Helms*, 459 U.S. 460, 473 (1983).

⁶³⁶ *Id.* at 474; *accord*, *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)

⁶³⁷ *Hewitt v. Helms*, 459 U.S. at 472; *accord*, *Banks v. Fauver*, 801 F.Supp. 1422, 1430-31 (D.N.J. 1992).

⁶³⁸ 545 U.S. 209 (2005).

⁶³⁹ *Wilkinson*, 545 U.S. at 225.

⁶⁴⁰ *Wilkinson*, 545 U.S. at 227.

decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.”⁶⁴¹

Nonetheless, *Wilkinson*'s outcome is consistent with *Hewitt*'s. The Court adhered to the view expressed in *Hewitt*, stating that since supermax placement was not based on “a specific parole violation” or “specific, serious misbehavior,” “more formal, adversary-type procedures” would not be useful.⁶⁴² Therefore, the “informal, nonadversary procedures” of *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*⁶⁴³ and of *Hewitt* “provide the appropriate model” even though their liberty interest methodology has been abrogated.⁶⁴⁴ It held that no alterations were needed in a procedural scheme that provided for “notice of the factual basis leading to consideration for [supermax] and a fair opportunity for rebuttal,” “a short statement of reasons” supporting recommendations for supermax placement, multiple levels of review of such recommendations, the opportunity “to submit objections prior to the final level of review,” and a further review within 30 days of initial assignment to supermax.⁶⁴⁵ In substance, the Court held that these provisions collectively minimized “the risk of an erroneous deprivation” and that additional safeguards would be of little value.⁶⁴⁶

Under *Hewitt*, the “informal nonadversary review” requires “some notice of the charges.”⁶⁴⁷ The Second Circuit has held in an administrative segregation case that due process

⁶⁴¹ *Wilkinson*, 545 U.S. at 228.

⁶⁴² Concerning “adversary-type” procedures, the Court said:

Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. This problem, moreover, is not alleviated by providing an exemption for witnesses who pose a hazard, for nothing in the record indicates simple mechanisms exist to determine when witnesses may be called without fear of reprisal. The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.

545 U.S. at 228.

⁶⁴³ 442 U.S. 1 (1979) (stating due process requirements for parole release decisions).

⁶⁴⁴ *Wilkinson*, 545 U.S. at 229.

⁶⁴⁵ 545 U.S. at 226-27; *see Iqbal v. Hasty*, 490 F.3d 143, 163-64 (2d Cir. 2007) (adhering to *Wilkinson* at the pleading stage in a case involving a post-9/11 detainee), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁶⁴⁶ *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁶⁴⁷ *Hewitt v. Helms*, 459 U.S. at 476; *see Brown v. Plaut*, 131 F.3d 163, 171 n.9 (D.C. Cir. 1997) (holding that notice need not be in advance of the hearing), *cert. denied*, 524 U.S. 939 (1998); *Matiyn v. Henderson*, 841 F.2d 31, 36 (2d Cir.) (lack of notice would deny due process), *cert. denied*, 487 U.S. 1220 (1988).

requires “a notice that is something more than a mere formality. . . . The effect of the notice should be to compel ‘the charging officer to be [sufficiently] specific as to the misconduct with which the inmate is charged’ to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges set out in a misbehavior report.”⁶⁴⁸ This formulation appears reasonably consistent with *Wilkinson*’s statement that “[r]equiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate’s being mistaken for another or singled out for insufficient reason.”⁶⁴⁹

Due process also requires “an opportunity [for the prisoner] to present his views” to the decision-maker, orally or in writing.⁶⁵⁰ *Wilkinson* noted the importance of “a fair opportunity for rebuttal” and approved a system that provided “the opportunity to be heard at the Classification Committee [initial] stage” and “to submit objections prior to the final level of review.”⁶⁵¹ Prisoners must be able to present their views directly to the person who actually makes the decision.⁶⁵² This must occur “within a reasonable time” after the confinement.⁶⁵³ What is

⁶⁴⁸ *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001) (holding that a notice referring only to “past admission to outside law enforcement,” “recent tension . . . involving gang activity,” and “statements by independent confidential informants” was too vague; officials must provide specific allegations of conduct involving current gang involvement); *accord*, *Brown v. Plaut*, 131 F.3d at 172 (“If *Brown* was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process.”); *Brown v. District of Columbia*, 66 F.Supp.2d 41, 45 (D.D.C. 1999) (holding that prisoner who did not get notice before or during his hearing of the alleged misconduct for which he was to be segregated “was not afforded the most basic process—an opportunity to know the basis on which a decision will be made and to present his views on that issue or issues”). Earlier decisions suggested that this notice may be less formal and detailed than the notice required for disciplinary charges. *See Stringfellow v. Perry*, 869 F.2d 1140, 1142-43 (8th Cir. 1989) (statements that “more extensive investigation” was needed were sufficient); *Toussaint v. McCarthy*, 801 F.2d 1080, 1100-01 (9th Cir. 1986) (“detailed written notice of charges” is not required), *cert. denied*, 481 U.S. 1069 (1987).

⁶⁴⁹ *Wilkinson v. Austin*, 545 U.S. at 226.

⁶⁵⁰ *Hewitt v. Helms*, 459 U.S. at 476; *Jackson v. Cain*, 864 F.2d 1235, 1252 (5th Cir. 1989).

⁶⁵¹ *Wilkinson v. Austin*, 545 U.S. at 226.

⁶⁵² *Hatch v. District of Columbia*, 184 F.3d 846, 852 (D.C.Cir. 1999) (holding that prisoner who was not allowed to attend his hearing and had an exchange of letters with other prison officials had not had an opportunity to present his views to the decision-maker); *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990); *Gittens v. LeFevre*, 891 F.2d 38, 41-42 (2d Cir. 1989).

Wilkinson did not comment on this issue directly. However, it did note that a subsequent review could overturn a recommendation for supermax placement, but the reverse was not true: once a reviewer at any level recommended *against* placement, that decision could not be reversed at higher levels of review. 545 U.S. at 226. Thus, a decisionmaker before whom the prisoner could not be heard directly could not place the prisoner in supermax confinement.

⁶⁵³ *Hewitt v. Helms*, 459 U.S. at 472.

“reasonable” depends on the reason for delay.⁶⁵⁴

Once in administrative segregation, prisoners are entitled to “some sort of periodic review”—which need not involve new evidence or statements—to determine if there is a need for continued segregation.⁶⁵⁵ The courts have not pinpointed how often this review must be conducted. One court has held that every 120 days is sufficient.⁶⁵⁶ Others have held that intervals of around a month are adequate⁶⁵⁷ but intervals approaching a year deny due process.⁶⁵⁸ *Wilkinson v. Austin* did not rule on the question because it was not before the Court, but cited the annual frequency of review as one of the factors rendering supermax confinement “atypical and significant.”⁶⁵⁹ Review must be meaningful; due process is not satisfied by perfunctory review and rote reiteration of stale justifications.⁶⁶⁰ One court held that if segregation is imposed to

⁶⁵⁴ *Hatch v. District of Columbia*, 184 F.3d 846, 852 (D.C.Cir. 1999) (holding an exchange of letters between prison officials, seven weeks after initial placement, was not “a reasonable time following his transfer”); *Layton v. Beyer*, 953 F.2d 839, 850-51 (3d Cir. 1992) (20 days might be unreasonable depending on the justification); *Russell v. Coughlin*, 910 F.2d 75, 78 (2d Cir. 1990) (ten days’ delay with no explanation except inadvertence was not reasonable); *Matiyn v. Henderson*, 841 F.2d at 36 (confinement for four days with no hearing denied due process; state regulation providing for no hearing for those held less than 14 days would be unconstitutional); *Sourbeer v. Robinson*, 791 F.2d 1094, 1100 (3d Cir. 1986) (35 days presents a “close question” but is approved), *cert. denied*, 483 U.S. 1032 (1987); *Hayes v. Lockhart*, 754 F.2d 281 (8th Cir. 1985) (15-day delay approved).

⁶⁵⁵ *Hewitt v. Helms*, 459 U.S. at 477 n. 9.

⁶⁵⁶ *Toussaint v. McCarthy*, 926 F.2d at 803; *see Smith v. Shettle*, 946 F.2d 1250, 1255 (7th Cir. 1991) (30-day intervals are not constitutionally required). *But see Hatori v. Haga*, 751 F.Supp. 1401, 1407-08 (D.Haw. 1989) (30-day review required in conformity with defendants’ own regulations).

⁶⁵⁷ *Rahman X v. Morgan*, 300 F.3d 970, 974 (8th Cir. 2002) (holding 60-day review adequate); *Luken v. Scott*, 71F.3d 192 (5th Cir. 1995) (holding 90-day review adequate); *Garza v. Carlson*, 877 F.2d 14, 17 (8th Cir. 1989) (monthly reviews upheld); *Clark v. Brewer*, 776 F.2d 226, 234 (8th Cir. 1985) (weekly hearings for two months and monthly hearings thereafter upheld); *Mims v. Shapp*, 744 F.2d 946, 952-54 (3d Cir. 1984) (30-day review adequate).

⁶⁵⁸ *McQueen v. Tabah*, 839 F.2d 1525, 1529 (11th Cir. 1988) (11 months without review stated a due process claim); *Toussaint v. McCarthy*, 801 F.2d at 1101 (12 months without review denied due process).

⁶⁵⁹ 545 U.S. at 224. *Wilkinson* did not otherwise address periodic review, except by implication. The district court had ordered the state to supplement its annual review by providing notifications twice a year of what specific conduct was required for each prisoner to achieve a classification reduction and how long it would take. 545 U.S. at 220. That requirement was implicitly reversed by the Court’s holding that the state’s procedures should not have been altered by the lower courts.

⁶⁶⁰ *Sourbeer v. Robinson*, 791 F.2d at 1101; *accord*, *Williams v. Hobbs*, 662 F.3d 994, 1008-09 (8th Cir. 2011) (upholding verdict based on sham review; due process is violated when “undue weight [is] accorded to past facts”), *cert. denied*, 133 S.Ct. 243 (2012); *McClary v. Kelly*, 87 F.Supp.2d 205, 214 (W.D.N.Y. 2000) (stating that review must be “‘meaningful’ and not a sham or fraud,” upholding damage

encourage a prisoner to improve his behavior, “the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (i.e., by giving the prisoner some idea of how he might progress toward a more favorable placement).” Where the goal of the confinement is behavior modification, periodic review must inform the prisoner of the reasons release is recommended or denied so the prisoner will have a guide for future behavior.⁶⁶¹ Prison officials should give notice if new evidence is to be presented at review hearings or if the hearings are not conducted on a regular and frequent schedule.⁶⁶²

The Court in *Hewitt* did not say anything about statements of reasons, and some applications of *Hewitt* held that they are not required by due process.⁶⁶³ However, *Wilkinson v. Austin* stated that Ohio “requires that the decisionmaker provide a short statement of reasons. This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review.”⁶⁶⁴ I think it is fair to conclude from that statement that it views a statement of reasons as part of the process due. Statements of reasons are as important in the review process as in the initial placement proceeding, since without one it is impossible to determine whether a prisoner’s continuing confinement is based on a continuing justification or whether it is just the “rote reiteration of

verdict for sham review), *aff’d*, 237 F.3d 185 (2d Cir. 2001); *Giano v. Kelly*, 869 F.Supp. 143, 150 (W.D.N.Y. 1994) (stating that “prison officials must be prepared to offer evidence that the periodic reviews held are substantive and legitimate, not merely a ‘sham’”); *see Thompson-El v. Jones*, 876 F.2d 66, 69 n. 6 (8th Cir. 1989) (dictum) (a claim that there was an “ongoing investigation” might not justify six months’ segregation when there was little or no actual investigation going on). *But see Edmonson v. Coughlin*, 21 F.Supp.2d 242, 253 (W.D.N.Y. 1998) (“The fact that the ASRC repeated the same rationale each week, and did not enable Edmonson to submit information is not a basis for finding that the ASRC violated due process”; though the process should have been “better documented,” it need not be “formalized”).

⁶⁶¹ *Toeys v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012) (stating “the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (i.e., by giving the prisoner some idea of how he might progress toward a more favorable placement)”; *Williams v. Hobbs*, 662 F.3d at 1008-09 (holding due process was violated where “the defendants failed to apprise Williams of the reasons that he continued to pose a threat to the security and good order of the prison”). In *Toeys*, the issue for review was not immediate release, but progress from level to level in a “Quality of Life Level Program” which involved confinement under conditions which concededly deprived prisoners of a liberty interest. The court treated progress or lack of it through this program towards eventual release as equivalent for due process purposes to the decision to release or not addressed in *Hewitt* and *Wilkinson*.

⁶⁶² *Clark v. Brewer*, 776 F.2d at 234.

⁶⁶³ *See Toussaint v. McCarthy*, 801 F.2d at 1101; *Jones v. Moran*, 900 F.Supp. 1267 (N.D.Cal. 1995).

⁶⁶⁴ *Wilkinson v. Austin*, 545 U.S. at 226 (citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16 (1979)).

stale justifications” that courts have condemned.⁶⁶⁵

Neither *Hewitt* nor *Wilkinson* said anything about impartial decisionmakers, a requirement of due process in disciplinary proceedings, and the courts have not resolved whether one is required for administrative segregation.⁶⁶⁶

In making segregation decisions, the Supreme Court said that prison officials may consider “the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se* [among themselves], and the like . . . ; rumor, reputation, and even more imponderable factors . . . ‘purely subjective evaluations’ . . . intuitive judgments.”⁶⁶⁷ In practice, common reasons include pending disciplinary charges,⁶⁶⁸ risk of escape or other security threats,⁶⁶⁹ involvement in gangs or other “security threat groups,”⁶⁷⁰ and protection of the segregated inmate.⁶⁷¹ Prison officials’ reasons deny due

⁶⁶⁵ *Sourbeer v. Robinson*, 791 F.2d at 1104; *see Sheley v. Dugger*, 833 F.2d 1420, 1427 (11th Cir. 1987) (hearing ordered to determine if there was continuing justification for twelve-year confinement); *cf. Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (explaining the need for written records).

