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Drug Treatment in Prison — rethinking our priorities?

Are we at last beginning a rational debate on the treatment of drug offenders in the United States? After a decade of harsher punishment and longer prison sentences driving incarceration rates to an all-time high, a few straws in the wind may signal at least a change in emphasis, if not direction. While there is little evidence of an end to the "war on drugs," there is a growing consensus that drug treatment programs, in and outside prison, will be far more effective than harsher punishment in reducing crime and recidivism rates. Among the welcome signs —

Joseph A. Califano, President of The National Center on Addiction and Substance Abuse at Columbia University (CASA) and strong supporter of criminal sanctions for drug use, released *Behind Bars: Substance Abuse and America's Prison Population*, the results of a three-year investigation into connections between drugs and alcohol and increases in U.S. incarceration rates.[1]

On January 8, 1998, Califano, accompanied at a press conference by Drug Czar General Barry McCaffrey and Charles Colson of Prison Fellowship, called for increases in spending for drug and alcohol treatment for prisoners and constructive aftercare services that aid and encourage ex-offenders to stay off drugs.

CASA estimates that 80% or 1.4 million of the men and women in prisons and local jails are locked up because of crimes linked to drugs or alcohol. Some of the 1.4 million prisoners were regular substance abusers and faced charges of drug possession or dealing, while others were arrested for stealing to support their drug habit. Many crimes, including violent crimes, were committed by individuals under the influence of drugs or alcohol.

The study also found strong connections between substance abuse and recidivism. In state prisons 81% of prisoners with five or more convictions were found to be regular drug users compared to only 41% of first time offenders. Despite these statistics most prisoners leave prison without receiving proper treatment for their addiction. As a result, the cycle of abuse and crime continues after they are out.

Comprehensive addiction programs are severely lacking in state and federal prisons. Unfortunately, investments in these services continue to be cut while the number of prisoners in need grows. In 1996 over 840,000 prisoners required drug treatment but only 150,000 received any service. The number of prisoners obtaining treatment decreased by more than 18,000 from 1995.

The report also recommends a stronger emphasis on rehabilitation for non-violent drug offenders rather than increasing spending for bed space. Effective treatment could stabilize the lives of hundreds of thousands of ex-offenders and dramatically reduce their chances of returning to prison. Additionally, substance abuse prevention programs targeting young people, before they have an opportunity to turn to drugs, can save many lives and taxpayer dollars.

The CASA report describes a plan of action to cut taxpayer costs and reduce recidivism and calls its agenda "The Second Front in the War on Crime." In addition to drug treatment in prison for all who need it and incentives (reduced prison time) for successfully completing treatment, CASA supports the abolition of mandatory sentences for nonviolent offenders, treatment alternatives to incarceration, pre-release planning for treatment and aftercare services, job placement services and help for parolees in finding drug-free housing, literacy training and social services.

The National District Attorneys' Association (NDAA) whose membership includes state and local prosecutors in all 50 states, issued a statement supporting CASA's findings. "Simply warehousing prisoners without regard to

[1] For further information contact: *The National Center on Addiction and Substance Abuse at Columbia University, 152 West 57th Street, New York, N.Y. 10019-3310 or call 212-841-5200.*

addressing and dealing with the underlying problem of substance abuse produces unending taxpayer costs. Longer prison terms without treatment, training and follow-up make matters even worse. Such practices breed the statistics that feed the system. They don't prevent or seek to put an end to crime."

The NDAA's spokesperson at the press conference said of the report, "*Behind Bars* should mark a turning point in the war on drugs. It provides the ammunition — hard facts and clear analysis — for what many of us in law enforcement believe is the key to victory: education and treatment.

President Clinton, responding to the CASA report, issued an executive order imposing tougher requirements on the states in reporting the level of drug use in prisons. However, the order also allows states to use federal funds allocated for prison construction to be used for drug treatment programs instead. In addition, the President has asked for $200 million in the next Federal budget to be earmarked for drug testing and drug treatment in state prisons.

Chiefs of police and prison wardens have been clear for a while about the need to change our approach to drug offenders. Chiefs of police surveyed in 1996 called overwhelmingly (85%) for major changes in the way we deal with the drug problem.[2] By a margin of two to one, police chiefs said that putting drug users in court-supervised treatment programs is more effective than prison or jail time. In a survey at the end of 1994, wardens urged a more intelligent use of prison space.[3] 92% said that more use should be made of alternatives to incarceration, including residential drug treatment programs, and 89% favored the expansion of drug treatment programs inside prison. Now it seems that their message is being heard more widely.

The National Rifle Association's Crime Strike project has been one of the strongest voices supporting increased imprisonment. Now even they have softened their official line. While still calling for more prison construction and an end to parole, the NRA now says that longer prison sentences are not the solution for non-violent drug offenders. More emphasis must be placed on drug treatment and other rehabilitative measures to help people stay out of prison.[4]

John DiIulio, professor of politics and public affairs at Princeton University and for many years the favorite academic of politicians calling for more prisons and longer sentences, seems also to have seen the light. Modifying his often stated position that the huge increase in prison populations are a result of the incarceration of violent and repeat offenders, DiIulio now finds that 25% of new inmates entering prison New York state are "drug-only" offenders with no record of other types of crimes. If that estimate is borne out by further research, he says, the criminal justice system is doing "a worse and worse job of diverting drug-only offenders" into alternative programs that would be less expensive and where drug users might be more likely to get treatment.[5]

Now if we can just get **Congress** to listen..... Unfortunately, legislation currently under consideration still focuses on mandatory minimum sentence, increasing funding for prison construction and decreasing expenditure on prevention programs. Of the seven bills currently before Congress to deal with the disparities in crack vs. powder cocaine sentencing, six propose longer sentences for offenses involving powder cocaine. An unfortunate side effect of the current strong economy is the lessening of fiscal pressure to reduce prison building. We can only hope that some state legislatures will show greater wisdom than the federal government, and allocate some of their increased tax revenues to rehabilitation, and in particular drug treatment, rather than continue to fuel the correctional industrial complex.

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[2] *Drugs and Crime Across America: Police Chiefs Speak Out*, Peter D. Hart Research Associates, 1996

[3] U.S. Senate Judiciary Committee's Subcommittee on the Constitution, survey published December 21, 1994.

[4] Crime Strike Director Elizabeth Swazey, on *Power Point*, NPR Radio, March 15, 1998.

[5] "As Crime Rate Falls, Number of Inmates Rises," Fox Butterfield, *New York Times*, January 19, 1998,

The National Prison Project is a special project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities; and to develop alternatives to incarceration.

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Case Law Report -- Highlights of Most Important Cases

by John Boston

U.S. Supreme Court Cases: 1996-97 Term

Color of Law/Qualified Immunity

Richardson v. McKnight, 117 S.Ct. 2100 (1997). Employees of a private prison are not entitled to qualified immunity. The Court previously held in *Wyatt v. Cole* that private defendants who had invoked state judicial processes later declared unconstitutional were not entitled to qualified immunity. There is no firmly rooted tradition of immunity applicable to privately employed prison guards. The rationale of protecting public officials from distraction and inhibition in performing their duties does not apply to private companies that are subject to market constraints (i.e., damage awards will hurt their competitiveness, but guards who are too timid will make them vulnerable to replacement by firms that do a better job). Other features of privatization, including the use of insurance and indemnification of employees and the lack of civil service constraints on salaries and benefits, further differentiate private prison staff from public.

The Court leaves open the question whether the defendant officers actually acted under color of state law; it cites *Lugar v. Edmondson Oil Co.* but not *West v. Atkins*. It notes the decision is limited to the context of a private firm, systematically organized to assume a big and long administrative task with limited direct supervision by the government, acting for profit and potentially in competition with other firms. The Court also does not exclude the possibility of a "good faith defense."

Procedural Due Process

Young v. Harper, 117 S.Ct. 1148 (1997). A "pre-parole" program which was virtually identical to parole is subject to the same due process constraints on revocation as is parole. The court rejects the view that pre-parole is really just a lower level of custody.

Transfer and Admission to Mental Health Facilities/Ex Post Facto Laws

Kansas v. Hendricks, 117 S.Ct. 2072 (1997). A Sexually Violent Predator Act establishes procedures for the civil commitment of persons who because of a "mental abnormality" or a "personality disorder" are likely to engage in "predatory acts of sexual violence." "Mental abnormality" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." The statute applies to prisoners convicted of sexually violent offenses scheduled for release, persons charged with such offenses but incompetent to stand trial, and persons found not guilty by reason of insanity *or just not guilty* of such an offense. A jury found Hendricks to fit the statutory terms after testimony in which he substantially confessed to them.

The definition of "mental abnormality" satisfies substantive due process requirements. A finding of dangerousness, supplemented by a finding of a volitional impairment rendering the person "dangerous beyond [his or her] control," suffices to support indefinite incarceration. The phrase "mental illness" has no talismanic significance and such a finding is not required.

The statute does not impose criminal liability, a conclusion the Court bases in part on the fact that it applies to people who have been *acquitted*. Nor does it operate as a deterrent; persons committed under it are treated like involuntarily committed persons and not like prisoners (i.e., in a separate unit in the prison system run by non-Department of Correction personnel). Thus, it is not punishment. The fact that safeguards equivalent to those in a criminal trial are used does not make the proceeding criminal in nature.

The alleged lack of meaningful treatment does not make the statute punitive. Incapacitation is a legitimate purpose if a disorder is untreatable, and in any case Hendricks got some treatment (per facts not legitimately in the record).

Since the statute is not punitive, there are no claims under either the Double Jeopardy Clause or the Ex Post Facto Clause. As to the latter, the statute has no retroactive effect but acts upon a determination of the person's current condition.

Good Time/Crowding/Ex Post Facto Laws

Lynce v. Mathis, 117 S.Ct. 891 (1997). Pursuant to a 1983 statute, Florida awarded "provisional credits" to prisoners hastening their release dates as a result of overcrowding. The petitioner, convicted in 1986, was released and then returned to prison after the state attorney general issued an opinion stating that a 1992 statute rescinded all such credits.

The retroactive cancellation of the petitioner's credits violated the Ex Post Facto Clause. This prohibition is "only one aspect of the broader constitutional protection against arbitrary changes in the law." (895) Whether the credits at issue were intended to reward good

conduct or relieve overcrowding was secondary; the question is whether the new statute objectively lengthened petitioner's prison time. The Court rejects the argument that crowding-related gain time is not "part of the sentence."

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Edwards v. Balisok, 117 S.Ct. 1584 (1997). A prisoner who sued over a disciplinary conviction could not proceed under § 1983 without first getting the conviction set aside via state proceeding or federal habeas corpus because success on his claim would necessarily imply the invalidity of the conviction. The plaintiff complained that he was denied the right to put on a defense by calling witnesses. At 1588: "This is an obvious procedural defect, and state and federal courts have reinstated good time credits (absent a new hearing) when it is established." *Id.*:

> Respondent's claim, however, goes even further, asserting that the cause of the exclusion of the exculpatory evidence was the deceit and bias of the hearing officer himself. . . . The due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence.

At 1589: "We conclude, . . . that respondent's claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983."

The district court should not have stayed the case while the plaintiff sought restoration of good time credits through state remedies. If a case is not legally cognizable under § 1983, it should be dismissed.

The concurring Justices (Ginsburg joined by Souter and Breyer) "agree that Balisok's claim is not cognizable under 42 U.S.C. § 1983 to the extent that it is 'based on allegations of deceit and bias on the part of the decisionmaker,'" but note that there are other procedural defects including failure to provide a statement of reasons. Defects like this do not necessarily imply the invalidity of the good time deprivation and are immediately cognizable under § 1983.

NON-PRISON CASES

Equal Protection

M.L.B. v. S.L.J., 117 S.Ct. 555 (1996). Refusal to permit indigents to appeal *in forma pauperis* from termination of parental rights is unconstitutional. The Court analogizes the case to *Griffin*, involving criminal appeals, and not to cases involving other kinds of civil proceedings, because of the importance of the interest at stake and the fact that the state is proceeding against the individual. The Court notes that the *Griffin* line of cases reflect both equal protection and due process concerns and that no "precise rationale" has been composed; the Court suggests that equal protection is more germane. Justice Thomas, with Justice Scalia concurring, says he would overrule *Griffin* and its progeny if the question were presented. Even Rehnquist doesn't buy this.

Sexual Abuse/Qualified Immunity

United States v. Lanier, 117 S.Ct. 1219 (1997). A state court judge was convicted of criminal civil rights violations for sexually assaulting judicial employees and litigants. The Sixth Circuit held that in the absence of a Supreme Court decision finding a right to be free from unjustified assault or invasions of bodily integrity in a "fundamentally similar" situation, the defendant had insufficient notice that his conduct was prohibited by the statute.

The appeals court used the wrong standard. A Supreme Court decision is not necessary; in qualified immunity cases, court of appeals cases may establish the law. The "fundamentally similar" standard is unnecessarily high; the "clearly established" standard of civil liability is sufficient. At 1227:

> This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," . . .

Municipalities/Use of Force

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 117 S.Ct. 1382 (1997). The plaintiff was injured by a police officer who had been hired despite his misdemeanor record which included assault and battery, resisting arrest and public drunkenness.

At 1388: ". . . [A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate

decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Id.*:

> . . . [I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

At 1389: ". . . [P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." By contrast, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Past cases where the Court has recognized municipal liability based on a single decision have been of the former sort, where evidence that the municipality had acted and the plaintiff had been deprived of federal rights "also proved fault and causation."

The Court distinguishes cases involving a "program" of inadequate training; if the training does not prevent constitutional violations, municipal decisionnmakers may eventually be put on notice that a new program is needed. Continued adherence to an approach that they know or should know has failed to prevent tortious conduct may establish the necessary deliberate indifference. The existence of a pattern of tortious conduct by inadequately trained employees may show that lack of training is the moving force behind a plaintiff's injury.

The analogy between failure to train cases and failure to screen cases is not convincing. *Canton* said a plaintiff might prevail on failure to train without showing a pattern of violations since the violation may be a "highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." (1391) However, the consequences of a single hiring decision are not so easily predictable; showing that inadequate scrutiny of an applicant's background would make a violation of rights more likely does not support an inference that failure to screen a particular applicant produced a specific constitutional violation. Liability must be based on "a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." (1392) This hiring decision could not have been deliberately indifferent unless, in light of the record the Sheriff did not look at, the officer's use of excessive force would have been a plainly obvious consequence of the hiring decision.

Municipalities

McMillian v. Monroe County, Ala., 117 S.Ct. 1734 (1997). An Alabama sheriff is a policymaker for the state, not the county, when acting in his law enforcement capacity. This conclusion does not necessarily apply to actions by the sheriff in other capacities.

Modification of Judgments

Agostini v. Felton, 117 S.Ct. 1997 (1997). The Supreme Court's overruling of constitutional precedent in this case entitles the defendants to relief under Rule 60(b)(5). The lower courts, however, should not reject the application of direct precedent even if it appears that that precedent has been overruled by implication.

State Officials and Agencies

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997). A suit by an Indian tribe alleging ownership of lands under a treaty and seeking declaratory and injunctive relief was the functional equivalent of a quiet title action, and was barred by the Eleventh Amendment; the Court declines to apply the *Ex parte Young* fiction in these circumstances. Justice Kennedy's majority opinion at §§ II.B-II.D sets out a revisionist view of Eleventh Amendment jurisprudence calling for a case-by-case inquiry into whether *Ex parte Young* should be applied depending on the weight of the state's interests. This is too much even for Justices O'Connor, Scalia, and Thomas, who concur in all but those sections of the opinion, leaving Kennedy and Rehnquist alone on that point.

State Officials and Agencies

Regents of the University of California v. Doe, 117 S.Ct. 900 (1997). The fact that a state agency will be indemnified by the federal government does not exempt a suit against it from the Eleventh Amendment's prohibition.

Remedial Principles

Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997). In a redistricting case, the state Attorney General's office agreed to a settlement, which one of the plaintiffs didn't like. It was not necessary for the court to have declared the original plan unconstitutional for it to approve the settlement. Approving the settlement was not inconsistent with the principle that a state should have the opportunity to make its own redistricting decisions; the state took that opportunity by having its

Attorney General submit a settlement proposal.

The court was not precluded from approving the settlement by the opposition of one party; that party had the right to be heard at the settlement approval proceeding. The settlement did not improperly dispose of the plaintiff's claim by cutting him off from a remedy; it gave him an element of the relief he had sought. The fact that he didn't have a judgment was irrelevant where he had the substance of relief. The fact that he didn't have the remedy he wanted is, apparently, irrelevant since the remedy the court imposed by settlement is not unconstitutional.

Class Actions--Certification of Classes, Settlement of Actions

Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997). When a class action is filed simultaneously with a settlement proposal, the court's review of the settlement should be accompanied by a review of the propriety of class certification, although in that context the court need not consider the manageability of the trial that the parties propose to avoid. All the other requirements of Rule 23 must be met.

The proposed class, a national class of persons exposed to asbestos who would otherwise bring suit separately under the tort laws of the various states, including persons falling into different categories (ill, merely exposed, etc.), did not meet the requirement of Rule 23(b)(3) that common issues predominate over individual issues. There are also potential conflicts of interest compromising representational adequacy. Finally, there are major problems of notice to persons without current symptoms, as well as to future spouses and children who may have consortium claims. The court questions whether sufficient notice could ever be given "to legions so unselfconscious and amorphous."

Standing

Raines v. Byrd, 117 S.Ct. 2312 (1997). This is the Line Item Veto Act case, which holds that federal legislators lack standing to challenge the statute. Standing boilerplate is succinctly recited

Court of Appeals Cases

Temporary Release/Work Assignments/ Personal Property

Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996). The plaintiff alleged that a requirement that he contribute ten per cent of his work-release wages from a private employer to an "Elderly/Victim Compensation Fund" violated the Fair Labor Standards Act.

The court declines to apply the usual "economic reality" test under the FLSA, which it finds "unserviceable" in the jailer-inmate context. Instead, it holds categorically that prison custodians are not employers of inmates in work-release programs.

The work-release agreement was not a contract of adhesion under state law nor the product of duress, and the work-release statute authorized conditioning work-release participation on the contribution. Apparently no federal constitutional claims were raised in this case.

AIDS/Medical Records/Hygiene/Recreation and Exercise/Qualified Immunity/Equal Protection/ Procedural Due Process

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995). The HIV-infected plaintiff alleged that prison officials disclosed his HIV status and denied him barbering and yard privileges because of his status.

There is no clearly established right in the privacy of medical records. Disclosure of medical information might violate the Eighth Amendment; "the fact that the punishment was purely psychological would not excuse it." (523) However, such a right was not established with respect to the acts alleged by the defendants in 1992, even had it been established that some medical disclosures might be unconstitutional. *Woods v. White* does not have precedential value, since it is a district court decision affirmed without published opinion. At 525: ". . . [W]e hold that warnings to endangered inmates or staff do not violate the Constitution just because they are ad hoc" nor because they violate state law. "Any duty to protect prisoners from lethal encounters with their fellows that is derived from the Eighth Amendment would take precedence over a state law."

