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.

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. 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." Indifference to what? That’s the objective prong of the Eighth Amendment standard, discussed below.

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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. On the other hand, the obviousness of a risk may support an inference of actual knowledge, as may other relevant circumstances. 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. Purposefully avoiding knowledge may

3 Farmer, 511 U.S. at 839-43; see 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 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); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (holding deliberate indifference finding supported by “obvious and pervasive nature” of challenged conditions); 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 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 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).
also amount to deliberate indifference. The defendant need not know the precise nature of the risk as long as he or she knows that a serious risk exists.

A defendant need not have knowledge of 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

7 Farmer, 511 U.S. at 843 n. 8; see 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 (2d 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 conditioned 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 plaintiff was part of a group at risk because of his accent and appearance was sufficient to withstand summary judgment.


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.")
violated.” The rationale for requiring such a showing is the need to balance restoration of security and order against prisoners’ rights and the need to act quickly and decisively. 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. 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, as are “bystander liability” claims that staff failed to intervene in excessive force by other staff. The same is true of security-related policy decisions not involving the use of force and even of uses of force that do not involve an immediate need to restore security and order. Inmate-inmate assaults that pose security risks are also governed by the deliberate indifference standard.


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).


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).


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.


\(^{24}\) 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 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. Nesic, 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).

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. However, these decisions have not excluded from Eighth Amendment scrutiny the “unquestioned and serious deprivations of basic human needs” or 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. Moreover, the Supreme Court’s holding that “calculated harassment unrelated to prison needs” may violate the Eighth Amendment, and several circuits’ holdings that exposure to the deranged behavior of persons with mental illness may do so as well, suggest that there is a level of sheer unpleasantness that will violate the Eighth Amendment independent of harm or injury.


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

Rhodes v. Chapman, 452 U.S. 337, 347 (1981); accord, Wilson v. Seiter, 501 U.S. 294, 304-05 (1991); 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).


See 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 recently held that “severe discomfort” resulting from exposure to
Basic human needs identified by the courts include “food, clothing, shelter, medical care and reasonable safety”, warmth, exercise, the “basic elements of hygiene”, and sleep.

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. 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 was

hot summer temperatures did not violate the Eighth Amendment, citing Farmer’s and Helling’s references to “serious 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.


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 Harper v. Showers, 174 F.3d 716, 717, 720 (5th Cir. 1999) (allegation of placement into filthy, sometimes feces-smeared 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).


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”).
to control ongoing misconduct by the prisoner. Whether such treatment would be upheld for significantly longer periods of time is questionable. 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.

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.” The Court did not spell out what it meant or how that analysis should be conducted. Courts have suggested that statutes or regulations governing civilian activities may inform that inquiry, and conversely that risks that are commonplace in free society in voluntary activity may

41 Trammell v. Keane, 338 F.3d 155, 163, 165-66 (2d Cir. 2003); see 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; affording 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 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).


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). A recent 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, 2006 WL 1408332 at *1 (2d Cir., May 18, 2006) (unpublished); see Rodriguez v. McClenny, 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.”).

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).

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.

See McElligott v. Foley, 182 F.3d 1248, 1256-57 (11th Cir. 1999) (holding failure to diagnose prisoner’s 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).
professional judgment.48 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:

48 Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); see 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).
Denial of or delay in access to medical personnel or in their providing treatment. 

Delay is evaluated in light of the seriousness of the prisoner's medical need.

Denial of access to medical practitioners qualified to address the prisoner's problem.

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49 Estelle v. Gamble, 429 U.S. 97, 104 (1976); see 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); Johnson 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); LeMarre 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).

50 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 (2d 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).

51 See Kikumura v. Osagie, ___ F.3d ___, 2006 WL 2578805 at *19 (10th Cir., Sept. 8, 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. 72, below.

52 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
• Failure to inquire into facts necessary to make a professional judgment. 53

• Interference with medical judgment by non-medical factors. 54 In particular, “systemic

53 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).

54 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 U.S. 1066 (1988); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1987) (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. 1994) (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).

Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977), quoting Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974); accord, 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 82, 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).

Estelle v. Gamble, 429 U.S. at 105 ("intentionally interfering with the treatment once prescribed"); see 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,
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." 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. . . ." A recent decision granting a 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

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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).

57 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).

58 Adams v. Poag, 61 F.3d 1537, 1543-44 (11th Cir. 1995); see also 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 guard against the possibility that the injury was severe" could 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).
conscious disregard of an excessive risk to plaintiff’s health.”59 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.60

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.61

It is medical judgment with respect to the particular patient to which courts defer under the deliberate indifference standard. Thus, the Second Circuit recently 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.62


60 Mata v. Saiz, 427 F.3d 745, 757-58 (10th Cir. 2005).

61 See 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”; 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 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).

62 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).
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.\textsuperscript{63} More recently, 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. ..."\textsuperscript{64} A finding of medical malpractice does not preclude a finding of deliberate indifference.\textsuperscript{65}

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."\textsuperscript{66} 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 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.’”\textsuperscript{67} Recent medical care decisions have given great emphasis in assessing medical needs to

\textsuperscript{63} Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), \textit{cert. denied}, 450 U.S. 1041 (1981); \textit{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).

\textsuperscript{64} Sellers v. Henman, 41 F.3d 1100, 1102-03 (7th Cir. 1994); \textit{accord}, Brooks v. Celeste, 39 F.3d 125, 128-29 (6th Cir. 1994).

\textsuperscript{65} Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996).

\textsuperscript{66} 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).

\textsuperscript{67} Brock v. Wright, 315 F.3d at 162; \textit{see also} Carnell v. Grimm, 872 F.Supp. 746, 755 (D.Haw. 1994), \textit{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), \textit{quoting} Nance v. Kelly, 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J., dissenting). In \textit{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.

See Estelle v. Gamble, 429 U.S. 97, 104 (1976). Numerous courts have cited pain in finding medical needs serious. 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).

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. 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).

a “serious cumulative effect from the repeated denial of care with regard to even minor needs.”

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.

Prison officials' "serious need list" is not dispositive, nor are non-legal catchphrases like "elective."

4. Mental health care

Mental health care is governed by the same deliberate indifference/serious needs analysis as physical health care. Serious mental illness has been defined by one court as one “that has caused


72 Kikumura v. Osagie, ___ F.3d ___, 2006 WL 2578805 at *19, *23 (10th Cir., Sept. 8, 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).


74 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).

75 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
significant disruption in an inmate’s everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself. Immediate psychological trauma may also constitute a serious need. Transsexualism or gender identity disorder (GID) is generally recognized as a serious medical need at least in some cases, though courts have differed over the extent of prison officials’ obligations in such cases.

Among the deficiencies in prison mental health care that courts have held actionable are the lack of mental health screening on intake, the failure to follow up inmates with known or suspected indifference in terminating patient’s medication and restraining her absent evidence that the defendant psychiatrist knew the nature of her illness).


77 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).

78 Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) and cases cited.

79 See 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); Brooks v. Berg, 270 F.Supp.2d 302, 310 (N.D.N.Y.) (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 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).

mental disorders, the failure to hospitalize inmates whose conditions cannot adequately be treated in prison, gross departures from professional standards in treatment, and the failure to separate severely mentally ill inmates from the mentally healthy. (Mixing mentally ill inmates with those who are not mentally ill may violate the rights of both groups.) Courts have also held that housing

81 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).

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

83 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).


85 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 prisoners under conditions of extreme isolation is unconstitutional.\textsuperscript{86} One recurring scenario is the seemingly baseless discontinuation of psychiatric medications, sometimes with disastrous results.\textsuperscript{87}

Many prison mental health care cases focus on the lack of adequate and qualified staff.\textsuperscript{88} Several courts have concluded that the lack of an on-site psychiatrist in a large prison is

\textsuperscript{86}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), \textit{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).

\textsuperscript{87}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). \textit{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). \textbf{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).

\textsuperscript{88}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), \textit{vacated}, 490 U.S. 1087 (1989), \textit{reinstated}, 886 F.2d 235 (9th Cir. 1989), \textit{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 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), \textit{aff’d in part and rev’d in part on other grounds}, 679 F.2d 1115 (5th Cir. 1982), \textit{cert. denied}, 460 U.S. 1042 (1983).
unconstitutional.\textsuperscript{89} The failure to train correctional staff to deal with mentally ill prisoners can also constitute deliberate indifference.\textsuperscript{90}

Prisoners have a limited substantive right to refuse psychotropic medication and a procedural right to notice and a hearing before they are involuntarily medicated.\textsuperscript{91} They are entitled by due process to notice and a hearing before involuntary commitment to a psychiatric hospital.\textsuperscript{92} 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.\textsuperscript{93} Denial of prison privileges has so far been held not to meet that threshold,\textsuperscript{94} and decisions (including one now on appeal in the Second Circuit) are


\textsuperscript{91} Washington v. Harper, 494 U.S. 210 (1990). 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 necessary “significantly to further important governmental trial-related interests.” Sell v. U.S., 539 U.S. 166, 179 (2003).


\textsuperscript{93} McKune v. Lile, 536 U.S. 24, 35-36 (2002).

\textsuperscript{94} 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 speak 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 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).
in conflict over whether the loss of good time constitutes compulsion. Persons not actually convicted of sex offenses may nonetheless be found to be sex offenders based on other evidence.56

5. Dental care

Dental care is also governed by the deliberate indifference/serious needs analysis.74 The 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.”98 Limiting care to pulling teeth that could be saved is unconstitutional.99

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95 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), appeal pending (2d Cir.), 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).

96 Gwinn v. Awmiller, 354 F.3d at1219-20 (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).

97 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 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).

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

99 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).
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.\textsuperscript{100} 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.\textsuperscript{101} Cases holding that "spontaneous, isolated" or "unprovoked" attacks are not "punishment" are no longer good law.\textsuperscript{102} Malice is seldom shown by direct evidence but may be inferred from circumstances and officers' actions.\textsuperscript{103} Thus, the Second Circuit has approved charging a jury that

\textsuperscript{100} See § I.A.2, above.

The Second Circuit has said that “\textit{Hudson [v. McMillian]} does not limit liability to that subset of cases where ‘malice’ is present. Rather, \textit{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.


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).


\textsuperscript{103} Skrtich 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), \textit{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.), \textit{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), \textit{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
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.”

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." The Eleventh Circuit has held that such claims require a showing of more than \textit{de minimis} force, at least in cases where there was probable cause for the arrest. Courts have differed over when a 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, while others apply the due process standard at earlier points.

2. \textbf{Amount of force and justification}

Any amount of force more than \textit{de minimis} is unconstitutional if done maliciously and requiring three and a half weeks in the infirmary).

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

105 Graham v. Connor, 490 U.S. 386, 397 (1989). \textit{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).

106 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, kneed 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 \textit{de minimis} force).

107 \textit{See} Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (dictum) (applying Fourth Amendment to conduct occurring before probable cause determination); Pierce v. Multnomah County, Or., 76 F.3d 1032, 1042-43 (9th Cir. 1996), \textit{cert. denied}, 519 U.S. 1006 (1996); Frohmader v. Wayne, 958 F.2d 1024, 1026-27 (10th Cir. 1992).

108 \textit{See} 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), \textit{cert. denied}, 493 U.S. 1026 (1990).
sadistically,\textsuperscript{109} including under some circumstances the proverbial push or shove.\textsuperscript{110} Conversely, serious threats to security or safety may justify injurious or even deadly force.\textsuperscript{111} But even when some force is justified, anything doesn't go.\textsuperscript{112} Beating a prisoner who may have been disruptive or violent but who has already been subdued is the classic case of excessive force.\textsuperscript{113} Physical abuse

\textsuperscript{109} 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.)

\textsuperscript{110} 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 \textit{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 \textit{de minimis} force where the force alleged was greater than \textit{de minimis}).

\textsuperscript{111} 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 where he refused to go back into his cell), rehearing denied, 818 F.2d 871 (11th Cir. 1987).

\textsuperscript{112} 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).

\textsuperscript{113} 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
may not be used to extract information, either in criminal investigation or for jail security purposes.\textsuperscript{114}

Injury is "relevant to the Eighth Amendment inquiry but does not end it."\textsuperscript{115} Minor injuries are actionable where force is gratuitous or clearly excessive.\textsuperscript{116} Courts have held that force without injury is actionable in extreme circumstances such as credible threat of death or injury or other egregious conduct.\textsuperscript{117} 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

\textsuperscript{114} 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). \textit{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).