⁶⁶⁶ *See Shoats v. Horn*, 213 F.3d 140, 146 (3d Cir. 2000) (rejecting claim of bias because there were many decision-makers who all reached the same conclusion; not deciding whether an impartial fact-finder is required); *Woods v. Edwards*, 51 F.3d 577, 582 (5th Cir. 1995) (noting lack of evidence to support claim of biased periodic review, not stating whether an impartial fact-finder is required); *Parenti v. Ponte*, 727 F.2d 21, 25 (1st Cir. 1984) (Classification Board members whose recommendations were nonbinding did not have to be impartial); *Gomez v. Coughlin*, 685 F.Supp. 1291, 1297 (S.D.N.Y. 1988) (due process may require a decisionmaker with an “open mind”).

⁶⁶⁷ *Hewitt v. Helms*, 459 U.S. at 474 (citations omitted); *accord, Shoats v. Horn*, 213 F.3d 140, 146 (3d Cir. 2000) (holding prison officials’ conclusion that plaintiff was a current threat to security and good order justified retention in segregation); *Mims v. Shapp*, 744 F.2d 946, 952-53 (3d Cir. 1984); *Crosby-Bey v. District of Columbia*, 598 F.Supp. 270 (D.D.C. 1984) (prisoner could be segregated because of injuries suggesting he had been in a fight).

⁶⁶⁸ *Russell v. Coughlin*, 910 F.2d 75, 77-78 (2d Cir. 1990).

⁶⁶⁹ *See, e.g., Toussaint v. McCarthy*, 926 F.2d at 802 (continuing gang affiliation); *Martin v. Tyson*, 845 F.2d 1451, 1457 (5th Cir.) (escape risk), *cert. denied*, 488 U.S. 863 (1988).

⁶⁷⁰ *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001). Decisions are in conflict as to whether mere membership in a gang is sufficient to justify placement in indefinite administrative confinement. *Compare Koch v. Lewis*, 216 F.Supp.2d 994, 1003 (D.Ariz. 2001), *appeal dismissed as moot*, 335 F.3d 993 (9th Cir. 2003) (holding that actions and not mere membership in a gang must be shown) *with Austin v. Wilkinson*, 372 F.3d 346, 356-57 (6th Cir. 2004), *rev’d on other grounds*, 545 U.S. 209 (2005) (rejecting the holding that mere gang membership cannot be the basis for indefinite segregation).

⁶⁷¹ *See, e.g., Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir.) (transsexual prisoner segregated for own protection), *cert. denied*, 484 U.S. 935 (1987); *Golub v. Coughlin*, 885 F.Supp. 42 (N.D.N.Y. 1995) (holding that a charge for a heinous murder was sufficient reason to keep a prisoner in

process only if they are clearly arbitrary or the segregation is clearly excessive.⁶⁷² Some courts have suggested that as the length of segregation increases, prison officials' burden of justification for continued segregation increases.⁶⁷³

The Second Circuit has applied the same requirement of "reliable" evidence to administrative segregation decisions that it and other courts have applied to disciplinary proceedings.⁶⁷⁴ That holding may seem to contrast with the Supreme Court's endorsement of "rumor, reputation, . . . [and] intuitive judgments" as a basis for segregation.⁶⁷⁵ On the other hand, prison officials' action in *Taylor* did not rest on some subjective predictive judgment but on the supposed fact that the prisoner was a gang member, as shown by his actions and other evidence—a determination that appears appropriately served by a requirement of reliability.

3. Temporary Release

Some courts hold that if there is a liberty interest in staying on temporary release, revocation proceedings need only meet the due process standards of prison disciplinary hearings.⁶⁷⁶ Others have held that the higher standards of parole or probation revocation "logically apply."⁶⁷⁷ Arguably, the latter conclusion is compelled by *Young v. Harper*, which

involuntary protective custody).

⁶⁷² See *Clark v. Brewer*, 776 F.2d at 234-35 (fear of adverse staff or inmate reaction may be considered, but the mere possibility of such reaction cannot by itself justify segregation); *Perez v. Neubert*, 611 F.Supp. 830, 839-40 (D.N.J. 1985) (defendants could not continue the segregation of all "Marielito" prisoners based only on their group membership).

⁶⁷³ *Sheley v. Dugger*, 833 F.2d at 1427 (allegation of 10-year segregation with no new information stated a due process claim); *Meriwether v. Faulkner*, 821 F.2d at 416 (protracted segregation unrelated to misconduct presents "a very difficult question"); *Mims v. Shapp*, 744 F.2d at 951-52.

⁶⁷⁴ *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001) (holding requirement not met by confidential informant information not supported by any indicia of reliability); *accord*, *Ryan v. Sargent*, 969 F.2d 638, 640-41 (8th Cir. 1992) (use of confidential informant information requires the same safeguards of reliability as in disciplinary cases), *cert. denied*, 506 U.S. 1061 (1993); *Koch v. Lewis*, 216 F.Supp.2d 994, 1003 (D.Ariz. 2001), *appeal dismissed as moot*, 335 F.3d 993 (9th Cir. 2003) (holding that confinement in supermax unit required evidence with sufficient "indicia of reliability" to justify indefinite confinement); *Jackson v. Bostick*, 760 F.Supp. 524, 530-31 (D.Md. 1991) (substantive due process requires an independent determination based on reliable information before a prisoner can be segregated as an escape risk); see *United States v. Gotti*, 755 F.Supp. 1159, 1164 (E.D.N.Y. 1991) ("subjective belief" of what was in a detainee's mind, without more' did not justify administrative detention).

⁶⁷⁵ *Hewitt v. Helms*, 459 U.S. at 474.

⁶⁷⁶ See *Lanier v. Fair*, 876 F.2d 243, 248-49 (1st Cir. 1989); *Brennan v. Cunningham*, 813 F.2d 1, 8-9 (1st Cir. 1987); *Tracy v. Salamack*, 572 F.2d 393, 397 (2d Cir. 1978).

⁶⁷⁷ *Friedl v. City of New York*, 210 F.3d 79, 84-85 (2d Cir. 2000); *accord*, *Anderson v. Recore*, 446 F.3d 324, 329 (2d Cir. 2006); *Edwards v. Lockhart*, 908 F.2d 299, 303 (8th Cir. 1990) (parole

analogized a “pre-parole” program to parole, reasoning which some courts have held applicable to non-institutional temporary release programs.⁶⁷⁸ Violation of state law protections that exceed federal due process requirements does not deny due process.⁶⁷⁹

4. Property

Prisoners’ property can be severely restricted, but when they are allowed to possess property in prison, their rights cannot be infringed without due process.⁶⁸⁰ However, most

revocation procedures were required to revoke temporary release in which the plaintiff lived at home); *Smith v. Stoner*, 594 F.Supp. 1091, 1107 (N.D.Ind. 1984) (parole revocation procedures required).

The relevant requirements are “(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present . . . evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a ‘neutral and detached’ hearing body such as a traditional parole board . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.” *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), *quoted in Friedl*, 210 F.3d 84-85. *Friedl* further held that revocation of temporary release must be supported by some evidence in the record of the alleged violation. *Id.*; *see also* *Quartararo v. Hoy*, 113 F.Supp.2d 405, 412-13 (E.D.N.Y. 2000) (requiring “a statement of the *actual* reason why the inmate’s removal from work release is being considered” and “a post-hearing written account of the *actual* reason for removal and a summary of the evidence supporting that reason”).

Despite the foregoing holdings, the Second Circuit has held that a prison disciplinary hearing taking place before a “neutral hearing officer” (i.e., a prison system employee assigned to hold hearings) under procedures allowing the prisoner to request witnesses and submit documentary evidence sufficed to establish his guilt of the temporary release rules violation and the appropriate disciplinary sanction. Although he was entitled to a further hearing before the Temporary Release Committee to determine if his release status should be revoked, he was not entitled to re-litigate these issues before it. *Anderson v. Recore*, 446 F.3d 324, 329-332 (2d Cir. 2006). The right to confront and cross-examine appear to have been lost in the shuffle in this decision.

⁶⁷⁸ *See* nn. 470-471, above.

⁶⁷⁹ *Holcomb v. Lykens*, 337 F.3d 217, 224 (2d Cir. 2003).

⁶⁸⁰ *McCrae v. Hankins*, 720 F.2d 863, 869 (5th Cir. 1983); *see* *Nevada Dept. of Corrections v. Greene*, 648 F.3d 1014, 1019 (9th Cir. 2011) (giving notice of withdrawal of permission to possess typewriters, and an opportunity to send them home or dispose of them otherwise, satisfied due process), *cert. denied*, 132 S.Ct. 1823 (2012). Some courts have said that contraband can be seized without due process because prisoners have no property interest in it. *See, e.g., Lyon v. Farrier*, 730 F.3d 525, 527 (8th Cir. 1984). That holding misses the point, which is that there should be a right to be heard on whether the item *is* contraband. *Stewart v. McGinnis*, 5 F.3d 1031, 1037 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994); *Farid v. Smith*, 850 F.2d 917, 925 (2d Cir. 1988) (evidence that prison officials made prisoners send alleged contraband out of the prison immediately and denied their subsequent grievances raised a factual question whether due process was violated); *U.S. ex rel. Wolfish v. Levi*, 439 F.Supp. 114, 151 (S.D.N.Y. 1977), *aff’d in pertinent part*, 573 F.2d 118, 131-32 n. 29 (2d Cir. 1978), *rev’d on other grounds sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979).

The decision in *Sandin v. Conner*, 515 U.S. 472 (1995), addresses prisoners’ liberty interests and does not address due process analysis in property cases. *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995).

prisoner property deprivations are not litigable in federal court because of the rule that post-deprivation process suffices for “random and unauthorized” deprivations of property.⁶⁸¹ That means if the state provides a tort remedy, there is no federal claim.⁶⁸² Deprivations that are not random and unauthorized, but represent authorized or established procedures or policy, do require further due process protections.⁶⁸³

Courts have held that prison officials are required to give receipts for property intentionally seized, a statement of reasons for the seizure, the right to be heard in opposition, and a decision with reasons if the seizure is upheld,⁶⁸⁴ which may be afforded at a disciplinary hearing on contraband charges.⁶⁸⁵

It is not generally a deprivation of property for prison officials to withdraw permission to possess property as long as the prisoner has an opportunity to send it to someone outside the prison.⁶⁸⁶ However, prison officials concerned with security are allowed to take the property first and deal with prisoners’ procedural rights later.⁶⁸⁷

⁶⁸¹ Hudson v. Palmer, 468 U.S. 517, 533-35 (1984).

⁶⁸² Jackson v. Burke, 256 F.3d 93 (2d Cir. 2001).

⁶⁸³ Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982); Burns v. PA Dept. of Corrections, 642 F.3d 163, 172 (3d Cir. 2011); Farid v. Smith, 850 F.2d 917, 925 (2d Cir. 1988). For example, searches and shakedowns conducted pursuant to regulations or to the orders of responsible officials are considered authorized or established. Caldwell v. Miller, 790 F.2d 589, 608 (7th Cir. 1986). For this purpose, a completely illegitimate practice may in fact constitute an established procedure. See Gates v. Towery, 331 F.Supp.2d 666, 670-71 (N.D.Ill. 2004) (holding allegations of a police policy of issuing incomplete, false, and misleading receipts to arrestees to obstruct their obtaining return of their property was not subject to dismissal based on existence of post-deprivation remedies).

⁶⁸⁴ U.S. ex rel. Wolfish v. Levi, 428 F.Supp. 333, 342 (S.D.N.Y. 1977), *supplemented*, 439 F.Supp. 114, 151 (S.D.N.Y. 1977), *aff’d in pertinent part*, 573 F.2d 118, 131-32 n. 29 (2d Cir. 1978), *rev’d on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979); Steinberg v. Taylor, 500 F.Supp. 477, 479-80 (D.Conn. 1980). The Second Circuit has held in a case involving a civilly detained sex offender that receipts need not be provided immediately; the plaintiff was given a receipt and statement of reasons for the seizure after the search. Ahlers v. Rabinowitz, 684 F.3d 53, 63 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 466 (2012).

⁶⁸⁵ Stewart v. McGinnis, 5 F.3d 1031, 1037 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). *Stewart* held that failure to provide a receipt did not deny due process because it was a deviation from the prison’s established policy. 5 F.3d at 1036. I think that conclusion is mistaken. The question is whether the *seizure* was authorized, not whether the officer followed all the rules in carrying it out.

⁶⁸⁶ Nevada Dept. of Corrections v. Greene, 648 F.3d 1014, 1019 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1823 (2012); Caldwell v. Miller, 790 F.2d at 609; Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984).

⁶⁸⁷ Beck v. Lynaugh, 842 F.2d 759, 761 (5th Cir. 1988) (immersion heaters that presented a fire hazard could be confiscated without a prior hearing); Caldwell v. Miller, 790 F.2d at 608-09.

Many prisoners are subject to actions for forfeiture of property allegedly related to their criminal behavior, and there is a recurrent problem of their failure to receive notice of the proceedings. The Supreme Court has held that notice need not actually be received by the prisoner as long as it is sent to the place where the prisoner is held.⁶⁸⁸

Money is obviously property and protected by due process.⁶⁸⁹ If state law or federal statute or regulation creates a right to be paid for prison work, that right is protected by due process,⁶⁹⁰ subject to limitations in the governing state law.⁶⁹¹ However, cash is contraband in most prisons, and courts have differed over whether prison officials may just confiscate it⁶⁹² or if statutory authorization is required.⁶⁹³ There is an ongoing controversy under both the Due Process Clauses and the Takings Clause over whether interest earned on prisoners' money must be paid to the prisoners.⁶⁹⁴ Charges to prisoners, even pre-trial detainees, to defray the cost of

⁶⁸⁸ *Dusenberry v. U.S.*, 534 U.S. 161 (2002); *see* *Nunley v. Department of Justice*, 425 F.3d 1132, 1137-38 (8th Cir. 2005) (rejecting Seventh Circuit's refusal to examine prison mail delivery, holding the plaintiff has the burden of proof of its inadequacy; also holding that notice to an outside address did not suffice where the prisoner was known to be in jail); *U.S. v. Howell*, 354 F.3d 693, 696 (7th Cir.) (holding that sending notice to two addresses, one of which was known to be vacant, resulting in both notices' being returned undelivered, while failing to send the notice to the address on the prisoner's driver's license or to the Minnesota jail where he was known to be held, was not adequate), *cert. denied*, 543 U.S. 862 (2004). *But see* *Chairez v. U.S.*, 355 F.3d 1099, 1101-02 (7th Cir. 2004) (applying *Dusenberry*, declining to inquire into operation of jail's internal mail delivery), *cert. denied*, 543 U.S. 823 (2004).