At 526:

> It is one thing to warn other prisoners that an inmate is an HIV carrier; it is another to "punish" him for being a carrier by refusing to allow him to get a haircut or to exercise in the prison yard. Although this is the first appellate case in which these specific modalities of punishing HIV carriers have been alleged, it has long been clear that the Eighth Amendment forbids the state to punish people for a physical condition, as distinct from acts, and that the equal protection clause forbids the state to treat one group, including a group of prison inmates, arbitrarily worse than another. If the *only* reason that the defendants denied haircuts and yard privileges to Anderson was that he was HIV-positive, and there is no *conceivable* justification for these as AIDS-fighting measures, then the absence of a case involving this

specific form of arbitrary treatment would not confer immunity on the defendants. A constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent.

A state regulation providing that all prisons "shall provide every committed person with access to . . . barber facilities" is sufficient to create an entitlement. At 527: "There is no novelty to this claim . . . and therefore no basis for a defense of immunity." However, *Sandin v. Conner* will have to be considered on remand.

At 527:

. . . To deny a prisoner *all* opportunities for exercise outside his cell would, the cases suggest, violate the Eighth Amendment unless the prisoner posed an acute security risk if allowed out of his cell for even a short time. . . . Prisoners are entitled to reasonable medical care, and exercise is now regarded in many quarters as an indispensable component of preventive medicine. But cases that purport to recognize a right to *outdoor* exercise . . . involve special circumstances, such as that the prisoners were confined to their cells almost 24 hours a day and were not offered alternative indoor exercise facilities, . . . or the only alternative offered to the prisoners was exercise in the corridor outside their cells rather than in an indoor exercise facility and the lack of outdoor exercise was merely one of a number of circumstances that in the aggregate constituted the infliction of cruel and unusual punishment. *Wilkerson v. Maggio* . . . held that an hour a day of indoor exercise satisfied the constitutional minimum.

The court then adds: "But these are matters for the district judge to consider in the first instance."

Transportation to Courts

Sampley v. Duckworth, 72 F.3d 528 (7th Cir. 1995). District courts lack authority to impose on the losing plaintiff the costs to a third party (the state Department of Corrections) of a writ of *habeas corpus ad testificandum.* The court distinguishes prior authority imposing such costs because it assumed that the individual defendants--rather than a third-party agency--had paid for the transportation.

Religion--Practices/QualifiedImmunity

Hayes v. Long, 72 F.3d 70 (8th Cir. 1995). Muslim inmates had a clearly established right not to handle pork in 1992, based on a district court decision that they have a right not to be exposed to food that has been in contact with pork or pork products. The result might be different if the defendants had shown that making the plaintiff handle pork met the *Turner* test, but they didn't try.

Searches--Person, Living Quarters /Qualified Immunity

Harding v. Vilmer, 72 F.3d 91 (8th Cir. 1995). The plaintiff alleged that he was subjected to retaliatory strip and cell searches in violation of the Eighth Amendment. It was clearly established that such searches could violate the Eighth Amendment. Given the factual disputes about the searches, there is no appellate jurisdiction over the defendant's qualified immunity appeal.

Service of Process/Procedural Due Process/Access to Courts

United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160 (3d Cir. 1995). Service by the government of a notice of civil forfeiture proceedings at the address of the seizure, rather than in prison where the government knew the claimant to be incarcerated, denied due process. Service in prison of a notice of the earlier administrative proceedings did not provide notice of the judicial proceedings. Service on the criminal defense attorney did not constitute adequate notice, since the attorney did not at that point represent the claimant in the forfeiture proceedings.

Habeas Corpus/State-Federal Comity

Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995). The plaintiff sued for damages, alleging an unconstitutional arrest and search and seizure in connection with his criminal prosecution. These claims are not barred by *Heck* because neither, if successful, would *necessarily* undermine the validity of the plaintiff's conviction. However, the *Younger* abstention doctrine bars the federal court from going forward until the state prosecution (now on appeal) is completed, since the issues in the federal suit might also be adjudicated in the state proceeding. The damage claims should therefore be stayed.

Use of Force/Pro Se Litigation

Eason v. Holt, 73 F.3d 600 (5th Cir. 1996). The plaintiff alleged that he was thrown to the ground, handcuffed, and kicked by prison staff without provocation. After a *Spears* hearing, the magistrate judge dismissed on the ground that he alleged no injury, or alternatively that the injury he alleged was *de minimis.*

The court improperly ignored the plaintiff's testimony concerning his injuries; once a *Spears* hearing is held, the testimony elicited becomes "part of the total filing" and should be considered on a motion to dismiss, even when an

amended complaint has been subsequently filed.

The alternative ground, that the injury was *de minimis*, is inconsistent with the allegations in the complaint. The court does not elaborate.

Procedural Due Process--Administrative Segregation

Pichardo v. Kinker, 73 F.3d 612 (5th Cir. 1996). Under *Sandin*, administrative segregation, without more, does not constitute a deprivation of a liberty interest.

Procedural Due Process--Temporary Release/Ex Post Facto Laws

Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996). The plaintiff had participated in work release for almost four years and was permitted to open his own vehicle repair business. His work release was revoked "because he remains in denial of his crime" and had too little accountability at his repair business. The revocation followed a highly publicized event involving another inmate. He is ineligible to be returned to work release because of new regulations about sex offenders.

Under *Sandin*, the plaintiff had no liberty interest in staying on work release. It did not affect the duration of his sentence, and his transfer to a more secure facility subjected him to conditions "no different from those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." (1160) Thus, the deprivation did not meet the "threshold test" of *Sandin*. The existence of a temporary release agreement does not alter this analysis.

New temporary release regulations barring sex offenders from work release until they successfully completed a treatment program, admitted their offense, etc., did not violate the Ex Post Facto Clause. The court notes the dispute among circuits as to whether a regulation constitutes a "law" for this purpose, but holds that in any case there is no violation. Under *Morales*, "this change in the conditions determining the nature of [the plaintiff's] confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for ex post facto purposes." (1163)

Federal Officials and Prisons/Law Libraries and Law Books

United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995). At 1491: "[T]he Sixth Amendment demands that a *pro se* defendant who is incarcerated be afforded reasonable access to 'law books, witnesses, or other tools to prepare a defense.'" (Citations omitted) This right must be balanced against legitimate security concerns and resource constraints. This defendant, who is a law school graduate, received 120-140 hours in the law library before trial and about five hours a week during the trial. He also had an attorney appointed to assist him. His access was adequate. The five hours a week during trial was justified by resource constraints.

The defendant was not denied access to witnesses, since they could visit him on 48 hours' notice and the provision of minimal personal information, and approval was given, and since he had access to unmonitored telephone calls and had access to his co-defendant at pretrial hearings and during trial. His inability to use the telephone during trial (since he was at court during the hours it was available) was remedied by letting him use the courthouse phone at lunch.

Correspondence--Legal and Official/Correspondence--Non-Legal/In Forma Pauperis

Treff v. Galetka, 74 F.3d 191 (10th Cir. 1996). The plaintiff claimed that the mail room supervisor interfered with his incoming and outgoing mail, legal and otherwise. His court access rights were not violated because in one case the court accepted his filing that was allegedly late because of defendants' actions, and in another case, it was the court's decision and not the defendants' not to consider it.

At 195: "A refusal to process any mail from a prisoner impermissibly interferes with the addressee's First and Fourteenth Amendment rights." This right is clearly established. The claim is rejected because the defendant was not shown to be involved in any deprivation and the deprivation was not shown to have occurred. The plaintiff's main evidence is that his mail was not responded to.

The costs of service were properly imposed against an IFP litigant whose financial status improved during the course of the litigation.

Pre-Trial Detainees/Habeas Corpus /Length of Stay

Hamilton v. Lyons, 74 F.3d 99 (5th Cir. 1996). The plaintiff alleged that an investigator told him that he would not be transferred out of a lousy county jail to a better one until he gave a statement. While this allegation might support a Fifth Amendment claim, it would imply the invalidity of his subsequent convictions and sentences and is barred by *Heck*.

A parolee arrested on a new charge is not entitled to the benefit of the part of the *Wolfish* "punishment" standard that permits inference of punitive intent from the lack of a reasonable relationship to legitimate governmental interests. Rather, the parolee must prove expressed intent to punish for the new charge. At 106:

> In [detainee] cases, a finding that the government intended to punish the detainee is equivalent to a finding that the government

intended to punish the detainee for the pending charge. Thus, an inference that governmental intent was punitive is equivalent to an inference that the challenged condition is unconstitutional.

However, such an inference is not warranted in the case of the detained parolee. Unlike the typical pretrial detainee, the justification for the detention of a detained parolee is dual. . . . [T]he detention and subsequent reincarceration of a parolee are only *triggered* by the new arrest; detention and reincarceration are *justified* by the prior conviction. . . . For detained parolees, the due process right to be free from punishment for a *pending* charge is *not* equivalent to the right to be free from punishment altogether.

The court does not remand for findings because the alleged three-day denial of visiting, telephone access, recreation, mail, legal materials, sheets and showers was *de minimis*. (If that's true, why did the court engage in the preceding theoretical exercise?)

Suicide Prevention/Negligence, Deliberate Indifference and Intent/Pre-Trial Detainees

Hare v. City of Corinth, Miss., 74 F.3d 633 (5th Cir. 1996) (en banc). Pre-trial detainee suicide cases should be decided under the same subjective definition of deliberate indifference used under the Eighth Amendment. This conclusion applies both to medical care and failure to protect claims. At 643:

> . . . [T]he *Bell* test retains vitality only when a pretrial detainee attacks general conditions, practices, rules, or restrictions of pretrial confinement. When, by contrast, a pretrial detainee's claim is based on a jail official's episodic acts or omissions, the *Bell* test is inapplicable, and hence the proper inquiry is whether the official had a culpable state of mind in acting or failing to act.

Deliberate indifference is the measure of culpability for *all* such episodic acts or omissions. This doesn't really change the law, because "a proper application of *Bell*'s reasonable relationship test is functionally equivalent to a deliberate indifference inquiry." There is no constitutionally significant difference between the rights of detainees and convicts to basic human needs, so the claims of both groups are governed by the subjective deliberate indifference standard. The court justifies this conclusion by noting that both the Eighth Amendment deliberate indifference standard and the due process right of detainees turn on the presence or absence of "punishment."

To invoke the *Bell* test, a detainee must show that the challenged act or omission "implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice." Otherwise, the detainee must show that acts or omissions "were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice to which the *Bell* test can be meaningfully applied." (645)

At 645-46: "Formulating a gossamer standard higher than gross negligence but lower than deliberate indifference is unwise because it would demand distinctions so fine as to be meaningless."

Only one of 17 judges objects to this conclusion.

Religion--Practices--Beards, Hair, Dress/Religion--Services Within Institution

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996). The plaintiff's claim based on religious rights "encompasses two separate theories: (1) deprivation of his constitutionally protected First Amendment right to the free exercise of his religion; and (2) deprivation of his statutorily protected right, under RFRA, to the free exercise of his religion."

The Native American plaintiff challenged the prison's hair length regulations and sweat lodge ceremonies. The plaintiff's First Amendment claim fails under the *Turner* test. His RFRA claim fails too. Although RFRA was intended to displace *O'Lone*, it was not intended to impose a standard more rigorous than that in effect before *O'Lone*. That case law incorporated the same principle of deference recognized in *O'Lone*. Its "[restrictions] no greater than necessary" principle is "functionally synonymous" with the least restrictive means prong of RFRA. (1554) However, prison officials must offer more than conclusory statements and post hoc rationalizations for their conduct. (1554 n. 10) The usual security justifications for hair length regulations (concealment of contraband and gang identification) are sufficient. The sweat lodge ceremony could be prohibited because it would provide an opportunity for assault, escape, drug use and homosexual conduct outside the view of prison guards, and other prisoners might consider it favoritism for the Native Americans to get their own religious facility. The defendants had offered less restrictive alternatives (i.e., ceremonies not inside an opaque structure), but the plaintiff had rejected them.

The dissenting judge objects to the majority's dismissal of the 1975 case of *Teterud v. Burns*, which struck down hair length regulations, and extensively

discusses the constitutionality of RFRA.

Disabled/Procedural Due Process--Administrative Segregation/Medical Care--Standards of Liability--Deliberate Indifference/Federal Officials and Prisons

Crowder v. True, 74 F.3d 812 (7th Cir. 1996). Under *Sandin*, federal prison regulations do not create a liberty interest in staying out of administrative segregation.

Allegations that the paraplegic plaintiff was denied his wheelchair because it did not fit through the cell doors, denied physical therapy sessions, and deprived of exercise, recreation, hygienic care, and medical care do not raise an inference of deliberate indifference to serious medical needs.

Religion--Services Within Institution/State Officials and Agencies/Pendent and Supplemental Claims

Ganther v. Ingle, 75 F.3d 207 (5th Cir. 1996). The plaintiff alleged that he had been permitted to conduct meetings in the yard of the House Hold Faith Full Gospel Church, with himself as pastor, but when he asked to hold services in the chapel, his request was denied and his yard meetings were terminated.

The plaintiff's damage claim against the defendants for intentional infliction of emotional distress was properly dismissed under the Eleventh Amendment because Texas has not waived its sovereign immunity as to such claims. (This makes no sense.)

The plaintiff's injunctive claim was improperly dismissed under the Eleventh Amendment, since there was one original defendant who was still in his position and in any case the successors of the others were automatically substituted as official capacity defendants.

The defendants were entitled to qualified immunity. At the time of the challenged conduct, the law did not require equality of resources for less populous denominations, and under the *Turner* standard the defendants brought forward sufficient reasons for stopping his yard meetings. (These included: administrative and space limits and the policy of not holding denominational services; the belief that allowing a prisoner to lead services violated "the spirit of *Ruiz*," presumably referring to giving inmates positions of authority; and the danger that inmate groups could meet for other purposes in the guise of religious services.)

The district court should not have refused to hear the plaintiff's RFRA claim on the ground that it was a new claim; his assertion of RFRA in his summary judgment motion should have been taken as a request to amend the complaint, and should have been granted.

Pre-Trial Detainees/Procedural Due Process--Disciplinary Proceedings/Searches--Living Quarters/Procedural Due Process/Damages--Punitive /Mootness

Mitchell v. Dupnik, 75 F.3d 517 (9th Cir. 1995). A search of the plaintiff's cell, including his legal papers, outside his presence does not violate the Fourth Amendment. A jail policy excepting legal papers from such searches did not create a liberty interest under *Sandin*. The fact that the plaintiff is a detainee and not a convict does not make a difference in this case.

A blanket prohibition on witness testimony during disciplinary proceedings for inmates in administrative segregation denies due process. The court distinguishes between a prisoner's right to cross-examine and confront adverse witnesses (which is nonexistent) and his right to call his own witnesses (at issue here). The fact that the plaintiff is a detainee renders *Sandin* inapplicable, since *Sandin* is based on "the expected parameters of the sentence imposed by a court of law." Pre-trial detainees are entitled to a due process hearing before they are restrained for reasons other than to assure their appearance at trial. *Wolff v. McDonnell* applies.

The district court should not have granted summary judgment based on the failure to tape-record a hearing. The fact that a new hearing resulted in a shorter sentence does not show that the failure to tape-record caused the injury.

Punitive damages cannot be awarded against defendants in their official capacities.

The plaintiff's injunctive claim is moot since he is no longer in the jail. The district court initially noted that stays in the jail were "typically" only 38 days, meeting the "evading review" requirement to avoid mootness. At the time, the plaintiff was expecting to be back in the jail for a post-conviction proceeding, meeting the "capable of repetition" requirement; but since that proceeding is over, the claim is now moot.

ProceduralDueProcess--Classification/Exhaustion of Remedies/Habeas Corpus

Miller v. Indiana Dept. of Corrections, 75 F.3d 330 (7th Cir. 1996).

Heck v. Humphrey applies to administrative rulings as well as court judgments. The plaintiff, who alleged that he was denied good time credits as a result of a classification decision that denied due process, was barred from proceeding in federal court because he had failed to "vindicate the challenge through the proper means." (331) The court does not say what the proper means is.

Procedural Due Process--Disciplinary Proceedings

McGuinness v. DuBois, 75 F.3d 794 (1st Cir. 1996). An across-the-board

policy of denying live testimony from inmate witnesses in disciplinary hearings held in the segregation unit did not deny due process in this case, though the court leaves open the possibility that on other facts it might. Since the plaintiff never made clear what the witnesses' testimony would have added to their written statements, the refusal to call them based on the policy was not arbitrary or capricious.

Procedural Due Process--Disciplinary Proceedings/ Statutes of Limitations/Personal Involvement and Supervisory Liability

Black v. Coughlin, 76 F.3d 72 (2d Cir. 1996). A prisoner's claim of unlawful disciplinary proceedings accrued for limitations purposes on the date that the convictions were reversed by a state court, not the date they were administratively affirmed. The court adopts the reasoning of *Heck v. Humphrey* on this point without addressing whether the rest of *Heck*--the proposition that there is no claim until and unless a state court or agency reverses---applies to prison disciplinary proceedings.

The Commissioner is not automatically personally involved in administrative appeals of disciplinary proceedings; evidence of involvement in the specific case is required.

Injunctive Relief--Preliminary/Medical Care--Isolation/Length of Stay/ Religion--Practices/Administrative Segregation/ Negligence, Deliberate Indifference and Intent/Exercise

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996). The Rastafarian plaintiff refused to take a screening test for "latent" tuberculosis and pursuant to DOCS policy was placed in "medical keeplock," released only for one ten-minute shower a week. Medical keeplock does not involve respiratory isolation; a prisoner who was found to *have* latent TB would neither be keeplocked nor be isolated. The plaintiff had been in medical keeplock for three and a half years before the district court granted a preliminary injunction. The district court granted a stay pending appeal, which the appeals court initially continued but vacated after oral argument.

A preliminary injunction is generally granted on a showing of irreparable harm and either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships decisively in the movant's favor. Where a movant seeks to enjoin "government action taken in the public interest pursuant to a statutory or regulatory scheme," the moving party must show likelihood of success on the merits. When the injunction would alter the status quo or give the movant substantially all the relief sought, which cannot then be undone, there must be a "clear" or "substantial" showing of likelihood of success. The plaintiff is required to meet the highest of these standards, and does.

First Amendment free exercise claims are governed by *O'Lone* but RFRA claims are governed by the compelling interest test. The plaintiff's religious rights are "substantially burdened" by the requirement that he take a PPD test. The court rejects the defendants' claim that his rights are not burdened because the test involves a naturally derived protein rather than an artificial substance; courts may review the sincerity and religious nature of beliefs but lack the power to examine their verity. A substantial burden exists whenever there is "substantial pressure" to violate one's beliefs, and the choice of submitting to the test or being keeplocked meets this standard.