\textsuperscript{115} Hudson v. McMillian, 503 U.S. 1, 7 (1992); \textit{accord}, Gomez v. Chandler, 163 F.3d 921, 924 and n. 4 (5th Cir. 1999) (noting that non-\textit{de minimis} standard may require only "minor" injury, leaving open possibility that \textit{de minimis} injury might be actionable if force is "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] \textit{more} demanding standard with regard to the subjective component of Eighth Amendment analysis, the objective component of an excessive force claim is \textit{less} demanding than that necessary for conditions-of-confinement or inadequate medical care claims.")

\textsuperscript{116} 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 \textit{de minimis} injury was shown); Felix v. McCarthy, 939 F.2d 699, 702 (9th Cir. 1991), \textit{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).

\textsuperscript{117} 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), \textit{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), \textit{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").
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.” Officers who are present and fail to take reasonable steps to prevent excessive force may be held liable. The deliberate indifference standard is applicable to defendants who do not directly use force. The persistent failure to control and discipline officers who misuse force can support a finding of deliberate indifference by supervisors or municipality.

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. A recent district court decision holds that contemporary standards of decency have evolved in the years since the Second Circuit’s leading case such at now “any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment.”

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

119 Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002).

120 Skrtich v. Thornton, id.

121 See § I.A.2, above.

122 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.")

123 Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997); see 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); 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).

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.”

2. Crowding

The constitutionality of crowding is determined by circumstances and consequences. The less out-of-cell activity prisoners are permitted, the more likely it is that crowding will be found unconstitutional. Crowding that is linked with violence or other safety hazards, breakdowns in security classification, food services, or medical care, or deteriorated physical plant, is also more likely to be found unconstitutional—though courts may try to remedy the consequences without remedying the crowding. (Indeed, the Prison Litigation Reform Act requires courts to take that

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125 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.”)

126 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).


128 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).

129 See, e.g., Fisher v. Koehler, 692 F.Supp. 519 (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.
Crowding that results in prisoners’ sleeping on floors, in corridors, or other non-housing areas has been found unconstitutional, though the cases are far from unanimous and outcomes depend on the overall circumstances.

3. Food

Prison food must be nutritionally adequate 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.” Contamination of drinking water may be unconstitutional.

4. Clothing

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

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132 Compare Moore v. Morgan, id., with 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”).

133 Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002).

134 Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); see 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”).

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


137 Divers v. Dep’t of Corrections, 921 F.2d 191, 194 (8th Cir. 1990).
control mechanism is unsettled.\textsuperscript{138}

5. Safety

The Eighth Amendment requires prison officials to provide “reasonable safety” for prisoners.\textsuperscript{139} That principle encompasses protection from assault by other prisoners occasioned by the affirmative acts of staff\textsuperscript{140} or by staff’s failure to respond to known risks of assault,\textsuperscript{141} including

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\begin{itemize}
  \item See 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).
  \item See 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), \textit{cert. granted, vacated and remanded on other grounds}, 474 U.S. 806 (1985).
  \item 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). \textit{But see} 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. \textit{See} n.9, above.
\end{itemize}

\textsuperscript{138} See 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).


\textsuperscript{140} See 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), \textit{cert. granted, vacated and remanded on other grounds}, 474 U.S. 806 (1985).

\textsuperscript{141} 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). \textit{But see} 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.”)
sexual assault. The Eighth Amendment also protects against dangerous living and working conditions, including:

- Exposure to environmental tobacco smoke.
- Exposure to sewage or human waste.
- Exposure to other toxic substances.
- Failure to correct safety hazards in living or working areas.

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142 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).

143 Helling v. McKinney, 509 U.S. at 35; 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 a recent 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, 2006 WL 1408332 at *1 (2d Cir., May 18, 2006) (unpublished).

144 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).

145 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).

146 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); see Brown v. Missouri Dep’t of Corrections, 353 F.3d 1038, 1040 (8th Cir. 2004) (per curiam) (holding that allegation that transportation officers refused to fasten the seat belt of a restrained prisoner and then drove recklessly stated a deliberate indifference claim).
Work or living assignments inconsistent with medical condition or physical capacity.  

Lack of fire safety.  

6. Temperture and ventilation  

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

7. Exercise  

Prisoners must be provided some opportunity to exercise, and restrictions on that right must be limited to “unusual circumstances” or those in which exercise is “impossible” for disciplinary reasons. Most courts have held that five hours of exercise a week is required under ordinary

147 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 193 (8th Cir. 1998); Baumann v. Walsh, 36 F.Supp.2d 508 (N.D.N.Y. 1999).


149 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 (2d 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 (2d Cir. 2001) (holding allegations of unrepairoed 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.)

150 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 (2d 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).

151 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
circumstances. 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.

8. Sanitation and personal hygiene

“A sanitary environment is a basic human need that a penal institution must provide for all inmates.”155 Prison officials must make arrangements for cleaning and sanitation of the prison156 and must control infestations of vermin.157 They must also permit prisoners reasonable opportunities to maintain personal cleanliness.158 Access to sanitary toilet facilities is required.

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).

152 See Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988).


154 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.


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.

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

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

158 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
9. **Sleep**

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

10. **Noise**

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

11. **Lighting**

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

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).

159 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).

160 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).


163 Keenan v. Hall, 83 F.3d 1083, 1090-01 (9th Cir. 1996).
12. Programs, activities, and idleness

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

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164 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).

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

166 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).


171 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).
the reasonable objective of rehabilitation,” though recent developments call that holding into question.

13. Disability rights

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

In addition, the federal disability statutes apply to prisoners. Both Title II of the Americans

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172 Ohlinger v. Watson, 652 F.2d 775, 777-79 (9th Cir. 1980). Similarly, a recent decision holds 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 recent 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).


174 See, e.g., 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).

175 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).
with Disabilities Act\textsuperscript{176} and Section 504 of the Rehabilitation Act\textsuperscript{177} prohibit discriminating against “otherwise qualified” disabled persons\textsuperscript{178} 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. 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,\textsuperscript{179} as compared to the “\textit{de minimis} cost” solutions prescribed under the reasonableness standard applied to other prisoner claims by \textit{Turner v. Safley}.\textsuperscript{180} However, some courts have held that the ADA/Rehabilitation Act standard must be interpreted consistently with the \textit{Turner} reasonable relationship standard,\textsuperscript{181} or may be informed by it.\textsuperscript{182} The disability statutes generally do not provide a remedy for inadequate medical care for disabilities without more.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{176} 42 U.S.C. § 12101 \textit{et seq.}
\item \textsuperscript{177} 29 U.S.C. § 794.
\item \textsuperscript{178} \textit{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), \textit{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 accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).
\item \textsuperscript{179} \textit{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”).
\item \textsuperscript{180} \textit{See} § II.A, below.
\item \textsuperscript{181} Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (holding \textit{Turner} standard applicable under ADA). \textit{Contra}, Amos v. Maryland Dep’t of Public Safety and Correctional Services, 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of \textit{Turner} as inconsistent with \textit{Yeskey}), \textit{dismissed as settled}, 205 F.3d 687 (4th Cir. 2000).
\item \textsuperscript{182} Onishea v. Hopper, 171 F.3d 1289, 1300-01 (11th Cir. 1999) (en banc) (holding the \textit{Turner} standard helpful in applying ADA), \textit{cert. denied}, 528 U.S. 1114 (2000).
\item \textsuperscript{183} Burger v. Bloomberg, 418 F.3d 882, 883 (8th Cir. 2005) (per curiam). In \textit{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
\end{itemize}
Relief under the disability statutes has been granted to prisoners with hearing impairments, visual impairments, mobility impairments, mental illness, and other disabilities. 

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. The question remains open whether it is also valid as to violations of the ADA that do not independently violate any constitutional provision. There is no issue of the statute’s validity as to injunctive claims. 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

program of medical services.


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

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).


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).

U.S. v. Georgia, ____ U.S. ____, 126 S.Ct. 877, 880-82 (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. 126 S.Ct. at 883 (concurring opinion).

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).
defense to Rehabilitation Act claims.\textsuperscript{191}

\section*{II. Prisoners' Civil Liberties}

\subsection*{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..."\textsuperscript{192} The reasonableness question is answered by weighing\textsuperscript{193} 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. ..."\textsuperscript{194} If this requirement is not met, the regulation is unconstitutional regardless of the other factors.\textsuperscript{195} Conversely, meeting it does not, without

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\textsuperscript{191} Garrett v. University of Ala. at Birmingham Bd. of Trustees, 344 F.3d 1288, 1293 (11\textsuperscript{th} Cir. 2003).


\textsuperscript{193} "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, ___ U.S. ___, 126 S.Ct. 2572, 2580 (2006) (plurality opinion) (“The real task . . . is not balancing these factors” but assessing whether the record shows a reasonable, not just logical, relationship).

\textsuperscript{194} Turner, 482 U.S. at 89; see Freeman v. Texas Dep’t of Criminal Justice, 369 F.3d 854 (5\textsuperscript{th} 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 (9\textsuperscript{th} 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.”)

\textsuperscript{195} Shaw v. Murphy, 532 U.S. 223, 229-30 (2001).
\end{footnotesize}
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more, validate a challenged policy.\textsuperscript{196} Prison policies can fail this test either because the asserted goal is not legitimate\textsuperscript{197} or because the policy is not logically related to it.\textsuperscript{198} The

\textsuperscript{196}Beard v. Banks, ___ U.S. ___, 126 S.Ct. 2572, 2580 (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).

\textsuperscript{197}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); 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).

\textsuperscript{198}See Jones v. Brown, ___ F.3d ___, 2006 WL 2441412 at *8-9 (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); 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 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).
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.”\footnote{199} 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,\footnote{200} despite the concern, echoed by several Justices and acknowledged by the majority, that “deprivation theory does not map easily onto several of the \textit{Turner} factors.”\footnote{201}

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  \item "\ldots [W]hether there are alternative means of exercising the right that remain open to prison inmates.\ldots"\footnote{202} What constitutes an alternative is debatable.\footnote{203} A Supreme Court plurality

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\item \footnote{199} Shakur v. Selsky, 391 F.3d 106, 116 (2d Cir. 2004).\n\item \footnote{200} Beard v. Banks, ___ U.S. ___, 126 S.Ct. 2572, 2578-79 (2006) (plurality opinion).\n\item \footnote{201} Beard v. Banks, 126 S.Ct. at 2588 (Stevens, J., dissenting); id., 2584-85 (Thomas, J., concurring). These passages were quoted and cited respectively by the plurality. 126 S.Ct. at 2580. 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.” 126 S.Ct. at 2588. This point is discussed further in § II.C, below.
\item \footnote{202} Turnor, 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).
\item \footnote{203} Compare 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”; \textit{Fraise} distinguished 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);
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.”

- “...[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...”

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accord, 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 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); Flagnier 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); Chriccol 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.”)


205 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 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)
"... [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."206

(holding that absence of Muslims from work assignments for Jumu’ah services had no “ripple effect”; they were just marked absent but not penalized).

206 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. Bittner, 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).

A particularly extreme weighing of costs and alternatives appears in Kimberlin v. U.S. Dep’
B. Scope of the standard

The *Turner* reasonableness standard applies to all claims that a prison regulation infringes on constitutional rights.\textsuperscript{207} 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.\textsuperscript{208} 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.\textsuperscript{209}

The *Turner* standard applies to informal policies and individualized actions as well as regulations.\textsuperscript{210} It may apply to some statutory claims as well as constitutional claims.\textsuperscript{211} It does not


The Second Circuit has recently 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.

\textsuperscript{209} Johnson v. California, 543 U.S. 499, 510-14 (2005); see § V, below, concerning equal protection claims.