⁶⁸⁹ *Alexanian v. New York State Urban Development Corp.*, 554 F.2d 15, 17 (2d Cir. 1977).

⁶⁹⁰ *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991).

⁶⁹¹ *Ward v. Ryan*, 623 F.3d 807 (9th Cir. 2010) (holding officials' withholding of \$50 in a "dedicated discharge account" did not deny due process or the Takings Clause, even for a prisoner who would probably never be discharged, because his right immediately to possess funds was not a "core" property interest and was limited by non-arbitrary statutes and regulations); *Allen v. Cuomo*, 100 F.3d 253 261 (2d Cir. 1996) (holding prison officials could impose a "pay lag" procedure because the governing statutes gave them great discretion over prisoners' pay); *James v. Quinlan*, 866 F.2d 627, 630 (3d Cir. 1989) (upholding regulation requiring prisoners to assign half their money to pay court-ordered obligations or lose their prison industries jobs), *cert. denied*, 493 U.S. 870 (1989); *Hrbek v. Farrier*, 787 F.2d 414, 416-17 (8th Cir. 1986).

⁶⁹² *Best v. State*, 736 P.2d 171, 172 (Okla.App. 1987).

⁶⁹³ *Sell v. Parratt*, 548 F.2d 753, 758 (8th Cir.), *cert. denied*, 434 U.S. 873 (1977); *see* *Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) (finding statutory authorization based on state court construction of Commissioner's authority).

⁶⁹⁴ *Compare* *Vance v. Barrett*, 343 F.3d 1083 (9th Cir. 2003) (holding that prisoners' interest is their property; deprivations pursuant to statute present Takings Clause issues and deprivations without statutory authorization present due process questions); *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003)

their incarceration have generally been upheld.⁶⁹⁵

Prison officials may not simply take money out of a prisoner's account without notice or hearing, but the process due will depend on context. If restitution is ordered as a disciplinary measure, the disciplinary hearing must address the relevant issues.⁶⁹⁶ Other non-routine deductions may also require notice and hearing.⁶⁹⁷ However, for deductions in the ordinary course of business, due process is satisfied by providing a complete account statement and an opportunity to contest the deduction.⁶⁹⁸

Regulations governing the management of prisoners' money will be upheld if rationally or reasonably related to legitimate penological purposes.⁶⁹⁹

(holding that interest income is property but need be paid only to individuals whose share of the total pooled interest is greater than the costs of administering the account) *with* *Young v. Wall*, 642 F.3d 49, 53-54 (1st Cir. 2011) (following *Givens* and *Washlefske*, citing “the highly idiosyncratic context that prison presents”); *Givens v. Alabama Dep’t of Corrections*, 381 F.3d 1064 (11th Cir. 2004) (holding that the usual “interest follows principal” rule does not apply to prisoners because traditionally prisoners had *no* property rights, their control over their inmate accounts is limited, and the statutes and regulations governing prisoner compensation do not explicitly address interest), *cert. denied*, 545 U.S. 1104 (2005); *Washlefske v. Winston*, 234 F.3d 179, 185 (4th Cir. 2000) (holding that the “interest follows principal” rule does not apply in prison because traditionally prisoners had no right to be paid at all for their work; prisoners’ interest can be disposed of by statute). Both *Givens* and *Washlefske* address money paid to prisoners for their labor. Whether their rationale would extend to money from other sources is an open question. *See also* *Allen v. Cuomo*, 100 F.3d 253 (2d Cir. 1996) (holding that two-week “pay lag” did not violate Takings Clause based on impact on interest earnings).

⁶⁹⁵ *See* *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 251-55 (4th Cir. 2005) (upholding charge of \$1.00 a day for pre-trial detention, with refunds for those adjudicated not guilty).

⁶⁹⁶ *Quick v. Jones*, 754 F.2d 1521 (9th Cir. 1985) (holding restitution sentence for destroyed property must be supported by findings that the inmate actually destroyed it); *Artway v. Scheidemantel*, 671 F.Supp. 330, 337 (D.N.J. 1987) (holding restitution sentence must be supported by a hearing addressing the value of the property); *see* *Allen v. Cuomo*, 100 F.3d 253, 259-60 (2d Cir. 1996) (upholding \$5.00 surcharge on disciplinary convictions).

⁶⁹⁷ *Wojnicz v. Department of Corrections*, 32 Mich.App. 121, 188 N.W.2d 251, 253-54 (Mich.App. 1971).

⁶⁹⁸ *Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981); *see* *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir. 1997) (holding that due process was satisfied by notice of a policy of charging for medical appointments and providing a post-deduction grievance procedure).

⁶⁹⁹ *Reedy v. Werholtz*, 660 F.3d 1270, 1275-76 (10th Cir. 2011) (upholding requirement to place a portion of funds received or earned in a savings account for use upon release as applied to prisoners eligible for release; noting that this justification cannot be applied to prisoners who will never be released); *Foster v. Hughes*, 979 F.2d 130, 132-33 (8th Cir. 1992) (upholding failure to provide for interest-bearing accounts; prisoners were allowed to buy savings bonds).

IV. Access to Courts

Prisoners have a right of access to courts,⁷⁰⁰ which extends to all categories of prisoners⁷⁰¹ and is supposed to be “adequate, effective, and meaningful.”⁷⁰² The right of court access in civil cases is distinct from the right of indigent persons to have lawyers appointed for their defense under the Sixth Amendment and the Due Process Clause.⁷⁰³ This constitutional right to appointed counsel is mostly limited to criminal trial and appellate proceedings,⁷⁰⁴ and to civil proceedings that may deprive a non-prisoner of liberty or other interests of compelling importance.⁷⁰⁵

A. Types of court access claims

Court access claims fall into three broad categories, as follows:

1. The right to assistance in bringing legal claims

The Supreme Court held in *Bounds v. Smith* that prison authorities have an affirmative obligation to “assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”⁷⁰⁶ It has also held that “indigent inmates must be provided at state expense with paper

⁷⁰⁰ Despite its importance, the courts aren’t too clear about where this right comes from; they have cited the Privileges and Immunities Clause of Article IV of the Constitution, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

⁷⁰¹ See *John L. v. Adams*, 969 F.2d 228, 232-33 (6th Cir. 1992) and cases cited (juvenile prisoners); *Hatch v. Yamauchi*, 809 F.Supp. 59, 61 (E.D.Ark. 1992) (prisoners held in a mental hospital); *Murray v. Didario*, 762 F.Supp. 109, 109-10 (E.D.Pa. 1991) (prisoners held in a mental hospital); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 384 (C.D.Cal. 1982) (immigration detainees); see also *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985) (civilly committed mental patients).

⁷⁰² *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

⁷⁰³ The Second Circuit has held that a criminal defendant’s right of access to courts is satisfied (at least for purposes of the criminal proceeding) by appointment of an attorney; the Sixth Amendment’s requirement of the *effective* assistance of counsel is not part of the access to courts analysis. *Bourdon v. Loughren*, 386 F.3d 88, 94-98 (2d Cir. 2004).

⁷⁰⁴ See *Murray v. Giarratano*, 492 U.S. 1, 7 (1989).

⁷⁰⁵ See *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 32-33 (1981) (holding counsel is not required in all proceedings to terminate parental rights).

⁷⁰⁶ *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (emphasis supplied). Since *Lewis v. Casey*, discussed below, some prison systems have removed or ceased updating their law libraries, providing

and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.”⁷⁰⁷ However, in *Lewis v. Casey*, the Supreme Court imposed several restrictions on prisoners’ ability to enforce the *Bounds v. Smith* obligation. *Lewis* held that a prisoner complaining of a *Bounds* violation must show that:

1. he was, or is, suffering “actual injury” by being “frustrated or impeded”⁷⁰⁸
2. in bringing a non-frivolous claim⁷⁰⁹
3. about his criminal conviction or sentence or the conditions of his confinement.⁷¹⁰

The following subsections address each of these requirements in turn, as well as other aspects of *Lewis*.

a. The “actual injury” requirement

Lewis v. Casey says it is not enough for prisoners to show that prison officials do not provide adequate law libraries, legal assistance, or legal supplies, or that they impose unreasonable restrictions on prisoners who try to use them. Prisoners must show that the inadequacies or restrictions caused them “actual injury,” *i.e.*, “that a nonfrivolous legal claim had been frustrated or was being impeded.”⁷¹¹ The large majority of prisoner court access claims that I see are dismissed for failure to allege actual injury or to provide factual support for it.

Exactly what “frustrated or impeded” means is not completely clear. *Lewis* gave two

instead very limited assistance from legally trained persons. The strictures of *Lewis* have made these systems very difficult to challenge. Thus, one lower court held that a prisoner was denied court access where he didn’t file a post-conviction proceeding because legal research was required to determine the merit of his claim and the “contract attorney” was instructed not to conduct legal research and did not have time to do so anyway. On appeal, the court reversed on the ground that the prisoner’s thwarted legal claims were, respectively, without merit and time-barred. *White v. Kautzky*, 386 F.Supp.2d 1042, 1053-56 (N.D. Iowa 2005), *rev’d and vacated*, 494 F.3d 677, 680-81 (8th Cir. 2007).

⁷⁰⁷ *Bounds*, 430 U.S. at 824-25; *see Allen v. Sakai*, 40 F.3d 1001, 1006 (9th Cir. 1994) (denial of pen to prisoner, resulting in his papers’ rejection by the court under a rule requiring handwritten papers to be written in black ink, denied access to court).

⁷⁰⁸ *Lewis v. Casey*, 518 U.S. 343, 351-53 (1996).

⁷⁰⁹ *Id.*

⁷¹⁰ *Lewis*, 518 U.S. at 355.

⁷¹¹ *Lewis*, 518 U.S. at 351-53; *see Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir.) (“The mere inability of a prisoner to access the law library is not, in itself, an unconstitutional impediment. The inmate must show that this inability caused an actual harm. . .”), *cert. denied*, 531 U.S. 971 (2000).

examples:

[The inmate] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.⁷¹²

Some courts seem to assume that the prisoner's case must be dismissed, or prevented from being filed, in order to be "frustrated or impeded."⁷¹³ Others assume that obstacles that impair the ability to present one's case effectively are also actionable.⁷¹⁴ The latter view appears to be the

⁷¹² *Lewis*, 518 U.S. at 351; *see* *Hebbe v. Pfler*, 627 F.3d 338, 342-43 (9th Cir. 2010) (holding prisoner whose appeal was dismissed because he was denied law library access and could not file a brief showed actual injury); *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 976-77 (E.D.Wis. 2002) (holding that a prisoner whose case was dismissed for failure to exhaust administrative remedies was denied access to courts because the jail lacked legal materials from which he could have learned about the exhaustion requirement, or materials about the jail grievance procedure).

⁷¹³ *See* *Ingalls v. Florio*, 968 F.Supp. 193, 203 (D.N.J. 1997); *Smith v. Armstrong*, 968 F.Supp. 40, 48-49 (D.Conn. 1996) (holding in class action that individuals who had managed to file complaints despite lack of assistance had not been injured); *Stewart v. Sheahan*, 1997 WL 392073 at *3 (N.D.Ill. 1997) ("If the judge ruled against him because Stewart did not have the resources to disabuse him of his misunderstanding of the law, this is a matter of effective argument, not inability to present a claim at all." The plaintiff alleged that he was denied access to authority that would have demonstrated that a state court had jurisdiction over his claim.)

⁷¹⁴ *See* *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2001) (holding the advantage defendants obtained by reading the plaintiff's private legal papers constituted actual injury); *Goff v. Nix*, 113 F.3d 887, 891 (8th Cir. 1997) (holding that inability of co-plaintiffs to coordinate recruitment of witnesses for trial "impeded" a non-frivolous claim, though upholding rule barring their correspondence under the *Turner* standard; holding that plaintiff who "lost papers critical to his post-conviction proceeding" was actually injured); *Glisson v. Sangamon County Sheriff's Dep't*, 408 F.Supp.2d 609, 623-24 (C.D.Ill. 2006) (holding inability to prepare defenses to criminal charges constituted actual injury); *Purkey v. CCA Detention Center*, 339 F.Supp.2d 1145, 1152 (D.Kan. 2004) (holding that defendants' alleged discarding of notes of interrogations essential for the plaintiff's challenge to his conviction sufficiently pled actual injury); *King v. Barone*, 1997 WL 337032 at *4 (E.D.Pa. 1997) (declining to dismiss claim based on confiscation of alleged exculpatory documentation since it is "conceivable" this may have impeded the plaintiff's petition for post-conviction relief); *David v. Wingard*, 958 F.Supp. 1244, 1256 (S.D. Ohio 1997) (lack of knowledge of court rules resulting from missing pages in law books, which allegedly resulted in dismissal of motion to reopen appeal, met injury requirement); *see also* *Ortloff v. United States*, 335 F.3d 652, 656 n.1 (7th Cir. 2003) (noting its pre-*Lewis v. Casey* holding that alleging "substantial and continuous limit on . . . access to legal materials or counsel . . . carries an inherent allegation of prejudice.") (dictum).