There is no compelling interest in putting the plaintiff to this choice. Although preventing the spread of TB is a compelling interest, medical keeplock does not serve it, since it does not isolate prisoners respiratorily, and those prisoners who are found to have latent TB and refuse to take their medication are not keeplocked or isolated. Nor does it serve the interest in administering an effective screening program as applied to the plaintiff, since he has already refused for three and a half years and further keeplock is unlikely to yield the necessary information. There is no evidence that letting him out would undermine the deterrent effect of medical keeplock.

Medical keeplock is not the least restrictive alternative. The defendants could treat the plaintiff as if he were known to have latent TB by making him submit periodically to chest x-rays and sputum samples.

At 477: ". . . [W]e have previously held that correctional officials have an affirmative obligation to protect inmates from infectious disease."

The plaintiff showed a likelihood of success on his Eighth Amendment claim. Three years keeplock with only ten minutes a week out of cell was a serious deprivation of the right to exercise, and the fact that defendants then proposed to permit an hour of exercise daily and three showers a week did not eliminate the Eighth Amendment violation in light of his prior length of stay and the possibility of indefinite further confinement. Deliberate indifference was shown by the defendants' knowledge of the plaintiff's undisputed conditions and the harm it caused; the issue was not defendants' intent in having a testing policy but their intent in keeping the plaintiff locked up.

At 482: "The district court . . . properly relied on the presumption of irreparable injury that flows from a

violation of constitutional rights. In any event, it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm." The violation of free exercise rights under RFRA is also irreparable harm. Also, the plaintiff claimed physical injury (headaches, hair loss, rashes, difficulty walking).

Personal Property/Procedural Due Process--Property

Mahers v. Halford, 76 F.3d 951 (8th Cir. 1996). The defendants automatically apply 20% of all money received by prisoners to their restitution obligations.

Prisoners have a property interest in money received from outside sources. However, they are not entitled to complete control over their money while in prison. Applying part of their money to restitution obligations does not absolutely deprive them of the benefit of it, since it lessens the debts they will owe on release. The court cites *Beeks v. Hundley*, 34 F.3d 658 (8th Cir. 1994), which upheld application of a § 1983 damage award to a restitution order.

The policy did not deny due process. Each prisoner had been protected by the due process of a criminal trial or plea proceeding and a sentencing hearing, with the opportunity to raise inability to pay, before a restitution order was entered. This met the requirement of pre-deprivation process. Individual restitution plans developed by the defendants could be reviewed by the state courts. There is no requirement of further pre-deprivation process before deductions are made. At subsequent stages, where a debt had already come into existence, notice of the 20% policy and the continued opportunity to contest payment plans provided the process due.

More recent state legislation provides for a pre-deprivation hearing for the deductions at issue, in response to a state court decision on due process grounds.

Procedural Due Process--Classification/ Summary Judgment

Samuels v. Mockry, 77 F.3d 34 (2d Cir. 1996). The plaintiff was placed in a "limited privileges" program for refusing a work assignment, which he disputed. The district court should not have granted summary judgment based on conclusory allegations, not based on personal knowledge, of the reason for his placement.

Sandin v. Conner is retroactive. The district court should consider whether *Sandin* bars the plaintiff's claim, which may require fact-finding the district court had no opportunity to conduct.

Hazardous Conditions and Substances/Medical Care--Standards of Liability--Serious Medical Needs

Oliver v. Dees, 77 F.3d 156 (7th Cir. 1996). The plaintiff alleged that he had asthma but was housed with cellmates who smoked. He had been housed with non-smoking cellmates in other prisons and a doctor issued a similar instruction when he arrived at his current prison.

The plaintiff did not have a serious medical need and was not denied "the minimal civilized measure of life's necessities." He "was asthmatic and showed signs of distress. A few fellow inmates said smoke made Mr. Oliver wheeze and that he showed other signs of discomfort. That's it." (160) He had been transferred from the prison and prison policy had subsequently been changed to accommodate non-smokers' preferences more fully. He got plenty of medical care and never required hospitalization; his records describe his asthma as "mild." The doctor denied that he had "ordered" that the plaintiff not be celled with a smoker.

The dissenting judge points out that the majority brushes off substantial evidence of the seriousness of the plaintiff's condition.

Telephones / Pre-Trial Detainees/ Federal Officials and Prisons

United States v. van Poyck, 77 F.3d 285 (9th Cir. 1996). Here's another criminal defendant who made incriminating statements over the telephones of a federal jail, despite signing a form consenting to routine monitoring and taping, and despite the notice over the telephone that calls may be monitored. The defendant had no expectation of privacy under the circumstances. Even if he thought his calls were private, "no prisoner should reasonably expect privacy in his outbound telephone calls." (Footnote and citations omitted) Even if there were a reasonable expectation of privacy, security concerns justify such recordings and render them reasonable under the Fourth Amendment. The defendant also consented to the taping by signing the form, reading the signs, and reading the prisoner's manual warning of the recordings.

The taping and monitoring does not violate the Omnibus Crime Control and Safe Streets Act of 1968. It falls within the "law enforcement exception" under which telephones being used by an "investigative or law enforcement officer in the ordinary course of his duties" are excluded from the statute's coverage. Consent also vitiates the statutory claim.

The taping policy does not apply to "properly placed" calls to attorneys.

Use of Force/Habeas Corpus

Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996). Execution by lethal gas as practiced in California is cruel and unusual. The district court's conclusions, after an eight-day trial, that cyanide gas execution hurts too much and takes too long (i.e., several minutes) are dispositive. There was no need for the district court to engage in analysis of legislative trends.

The means of carrying out a sentence of death may be challenged via § 1983;

plaintiffs are not required to proceed via habeas corpus because they are not challenging the fact or duration of their sentences. At 305: "Method of execution challenges are analogous to challenges to conditions of confinement."

Procedural Due Process--Disciplinary Proceedings

Williams v. Fountain, 77 F.3d 372 (11th Cir. 1996). The use of confidential informants in disciplinary proceedings must be supported in the record by documentation of some good faith investigation and findings as to their credibility and the reliability of the information they have provided. The failure to do so here does not render the plaintiff's conviction invalid because the plaintiff's own admission that he was involved in a fight provided "some evidence" to support it, even though he denied the accusation that he used a weapon. (The defendants "tread precariously close to the due process line" here.)

At 374 n. 3: The court assumes that sanctions including a year of solitary are atypical and significant under *Sandin*.

Use of Force/Chemical Agents/ Restraints/Hygiene/Procedural Due Process

Williams v. Benjamin, 77 F.3d 756 (4th Cir. 1996). The plaintiff alleged that he was sprayed with mace, confined in four-point restraints on a bare metal bed frame and not allowed to wash off the mace, and left there for eight hours without medical care or access to a toilet.

At 761: "Although an inmate asserting an excessive force claim is thus required to meet this *more* demanding standard with regard to the subjective component of Eighth Amendment analysis, the objective component of an excessive force claim is *less* demanding than that necessary for conditions-of-confinement or inadequate medical care claims."

As to the subjective component, the court applies the factors set out in *Whitley v. Albers* (762):

> [1] the need for application of force, [2] the relationship between that need and the amount of force used, [3] the threat "reasonably perceived by the responsible officials," and [4] "any efforts made to temper the severity of a forceful response."

The use of mace did not violate the Eighth Amendment. The plaintiff had thrown water out of his cell and then refused to remove his arm from the food service window, along with several other inmates. (The court attempts to state the standard for use of chemical agents favorably to prisoners while ruling against this one.)

The decision to use four-point restraints, made minutes after the gassing, does not by itself support an inference of wantonness.

Leaving the plaintiff restrained for eight hours without access to a toilet, medical attention, or the ability to wash off the mace may have violated the Eighth Amendment, since there was no evidence that the plaintiff had done anything threatening (even verbally) after being restrained, and the defendants did not dispute that he was "hollering with pain." At 765: "Deference to prison officials does not give them constitutional license to torture inmates."

Compliance with the prison system's restraint policy would be powerful evidence that the officers acted in good faith, noncompliance with it could be evidence to the opposite effect. Defendants' compliance with the requirement of medical review and of leaving prisoners restrained for no longer than necessary was disputed.

Placement in four-point restraints is an "atypical and significant hardship" under *Sandin*." Regulations providing that four-point restraints will not be imposed except as a last resort to prevent harm and with medical approval arguably create a liberty interest. However, there was no due process violation. The plaintiff made no argument as to what sort of process was due, and the restraints were imposed after a disturbance, when process is not possible. Post-deprivation process is adequate. But (at 769 n. 10): at some point the continuation of restraints would require due process. The court declines to say when and also does not examine the possible contradiction between this statement and its holding about post-deprivation process.

Procedural, Jurisdictional and Litigation Questions/Sanctions

Long v. Simmons, 77 F.3d 878 (5th Cir. 1996). The plaintiff alleged that he was placed in a cell with a prisoner against whom he had testified in a murder trial, who stabbed him. His case was dismissed because the plaintiff did not return a form sent to him under new district court procedures. He filed a motion to reinstate, and then filed a notice of appeal before it was acted on, then sought voluntary dismissal of the motion to reinstate.

The appeal was timely because the motion to reinstate was filed timely. The court applies the revised rule, which refers to timely filing rather than timely service, retroactively.

The district court abused its discretion in dismissing the case (*de facto* with prejudice because the statute of limitations had run) absent evidence that the plaintiff failed to return the form to delay or out of contumaciousness, and without trying lesser sanctions first.

Habeas Corpus/Res Judicata and Collateral Estoppel

Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996). The plaintiff's allegation that he was not given *Miranda* warnings and that his interrogation was coercive and involved physical and psychological duress is not barred by *Preiser* and *Heck* because if successful, the suit would not necessarily invalidate his conviction. However, his claim was barred by issue preclusion because it was necessarily litigated at the suppression hearing in the criminal proceeding.

Procedural Due Process/Use of Force

Bonin v. Calderon, 77 F.3d 1155 (9th Cir. 1996). There is no liberty interest under California law in choosing between execution by lethal injection and the gas chamber, since state law says that if one of these methods is held invalid, the other shall be applied. The gas chamber had been held invalid.

Use of Force/Evidentiary Questions/ Pendent and Supplemental Claims; State Law in Federal Courts

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996). The plaintiff alleged two incidents of excessive force. A jury awarded $1250 compensatory and no punitive damages on incident 1 and awarded a *defendant* $1500 in compensatory damages on incident 2 on his counterclaim. The plaintiff appealed.

The plaintiff is entitled to a new trial on incident 2. The district judge abused his discretion by admitting parts of the plaintiff's disciplinary history. If the plaintiff had put his intent at issue, e.g. by saying that he had kicked the officer unintentionally, it might have been admissible, but the plaintiff denied kicking the officer at all. It might have been relevant to the reasonableness of the defendants' actions if they had presented evidence that they were aware of his disciplinary record, but they didn't. It was not relevant to show a pattern of conduct, "for the proper purpose of pattern evidence is principally to show the identity of the perpetrator or the absence of mistake." (292) In addition, the record is "replete with defense statements revealing precisely and explicitly that the records were intended to show Hynes' 'character'"--exactly what Rule 404(b) is intended to prevent. The error was not harmless given the defense's "relentless emphasis" on them.

The district court did not abuse its discretion in excluding cross-examination indicating that one of the defendant officers had been criticized for her dealing with fellow employees, since this was not sufficiently relevant to her treatment of inmates, and it was not admissible to show a "temperament problem." Cross-examination indicating that a defendant made a false workers' compensation claim and was once suspended for giving false information should have been permitted because it is probative of the witness's truthfulness.

A use of force report recounting incidents that the writer did not observe was inadmissible. The present-sense impression exception applies only to statements made at the time of the perception. The public records exception is also generally limited to matters *observed*. The report may be admissible as a business record, but defendants need to lay the proper foundation by showing that the information was "transmitted by a person with knowledge."

Punitive Segregation

O'Leary v. Iowa State Men's Reformatory, 79 F.3d 82 (8th Cir. 1996). The plaintiffs were placed on a "progressive four-day behavior management program" after committing disciplinary offenses in the segregation unit. On the first day, the prisoner is deprived of underwear, blankets and mattress, exercise and visits but not normal diet, sanitation and hygienic supplies; he can read but not retain his mail. The items are gradually restored. If the prisoner misbehaves on a day, he must repeat that day. (The deprivation of underwear was not a complete deprivation of clothing; they kept their jumpsuits.)

This program did not deny "the minimal civilized measures of life's necessities" or represent official knowledge and disregard of "an excessive risk to plaintiffs' health or safety."

Appeal

Benavides v. Bureau of Prisons, 79 F.3d 1211 (D.C.Cir. 1996). A prisoner who did not receive timely notice of the denial of a motion, in part because he was transferred five times in less than a month, could get the time for appeal reopened months. The seven-day "filing window" of Rule 4(a)(6), triggered when a party receives notice from the clerk or another party of the entry of judgment, did not open when the plaintiff was told by an attorney representing him on another matter that his motion had been decided.

Statutes of Limitations/Protection from Inmate Assault

Soto v. Brooklyn Correctional Facility, 80 F.3d 34 (2d Cir. 1996). The plaintiff sued the jail, but no individuals, because he was placed back in the same housing area as inmates who had previously assaulted him, and who assaulted him again. His failure to name the correction officers involved was a "mistake concerning the identity of the proper party" that relates back to the filing of the complaint under Rule 15(c), Fed.R.Civ.P., which applies to mistakes of law as well as fact. (This rationale may not apply to a litigant who knows he has to name individuals but fails to

name all of them or the right ones.) The parties being added appeared to have the knowledge required by Rule 15(c). At 36: "Since government officials are charged with knowing the law . . . any BCF corrections officers who were aware of a lawsuit arising out of the attack on Soto 'knew or should have known' that they, not BCF, were subject to liability. . . ." The district court must determine on remand whether the officers had the notice required by the rule, and should first permit reasonable discovery for identification of the officers. The district court "might also wish to reconsider Soto's request for appointment of counsel." (37)

Publications

Montcalm Publishing Corp. v. Beck, 80 F.3d 105 (4th Cir. 1996). Two prisoners sued over the censorship of *Gallery*, apparently a *Penthouse* knock-off, and the publisher--who learned of the suit when one of the prisoners asked for a refund on his subscription---intervened.

The publisher has a constitutional interest in communicating with its inmate-subscribers, and it is entitled to some process when its publication is censored; the court suggests sending it the same notice that the prisoners get, but leaves it to the district court to decide the form of remedy. At 109: "An inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication, and while the inmate is free to notify the publisher and ask for help in challenging the prison authorities' decision, the publisher's First Amendment right must not depend on that." The court notes that *Thornburgh v. Abbott* explicitly cited a notice-to-sender provision in upholding the federal censorship regulations.

Telephones

United States v. Workman, 80 F.3d 688 (2d Cir. 1996). The criminal defendant's telephone conversations from a state prison were taped and the tapes used in his federal criminal prosecution. A sign near the telephone indicating that conversations "are subject to electronic monitoring," combined with statements in an inmate orientation handbook and state prison regulations, gave sufficient notice that his use of the telephone despite these warnings constituted consent for purposes of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The fact that none of these statements explicitly said that using the telephone constituted consent did not matter. Nor did the fact that none of the warnings mentioned recording. There was no violation of the Fourth Amendment rights of the non-prisoner who was also recorded, since the consent of the prisoner was sufficient to render the taping reasonable.

Use of Force/Pleading/Administrative Segregation/ Emergency/Totality of Conditions Length of Stay/Medical Care--Standards of Liability--Serious MedicalNeeds/ProceduralDueProcess--Disciplinary Proceedings/Restraints/ Procedural, Jurisdictional and Litigation Questions

Mitchell v. Maynard, 80 F.3d 1434 (10th Cir. 1996). The plaintiff, along with other prisoners, was transferred after a riot in which hostages were taken. The district judge dismissed his claim as frivolous, and was reversed; he then granted judgment as a matter of law to the defendants rather than submitting the case to a jury.

Evidence that showed that the plaintiff, who was naked and shackled, fell to the ground and was beaten by several guards who shouted racial epithets at him, could support a jury finding of malicious and sadistic behavior even if the situation at the receiving prison could be characterized as an emergency. However, the plaintiff failed to name the officers in his complaint, and naming them in a brief is not sufficient.

The plaintiff was stripped of his clothing, placed in a concrete cell with no heat, provided with no mattress, blankets, or bedding of any kind, deprived of his prescription eyeglasses, not allowed out-of-cell exercise, not provided with writing utensils, not provided adequate ventilation or hot water, and allowed minimal amounts of toilet paper. These conditions variously continued for days, weeks or months. At 1442:

> The combination of these factors is a significant departure from the "healthy habilitative environment" the state is required to provide its inmates. . . . In *Ramos*, we recognized "a state must provide [an inmate with] reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing)."

A reasonable jury could find that a warden who denied the plaintiff's grievance had knowledge of these conditions and condoned them.

The warden said, "I made the decision to deprive them of certain things until they showed me that they were going to act like men and not become disruptive and tear up another unit and cause my staff problems." At 1443: "We agree that the opinions of prison administrators carry great weight; however, their discretion is not absolute." *Id.*:

> In a case such as this, where the alleged deprivations are numerous and inhumane, we cannot blindly acquiesce to [the warden's] authority. . . . In particular we are troubled by the lack of heat combined with the lack of clothing and bedding, the

> deprivation of exercise for an extended period of time, the lack of hot water, the denial of toilet paper, the removal of his prescription eyeglasses, the lack of adequate ventilation and the denial of writing utensils.

Once the jury decided whom to believe about the length of time these were denied (24 hours to five and a half months, depending on the item), it could have found an Eighth Amendment violation.

The plaintiff's medical care claim is rejected because he shows no knowledge on the part of any named defendant of his condition or that he requested and was denied medical care; when someone did notice his condition, he received treatment. The fact that he didn't ask for medical care undermines his claim that his needs were serious.

Due process was not violated; the plaintiff signed a waiver of the right to call witnesses and have a staff assistant. There was some evidence to sustain the conviction. (In fact, this appears to have been an egregiously trumped-up disciplinary proceeding.) Failure to comply with defendants' own rules concerning who could be a hearing officer did not deny due process.

Shackling a prisoner plaintiff at trial is within the court's discretion. In this case, since the case never went to the jury, the plaintiff was not prejudiced.

The plaintiff's claims of retaliation for protected conduct were properly dismissed, since he cited only the Eighth Amendment in his pre-trial order.

The court directs that the case be assigned to another district judge on remand given the original judge's stated view that the plaintiff's Eighth Amendment claims were a waste of time.

