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WHAT'S WRONG WITH THE ACA?

By Elizabeth Alexander
NPP Director

The American Correctional Association (ACA) is the largest and best-known organization of correctional staff in the country. It offers higher education programs designed to train correctional professionals and, like a traditional professional association, it certifies persons as members in good standing of the profession. Of course, the major organizational function of the ACA is accreditation of prisons, jails, and juvenile facilities on the basis of published standards that the ACA has promulgated. Unfortunately, the ACA's actual performance of this function does not assure that minimum professional standards are observed. In fact, the ACA's process substitutes the standards and accreditation process for any form of more meaningful corrections oversight.

The ACA appears to embrace the deployment of their standards and accreditation process to protect facilities from outside scrutiny. On their website is a list of benefits that a prison obtains by being accredited. The first benefit is that the cost of liability insurance will decrease, because it will be harder to sue the prison successfully. The second benefit states that "accredited agencies have a stronger defense against litigation" because accreditation shows that the prison is trying to do things right.

The ACA claims that prisons are safer from being sued because the conditions in accredited facilities are better. But it is hard to find compelling evidence in support of this proposition. This year I represented a prisoner from the Maximum Security Facility in Lorton, Virginia in a case that challenged denial of

Government Will Eavesdrop on Prisoner-Attorney Conversations

In the wake of the events of September 11, the U.S. Department of Justice instituted a new Bureau of Prisons regulation on October 30 permitting the monitoring of communications between federal prisoners and detainees and their lawyers. The regulation removes all judicial review from the eavesdropping, allowing the government to listen in any time the Attorney General believes there exists "reasonable suspicion" that a conversation between a prisoner and counsel has any connection to terrorist or violent activity.

Calling it an unprecedented power grab completely at odds with the Constitution, the American Civil Liberties Union and the National Prison Project publicly announced it vehemently opposes the new regulation. The rule would discourage prisoners and detainees

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medical care for his glaucoma and skin cancer, and the conditions of confinement in his cell. Conditions included being locked up for extended periods of time in a cell flooded with human waste from other cells, without ventilation in temperatures over 100 degrees, over twenty-three hours a day without ever getting outside or even seeing the outside. The laundry facilities did not work, the heat sometimes did not work in the winter, and the entire cellblock was filthy and noisy [See NPP Journal Fall 2000/Winter 2001].

This facility had been accredited by the ACA just before the litigation began, despite the fact that an internal report of the prison system acknowledged that the facility failed to meet the ACA standards. How could that happen? The ACA inspection team simply waived the failure to meet the standards and accredited the prison anyway. Luckily in this case, the jury was not impressed with the fact that the facility was accredited and awarded about $175,000 in damages, including punitive damages.

What happened at Lorton is not an aberration. Last year, the Suffolk County Detention Center in Massachusetts received a score of 98.96 in the ACA's accreditation process. Shortly after accreditation, seven correctional officers were charged with federal crimes for assaulting and abusing prisoners. In addition, a number of women prisoners have come forward to report rapes and other forms of sexual abuse by male guards at the jail.[1]

In another case, the ACA accredited a Louisiana juvenile facility in 1996. That same year, in a one-week period, 28 children at the facility were treated for broken bones or other injuries. On one day eight children suffered broken eardrums as a result of beatings by staff. The ACA never revoked the accreditation.[2] There are many more horrifying examples that could be cited.

How can that be? It is easier to understand why these dangerous and disgusting facilities secure accreditation in light of the membership of the accreditation committee. The person in charge of the accreditation process at the Suffolk County Jail was Harold Clarke, the Director of the Nebraska Department of Corrections.[3] Just before Mr. Clarke led the audit at the jail, a Nebraska state agency issued a devastatingly critical report about medical care in his correctional system. The beginning of the report quotes a prison doctor who exposed the dangerous neglect within the system: "I am ashamed of what I have become, I really am...For the first time, I stood up and said, I can't kill any more. Too much. These are human beings, for crying out loud."[4]

In response to the controversy about Mr. Clarke's accreditation of Suffolk County, an ACA official refused to release the names of any prisons or jails that had actually been refused accreditation, but did claim that some actually exist.[5] Only after the problems at Suffolk County led to wide-spread news coverage did ACA auditors return to perform a more critical examination of the jail.[6]

It is not just that the ACA accreditation process allows the auditors to waive compliance with standards. The standards themselves reflect the same weakness. The ACA chose as head of its standards committee, Ronald Angelone, the controversial director of the Department of Corrections in Virginia.

Until recently, the State of Connecticut sent prisoners to Wallens Ridge State Prison, a supermax prison in Virginia. Two mentally ill Connecticut prisoners died there over a short

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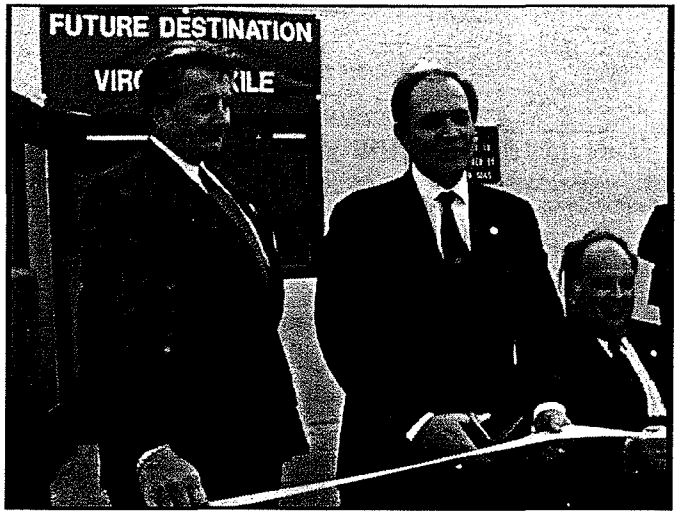