Other courts have explicitly rejected the notion that inability to present a case well constitutes injury. *See* *Curtis v. Fairman*, 1997 WL 159319 at *5 (N.D.Ill. 1997) (holding that denial of law library

correct one, since the Supreme Court said later that cases that were inadequately tried or settled, or where a particular kind of relief could not be sought, as a result of officials' actions, could amount to denials of court access, in addition to those that were dismissed or never filed.⁷¹⁵

Courts have held generally that delay by itself is not sufficient injury to constitute a denial of court access,⁷¹⁶ though in my view that holding would be wrong in a case where the delay resulted in a prisoner's spending unnecessary time in prison, in segregated confinement, or in unlawful conditions that timely court access would have remedied.⁷¹⁷ A claim that denial of access to courts caused a prisoner to be convicted or kept him from getting his conviction or sentence overturned is subject to the rule of *Heck v. Humphrey*,⁷¹⁸ which requires the plaintiff to exhaust state judicial remedies (or show that those remedies were not available) and then proceed via federal habeas corpus to get the conviction or sentence overturned before filing a civil suit.⁷¹⁹

access to respond to a motion to dismiss is not actual injury because case citations and legal arguments are not absolutely necessary at this stage); *Kain v. Bradley*, 959 F.Supp. 463, 468 (M.D.Tenn. 1997) (holding that plaintiff's inability to discover a legal argument more successful than the one he made was not injury where he was able to submit some response to a motion).

⁷¹⁵ *Christopher v. Harbury*, 536 U.S. 403, 414, 416 n.13 (2002). *Christopher* was not a prison case, and it referred to a case which was "tried to an inadequate result due to missing or fabricated evidence in an official cover-up," rather than dismissed or not filed because of inadequate law library access or other prison shortcomings. But it cites *Lewis v. Casey* repeatedly, and its principles would seem to be applicable to prison cases governed by *Lewis*. See also *Marshall v. Knight*, 445 F.3d 965, 968-69 (7th Cir. 2006) (holding that "because of my inability to prepare I was Denied credit Time that I was entitled to" sufficiently pled actual injury).

⁷¹⁶ *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003); *Johnson v. Barczak*, 338 F.3d 771, 773 (7th Cir. 2003) ("But a delay becomes an injury only if it results in 'actual substantial prejudice to specific litigation.'") (citation omitted); *Konigsberg v. LeFevre*, 267 F.Supp.2d 255, 261 (N.D.N.Y. 2003) ("Interferences that merely delay an inmate's ability to work on a pending action or to communicate with the courts does not rise to the level of a constitutional violation."); *Griffin v. DeTella*, 21 F.Supp.2d 843, 847 (N.D.Ill. 1998) ("Standing alone, delay and inconvenience to not rise to the level of a constitutional deficiency.")

⁷¹⁷ *May v. Sheahan*, 226 F.3d 876, 883 (7th Cir. 2000) (holding that a hospitalized pre-trial detainee's allegations that refusal to take him to court would result in delay in disposition resulting in longer incarceration, inability to seek lower bail, delay in other motions, and restricted attorney access met the actual injury requirement); *Simpson v. Gallant*, 231 F.Supp.2d 341, 348-49 (D.Me. 2002) (holding that restrictions that prevented plaintiff from making bail and proceeding with a scheduled trial stated a court access claim); *Taylor v. Cox*, 912 F.Supp. 140, 142, 144 (E.D.Pa. 1995) (holding allegation that seizure of legal materials resulted in an extra month's incarceration stated a court access claim)

⁷¹⁸ 512 U.S. 477 (1994); see § III.E, above.

⁷¹⁹ *Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir.) (denying injunction to make state court reopen a post-conviction proceeding), *cert. denied*, 528 U.S. 970 (1999) .

b. The non-frivolous claim requirement

To violate the right of court access, deficiencies in prison facilities or services must “frustrate or impede” a claim that is not frivolous.⁷²⁰ That merely means the claim must be “arguable,”⁷²¹ not that the prisoner must prove he would have won the case.⁷²² The claim must be described specifically enough so the court can tell if it is frivolous or not⁷²³—in fact, the prisoner must plead that claim, as well as the court access claim, in the complaint.⁷²⁴

c. The criminal sentence/conditions of confinement requirement

Lewis v. Casey says that the affirmative obligation to help prisoners bring lawsuits extends only to what prisoners need “in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.”⁷²⁵ Thus, prison officials need not provide assistance to prisoners with respect to child custody, divorce, suits against them by crime victims, civil suits for false arrest or other police misconduct, etc.⁷²⁶—though that doesn’t mean prison officials can obstruct such claims or retaliate against prisoners who file them.⁷²⁷ There is an open question whether prisoners have a right to law libraries or other assistance to pursue conditions of confinement cases based on state law.⁷²⁸ It is also questionable whether the criminal sentence/prison conditions limitation applies

⁷²⁰ *Lewis v. Casey*, 343 U.S. at 353. The *Bounds* right to assistance does not extend to frivolous cases. *Id.* at n.3.

⁷²¹ *Lewis v. Casey*, 343 U.S. at 353 n.3. A frivolous claim is defined as one that “lacks an arguable basis either in law or fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

⁷²² *Walters v. Edgar*, 163 F.3d 430, 434-35 (7th Cir. 1998), *cert. denied*, 526 U.S. 1149 (1999); *Gomez v. Vernon*, 962 F.Supp. 1296, 1302 (D.Idaho 1997); *see Bell v. Johnson*, 308 F.3d 594, 607 (6th Cir. 2002) (holding that losing a case on summary judgment does not make it frivolous, and that it could be the basis of a court access claim).

⁷²³ *Tarpley v. Allen County, Ind.*, 312 F.3d 895, 899 (7th Cir. 2002) (holding a prisoner who provided no detail about the cases he was unable to bring did not state a court access claim); *Moore v. Plaster*, 266 F.3d 928, 933 (8th Cir. 2001) (rejecting court access claim because the plaintiff did not show his case was not frivolous), *cert. denied*, 535 1037 (2002).

⁷²⁴ *See* § IV.A.1.d, below.

⁷²⁵ *Lewis v. Casey*, 518 U.S. at 355.

⁷²⁶ *See Wilson v. Blankenship*, 163 F.3d 1284, 1291 (11th Cir. 1998) (holding that there is no right to law library access for a civil forfeiture proceeding); *Canell v. Multnomah County*, 141 F.Supp.2d 1046, 1056 (D.Or. 2001) (finding no right to assistance for civil cases not involving conditions of confinement).

⁷²⁷ *See* § IV.A.2-3, below.

⁷²⁸ *Arce v. Walker*, 58 F.Supp.2d 39, 44 (W.D.N.Y. 1999); *see Thaddeus-X v. Blatter*, 175 F.3d 378, 403 (6th Cir. 1999) (en banc) (stating the right is limited to “direct appeal, collateral attack, and §

to cases of interference and retaliation claims.⁷²⁹

d. The requirement to plead the claim that was “frustrated or impeded”

In *Christopher v. Harbury*, the Supreme Court said that the plaintiff must *plead* the claim that allegedly was “frustrated or impeded.”⁷³⁰ It must “be described well enough to apply the ‘nonfrivolous’ test and to show that the ‘arguable’ nature of the underlying claim is more than hope.”⁷³¹ The plaintiff must also describe any remedy that he was prevented from getting, and that he can only get now as part of your court access claim.⁷³² How these rules interact with the principle of leniency towards *pro se* pleadings has not been addressed.

e. Does the right to court access stop with the filing of a complaint?

Lewis contains statements that, some courts say, limits the requirement of law libraries or legal assistance to the initial preparation of complaints and petitions. What *Lewis* actually says is that the right of court access is the right to “bring to court a grievance that the inmate wishe[s] to present”; the government need not “enable the prisoner to *discover* grievances” or “to *litigate effectively* once in court.”⁷³³ Some courts have held that this means the right of court access is only a “right of initial access to commence a lawsuit.”⁷³⁴

1983 civil rights actions”).

⁷²⁹ See § IV.A.2-3, below.

⁷³⁰ *Christopher v. Harbury*, 536 U.S. 403, 415-16 (2003).

⁷³¹ *Id.* at 416. *But see* Thomson v. Washington, 362 F.3d 969, 970-71 (7th Cir. 2004) (holding failure to identify the allegedly thwarted lawsuits did not support dismissal. “Federal judges are forbidden to supplement the federal rules for requiring ‘heightened’ pleading of claims not listed in Rule 9.”)

⁷³² *Id.*

⁷³³ *Lewis*, 343 U.S. at 354.

⁷³⁴ Benjamin v. Jacobson, 935 F.Supp. 332, 352 (S.D.N.Y. 1996), *aff’d in part, rev’d in part and remanded on other grounds*, 172 F.3d 144 (2d Cir. 1999) (en banc), *cert. denied*, 528 U.S. 824 (1999); *accord*, Zigmund v. Foster, 106 F.Supp.2d 352, 359 (D.Conn. 2000); Stewart v. Sheahan, 1997 WL 392073 at *3-*4 (N.D.Ill. 1997) (“ . . . Stewart did succeed in putting his petition before the court. If the judge ruled against him because Stewart did not have the resources to disabuse him of his misunderstanding of the law, this is a matter of effective argument. . . . Institutions are not required to provide inmates with the ability to argue the legal basis of their claims in court.”). Some courts had reached this conclusion or something similar before *Lewis v. Casey*. See Knop v. Johnson, 977 F.2d 996, 1000, 1007 (6th Cir. 1992) (holding the right limited to the “pleading stage,” which apparently includes “not only the drafting of complaints and petitions for relief but also the drafting of responses to motions to dismiss and the drafting of objections to magistrates’ reports and recommendations”), *cert. denied sub nom.* Knop v. McGinnis, 507 U.S. 973 (1993); Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) (holding the right limited to “pleading stage” including reply to a counterclaim or answer to a cross-claim if one is asserted), *cert. denied sub nom.* Henry v. Caballero, 518 U.S. 1033 (1996); Nordgren v. Milliken,

In my view *Lewis v. Casey* doesn't mean that; rather, it means that the government is not obligated to make prisoners, many of whom are poorly educated and legally unsophisticated, into "effective[]" litigators, since that's impossible in many cases.⁷³⁵ In addition, *Lewis* says: "It is the role of courts to *provide relief* to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. . . ."⁷³⁶ A court does not "provide relief" based only on a complaint; "presenting" a claim requires both defending the claim (*e.g.*, through responding to motions to dismiss and for summary judgment) and moving it toward judgment (*e.g.*, through discovery, motion practice, and ultimately trial).⁷³⁷ So it makes sense that the obligation to assist prisoners with their legal claims extends to all stages of the litigation. *Bounds v. Smith* itself supports this view.⁷³⁸

f. The reasonable relationship standard

The operation of prison law library or legal assistance programs is governed by the "reasonable relationship" standard, which lets prison officials adopt whatever practices or restrictions they choose as long as they are reasonably related to legitimate penological interests.⁷³⁹ That means that even if restrictions do cause actual harm to prisoners' litigation, they don't violate the right of court access if they are reasonably related to legitimate ends.⁷⁴⁰

762 F.2d 851, 855 (10th Cir.) (right limited to filing of complaint or petition), *cert. denied*, 474 U.S. 1032 (1985).

⁷³⁵ The case says: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires." *Lewis*, 343 U.S. at 354.

⁷³⁶ *Id.*, 343 U.S. at 349 (emphasis supplied).

⁷³⁷ See *Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1212-13 (11th Cir. 1981) (en banc) (holding that the right of court access was not satisfied by permitting prisoner to file a complaint and then dismissing his case until the end of his ten-year sentence); *NAACP v. Meese*, 615 F.Supp. 200, 206 n. 18 (D.D.C. 1985) (holding the right of court access extends past pleading stage); *Gilmore v. Lynch*, 319 F.Supp. 105, 111 (N.D.Cal. 1970) holding the (right entails "all the means a defendant or petitioner might require to get a fair hearing from the judiciary"), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

⁷³⁸ As one court pointed out: "The inmates' ability to file is not dispositive of the access question, because the Court in *Bounds* explained that for access to be meaningful, post-filing needs, such as the research tools necessary to effectively rebut authorities cited by an adversary in responsive pleadings, should be met." *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (citing *Bounds v. Smith*, 430 U.S. 817, 825-26 (1977)); see Michael B. Mushlin, *2 Rights of Prisoners* at § 11:4 (Thomson West, 3d ed. 2002).

⁷³⁹ *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (citing *Turner v. Safley*, 482 U.S. 78 (1987)); see § II.A, above.

⁷⁴⁰ *Lewis, id.*

g. Prisoners with pending criminal cases

Some courts have held that a prisoner who is represented by criminal defense counsel has no right to a law library or any other means of court access.⁷⁴¹ In my view that conclusion is wrong, because an attorney handling a criminal case is not always prepared to deal with all of the client's other legal problems and proceedings.⁷⁴² Of course having a criminal defense lawyer does satisfy the right of court access for purposes of the criminal case itself.⁷⁴³

The right to court access with respect to the criminal case is satisfied when a criminal defendant is offered appointed counsel, whether he takes it or not.⁷⁴⁴ However, there is also a separate Sixth Amendment right to defend oneself *pro se*.⁷⁴⁵ One federal appeals court has

⁷⁴¹ Johnson by Johnson v. Brelje, 701 F.2d 1201, 1208 (7th Cir. 1983); Canell v. Multnomah County, 141 F.Supp.2d 1046, 1056 (D.Or. 2001); Maillett v. Phinney, 755 F.Supp. at 465-66; Bell v. Hopper, 511 F.Supp. 452, 453 (S.D.Ga. 1981).