Religion--Practices, Services Within Institution/Equal Protection

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996). At 1179: ". . . [A] substantial burden on the free exercise of religion, within the meaning of the [Religious Freedom Restoration] Act, is one that forces adherents of a religion to refrain from religiously motivated conduct or expression that manifests a central tenet of a person's religious belief, or compels conduct or expression that is contrary to those beliefs." The court adopts this "more generous definition" while noting that other courts have held that a "substantial burden" must compel the religious adherent to do something that is forbidden or prevent him from doing something that is required. The "decisive argument" in favor of the broader definition is "the undesirability of making judges arbiters of religious law," which is unfeasible in the case of nonhierarchical religions. Courts will still have to "separate center from periphery in religious disputes," but that "sociological" inquiry is more manageable than is taking sides in religious disputes about what is mandated. One plaintiff's claim of failure to accommodate the needs of Ramadan observation should not have been dismissed on the pleadings. The other plaintiff's claim that adherents of the Moorish Science Temple were not permitted to have a banquet for their founder's birthday. Prison officials had grouped the 300 religious denominations into four umbrella groups (Catholic, Jewish, Muslim and Protestant), each of which is allowed one or two picnic days a year, which they can use for sacred feasts, and it is obviously impossible to permit 300 feasts a year.

At 1180: "The prison officials do not have to do handsprings to accommodate the religious needs of inmates, and the less central an observance is to the religion in question the less the officials must do." One plaintiff's claim under the Equal Protection Clause, alleging that prison officials were more accommodating to Christians than Muslims, should not have been dismissed on the pleadings. This claim could also be described as a First Amendment claim. The RFRA does not displace it. At 1181: ". . . [A] statute cannot either enlarge or contract the Constitution."

Procedural Due Process--Disciplinary Proceedings,Work Assignments/Prison Records

Frazier v. Coughlin, 81 F.3d 313 (2d Cir. 1996). A prisoner who was confined in special housing for 12 days before a disciplinary hearing failed to show that the conditions of his confinement were "dramatically different" from prison conditions generally. Therefore the deprivation was not atypical and significant under *Sandin*.

The plaintiff's confinement in a "Close Supervision Unit" did not deprive him of a liberty interest, since there was no difference in lock-in time from general population, and since the only other substantial differences involved exclusion from certain prison jobs and the assignment of more correctional officers to supervise the unit. Prisoners do not have a liberty interest in particular job assignments or in the deployment of prison staff.

The court does not reach the claim of a due process right to be free of erroneous information in prison records because the information at issue was not erroneous, even though it related to the underlying allegations of a disciplinary conviction that had been expunged.

Religion--Names

Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996). Requiring a prisoner to use both his Muslim name and the name he was committed under on his correspondence did not violate his rights under the Religious Freedom Restoration Act. The state has a compelling interest

in prison security, and an efficient identification system for correspondence is part of that.

Procedural Due Process--Disciplinary Proceedings/ Searches--Urinalysis

Meeks v. McBride, 81 F.3d 717 (7th Cir. 1996). A prisoner was accused by an officer of smoking marijuana and received a disciplinary charge. Five days later he was subjected to a urine test. His toxicology report was positive and he received a second charge based solely on it. The first charge was dismissed for insufficient evidence. The second charge resulted in conviction and loss of good time.

The toxicology report did not meet the "some evidence" standard because there were two instances of unreliable identifying information in the report and the plaintiff showed that there was another prisoner with the same name who had been confused with him in prior disciplinary proceedings. The state can't rely on the evidence from the first proceeding because that had been rejected at a hearing as unpersuasive. The state submitted no evidence of the number of urine samples taken on the day in question or the proper identifying information for the other Mr. Meeks, which would permit some assessment of the likelihood of error, and there is no indication in the record of why the disciplinary board rejected the plaintiff's exculpatory evidence.

Under the "some evidence" standard, the court does not weigh exculpatory evidence unless it "directly undercuts the reliability of the evidence" against the prisoner, in which case there must be sufficient evidence of reliability of the latter evidence, and an explanation of why the exculpatory evidence is rejected.

The plaintiff's double jeopardy claim is without merit, since there is no evidence that the two charges stemmed from the same alleged use of marijuana, and more fundamentally because the Double Jeopardy Clause does not apply to prison disciplinary proceedings. At 722:

> . . . [T]o apply double jeopardy protection to prohibit a subsequent disciplinary hearing after acquittal would impose an extreme burden on prison administrators. If an acquittal in an earlier hearing were to preclude a subsequent hearing on the same charge, the overriding interest of prison administrators to act swiftly to maintain institutional order could be compromised in the interest of developing the evidence needed to obtain a conviction.

Pre-Trial Detainees/Service of Process

Antonelli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996). At 1426: "The Marshals Service's failure to complete service, once furnished with the necessary identifying information, is automatically 'good cause' requiring an extension of time under Rule 4(m)." The defendant officers' last names and their specific posts at the jail were sufficient information, even if more than one officer with a particular last name worked at the jail.

At 1428: "A prison official violates the constitutional rights of a pretrial detainee only when he acts with deliberate indifference."

Personal Involvement and Supervisory Liability (1428-29): Even if complaints were directed personally to the County Sheriff and Director of Corrections, "neither could realistically be expected to be personally involved in resolving a situation pertaining to a particular inmate unless it were of the gravest nature. However, [they] can be expected to know of or participate in creating systemic, as opposed to localized, situations."

Negligence, Deliberate Indifference and Intent (1429): Even though the plaintiff generally pleaded deliberate indifference, he specifically mentioned negligence in connection with certain allegations, and these must therefore be dismissed.

Crowding (1430): An allegation that the plaintiff was forced to sleep on the floor for one night because of overcrowded conditions does not state a constitutional claim.

Procedural Due Process--Property (1430): Allegations of property confiscation by staff, not alleged to take place according to established state procedure, and without an allegation of inadequate post-deprivation procedures, did not state a constitutional claim.

Procedural Due Process; Emergency; Cell Confinement (1430): Allegations of arbitrary lockdowns do not state a constitutional claim because there is no liberty interest in out-of-cell movement.

Correspondence--Legal (1430): Allegations of opening, delaying and stealing legal mail, without indication of detriment to the plaintiff's court access, do not state a constitutional claim.

Grievances (1430): There is no substantive right to a grievance procedure, and state procedures do not give rise to a liberty interest.

Unsentenced Prisoners and Convicts Held in Jails, Good Time, Rehabilitation (1431): The failure to transfer a prisoner from a detention facility to a penitentiary after his conviction does not state a claim, despite the loss of opportunity to earn good time and enter rehabilitation programs, because "there is no due process right to the correctional facility of his choice" and no such right to earn good time credits.

Pest Control (1431): An allegation that the prison was sprayed twice by a pest control service during 16 months

does not negate deliberate indifference in light of allegations of continuing severe infestation. The court tries to distance itself from earlier precedent dismissing infestation claims as trivial.

Correspondence; Legal (1431-32): Allegations of deliberate obstruction of mail delivery meet the deliberate indifference standard. "The district court was correct that prison employees can open official mail sent by a court clerk to an inmate without infringing on any privacy right." However, allegations that "legal mail" was opened, possibly including privileged mail to and from attorneys, and that mail was sometimes stolen, sufficiently alleged violations of free speech and association.

Food (1432): Allegations of nutritionally deficient food state a constitutional claim.

Exercise and Recreation (1432): "Lack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." Allegations that the plaintiff's unit was not called for up to seven weeks and at most was called for an hour once every two weeks, in an area without room to recreate, sufficiently alleged a constitutional claim.

Mental Health Care, Medication (1432): Allegations that the plaintiff's "pleas" for psychological treatment were "ignored" state a claim, as do allegations of denial of necessary medication.

Publications, Lighting (1433): "To the extent that Mr. Antonelli may be suggesting that he has the right to leave his cell to go to a general reading library, he has no claim." However, an allegation that "his access to reading material was greatly circumscribed" states a claim under the First Amendment and the Due Process Clause, though not the Eighth Amendment. "Any right to access to printed materials protected by the First Amendment and (in the case of a pre-trial detainee) the Due Process Clause is necessarily implicated where there is objectively insufficient lighting to enable reading." Insufficient lighting may also violate the Eighth Amendment.

Noise (1433): Allegations that excessive noise "occurred every night, often all night, interrupting or preventing [plaintiff's] sleep," stated a constitutional claim.

Ventilation and Heating (1433): Exposure to extremely cold temperatures through failure to provide blankets states a constitutional claim.

Classification--Race (1433): An allegation that the plaintiff was deprived of out-of-cell movement permitted to other prisoners because he is white stated an equal protection claim.

Medical Care

Steele v. Choi, 82 F.3d 175 (7th Cir. 1996). Three sets of doctors diagnosed the plaintiff as overdosing on Percocet, despite the lack of evidence of drug abuse and the negative drug test; almost a week later, after continuing serious symptoms, he was sent to a hospital where he was diagnosed with a brain hemorrhage resulting from an aneurysm. He sustained substantial brain damage.

The main defendant was not deliberately indifferent, since he did not know the plaintiff had a hemorrhage and did not know of a risk of such. The defendant cannot be held liable on the ground that the risk was "obvious." Two other sets of doctors reached the same misdiagnosis. The claim that a minimally competent doctor would have properly diagnosed the hemorrhage is an objective approach, rather than the subjective approach required by *Farmer v. Brennan.* There is no evidence that the symptoms were consistent only with hemorrhage, or that the doctor was ignoring the plaintiff's needs. At 179:

> If the symptoms plainly called for a particular medical treatment--the leg is broken, so it must be set; the person is not breathing, so CPR must be administered--a doctor's deliberate decision not to furnish the treatment might be actionable under § 1983. If Steele's chart had page after page documenting a heart condition, and he came in with a set of symptoms consistent with heart attack, it is possible that the *Farmer* standards might be met.

Juveniles/Crowding/Totality of Conditions/Negligence, Deliberate Indifference and Intent/Protective Custody/ Access to Courts--Law Libraries and Law Books

Nami v. Fauver, 82 F.3d 63 (3d Cir. 1996). The plaintiffs are protective custody inmates at a "Youth Correctional Facility." They alleged that they were double celled in 80-square foot cells with only one bed, so one inmate had to sleep on the floor by the toilet; that the cells had solid doors and it was difficult to summon help; that inmates were double celled with others who had psychiatric problems, were violent, or who smoked; that the ventilation system was inadequate; that double celling had resulted in rapes and other assaults; that they were confined to their cells except for recreation and half-hour to hour job assignments, and recreation was limited to one two and a half hour period twice a week; that they were not allowed access to bathrooms during recreation; that they were provided less access to jobs and educational programs, as well as drug and alcohol programs required by the parole board, than general population inmates; that general population inmates worked in protective custody despite a statute to the contrary; and that they must wear the

"black box" when transported to other locations such as medical appointments.

The district court erred in failing to consider the relation of crowding to the other conditions alleged, especially the increased risk of rape and assault. It erred in holding that there was no allegation of deliberate indifference, despite the allegation that "letters have been written to the [administration]. . . . All requests for administrative remedies were refused." (67) This allegation of actual notice is sufficient to state a claim.

The district court improperly dismissed allegations of disparate treatment of protective custody inmates, since these were raised as Eighth Amendment claims, and should have been considered as such, and in connection with the crowding claim.

The plaintiffs alleged that they were denied the assistance of paralegals or others trained in the law, a defendant frustrated their attempts to file court papers by delaying return of documents and failing to make copies, a policy prevents PC inmates from helping each other by talking through the doors and passing items between cells, and they can only obtain legal materials by submitting requests for specific items, with no means of identifying the items they need. The district court erred in failing to assess the entire "legal resource package" and in crediting an affidavit filed in another case that contradicted the complaint's allegations.

Fire Safety/Environment

Standish v. Bommel, 82 F.3d 190 (8th Cir. 1996). An allegation that the defendants were deliberately indifferent to the risk of fire stated a claim under the deliberate indifference standard, but there was no showing of deliberate indifference, since the only recent fires were mattress or bedding fires, no one had been injured by fire or smoke, and prison officials had taken action, e.g., by prohibiting smoking.

The district court properly granted summary judgment on the claim that the housing unit leaked in bad weather, forcing him to move his mattress to the floor to stay dry.

Grievances/Correspondence--Legaland Official/Access to Courts

O'Keefe v. Van Boening, 82 F.3d 322 (9th Cir. 1996). The refusal to treat grievances sent to state officials as privileged legal mail did not violate the First Amendment. Even if this practice had a chilling effect on First Amendment rights, it withstands the *Turner* test. It was related to legitimate interests. At 326: "It would be possible for a prisoner to utilize alleged grievance mail to plan escapes or to commit other crimes. A prisoner could also create a mail ruse by having an outside confederate send mail that threatens prison security under the guise of a grievance response." (How is this different from any other kind of privileged mail?) The plaintiff had alternatives because he could still write to other state officials. Treating this mail as privileged would create an administrative burden. There is no alternative that has *de minimis* cost to security interests.

At 325: "Prisoners have a constitutional right to petition the government for redress of grievances, which includes a reasonable right of access to the courts."

Procedural Due Process--Property/Federal Officials and Prisons

Armendariz-Mata v. U.S. Dept. of Justice, Drug Enforcement Administration, 82 F.3d 679 (5th Cir. 1996). The Administrative Procedure Act waives sovereign immunity for actions seeking relief other than damages against the government. An equitable claim for return of seized currency was properly before the court, but claims for seizure of other property were barred because the remedy was money damages.

The plaintiff did not receive adequate notice of forfeiture proceedings against him, as a result either of a notice sent to his home while he was in jail or a notice sent to the jail that was returned to sender rather than delivered. At 683: "Where the government seeks the traditionally disfavored remedy of forfeiture, due process protections ought to be diligently enforced, and by no means relaxed."

ProceduralDueProcess--Classification/ Administrative Segregation--High Security

Keenan v. Hall, 83 F.3d 1083 (9th Cir. 1996). The plaintiff served a disciplinary segregation sentence and was then sent to the "Intensive Management Unit" for six months as a result of a classification hearing. The court remands for consideration under *Sandin v. Conner.* The "atypical and significant" standard is not synonymous with the Eighth Amendment standard.

Recreation and Exercise (1089): "Deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation." An undisputed allegation that for six months plaintiff was able to exercise only in a space with a "wall of perforated steel admitting sunlight through only the top third" presents a triable claim.

Noise (1090): "[P]ublic conceptions of decency inherent in the Eighth Amendment require that [inmates] be housed in an environment that, if not quiet, is at least reasonably free of excess noise." (Citation omitted) Allegations of continuous noise caused by other inmates present a triable claim.

Heating and Ventilation (1090): "Inadequate 'ventilation and air flow' violates the Eighth Amendment if it

'undermines the health of inmates and the sanitation of the penitentiary.'" (Citation omitted.) "If the air was in fact saturated with the fumes of feces, urine, and vomit, it could undermine health and sanitation." There is a triable issue. At 1091: "The Eighth Amendment guarantees adequate heating." However, complaints that the temperature was "well above" or "well below" room temperature suggest only discomfort and do not present a triable issue.

Lighting (1090): "Adequate lighting is one of the fundamental attributes of 'adequate shelter' required by the Eighth Amendment. . . . Moreover, '[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional." (Citations omitted.) The allegation that large fluorescent lights directly in front of and behind the plaintiff's cell were left on 24 hours a day created a triable issue.

Hygiene (1091): "Indigent inmates have the right to personal hygiene supplies such as toothbrushes and soap." The allegation that plaintiff was denied such items except when he could pay for them, and that the indigency standard forced him to choose between hygiene items and legal supplies, stated a claim.

Food (1091): "Adequate food is a basic human need protected by the Eighth Amendment." It must be "adequate to maintain health." (Citations omitted) "Food that is spoiled and water that is foul would be inadequate to maintain health."

PersonalSpace (1091): Confinement in a 54-square foot cell is not unconstitutional.

Verbal Abuse (1092): Verbal harassment generally does not violate the Eighth Amendment, and there is no evidence that the comments at issue were "unusually gross even for a prison setting and were calculated to and did cause [the plaintiff] psychological damage." There is no triable issue.

Restraints (1092): Placement of a segregation inmate in restraints does not violate the Constitution; the plaintiff alleges no "discomfort beyond that inherent from movement in restraints."

Visiting (1092): Denial of visits from anyone other than immediate family did not violate the Constitution.

Personal Property (1092): Denial of canteen products such as birthday cards did not violate the Constitution.

Telephones (1092): "Prisoners have a First Amendment right to telephone access, subject to reasonable security limitations." The defendants said the plaintiff had some telephone access, and the plaintiff did not say whether the alleged denial of access was total, partial, or occasional, and did not allege a specific emergency denial or call to his lawyer on an occasion of special need; there was no triable issue.

Religion--Outside Organizations, Standing (1092): The plaintiff alleged that defendants refused to let a Native American spiritual leader enter the unit and speak with the inmates; but since the plaintiff did not say he adhered to this religion or had ever requested such religious guidance, he lacked standing to complain.

Publications (1093): The prison's "publisher only" rule may be unconstitutional; *Bell v. Wolfish* upheld such a rule that applied only to hardcover books. The plaintiff's complaint about the limited prison library, segregation inmates' lack of access to it and to the state library, and the ban on inmates' passing books to one another are all part of the plaintiff's overall claim of deprivation of reading material.

Law Libraries and Law Books (1093): The defendants provided segregation inmates with a cell delivery system that responds within 24 hours and indexes to help select materials to request, with weekly assistance from inmate law clerks. At 1094: "Although an inmate in segregation may prevail on a denial of access claim if he has a particular need for more access than that allowed him, and that denial has caused him actual harm, such a system as that afforded here in a high security unit has been upheld as generally adequate."

Access to Courts--Notarial Services, Services and Materials (1094): Complaints that photocopy and notary services are too slow and expensive do not raise a constitutional issue absent a specific instance of actual injury.

Attorney Consultation, Visiting--Contact Visits (1094): The Constitution protects contact visits with counsel, but these may be restricted for high-risk inmates, and the plaintiff alleged no prejudice.

Correspondence--LegalandOfficial (1094): "Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not legal mail." The court raises but does not decide the question whether a rule that requires mail to be labelled "Legal Mail" in order to be treated as such may be applied to mail that is obviously from counsel but lacks the precisely correct label.

Procedural Due Process--Disciplinary Proceedings (1094-95): The court rejects the claim that the plaintiff's disciplinary sanction violated the state's regulations on state law grounds without discussing whether the claim presented a federal question.

Disabled/Summary Judgment

Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996), *rehearing denied*, 91 F.3d 994 (7th Cir. 1996). The plaintiff, a paraplegic, alleged that defendants had refused his request for guardrails for his bed and that he had broken his leg as a result, and that he was denied pain

medication after the operation.

The district judge erred in failing to explain to the *pro se* plaintiff the consequences of failing to respond to evidence tendered in a summary judgment motion.