\textsuperscript{210} Ford v. McGinnis, 352 F.3d 582, 595 n.15 (2d Cir. 2003); Cornwell v. Dahlberg, 963 F.2d 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
apply to claims pertaining to outgoing correspondence.\textsuperscript{212}

At least one recent decision holds that certain rights are “fundamentally inconsistent” with incarceration, and the Turner analysis is not applicable in cases involving them.\textsuperscript{213} This argument, which appears inconsistent with the Supreme Court’s post-Turner decisions, was recently presented to the Supreme Court in Overton v. Bazzetta and was not accepted, though it was not conclusively ruled out either.\textsuperscript{214} On the other hand, more recently the Court has 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.\textsuperscript{215} Another recent 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, \textit{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.\textsuperscript{216}

\section*{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.\textsuperscript{217} Its application has mostly been \textit{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 resting on

\begin{itemize}
  \item \textsuperscript{211}See § I.E.13, above.
  \item \textsuperscript{212}Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).
  \item \textsuperscript{213}Gerber v. Hickman, 291 F.3d 617, 620 (9th Cir. 2002) (en banc).
  \item \textsuperscript{214}Overton v. Bazzetta, 539 U.S. 126, 131-32 (2003).
  \item \textsuperscript{215}Johnson v. California, 543 U.S. 499, 510 (2005).
  \item \textsuperscript{216}Kimberlin v. U.S. Dep’t of Justice, 318 F.3d 228, 232-33 (D.C.Cir.), rehearting denied, 351 F.3d 1166 (D.C.Cir. 2003); see id., 318 F.3d at 237-38 (concurring and dissenting opinion).
  \item \textsuperscript{217}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”).
\end{itemize}
“excessive paternalism,” and it has subsequently described the standard as not “toothless.” More recent decisions suggest a more deferential attitude.

The lower courts have differed with each other, and sometimes with themselves, 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. The Ninth Circuit has held that

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220 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.

More recently, 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).

221 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).

222 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).


224 See 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”).

225 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).
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 shown to be adequate alternatives); Salahuddin v. Coughlin, 993 F.2d 306 (2d Cir. 1993) (rejecting conclusory justifications for denying congregate 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. . .”).

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 Duametef 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 Duametef 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...
The Supreme Court has recently addressed *Turner* analysis methodology from a different standpoint and in a quite narrow and inconclusive manner. In *Beard v. Banks*,²²₈ 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.”²²⁹ 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.”²³⁰ 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.”²³¹ 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.”²³² It also “offer[ed] too little deference to the judgment of prison officials about such matters.”²³³

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

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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.


²²₉ *Beard*, 126 S.Ct. at 2579.

²³₀ 126 S.Ct. at 2580 (emphasis supplied).

²³₁ 126 S.Ct. at 2580.

²³² 126 S.Ct. at 2581.

²³³ *Id.*
to success 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. 234

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

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

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234 *Beard*, 126 S.Ct. at 2581-82.

235 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. 126 S.Ct. at 2589. The plurality chose not to acknowledge these concerns in the absence of an affirmative evidentiary presentation by the prisoners.
possibility that the prisoner can regain the right at some future time by modifying his behavior.\footnote{126 S.Ct. at 2580.} Further, this “deprivation theory” is incapable of coherent analysis within the \textit{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.”\footnote{539 U.S. 126 (2003).} 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 \textit{reasonable} relation.”\footnote{126 S.Ct. at 2588.} Thus, the plurality acknowledges that the bottom line of applying the \textit{Turner} analysis to a defense based on “deprivation theory” is the collapse of the \textit{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 \textit{Overton v. Bazzetta},\footnote{Beard, 126 S.Ct. at 2580.}

\ldots [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 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 \textit{[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.\footnote{539 U.S. 126 (2003).}

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

\footnote{126 S.Ct. at 2588.}

\footnote{126 S.Ct. at 2588; \textit{accord}, Kimberlin v. U.S. Dep’t of Justice, 318 F.3d 228, 239-40 (D.C.Cir.) (concurring and dissenting opinion), \textit{rehearing denied}, 351 F.3d 1166 (D.C.Cir. 2003) (noting incompatibility of punitive rationale and \textit{Turner} standard).}

\footnote{126 S.Ct. at 2580.}

\footnote{539 U.S. 126 (2003).}

\footnote{Beard, 126 S.Ct. at 2580.}
persons with the most serious records of misbehavior—or at least that their opinion should not be read as endorsing any more than that.\textsuperscript{241}

D. Particular civil liberties issues

1. Correspondence

Prisoners’ “right to the free flow of incoming and outgoing mail is protected by the First Amendment.”\textsuperscript{242} Legal mail is entitled to greater protection than non-legal mail;\textsuperscript{243} it generally may not be read without a warrant,\textsuperscript{244} and prisoners have the right to be present when it is opened and inspected for contraband.\textsuperscript{245} Isolated incidents of mail tampering generally do not establish a constitutional violation.\textsuperscript{246} Prison authorities have authority to prohibit or restrict inmate-inmate

\textsuperscript{241} 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.” 126 S.Ct. at 2583, 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.

\textsuperscript{242} 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.

\textsuperscript{243} 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).

\textsuperscript{244} Sallier v. Brooks, 343 F.3d 868, 873-74 (6th Cir. 2003); Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978).

\textsuperscript{245} Wolff v. McDonnell, 418 U.S. 539, 577 (1974); Jones v. Brown, ___ F.3d ___, 2006 WL 2441412 at *4-8 (3d Cir. 2006) (holding unconstitutional post-9/11/01 rules allowing opening of legal mail outside prisoners’ presence); Davis v. Goord, 320 F.3d at 351; see 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).

\textsuperscript{246} Davis v. Goord, 320 F.3d 346, 351-52 (2d Cir. 2003).
correspondence.\textsuperscript{247} Reasonable restrictions on postage for indigents for non-legal correspondence are upheld.\textsuperscript{248}

2. Reading

Prisoners’ right to read may be restricted under the \textit{Turner} reasonableness standard,\textsuperscript{249} though much prison censorship has been struck down as overbroad.\textsuperscript{250} Even a valid and neutral regulation may be misapplied, so courts must review the particular instance of censorship that is challenged.\textsuperscript{251}

\begin{itemize}
\item \textsuperscript{247} Turner v. Safley, 482 U.S. 78, 91-93 (1987); Purnell v. Lord, 952 F.2d 679 (2d Cir. 1992).
\item \textsuperscript{248} 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).
\item \textsuperscript{249} 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 publication's] content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."); \textit{accord}, Bahrampour v. Lampert, 356 F.3d 969 (9th Cir. 2004) (upholding censorship of \textit{Muscle Elegance} magazine under regulation restricting sexually explicit materials and \textit{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), \textit{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").
\item \textsuperscript{250} \textit{See}, \textit{e.g.}, Cline v. Fox, 319 F.Supp.2d 685 (N.D.W.Va. 2004) (striking down policy under which officials censored \textit{Sophie’s Choice, Myra Breckinridge}, and works by John Updike); \textit{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).
\item \textsuperscript{251} Murphy v. Missouri Dep’t of Correction, 372 F.3d 979, 986 (8th Cir.), \textit{cert. denied}, 543 U.S. 991 (2004); \textit{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 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).
\end{itemize}
Prison censors must observe procedural safeguards. There must be individualized decisions about particular items and not just an "excluded list" of publications. The sender of literature, as well as the recipient, should receive notice and an opportunity to be heard.

Non-content-based restrictions on reading material, such as variations on the “publisher only” rule, will be upheld if reasonable. In assessing reasonableness, access to radio or television is not

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252 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.

253 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 Dept 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.


255 Bell v. Wolfish, 441 U.S. 520, 550-52 (1979) (detainee case). 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 420, 429-32 (10th Cir. 2004) (questioning reasonableness of prohibition on receiving any publications for the first 120 days after...
an adequate alternative to reading material; the question is whether a broad range of publications may be read under the challenged policy.\textsuperscript{256} Courts have struck down prohibitions on newspapers.\textsuperscript{257} Prison officials may restrict reading material in punitive segregation, although most cases upholding this practice have involved short periods of time.\textsuperscript{258} 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.\textsuperscript{259}

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.\textsuperscript{260} However, some cases involving religious literature have addressed broad categories of material rather than reviewing the

\textsuperscript{256} Jacklovich v. Simmons, 392 F.3d 420, 431 (10\textsuperscript{th} Cir. 2004).
\textsuperscript{257} 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).
\textsuperscript{258} 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), \textit{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).
\textsuperscript{259} Beard v. Banks, ___ U.S. ___, 126 S.Ct. 2572, 2581-82 (2006) (plurality opinion). \textit{Beard} is discussed extensively in § II.C, above.
content of each challenged item, incorrectly in my view.

3. Complaining

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

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And in the view of the Seventh Circuit, apparently. See Borzych 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. . . .”).


263 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").

264 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).
Grievances filed through an official grievance procedure are constitutionally protected as are criticisms made in outgoing letters, communication with official agencies, orderly participation in forums designed for prisoners to express their views, complaints addressed directly to prison officials and other activities that do not threaten security. Communications may not be protected if they involve direct confrontation with prison personnel, are disrespectful or abusive.

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268 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).

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

270 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); Utrak 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).

271 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).

272 See, e.g., 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); Garriod 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").
to or about staff,\textsuperscript{273} or contain threats of unlawful or improper action.\textsuperscript{274} A "threat" to take a constitutionally protected action is itself constitutionally protected.\textsuperscript{275} 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.\textsuperscript{276}

“The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech.”\textsuperscript{277} Such claims may be litigated by alleging and proving "a

\begin{itemize}
\item Gibbs v. King, 779 F.2d 1040, 1045-46 (5th Cir.), \textit{cert. denied}, 476 U.S. 1117 (1986); \textit{accord}, 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 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).

\item 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).

\item 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), \textit{aff'd sub nom.} Cavey v. Williams, 580 F.2d 1047 (4th Cir. 1978); \textit{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).

\item Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000). \textit{Contra}, McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005). \textit{See} 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).

\item 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); 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. 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.

\end{itemize}

\textsuperscript{273} Gibbs v. King, 779 F.2d 1040, 1045-46 (5th Cir.), \textit{cert. denied}, 476 U.S. 1117 (1986);

\textsuperscript{274} 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).

\textsuperscript{275} 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), \textit{aff'd sub nom.} Cavey v. Williams, 580 F.2d 1047 (4th Cir. 1978); \textit{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).

\textsuperscript{276} Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000). \textit{Contra}, McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005). \textit{See} 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).

\textsuperscript{277} 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); 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. 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.
chronology of events from which retaliation may plausibly be inferred.\textsuperscript{278}

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."\textsuperscript{279} 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.\textsuperscript{280} In general, the press has no more right to enter jails or prisons than does the general public.\textsuperscript{281}

Prison officials may not restrict prisoners’ right to write letters to the press or to write for

\textsuperscript{278} Cain v. Lane, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988); see Gayle v. Gonyea, 313 F.3d 677, 683 (2d Cir. 2002) (holding “temporal proximity” of alleged retaliation to grievance supported a retaliation claim).


\textsuperscript{280} 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). 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).

publication unless they have substantial reasons,\textsuperscript{282} and may not retaliate for such activity.\textsuperscript{283}

Involuntary media exposure may violate the Constitution.\textsuperscript{284}

5. Visiting

The Supreme Court has recently 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.\textsuperscript{285} 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,\textsuperscript{286} and that qualification is of debatable validity in light of the Court’s subsequent prison due process jurisprudence.\textsuperscript{287}

\textsuperscript{282} 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); 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 as moot sub nom. Chronicle Publishing Co. v. Rison, 962 F.2d 959 (9th Cir. 1992), cert. denied, 507 U.S. 984 (1993).

\textsuperscript{283} 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).

\textsuperscript{284} 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, 125 S.Ct. 2961 (2005); Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (holding “perp walk” violated the Fourth Amendment).

\textsuperscript{285} Overton v. Bazzetta, 539 U.S. 126 (2003); see 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).

\textsuperscript{286} Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 460-61 (1989).

6. Telephones

Telephones

Prisoners have been held to have a First Amendment right to telephone access subject to reasonable limitations.\(^\text{288}\) 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.\(^\text{289}\) Severe restrictions on telephone use have been upheld for particular prisoners to protect the safety of witnesses and prevent further criminal activity.\(^\text{290}\) 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,\(^\text{291}\) 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.”\(^\text{292}\) Such surveillance generally does not violate the Fourth Amendment either.\(^\text{293}\) 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.\(^\text{294}\)

\(^{288}\) 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).

\(^{289}\) 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 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).

\(^{290}\) United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000).


\(^{292}\) See, e.g., U.S. v. Friedman, 300 F.3d 111, 122-23 (2d Cir. 2002), cert. denied, 538 U.S. 981 (2003).

\(^{293}\) See 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).

\(^{294}\) See 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).
7. Voting

Convicted felons may be disenfranchised, and usually are while they are incarcerated. Pre-trial detainees and misdemeanants are generally eligible to vote, and must be provided a means to do so, usually absentee ballots. Challenges to felon disenfranchisement statutes have recently been rejected by both the Second and Eleventh Circuits.