Director Angelone, left, pictured with Virginia's Governor James Gilmore at opening of Wallens Ridge State Prison in 1999.

period of time. One committed suicide and another died after being repeatedly shocked with a stun gun and then placed in restraints. After these events, the National Prison Project sued over the treatment of the Connecticut prisoners. Furthermore, a Connecticut state agency, the Office of Protection and Advocacy for Persons with Disabilities, attempted to inspect Wallens Ridge to evaluate the treatment of mentally ill prisoners there. Director Angelone refused to allow the agency to inspect his prison despite a federal law that denies his ability to do so.

Prior to Director Angelone's current position, he served as the director of corrections in Nevada until 1994. The National Prison Project sued Nevada because of its unconstitutional use of force policies around the same time. In the course of the lawsuit, the NPP found that at one prison, from July 1993 to June 1994, there had been 50 incidents in which staff shot prisoners, 20 incidents of the use of chemical agents against prisoners, and 128 incidents involving hands-on use of force. The year after Angelone left, there were only eight reported uses of firearms. The use of chemicals fell to a fraction of its previous level, and the number of hands-on use of force incidents decreased nearly 50 percent. The state's new director and the prison's warden admitted in sworn testimony that the past practices, during Angelone's tenure, were improper.

When Angelone came to Virginia he brought with him many of the same dangerous policies and practices. Correctional officers in Virginia now carry guns in the housing units and have access to various devices for delivering electric shocks to prisoners. An editorial published in *The Virginian-Pilot* in Norfolk, Virginia, declared that "if the price is vindictive or even abusive treatment of prisoners - while hurdles are placed in the way of public oversight - then the price is too high and [Angelone] should go."[7]

I testified before Mr. Angelone and the rest of the Standards Committee in support of a policy of keeping juveniles out of adult prisons, because a juvenile in an adult prison is several times more likely to be raped or to commit suicide if placed in an adult prison rather than a juvenile facility. Angelone led a successful fight at that meeting to water down the standards.

The decision of the ACA membership to put in charge of the Standards Committee someone like Angelone, who advocates dangerous and reactionary practices, and who has displayed indifference to public accountability of corrections, is extraordinarily revealing. Absent complete restructuring, the ACA is as much a barrier to meaningful reform of prison conditions as it is an ally.

The preceding article was originally presented in Philadelphia at the Stop the American Correctional Association - Counter Conference on August 12, 2001.

1. Francie Latour, "Suffolk Jail Audit Group is Faulted, Critics to Demand New Review Panel," *The Boston Globe*, 20 June 2001.

2. Ibid.

3. Ibid.

4. *Ombudsman's Report: Examination of the Medical System of the Nebraska Department of Correctional Services*, 23 Nov. 1999.

5. Francie Latour, "Suffolk Jail Audit Group is Faulted, Critics to Demand New Review Panel," *The Boston Globe*, 20 June 2001.

6. Francie Latour, "Report Blasts Operation of Suffolk Sheriff's Office," *The Boston Globe*, 19 July 2001.

7. Editorial, *The Virginian-Pilot*, 14 May 2000.

Surprising New Poll Results About American Attitudes on Crime, Punishment, and Over-Incarceration

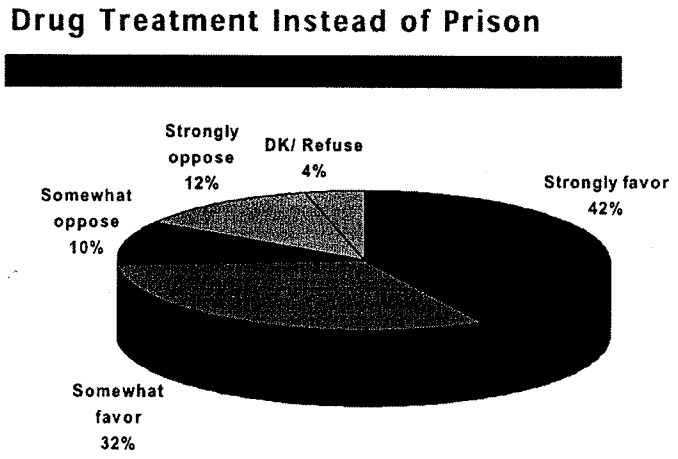
A new poll commissioned by the American Civil Liberties Union reveals a strong dissatisfaction with the current state of the criminal justice system in America and a growing public confidence in rehabilitation and alternative punishments for non-violent offenders.

"Contrary to popular belief, punishment and retribution are not foremost in most Americans' minds," said Nadine Strossen, President of the ACLU. "In fact, this new study shows our nation to be far more concerned with rehabilitation and social reintegration than with throwing away the proverbial key."

Of particular interest are the encouraging public attitudes about drugs and drug crimes revealed in the study. According to the poll, a majority of Americans draw sharp distinctions between trafficking in illicit narcotics and other drug offenses. While a majority believe that drug dealers should always be sent to prison, far fewer agree that users (25 percent), minor possessors (19 percent) or buyers (27 percent) should always be locked up.