The court does not reach the question whether the Americans with Disabilities Act applies to prisons and jails. At 248:

> It is very far from clear that prisoners should be considered 'qualified individual[s]' within the meaning of the Act. Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? . . . Judge-made exceptions . . . to laws of general applicability are justified to avoid absurdity.

Even if the ADA applied, it would not govern the plaintiff's claim for denial of medical care, which does not allege that he was treated worse because he was disabled. At 249: ". . . [I]ncarceration, which requires the provision of a place to sleep, is not a 'program' or activity.' Sleeping in one's cell is not a 'program' or 'activity.'" The ADA does not provide a malpractice remedy for the disabled.

Protection from Inmate Assault/Summary Judgment

Hayes v. New York City Dept. of Correction, 84 F.3d 614 (2d Cir. 1996). The plaintiff testified at a deposition taken when he was proceeding *pro se* that he did not identify by name the inmates of whom he was afraid to prison staff. After counsel was appointed, he gave testimony that was arguably contradictory in a second deposition. Counsel for the parties agreed that the prior deposition "does not exist."

The district court erred in dismissing the case on the ground that the second deposition contradicted the first deposition. While a party may not escape summary judgment by submitting an affidavit that contradicts prior deposition testimony, that rule does not apply to a conflict of deposition testimony elicited long before the summary judgment motion. The first deposition was brief and conducted while the plaintiff was *pro se*. The depositions were only arguably contradictory, since defense counsel did not ask questions sufficient to establish or negate a direct contradiction. The district court in effect engaged in a credibility assessment on a summary judgment motion.

The district court improperly relied on the conclusion that the plaintiff did not name his enemies to the defendants. At 621:

> First, we note that the issue is not whether Hayes identified his enemies by name to prison officials, but whether they were aware of a substantial risk of harm to Hayes. Although a prisoner's identification of his enemies is certainly relevant to the question of knowledge, it is not, necessarily, outcome determinative.

The district court erred in holding defendants' response to the plaintiff's complaint--which did not include transferring him---adequate as a matter of law. There was contradictory testimony whether it is standard practice to relocate any inmate who states that his life is in danger. Also, the defendants did not issue a timely separation order and allowed him to move without an escort even though he was in segregation.

Pro Se Litigation

Lucas v. Miles, 84 F.3d 532 (2d Cir. 1996). The court denied the plaintiff's motions to file supplemental complaints without prejudice to his filing such a complaint limited to specified allegations within 60 days. He missed the deadline by about 39 days but otherwise complied with the order. Months later, after the defendants had answered the supplemental complaint, the judge dismissed the supplemental complaint because of the missed deadline.

The dismissal was an abuse of discretion. The delay was not significant in context or prejudicial to defendants; the *pro se* plaintiff was never warned of the possibility of dismissal; the delay did not contribute materially to court congestion; no lesser sanctions were contemplated.

Procedural Due Process/Injunctive Relief

Ellis v. District of Columbia, 84 F.3d 1413 (D.C.Cir. 1996). *Sandin v. Conner* does not overrule *Greenholtz* or *Board of Pardons v. Allen*, and those cases should continue to be applied, even though their reasoning appears to be suspect in light of *Sandin*. Using these cases' analysis, the court holds that there is no liberty interest of D.C. prisoners in obtaining parole. (At 1425-26: the concurring/dissenting judge argues that *Greenholtz* and *Allen* do and should survive *Sandin*, and notes *Sandin*'s citation of *Allen* with approval.)

A "small but significant number" of cases in which parole revocation hearings are not held within 90 days, as required by *Morrissey*, does not support injunctive relief against the Parole Board. Such relief may be granted only based on "a pervasive pattern . . . flowing from a deliberate plan by the named defendants." (1424, citing *Rizzo v. Goode*.) Plaintiffs must show either that the defendants were directly responsible for the violations or that "the incidence of such misconduct was more severe than elsewhere. . . ." *Id.*

District Court Cases

Procedural Due Process--Disciplinary Proceedings

Lee v. Coughlin, 902 F.Supp. 424 (S.D.N.Y. 1995). The plaintiff was charged with assault. He was convicted and sentenced to two years in SHU. His administrative appeal was denied. He got the conviction reversed in an Article 78 proceeding after he had served 376 days.

At 431: "In relation to the ordinary incidents of prison life, I find that plaintiff Lee's confinement for 376 days in SHU imposed an atypical and significant hardship on plaintiff." *Sandin* was decided while this motion was pending. *Id.* n. 9: "I am hard pressed to believe that 376 days in SHU would not constitute an 'atypical and significant hardship' as defined by *Sandin* and I assume that is why defendants did not seek to supplement their papers." The court invites a motion for reconsideration, which was granted, and the issue is now being litigated.

The plaintiff designated several staff members as employee assistants, but the defendants assigned someone else, and after the plaintiff said he would rather have an assistant of his choice, the designated assistant did nothing. The plaintiff did not waive his right to assistance. He asked for assistance three times during a hearing that was adjourned five times over a period of 25 days, but was not given assistance, and no reason was given. The hearing officer could not be said to have played both roles, given that state regulations provide both for an impartial hearing officer and an assistant. In any case, an assistant is supposed to *prepare* a defense, not just assist after the hearing begins. At 433: "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."

The court does not reach whether the state court determination is binding. It is "persuasive evidence" of the lack of meaningful assistance. At 433: "As did the state court, I find that there were many issues raised by the reports relating to the underlying assault charges against plaintiff which an assistant could have aided plaintiff in investigating."

The defendant hearing officer is not entitled to qualified immunity.

Women/Visiting/Injunctive Relief--Preliminary/Ripeness

Bazzetta v. McGinnis, 902 F.Supp. 765 (E.D.Mich. 1995). The prison system instituted visiting restrictions forbidding visitors under 18 who are not children, step-children or grandchildren; forbidding visiting with natural children if the prisoner's parental rights have been terminated for any reason; limiting the visiting list to only 10 people who are not "immediate family"; requiring minor children to visit only with an adult legal guardian with proof of legal guardianship; limiting "members of the public" to only one prisoner's visiting list (i.e., "activists cannot visit more than one prisoner"); permitting denial of all visiting except from clergy and attorneys based on two major misconducts involving substance abuse; barring all former prisoners from visiting any one except "immediate family."

The court granted a temporary restraining order but denies a preliminary injunction. It concludes that prisoners have no First Amendment right of freedom of association and that the right to family integrity does not extend to prison visiting with persons other than immediate family. The court assumes that there is a fundamental right of parents and grandparents to associate with immediate family members in prison, but upholds the regulations under the *Turner* standard. Members of the public have no First Amendment right to visit because alternative means of communication are available.

The challenge to disciplinary deprivation of visiting is not ripe because it is discretionary and it hasn't happened yet.

In Forma Pauperis/Procedural Due Process--Disciplinary Proceedings

Priest v. Gudmanson, 902 F.Supp. 844 (E.D.Wis. 1995). The plaintiff was indigent for IFP purposes, having received some $700 in "legal loans" over the past year, having made $6 every two weeks at his prison job, and having $4.48 in his account.

A 20-day extension of the plaintiff's mandatory release date is actionable under the due process clause under Sandin. The plaintiff's claim of lack of an impartial decision-maker, since one of the hearing panel members was a witness to the incident, was not frivolous.

Religion--Practices--Beards, Hair, Dress/Equal Protection/State-Federal Comity/Pendent and Supplemental Claims; State Law in Federal Courts/Immunity--Absolute Immunities --Legislative

Abordo v. State of Hawaii, 902 F.Supp. 1220 (D.Haw. 1995). The challenge of the Native American plaintiff to prison restrictions on hair length and beards, with no religious exemtpions, stated a claim under the Religious Freedom Restoration Act. The policy did not create a liberty interest under *Sandin*.

Allegations that "Hawaiians" (who plaintiff contends constitute a religious sect) and women were permitted to wear long hair and Muslims were permitted to wear beards stated an equal protection claim.

The plaintiff's state law claims both for money damages and for injunctive relief against defendants in their official capacities are barred by the Eleventh Amendment under *Pennhurst*. Individual capacity state law claims are not barred, but the claims have no merit because they are duplicative of the federal law claims, and in the case of intentional infliction of emotional distress, he failed to allege sufficiently "extreme and outrageous conduct." (1227)

Defendants who participated in formulating the challenged policy, but not enforcing it, are entitled to absolute immunity. "Such actions involve the formulation of policy and apply to the prison community at large." (1228) This application of legislative immunity to prison officials is unique to my knowledge.

The defendants are entitled to qualified immunity under RFRA, since it was not apparent that the challenged policy violated it.

RFRA is constitutional and does not violate the separation of powers (extensive discussion).

Searches--Urinalysis/Procedural Due Process--Administrative Segregation, Disciplinary Proceedings/ Visiting

McDiffett v. Stotts, 902 F.Supp. 1419 (D.Kan. 1995). Repeated urinalysis testing based on individualized suspicion concerning drug use does not violate the Fourth Amendment. The plaintiff's placement in segregation after a positive urinalysis did not deny due process; "*Sandin* makes clear that an inmate's segregated confinement is not [an atypical and significant] deprivation."

The failure to follow prison regulations during disciplinary hearings does not deny due process. Holding a hearing, withdrawing the finding of guilt, then proceeding with a second hearing does not violate the Double Jeopardy Clause.

A 90-day deprivation of contact visits after a positive drug test does not violate the Constitution.

Procedural Due Process--Transfers/ Publications/Law Libraries and Law/ Books/Emergency Protection from Inmate Assault/Verbal Abuse/Access to Courts--Punishment and Retaliation/ Deference/Procedural Due Process--Disciplinary Proceedings

Knecht v. Collins, 903 F.Supp. 1193 (S.D.Ohio 1995). Transfers between prisons do not deprive prisoners of liberty under *Sandin*.

The plaintiff spent "months" in disciplinary segregation; his disciplinary proceeding was initially reversed because the appeals officer was not provided with a complete file, then affirmed when the file turned up after the 30-day time limit for issuing decisions. The court cannot determine on this record whether the plaintiff suffered an atypical or significant hardship.

Under the *Turner* test, defendants improperly censored an issue of *Prison News Service* which "does not incite unrest or an overthrow of the penal system, but instead encourages peaceful protests" (e.g., letters to the Governor or prison officials). A second issue stating that "[t]he affirmative defense of self defense/justification should be a viable option for the Brothers to illustrate that the conditions were so oppressive that the takeover was necessary to save their lives," and another advocating that prisoners "break the walls down," were properly censored. An article encouraging people to "act" and "resist" and overthrown the white supremacist regime, which includes prison authorities, was properly censored. An issue for which no reason for censorship was given should be given to the prisoner. Another publication described as "anti-government" and "anti-establishment," which allegedly "could provoke violence," was improperly censored since none of the articles incite violence. At 1200:

> The substantial deference accorded prison officials, however, does not relieve federal courts from their duty to ensure that prison officials' actions are not exaggerated responses to prison concerns. . . . This is especially true in the First Amendment area, where prison officials may attempt "to eliminate unflattering or unwelcome opinions [and] apply their own personal prejudices and opinions. . . ." Additionally, the First Amendment plays a unique and special role in the prison environment. Such freedoms taken for granted in the free world, assume great significance behind bars. Prisoners of ten remain in their cells between fifteen and twenty hours a day with very little to do. The opportunity to read and write allows a prisoner to remain in tough with the outside world, and provides the opportunity for a prisoner to nourish his mind despite the bleakness of his environment. Most importantly, it allows prisoners to channel tensions and frustrations into something positive and peaceful.

Two paralegals and a paging system provide adequate law library access for "administrative control" inmates. A denial of all access to the library, without paralegal assistance, would have been unconstitutional under ordinary circumstances, but since it occurred during a post-riot lockdown, it was not.

Allegations that two staff members have issued death threats and harassment

to the plaintiffs and have told other inmates that they are snitches state a claim when it is alleged that these actions were done in response to plaintiffs' filing lawsuits and writing newspaper articles. The allegation that the plaintiffs were labelled snitches is actionable under *Farmer v. Brennan.*

At 1204: "Prison authorities cannot frame and then improperly discipline prisoners for exercising their constitutional rights."

Rights of Staff/Evidentiary Questions

Sagendorf-Teal v. County of Rensselaer, 904 F.Supp. 95 (N.D.N.Y. 1995). Past and present jail employees are not equally available to plaintiff and defendant in a case where the plaintiff is a former jail employee suing over her discharge. At 97: "Testimony described corrections officers as a group to be close and binding." The officers "bore significant interest in a favorable outcome for the defense: through their support of former co-workers and through their own personal involvement."

Protection from Inmate Assault

Knowles v. New York City Dept. of Corrections, 904 F.Supp. 217 (S.D.N.Y. 1995). The plaintiff, a segregation inmate, was slashed in the jail yard. Allegations that prison officials were aware of a "war" between Jamaican and Hispanic inmates, that a Hispanic inmate who had been cut had been transferred to the jail where plaintiff was held, and that the plaintiff, "due to his physical characteristics and accent, belonged to an identifiable group of prisoners for whom risk of . . . assault [was] a serious problem of substantial dimensions." (222, citations and internal quotation marks omitted)

The court notes that "the defendants have failed to come forward with some of the most obvious evidence to attempt to show that there is no genuine issue of material fact," e.g., no "affidavit from any guard or prison official explaining the circumstances of the attack on the plaintiff and attesting to the lack of awareness of the particularized risk to the plaintiff. . . . The defendant appears to seek to take advantage of the *pro se* plaintiff's failure to obtain the evidence from the prison guards." (222)

Religion--Services Within Institution

Muhammad v. City of New York Dept. of Corrections, 904 F.Supp. 161 (S.D.N.Y. 1995). The plaintiffs complained of restrictions on their religious practice as members of the Nation of Islam. The City defended by emphasizing its policy of "generic services."

Under the Religious Freedom Restoration Act, plaintiffs must show a "substantial burden" on their religious rights, i.e., pressure to commit an act forbidden by the religion or prevention of conduct or experience mandated by the religion.

The failure to employ a Nation of Islam minister does not substantially burden free exercise, since there are numerous Muslim imams and various Muslim religious accommodations. Inmates may have personal visits from Nation of Islam clergy, NOI "personal development workshops" are provided, and NOI clergy have appeared as guest speakers.

The failure to have separate NOI services does not substantially burden free exercise; although NOI beliefs are different from orthodox Muslim beliefs, the plaintiff failed to show that the generic service "offends or ignores particular practices or beliefs that are *mandated* by NOI teachings." (191, emphasis in original)

The court finds no factual support for various other claims of burdens on religious exercise.

The logistical, administrative and security concerns underlying the policy of generic services are compelling and justify the defendants' practices.

The plaintiffs' First Amendment claims fail *a fortiori* for the same reasons as the RFRA claims. At 196: "[T]here does not appear to be a clear consensus in the courts as to whether RFRA's heightened standard is limited in application to statutory claims brought pursuant to RFRA itself or whether it also applies to constitutional claims brought under the First Amendment."

The defendants' decisions as to what religions they recognize and provide services for do not violate the Establishment Clause.

The plaintiffs' state law and city regulations claims are also rejected.

False Imprisonment

Hoover v. Snyder, 904 F.Supp. 232 (D.Del. 1995). Claims challenging state court interpretations and applications of state court sentencing statutes are not cognizable under § 1983.

Disabled

Staples v. Virginia Dept. of Corrections, 904 F.Supp. 487 (E.D.Va. 1995). The Americans with Disabilities Act does not apply to prisons.

A paraplegic's *pro se* claims are dismissed. The plaintiff did not respond to the summary judgment motion and his complaint was not sworn to, so the court relies on the defendants' statements that their medical treatment of him was appropriate, that delays in helping him defecate and cleaning him up were his own fault because he didn't go during the daytime when more staff were available, and that his medical and physical therapy treatment are appropriate.

Rights of Staff/Classification--Race

Wittmer v. Peters, 904 F.Supp. 845 (C.D.Ill. 1995). In a challenge by white staff to the race-based promotion of an African-American staff member in a boot camp, the defendants argued that given the 60-70% African-American composition of the inmate population, the operational needs of the camp provided a compelling interest that was served by the promotion. The court says the defendant's consideration of race in the promotion was prudent but that this conclusion is not sufficient to support summary judgment as to the *necessity* of consideration of race under strict scrutiny. However, they are entitled to qualified immunity.

The court declines to order the next available promotions for the plaintiffs because there was no evidence that any of them would have been promoted in place of the African-American had race not been a factor.

Procedural Due Process--Disciplinary Proceedings/Use of Force/Discovery

Carter v. Carriero, 905 F.Supp. 99 (W.D.N.Y. 1995). Disciplinary confinement in special housing does not deny liberty under *Sandin* because the restrictions involved are imposed on all SHU inmates, whether or not they are there for disciplinary purposes. The fact that the plaintiff was sentenced to 360 days, with 90 suspended, did not matter because it did not exceed similar administrative confinement.

The prisoner was not denied due process in any case. The hearing officer's refusal to ask witnesses particular questions about the incident was appropriate because the witnesses said they had no personal knowledge of the incident. The failure to produce a baton at the hearing did not deny due process because there was no claim that the prisoner broke it. The plaintiff's claim that the the hearing officer was biased is unsupported.

The court declines to grant summary judgment to the warden on the plaintiff's claim that he tolerated misuse of force by officers, pending a magistrate judge's consideration of whether the officers' personnel files should be produced.

Procedural Due Process--Classification /Procedural Due Process--Temporary Release Classification/Equal Protection/Negligence, Deliberate Indifference and Intent/Rehabilitation/Ex Post Facto Laws

Neal v. Shimoda, 905 F.Supp. 813 (D.Haw. 1995). Under *Sandin*, there is no liberty interest in furlough or in freedom from being labeled as a sex offender.

The Sex Offender Treatment Program does not deny equal protection. At 819:

> Given the high probability that an untreated sex offender will commit another offense, the state's policy of denying parole, furlough and minimum security classification to untreated offenders is rationally related to the government's interest in protecting the public. Denying untreated offenders placement in minimum facilities also furthers the state's interest in maintaining safety and security in its prison facilities.

The fact that the program extends to persons who were not convicted of sex offenses, based on the "offense facts," does not make it unlawfully overinclusive. *Id.*: "The consequences of releasing untreated sex offenders back into society is the same, regardless of whether they have been convicted of the offense."

Requiring that sex offenders "not be in denial about their crimes" does not violate the Fifth Amendment prohibition against self-incrimination, since the program is not a proceeding in which the answers might subsequently incriminate him.

The sex offender program does not violate the Eighth Amendment. Under *LeMaire*, since prison officials must balance other important responsibilities against the plaintiff's rights, they must be shown to have acted maliciously and sadistically. Here, they have acted with concern for his welfare.

The sex offender program is not an ex post facto law with respect to its prohibition on placing untreated offenders in minimum custody, since it was created to treat inmates, not to punish them. It is also not a "law"; rather, it is a non-binding policy.