8. Religious exercise

Prisoners are constitutionally entitled to the free exercise of religion subject to the reasonable relationship test of Turner v. Safley. 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. The same standard is imposed by the Religious Freedom Restoration Act (RFRA) on the federal government, that statute having been struck down by the Supreme Court as applied to state governments. Courts have held that this standard is to be applied with regard

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297 See 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, 126 S.Ct. 650 (2005). In Hayden, 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.

298 482 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.


301 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).
to the “special circumstances” of prison security, which is a compelling interest, 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.

A good recent example of the RLUIPA/RFRA analytical method is Warsoldier v. Woodford, 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 alleged justification for the policy, is a compelling interest, 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. “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

302 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”).

303 See 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); Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) (holding that punishing a Rastafarian prisoner for refusing to take a tuberculosis test violated RFRA in light of available alternatives); Williams v. Bitner, 359 F.Supp.2d 370, 375-76 (M.D.Pa. 2005) (holding that punishing a Muslim prisoner assigned to work in food service for refusing to touch or assist in preparing pork could violate RLUIPA), aff’d, 455 F.3d 186 (3d Cir. 2006).

Notwithstanding the foregoing, there are decisions under RLUIPA which appear to be indistinguishable in their analytic approach from the prison First Amendment analysis that RLUIPA was intended to replace. See Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2006) (upholding hair length restrictions, stating district court "improperly substituted its judgment for that of prison officials" in applying the least restrictive means test), pet. for cert. filed (June 22, 2006); Orfan v. Goord, 411 F.Supp.2d 153 (N.D.N.Y. 2006) (holding that Shiite Muslims were not entitled to services separate from Sunni Muslims).

304 418 F.3d 989 (9th Cir. 2005).
before adopting the challenged practice.” 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.” The alternatives available in *Warsoldier* included the creation of religious exemptions, which the defendants had dismissed out of hand. The court noted that other prison systems, including the Federal 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.” This statement, too, is at odds with the Supreme Court’s dismissal of such arguments under a reasonable relationship standard, as well as with *Turner’s* allocation of the burden of proof generally to plaintiffs.

The Supreme Court has only recently upheld the constitutionality of RLUIPA against a claim that it constituted an establishment of religion. Until recently there have been relatively few decisions on the merits under RFRA and RLUIPA, at least in prison cases, probably in part because few prisoners know about the statutes. However, 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.

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305 *Id.*, 418 F.3d at 999.


307 *Warsoldier*, 418 F.3d at 1000.

308 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

309 *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).

310 *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*, 2006
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. To enjoy First Amendment protection, beliefs need not be 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.” The question is open under the First Amendment whether plaintiffs must show a “substantial burden” on their religious rights in a free exercise case 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. 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.’”

311 Ford v. McGinnis, 352 F.3d 582, 590-91 (2d 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 (3d Cir. 2006).

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. 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.

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

313 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).

314 Ford, id.

circuits have adopted a similar definition under RLUIPA. See Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004), cert. denied, 125 S.Ct. 2549 (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).

a. Worship and ceremony

Prisoners have a constitutional right to participate in services, ceremonies, and celebrations of their religion, subject to the restrictions of the reasonable relationship standard. Blanket exclusion of segregated prisoners from congregate services is unlawful, but prisoners may be excluded based on case-by-case inquiry. Purposeful interference with individual worship may be

316 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). 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).

317 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); 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

318 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).
unconstitutional.\textsuperscript{319} Prisoners may obtain more favorable outcomes under RLUIPA than under the Constitution.\textsuperscript{320}

\begin{itemize}
\item[b.] \textbf{Dress and appearance}
\end{itemize}

Prisoners have a right to maintain dress and appearance required by their religious beliefs, subject to restrictions meeting the reasonable relationship standard.\textsuperscript{321} Restrictions on hair length and facial hair, often struck down under pre-\textit{Turner/O'Lone} law, have generally been upheld under that standard.\textsuperscript{322} Results have been mixed under RFRA and RLUIPA.\textsuperscript{323}

\textsuperscript{319} 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 \textit{salat}, knowing the prisoner could not respond, and then disciplining the prisoner, could not be dismissed under First Amendment).

\textsuperscript{320} \textit{See} Murphy v. Missouri Dep’t of Correction, 372 F.3d at 983-85, 988-89 (upholding summary judgment for defendants under \textit{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).

\textsuperscript{321} 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).

\textsuperscript{322} Henderson v. Terhune, 379 F.3d 709, 713-15 (9th Cir. 2004); Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989); \textit{compare} Fromer v. Scully, 817 F.2d 227 (2d Cir. 1987) (striking rule down before \textit{Turner v. Safley}).

c. Diet

“[P]rison officials must provide a prisoner a diet that is consistent with his religious scruples.”\(^{324}\) In practice, the outcomes of religious diet controversies have varied widely.\(^{325}\)

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.\(^{326}\)

9. Establishment of religion

Requiring participation or penalizing non-participation in prison programs of a religious

\(^{324}\) 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). \textit{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. \textit{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), \textit{aff’d}, 455 F.3d 186 (3d Cir. 2006).

\(^{325}\) \textit{See, e.g.}, 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” 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 \textit{Turner} standard).

\(^{326}\) \textit{See} Hakim v. Hicks, 223 F.3d 1244 (11th Cir. 2000) (affirming order that prison officials add religious names to ID cards), \textit{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 \textit{Turner}).
nature violates the Establishment Clause.\textsuperscript{327} The exercise of non-religious authority by prison chaplains raises “significant constitutional questions” (never resolved, to my knowledge) under the Establishment Clause.\textsuperscript{328} 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.\textsuperscript{329} The unjustified preferential treatment of some religious views over others violates the Establishment Clause.\textsuperscript{330} The heightened protection afforded religious exercise by the Religious Land Use and Institutionalized Persons Act does not violate the Establishment Clause.\textsuperscript{331}

10. Searches and privacy

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

\textsuperscript{327} Kerr v. Farrey, 95 F.3d 472, 478-80 (7th Cir. 1996) (holding that a prisoner could not be 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).

\textsuperscript{328} Theriault v. A Religious Office, 895 F.2d 104 (2d Cir. 1990).

\textsuperscript{329} \textit{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), \textit{reconsideration denied}, 2005 WL 1261970 (W.D.Wis., May 26, 2005), \textit{aff’d}, 2006 WL 2267092 (7th Cir., Aug. 3, 2006) \textit{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).

\textsuperscript{330} Kaufman v. McCaughtry, 419 F.3d 678, 684 (7th Cir. 2005).

living quarters and the Fourth Amendment does not protect against searches of them, however unreasonable or abusive they may be. 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. The Second Circuit has recently limited that holding to pre-trial detainees. 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. The Eighth Amendment does protect against searches amounting to “calculated harassment unrelated to prison needs.”

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


335 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.

336 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).
process under the rule of *Parratt v. Taylor*.\(^{337}\) An allegation that confiscations are or result from an established state procedure takes the claim outside the scope of the *Parratt* rule.\(^{338}\) Allegations that seizure of property interferes with or retaliates for the exercise of other constitutional rights may state violations of those rights.\(^{339}\)

Prisoners retain a limited expectation of privacy in their persons.\(^{340}\) The Second Circuit has held, consistently with most other circuits, that persons newly arrested (at least for minor offenses) may not be strip searched\(^{341}\) without reasonable suspicion that the person is concealing contraband.\(^{342}\)

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\(^{337}\) *Hudson*, 468 U.S. at 531-33, citing *Parratt v. Taylor*, 451 U.S. 527 (1981); see § III.F.4, below.

\(^{338}\) *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).

\(^{339}\) *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).

\(^{340}\) Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005), *pet. for cert. filed*, 75 U.S.L.W 3061 (No. 06-131, July 25, 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*, Peckham v. Wisconsin Dept. of Correction, 141 F.3d 694, 696-97 (7th Cir. 1998).

\(^{341}\) 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).

\(^{342}\) 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); 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. 2006) (striking down blanket policy of strip searching all persons arrested for all drug offenses, including being under the influence of a drug), *pet. for certiorari filed* (Aug. 25, 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).
Less intrusive searches of arrestees may be upheld. However, routine strip searches may be conducted after contact visits of detainees who have been admitted to the jail. Courts have generally upheld strip search practices for which officials presented a reasonable security rationale, including in one Circuit random visual body cavity searches. More intrusive searches may require individualized suspicion. Strip searches unrelated to legitimate security concerns or designed to harass may violate the Fourth Amendment or the Eighth Amendment.

Even searches that are otherwise lawful must be conducted in a reasonable manner. They

In *Skurstenis*, the court also notoriously upheld a manual search for lice of the female plaintiff’s pubic hair by a male employee, immediately before the plaintiff’s release, on the ground that the search was done privately in the clinic by a member of the medical staff and it was done at the earliest opportunity. 236 F.3d at 683-84; *compare* Skurstenis v. Jones, 81 F.Supp. 2d 1228, 1237 (N.D.Ala. 1999) (describing incident as “the search to keep lice from escaping from the jail”). *See also* 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)

343 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).


345 *See* 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).

346 Covino v. Patrissi, 967 F.2d 73, 77-80 (2d Cir. 1992).

347 Vaughan v. Ricketts, 950 F.2d 1464, 1468-69 (9th Cir. 1991) (requiring “reasonable cause” to justify digital rectal searches).

348 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)
must not be needlessly intrusive, abusively performed, or conducted in an unnecessarily public manner. 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. However, applications of this idea to particular sets of facts and justifications has yielded mixed results. One circuit has held that intrusive clothed pat frisks of women prisoners

349 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).

350 See 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).

351 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).

352 Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992), cert. denied, 510 U.S. 931 (1993); see Mills v. City of Barbourville, 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 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)).

353 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...
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.\textsuperscript{354} A recent 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.\textsuperscript{355}

The extraction of bodily fluids is a search.\textsuperscript{356} 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.\textsuperscript{357} Prisoners may be compelled to provide DNA samples pursuant to state or federal statute,\textsuperscript{358} though there is a question as to whether that requirement may be extended to all categories of offenders.\textsuperscript{359}

\textsuperscript{354} Jordan v. Gardner, 986 F.2d 1521, 1526-27 (9th Cir. 1993) (en banc).


\textsuperscript{357} 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).

\textsuperscript{358} Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005), pet. for cert. filed, 75 U.S.L.W 3061 (No. 06-131, July 25, 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)

\textsuperscript{359} 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, kidnapping, arson, and burglary, suggesting its rationale applies to all convicted felons).
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, to confidentiality of information about their medical condition and treatment, and to rights of private choice with respect to refusal of medical treatment, termination of pregnancy, and matters of family relationships such as marriage. They may not be put on view for the delection of the media or the public. The federal Privacy Act provides additional protections to federal prisoners from disclosure of their prison records, and state law may protect broader rights of privacy for

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

361 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. Schrimer, 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); Hunnicutt 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).

362 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 behavior modification treatment in finding a general right to refuse medical treatment).

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, ___ F.3d ___, 2006 WL 2171523 at *1 (2d Cir. 2006); accord, White v. Napoleon, 897 F.2d at 113.


365 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, 125 S.Ct. 2961 (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.”)

III. Procedural Due Process

A. Liberty in prison: Sandin v. Conner

In Sandin v. Conner, the Supreme Court limited the due process protections of prisoners, holding that in-prison restrictions 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.”

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." 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. 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

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368 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.

369 515 U.S. at 484.

370 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).

major disruption in his environment." 372 Under prior law, any substantial period of punitive confinement had been held to require due process protections. 373

The *Sandin* holding set off a major reevaluation of prison due process issues in the lower courts, some of which seem disposed simply to sweep prisoners’ due process rights off the board. 374 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. 375 The paradigm cases are commitment of a prisoner to a mental institution or the involuntary administration of psychotropic drugs. 376 Some courts have held that designation as a sex offender is comparable in severity. 377

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.” 378 Some courts, including the Second Circuit, have thought that the “certain

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

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


375 *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").

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

377 Coleman v. Dretke, 395 F.3d 216, 222-23 (5th Cir. 2004), *cert. denied*, 126 S.Ct. 427 (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).