⁷⁴² Ortiz v. Downey, 561 F.3d 664, 671 (7th Cir. 2009) (“the assistance of counsel in [a] criminal case did not diminish [plaintiff’s] right to adequate legal resources for the purpose of pursuing his civil suit”); Peterkin v. Jeffes, 855 F.2d 1021, 1042-47 (3d Cir. 1988) (noting that availability of counsel to death row inmates did not necessarily extend to federal habeas or civil rights matters); Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986) (noting that availability of defense trial counsel was irrelevant to need for court access for postconviction relief); Mann v. Smith, 796 F.2d 79, 83-84 (5th Cir. 1986) (holding that access to a court-appointed defense lawyer who refused to pursue a civil rights claim did not satisfy the court access requirement); Gilland v. Owens, 718 F.Supp. 665, 688-89 (W.D.Tenn. 1989) (holding that availability of criminal defense lawyers did not address the right of access with respect to non-criminal matters). Cf. Martucci v. Johnson, 944 F.2d 291, 295 (6th Cir. 1991) (holding that availability of appointed counsel plus provision of legal materials “on request” satisfied court access requirement in the absence of evidence that the plaintiff was barred from discussing his other problems with the criminal attorney).

⁷⁴³ Bourdon v. Loughren, 386 F.3d 88, 94-99 (2d Cir. 2004); Perez v. Metropolitan Correctional Center Warden, 5 F.Supp.2d 208, 211-12 (S.D.N.Y. 1998); Ingalls v. Florio, 968 F.Supp. 193, 202-03 (D.N.J. 1997) (holding that denial of law library access does not establish actual injury in the form of inability to assist one’s criminal defense lawyer, since defendants assist their attorneys with factual issues and not legal issues).

In *Bourdon*, the Second Circuit held that the Sixth Amendment’s requirement of the *effective* assistance of counsel is not part of the determination whether government has satisfied the separate right of access to courts. 386 F.3d at 94-98.

⁷⁴⁴ United States v. Wilson, 690 F.2d 1267, 1271-72 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983); *see also* Sahagian v. Dickey, 827 F.2d 90, 90-98 (7th Cir. 1987) (prison officials had no obligation to provide law library or legal materials for discretionary direct review of a criminal conviction, since the prisoner already had the benefit of a transcript, initial appellate brief, and appellate opinion).

⁷⁴⁵ Faretta v. California, 422 U.S. 806 (1975) (establishing the right to proceed *pro se*). *But see* Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152 (2000) (holding there is no right to self-representation on direct appeal).

stated: “An incarcerated criminal defendant who chooses to represent himself has a constitutional right to access to ‘law books . . . or other tools’ to assist him in preparing a defense.”⁷⁴⁶ Others disagree.⁷⁴⁷

2. The right to be free from interference with court access

Government is prohibited from interfering with people’s (including prisoners’) efforts to use the courts.⁷⁴⁸ The Supreme Court has said: “Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.”⁷⁴⁹ Isolated acts of interference that do not represent regulations or practices can also violate the right of court access. Types of interference that have been found unlawful include refusal to let prisoners send their legal papers to court,⁷⁵⁰ refusal to allow

⁷⁴⁶ *Bribiesca v. Galaza*, 215 F.3d 1015, 1020 (9th Cir. 2000) (dictum); *accord*, *Taylor v. List*, 880 F.2d 1040, 1046 (9th Cir. 1989) (“An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense”); *Milton v. Morris*, 767 F.2d 1443, 1447 (9th Cir. 1985) (holding that the right to a *pro se* criminal defense requires officials to provide “some access to materials and witnesses”); *Kaiser v. City of Sacramento*, 780 F.Supp. 1309, 1314-15 (E.D.Cal. 1992) (provision of information packets plus cell delivery systems satisfied the Sixth Amendment).

⁷⁴⁷ *See* *United States v. Taylor*, 183 F.3d 1199, 1205 (10th Cir.) (stating that “we announce our agreement with those circuits holding that a prisoner who voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding is not entitled to access to a law library or other legal materials”; citing cases), *cert. denied*, 528 U.S. 904 (1999); *Degrate v. Godwin*, 84 F.3d 768, 769 (5th Cir. 1996) (per curiam); *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 973 (E.D.Wis. 2002) (holding that exercising the right to a *pro se* defense does not give rise to alternative rights such as access to a law library).

⁷⁴⁸ As one court put it:

First, . . . in order to assure that incarcerated persons have meaningful access to courts, states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration. . . .

Second, in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons.

John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992).

⁷⁴⁹ *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (striking down a rule barring attorneys from using students and paraprofessionals to conduct prisoner interviews); *see* *United States v. Mikhel*, 552 F.3d 961, 963-64 (9th Cir. 2009) (striking down “Special Administrative Measures” barring use of translator at interviews and barring public defender’s investigator from meeting with criminal defendant without an attorney or paralegal present).

⁷⁵⁰ *Ex parte Hull*, 312 U.S. 546, 549 (1941) (striking down regulation permitting officials to screen prisoners’ submissions to court). Similarly, the court in *Simkins v. Bruce*, 406 F.3d 1239, 1242-43 (10th Cir. 2005), held that the failure to forward plaintiff’s legal mail from prison to the county jail where he was held for a year, contrary to the prison’s written regulations, denied him access to the court, since

prisoners to obtain help from other prisoners if there is no other way of getting legal assistance,⁷⁵¹ confiscation or destruction of prisoners' legal papers and books,⁷⁵² or destruction or fabrication of evidence or cover-ups of misconduct that deprive its victims of the means to challenge it in court.⁷⁵³

Rules, practices, or actions that interfere with court access are not always unlawful; they will be upheld if they satisfy the *Turner v. Safley* standard of a "reasonable relationship" to legitimate penological goals.⁷⁵⁴ Courts have upheld a variety of rules and actions that make litigation more difficult for prisoners,⁷⁵⁵ including limits on the amount of legal materials a

he lost the ability to respond to a dispositive motion and to appeal when his case was dismissed.

⁷⁵¹ *Johnson v. Avery*, 393 U.S. 483, 490 (1969). *But see* *Bass v. Singletary*, 143 F.3d 1442, 1444-46 (11th Cir. 1998) (holding a claim of interference with mutual assistance requires a showing of actual injury to a non-frivolous criminal appeal, habeas petition, or civil rights action).

⁷⁵² *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992); *Roman v. Jeffes*, 904 F.2d 192, 198 (3^d Cir. 1990); *Morello v. James*, 810 F.2d 344, 347 (2^d Cir. 1987). *But see* *Chavers v. Abrahamson*, 803 F.Supp. 1512, 1514 (E.D.Wis. 1992) (deprivation of legal materials denies court access only if they are "crucial or essential to a pending or contemplated appeal"); *Weaver v. Toombs*, 756 F.Supp. 335, 340 (W.D.Mich. 1989) (legal papers sent between inmates could be confiscated because the inmates had not followed the rules for inmate-inmate legal assistance), *aff'd*, 915 F.2d 1574 (6th Cir. 1990).

Generally, prisoners complaining that property has been seized must pursue their claims in state court, *see* § III.F.4, above, but materials essential to court access are not just property; their confiscation states a federal law claim that may be litigated in federal court. *Zilich v. Lucht*, 981 F.2d 694, 696 (3^d Cir. 1992); *Morello v. James*, 810 F.2d 344, 347-48 (2^d Cir. 1987). Merely negligent deprivations of legal papers do not deny access to courts. *Crawford-El v. Britton*, 951 F.2d 1314, 1318-19 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 818 (1992); *Morello v. James*, 797 F.Supp. 223, 227 (W.D.N.Y. 1992); *Duff v. Coughlin*, 794 F.Supp. 521, 524 (S.D.N.Y. 1992).

⁷⁵³ *Christopher v. Harbury*, 536 U.S. 403, 414, 416 n. 13 (2002); *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003) (per curiam) ("... [I]nterference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights."), *cert. denied*, 540 U.S. 1219 (2004); *Swelk v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997); *Heinrich ex rel. Heinrich v. Sweet*, 62 F.Supp.2d 282, 315 (D.Mass. 1999) and cases cited (stating that the right of court access is violated when government officials wrongfully and intentionally conceal information crucial to judicial redress, do so in order to frustrate the right, and substantially reduce the likelihood of obtaining redress). *But see* *Pizzuto v. County of Nassau*, 240 F.Supp.2d 203 (E.D.N.Y. 2002) (holding that an attempted cover-up that didn't work did not deny court access).

⁷⁵⁴ *Lewis v. Casey*, 518 U.S. 343, 361-62 (1976) (citing *Turner v. Safley*, 482 U.S. 87 (1987) (upholding restrictions on "lockdown" prisoners' access to legal materials and assistance)); *see* § II.A, above.

⁷⁵⁵ *See, e.g., Nevada Dept. of Corrections v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011) (upholding withdrawal of permission to possess typewriters after a component of one was used as a weapon), *cert. denied*, 132 S.Ct. 1823 (2012); *Smith v. Erickson*, 961 F.2d 1387, 1388 (8th Cir. 1992) (holding refusal to send plaintiff's legal mail was justified by his failure to comply with valid

prisoner may possess.⁷⁵⁶

Interference cases are subject to the *Lewis v. Casey* rule that plaintiffs must show “actual injury,” *i.e.*, that the interference “frustrated . . . or impeded” a non-frivolous claim.⁷⁵⁷ *Christopher v. Harbury*, a non-prisoner interference case, says so,⁷⁵⁸ and so have lower courts in prison cases.⁷⁵⁹

Lewis v. Casey also said that the *Bounds* right to law libraries or legal assistance is limited to cases about prisoners’ criminal convictions and sentences and about conditions of confinement. That rule should not apply to interference cases. *Lewis*’s discussion of that restriction focused on the *Bounds v. Smith* assistance requirement and not the rule against

correspondence rules); *see also* *Prison Legal News v. Lehman*, 397 F.3d 692, 703 (9th Cir. 2005) (holding constitutional under the First Amendment a “third party legal material” policy that prohibited delivery of mail, including judicial decisions and litigation documents, which could create a risk of violence or harm, but holding that its discriminatory application to suppress materials that would embarrass prison officials or educate prisoners about their rights would violate the First Amendment); *accord*, *Van den Bosch v. Raemisch*, 658 F.3d 778, 789-91 (7th Cir. 2011) (upholding similar policy), *cert. denied sub nom. Jones-El v. Pollard*, 132 S.Ct. 1932 (2012).

⁷⁵⁶ *See, e.g.*, *Green v. Johnson*, 977 F.2d 1383, 1390 (10th Cir. 1992) (upholding rule limiting possession of legal materials in cells to two cubic feet); *Savko v. Rollins*, 749 F.Supp. 1403, 1407-09 (D.Md. 1990) (regulation limiting possession of written material, including legal papers, to 1.5 cubic feet upheld), *aff’d sub nom. Simmons v. Rollins*, 924 F.2d 1053 (4th Cir. 1991).

⁷⁵⁷ *See Lewis*, 518 U.S. at 351-53; *see* § IV.A.1.b, above.

⁷⁵⁸ 536 U.S. at 415.

⁷⁵⁹ *See Ali v. District of Columbia*, 278 F.3d 1, 8 (D.C.Cir. 2003) (applying actual injury rule to a claim that plaintiff had to send legal documents out of the prison); *Cody v. Weber*, 256 F.3d 764, 769-70 (8th Cir. 2001) (holding deprivation of access to legal documents did not meet the actual injury standard without explanation of what the documents were and how they affected litigation); *McBride v. Deer*, 240 F.3d 1287, 1290 (10th Cir. 2001) (holding allegation that prison official’s refusal to disburse a prisoner’s money so he could buy legal materials did not state a court access claim without an explanation of what materials he needed, how the prison law library failed to provide what he needed, or how his legal claim was non-frivolous); *Bass v. Singletary*, 143 F.3d 1442, 1444-45 (11th Cir. 1998) (rejecting the idea that the actual injury requirement is limited to cases asserting a right to affirmative assistance); *Livingston v. Goord*, 225 F.Supp.2d 321, 331 (W.D.N.Y. 2003) (dismissing claim of deprivation of legal papers in the absence of any showing of harm; the plaintiff won the relevant case), *aff’d in part, vacated in part, remanded on other grounds*, 153 Fed.Appx. 769 (2d Cir. 2005); *Leach v. Dufrain*, 103 F.Supp.2d 542, 548 (N.D.N.Y. 2000) (holding confiscation of legal papers does not state a court access claim without sufficient information about the quantity and contents of the papers to determine whether the confiscation “impermissibly compromised” a legal action). *Compare Lueck v. Wathen*, 262 F.Supp.2d 690, 695 (N.D.Tex. 2003) (holding that confiscation of the affidavit of a key witness that his defense lawyer never interviewed, which was necessary in his post-conviction proceeding to show that the witness had evidence material to his claim of ineffectiveness of counsel, constituted actual injury).

interference with court access,⁷⁶⁰ which is a separate constitutional principle set out in its own line of cases.⁷⁶¹

As explained above, some courts have said that the *Bounds* right to law libraries or legal assistance stops once a prisoner gets a complaint filed. That rule should not apply to interference cases. Even if *Lewis* does limit the state's *Bounds* obligation to assisting with the filing of complaints, it "cannot, however, be read to give officials license to thwart that litigation once it is filed."⁷⁶²

3. The right to be free from retaliation for using the court system⁷⁶³

Prison officials may not retaliate against prisoners for using the courts or trying to do so, whatever the form of the retaliation.⁷⁶⁴ The Supreme Court has explained: "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. . . . Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit."⁷⁶⁵ Such actions may be remedied by an injunction, even if the

⁷⁶⁰ *Lewis* said: "The tools [*Bounds v. Smith*] requires to be provided are those that inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." 518 U.S. at 355.

⁷⁶¹ *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011); *Snyder v. Nolen*, 380 F.3d 279, 290 (per curiam); see *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992) (stating, before *Lewis v. Casey*, that the *Bounds* right was limited to challenges to convictions, sentences, and prison conditions, but that "in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons."); see also *Montanez v. Cuoco*, 361 Fed.Appx. 291, 293-94 (2^d Cir. 2010) (unpublished) (noting "there is at least a question as to whether an inmate's right of access to the courts is so confined in the context of interference"; suggesting appointment of counsel).