Medical Care/Medical Care -- Standards of Liability--Deliberate Indifference/ Color of Law/Disabled Hygiene/ Restraint/Pendent and Supplemental Claims; State Law in Federal Courts/ State Law Immunities

Coppage v. Mann, 906 F.Supp. 1025 (E.D.Va. 1995). The plaintiff had a spinal cancer that went undiagnosed, causing partial paralysis and incontinence. He failed to report some of his pre-incarceration medical complaints to prison medical staff. He saw prison medical staff repeatedly about his continuing (worsening but sporadic) complaints. A prison doctor diagnosed him as having a conversion reaction. On occasion he lay in his own wastes for several hours. He developed a bedsore. He refused to turn over in bed as directed and was turned by staff and handcuffed to the bed rail to keep him from lying on his back. It took eight months for his condition to be diagnosed.

At 1036: Deliberate indifference may be shown without evidence that "the official acted or failed to act knowing that harm *would* result. It is enough to show that the official knew of a *substantial risk* of harm." This may be done by

circumstantial evidence, including the obviousness of the risk.

An outside consulting physician acted under color of state law even in the absence of a contractual relationship with the prison.

An outside consultant was not liable for failing to convey the appropriate "sense of urgency" about the plaintiff's treatment since no consequences could be traced to this failure and since he mentioned the possibility of cancer. He was not liable for failing to perform two tests because the patient had soiled himself given that he referred the patient to another practitioner who performed the tests three days later. A complaint that the tests he ordered were less effective than other possible tests amounted to a claim of negligence at most. This negligence cannot be promoted to deliberate indifference by dressing it up with other pieces of circumstantial evidence of deliberate indifference.

The prison doctor's failure to diagnose was not deliberately indifferent, since he examined the patient and sent him out for x-rays, and since his skepticism of the patient's complaints were based on past experience. At 1041: "Courts have held that an unusually long delay between the emergence of a serious medical need and treatment of that need may provide a reasonable basis for an inference of deliberate indifference." However, there is no evidence that the doctor knew of a substantial risk.

The prison superintendent was not deliberately indifferent because he relied on advice of his medical personnel with regard to transferring the plaintiff to another institution.

Leaving the plaintiff to lie in his own wastes for hours did not violate the Eighth Amendment because he was cleaned and his sheets were changed several times each day, an incontinence training program was implemented, and absorbent pads were placed beneath him. No defendant was shown to be responsible for the short-staffing that caused his problems. The failure to provide a wheelchair for a month fails because there is no evidence as to any of the defendants' states of mind.

Handcuffing the plaintiff to his bed did not violate the Eighth Amendment because it was done as a last resort to get him to turn in bed, not as punishment.

After dismissing the federal law claims, the court retains pendent jurisdiction over his state law claims because of the advanced stage of the litigation.

The defendants are immune under state law for acts of ordinary negligence. The prison doctor could be found to be grossly negligent if he should have known that the patient was suffering from compression of the spinal cord; summary judgment is denied on that claim.

The plaintiff had no claim for the intentional infliction of emotional distress under state law because the alleged conduct was not sufficiently outrageous.

Handcuffing the plaintiff did not constitute battery because it was not done with wantonness, malice or anger.

Suicide Prevention/Use of Force/Pre-Trial Detainees/Medical Care/ Municipalities

Pyka v. Village of Orland Park, 906 F.Supp. 1196 (N.D.Ill. 1995). An arrestee subjected to the use of force in a police station before arraignment or probable cause hearing is protected by the Fourth Amendment. (The court reviews conflicting and ambiguous case law on the question of where the line is between Fourth Amendment and due process protections.) An officer's use of a chokehold against a person who had been yelling into a telephone was actionable under the Fourth Amendment. The claim may be pursued both against the officer who administered the force and another officer who had the opportunity to intervene.

Evidence that an arrestee was struck after he was placed in his cell states a Fourth Amendment claim.

The defendants are not liable for the decedent's suicide because there is no evidence that they were aware of his suicidal tendencies or any need for mental health care. Their failure to administer CPR when he was found hanging did not violate the Constitution.

There is no basis for municipal liability for failure to train because there is no evidence that there was a sufficiently serious problem of jail suicide to require such training and there were no statutes or regulations calling for such training.

AIDS/Pre-Trial Detainees/Privacy/ Pendent and Supplemental Claims; State Law in Federal Courts/Protection from Inmate Assault

Adams v. Drew, 906 F.Supp. 1050 (E.D.Va. 1995). The plaintiff alleged that jail medical staff acted in a manner that led other inmates to learn that he was receiving AZT. However, there is no clearly established right of privacy in medical information, and it is inappropriate for courts to extend such rights into the prison context. The court declines to exercise supplemental jurisdiction over the plaintiff's state law claim because of its novelty.

A detainee's claim about an inmate assault is governed by the deliberate indifference standard. The plaintiff's allegations against one defendant withstand summary judgment, since he alleged that he gave that defendant a grievance stating that he needed to be moved because others in the cell block did not want someone with AIDS there, he told that defendant that he would be

beaten if he wasn't moved, and other inmates said the same to the defendant.

Access to Courts--Services and Materials/ Sanctions/Appointment of Counsel

Giles v. Tate, 907 F.Supp. 1135 (S.D. Ohio 1995). There is no general constitutional right to free, unlimited photocopying. However, "some reasonable means of access to a photocopy machine will be necessary to protect an inmate's right of access to the courts." (1138) The defendants' charge of 35 cents a page, without provision to advance funds against the prisoner's pay of $9.00 a month, violated the plaintiffs' court access rights, since he is unable to pay for the medical records and other documents necessary to maintain his civil rights suit. This sufficiently establishes actual injury.

The court declines to sanction the defendants for discovery delay since they have complied with the discovery order and apologized to the plaintiff.

The court declines to consider the plaintiff's objection to the magistrate judge's refusal to appoint counsel because the plaintiff has not followed instructions to certify that he had contacted at least three lawyers by mail or otherwise, submitted to each lawyer a written narrative statement of facts, and asked for representation without success.

False Imprisonment/Service of Process/ State Officials and Agencies/Negligence, Deliberate Indifference and Intent

Campbell v. Illinois Dept. of Corrections, 907 F.Supp. 1173 (N.D.Ill. 1995). At 1178: ". . . [W]hen *pro se* litigants have reasonably relied to their detriment on the advice and services of others, especially individuals employed by the courts, a showing that they have made a diligent effort to effect service will generally suffice as good cause for a delay in service." This plaintiff had relied on the Marshals.

A state court had ruled that the plaintiff was held beyond his sentence, apparently for as much as two years. The plaintiff's due process claim was previously dismissed for reasons not stated in this opinion. His Eighth Amendment claim is governed by the deliberate indifference standard. At 1180: "Anything more than a *de minimis* incarceration beyond a prisoner's proper sentence satisfied the requirement under *Farmer* . . . that the punishment, if inflicted along with the culpable state of mind, be 'sufficiently serious' to pose a constitutional violation."

The personal animus one defendant had expressed towards the plaintiff, combined with the magnitude of the error and the "apparent ease with which it could have been detected" (1180), could support a finding of deliberate indifference on the part of the main defendant. Liability would not be supported by incompetence on the defendants' part but would be supported by knowing failure to follow routine procedures that would have enabled them to detect the calculation errors.

Punitive Segregation

Killen v. McBride, 907 F.Supp. 302 (N.D.Ind. 1994). The plaintiff, held in segregation, stabbed another inmate by reaching out through the bars of his cell. After a disciplinary conviction, he was placed in a cell with a shield or bubble in front of it for eight days. The bubble is designed to allow adequate ventilation and other conditions in the unit are constitutional. Applying "the evolutionary concept of deliberate indifference," there is no violation.

Ex Post Facto Laws

Taylor v. State of R.I. Dept. of Correction, 908 F.Supp. 92 (D.R.I. 1995). Imposition of a monthly supervision fee on probationers was an *ex post facto* law as applied to persons sentenced before the regulation's effective date. A $15 supervision fee does not deny substantive due process because it does not shock the conscience.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Richmond v. Duke, 909 F.Supp. 626 (E.D.Ark. 1995). The plaintiff was convicted of a disciplinary offense, lost his administrative appeal, and did not seek review in the state courts. Under *Heck v. Humphrey*, the plaintiff (who lost good time) could not seek relief in federal court without first getting the proceeding reversed in a state administrative or judicial proceeding. The court suggests it disagrees with this view but is bound by Eighth Circuit precedent.

Rights of Particular Groups/Classification/ Equal Protection/Procedural Due Process--Transfers/Class Actions--Certification of Classes/Non-English Languages

Franklin v. Barry, 909 F.Supp. 21 (D.D.C. 1995). Hispanic prisoners incarcerated in the D.C. jail system challenged various aspects of their treatment, including lack of Spanish-speaking staff and interpreters.

Defendants' policy precludes inmates with detainers from being assigned to minimum security facilities. The Immigration and Naturalization Service issues detainers for alienage-neutral reasons, e.g., the alien is subject to deportation for a criminal law violation.

The plaintiffs have not shown an equal protection violation. There is no evidence that Hispanic prisoners with detainers are treated any differently from non-Hispanic prisoners with detainers, or that INS detainers are treated differently from non-INS detainers. Since

there is no alienage discrimination, "heightened constitutional scrutiny under *Turner [v. Safley]* is not applicable," and if it were, the policy would be upheld as valid and rationally related to a legitimate penological interest. (The heightened scrutiny comment makes no sense.) A policy of case-by-case adjudications is not required.

There is no due process violation because there is no liberty interest in a transfer to a minimum security institution.

The court grants class certification to "all inmates of Hispanic origin who are now or who will later be incarcerated" in the D.C. jails. The defendants, having first provided a list of all such inmates, then argued that it was impossible to identify them, which the court says "rings hollow." The class of about 200 people meets the numerosity standard. The fact that discrimination is claimed, combined with the facts of the discrimination allegations, meets the commonality requirement. Certification is appropriate both to avoid inconsistent decisions applying to different institutions and because final injunctive relief is appropriate. The court asks for further briefing as to whether it should certify subclasses based on degree of fluency in English.

Federal Officials and Prisons/ Hazardous Conditions and Substances/Procedural, Jurisdictional and Litigation Questions

Robinson v. Brown & Williamson Tobacco Corp., 909 F.Supp. 824 (D.Colo. 1995). The court declines to exercise diversity jurisdiction over the plaintiff's second-hand smoke suit, since there is a presumption that the plaintiff's domicile is where he lived before he was incarcerated, but the prisoner does not affirmatively plead his state of citizenship, as required by the presumption against diversity jurisdiction.

Mental Health Care/Use of Force/Pre-Trial Detainees/Personal Involvement and Supervisory Liability

Lopes v. Rogers, 909 F.Supp. 737 (D.Haw. 1995). The plaintiff, held in a psychiatric hospital to determine fitness to stand trial, alleged that he was assaulted by staff. Both his due process and Eighth Amendment claims are sufficient to withstand summary judgment. The plaintiff is protected by the Eighth Amendent, since his status is "sufficiently analogous [to punishment] to determine the issues on their merit." 742 at n. 3. The Superintendent was not deliberately indifferent, given his efforts to revise the hospital's policies and procedures. His knowledge of the alleged assailant's employment record and history of past violence were insufficient to show that he knew of a substantial risk to the plaintiff.

Publications

Packett v. Clarke, 910 F.Supp. 469 (D.Neb. 1996). The plaintiff was denied the right to receive a catalog from The Edge Compan y containing "knives, tools, & gifts for modern man" as well as "Maxwell Smart-like items" such as lock-picking gear and instructions, umbrellas with hidden blades, restraining devices and keys to unlock them, etc.

This censorship did not violate the plaintiff's rights under *Turner* because it was rationally related to the legitimate objective of preventing prisoners from getting ideas about making weapons or means of escape, plaintiff had alternative means of exercising his rights (i.e., by reading something else), and there was no "obvious, easy alternative" to censorship; limiting where the publication could be read or denying prisoners the right to order from the catalog would not adequately protect the defendants' security interests.

Access to Courts--Punishment and Retaliation/Equal Protection

Johnson v. Texas Dept. of Criminal Justice, 910 F.Supp. 1208 (W.D.Tex. 1995). The court finds that "historically there has been a bias against inmates considered to be writ writers" by prison employees, which includes the Parole Board. Therefore "there should be a Board rule which definitely prohibits the consideration of an inmate's legal activities when the Board determines that inmate's candidacy for parole." (1212) Such consideration would violate both due process and equal protection.

A policy of considering "protest letters" against the parole of particular individuals without disclosing them to the prisoners does not deny due process, since there is no liberty interest in obtaining parole in Texas, but does deny equal protection, since the Board usually denies parole to those against whom a protest letter is sent.

Medical Care--Denial of Ordered Care/Disabled

Pugliese v. Cuomo, 911 F.Supp. 58 (N.D.N.Y. 1996). The plaintiff was injured before his incarceration. A doctor prescribed physical therapy and electrostimulation. Neither treatment was made available in state custody after his conviction. A year later he filed this lawsuit and began to receive the treatment. Two months later he was transferred and received electrostimulation but no physical therapy at the receiving prison. Three months later he was moved again to a prison where he got both forms of treatment. He was transferred to a fourth prison where he received neither treatment. A doctor at this prison said he would never waste the state's money on such treatment. When he was first incarcerated he could lift a twelve-pound weight with his injured arm; when he was

released from prison after two and a half years, he could not lift one pound.

The Commissioner could not be held liable; he forwarded the plaintiff's complaint to the Office of Health Services.

The plaintiff sufficiently alleged a serious medical need and knowledge on the part of the defendants, based on what was in his medical records and defendants' physical examinations, to defeat summary judgment on the question of deliberate indifference.

Federal Officials and Prisons/Use of Force/Medical Care--Standards of Liability--Serious Medical Needs/ Pendent and Supplemental Claims; State Law in Federal Courts/Immunity--Federal Officials

Ruble v. King, 911 F.Supp. 1544 (N.D.Ga. 1995). Sovereign immunity bars official capacity claims against federal officials.

The plaintiffs created a disturbance requiring that they be removed from their cells, including throwing sour milk on staff, starting a small fire, covering their cell doors with feces, arming themselves, threatening violence, etc. The court would be "hard pressed" to deny defendants' summary judgment motion concerning use of force in removing plaintiffs from their cells. However, plaintiffs alleged that they were beaten after they were removed and shackled and after they were placed in a "safe room." The court denies summary judgment on this claim as to the officers who allegedly assaulted the plaintiffs and as to officers who were present when they were assaulted. Whether the latter had an opportunity to intervene is a disputed issue of fact.

The defendants are not entitled to qualified immunity. At 1557: "The Court concludes that the law is clearly established that an officer may not beat an inmate who is handcuffed and shackled and poses no danger to the officer." The obligation to intervene when another officer uses excessive force is also clearly established.

One plaintiff alleged that he did not get medical attention for 36 hours; the court grants summary judgment to defendants because the plaintiff did not provide any information about what his medical condition was.

The plaintiffs' state law assault and battery claim against the officers who allegedly beat them is not barred by discretionary immunity because the facts alleged could support a finding of wilful intent to harm the plaintiffs. An assault and battery claim could not be maintained against a bystanding officer because the definition of the tort requires an act of physical violence.

The plaintiffs did not make out a claim of intentional infliction of emotional distress, which requires conduct "so severe that no reasonable man could be expected to endure it." (1559)

Mental Health Care

Coleman v. Wilson, 912 F.Supp. 1282 (E.D.Cal. 1995). In evaluating claims of systemic denial of mental health care, courts have focused on "six basic, essentially common sense components of a minimally adequate prison mental health care delivery system." (1298) These are (*id.* at n. 10):

> (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professional; (4) maintenance of accurate, complete and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to identify, treat, and supervise inmates at risk for suicide.

Evidentiary Questions (1294-96): The court disregards documents filed in another, settled case because that case involved a different institution and its proceedings were governed by a consent decree rather than the Eighth Amendment. A letter from the Commissioner of Corrections to the court monitor in the other case is admissible in this case as an admission. Deposition excerpts of persons who were prison employees at the time of their depositions were admissible as admissions of party opponents, notwithstanding Rule 32, Fed.R.Civ.P., even if they had transferred to other prisons. Depositions of persons not employed by the Department of Corrections at the time they were deposed were not admissible. The court avoids the question whether depositions of consultants are admissions.

Certification of Classes, Serious Medical Needs (1300-01): The court rejects the view that the magistrate judge's failure to define the term "serious mental disorder" undermines his analysis. The certified class of persons with serious mental disorders, "far from representing some amorphous enigma to defendants, describes a group of inmates who have been studied by the CDC for over eight years." (1300) The witnesses at trial had no trouble addressing the term. Also, the Eighth Amendment addresses serious medical needs in both the physical and mental contexts, providing a legal gloss on the term.

Remedial Principles (1301): The magistrate judge's failure to specify precise constitutional minima for each

of the elements of an adequate mental health care system was not error. "The Constitution does not, however, prescribe the precise mechanisms for satisfying its mandate to provide access to adequate mental health care." Also, the court must defer to the discretion of prison administrators. Therefore remedies "can only be developed contextually." The magistrate judge properly proposed having the defendants develop protocols, standards, procedures and forms in consultation with court-appointed medical experts. At 1304: The failure to provide standards, beyond its constitutional findings, to guide the formulation of remedies by defendants.

Evidentiary Questions; State, Local and Professional Standards (1302-04): The court rejects the view that mental health professionals' expert testimony was improperly relied on; it is exactly the kind of testimony contemplated by the Federal Rules of Evidence. The magistrate judge did not rely on it to establish constitutional minima.

Examinations (1305-06): The magistrate judge properly found that a system that provided care only to those who self-report, who have medical records indicating prior psychiatric history, who exhibit bizarre behavior, or who ask to be seen by a psychiatrist, was constitutionally inadequate, based on evidence that some seriously mentally ill inmates are incapable of making their needs for care known.

Staffing (1306-07): The magistrate judge properly found inadequate mental health staffing. The fact that the defendants have some staff providing care does not preclude liability. A study that provided a plan for "reasonable access," defined as "timely, responsible, and adequate care provided by qualified (and appropriately licensed) staff," was "not materially different from the constitutional requirement of ready access to competent medical staff." (1307) There was "overwhelming" evidence of understaffing in studies and expert testimony.

Qualifications of Personnel (1308): The Constitution requires a competent medical staff. Defendants' expert testified that a system as large as California's could not provide adequate care without a management information system and some form of quality assurance. The magistrate judge properly required development of a QA system.

Access to Medical Personnel (1308-09): The Constitution requires either ready access to physicians at the prison or reasonably speedy access to outside physicians or facilities. The inadequacies in screening and staffing render inescapable the conclusion that access to care is unconstitutionally delayed, and the record directly shows "that there are delays everywhere within the system and that those delays result in exacerbation of illness and patient suffering. . . ."