378 *Sandin*, 515 U.S. at 484.
circumstances” under which states create liberty interests amounted to a similar analysis of statutes and regulations to that prevailing before Sandin. However, the Court appears to have overruled such holdings this Term in Wilkinson v. Austin, in which it reiterated Sandin’s “abrogation of the methodology of parsing the language of particular regulations,” and stated: “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.’” Thus it appears that the state’s statutes and regulations simply have no further role in prison due process analysis.

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

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.”

379 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 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. However convincing that logic might seem, the unequivocal statement in Wilkinson seems to overrule it.


381 Wilkinson, 125 S.Ct. at 2394, quoting Sandin, 515 U.S. at 484.


As noted above, it appears that Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384 (2005), has read the analysis of state statutes and regulations out of the due process inquiry. Even under the former liberty interest analysis, there was no 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. 80
The application of this standard in the circuits varies widely. The best-developed analysis of *Sandin* is in the Second Circuit, which after a series of cases emphasizing the need for careful fact-finding concerning the conditions of confinement, 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. 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 confines 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. 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*.”

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1991); Green v. Ferrell, 801 F.2d 765 (5th Cir. 1986).

383 *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").

384 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 recently 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.

385 *Colon*, 215 F.3d at 232.

386 *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

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. . . .


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
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.\textsuperscript{390}

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 recently acknowledged this “appropriate baseline” question but did not decide it.\textsuperscript{391} 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.\textsuperscript{392} In \textit{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.\textsuperscript{393} In New York, by contrast, there are significant differences between punitive SHU confinement and administrative and protective confinement;\textsuperscript{394} administrative confinement is infrequently used; and in any case administrative segregation in New York is not entirely discretionary, as was the case in \textit{Sandin}.\textsuperscript{395} In fact, the Second Circuit has held that administrative segregation in New York itself involves sufficient constraints on official discretion to give rise to

\textsuperscript{390} 615 F.Supp.2d at 619-23.

\textsuperscript{391} Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384, 2394 (2005) (stating that the “supermax” conditions before it were atypical and significant “under any plausible baseline”).

\textsuperscript{392} \textit{Colon}, 215 F.3d 227, 231.

\textsuperscript{393} \textit{Sandin}, 515 U.S. at 486.

\textsuperscript{394} This may vary from prison to prison. In \textit{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.

\textsuperscript{395} See \textit{Lee}, 26 F.Supp.2d at 633.
a state-created liberty interest, requiring courts to go on to the “atypical and significant” part of the Sandin analysis.\textsuperscript{396} It has acknowledged that administrative segregation of sufficient duration meets the Sandin standard.\textsuperscript{397}

The Supreme Court’s recent 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:

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.\textsuperscript{398}

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 my view and that of most courts

\textsuperscript{396} Sealey v. Giltner, 197 F.3d 578, 584-85 (2d Cir. 1999).


\textsuperscript{398} Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384 (2005); see 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).
that have actually asked the question.\textsuperscript{399} \textit{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. . . . 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.”\textsuperscript{400} Since \textit{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 restrained for reasons other than to assure their appearance at trial.\textsuperscript{401} 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.\textsuperscript{402}

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 time, remain deprivations of liberty under the \textit{Sandin} analysis. \textit{Sandin} echoed Wolff v. McDonnell's characterization of statutory good time as an interest of "real substance."\textsuperscript{403} There are two important

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{399}]
\item 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). \textit{But see} Magluta v. Samples, 375 F.3d 1269, 1278-82 (11th Cir. 2004) (applying \textit{Sandin} in a pre-trial detainee case without asking whether it is appropriate).
\item Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (emphasis supplied); \textit{compare} Sandin, 515 U.S. at 478, 483 (citing \textit{Meachum}; see Benjamin, 264 F.3d at 189 (relying on \textit{Meachum} and \textit{Sandin}).
\item Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1995); \textit{accord}, 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”), \textit{certiorari denied}, 126 S.Ct. 1166 (2006); 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-\textit{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.
\item See 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 \textit{Sandin} purposes).
\item 515 U.S. at 478.
\end{enumerate}
\end{footnotesize}
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. 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. In Wolff, the Court explicitly acknowledged that “good time may be restored,” 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, 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.

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. Others have disagreed and held that recommendation of loss of good time is a liberty deprivation. The Second Circuit has addressed this question only in unpublished opinions. 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 barred


405 515 U.S. at 483.

406 418 U.S. at 561.


by the *Heck/Balisok* rule.\(^{410}\) 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."\(^{411}\) 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.”\(^{412}\) 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.\(^{413}\) In addition, 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.\(^{414}\)

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.\(^{415}\) Denial of parole release remains a liberty deprivation if regulations create a


\(^{411}\) 7 N.Y.C.R.R. § 254.7(a)(1)(vi) (emphasis supplied).

\(^{412}\) 7 N.Y.C.R.R. § 261.4(a).

\(^{413}\) *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).


\(^{415}\) 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
liberty interest. The Supreme Court has recently 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.

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. Several courts have suggested (correctly, in my view) that the

subject to Morrissey holding).

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, 125 S.Ct. 2384, 2397 (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 Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C.Cir. 1996) (stating Greenholtz and Board of Pardons v. 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).

Wilkinson v. Austin, 125 S.Ct. at 2395.

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)
former outcome is dictated by the Supreme Court’s 1997 decision in Young v. Harper\(^{419}\) 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.\(^{420}\) 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.\(^{421}\) (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.

There is no constitutionally based liberty interest in obtaining temporary release.\(^{422}\) Can statutes and regulations create a liberty interest in obtaining temporary release, as is the case with parole?\(^{423}\) Before Sandin v. Conner, some courts had found liberty interests in admission to temporary release in statutes and regulations,\(^{424}\) though most had not, because in most cases the


\(^{420}\) 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).


\(^{422}\) 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).

\(^{423}\) As discussed above, see n. 416, statutes and regulations governing parole release can create a liberty interest if they place sufficient limits on official discretion (though most do not).

\(^{424}\) 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
statutes and regulations left prison officials with so much discretion in granting temporary release to create a liberty interest.\textsuperscript{425} If \textit{Sandin v. Conner}’s requirement that prisoners show “atypical and significant hardship” compared to ordinary prison conditions\textsuperscript{426} 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.\textsuperscript{427} 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 \textit{Young v. Harper},\textsuperscript{428} it would seem that statutes and regulations could create a liberty interest,\textsuperscript{429} just as some parole statutes and regulations do.

\textbf{E. Prison discipline and habeas exhaustion}

State prisoners seeking the return of good time, or other relief affecting the fact or 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.\textsuperscript{430} 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 \textit{Heck v. Humphrey},\textsuperscript{431} 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.\textsuperscript{432}

\begin{footnotes}{
\footnotetext[425]{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).}
\footnotetext[426]{See \S \textit{III.A}, above.}
\footnotetext[427]{See Kitchen v. Upshaw, 286 F.3d 179, 186-87 (4\textsuperscript{th} Cir. 2002).}
\footnotetext[428]{See nn. 419-20, above.}
\footnotetext[429]{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), \textit{aff’d}, 216 F.3d 1075 (3d Cir. 2000).}
\footnotetext[430]{Preiser v. Rodriguez, 411 U.S. 475, 494 (1973).}
\footnotetext[431]{512 U.S. 477 (1994).}
\footnotetext[432]{512 U.S. at 485.}
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, 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. 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. 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.

The Supreme Court has recently 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.” Challenges to state laws, procedures, or standards 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.

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. A prison disciplinary proceeding that reaches

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434 Id., 520 U.S. at 646.
435 Id. at 649.
438 Wilkinson, id.; see 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).
439 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
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.\footnote{440}

The Second Circuit has held that the \textit{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.\footnote{441} 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,\footnote{442} is the subject of a conflict among circuits.\footnote{443}

The Second Circuit has held that habeas corpus is a proper means of seeking release from prison segregation, a conclusion it has not \textit{directly} re-examined since recent Supreme Court decisions concerning the scope of § 1983 and habeas.\footnote{444} Other courts are in disagreement.\footnote{445} The Second Circuit’s holding may not be good law after the Supreme Court’s decision in \textit{Muhammad}

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\textit{findings).}
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\footnote{441} Huang v. Johnson, 251 F.3d 65, 74 (2d Cir. 2001); \textit{accord}, Nonnette v. Small, 316 F.3d 872, 875-76 (9th Cir. 2002), \textit{cert. denied}, 540 U.S. 1218 (2004).


\footnote{443} \textit{See, e.g.}, Gilles v. Davis, 427 F.3d 197, 210 (3d Cir.2005) (rejecting \textit{Huang} holding).

\footnote{444} Boudin v. Thomas, 732 F.2d 1107, 1111 (2d Cir.), \textit{reh'g denied}, 737 F.2d 261, 262 (2d Cir. 1984); \textit{see} Abdul-Hakeem v. Koehler, 910 F.2d 66, 69-70 (2d Cir. 1990) (clarifying \textit{Boudin}, holding that habeas or § 1983 may be used to challenge the place of confinement).

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.

Levine v. Apker, 455 F.3d 71, 78 (2d Cir. 2006), quoting Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001). 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 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 602, 605 (7th Cir. 2004).

The Second Circuit has recently held that prison disciplinary sanctions are civil rather than criminal, rendering the protection against double jeopardy inapplicable between criminal and 93
McDonnell and said they were not “graven in stone.” 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 the hearing. 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." Accordingly, the prisoner must be allowed to retain possession of the notice pending the hearing. It must also be reasonably specific about what the prisoner is accused of doing. Merely listing the number or name of the rule that the prisoner allegedly violated is not enough. 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.

disciplinary proceedings, under the Supreme Court’s current analysis. Porter v. Coughlin, 421 F.3d 141, 146-48 (2d Cir. 2005).


452 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.”)


454 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).


456 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.”)
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. Prisoners also have the right to hear—i.e., to be informed of the evidence in order to respond to it. Prison officials are obligated to take the necessary steps so prisoners can hear and be heard.

In order to hear and be heard, prisoners must be present at the hearing. However, because there is no right to confrontation and cross-examination, the testimony of some witnesses may be taken outside the prisoner’s presence. Under exceptional circumstances, an accused prisoner may be excluded entirely from the disciplinary hearing if the hearing officer "reliably concludes that his

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457 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").

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

459 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).

460 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).

461 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).
presence would unduly threaten institutional safety or undermine correctional goals.\[^{462}\]

c. Witnesses

Prisoners have the right to call witnesses when it is not "unduly hazardous to institutional safety or correctional goals."\[^{463}\] Prison officials can decline to call witnesses if their reasons are "logically related to preventing undue hazards to 'institutional safety or correctional goals.'"\[^{464}\] Witnesses may be denied for reasons such as "irrelevance, lack of necessity, or the hazards presented in individual cases."\[^{465}\] But prison officials may not automatically refuse to call multiple witnesses,\[^{466}\] especially when a prisoner "faces a credibility problem trying to disprove the charges of a prison guard."\[^{467}\] The refusal to call eyewitnesses to a disputed incident is particularly likely to deny due process.\[^{468}\] Blanket policies of denying witnesses, or types of witnesses (including staff


\[^{465}\] Wolff v. McDonnell, 418 U.S. at 566; see 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 involved in the same riot plaintiff was accused of; their written statements had been obtained).

\[^{466}\] 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').

\[^{467}\] Ramer v. Kerby, 936 F.2d 1102, 1104 (10th Cir. 1991).

\[^{468}\] 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
members), have generally been held unconstitutional; the reason for denying a particular witness should be related to the specific facts of the case.\footnote{Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (per curiam), \textit{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).}

If prison officials refuse to call requested witnesses, the burden is on them to explain their decision at least "in a limited manner."\footnote{Ponte v. Real, 471 U.S. 491, 497 (1985); \textit{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), \textit{cert. denied}, 540 U.S. 1114 (2004); Forbes v. Trigg, 976 F.2d at 316-18.} However, they need not explain it or write it down at the time of the hearing; they may present their explanation when sued.\footnote{Ponte v. Real, 471 U.S. at 497.} Prison officials may be required to make reasonable efforts to identify and locate witnesses that the prisoner cannot completely identify.\footnote{Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2d Cir. 1991) (prisoner did not know 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).}

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.\footnote{\textit{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).} In my view this holding is mistaken\footnote{Here’s how the mistake happened. \textit{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 \textit{against} the inmate—\textit{i.e.}, with the right to confrontation and cross-examination, which \textit{Wolff v. McDonnell} did not extend to prison disciplinary hearings. \textit{See} Bolden v. Alston, 810} 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.\textsuperscript{475} 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.\textsuperscript{476}

d. Confrontation and cross-examination

There is no constitutional right to "confrontation and cross-examination of those furnishing evidence against the inmate."\textsuperscript{477} 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.\textsuperscript{478} In the case of staff members, some courts have held that they need not personally testify or be interviewed at all, and that a written report can be sufficient evidence to convict\textsuperscript{479} (though if the prisoner asks for

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\item 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.