⁷⁶² *Rhoden v. Godinez*, 1996 WL 559954 *3 (N.D.Ill. 1996); accord, *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) (holding "prisoners have a right under the First and Fourteenth Amendments to litigate claims challenging their sentences or the conditions of their confinement to conclusion without active interference by prison officials"); *Simkins v. Bruce*, 406 F.3d 1239, 1242-43 (10th Cir. 2005) (holding that failure to forward legal mail per prison procedure to a prisoner held temporarily in a local jail, resulting in his not receiving and not responding to a summary judgment motion, violated the right of court access).

⁷⁶³ Prisoners may bring retaliation claims for First Amendment-protected activity other than using the courts. See § II.D.3, above. The general principles of retaliation claims are the same whether they are based on court access or other expressive behavior, so some of the cases cited in this section involve retaliation for, e.g., filing grievances rather than lawsuits.

⁷⁶⁴ See, e.g., *DeTomaso v. McGinnis*, 970 F.2d 211, 214 (7th Cir. 1992) ("whether the retaliation takes the form of property or privileges does not matter") (dictum); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (job denials and transfers); *Madewell v. Roberts*, 909 F.2d 1203, 1206 (8th Cir. 1990) (blocking reclassification opportunities, worsening living and working conditions).

⁷⁶⁵ *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998).

practices are not formally part of official policy,⁷⁶⁶ or by an award of damages.⁷⁶⁷

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.⁷⁶⁸

The Second Circuit has required non-prisoner retaliation plaintiffs to show that they were “actually chilled” in their First Amendment activities, but has not imposed that requirement in prison retaliation cases.⁷⁶⁹ Even if the plaintiff establishes the elements of the claim, defendants can still prevail if they show that they would have taken the same action without the retaliatory motive (the “but for” test).⁷⁷⁰

The “adverse action” need not be unconstitutional by itself to violate the rule against retaliation.⁷⁷¹ For example, disciplinary charges for which the punishment was not sufficiently

⁷⁶⁶ *Gomez v. Vernon*, 255 F.3d 1118, 1127, 1129-30 (9th Cir.), *cert. denied sub nom. Beauclair v. Puente Gomez*, 534 U.S. 1066 (2001); *Ruiz v. Estelle*, 679 F.2d 1115, 1154 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Pratt v. Rowland*, 770 F.Supp. 1399, 1406 (N.D.Cal. 1991).

⁷⁶⁷ *Dannenbergh v. Valadez*, 338 F.3d 1070 (9th Cir. 2003) (noting jury verdict of \$6,500 compensatory and \$2,500 punitive damages for retaliation for assisting another prisoner with litigation; noting injunction requiring expungement of material related to disciplinary action); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir. 1988) (nominal damages only); *Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982) (nominal damages), *on rehearing*, 698 F.2d 1286 (5th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983); *Cruz v. Beto*, 603 F.2d at 1181.

⁷⁶⁸ *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc); *accord*, *Espinal v. Goord*, 558 F.3d 119, 128 (2^d Cir. 2009); *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2^d Cir. 2004); *Scott v. Coughlin*, 344 F.3d 282, 287-88 (2^d Cir. 2003); *Bennett v. Goord*, 343 F.3d 133,137 (2^d Cir. 2003) (holding the prisoner must show “first, that he engaged in constitutionally protected conduct and, second, that the conduct was a substantial or motivating factor for the adverse actions taken by prison officials”); *see Farrow v. West*, 320 F.3d 1235, 1248-49 (11th Cir. 2003) (affirming summary judgment for defendants where prisoner failed to show that defendants knew of his protected activity and therefore failed to establish causation).

⁷⁶⁹ *Espinal v. Goord*, 558 F.3d 119, 127 n. 6 (2^d Cir. 2009).

⁷⁷⁰ *Bennett v. Goord*, *id.*; *Carter v. McGrady*, 292 F.3d 152, 154 (3^d Cir. 2002); *Ponchik v. Bogan*, 929 F.2d 419, 420 (8th Cir. 1991); *Smith v. Maschner*, 899 F.2d 940, 949-50 (10th Cir. 1990). *Contra*, *Adams v. Wainwright*, 875 F.2d 1536, 1537 (11th Cir. 1989) (per curiam) (declining to adopt the “but for” test because it increases the burden on the prisoner).

⁷⁷¹ *Cody v. Walker*, 256 F.3d 764, 771 (8th Cir. 2001); *Wilson v. Silcox*, 151 F.Supp.2d 1345, 1351 (N.D.Fla. 2001) (citing *Thomas v. Evans*, 880 F.Supp.2d 1235, 1242 (11th Cir. 1989)).

“atypical and significant” to require due process protections⁷⁷² may still be unconstitutional if they were made for retaliatory reasons.⁷⁷³ Courts have held a variety of actions sufficiently “adverse” to support a suit for retaliation.⁷⁷⁴ The Second Circuit and most other courts have held that retaliatory action must be serious enough to deter “a similarly situated individual of ordinary firmness” from exercising First Amendment rights.⁷⁷⁵

⁷⁷² See § III.A, above.

⁷⁷³ Gill v. Pidlypchak, 389 F.3d 379, 384 (2d Cir. 2004) (so holding as to the filing of false misbehavior reports resulting in three weeks of keeplock); Allah v. Sieverling, 229 F.3d 220, 224 (3d Cir. 2000); Williams v. Manternach, 192 F.Supp.2d 980, 987 (N.D.Iowa 2002).

⁷⁷⁴ Silva v. Di Vittorio, 658 F.3d 1090, 1104-05 (9th Cir. 2011) (holding allegations of confiscation and retention of legal files stated a court access claim); Morris v. Powell, 449 F.3d 682, 686-87 (5th Cir.) (holding transfer to a more dangerous prison was sufficiently adverse, but brief transfer to a less desirable job was not), *cert. denied*, 549 U.S. 1038 (2006); Biggers-El v. Barlow, 412 F.3d 693, 701-02 (6th Cir. 2005) (holding that a transfer to a similar prison met the adverse action requirement where the prisoner lost the high-paying job he needed to pay his attorney and the transfer made it more difficult for the attorney to visit him); Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003) (holding denial of high fiber diet, having to wait for a medical appointment, and having to deal with defendants’ obstruction of grievances might meet the standard, but “[i]nsulting or disrespectful comments” ordinarily do not); Bell v. Johnson, 308 F.3d 594, 604-05 (6th Cir. 2002) (confiscating legal papers, destroying property, confiscating dietary supplements prescribed for AIDS); Walker v. Thompson, 298 F.3d 1005, 1008-09 (7th Cir. 2002) (denial of out-of-cell exercise); Morales v. Mackalm, 278 F.3d 126, 132 (2d Cir. 2002) (transfer to a psychiatric hospital was sufficiently adverse, calling plaintiff a “stoolie” was not); Gomez v. Vernon, 255 F.3d 1118, 1127, 1130 (9th Cir.) (threats of transfer), *cert. denied sub nom.* Beauclair v. Puente Gomez, 534 U.S. 1066 (2001); Wilson v. Silcox, 151 F.Supp.2d 1345, 1350 (N.D. Fla. 2001) (verbal harassment and threats of bodily harm).

⁷⁷⁵ Gill v. Pidlypchak, 389 F.3d 379, 381 (2d Cir. 2004); Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003); *accord*, Morris v. Powell, 449 F.3d 682, 686 (5th Cir. 2006), *cert. denied*, 549 U.S. 1038 (2006); Rhodes v. Robinson, 408 F.3d 559, 569 (9th Cir. 2005); Allah v. Sieverling, 229 F.3d at 224; Thaddeus-X v. Blatter, 175 F.3d 378, 397-98 (6th Cir. 1999) (en banc) (noting the standard is intended to weed out “inconsequential” actions and may require prisoners to tolerate more than public employees or “average citizens”).

Most courts have said that the question whether a particular action would deter a person of ordinary firmness is an objective one and does not depend on how a particular plaintiff reacts; the question is whether the defendants’ actions are *capable* of deterring a person of ordinary firmness. Rhodes v. Robinson, 408 F.3d at 568-69 (rejecting the argument that the plaintiff’s persistence despite retaliation defeats his claim); Bell v. Johnson, 308 F.3d 594, 606 (6th Cir. 2002). In a case tried to a jury, that question is to be decided by the jury, *id.*, 308 F.3d at 603, and the claim need not be supported by expert testimony. *Id.* at 605-07.

In *Gill v. Pidlypchak*, 389 F.3d 379 (2d Cir. 2004), the court acknowledged an argument that without a “subjective chill” there is not an injury sufficient to confer standing, but pointed out that the adverse action itself may constitute such injury, though ultimately the court did not decide the question at the pleading stage. 389 F.3d at 382-84. The court has subsequently characterized the *Gill* holding as “clarifying that in proving adverse action, a prisoner need *not* demonstrate an actual or subjective chill—that is, any dissuasion from further exercising *his own* rights.” *Gill v. Calescibetta*, 157 Fed.Appx. 395,

Retaliation is easy to allege and courts are inclined to be suspicious of such claims.⁷⁷⁶ However, the plaintiff's burden may be met by sufficiently convincing circumstantial evidence such as the time sequence of the legal action and the alleged retaliation.⁷⁷⁷

Retaliation claims, logically, should not be subject to the *Lewis v. Casey* requirements that the plaintiff show "actual injury" in the form of impairment of litigation of a non-frivolous claim. "In a retaliation claim . . . , 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."⁷⁷⁸ Nor in my view should retaliation claims be limited to retaliation for suits challenging criminal convictions or conditions of confinement, since that *Lewis v. Casey* rule was intended to apply only to prison officials' affirmative obligation to assist prisoners with law libraries or legal assistance.⁷⁷⁹ However, court decisions to date are to the contrary.⁷⁸⁰

B. Alternatives to the right of court access

As shown in the previous section, Supreme Court decisions have made it very difficult for prisoners to pursue court access claims. However, some claims that are commonly framed as court access claims may be more successfully pursued under other legal theories. For example,

2005 WL 3309615 at *2 (2d Cir. 2005) (unpublished).

⁷⁷⁶ *See, e.g.*, *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003); *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001).

⁷⁷⁷ *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) (passage of only six months between lawsuit and beating by officers including one of the defendants supported an inference of causation); *Bennett v. Goord*, 343 F.3d at 138-39 (finding time sequence of litigation and alleged retaliation sufficient to support claim, plus the fact that the retaliatory discipline was later found unjustified by higher authorities); *Flaherty v. Coughlin*, 713 F.2d 10 (2d Cir. 1983); *Baskerville v. Blot*, 224 F.Supp.2d 723, 733 (S.D.N.Y. 2002) (holding that the fact the alleged retaliatory disciplinary charges were dismissed, and evidence that the officers made statements suggesting retaliatory motive, supported a claim of retaliation); *Baker v. Zlochowon*, 741 F.Supp. 436, 439-40 (S.D.N.Y. 1990); *Jones v. Coughlin*, 696 F.Supp. at 922.

⁷⁷⁸ *Thaddeus-X v. Blatter*, 175 F.3d at 394; *accord*, *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001). *But see* *Oliver v. Powell*, 250 F.Supp.2d 593, 600 (E.D.Va. 2002) (holding that a prisoner who continued to file suits after retaliatory acts had no claim for unconstitutional retaliation).

⁷⁷⁹ *See* § IV.A.1.c, above.

⁷⁸⁰ *See* *Johnson v. Rodriguez*, 110 F.3d 299, 311 (5th Cir.) (applying *Lewis* rule to hold that retaliation for bringing lawsuits other than those challenging convictions and conditions of confinement does not violate the Constitution), *cert. denied*, 522 U.S. 995 (1997); *see also* *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000) (holding retaliation for a frivolous complaint is not actionable).

interference with attorney-client consultation or invasion of its confidentiality is a violation of the First Amendment, outside prison⁷⁸¹ or inside.⁷⁸² As such, it is not subject to the requirement of many court access claims, discussed above, that the challenged action have caused actual injury by impeding the litigation of a non-frivolous legal claim concerning prison conditions or a criminal conviction or sentence.⁷⁸³ The same is true of a claim that interference with attorney-client consultation or other obstruction of the preparation and presentation of a criminal defense violated the Sixth Amendment right to counsel.⁷⁸⁴ Intrusion on attorney-client confidentiality by

⁷⁸¹ See *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (“First Amendment rights of association and free speech extend to the right to retain and consult with an attorney.”); *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000). *Denius* states:

The right to hire and consult an attorney is protected by the First Amendment’s guarantee of freedom of speech, association and petition. Furthermore, the right to obtain legal advice does not depend on the purpose for which the advice was sought. . . . In sum, the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter.

. . . . Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client’s First Amendment, [sic] right to obtain legal advice.

A more recent decision from the same court assumes, with no discernible basis, that “the purpose of confidential communication with one’s lawyer is to win a case,” and concludes that the right of access to courts is a more appropriate basis for claims based on invasion of attorney-client privacy. *Guajardo-Palmer v. Martinson*, 622 F.3d 801, 802 (7th Cir. 2010). That would mean the plaintiff would have to show actual injury to litigation to prevail, though the court concedes that “proof of a *practice* of reading a prisoner’s correspondence with his lawyer should ordinarily be sufficient to demonstrate hindrance,” since knowledge of such a practice would likely “reduce the candor of those communications.” *Id.* at 805. The court does not acknowledge the many reasons prisoners and others may communicate with lawyers other than to pursue litigation. However, *after* this discussion, the court concludes that none of the communications at issue were in fact attorney-client communications, *id.* at 806, rendering the prior discussion dictum. *Denius* thus remains the law of the Seventh Circuit.