Psychotropic Medication, Injunctive Relief (1309-1312): The district court's finding that defendants inadequately supervised medication are supported by the record; the fact that some prisons do a good job does not address the system-wide problems and the existence of a computer tracking system in each prison does not address the problem of transfers. Some medications are unavailable. "In order to satisfy the Constitution, medical staff must have available to them the modalities to provide inmates with necessary care." The record also supports making permanent the preliminary injunction concerning heat plans for inmates on psychotropics. At 1311: "The history of defendants' response to this issue demonstrates a recalcitrant refusal to address the serious issues underlying the preliminary injunction until forced to do so under pressure of this litigation." The injunction is made permanent for a period of three years.

The record shows that involuntary medication is necessary for some gravely mentally ill inmates who do not receive it; that it has sometimes been ordered over the telephone without prior physician's examination; and that custody staff plays an inappropriate role in medication decisions. These practices violate the Constitution.

Mental Health Care--Restraints (1314): The record shows that procedures for the use of restraint vary from prison to prison and that there is no systemwide review. The court holds that a state regulation and other measures designed to remedy constitutional deficiencies are sufficient and declines to order additional relief concerning restraints.

Medical Records (1314): "A necessary component of minimally adequate medical care is maintenance of complete and accurate medical records." The district court properly ordered a plan to ensure that medical records are transferred with prisoners and that they are obtained for prisoners who are received from county jails.

Suicide Prevention (1315): Insofar as there is a constitutional violation with respect to failure to implement suicide watches, it arises from chronic understaffing and will be remedied by staffing relief.

Negligence, Deliberate Indifference and Intent (1299 n. 11, 1315-19): The court briefly explains why the holding of *Wilson v. Seiter*, that an Eighth Amendment claim must be supported by intent because that requirement is inherent in the word "punish," is nonsense, even though it has to follow it.

The defendants are deliberately indifferent, based on their current attitudes and conduct. At 1316: "The inference of knowledge from an obvious risk has been described by the Supreme Court as a rebuttable presumption, and

thus prison officials bear the burden of proving ignorance of an obvious risk." The risk of serious harm from systemic deficiencies in mental health care is clear, and defendants' knowledge of the risk is also apparent. At 1316: "The risk of harm from these deficiencies is obvious to plaintiffs' experts, to defendants' experts, to defendants' consultants, to individual employees of the Department of Corrections in the field, and to this court." The court rejects the defendants' efforts to escape a deliberate indifference finding. Correctional health care and mental health officials argued that they didn't have power to hire staff or implement particular reforms, but there were many other areas in which they did have authority, and in any case their argument "does not necessarily contraindicate scienter." The Governor's lawyers' claim of "ignorance concerning information he was duty bound to be familiar with seems remarkable," and in any case there is no evidence supporting the assertion of ignorance of legislatively or departmentally commissioned reports. At 1317: "Moreover, after five years of litigating, the claimed lack of awareness is not plausible." Each defendant "is responsible to a greater or lesser degree for the tragic state of affairs revealed by this record. Each to a greater or lesser degree can make significant contributions to its solution." (1317) The defendants have also failed to take reasonable steps to solve the problem. Their response has been "to question the experts who provide information to them, to commission more studies, to make ineffective gestures toward the serious issues that pertain to the chronic problem of understaffing, and to initiate planning for a central administrative structure to manage a completely inadequate field delivery system." At 1318: "Defendants are not free to disregard the constitutional rights of mentally ill inmates for three to four years" while they add administrators. Other steps are inadequate, e.g., asking for 21.25 new positions when the shortfall is in the range of 300. At 1319: ". . . [P]atently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it." Defendants' arguments and their flimsiness suggest that they "are simply seeking to delay meeting their constitutional obligations to the mentally ill inmates who are their charges. . . . Acting for the sole purpose of delay perpetuates the human suffering caused by the violations of the federal Constitution which the evidence in this case demonstrates. Deliberate indifference is nothing if it is not that."

Financial Resources (1319): The defendants said before trial that they would not argue that fiscal constraints authorize violation of the Eighth Amendment, and they can't raise it now. Besides (at n. 53): "The administrators appear to have funds for those projects which appeal to them. . . ."

Staff--Training, Procedural Due Process--Disciplinary Proceedings (1320-21): The magistrate judge found that mentally ill inmates who act out are typically treated with punitive measures without regard to their mental status. His "generous" inference that this resulted from a lack of training of custody staff is supported by the record. The placement of segregation units at Pelican Bay and statewide to house mentally ill inmates violates the Eighth Amendment.

Use of Force; Negligence, Deliberate Indifference and Intent (1321-1323): The magistrate judge found that tasers and 37mm. guns were used without regard to the psychiatric origin of their behavior or the impact of these measures on their condition. Since the defendants' policy requires deliberation before use of tasers on prisoners taking psychotropic medications, the deliberate indifference standard, rather than the malicious and sadistic standard, applies, and on this record is violated.

Timetables (1323): Requiring the defendants to come forward with standardized screening forms and protocols within 30 days was appropriate, especially since the Commissioner had testified a year earlier that some of these were necessary; "it is to be expected that defendants have been working on the problem." The court declines to set specific time frames for other required remedies until after consultation with the special master and court-appointed experts about the time frames.

Monitoring (1324): The "formidable task" of monitoring injunctive relief addressed to systemwide deficiencies in mental health care meets the exceptional circumstances requirement for appointing a special master.

Hazardous Conditions and Substances/ Personal Involvement and Supervisory Liability/Medical Care--Standards of Liability--Serious Medical Needs

Walker v. Godinez, 912 F.Supp. 307 (N.D.Ill. 1993). The plaintiff, who has asthma, emphysema, and diabetes, alleged that on several occasions officers directly and persistently blew cigarette smoke in his face, causing violent asthma attacks. These allegations raise triable issues of fact under the deliberate indifference standard (the court rejects the defendants' argument that the plaintiff must meet the "malicious and sadistic" standard). The court declines to hold that avoiding violent asthma attacks is not a serious medical need. Allegations that the warden and housing unit supervisor were told of this conduct but refused to do anything are sufficient to defeat summary judgment as to their liability.

AIDS/Disabled

Dean v. Knowles, 912 F.Supp. 519 (S.D.Fla. 1996). An HIV-positive prisoner who remained asymptomatic during his incarceration was denied trustee status for medical reasons with no further explanation. There was a material issue of fact under the Americans with Disabilities Act as to the reason for the plaintiff's exclusion.

Disabled/Statutes of Limitations/ Medical Care/Hazardous Conditions and Substances

Little v. Lycoming County, 912 F.Supp. 809 (M.D.Pa. 1996). The plaintiff's § 1983 claims are mostly barred by the two-year Pennsylvania statute of limitations for personal injuries. Claims of Americans with Disability Act violations and of exposure to second-hand smoke are arguably continuing violations that extended throughout the plaintiff's term of incarceration.

The court grants defendants summary judgment as to the plaintiff's claims of medical care violations, including allergy to fluoride (apparently unknown to the medical profession), on the ground that the defendants made "considerable and diligent efforts" to deal with her complaints.

A single reported instance of congestion and coughing from environmental tobacco smoke is insufficient to establish an Eighth Amendment claim.

At 819: "The ADA should not be held applicable to facilities provided for prisoners in state prisons in the absence of a clear expression of congressional intent that that be the case, and we are not convinced that such intent has been expressed." The claim would be rejected on the merits in any case; her alleged disability was said to be resolved by her own doctor, and her prescription pain medication was recommended to be discontinued by that doctor as well.

Religion--Services Within Institution /Injunctive Relief--Preliminary/Equal Protection

Abdul Jabbar-al Samad v. Horn, 913 F.Supp. 373 (E.D.Pa. 1995). A rule that religious services must be conducted by outside religious leaders raises a First Amendment claim. The plaintiffs argued that the supposed security justification was pretextual, that there is no alternative because Muslim doctrine requires an Imam to be selected from the congregation, and accommodation would have no impact because defendants had accommodated them for years.

The plaintiffs raise an equal protection claim, since civil organizations may continue to pick their leaders from within the prison population. The defendants argue that these groups are not similarly situated, but the court says they mistake "identically" for "similarly."

The court declines to rule on plaintiffs' motion for a preliminary injunction without an evidentiary hearing. A TRO is premature because the rule is not to go into effect for another month.

The court notes that the Religious Freedom Restoration Act was not pled, but states that the plaintiffs may amend their complaint and present relevant testimony at the preliminary injunction hearing.

Procedural Due Process -- Administrative Segregation

Bruns v. Halford, 913 F.Supp. 1295 (N.D.Iowa 1996). The plaintiff was placed in segregation for 90 days after witnessing an assault and refusing to identify the perpetrator; he received a notice stating that he was segregated because of "complicity in a serious assault and interfering with an investigation." (Nonetheless his segregation was labelled "non-voluntary, non-disciplinary.")

Administrative segregation does not give rise to a liberty interest, and the plaintiff's characterization of his segregation as punitive does not change the analysis, since *Sandin* requires the court to focus on the nature of the deprivation. In any case, this plaintiff's placement was not atypical and significant relative to administrative segregation generally.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Stone-Bey v. Barnes, 913 F.Supp. 1226 (N.D.Ind. 1996). A prison disciplinary proceeding is not equated with a criminal judgment for purposes of *Heck v. Humphrey*.

Placement in segregation for a year "does not constitute an extreme term of segregation and, by itself, does not create a liberty interest under *Sandin*." (1233) The court doesn't say what an "extreme" term would be and does not clearly state that such a term would deny liberty under *Sandin*. The plaintiff's allegation that he was kept in a "bug-infested, unsanitary, bathroom-sized cell with no furnishings except a cot, toilet, and small basin," as well as the usual restrictions of punitive segregation, did not make his confinement atypical and significant. The court relies on a case involving 34 days of segregation. Note that this court addresses length of confinement and conditions of confinement separately for *Sandin* purposes.

State regulations disqualifying prisoners with recent disciplinary offenses from seeking clemency and making disciplinary record a consideration in the grant of parole do not create a liberty interest under *Dumschat* and *Sandin* respectively.

Habeas Corpus/Confiscation and Destruction of Legal Papers

Banks v. Sheahan, 914 F.Supp. 231

(N.D.Ill. 1995). The plaintiff alleged that he was transferred to the Cook County Jail without his legal papers, and defendants refused to do anything to get them forwarded to him.

Heck v. Humphrey does not bar a court access claim involving an unreversed criminal judgment. However, the plaintiff (who had been sentenced to death after a trial at which he represented himself) did not show detriment, since the state Supreme Court denied him leave to file his own appellate brief, and having access to his materials therefore had no effect on his ability to present claims.

An allegation that the plaintiff was deprived of a complaint he had drafted, and without his notes and other materials (apparently also taken) he could not reconstruct it adequately, stated a court access claim.

Procedural Due Process--Disciplinary Proceedings

Campo v. Keane, 913 F.Supp. 814 (S.D.N.Y. 1996). A prisoner who received a sentence of a year in SHU and was released after 61 days based on an administrative appeal may state a liberty deprivation under *Sandin*; the court notes that the *Sandin* plaintiff's 30-day sentence was the maximum he could have received, and cites pre-*Sandin* Second Circuit authority holding that due process rights are determined with respect to the potential penalty. The court does not actually decide the *Sandin* issue since it disposes of the case on other grounds.

The hearing officer did not deny due process in refusing to call a witness whose testimony he deemed redundant. He did not deny due process in questioning an inmate witness outside the plaintiff's presence, pursuant to a rule prohibiting contact between segregated inmates and others; he asked the questions the plaintiff told him to and was not responsible for the witness's apparent misunderstanding of a question. (He also offered to ask the witnesses different questions, but declined to ask the same question again.)

The hearing officer was entitled to qualified immunity for relying on confidential information, since he had verified from other staff members that this source had previously provided reliable information, despite his "troubling" misleading of the plaintiff about whether he would personally interview the sources.

The hearing officer's conduct did not show lack of impartiality.

Hazardous Conditions and Substances/ Injunctive Relief--Preliminary/Clothing/ Recreation and Exercise/Medical Care--Standards of Liability--Serious Medical Needs/Eye Care/Access to Courts--Services and Materials /Religion--Practices--Diet/ Punitive Segregation

Davidson v. Scully, 914 F.Supp. 1011 (S.D.N.Y. 1996). The court holds that the less favorable standard for granting preliminary injunctions--requiring a showing of likelihood of success, not just serious questions going to the merits and a balance of hardships favoring the plaintiff--applies to prison cases in light of the principle of deference to prison administration.

The plaintiff fails to show likelihood of success on his medical care claims. They "spring from conditions which do not produce death, degeneration, or extreme pain. His complaints, though serious, concern conditions which many people suffer from and function despite [sic] on a day-to-day basis and the fact that a sufferer is incarcerated does not elevate every perceived lack of treatment to the level of cruel and unusual punishment." (1015) The plaintiff sought a smoke-free environment (he is held in punitive segregation), a particular type of eye drop, and new eyeglasses for an unspecified eye condition which the court says is insufficiently serious, and his request for eyeglasses does not establish deliberate indifference because defendants have repeatedly tried to provide eyeglasses that will satisfy the plaintiff.

Tinnitus (which causes ringing in the ears) "may very well be painful, but it does not cause death, and plaintiff [has not shown] that his condition is degenerative or causes extreme pain." (1015) This, as well as his allergies, his podiatric condition, his post-surgery hernia condition, his knee condition, his urological, dermatological, and cardiological problems "do not present urgent medical conditions the maltreatment of which amounts to cruel and unusual punishment. . . ." (1016)

The court does not determine whether "the nearly constant medical attention" plaintiff has received amounts to deliberate indifference.

The court previously declined to order more telephone access than one half-hour telephone call per week to counsel. It now declines to order more furnishings and supplies for him. He complained that he had to sit on his bed and write on a shelf with an undersized pen and no light except an overhead fixture; the decision to provide only this in special housing is upheld under the *Turner* standard. Refusal to provide letter-size paper would not be upheld, but the defendants say they make it available. Having had papers returned by the court because they are on the wrong size paper does not establish prejudice, but merely inconvenience.

At 1017: ". . . [F]or the prison to refuse to provide adequate clothing for outdoor exercise is tantamount to refusing to provide outdoor exercise, which refusal would be a constitutional violation. In particular, the refusal to provide reasonably warm clothing for outdoor exercise during the cold winters of upstate New York cannot be supported,

and in fact defendants have not attempted to defend the practice. . . ." The court preliminarily enjoins the defendants to provide warm clothing to use in the exercise area.

Plaintiff's request that exercise clothing be issued to each inmate individually is not of constitutional statute.

The court rejects the plaintiff's claim that the "nutri-loaf" served to prisoners on restricted diets in segregation is not kosher because the defendants submitted evidence that it is kosher!

Procedural Due Process--Disciplinary Proceedings

Lee v. Coughlin, 914 F.Supp. 1004 (S.D.N.Y. 1996). The district court granted summary judgment to plaintiff in a disciplinary case that was submitted before *Sandin* but decided afterward; the court noted that it was "hard pressed to believe" that 376 days in segregation is not atypical and significant. However, defendants are entitled to reconsideration in light of *Sandin*, and the court permits them to resubmit their own summary judgment motion after discovery.

Exercise and Recreation/Religion--Practices--Beards, Hair, Dress /Injunctive Relief--Changed Circumstances,Preliminary/Protection from Inmate Assault/Negligence, Deliberate Indifference and Intent

Estep v. Dent, 914 F.Supp. 1462 (W.D.Ky. 1996). At 1465: "Because defendants have already begun to build an outside recreation site for [this unit's] inmates, they are not acting with a deliberate indifference to the inmates' health and safety needs." The court declines to issue a preliminary injunction.

The court declines to enjoin defendants to separate segregation inmates according to category (PC, death row, etc.) during recreation periods, since the plaintiff has not alleged harm from any other prisoner.

The court grants a preliminary injunction prohibiting the defendants from cutting the earlocks of the plaintiff, an Orthodox Hasidic Jew. The fact that the defendants waited three months to cut the plaintiff's hair weakens defendants' claim of a compelling interest.

Publications

Golden v. McCaughtry, 915 F.Supp. 77 (E.D.Wis. 1995). The plaintiff complained that defendants had a policy of reviewing cassette tapes marked "parental advisory--explicit lyrics" and barring those that "advocate violence," giving the prisoner 30 days to send them home, after which they were destroyed. The plaintiff asserted he was denied a rap music tape. He stated a First Amendment claim. At 79: "Rap music constitutes speech protected by the First Amendment. . . . An arbitrary denial of access to published materials may violate an inmate's First Amendment rights. . . ."

Procedural Due Process--Disciplinary Proceedings/ResJudicataandCollateral Estoppel

Smith v. Maschner, 915 F.Supp. 263 (D.Kan. 1996). The plaintiff was disciplined for disrespect. He asked that the officer to whom he was disrespectful be called as a witness but was refused. The right to call such an important witness was clearly established in 1984. It was reflected in regulations that appeared to specify the kind of balancing prescribed in *Wolff*. The claim that the witness, if called, would not have supported the plaintiff's story is irrelevant to the due process question, since it is not the reason given for refusing to call him; it may be relevant to damages. Since no clear delineation of reasons is given, there is a triable issue of fact. The defendants will have the burden of going forward and of proof as to the legitimacy of their reason.

Res judicata does not apply based on a state court finding that the plaintiff was harassed by the defendants; the court finds the record too confusing to support such a holding.

Personal Property/Procedural Due Process--Property, Disciplinary Proceedings/Work Assignments/Equal Protection

Rudolph v. Cuomo, 916 F.Supp. 1308 (S.D.N.Y. 1996), *aff'd sub nom. Allen v. Cuomo*, 100 F.3d 253 (2d Cir. 1996). The "pay lag" policy, which withholds part of inmate pay to accumulate "gate money" for release, and the $5.00 surcharge for conviction of Tier II or III disciplinary offenses, are constitutional.

At 1315: "There is . . . no constitutional right to prison wages and any such compensation is by the grace of the state." However, inmates do have a property right in wages already earned under the system of compensation that the state created; the authority to create such a system, plus the long-standing policy of paying wages and the acknowledgement by the state that the wages were owed, created a property interest. However, there is no property interest in *timely* payment. There is also no Takings Clause violation, since no reasonable investment-backed expectations are disturbed when the state acts in a manner expressly authorized by pre-existing law. Nor is there a Contracts Clause violation. Prison work does not involve a contractual relationship, and the forms signed by inmates consenting to assignments are not a contract governing pay or conditions. Even if there were a contract, it would not prescribe the timing of payment.

The disciplinary surcharge did not introduce bias into disciplinary proceedings. Plaintiffs alleged that the

threat of layoffs among prison staff created an incentive to find inmates guilty and raise money; however, this alleged incentive was far too attenuated to give rise to a due process violation. The allegation that the surcharge exceeded statutory authorization at most stated a state law question, and in any case there is adequate state law authority.