\textsuperscript{475} 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).

\textsuperscript{476} 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.


\textsuperscript{478} 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. Lane, 509 F.Supp. 796, 800 (S.D.Ill. 1981) (witnesses can be interviewed over the telephone).

\textsuperscript{479} 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). If witnesses are presented outside the prisoner's presence, due process requires that the prisoner be informed of what they said.\footnote{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").}

\textbf{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."\footnote{Id.} Prison officials have the discretion "to limit access to other inmates to collect statements or to compile other documentary evidence."\footnote{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).} 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.\footnote{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).} Some courts have held that the "\textit{Brady} rule," which requires the disclosure of material exculpatory evidence in criminal prosecutions, also applies to prison disciplinary proceedings.\footnote{Piggie v. Cotton, 344 F.3d at 678, \textit{citing} Brady v. Maryland, 373 U.S. 83 (1963); Thompson v. Hawk, 978 F.Supp. 1421, 1424 (D.Kan. 1997).}

\textit{Videotapes are a type of document;} courts have held that disciplinary bodies must review relevant videotapes, and prisoners must be shown videotapes that are used as evidence against them, unless there is a specific security reason not to do so.\footnote{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).}
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.\footnote{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").}

\textbf{f. Assistance with a defense}

There is no constitutional right to counsel in the disciplinary process.\footnote{Baxter v. Palmigiano, 425 U.S. 308, 315 (1976); Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974).} 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.\footnote{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).} In my view prisoners with significant mental problems should also be entitled to such assistance,\footnote{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). \textit{But see} Horne v. Coughlin, 191 F.3d 244 (2d Cir. 1999) (declining to decide whether a mentally retarded prisoner was entitled to assistance).} since 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.\footnote{State law or prison regulations sometimes require this. \textit{See, e.g.,} Rivera v. Smith, 110 A.D.2d 1043, 489 N.Y.S.2d 131 (N.Y.App.Div. 1985).} 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.\footnote{Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (requiring assistance for prisoners in pre-hearing segregation).}

\footnote{Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (requiring assistance for prisoners in pre-hearing segregation).}
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."\(^{492}\) 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.\(^{493}\) The hearing officer cannot properly serve as the prisoner’s assistant.\(^{494}\)

If a staff member is appointed as an assistant and then does not actually assist the prisoner, that failure to assist denies due process.\(^{495}\)

### 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.\(^{496}\) The courts have held that prison officials in

\(^{492}\) Eng v. Coughlin, 858 F.2d at 898.


\(^{494}\) 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).

\(^{495}\) 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).

\(^{496}\) 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); Hodg es 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).

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).

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).

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).


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).

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 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
h. Standards of proof and evidence


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.” 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 these procedures and retain a semblance of “fundamental fairness.”

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504 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). More recently, 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).

505 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).

506 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
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.\(^{507}\)

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"\(^{508}\) or otherwise get involved in weighing the evidence or second-guessing the disciplinary committee's finding of guilt.\(^{509}\) The courts will intervene only if there is no evidence at all to support the charge,\(^{510}\) or an evidence”

\(^{507}\) 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.").

\(^{508}\) Superintendent v. Hill, 472 U.S. at 455.

\(^{509}\) 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.”).

\(^{510}\) See, e.g., Burnsworth v. Gunderson, 179 F.3d 771, 772-74 (9th Cir. 1999) (there was no evidence that a prisoner who said that if 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 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).
essential element of the charge.\textsuperscript{511} (As the footnoted cases show, most “no 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.\textsuperscript{512}

The Second Circuit, like other courts, has cautioned that “the ‘some evidence’ standard requires ‘reliable evidence.’”\textsuperscript{513} 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 evidence” standard does not “require that credence be given to that evidence which common sense

\textsuperscript{511} 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), \textit{pet. for cert. filed}, 74 U.S.L.W. 3723 (No. 05-1618, June 16, 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).


\textsuperscript{513} 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 \textit{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).
and experience suggest is incredible."\textsuperscript{514} 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.”\textsuperscript{515} 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.\textsuperscript{516}

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.\textsuperscript{517} 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.”\textsuperscript{518} 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 recent 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,\textsuperscript{519} and hearsay is admissible.\textsuperscript{520} In particular,

\textsuperscript{514} 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).

\textsuperscript{515} Viens v. Daniels, 871 F.2d 1328, 1335 (7th Cir. 1989).

\textsuperscript{516} 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).


\textsuperscript{518} Scott v. Kelly, 962 F.2d 145, 147 (2d Cir. 1992).


\textsuperscript{520} 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
written reports by prison staff—-a type of hearsay—-can be sufficient evidence to prove a disciplinary violation, at least as long as they are based on personal knowledge and properly signed and dated. However, courts have cautioned that hearsay that is completely uncorroborated and has no other indications of reliability does not constitute some evidence. The determination whether there was some evidence to support a disciplinary conviction must be limited to evidence in the administrative record. 

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. 

positive reaction for cocaine or cannabinoids, was hearsay but was “some evidence”.

521 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).

522 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).

523 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").

524 Riggins v. Walter, 279 F.3d 422, 428-29 (7th Cir. 1995).

525 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.
A "reasonably reliable chain of custody" for urine samples must be maintained.\(^{526}\)

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.\(^{527}\) The use of polygraph testing as an investigative matter is within the discretion of prison officials.\(^{528}\) Although most courts hold that polygraph evidence is admissible in disciplinary hearings,\(^{529}\) 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.\(^{530}\)

### j. Written disposition

Prisoners are entitled to a "written statement by the factfinders as to the evidence relied on


\(^{529}\) 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).

\(^{530}\) 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).
and the reasons for the disciplinary action." 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."

Several courts have held that the written statement must be reasonably specific about the reasons for the decision. Other courts have been less demanding. 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. . . . 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


\[533\] See, e.g., 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.) 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).

\[534\] 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).

\[535\] 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.
or erroneous considerations.” 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. The very lenient "some evidence" standard of judicial review makes it easy for 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, a practice that "invites disciplinary sanctions on the basis of trumped up charges." Courts allow such proceedings because they understand that there may be a risk of violence and retaliation in connection with disciplinary proceedings. 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

536 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.

537 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 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).

538 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.


540 Sira v. Morton, 380 F.2d 57, 78 (2d Cir. 2004).
authorities” and a statement that other facts are unknown. At the hearing itself, the “due process right to know the evidence upon which a discipline ruling is based” may have to be compromised, but prison officials who do so “must offer a reasonable justification for their actions, if not contemporaneously, then when challenged in a court action.”

At the hearing, courts have recognized that if the usual due process safeguards are bypassed, other safeguards become more necessary. Due process therefore requires that prison officials independently establish the reliability of confidential informants. "A bald assertion by an unidentified person, without more, cannot constitute some evidence of guilt." The Second Circuit

541 Sira v. Morton, 380 F.3d at 72; see 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).

542 Sira v. Morton, 380 F.3d at 74.

543 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.

544 Sira v. Morton, 380 F.3d at 78; McCollum v. Miller, 695 F.2d at 1048-49.

545 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.

546 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
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.\footnote{547}

The Second Circuit appears somewhat more restrictive in this regard than other courts, which have allowed determination of reliability based only on past record.\footnote{548}

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

\footnote{547} 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 just a finding that the informant has provided correct information in the past) (emphasis supplied).

\footnote{548} 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).
Courts have disagreed whether that information must be documented at the time of the hearing or whether it can be reconstructed after the fact.\footnote{550}

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.\footnote{551}

I. False charges

False or unfounded charges do not deny due process as long as prison officials go through the required procedural motions.\footnote{552} 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.\footnote{553}

\footnote{549}Hensley v. Wilson, 850 F.2d at 279.

\footnote{550}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) \textit{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 \textit{in camera} did not establish reliability; the question is what evidence was presented \textit{to the disciplinary board}.)

The Supreme Court in \textit{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 \textit{Hensley v. Wilson} explains at length why that holding is not applicable to documentation of the reliability of confidential informants.

\footnote{551}See Hudson v. Hedgepeth, 92 F.3d 748, 751 (8th Cir. 1996); Sauls v. State, 467 N.W.2d 1, 3 (Iowa App. 1990).

\footnote{552}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 \textit{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).

\footnote{553}See § IV.A.3, below, for a discussion of retaliation claims.
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." 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. Some courts have held that the Constitution forbids punishment for behavior caused or influenced by mental illness.

Courts have also condemned the housing of mentally disturbed inmates in punitive segregation units. Placing mentally ill inmates in punitive segregation may constitute cruel and unusual punishment in some cases, and at a minimum such inmates must be screened by qualified mental health staff before they are placed in segregation.

References:


556 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).


558 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).
Prisoners with significant mental problems facing disciplinary proceedings should also be entitled to assistance from a counsel substitute, in my view.\textsuperscript{559}

\textbf{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.\textsuperscript{560} Punishments may also be held to be cruel and unusual if they are grossly disproportionate to the offense,\textsuperscript{561} but courts are "extremely reluctant" to find prison punishments to be disproportionate.\textsuperscript{562} The Supreme Court upheld a 30-day limit on punitive segregation in one case, but that decision was based mostly on the extremely bad conditions of confinement.\textsuperscript{563} The Eleventh Circuit has held that twelve years and counting in \textit{administrative} segregation after an escape and several escape attempts, but with no significant misconduct in the preceding ten years, raised serious constitutional questions,

\textsuperscript{559} See § III.F.1.f, above.

\textsuperscript{560} 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). \textit{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).


\textsuperscript{562} 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); \textit{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).

especially in light of the allegation that the confinement was in fact punitive. 564

Monetary restitution for property damage or other offenses that cost the prison money is a legitimate form of punishment. 565 Restitution orders must be supported by evidence of the value of the items that the prisoner is alleged to have destroyed or damaged. 566

o. Disciplinary rules

Many things can be forbidden in prison that could not be forbidden in the "free world." 567 It is very hard to get a prison disciplinary rule struck down as unconstitutional on its face unless it severely restricts basic constitutional rights. 568 Courts are somewhat more willing to strike down particular applications of rules. 569

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564 Sheley v. Dugger, 833 F.3d 1420, 1429 (11th Cir. 1987).

565 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).

566 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).

567 See, e.g., 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).


569 See, e.g., Hargis v. Foster, 312 F.3d 404, 406 (9th Cir. 2002) (rule prohibiting “involvement in any disorderly conduct by coercing or attempting to coerce any unconstitutional 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
"Due process requires that inmates receive fair notice of a rule before they can be sanctioned for its violation." This rule does not apply if the conduct in question also violates criminal statutes.

A prison rule that is so vague that people of ordinary intelligence must guess at its meaning denies due process. A rule may be vague "on its face," meaning that under no circumstances can it be applied constitutionally. 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.

For true 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).

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 (2d Cir. 1988); Robles v. Coughlin, 725 F.2d 12, 16 (2d Cir. 1983) and cases cited.

Frazier v. Coughlin, 850 F.2d at 130.


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).

Gayle v. Gonyea, 313 F.3d 677, 680 n.3 (2d 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 (2d 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 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
Courts tolerate a greater degree of vagueness in prison rules than in criminal statutes. 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.

2. Administrative segregation

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 it or in avoiding prolonged retention in it. However, the Supreme Court’s recent decision concerning “supermax” confinement appears to read state statutes and regulations out of the analysis entirely, meaning that atypical and significant hardship by itself gives rise to a liberty interest.

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).

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).

Gibbs v. King, 779 F.2d 1040, 1045-46 (5th Cir.); 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).

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.

See nn. 396-97, 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).

See Tellier v. Fields, 280 F.3d 69, 82 (2d Cir. 2000) (finding liberty interest under federal prison regulations in avoiding protracted administrative segregation).

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.\(^{581}\) 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.\(^{582}\) So, it held, due process requires only "an informal nonadversary review of the information supporting [the prisoner's] administrative confinement."\(^{583}\)

The Supreme Court revisited the question of the process due for administrative confinement in *Wilkinson v. Austin*,\(^{584}\) 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.”\(^{585}\) 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.”\(^{586}\) It also gave weight to scarce resources and the high cost of incarceration, stating that “courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.”\(^{587}\)

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


\(^{582}\) *Id.* at 474; *accord*, Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)


\(^{584}\) 545 U.S. 209, 125 S.Ct. 2384 (2005).