The public's recognition of the misdirection of the drug war and the race to incarcerate in America is also reflected in the finding that a majority of Americans (61 percent) oppose mandatory sentences that require an automatic sentence for non-violent crimes. Federal and state policies do not yet reflect the popular attitude among Americans brought out in the main findings of the poll. Specifically, the poll shows that lawmakers and prosecutors should start to consider that a majority of Americans support alternative punishments for non-violent offenders, believe that rehabilitation is an important goal for the courts and prisons, and are strongly dissatisfied with the current state of the criminal justice system.

Prominent in the polling results is surprising support for and emphasis on rehabilitation for non-violent offenders. According to the poll, six in ten Americans believe that it is possible to rehabilitate a non-violent offender; four in ten believe the main purpose of prison is rehabilitation, rather than deterrence,



Q16. Would you favor or oppose replacing prison sentences with mandatory drug treatment and probation for people convicted of non-violent illegal drug use?

punishment, or the protection of society. The study also found strong public support for changing the current laws so that fewer non-violent offenses are punishable by prison (62 percent). In particular, Americans showed enthusiasm for alternatives for non-violent offenders such as mandatory education and job training (81 percent), compensation to victims (76 percent) and community service (80 percent). The poll also studied society's views on education and skills training for offenders and showed very strong support for providing inmates with skills training in prison (88 percent).

The survey also shows that most Americans believe that prisons are largely failing in their rehabilitative mandate (six in ten). The poll therefore demonstrates that American citizens are dissatisfied with the status quo and favor decisive reforms of the criminal justice system that will render it more practical, more realistic and more responsive to current social needs.

The ACLU study was conducted by the private firm Belden, Russonello & Stewart (BRS). The polling firm conducted telephone interviews during January of 2001 with 2,000 adults randomly selected across the United States. The margin of sampling error for the entire survey is

plus or minus 2.2 percentage points at the 95 percent level of tolerance.

A copy of the survey is available online at www.aclu.org.

NPP Applauds Mississippi Prisons' HIV Integration

The National Prison Project is hailing the ongoing dismantling of one of the nation's most longstanding discriminatory HIV/AIDS policies as "an unmitigated success," according to Associate Director Margaret Winter. In the past three months, Mississippi's prisoners with HIV/AIDS have been gradually integrated into prison programs – jobs, vocational training, education, and religious services – with other prisoners.

Since integration began, just after Labor Day this year, there have been no reported adverse incidents related to the integration process. Prisoners living with HIV/AIDS have told the American Civil Liberties Union that they have been welcomed by staff and by other prisoners in the newly-integrated programs.

HIV Segregation

Under the previous policy of HIV segregation, Mississippi's HIV-positive prisoners were denied equal access to such programs for more than a decade. Although there is no evidence that segregating prisoners with HIV reduces the transmission of HIV within prisons, HIV-positive prisoners were not only housed separately, they were also denied access to jobs and to education, vocational training, and religious programming with other prisoners. The few programs to which they did have access were segregated and inferior. As a result, prisoners with HIV served longer sentences under much harsher conditions than their HIV-negative peers.

The policy of segregating prisoners with HIV is rejected by the American Correctional Association, the National Commission on Correctional Health Care, the Federal Bureau of Prisons, the National Commission on AIDS, the American Public Health Association, and the World Health Organization.

Although many states had HIV segregation policies early in the HIV/AIDS epidemic – before the virus and its means of transmission were well understood – most states dropped them by the early 1990s. Until this year, Mississippi and Alabama were holdouts – the last two states to retain complete HIV segregation for prisoners. Now that Mississippi has changed its policy, Alabama remains the only state in the country with complete HIV segregation in prison housing and programs. The NPP is now working with advocates in Alabama to bring an end to that state's segregation policy as well.

NPP and Mississippi's HIV+ Prisoners

The NPP began working with prisoners in Mississippi's Parchman State Prison's Unit 28 – the segregated area for male prisoners with HIV – in 1998. At that time, prisoners were not receiving standard medication for HIV and were endangered by living conditions that included rats and vermin, exposure to raw sewage, and extreme temperatures. "This is a matter of basic justice and fairness. Conditions for prisoners with HIV here have been both separate and unequal," said Jane Hicks, a volunteer attorney for the ACLU of Mississippi. "While litigation has begun to improve some of the other living conditions for these prisoners, notably their access to medical care, we're hopeful now that inequality in programs is being eradicated."

Outside the Courtroom

Litigation on behalf of Mississippi prisoners with HIV continues, but the NPP sought to end the segregation policy through negotiations outside the courtroom. The NPP, local activists, prisoners' families and the Mississippi ACLU affiliate formed a coalition to help persuade Mississippi Department of Corrections (MDOC) Commissioner Robert L. Johnson to appoint a state HIV/AIDS Inmate Program Access Task Force in late 2000. In April 2001, Johnson announced his acceptance of all of the Task Force's recommendations, including the gradual integration of prisoners with HIV into prison programs, immediate training on HIV transmission, treatment and prevention for correctional staff and prisoners directly affected by integration, as well as training on HIV issues for all prisoners and MDOC staff within two years.