The surcharge does not violate equal protection in its lack of indigency waivers because prisoners are not similarly situated to indigent free citizens who can get waivers from other state surcharges. In any case, it was rationally related to legitimate interests: getting inmates to behave and raising revenue for the state and defraying the costs of the disciplinary system.

Searches--Person--Convicts/Grievances and Complaints about Prison/Religion

Hill v. Blum, 916 F.Supp. 470 (E.D.Pa. 1996). The plaintiff alleged that the defendant officer squeezed his genitals during a pat search and that he was fired from his prison job in retaliation for filing a grievance.

A pat search including the genitals does not violate the First Amendment rights of a Muslim prisoner and is not unreasonable under the Fourth Amendment. The officer's conduct did not "shock the conscience" under the Due Process Clause or violate the Eighth Amendment.

There was no evidence supporting the allegation that the plaintiff was fired from his job for grieving the search.

Procedural Due Process--Disciplinary Proceedings/Statutes of Limitations

Reynolds v. Wolff, 916 F.Supp. 1018 (D.Nev. 1996). The plaintiffs alleged that their disciplinary proceedings were tainted because a higher prison official directed the hearing committee to find them guilty. The statute of limitations did not begin to run until they learned of this intervention, which occurred at a criminal trial two years after the disciplinary hearing. (One of the hearing officers testified that she had been so instructed.)

The Nevada good time statute is stated in mandatory terms and therefore creates a liberty interest. Having reached that conclusion, the court *dismisses* the plaintiffs' due process claims on the ground that *Wolff* rights were not denied. The issue of lack of impartiality is not mentioned in this opinion.

Correspondence/Searches

Webster v. Mann, 917 F.Supp. 185 (W.D.N.Y. 1996). A mail room clerk inspected an incoming letter for contraband, found a pamphlet about non-drivers' identification cards, and read the letter, which contained instructions about creating false identification and related material. The state police obtained a search warrant and the sender of the letter was ultimately convicted of possession of a forged instrument. The plaintiff was not disciplined or prosecuted.

Opening the letter to search for contraband was clearly constitutional. Once she had seen the pamphlet on identification cards, the defendant acted reasonably in reading the letter. Any departures from the prison system's procedures requiring the superintendent's authorization and immediate notice to the prisoner of the seizure of his letter failed to state a constitutional claim.

Law Libraries and Law Books

Degrate v. Godwin, 84 F.3d 768 (5th Cir. 1996). A prisoner who rejects court-appointed counsel for his criminal defense has no right of access to a law library.

Procedural Due Process -- Administrative Segregation/Procedural Due Process --Temporary Release/Equal Protection

Quartararo v. Catterson, 917 F.Supp. 919 (E.D.N.Y. 1996). The plaintiff, who was convicted of a notorious child murder committed when he was only 14, was approved for work release. His work release was revoked, he was placed in segregation, and his parole application was denied under extremely bizarre circumstances suggesting intentional official misconduct.

Administrative segregation for 14 days does not deprive the plaintiff of liberty under *Sandin* even if labelled as punitive. The court thinks that the length of a prisoner's sentence (here, nine years) is relevant to the *Sandin* determination. The supposed effects on his parole (which was denied) are too speculative to be considered.

Plaintiff also argued that since he had been on work release before being segregated, his segregation was atypical and significant relative to what he had lost. However, the court says it was the loss of work release, not the segregation, that constituted the major deprivation. Removal from work release *does* constitute an atypical and significant deprivation and a significant hardship. The SHU confinement may be an item of damages for this deprivation.

A claim of denial of equal protection by selective application of a facially lawful state regulation requires the plaintiff to allege that he was selectively treated because of impermissible considerations such as race, religion, intent to inhibit the exercise of constitutional rights, or bad faith intent to injure the plaintiff. The plaintiff's allegations meet the last prong of the standard.

Use of Force

Smith v. Marcellus, 917 F.Supp. 168 (W.D.N.Y. 1995). The plaintiff alleged that he was beaten in the course of a cell

move, suffering abrasions, a small laceration, and superficial skin tears. The injuries were not *de minimis*. There was some evidence that there was no need for force (the plaintiff said he was sitting on his bed when he was attacked, a lieutenant was not notified as prison procedures required, the defendant was reprimanded for his conduct). The existence of an emergency "does not . . . automatically justify whatever steps might have been taken" by the defendants. The plaintiff's allegation that he was struck with batons and a walkie-talkie and forcibly pinned against the wall with a body shield presented a factual question as to the necessity of the extent of force used.

Education and Training/Ex Post Facto /EqualProtection/GovernmentBenefits

Tremblay v. Riley, 917 F.Supp. 195 (W.D.N.Y. 1996). The statutory termination of Pell Grants to prisoners is not punishment for purposes of the Ex Post Facto Clause. It is the mere denial of a noncontractual governmental benefit; it is temporary, ending when the prisoner is released; and it does not single out persons convicted of specific offenses. There are other rational bases for the statute as well: budget constraints, the desire to increase funding available to the law-abiding, the conclusion that other sources of funding were available to prisoners, etc.

The plaintiff's equal protection claim as to non-prisoners fails for the same reason as his ex post facto claim. The equal protection claim as to the non-exclusion of prisoners in local jails and prison fails, first, because the statute does not clearly exempt local facilities, and even if it does, there is a rational basis for treating those serving shorter sentences differently.

The plaintiff's due process claim is rejected because any property interest he had in the Pell grants was extinguished by amendment of the underlying legislation. The plaintiff also fails to identify any *procedure* he was denied, and his substantive due process claim is rejected because of the statute's rational basis.

Denial of educational funding is not punishment, much less cruel and unusual punishment.

John Boston is the Director of the Prisoners' Rights Project, Legal Aid Society of New York.

The National Center for Women in Prison Opens

The National Center for Women in Prison—the legislative lobbying arm of the National Network for Women in Prison—opened in Washington on November 7, 1997. At a news conference, Executive Director, Margaret J. B. Owens said the Center would work to promote equity and justice for women and their families, whose lives are impacted by the criminal justice system.

In 1985 several organizations came together to share information, strategies and inspiration and began a series of national meetings. The first of these *National Roundtables for Women in Prison*, was held in New York in March 1985. The National Network for Women in Prison was developed to carry on the work and strategies discusses at the Roundtables to support women prisoners and their families. Formerly incarcerated women play central roles in planning and implementing public education, and advocacy for the Roundtables and the Network.

The Center's priorities, outlined by Owens at the news conference, are:

1) improvements in the quality and scope of health and mental health care, alcohol and substance abuse treatment, and education, prevention and vocational services for women and girls in prison or at risk of incarceration.

2) protection of the human rights of incarcerated women and girls, including adoption of a zero tolerance policy nationally toward their sexual abuse and harassment.

3) effective medical and community discharge planning as a standard, not an exception.

4) greater investments in human services programs to decrease the likelihood of conflict with the law for women at risk

5) reduction in the overall incarceration rate of women through the use of appropriate alternatives to imprisonment and ending of mandatory minimum sentences for non-violent female offenders.

6) greater availability of programs to help incarcerated women and their children, especially legal assistance with custody, visitation, transfer of benefits, wills and support services for children.

7) a national campaign to educate the public and the criminal justice system about the damaging impact on families and communities of increasing incarceration rates for mothers.

8) increased investment to aid community-based organizations in addressing incarcerated and formerly incarcerated women's issues.

9) congressional appropriations to allow the already authorized Family Unity Demonstration Program to establish pilot programs across the nation giving non-violent women offenders the opportunity to live with their minor children.

10) the removal of stigmatizing policies and attitudes that impede the ability of formerly incarcerated women to successfully re-establish their lives and those of their children.

The National Center for Women in Prison is located at 1318 Pennsylvania Avenue, S.E., Washington, D.C. 20003.

NPP AIDS In Prison Project Update

Prisoners' Access to Protease Inhibitors Varies

by Jackie Walker, Project Coordinator

In a federal prison in Connecticut Marie receives her medications, which include a protease inhibitor in seven and thirty day supplies. The schedule she has devised to maintain her treatment regime includes reminders to drink plenty of water and specific times to have an empty stomach. She follows it religiously. After two viral loads the HIV virus remains undetectable in her body.

The medical staff at Tim's facility in North Florida recently started him on a combination of Viramune, Norvir and Videx. He was told that if he missed a few days of medication they would no longer be effective. But sometimes he receives his dosages hours late. Now he's afraid of developing resistance.

These are just a few of the letters we've received in the last year regarding the implementation of combination therapy and protease inhibitors. They characterize a range of experiences faced by prisoners living with HIV/AIDS. According to Theodore Hammett, Abt Associates, 46 state systems and the Bureau of Prisons make combination therapy and protease inhibitors available to prisoners. To learn how these treatments are being implemented I interviewed officials at the Federal Bureau of Prisons and in the state systems of Mississippi, New York, Florida and Connecticut. I also interviewed prisoner advocates regarding problems they are aware of with implementation.

The Federal Bureau of Prisons(BOP) formulary includes all four Food and Drug Administration(FDA) approved protease inhibitors with the exception of delavadine, which is under review for inclusion. Medications are generally provided in seven day supplies with the exception of Crixivan, which comes in thirty day supplies and Ritonavir which is administered daily." This is our compromise between daily and monthly prescriptions. But we do put inmates on pill line if there are concerns with compliance." says Dr. Kendig of the BOP.

Reports from doctors on site indicate the new medications have resulted in less hospitalization.

When asked about the prospect of medical segregation to implement the new therapies Dr. Kendig responded, "We don't segregate inmates based on HIV status. But we do send those who are severely ill to medical centers for closer evaluation and specialty care. I think that there are definite disadvantages to inmates being segregated. It tends to limit their participation in programs provided to the general population. We don't really favor it. Although I understand the advantages of doing it"

At the Mississippi State Prison in Parchman, where male prisoners living with HIV/AIDS are segregated, the institutional medical director Dr. Jonn Bearry only offers one protease inhibitor, Crixivan. Dr. Bearry explains, "In my mind Crixivan is clearly the more superior in terms of bioavailability and contraindication. But I have an open mind. I'd be willing to consider adding other medications." Prisoners at his facility must demonstrate compliance to a combination of two nucleoside analogs(e.g. AZT, 3TC etc.) for six months before being offered a protease inhibitor. This rule is waived for prisoners who come into the system on a therapy that includes a protease inhibitor and for those who enter with a low CD4 count. Despite these limitations he has seen a decrease in the deaths and improvements in clinical status .

Significant changes have been witnessed in New York prisons by Dr. Lester N. Wright, Chief Medical Officer New York Department of Correctional Services(NYDOCS), since implementing the new HIV/AIDS treatments. Combination therapy with protease inhibitors and viral load testing became available to prisoners in 1996. Some prisoners also participate in HIV/AIDS treatment protocols offered by medical centers on as yet FDA unapproved medications. According to Dr. Wright, "HIV-related mortality has decreased approximately 80% in 1997 compared with 1995. This year, for the first time in ten years, HIV no longer causes the majority of deaths in the DOC system; while HIV-related hospital days have decreased by over 25%"

The introduction of these new treatments has been accompanied by various educational programs. To update the knowledge of health care staff, Albany Medical Center has been offering a series of satellite-broadcasts on HIV treatment in correctional settings. NYDOC'S staff pharmacist has developed a color-coded picture-based treatment schedule card for prisoners to help compliance. There is currently no data on compliance or development of resistance. When asked to speculate on using medical segregation to implement the new treatments Dr. Wright said, "Segregation of the 7500 to 8000 HIV infected inmates(estimated by blind seroprevalence studies) would not be logistically possible in New York. I do not feel it would help in providing therapy and it would publicly identify those who are known to be HIV infected thus probably decreasing the number of those who are willing to be HIV tested."

Since implementing the new therapies

the Florida Department of Corrections budget for HIV/AIDS medications has increased to $125,000 a month. According to medical director Dr. David Thomas, "All recommended modalities of infectious disease treatments are available to our inmates. Most are on triple combination therapy of two nucleoside reverse transcriptase and one protease inhibitor, but of course this is individualized by each physician." Dr. Thomas notes these medications are administered by directly observed therapy.

Last year Dr. Thomas organized two conferences to educate doctors about the treatments. Both correctional and community physicians were included in each presentation. Education for prisoners is provided at clinic visits and documented before directly observed therapy begins.

In Connecticut medical care for prisoners living with HIV/AIDS is subcontracted through Dr. Frederick Altice, director of the Yale AIDS in Prison Project. His program offers prisoners a unique opportunity to receive care from a community doctor. The majority of prisoners are offered some form of treatment and medications are offered by directly observed therapy or weekly dispensation. Speaking to the issue of compliance Dr. Altice says "We've found the adherence rates on medication line and self medication to be the same. But we allow prisoners to make the choice. Some people won't go to medication line. You have to individualize it for each person."

Last year Dr. Altice did a pilot project on the impact of peer education on adherence to treatment. Twenty women living with HIV/AIDS who were respected peer leaders received an intensive eight week medical training in HIV/AIDS. The women were taught everything from how to deal with medication side effects to how to get medical care when you're being ignored. The women took all the information to their cells which become libraries for other women living with HIV/AIDS. Dr. Altice has documented higher rates of adherance to treatment among these women and their peers — up to 84%. Among pregnant women prisoners, he has seen an adherence rate of 100%.

Advocates have been documenting a mix of experiences in implementation of the new treatments. In New York, the most complaints received by the AIDS in Prison Project of the Osborne Association are about interruption of medication and less than optimal combinations being administered.

Steve Nesselroth, Director of the AIDS in Prison Project, has two major concerns, "First, the training and expertise of doctors prescribing medications coupled with the level of testing and monitoring they are able to do; second, the interruption of medications and how to address this within a system that focuses on security and not medical care." However, following a meeting last year between advocates and Dr. Lester Wright, Medical Director for the New York DOC, he feels some changes for the better have occurred.

Similar complaints have been received by Bill Gibney, staff attorney with Prisoners Legal Services. He expresses concern on the long range impact of the new therapies, "Unless the recommended timing of these medications is regularly followed the treatments become less effective. Poor administration of the treatments can create hazards down the road. For instance prisoners become immune to certain therapies."

He notes that one positive change since the meeting with Dr. Wright has been New York's creation of a criminal justice initiative on HIV/AIDS. This program has brought community based organizations into facilities to provide a variety of services including HIV/AIDS education and discharge planning.

Peter Siegel, a lawyer with the Florida Justice Institute, has experienced problems similar to his colleagues in New York. "Most of the complaints I receive involve dosages being missed or late. My main concern is making sure prisoners get their regimen in a timely manner. Additionally most doctors in the system practice by rote and have no real understanding of HIV/AIDS," says Siegel.

He has investigated a variety of complaints from prisoners on combination therapy that included a protease inhibitor. In one case a prisoner's verbal altercation with a nurse resulted in his medications being stopped for a number of days. These medications were later resumed. But when he wrote a grievance regarding the lapse the official response was that his behavior justified the interruption of his medication.

In California, Judy Greenspan, Director of Catholic Charities' AIDS in Prison Project sees a pattern of inconsistency based on her interviews and correspondence. She explains, "Some doctors started making protease inhibitors available on their own. But later these treatments were interrupted until the DOC developed a protocol. It's still hit or miss. Relatively speaking the men get better treatment, especially at Vacaville or San Luis Obispo. At the women's prisons they're still doing two drug combination, it's hard for them to get triple combination therapy."

The accounts she has received from prisoners range from those receiving a two week supply of their medication in plastic bags damaged and mixed together to others who experience side effects but find doctors unwilling to make adjustments in their medications. In reflecting on these incidents she feels, "Prisoners are making every effort to be compliant, but the system can't figure out how to implement these treatments."

Highlights from the National Prison Project Docket

Young v. Harper (Oklahoma): .The United States Supreme Court requested that the NPP represent a prisoner who had filed a suit when he was removed from pre-parole without a hearing. The Supreme Court affirmed the rulings of the lower federal court that Mr. Harper had been denied due process. Following the Supreme Court's decision, the State of Oklahoma continued to hold Mr. Harper without a hearing, and we returned to the district court, which ordered him released. The Tenth Circuit denied the defendants' motion for a stay, and Mr. Harper was released. The state held a revocation hearing but Mr. Harper remains free.

Amatel v. Reno (District of Columbia): This case challenges the "Ensign Amendment," passed by Congress in 1996, which prohibits the Federal Bureau of Prisons from allowing prisoners to receive publications featuring nudity. On August 12, 1997, the district court held the statute unconstitutional and granted a permanent injunction against its enforcement by the Bureau of Prisons. The defendants have appealed to the District of Columbia Circuit Court of Appeals. Oral argument is set for May. In the meantime, Congress has reenacted the challenged statute.

Inmates of Occoquan v. Barry (District of Columbia): This class action challenges conditions at the District of Columbia's Occoquan facility in Lorton, Virginia. Monitoring has been continuing since the district court found that inadequate medical and mental health care, fire safety, and sanitation, and the failure to protect prisoners from harm violated the Constitution.

At the end of last year, the Special Officer wrote a Report finding significant violations of the personal safety orders. In January 1998, the parties agreed to an order reducing population in order to decrease the risk of assault at the prison., and have requested pursuant to PLRA that a three-judge court be convened to approve the agreement.

Onishea v. Herring (Alabama): .This class action challenges the segregation and exclusion of all HIV positive prisoners from all prison programs and activities available to other prisoners. Following trial, the district court ruled against plaintiffs on every issue. The court of appeals ordered a new trial on plaintiffs' claims that their automatic exclusion from prison programs violated the Rehabilitation Act. Following retrial, the district court again ruled against plaintiffs. In November, the Eleventh Circuit granted plaintiffs' appeal, reversed the decision of the district court, and remanded for retrial before a new judge. Defendants asked for, and have been granted, a rehearing *en banc*.

National Prison Project Publications

The National Prison Project Journal, a quarterly publication, $30/year ($2 for prisoners), send check or money order to the NPP.

The Prisoner Assistance Directory, identifies and describes organizations and agencies that provide assistance to prisoners. Lists national, state and local organizations and sources of assistance including legal, AIDS, family support and ex-offender aid. 11th Edition, July 1996. Paperback, $30 prepaid from NPP.

1997 AIDS in Prison Bibliography **NEW EDITION** -- revised and greatly expanded, lists resources on AIDS in prison available from the NPP and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $25 prepaid from NPP.

AIDS in Prisons: The Facts for Inmates and Officers is a simply written educational tool for prisoners, corrections staff and AIDS service providers. The booklet answers commonly asked questions concerning the meaning of AIDS, the medical treatment available, legal rights and responsibilities. Also available in Spanish. Single copies free, for bulk order pricing call 202/234-4830.

TB: The Facts for Inmates and Officers answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free, for bulk order pricing call 202/234-4830.

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