\(^{585}\) *Wilkinson*, 125 S.Ct. at 2395.

\(^{586}\) *Wilkinson*, 125 S.Ct. at 2396.

\(^{587}\) *Wilkinson*, 125 S.Ct. at 2397.
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.

125 S.Ct. at 2397.

442 U.S. 1 (1979) (stating due process requirements for parole release decisions).

Wilkinson, 125 S.Ct. at 2397.

125 S.Ct. at 2396.


and not be made to explain away vague charges set out in a misbehavior report.”

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.”

Due process also requires “an opportunity [for the prisoner] to present his views” to the decision-maker, orally or in writing. 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.” Prisoners must be able to present their views directly to the person who actually makes the decision.

594 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).

595 Wilkinson v. Austin, 125 S.Ct. at 2396.


597 Wilkinson v. Austin, 125 S.Ct. at 2396.

598 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. 125 S.Ct. at 2396. Thus, a decisionmaker before whom the prisoner could not be heard directly could not place the prisoner in supermax confinement.
must occur "within a reasonable time" after the confinement.\footnote{599} What is "reasonable" depends on the reason for delay.\footnote{600}

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.\footnote{601} The courts have not pinpointed how often this review must be conducted. One court has held that every 120 days is sufficient.\footnote{602} Others have held that intervals of around a month are adequate\footnote{603} but intervals approaching a year deny due process.\footnote{604} 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.”\footnote{605} Review must

\footnote{599} Hewitt v. Helms, 459 U.S. at 472.

\footnote{600} 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).

\footnote{601} Hewitt v. Helms, 459 U.S. at 477 n. 9.

\footnote{602} 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).

\footnote{603} Rahman X v. Morgan, 300 F.3d 970, 974 (8th Cir. 2002) (holding 60-day review adequate); Lukn 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).

\footnote{604} 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).

\footnote{605} 125 S.Ct. at 2394-95. 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 to achieve a classification reduction
be meaningful; due process is not satisfied by perfunctory review and rote reiteration of stale justifications.\textsuperscript{606} 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.\textsuperscript{607}

The Court in \textit{Hewitt} did not say anything about statements of reasons, and some applications of \textit{Hewitt} held that they are not required by due process.\textsuperscript{608} However, \textit{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.”\textsuperscript{609} 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 stale justifications" that courts have condemned.\textsuperscript{610}

\begin{thebibliography}{610}
\bibitem{606} Sourbeer v. Robinson, 791 F.2d at 1101; 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 verdict for sham review), \textit{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’”); \textit{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). \textit{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”).

\bibitem{607} Clark v. Brewer, 776 F.2d at 234.

\bibitem{608} \textit{See} Toussaint v. McCarthy, 801 F.2d at 1101; Jones v. Moran, 900 F.Supp. 1267 (N.D.Cal. 1995).

\bibitem{609} Wilkinson v. Austin, 125 S.Ct. at 2396, \textit{citing} Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 16 (1979).

\bibitem{610} Sourbeer v. Robinson, 791 F.2d at 1104; \textit{see} Sheley v. Dugger, 833 F.2d 1420, 1427 (11\textsuperscript{th} Cir. 1987) (hearing ordered to determine if there was continuing justification for twelve-year confinement); \textit{cf.} Wolff v. McDonnell, 418 U.S. 539, 565 (1974) (explaining the need for written records).

\end{thebibliography}
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.\(^{611}\)

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."\(^{612}\) In practice, common reasons include pending disciplinary charges,\(^ {613}\) risk of escape or other security threats,\(^ {614}\) involvement in gangs or other "security threat groups,"\(^ {615}\) and protection of the segregated inmate.\(^ {616}\) Prison officials' reasons deny due process only if they are clearly arbitrary or the

\(^{611}\) 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").

\(^{612}\) 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).

\(^{613}\) Russell v. Coughlin, 910 F.2d 75, 77-78 (2d Cir. 1990).

\(^{614}\) 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).

\(^{615}\) 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*, 125 S.Ct. 2384 (2005) (rejecting the holding that mere gang membership cannot be the basis for indefinite segregation).

\(^{616}\) 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 involuntary protective custody).
segregation is clearly excessive. Some courts have suggested that as the length of segregation increases, prison officials' burden of justification for continued segregation increases.

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. That holding may seem to contrast with the Supreme Court’s endorsement of “rumor, reputation, . . . [and] intuitive judgments” as a basis for segregation. 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. Others have

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617 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).

618 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.

619 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).


621 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).
held that the higher standards of parole or probation revocation “logically apply.”\(^{622}\) Arguably, the latter conclusion is compelled by \textit{Young v. Harper}, which analogized a “pre-parole” program to parole, reasoning which some courts have held applicable to non-institutional temporary release programs.\(^{623}\) Violation of state law protections that exceed federal due process requirements does not deny due process.\(^{624}\)

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.\(^{625}\) However, most prisoner property

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\(^{622}\) 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 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.” \textit{Morrissey v. Brewer}, 408 U.S. 471, 489 (1972), quoted in Friedl, 210 F.3d 84-85. \textit{Friedl} further held that revocation of temporary release must be supported by some evidence in the record of the alleged violation. \textit{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.

\(^{623}\) See nn. 419-20, above.

\(^{624}\) Holcomb v. Lykens, 337 F.3d 217, 224 (2d Cir. 2003).

\(^{625}\) McCrae v. Hankins, 720 F.2d 863, 869 (5th Cir. 1983). Some courts have said that contraband can be seized without due process because prisoners have no property interest in it. \textit{See}, \textit{e.g.}, Lyon v. Farrier, 730 F.3d 525, 527 (8th Cir. 1984). That holding misses the point, which is that
deprivations are not litigable in federal court because of the rule that post-deprivation process suffices for “random and unauthorized” deprivations of property.\textsuperscript{626} That means if the state provides a tort remedy, there is no federal claim.\textsuperscript{627} Deprivations that are not random and unauthorized, but represent authorized or established procedures or policy, do require further due process protections.\textsuperscript{628}

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,\textsuperscript{629} which may be afforded at a disciplinary hearing on contraband charges.\textsuperscript{630}

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there should be a right to be heard on whether the item \textit{is} contraband. Stewart v. McGinnis, 5 F.3d 1031, 1037 (7th Cir. 1993), \textit{cert. denied}, 510 U.S. 1121 (1994); Farid v. Smith, 850 F.2d at 925 (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), \textit{aff’d in pertinent part}, 573 F.2d 118, 131-32 n. 29 (2d Cir. 1978), \textit{rev’d on other grounds sub nom.} Bell v. Wolfish, 441 U.S. 520 (1979).


\textsuperscript{627} Jackson v. Burke, 256 F.3d 93 (2d Cir. 2001).

\textsuperscript{628} Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982); 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. \textit{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).


\textsuperscript{630} Stewart v. McGinnis, 5 F.3d 1031, 1037 (7th Cir. 1993), \textit{cert. denied}, 510 U.S. 1121 (1994). \textit{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.

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The question is whether the seizure was authorized, not whether the officer followed all the rules in carrying it out.\[^{631}\] However, prison officials concerned with security are allowed to take the property first and deal with prisoners’ procedural rights later.\[^{632}\]

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.\[^{633}\]

Money is obviously property and protected by due process.\[^{634}\] If state law or federal statute or regulation creates a right to be paid for prison work, that right is protected by due process,\[^{635}\] subject to limitations in the governing state law.\[^{636}\] However, cash is contraband in most prisons, and

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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.\[^{631}\] However, prison officials concerned with security are allowed to take the property first and deal with prisoners’ procedural rights later.\[^{632}\]

\[^{631}\]Caldwell v. Miller, 790 F.2d at 609; Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984).

\[^{632}\]Beck v. Lyanaugh, 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.

\[^{633}\]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, 125 S.Ct. 189 (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).

\[^{634}\]Alexanian v. New York State Urban Development Corp., 554 F.2d 15, 17 (2d Cir. 1977).

\[^{635}\]Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1327 (9th Cir. 1991).

\[^{636}\]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).
courts have differed over whether prison officials may just confiscate it or if statutory authorization is required. 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. Charges to prisoners, even pre-trial detainees, to defray the cost of their incarceration have generally been upheld.

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. Other non-routine deductions


638 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).

639 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) (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 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, 125 S.Ct. 2543 (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).

640 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).

641 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).
may also require notice and hearing. However, for deductions in the ordinary course of business, due process is satisfied by providing a complete account statement.

IV. Access to Courts

Prisoners have a right of access to courts, which extends to all categories of prisoners and is supposed to be “adequate, effective, and meaningful.” 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. This constitutional right to appointed counsel is mostly limited to criminal trial and appellate proceedings, and to civil proceedings that may deprive a non-prisoner of liberty or other interests of compelling importance.

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643 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).

644 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).


647 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).


649 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).
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.” It has also held that “indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.”

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”
2. in bringing a non-frivolous claim
3. about his criminal conviction or sentence or the conditions of his confinement.

The following subsections address each of these requirements in turn, as well as other aspects of *Lewis*.

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*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 instead very limited assistance from legally trained persons. The strictures of *Lewis* have made these systems very difficult to challenge. For one successful challenge, see *White v. Kautzky*, 386 F.Supp.2d 1042, 1053-56 (N.D. Iowa 2005) (holding 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), *motion to amend denied*, 2006 WL 141854 (N.D.Iowa, Jan. 18, 2006).

*Bounds*, 430 U.S. at 824-25 (1977); see *Phillips v. Hust*, 338 F.Supp.2d 1148, 1162 (D.Or. 2004) (holding that denial of access to a binder necessary to comply with court filing rules denied access to courts).


*Id.*

*Lewis*, 518 U.S. at 355.
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.”655 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 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.656

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.”657 Others assume that obstacles that impair the ability

655 *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).

656 *Lewis*, 518 U.S. at 351; see 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).

657 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.)
to present one's case effectively are also actionable.\textsuperscript{658} The latter view appears to be the 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.\textsuperscript{659}

Courts have held generally that delay by itself is not sufficient injury to constitute a denial of court access,\textsuperscript{660} though in my view that holding would be wrong in a case where the delay resulted

\textsuperscript{658} 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 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).

\textsuperscript{659} 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).

\textsuperscript{660} 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
in a prisoner’s spending unnecessary time in prison, in segregated confinement, or in unlawful conditions that timely court access would have remedied. 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*, 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.

**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. That merely means the claim must be “arguable,” not that the prisoner must prove he would have won the case. The claim must be described

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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)

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662 512 U.S. 477 (1994); *see* § III.E, above.

663 Lewis v. Casey, 343 U.S. at 353. The *Bounds* right to assistance does not extend to frivolous cases. *Id.* at n.3.

664 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).

665 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).
specifically enough so the court can tell if it is frivolous or not; in fact, the prisoner must plead that claim, as well as the court access claim, in the complaint.

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.” 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.—though that doesn’t mean prison officials can obstruct such claims or retaliate against prisoners who file them. 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. It is also questionable whether the criminal sentence/prison conditions limitation applies to cases of interference and retaliation claims.

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

667 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 U.S. 1037 (2002).

668 See § IV.A.1.d, below.

669 Lewis v. Casey, 518 U.S. at 355.

670 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).

671 See § IV.A.2-3, below.

672 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 § 1983 civil rights actions”).

673 See § IV.A.2-3, below.
allegedly was “frustrated or impeded.” 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.” 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. 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." Some courts have held that this means the right of court access is only a "right of initial access to commence a lawsuit."


675 *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.”)

676 *Id.*

677 *Lewis*, 343 U.S. at 354.

678 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, 762 F.2d 851, 855 (10th Cir.) (right limited to filing of complaint or petition), *cert. denied*, 474 U.S. 1032 (1985).
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. 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. . . ". 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). 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.

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. 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.

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679 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.

680 *Id.*, 343 U.S. at 349 (emphasis supplied).

681 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).

682 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).


684 *Lewis, id.*
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. 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. Of course having a criminal defense lawyer does satisfy the right of court access for purposes of the criminal case itself.

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. However, there is also a


686 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).

687 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.