Integration of Programs

On September 4, 2001, HIV-positive men

participated in an integrated adult literacy class at Mississippi State Penitentiary, in Parchman. This was the very first integrated class since 1989, when the HIV segregation policy went into effect. In the words of Margaret Winter:

> *Several HIV-positive inmates told me they had been uneasy and fearful as the day approached, because they had been warned, by a number of prison officials still hostile to the new policy, that they would be probably be subjected to insults, abuse, and perhaps even physical violence from the other prisoners and that they would either be ignored or treated with contempt by the teachers. The reality was completely different. HIV-positive inmates reported to me the next day that they had been warmly welcomed by prisoners and staff alike, and been treated with respect and kindness. The prisoners were deeply moved by the experience, and euphoric about attending a "real" class, learning to read and write and having the opportunity to earn their GED.*

According to Jackie Walker, the AIDS Information Coordinator for the NPP, "Much remains to be done in Mississippi. HIV-positive prisoners are still categorically excluded from extremely important out-of-prison programs, like work release. Nevertheless, a huge step forward has been taken, a milestone achieved."

The most recent data from the Bureau of Justice Statistics show people living with HIV/AIDS represented 2% of all male prisoners, and 1.1% of all female prisoners in Mississippi. In Alabama, people living with HIV/AIDS represented 1.3% of all prisoners.

A man with HIV who spent two years in a Mississippi prison before being released late last year applauded the new policy: "This is an outstanding move," said the former prisoner, identified only as "Jesse" because he fears losing his job if his HIV status was known. "Not being allowed to attend the vocational programs afforded all other prisoners put a lot of anxiety and physical and emotional obstacles on us, and made it much harder to get a job when we got out. This change means opportunity for offenders as they return to society."

Government Eavesdropping

Continued from cover

from having full and open conversations with their own defense attorneys about the facts of their case, information which is a prerequisite for good legal advice. "This is a breathtaking violation of civil liberties," said Elizabeth Alexander, the NPP's director, to Knight Ridder News Service. "I am absolutely certain that if the government does not back down on this, litigation will immediately follow."

The new regulation appeared in the Federal Register on October 31 along with a number of other changes in the current rules governing the Bureau of Prisons. Previously, the government could only monitor attorney-client communications if it showed just cause and received a court order. Under the new rule, lawyers and prisoners would be notified of the Attorney General's decision to monitor, unless a court order specifies otherwise. The Department of Justice also indicated that the eavesdropping will be conducted by a "taint team" that will not disclose the information it hears to prosecutors without approval of a federal judge.

Even though the Department of Justice claims it will protect prisoners' Sixth Amendment right to assistance of counsel in this new regulation by establishing a "firewall" within the department to prevent prosecutors from getting their hands on privileged information, the ACLU questioned the Department's trustworthiness. It pointed out that the Department of Justice just successfully petitioned Congress to remove the firewall between intelligence and criminal investigations, a key check on law enforcement power.

Civil liberties advocates also fear that the regulation could provide innocent prisoners a disincentive to volunteer information to their defense counsel that could potentially clear their name. "If a suspect's sole alibi is potentially damaging, but unrelated to the alleged crime, he or she will obviously be hesitant to whisper this little

secret directly in the government's ear," said Laura Murphy, the ACLU's Legislative Office Director. "Each and every person in this country must be given the constitutional right to private consultation with legal counsel."

Case Law Report: Highlights of Most Important Prison Cases

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

U.S. Court of Appeals Cases

PLRA: Screening and Dismissal; Mental or Emotional Injury/Searches: Person/Sexual Abuse

Liner v. Goord, 196 F.3d 132 (2d Cir. 1999). Dismissals under 28 U.S.C. § 1915A and 42 U.S.C. § 1999e(c)(2) are subject to *de novo* review on appeal.

Plaintiffs' claim of intrusive body searches should not have been dismissed under the PLRA mental/emotional injury provision. At 135-36: Alleged sexual assaults qualify as physical injuries as a matter of common sense and constitute more than *de minimis* injury if they occurred. "[A]llegations of sexual abuse may . . . stat[e] an Eighth Amendment claim under Section 1983."

Religion: Practices, Diet

Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999). At 320: ". . . [P]rison officials must provide a prisoner a diet that is consistent with his religious scruples." (Citation and internal quotation marks omitted)

The right to a kosher diet of an African-American prisoner who identified himself as Jewish, but had not formally converted, depends on the sincerity of his beliefs, not on the court's or prison officials' determination whether he was actually Jewish. At 320: "A claimant need not be a member of a particular organized religious denomination to show sincerity of belief." The defendants' argument for deference to Jewish religious authorities is unsupported by any citation of a legitimate penological interest. The court rejects the argument that the question of Jewish status is an "ecclesiastical question" beyond the courts' competence, since the relevant constitutional question is whether plaintiff's beliefs are religious and are sincerely held.

Delegating the decision of who is Jewish to the prison Jewish chaplain did not "excessively entangle" the state with religion in violation of the Establishment Clause. This is just a muddled restatement of the plaintiff's Free Exercise claim.

Procedural Due Process: Disciplinary Proceedings

Welch v. Bartlett, 196 F.3d 389 (2d Cir. 1999). At 392: "After *Sandin [v. Conner]*, . . . [w]here a statute limits a prison's ability to impose a constraint as a punishment, but the prison makes a practice of imposing for non-punitive reasons a constraint endured under similar conditions and for a similar duration with sufficient regularity, then freedom from the deprivation is not a right of 'real substance' which due process protects. . . ."

The district court inappropriately assumed that SHU conditions were not qualitatively different from general population cell conditions. The plaintiff said that hygiene (supply of toilet paper, soap and cleaning materials; cleanliness of mattresses; changes of clothes) was worse in SHU. The court also inappropriately equated general population confinement, involving lock-up half the day, with 23-hour lock-in ("the difference seems to us to be great"), and the fact that GP prisoners' program access is sometimes restricted or interrupted does not mean that such limitations are typical or are comparably severe to SHU confinement. "Atypical and significant" analysis requires comparison of actual conditions with general population as well as administrative segregation and protective custody, and the frequency and duration of such deprivations are highly relevant.