⁷⁸² *Massey v. Helman*, 221 F.3d 1030, 1035-36 (7th Cir. 2000) (acknowledging attorney’s First Amendment claim but rejecting it on the merits); *Sturm v. Clark*, 835 F.2d 1009, 1015 and n.3 (3d Cir. 1987) (holding special restrictions on one attorney’s prisoner consultation stated a violation of her First Amendment rights; *but* seeming to assume that violations of confidentiality only implicated the client’s First Amendment rights); *Williams v. Price*, 25 F.Supp.2d 623, 629-30 (W.D.Pa. 1998) (holding that lack of confidentiality in attorney-client consultation violated the First Amendment); *Chinchello v. Fenton*, 763 F.Supp. 793 (M.D.Pa. 1991) (holding that interception and reading of a prisoner’s letter to an attorney violated the First Amendment).

⁷⁸³ *Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008), *cert. denied*, 555 U.S. 820 (2008); *Jones v. Brown*, 461 F.3d 333, 359-60 (3d Cir. 2006), *cert. denied*, 549 U.S. 1286 (2007).

⁷⁸⁴ *Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001) (“It is not clear to us what ‘actual injury’ would even mean as applied to a pretrial detainee’s right to counsel.”); *see United States v. Mikhel*, 552 F.3d 961, 963-64 (9th Cir. 2009) (striking down “Special Administrative Measures” barring use of translator at interviews as violating criminal defendant’s Sixth Amendment and due process rights); *Iqbal*

eavesdropping, wiretapping, reading legal mail, etc., would seem to be a search within the meaning of the Fourth Amendment.⁷⁸⁵ The attorney-client privilege is applicable to materials retained in a prisoner's cell that comprise or recount conversations with counsel or outline matters that the client intends to discuss with counsel.⁷⁸⁶ Failure to provide adequate facilities for confidential legal communications has been held to violate the Fourteenth Amendment right to privacy by at least one court.⁷⁸⁷ Finally, the Supreme Court has characterized litigation (or, more precisely, arguments made in the course of litigation) as speech,⁷⁸⁸ whether that holding has any implications for prisoners' legal activities has not been explored.

v. Hasty, 490 F.3d 143, 170 (2d Cir. 2007) (holding detainee's allegations of interference with attorney-client communication pled a Sixth Amendment claim), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

⁷⁸⁵ In *Mockaitis v. Harclerod*, 104 F.3d 1522, 1532-34 (9th Cir. 1997), the court affirmed liability under the Fourth Amendment for the taping of a detainee's confession to priest, relying on the statutory and historical clergy-penitent privilege as the basis for a reasonable expectation of privacy. The attorney-client privilege is equally deeply rooted. *See Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998).

⁷⁸⁶ *U.S. v. DeFonte*, 441 F.3d 92, 94-96 (2d Cir. 2006) (per curiam). The lack of a Fourth Amendment-protected expectation of privacy in one's prison cell, *see* n.372, above, does not mean that a prisoner waives the attorney-client privilege with respect to materials in her cell. The attorney-client privilege inquiry and the Fourth Amendment inquiry are separate and independent. 441 F.3d at 94.

⁷⁸⁷ *Williams v. Price*, 25 F.Supp.2d 623, 619 (W.D.Pa. 1998).

⁷⁸⁸ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001).

V. Equal Protection

The application of the Equal Protection Clause to prisoners is analytically up for grabs. The Supreme Court has declared unusually forcefully that prisoners' claims of racial discrimination are governed by the same strict scrutiny standard as any other racial discrimination claim.⁷⁸⁹ However, it studiously avoided any more general comment on prison equal protection analysis. Although it explicitly rejected the notion that the *Turner v. Safley* reasonable relationship standard governs prison racial discrimination, it said nothing to confirm or deny the correctness of decisions (including one from the Second Circuit) applying that standard to other kinds of prison equal protection claims.⁷⁹⁰ It did say that the kinds of issues to which it has applied *Turner*—unlike freedom from racial discrimination—are “‘inconsistent with proper incarceration’ . . . because certain privileges and rights must necessarily be limited in the prison context,” citing decisions concerning First Amendment challenges to prison regulations and due process claims concerning involuntary psychotropic medication and restrictions on marriage.⁷⁹¹ This discussion seems to leave open the possibility of applying *Turner* to non-racial equal protection claims. On the other hand, when the Supreme Court ruled in a pre-*Turner* decision on an equal protection claim that implicated First Amendment rights, it applied the rational basis test,⁷⁹² as have many lower courts in equal protection cases where a fundamental right was arguably at stake.⁷⁹³ Where there is neither a fundamental right nor a suspect class

⁷⁸⁹ *Johnson v. California*, 543 U.S. 499 (2005). The Second Circuit has held that the disparate impact theory of liability is not applicable to prisoners' equal protection racial discrimination claims under § 1983, or their claims under other statutes including 42 U.S.C. § 1981, 1985 and 1986, since all of these require a showing of intentional discrimination. Nor is the pattern or practice evidentiary framework appropriate in such cases, since the plaintiff must show that he was individually the subject of intentional unlawful discrimination by defendants with discriminatory intent. *Reynolds v. Barrett*, 685 F.3d 193 (2d Cir. 2012).

⁷⁹⁰ *See, e.g.*, *Yates v. Stalder*, 217 F.3d 332, 335 (5th Cir. 2000); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990). The Second Circuit has stated in an unreported opinion: “Although *Turner* was developed in the First Amendment context, this Court has used it as the framework in which to analyze Equal Protection claims.” *Dingle v. Zon*, 189 Fed.Appx. 8, 9, 2006 WL 1527156 (2d Cir. 2006) (unpublished) (citing *Benjamin*). Neither *Dingle* nor *Benjamin* presents any substantial analysis of why *Turner* should apply to equal protection claims.

⁷⁹¹ *Johnson v. California*, 543 U.S. at 510.

⁷⁹² *See, e.g.*, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 136 (1977) (rejecting equal protection claim involving First Amendment rights of association).

⁷⁹³ *See, e.g.*, *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (upholding requirement that prisoners convicted of sexual assault provide DNA samples); *Lee v. Governor of State of New York*, 87 F.3d 55, 60 (2d Cir. 1996) (upholding exclusion of certain categories of prisoners from temporary release).

involved, the rational basis test is of course applicable.⁷⁹⁴

Intermediate scrutiny has been applied in some prison gender discrimination cases.⁷⁹⁵

Equal protection analysis requires that groups being compared be “similarly situated,” which dooms most claims that prisoners are treated differently from non-prisoners.⁷⁹⁶ The new game in town is to declare that groups of prisoners are not “similarly situated” and therefore no standard of scrutiny must be met.⁷⁹⁷ This method has been applied to some more recent prison gender discrimination suits.⁷⁹⁸ It is an inappropriate analytical approach because once the “not

⁷⁹⁴ *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012) (applying rational basis test to claim of prison job discrimination against gay prisoner; noting “the desire to effectuate one’s animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause.”) (citation omitted).

⁷⁹⁵ *See, e.g., Glover v. Johnson*, 478 F.Supp. 1075, 1079 (E.D.Mich. 1979) (requiring “parity of treatment,” which requires prison officials “to provide women inmates with treatment facilities that are substantially equivalent to those provided for men—i.e., equivalent in substance, if not in form—unless their actions . . . nonetheless bear a fair and substantial relationship to achievement of the State’s correctional objectives.”); *Clarkson v. Coughlin*, 898 F.Supp. 1019, 1043 (S.D.N.Y. 1995) (holding that provision of a Sensorially Disabled Unit for men but not women denied equal protection); *West v. Virginia Dept. of Corrections*, 847 F.Supp. 402, 407-09 (W.D. Va. 1994) (holding failure to provide boot camp programs for women as well as men denied equal protection). *But see Glover v. Johnson*, 35 F.Supp.2d 1010, 1013-15 (E.D. Mich. 1999) (holding that “parity of treatment” is to be determined by *Turner v. Safley* reasonable relationship analysis), *aff’d*, 198 F.3d 557 (6th Cir. 1999) (not reaching the question). One court has suggested that a “substantial relationship” test should be applicable to prison gender discrimination involving “general budgetary and policy choices” but the rational basis test should be applied to gender discrimination in the daily management of prison. *Accord, Pitts v. Thornburgh*, 866 F.2d 1450, 1454 (D.C.Cir. 1989); *see id.* at 1459 (holding distinctions are more likely to be upheld if not based on “traditional stereotyping or archaic notions of ‘appropriate’ gender roles”).

⁷⁹⁶ *See, e.g., Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) (a surcharge on disciplinary convictions lacking a hardship waiver for indigents, unlike other state statutes, does not deny equal protection. “Inmates are not similarly situated to unincarcerated persons subject to other surcharges. . . . The rights of prisoners are necessarily limited because of their incarceration, not to mention that all their essential needs, such as food, shelter, clothing and medical care, are provided by the state.”)

⁷⁹⁷ *See DeHart v. Horn*, 390 F.3d 262, 272 & n.14 (3d Cir. 2004) (holding that since the Mahayana Buddhist plaintiff’s dietary needs were more difficult to meet than those of other sects, he was not similarly situated to them for equal protection purposes); *Murphy v. Missouri Dep’t of Correction*, 372 F.3d 979, 984 (8th Cir.) (rejecting equal protection claim by members of a racial separatist church that denying them privileges extended to other separatist religious groups on the ground that those groups were not similarly situated because it was not shown that separatism was a “central tenet” of those groups), *cert. denied*, 543 U.S. 991 (2004).

⁷⁹⁸ *See Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994) (women prisoners are not similarly situated to male prisoners for purposes of a challenge to unequal program opportunities because the women’s prison is smaller than the men’s prisons, the length of stay for men is longer, the

similarly situated” judgment is made and no standard of scrutiny is applicable, no discrimination, however extreme or irrational, would be subject to equal protection scrutiny.

VI. Pre-trial Detainees

The Eighth Amendment has no application to unconvicted persons; their treatment is governed by the Due Process Clause,⁷⁹⁹ which protects persons who have not been convicted from being punished through their treatment in jail.⁸⁰⁰

“. . . [A] showing of an intent to punish suffices to show unconstitutional pretrial punishment.”⁸⁰¹ That’s the easy case. Absent expressed punitive intent, the plaintiff must show

women’s prison has a lower security classification than some of the men’s prisons, and women prisoners have “special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims.”), *cert. denied*, 513 U.S. 1185 (1995); *accord*, *Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910, 925-27 (D.C.Cir. 1996); *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996).

⁷⁹⁹ *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983).

⁸⁰⁰ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *accord*, *Block v. Rutherford*, 468 U.S. 576, 585-86 (1984); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004).

The rights of arrestees are governed by the Fourth Amendment’s objective reasonableness standard. *See, e.g.*, *Sallenger v. City of Springfield*, 630 F.3d 499, 503 (7th Cir. 2010) (holding reasonableness of police action regarding arrestees’ medical problems depends on “(1) the officer’s notice of the detainee’s need for medical attention; (2) the seriousness of the need; (3) the nature or scope of the required treatment; and (4) any countervailing police interests, e.g., the need to prevent the destruction of evidence, or other similar law-enforcement interest”). Some courts have held that the line between arrest and detention for purposes of determining which standard applies is the initial judicial probable cause hearing. These holdings occur most often in use of force cases, *see* n.117, above, but the Seventh Circuit has held that the conditions of confinement of an arrestee held for four days and nights before being brought before a judge are subject to Fourth Amendment scrutiny. *Lopez v. City of Chicago*, 464 F.3d 711, 718-20 (7th Cir. 2006).

⁸⁰¹ *McMillian v. Johnson*, 88 F.3d 1554, 1564 (11th Cir.) (holding evidence that a detainee in a capital case was placed on death row, contrary to state law and prison regulations, for punitive rather than security reasons supported due process claim, even if there could have been a legitimate alternative purpose), *amended*, 101 F.3d 1363 (11th Cir. 1996); *accord*, *Magluta v. Samples*, 375 F.3d 1269, 1274-75 (11th Cir. 2004) (holding allegations that jail officials fabricated escape allegations and kept him in segregation in retaliation for constitutionally protected conduct stated a claim of unconstitutional punishment); *Gerakaris v. Champagne*, 913 F.Supp. 646, 651 (D.Mass. 1996).

The requirement of a showing of punitive intent (directly or circumstantially) is not applicable to detainees’ claims of denial of procedural due process insofar as they are based on regulations. *Iqbal v. Hasty*, 490 F.3d 143, 164-65 (2d Cir. 2007), *aff’d in part, rev’d in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see* § III.C, above, concerning detainees’ procedural due

that the challenged practice is not “reasonably related to a legitimate governmental objective,”⁸⁰² or that conditions inflict “genuine privations and hardship over an extended period of time.”⁸⁰³

Exactly what any of that means is not clear. The Supreme Court did not hear a detainee conditions case between 1984 and 2012, and did not elaborate on the application of the *Wolfish* “no punishment” holding. In the interim, it declared and elaborated a “reasonable relationship” test for the civil liberties claims of convicted prisoners without saying whether it is the same reasonable relationship test it asserted in *Wolfish*. It also elaborated its Eighth Amendment jurisprudence considerably, without saying whether the “punishment” analysis that led it to require a showing of criminal recklessness or malicious and sadistic intent in Eighth Amendment cases has implications for the very different punishment analysis of *Wolfish*, or whether its holdings concerning the objective seriousness of conditions required by the Eighth Amendment bears on the “genuine privations and hardship” standard of *Wolfish*. It did not address whether the standards of *Wolfish*, which were articulated in a case challenging ongoing jail practices, also govern challenges to individual instances of alleged mistreatment. In 2012, when it rejected prior holdings that persons convicted of minor offenses cannot be subjected to intake strip searches without reasonable suspicion, it made no effort to distinguish between the standards applicable to the detainee plaintiff and those that might be applicable to a convict.⁸⁰⁴ Rather, its opinion cites convict cases such as *Turner v. Safley* and its progeny for the importance of deference to prison officials, and in the next paragraph describes *Bell v. Wolfish* as “the starting point for understanding how this framework applies to Fourth Amendment challenges.”⁸⁰⁵ So it appears that the Court in this case gave no weight at all to the difference between convicts and detainees in addressing what it treated mostly as a practical problem for law enforcement personnel, though it is impossible to say whether its silence on that point represents a general principle or is a function of the particular Fourth Amendment question before it.