688 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).
separate Sixth Amendment right to defend oneself \textit{pro se}. One federal appeals court has 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.”\footnote{690} Others disagree.\footnote{691}

\section*{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.\footnote{692} 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.”\footnote{693} 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

\footnote{689}{\textit{Faretta} v. \textit{California}, 422 U.S. 806 (1975) (establishing the right to proceed \textit{pro se}). \textit{But see} \textit{Martinez} v. \textit{Court of Appeal of California, Fourth Appellate District}, 528 U.S. 152 (2000) (holding there is no right to self-representation on direct appeal).}

\footnote{690}{\textit{Bribiesca} v. \textit{Galaza}, 215 F.3d 1015, 1020 (9th Cir. 2000) (dictum); \textit{accord}, \textit{Taylor} v. \textit{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”); \textit{Milton} v. \textit{Morris}, 767 F.2d 1443, 1447 (9th Cir. 1985) (holding that the right to a \textit{pro se} criminal defense requires officials to provide "some access to materials and witnesses"); \textit{Kaiser} v. \textit{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).}

\footnote{691}{\textit{See} \textit{United States} v. \textit{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), \textit{cert. denied}, 528 U.S. 904 (1999); \textit{Degrate} v. \textit{Godwin}, 84 F.3d 768, 769 (5th Cir. 1996) (per curiam); \textit{Davis} v. \textit{Milwaukee County}, 225 F.Supp.2d 967, 973 (E.D.Wis. 2002) (holding that exercising the right to a \textit{pro se} defense does not give rise to alternative rights such as access to a law library).}

\footnote{692}{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. \textit{John L. v. Adams}, 969 F.2d 228, 235 (6th Cir. 1992).}

\footnote{693}{\textit{Procunier} v. \textit{Martinez}, 416 U.S. 396, 419 (1974) (striking down a rule barring attorneys from using students and paraprofessionals to conduct prisoner interviews).}
prisoners send their legal papers to court, refusal to allow prisoners to obtain help from other prisoners if there is no other way of getting legal assistance, confiscation or destruction of prisoners’ legal papers and books, or destruction or fabrication of evidence or cover-ups of misconduct that deprive its victims of the means to challenge it in court.

Rules, practices, or actions that interfere with court access are not always unlawful; they will

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694 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 he lost the ability to respond to a dispositive motion and to appeal when his case was dismissed.


696 Brownlee v. Conine, 957 F.2d 353, 354 (7th Cir. 1992); Roman v. Jeffes, 904 F.2d 192, 198 (3d Cir. 1990); Morello v. James, 810 F.2d 344, 347 (2d 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).


697 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); Swekel 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).
be upheld if they satisfy the *Turner v. Safley* standard of a “reasonable relationship” to legitimate penological goals.\(^{698}\) Courts have upheld a variety of rules and actions that make litigation more difficult for prisoners,\(^{699}\) including limits on the amount of legal materials a prisoner may possess.\(^{700}\)

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.\(^{701}\) *Christopher v. Harbury*, a non-prisoner interference case, says so,\(^{702}\) and so have lower courts in prison cases.\(^{703}\)


\(^{699}\) See, e.g., 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 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).

\(^{700}\) 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).

\(^{701}\) See *Lewis*, 518 U.S. at 351-53; see § IV.A.1.b, above.

\(^{702}\) 536 U.S. at 415.

\(^{703}\) 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. Dufrairn, 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
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 interference with court access, which is a separate constitutional principle set out in its own line of cases.

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.”

3. The right to be free from retaliation for using the court system

Prison officials may not retaliate against prisoners for using the courts or trying to do so, whatever the form of the retaliation. The Supreme Court has explained: “The reason why such 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).

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.

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.”).

Rhoden v. Godinez, 1996 WL 559954 *3 (N.D.Ill. 1996); accord, 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).

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.

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,
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.” Such actions may be remedied by an injunction, even if the practices are not formally part of official policy, or by an award of damages.

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.

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).

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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).


Dannenberg 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.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc); accord, Gill v. Pidlypchak, 389 F.3d 379, 380 (2d Cir. 2004); Scott v. Coughlin, 344 F.3d 282, 287-88 (2d Cir. 2003); Bennett v. Goord, 343 F.3d 133,137 (2d 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).

Bennett v. Goord, id.; Carter v. McGrady, 292 F.3d 152, 154 (3d 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
The “adverse action” need not be unconstitutional by itself to violate the rule against retaliation.714 For example, disciplinary charges for which the punishment was not sufficiently “atypical and significant” to require due process protections715 may still be unconstitutional if they were made for retaliatory reasons.716 Courts have held a variety of actions sufficiently “adverse” to support a suit for retaliation.717 In recent years the Second Circuit and 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.718


715 See § III.A, above.

716 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).

717 Morris v. Powell, 449 F.3d 682, 686-87 (5th Cir. 2006) (holding transfer to a more dangerous prison was sufficiently adverse, but brief transfer to a less desirable job was not); 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).

718 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); 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
Retaliation is easy to allege and courts are inclined to be suspicious of such claims.\textsuperscript{719} However, the plaintiff’s burden may also be met by sufficiently convincing circumstantial evidence such as the time sequence of the legal action and the alleged retaliation.\textsuperscript{720}

Retaliation claims, logically, should not be subject to the \textit{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.”\textsuperscript{721} Nor in my view should retaliation claims be limited to retaliation for suits challenging criminal convictions or conditions of confinement, since that \textit{Lewis v. Casey} rule was intended to apply only to prison officials’ affirmative obligation to assist prisoners with law libraries or legal assistance.\textsuperscript{722} However, court decisions to date are to the

\textsuperscript{719} See, \textit{e.g.}, Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003); Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001).

\textsuperscript{720} Bennett v. Goord, 343 F.3d at 138-39 (finding time sequence of litigation and alleged retaliatory discipline 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.

\textsuperscript{721} Thaddeus-X v. Blatter, 175 F.3d at 394; \textit{accord}, Poole v. County of Otero, 271 F.3d 955, 960 (10th Cir. 2001). \textit{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).

\textsuperscript{722} See § IV.A.1.c, above.
B. Alternatives to the right of court access

As shown in the previous section, recent 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, interference with attorney-client consultation or invasion of its confidentiality is a violation of the First Amendment, outside prison \(^{724}\) or inside.\(^{725}\) 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.\(^{726}\) 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

\(^{723}\) 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).

\(^{724}\) 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.

\(^{725}\) 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).

the Sixth Amendment right to counsel. Intrusion on attorney-client confidentiality by eavesdropping, wiretapping, reading legal mail, etc., would seem to be a search within the meaning of the Fourth Amendment. 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. 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. Finally, the Supreme Court has characterized litigation (or, more precisely, arguments made in the course of litigation) as speech; whether that holding has any implications for prisoners’ legal activities has not been explored.

V. Equal Protection

The application of the Equal Protection Clause to prisoners is analytically up for grabs. The Supreme Court has just declared unusually forcefully that prisoners’ claims of racial discrimination are governed by the same strict scrutiny standard as any other racial discrimination claim. 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

727 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.”)

728 In Mockaitis v. Harcleroad, 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).

729 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. 332, 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.


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 recently 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, 2006 WL 1527156 at *1 (2d Cir., June 1, 2006) (unpublished) (citing Benjamin). Neither Dingle nor Benjamin presents any substantial analysis of why Turner should apply to equal protection claims.

Intermediate scrutiny has been applied in some prison gender discrimination cases. Equal protection analysis requires that groups being compared be “similarly situated,” which dooms most claims that prisoners are treated differently from non-prisoners. The new game in

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733 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 recently 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, 2006 WL 1527156 at *1 (2d Cir., June 1, 2006) (unpublished) (citing Benjamin). Neither Dingle nor Benjamin presents any substantial analysis of why Turner should apply to equal protection claims.

734 Johnson v. California, 543 U.S. at 510.


736 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).

737 See, e.g., Glover v. Johnson, 478 F.Supp. 1075, 1079 (E.D.Mich. 1979) (requiring "parity of treatment"). 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. 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”).

738 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
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."

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).

Some courts have held that the line between arrest (governed by the Fourth Amendment’s objective reasonableness test) and pre-trial detention (governed by due process) is the initial judicial probable cause hearing. These holdings occur most often in use of force cases, see n.107, above, but
the Seventh Circuit has recently 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, ___ F.3d ___, 2006 WL 2707970 at *5-7 (7th Cir., Sept. 22, 2006).

Exactly what any of that means is not clear, since the Supreme Court has not heard a detainee conditions case since 1984 and has not elaborated on the application of the Wolfish “no punishment” holding. In the interim, it has 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 has 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 has not addressed 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 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. In that vacuum, many lower courts have abandoned any notion that there

743 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).

744 Wolfish, 441 U.S. at 538-39; accord, Block v. Rutherford, 468 U.S. at 586.

745 Id. at 542.

746 Forget the presumption of innocence. The Court dismissed it in Wolfish as merely a rule of evidence having nothing to do with conditions of confinement. Wolfish, id. at 533.
is a difference between convicts’ and detainees’ rights,\footnote{See, e.g., 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) ("When 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).} 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,\footnote{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).} without attempting to say what the difference might be.\footnote{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).}
vitality” only as the former.\footnote{Hare v. City of Corinth, Miss., 74 F.3d 633, 643 (5th Cir. 1996) (en banc).} Since both the \textit{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 \textit{Bell}’s reasonable relationship test is functionally equivalent to a deliberate indifference inquiry.”\footnote{\textit{Hare}, 74 F.3d at 643.} To invoke the \textit{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 \textit{Bell} test can be meaningfully applied.”\footnote{\textit{Hare}, 74 F.3d at 645.}

The Second Circuit, by contrast, addressed a jail environmental conditions case by noting that the inquiry into punitiveness—essentially an intent requirement—is “of limited utility” in evaluating conditions which mostly “were not affirmatively imposed.”\footnote{Benjamin v. Horn, 343 F.3d 35, 49 (2d Cir. 2003).} The court declined to hold the plaintiffs to the actual knowledge standard of \textit{Farmer v. Brennan}, stating:

\ldots [T]his requirement is unique to Eighth Amendment claims, stemming from that amendment's prohibition of cruel and unusual \textit{punishments} as opposed to cruel and unusual \textit{conditions}. \ldots 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. \ldots [I]n a challenge by pretrial detainees asserting a \textit{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.\footnote{\textit{Benjamin}, \textit{id.} at 51.}

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.”\footnote{\textit{Id.} at n. 18.} And indeed, in other contexts, the Second Circuit has, like other courts, held or assumed that Eighth
Amendment standards do apply in detainee cases.\textsuperscript{756}

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 \textit{Turner v. Safley} reasonable relationship standard applies to pre-trial detainees, since the “penological interests” with which \textit{Turner} was concerned include “interests that related to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes.”\textsuperscript{757}

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.\textsuperscript{758} Persons who have not been convicted of crimes may not be forced to work under the Thirteenth Amendment, though courts sometimes construe this protection narrowly.\textsuperscript{759} The \textit{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

\textsuperscript{756} \textit{See}, e.g., \textit{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).


The Ninth Circuit has taken contradictory positions on the question. In \textit{Mauro v. Arpaio}, 188 F.3d 1054 (9th Cir. 1999) (en banc), \textit{cert. denied}, 529 U.S. 1018 (2000), the court applied the \textit{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. \textit{Id.} at 1059 n.2. The majority ignored \textit{Wolfish}. \textit{Compare id.} at 1067 (dissenting opinion) (pointing out inappropriateness of \textit{Turner} standard in detainee case). Subsequently, it has applied \textit{Wolfish} and rejected \textit{Turner} in a detainee case, ignoring \textit{Mauro}. \textit{Demery v. Arpaio}, 378 F.3d 1020, 1028-29 (9th Cir. 2004), \textit{cert. denied}, 125 S.Ct. 2961 (2005). \textit{Demery} relied in part on \textit{Valdez v. Rosenbaum}, 302 F.3d 1039 (9th Cir. 2002), \textit{cert. denied}, 538 U.S. 1047 (2003), which cited \textit{Mauro} in applying \textit{Wolfish}).

\textsuperscript{758} \textit{Benjamin v. Fraser}, 264 F.3d 175, 184-88 (2d Cir. 2001).

\textsuperscript{759} \textit{See} \textit{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); \textit{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”).
criminal conviction largely extinguishes liberty.\textsuperscript{760} 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.\textsuperscript{761}

\textsuperscript{760} See § III.C, above.

\textsuperscript{761} 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).