The district court also erred in concluding

that a 90-day SHU sentence was typical because about half the SHU sentences are that long. The relevant comparison is between what happened to the plaintiff and "periods of comparable deprivation typically endured by other prisoners" in general population as well as administrative and protective custody. The fact that 10% of the population gets SHU time at some point during their sentences does not establish typicality. At 394: "How many prisoners receive such terms as punishment for misbehavior does not measure how likely a prisoner is to suffer comparable privation in the ordinary administration of the prison."

The court rejects the notion that under *Sandin*, SHU confinement cannot give rise to a liberty interest. *Hewitt v. Helms* is still good law, as modified by the atypical and significant standard, and DOCS is still operating under the pre-*Sandin* regulations that created a liberty interest.

Hazardous Conditions and Substances/Qualified Immunity

Warren v. Keane, 196 F.3d 330 (2d Cir. 1999). A prison smoking policy permitted smoking in cells and cellblock recreation areas, but prohibits it in gym, classroom, messhall, library and chapel. The plaintiffs alleged that environmental tobacco smoke (ETS) combined with poor ventilation created serious long-term health risks, and that they suffered from sinus problems, headaches, dizziness, asthma, hepatitis, nausea, shortness of breath, chest pains, and tuberculosis as a result of ETS.

These allegations make out a violation of the clearly established right under *Helling v. McKinney* to be free of unreasonable risks to health from exposure to ETS, as well as the broader right to freedom from deliberate indifference to serious medical needs. Defendants' own policy shows that the medical dangers of ETS were well known. Defendants could not reasonably have believed that they were not violating these rights, in light of the plaintiffs' allegations of a prison environment "permeated with smoke resulting from, *inter alia*, under-enforcement of inadequate smoking rules, overcrowding of inmates, and poor ventilation." (333, quoting district court)

PLRA: Mental or Emotional Injury/Correspondence: Non-Legal/Standing/Procedural Due Process

Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999). The plaintiff's First Amendment claim of mail delays is not barred by the PLRA mental/emotional injury provision. At 781: "A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."

"Relatively short-term and sporadic" delays in delivering mail, not alleged to result from a content-based prisoner regulation or practice, and not involving legal mail or the loss of mail, do not violate the First Amendment.

A correspondent whose mail was delayed had standing to complain of the delays: "non-prisoners do indeed have a First Amendment right to correspond with prisoners." (783)

PLRA: Exhaustion of Administrative Remedies/Rights of Staff/Standing/Federal Officials and Prisons/Medical Care

Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Failure to exhaust administrative remedies does not deprive the court of jurisdiction over the case. A complaint of failure to provide hernia surgery recommended by a prison doctor should have been exhausted, even though the grievance system doesn't provide for damages. A remedy doesn't have to be effective, it just has to be available, and there is no futility exception to the PLRA exhaustion requirement.

The court rejects the argument that there was *no* available grievance remedy for the plaintiff, since when he filed suit his hernia was still giving him trouble, and he could have filed a grievance to get the surgery.

Failure to exhaust under the PLRA is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, and defendants have the burden of pleading and proving it. However, when the plaintiff filed an amended complaint, it opened the door for defendants to assert an exhaustion defense, even though they had previously omitted it.

The doctor who had recommended the surgery and was later fired could not bring a First

Amendment claim because the administrative remedies available to federal employees preclude the availability of a *Bivens* claim. The doctor lacks standing to assert the prisoners' rights because he does not have a personal stake in the outcome of their claims, he had no continuing doctor-patient relationship with the prisoners after he was fired, the claim at issue here involves "run-of-the-mill ailments," and prisoners have no difficulty asserting their own rights.

PLRA: Exhaustion of Administrative Remedies

Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999). The plaintiff did not fail to exhaust because he failed to sign and date his grievance, since the written procedures do not require that an inmate sign or date it. (At 1193 n. 6: if grievances had to be submitted under penalty of perjury, a signature would be required.) The plaintiff did not fail to exhaust by not appealing, since the response to his institutional grievance said he did not have the right to appeal. He was not required "to file an appeal after being told unequivocally that appeal of an institution-level denial was precluded." (1194)

PLRA: Exhaustion of Administrative Remedies

Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999). Prisoners seeking damages must exhaust administrative remedies that do not provide damages. A use of force case is a prison conditions case under the PLRA exhaustion requirement; the court cites the definition of prison conditions in 18 U.S.C. § 3626(g)(2) as including "effects of actions by government officials on the lives of confined persons."

Investigations by the prison Use of Force Committee and the Ohio State Highway Patrol did not meet the exhaustion requirement. The PLRA exhaustion requirement "is directed at exhausting the prisoner's administrative remedies in the corrections system, and investigation by another agency does not satisfy the requirement of the statute." (644)

The fact that the plaintiff filed suit before his grievance was completed requires dismissal of his suit.

Pre-Trial Detainees/Hazardous Conditions and Substances

Henderson v. Sheahan, 196 F.3d 839 (7th Cir. 1999). The plaintiff alleged that prisoners in the Cook County Jail were routinely permitted to violate non-smoking policies and he was exposed to excessive levels of second-hand smoke during four and a half years of pre-trial detention.