In short, there is a remarkable lack of definition of the difference, if any, in government’s obligations to persons incarcerated for conviction of crime and to persons merely accused and not subject to punishment.⁸⁰⁶ In that vacuum, many lower courts have abandoned any notion that

process claims.

⁸⁰² *Wolfish*, 441 U.S. at 538-39; *accord*, *Block v. Rutherford*, 468 U.S. at 586. One court has rejected the argument that only institutional purposes, as opposed to prevention of crime and physical harm to individuals, can justify restrictions under the *Wolfish* standard, and such restrictions require further pre-deprivation process. *Jones v. Horne*, 634 F.3d 588, 598-99 (D.C. Cir. 2011). (The holding is framed in qualified immunity terms but the court clearly rejects the argument on its merits.)

⁸⁰³ *Id.* at 542.

⁸⁰⁴ *Florence v. Board of Chosen Freeholders of County of Burlington*, ___ U.S. ___, 132 S.Ct. 1510 (2012).

⁸⁰⁵ *Florence*, 132 S.Ct. at 1515.

⁸⁰⁶ Forget the presumption of innocence. The Court dismissed it in *Wolfish* as merely a rule of

there is a difference between convicts' and detainees' rights,⁸⁰⁷ and others have simply stated (as did the Supreme Court in one case) that detainees' rights are "at least as great" as those of a convicted prisoner,⁸⁰⁸ without attempting to say what the difference might be.⁸⁰⁹

A few courts, including the Second Circuit, have made attempts to fill parts of this analytical gap. The Second Circuit addressed a jail environmental conditions case by noting that the inquiry into punitiveness—essentially an intent requirement—is "of limited utility" in

evidence having nothing to do with conditions of confinement. *Wolfish, id.* at 533.

⁸⁰⁷ See, e.g., *Bistran v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012) (applying Eighth Amendment standard to failure to protect claim); *Butler v. Fletcher*, 465 F.3d 340, 344-45 (8th Cir. 2006) (holding that detainees' claims concerning adequate food, clothing, shelter, medical care, and reasonable safety are not governed by the *Wolfish* "no punishment" standard, but by "principles of safety and general well-being," which turn out to be the deliberate indifference standard), *cert. denied*, 550 U.S. 917 (2007); *Surprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005) (holding that the "parameters" of detainees' rights concerning conditions of confinement are "coextensive" with Eighth Amendment protections); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, . . . the Eighth Amendment standard provides the benchmark for such claims."); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (Under Eighth Amendment and Due Process Clause, "the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.").

Some courts have tried to present a rationale for that result. See *Hart v. Sheahan*, 396 F.3d 887 (7th Cir. 2005) (" . . . [W]hen the issue is whether brutal treatment should be assimilated to punishment, the interests of the prisoner is [sic] the same whether he is a convict or a pretrial detainee. In either case he (in this case she) has an interest in being free from gratuitously severe restraints and hazards, while the detention facility has an interest in protecting the safety of inmates and guards and preventing escapes."); *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) ("Distinguishing the eighth amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. . . . That approach would result in the courts' becoming 'enmeshed in the minutiae of prison operations,' Life and health are just as precious to convicted persons as to pretrial detainees.").

Some circuits have held that detainees' and convicts' use of force claims are governed by the same standard. See *U.S. v. Walsh*, 194 F.3d 37, 47-48 (2d Cir. 1999); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993).

⁸⁰⁸ *City of Revere v. Massachusetts General Hosp.*, 463 U.S. at 244; see also *Hubbard v. Taylor*, 399 F.3d 150, 165-66 (3d Cir. 2005) (remanding a jail crowding claim, asserting that the applicable due process standard is not the same as the Eighth Amendment standard used by the district court, with no explanation of what the difference is).

⁸⁰⁹ The Ninth Circuit has suggested in dictum that in medical care cases, detainees might be entitled to the benefit of the standard it has held applicable to persons civilly committed, which requires committing physicians to "exercise judgment 'on the basis of substantive and procedural criteria that are not substantially below the standards generally accepted in the medical community.'" *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003) (quoting *Jensen v. Lane County*, 312 F.3d 1145, 1147 (9th Cir. 2002)).

evaluating conditions which mostly “were not affirmatively imposed.”⁸¹⁰ The court declined to hold the plaintiffs to the actual knowledge standard of *Farmer v. Brennan*, stating:

. . . [T]his requirement is unique to Eighth Amendment claims, stemming from that amendment’s prohibition of cruel and unusual *punishments* as opposed to cruel and unusual *conditions*. . . . The analysis of a claim brought by one who cannot be punished at all is different, beginning instead from the premise of a state’s obligation to take some responsibility for the safety of those involuntarily committed to its custody. . . . [I]n a challenge by pretrial detainees asserting a *protracted* failure to provide safe prison conditions, the deliberate indifference standard does not require the detainees to show anything more than actual or imminent substantial harm.⁸¹¹

The court declined to generalize about pre-trial detainees’ rights, stating: “In other types of challenges—for example, when pretrial detainees challenge discrete judgments of state officials—meeting the deliberate indifference standard may require a further showing.”⁸¹² And indeed, in other contexts, the Second Circuit has, like other courts, held or assumed that Eighth Amendment standards do apply in detainee cases.⁸¹³ However, in *Iqbal v. Hasty*,⁸¹⁴ the court noted its distinction in *Benjamin* between challenges to environmental conditions, which are

⁸¹⁰ *Benjamin v. Horn*, 343 F.3d 35, 49 (2d Cir. 2003).

⁸¹¹ *Benjamin*, *id.* at 51. Subsequently, the Second Circuit has characterized *Benjamin* as holding that deliberate indifference “could be presumed from an absence of reasonable care” in detainee cases. *Iqbal v. Hasty*, 490 F.3d 143, 169 (2d Cir. 2007), *aff’d in part, rev’d in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁸¹² *Benjamin*, 343 F.3d at 51 n.18.

⁸¹³ *See, e.g.*, *Caiozzo v. Koreman*, 581 F.3d 63, 69-71 (2d Cir. 2009) (holding claims about denial of medical care or other serious threats to health or safety are governed by the deliberate indifference standard of the Eighth Amendment); *Cuoco v. Moritsugu*, 222 F.3d 99, 106-07 (2d Cir. 2000) (holding that pre-trial detainees’ medical care claims invoke the Eighth Amendment deliberate indifference standard); *U.S. v. Walsh*, 194 F.3d 37, 47-48 (2d Cir. 1999) (applying requirement of malicious and sadistic intent to detainee’s use of force claim).

In strip search cases, the Second Circuit has held that different standards apply, based not on whether the suit was brought by a detainee or a convict, but on whether the *institution* where the plaintiff was held was a jail or a prison; prisons may require suspicionless strip searches as long as they bear a reasonable relationship to legitimate penological interests, but jails are governed by a requirement of reasonable suspicion for individual strip searches. *Shain v. Ellison*, 273 F.3d 56, 65-66 (2d Cir. 2001). Most recently, the court has held that the claim of a person held “in a prison-like environment” and *charged* with felonies is governed by the more permissive reasonable relationship standard. *Iqbal v. Hasty*, 490 F.3d 143, 172 (2d Cir. 2007), *aff’d in part, rev’d in part, and remanded on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁸¹⁴ 490 F.3d 143 (2d Cir. 2007).

subject to a modified deliberate indifference standard, and challenges to “disabilities imposed purposefully on pretrial detainees, which are analyzed under the *Wolfish* punitive inquiry.”⁸¹⁵ Applying that standard, it held that allegations that jail staff “placed a detainee in solitary confinement, deliberately subjected him to extreme hot and cold temperatures, shackled him every time he left his cell, and repeatedly subjected him to strip and body-cavity searches, and that these conditions were intended to be, and were in fact, punitive,” stated a substantive due process claim under *Wolfish*.⁸¹⁶

The Fifth Circuit has made a different distinction between challenges to “general conditions, practices, rules, or restrictions of pretrial confinement” and jail officials’ “episodic acts or omissions,” and has held that *Wolfish* “retains vitality” only as the former.⁸¹⁷ Since both the *Wolfish* analysis and the Supreme Court’s subsequent Eighth Amendment analysis turn on the presence or absence of “punishment,” and since there is no constitutionally significant difference between detainees’ and convicts’ entitlement to basic human needs, the Eighth Amendment subjective deliberate indifference standard is the measure of culpability for all “episodic acts or omissions” regardless of the prisoner’s legal status; indeed, the court says, “a proper application of *Bell*’s reasonable relationship test is functionally equivalent to a deliberate indifference inquiry.”⁸¹⁸ To invoke the *Wolfish* analysis, a detainee must show that a challenged act or omission “implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice,” or else show that acts or omissions “were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice to which the *Bell* test can be meaningfully applied.”⁸¹⁹

These conditions of confinement decisions say little about the similarity or difference in governing standards with respect to practices that restrict prisoners’ civil liberties. The Second Circuit has expressed doubt that the *Turner v. Safley* reasonable relationship standard applies to pre-trial detainees, since the “penological interests” with which *Turner* was concerned include “interests that related to the treatment (including punishment, deterrence, rehabilitation, etc.) of

⁸¹⁵ *Iqbal*, 490 F.3d at 169.

⁸¹⁶ *Iqbal*, 490 F.3d at 168-69.

⁸¹⁷ *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc). In *Shepherd v. Dallas County*, 591 F.3d 445 (5th Cir. 2009), the court made clear that a failure to provide adequate medical care to an individual that occurred because “[t]he jail’s evaluation, monitoring, and treatment of inmates with chronic illness was . . . grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel,” not because of fault on the part of particular individuals, was to be treated as a conditions claim governed by *Wolfish*. 591 F.3d at 453.

⁸¹⁸ *Hare*, 74 F.3d at 643.

⁸¹⁹ *Hare*, 74 F.3d at 645.

persons convicted of crimes.”⁸²⁰

There are some legal rights which by their nature apply differently to detainees and convicts, or not at all to convicts. Persons awaiting trial have a Sixth Amendment right to the assistance of counsel and to an unimpeded criminal defense that is different from the more general right of access to courts and not subject to its limitations.⁸²¹ Persons who have not been convicted of crimes may not be forced to work under the Thirteenth Amendment.⁸²² The *Sandin v. Conner* “atypical and significant hardship” threshold for convicts’ due process claims is inapplicable to detainees because it is based on the premise that a criminal *conviction* largely extinguishes liberty.⁸²³ Similarly, the Second Circuit has held that its rule subjecting law-enforcement-related cell searches to the Fourth Amendment applies only to detainees, not to convicts, because “a convicted prisoner’s loss of privacy rights can be justified on grounds other than institutional security,” i.e., retribution.⁸²⁴ In another recent strip search case, the Ninth Circuit held that a search that may be reasonably related to a legitimate purpose under *Wolfish* may be an unreasonable search that violates the Fourth Amendment.⁸²⁵ However, the Supreme

⁸²⁰ *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001); *see Shain v. Ellison*, 273 F.3d 56, 65-66 (2d Cir. 2001) (holding *Turner* applies to prisons and not jails), *cert. denied sub nom. Nassau County, New York v. Shain*, 537 U.S. 1083 (2002).

The Ninth Circuit has taken contradictory positions on the question. In *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1018 (2000), the court applied the *Turner* standard to censorship of publications in a jail housing both sentenced prisoners and detainees, though it acknowledged that the rehabilitative rationale relied on has no application to detainees. *Id.* at 1059 n.2. The majority ignored *Wolfish*. *Compare id.* at 1067 (dissenting opinion) (pointing out inappropriateness of *Turner* standard in detainee case). Subsequently, it has applied *Wolfish* and rejected *Turner* in a detainee case, ignoring *Mauro*. *Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005). *Demery* relied in part on *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002), *cert. denied*, 538 U.S. 1047 (2003), which cited *Mauro* in applying *Wolfish*.

⁸²¹ *Benjamin v. Fraser*, 264 F.3d 175, 184-88 (2d Cir. 2001).

⁸²² *McGarry v. Pallito*, 687 F.3d 505, 511-13 (2d Cir. 2012) (holding detainee compelled to work in prison laundry under threat of disciplinary confinement stated a Thirteenth Amendment claim; noting that a state may not “rehabilitate” detainees, and rejecting a “housekeeping exception” broader than for personally-related chores). Narrower constructions of the Thirteenth Amendment’s protections should not be persuasive authority in the Second Circuit. *See, e.g., Channer v. Hall*, 112 F.3d 214, 218-19 (5th Cir. 1997) (holding immigration detainee compelled to work in prison food service fell within the “civic duty” exception to the Thirteenth Amendment); *Ford v. Nassau County Executive*, 41 F.Supp.2d 392, 397 (E.D.N.Y. 1999) (holding that compulsory work as “food cart worker” resembled “housekeeping duties” rather than “forced labor”; Thirteenth Amendment is violated by “compulsory labor akin to African slavery”).

⁸²³ *See* § III.C, above.

⁸²⁴ *Willis v. Artuz*, 301 F.3d 65, 69 (2d Cir. 2002); *compare U.S. v. Cohen*, 796 F.2d 20, 24 (2d Cir.), *cert. denied*, 479 U.S. 854 (1986).

Court has recently decided a different strip search case, and its opinion cites the *Turner v. Safley* line of cases for the importance of deference to prison officials, and then describes *Bell v. Wolfish* as “the starting point for understanding how this framework [the *Turner* standard] applies to Fourth Amendment challenges.”⁸²⁶ So it may be that the distinction made by the Ninth Circuit between Fourth Amendment reasonableness and the *Turner* reasonable relationship standard will not hold up in future cases.

⁸²⁵ *Byrd v. Maricopa County Sheriff’s Dep’t*, 629 F.3d 1135, 1140-47 (9th Cir. 2011), *cert. denied*, 131 S.Ct. 2964 (2011).

⁸²⁶ *Florence v. Board of Chosen Freeholders of County of Burlington*, ___ U.S. ___, 132 S.Ct. 1510, 1515 (2012).