The plaintiff's claim of present injuries--"breathing problems, chest pains, dizziness, sinus problems, headaches and a loss of energy"--does not meet the standard definition of "serious medical need" since no physician diagnosed him as having a medical condition that required a smoke-free environment or treated him for consequences of exposure to smoke, and no layperson would consider the injuries so serious as to require medical care and attention.

The claim of future injury is not actionable absent evidence of a "reasonable medical certainty" of some defined level of increased risk of developing a serious medical condition, proximately caused by his jail exposure to second-hand smoke. General testimony of an increased risk of atheriosclerosis does not suffice absent evidence applicable to the particular plaintiff. The court bases this conclusion on Illinois law; there is some question whether state law governs, but the issue was waived.

Visiting/Transfers/Cruel and Unusual Punishment

Froehlich v. State of Wisconsin, Dept. of Corrections, 196 F.3d 800 (7th Cir. 1999). The interstate transfer of a female prisoner does not violate the Eighth Amendment rights of her young children. At 801: "The state is not punishing the children; the incidental infliction of hardship on a person not convicted of a crime is not punishment within the meaning of the amendment."

Though there is no due process right to visit a prisoner, due process probably protects the right of children to associate with their parents. However, "imprisonment of a family member in an inconvenient location" cannot be equated with the destruction of the family, and the court declines to extend "the disfavored doctrine of substantive due process" in a manner that would inject the courts deeply into prison administration.

Procedural Due Process: Disciplinary Proceedings/Evidentiary Questions

Sealey v. Giltner, 197 F.3d 578 (2d Cir. 1999). *Sandin v. Conner* did not abolish liberty interest analysis, it just limited it to atypical and significant deprivations (584). *Sandin* does not say or mean that administrative segregation can never implicate a liberty interest. *Sandin*'s statement that administrative segregation in Hawaii does not involve a liberty interest may have turned on the fact that it was completely discretionary there; in other states it is not discretionary. Since *Sandin* acknowledged that atypical restricted confinement could implicate a liberty interest, there is no apparent reason why administrative confinement should be excluded.

Whether conditions are atypical is a question of law, but if facts about the conditions or their duration are disputed, the question may need to be submitted to the jury. The court may also submit interrogatories to the jury and apply the law of atypicality itself.

A prisoner's testimony about conditions, if believed, can establish a liberty interest without corroborating evidence.

Testimony establishing 101 days of 23-hour confinement, three showers a week, loss of various privileges, a noisy environment, and incidents in which other inmates threw feces at the plaintiff, did not meet the *Sandin* atypical and significant standard.

The court treats the relevant period for the atypical and significant determination as 101 days, even though the first 18 stemmed from an earlier proceeding. At 587: "Whatever the point is beyond which confinement in harsh conditions constitutes atypicality, a prison official must not be permitted to extend such confinement beyond that point without according procedural due process."

Religion: Practices/Mootness

Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999). A challenge to a rule barring the possession of crosses was not mooted by a new rule permitting them, since the new rule was promulgated only after the old one down was struck down, even though the defendants said they have no present intention of reinstating the old rule. The fact that the state is still defending the legality of the old regulation presents sufficiently high risk that they will return to it to support injunctive

This case is governed by *Turner* and *O'Lone* and not *Employment Division v. Smith*, since *Smith* was not a prison case and did not purport to overrule *Turner* and *O'Lone*.

The old rule is unconstitutional under the *Turner/O'Lone* standard, given the feebleness of its security rationale discussed in the earlier decision. Even *Smith* does not permit government to pick and choose among religions, which the old rule does by allowing the cross to be worn when attached to a rosary but not otherwise.

The prohibition on crosses was not a free speech violation. Though wearing a cross is expressive, "to equate public religious observance to free speech would empty the free-exercise clause of a distinctive meaning." (292)

Publications/Deference

Frost v. Symington, 197 F.3d 348 (9th Cir. 1999). A prisoner "has a Fourteenth Amendment due process liberty interest in receiving notice that his incoming mail is being withheld by prison authorities," and that principle applies to the withholding of magazines.

The court undertakes to harmonize the *en banc* decision in *Mauro v. Arpaio* (which says that *Turner* requires only that the defendants "might reasonably have thought that the policy would advance its interests" and does not require evidence of the actual motivation) with the earlier panel decision in *Walker v. Sumner* (which says that defendants "cannot rely on general or conclusory assertions to support their policies" but must "identify the specific penological interests involved" and show both that those are the actual bases for their policies and that the policies are reasonably related to them, with evidence). These principles (at 357)

> merely apply in different situations. When the inmate presents sufficient (pre or post) trial evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, *Walker* applies, and the state must present enough counter-evidence to show that the

> connection is not so "remote as to render the policy arbitrary or irrational." . . . On the other hand, when the inmate does not present enough evidence to refute a common-sense connection between a prison regulation and the objective that government's counsel argues the policy was designed to further, *Mauro* applies and, presuming the government objective is legitimate and neutral, . . . *Turner*'s first prong is satisfied.

Here the purported justifications for excluding publications depicting sexual penetration--to insure the safety of staff and officers and to protect female officers from abuse and harassment, based on the perception that such publications are likely to cause their readers to harass and/or abuse others--meet the common sense standard, and the plaintiff presented insufficient evidence to refute this "common-sense connection." Therefore the defendants didn't need to come up with any evidence.

The policy meets the other *Turner* requirements. There are alternative means of exercising the right in question, since prisoners can receive other sexually explicit communications and publications. There would be consequences to other prisoners and staff of allowing access to materials depicting sexual penetration because they might be subjected to sexual harassment as a result. The presence of such materials might also prompt bartering among prisoners and disputes over possession. The plaintiff failed to articulate obvious, easy alternatives; disciplinary or other action against individual prisoners who misbehave is not sufficient because officials need preventive measures, and in any case the material can be passed from one prisoner to another.

Protection from Inmate Assault/Statutes of Limitations/Summary Judgment

Wayne v. Jarvis, 197 F.3d 1098 (11th Cir. 1999). The plaintiff stated falsely that he was bisexual so he would get put in a medium security dormitory and was repeatedly attacked there by other prisoners.

The district court properly granted summary judgment in favor of the county and the defendants in their official capacities in the absence of evidence (as opposed to assertion) of a county policy of placing homosexual, bisexual, HIV-positive or AIDS-positive prisoners in a dormitory without regard to propensity for violence. He did not identify any prisoners, including his assailants, who were placed there despite evidence that they were excessively violent, and the record showed that defendants transferred prisoners out, albeit temporarily, when they committed violent acts in that unit.

John Doe defendants could not be identified and named after the statute of limitations expired; Rule 15(c), Fed.R.Civ.P. does not permit a new complaint to "relate back" for purposes of adding newly identified defendants.

False Imprisonment/Federal Officials and Prisons

Estate of Brooks ex rel. Brooks v. U.S., 197 F.3d 1245 (9th Cir. 1999). The plaintiff, a federal detainee held in a county jail, was detained for 12 days before being taken before a judicial officer. The county could not be held liable under § 1983 or for the tort of false imprisonment because its actions did not cause the deprivation: it acted pursuant to the federal marshals' instructions and to a state statute requiring it to hold persons committed pursuant to federal authority, and it had no authority anyway to bring the plaintiff before a federal magistrate.

PLRA: Exhaustion of Administrative Remedies, Screening and Dismissal/Medical Care: Standards of Liability, Deliberate Indifference

Harris v. Hegmann, 198 F.3d 153 (5th Cir. 1999). Dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) is reviewed under the same *de novo* standard as dismissals under Rule 12(b)(6).

Exhaustion of administrative remedies tolls the statute of limitations. The court seems to be applying state tolling rules to the disability from suing created by the PLRA.

The plaintiff alleged that surgery for his broken jaw failed before he was discharged from the hospital, and that the doctor and two nurses "ignored his urgent and repeated requests for

immediate medical treatment . . . and his complaints of excruciating pain." (160) These allegations sufficiently pled deliberate indifference, since they show that all three defendants "were made aware of, and disregarded, a substantial risk to Harris's health."

Suicide Prevention

Ellis v. Washington County and Johnson City, Tenn., 198 F.3d 225 (6th Cir. 1999). The decedent hanged himself after being arrested for irrational behavior under the influence of drugs. Jail personnel who had no information that the decedent was a suicide risk could not be found to have proximately caused the suicide. The only exception is a jailer who allegedly saw the decedent (via a monitor) tie a noose around a bar at 1:45 p.m. but did not tell anybody or call an emergency medical team for ten minutes.

Classification: Race/Correspondence: Legal and Official/PLRA: Three Strikes Provision

Powells v. Minnehaha County Sheriff Dept., 198 F.3d 711 (8th Cir. 1999) (per curiam). The plaintiff filed five suits, which the district court consolidated into two; then it dismissed one of the consolidated cases for failure to state a claim, counted the three cases separately for purposes of the three strikes provision, denied IFP status and dismissed for failure to pay the filing fees. The appeals court reverses one of the initial dismissals in part and holds that the resulting partial dismissal can no longer be considered a strike; it remands so plaintiff can proceed IFP if he is otherwise eligible.

The black plaintiff's allegation that an officer gave his white cellmate an extra mattress and blanket but denied one to him stated an equal protection claim. So did his allegation that an officer placed him in solitary confinement while not doing so to a white inmate involved in the same conduct.

The plaintiff's allegation that officers opened his "legal mail" (quotation marks by court) outside his presence stated a constitutional claim.

Medication/Medical Care: Standards of Liability, Serious Medical Needs, Deliberate Indifference

Roberson v. Bradshaw, 198 F.3d 645 (8th Cir. 1999). The plaintiff alleged that the Sheriff refused to provide medication and a special diet for his diabetes without a doctor's order, and did not arrange for him to be examined for a month; after he saw the doctor, he had an adverse reaction to the medication he was given, but was not taken back to the doctor for another month. The doctor re-prescribed the same medication.

The Sheriff was not entitled to summary judgment. The lack of "verifying medical evidence" for the effects of the delay is not fatal to plaintiff's case, since the existence of a serious medical need can be "obvious to the layperson."

The allegation that the doctor ignored the plaintiff's complaints of adverse reaction to a medication and kept him on that medication cannot be dismissed as a difference of opinion. The doctor does not claim that he considered the adverse reaction and made a medical judgment; he denies that any complaint of adverse reaction was made.

Women/Judicial Disengagement/Programs and Activities/Equal Protection

Glover v. Johnson, 198 F.3d 557 (6th Cir. 1999). Defendants moved to terminate orders remedying gender discrimination in prison programming. They seem to have proceeded under Rule 60 and not under the PLRA.

The appeals court avoids the question whether prison gender discrimination claims are governed by the *Craig v. Boren* heightened scrutiny standard previously applied in this case, or by the *Turner v. Safley* standard, because it says the district court found parity of treatment, and absent disparate treatment there is no need to proceed further with an equal protection analysis.

The parties agreed that the access to courts claim would be settled by adopting the court orders and plans applicable to male inmates under other litigation. The district court lacks jurisdiction over this agreement, which is enforceable as a contract in state court.

Federal Officials and Prisons/Personal Involvement and Supervisory Liability/Work Assignments/Grievances and Complaints about Prison

Shehee v. Luttrell, 199 F.3d 295 (6th Cir. 1999). The plaintiff was fired from his commissary job in explicit retaliation for filing grievances against the commissary supervisors. He filed a grievance, but his firing was upheld.

The officials involved in denying the plaintiff's grievance, and others who knew of his termination but failed to act, cannot be held liable for the underlying violation, since "liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'" (300) (This is directly contrary to law in other circuits; *see Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *accord, Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).)

Two other defendants who allegedly "instigated" the firing but did not have authority themselves to fire him could not be held liable. They allegedly fabricated allegations against him for corrupt reasons, but that is not a First Amendment claim; it "is more properly characterized as a substantive due process claim of 'abuse of authority,'" which is governed by a "shocks the conscience" or "egregious abuse of governmental power" standard. The allegations do not rise to that level, even if there was a retaliatory motive.

PLRA: Exhaustion of Administrative Remedies/Use of Force: Restraints

Hartsfield v. Vidor, 199 F.3d 305 (6th Cir. 1999). A plaintiff who said he filed a grievance, but who had been told by prison officials no grievance was on record and he should refile, had not exhausted. Even if he did file the grievance initially, he was obliged to continue to the next step within the prescribed time frames if he did not receive a response or a satisfactory response from prison officials. At 309: "We have previously held that an inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations."

State law claims must be exhausted. The exhaustion requirement applies to claims brought under § 1983 "or any other Federal law," and the diversity jurisdiction statute is a federal law.

The plaintiff alleged that he was restrained for 18 hours and not allowed to use the toilet, was left to sit in his own urine, and was not provided fresh drinking water for two 8-hour periods. At 310: ". . . [W]e have previously held that deprivations of fresh water and access to the toilet for a 20-hour period, while harsh, were not cruel and unusual punishment." Defendants also provided evidence that adequate toilet breaks and water were provided to him, which he did not refute.

Women/Contempt

Glover v. Johnson, 199 F.3d 301 (6th Cir. 1999). Prison officials were fined $385,000, at a rate of $5,000 a day, for failure to provide programming to female prisoners equivalent to that for male prisoners, as required by the court's prior orders. The appeals court affirms. The sanction need not match any demonstrated loss by the plaintiffs because it "was not intended as compensatory damages, but as a punitive measure" intended to force compliance (and the court notes it seems to have worked). At 313: "The State's recalcitrance, not the prisoners' damage, is what validates the sanction amount in this case."

Disabled/PLRA: Mental or Emotional Injury

Cassidy v. Indiana Dept. of Corrections, 199 F.3d 374 (7th Cir. 2000). The PLRA mental/emotional injury provision applies to Americans with Disabilities Act claims insofar as they seek damages for mental/emotional injury. The court rejects the argument that Congress intended the statute to apply only to non-constitutional tort claims.

The plaintiff may proceed with his other claims which do not seek damages for mental/emotional injury. Apparently this includes the items that appeared in his list of injuries in addition to emotional and mental harm, embarrassment, and humiliation. These include (at 375-76):

> (2) the loss of the opportunity to enjoy an early discharge from prison or the chance of a pardon or clemency based on efforts to rehabilitate himself; (3) the loss of participation in and advantages of

activities to which the non-disabled had access while in prison, and the loss of the freedom of movement and social contact; (4) a diminished quality of life; and (5) the loss of access to programs, services and activities guaranteed by federal law (presumably to the extent that the non-disabled enjoyed these rights).

That is, it appears that the court does not consider the foregoing to be mental or emotional injuries.

PLRA: Exhaustion of Administrative Remedies, Screening and Dismissal, Three Strikes Provision

Snider v. Melindez, 199 F.3d 108 (2d Cir. 1999). 28 U.S.C. § 1997e(c)(1), which provides for sua sponte dismissal, was not intended to apply to dismissal for non-exhaustion; otherwise the provision for dismissal of complaints that are frivolous, malicious or don't state a claim "without first requiring the exhaustion of administrative remedies" would make no sense. Also, that section seems to contemplate dismissal that finally terminates cases that can't succeed--not dismissal without prejudice for non-exhaustion. At 111: The court concludes that the three strikes provision also does not apply to dismissal for non-exhaustion.

Courts can dismiss on their own motion for non-exhaustion despite the lack of statutory authorization. However, the prisoner must receive notice and opportunity to be heard before such dismissal.

The existence and applicability of an administrative remedy is a question of law (even though, if the remedy is informally established, it may depend on a question of fact) which must be established from "a legally sufficient source" before dismissal for non-exhaustion.

The district court erred in directing the entry of a strike without giving the prisoner notice and an opportunity to be heard. The court expresses its doubts whether the entry of a strike is properly considered when a case is dismissed, or whether that determination should wait until the prisoner brings a new suit and a defendant contests the plaintiff's entitlement to proceed IFP.

PLRA: Attorneys' Fees

Montcalm Pub. Corp. v. Commonwealth of Va., 199 F.3d 168 (4th Cir. 1999). A non-prisoner intervenor in a case brought by a prisoner is governed by the PLRA limits on attorneys' fees, since the PLRA applies to actions "brought by a prisoner." The intervenor (a publisher in a censorship case) could and should have filed a separate action.

PLRA: Exhaustion of Administrative Remedies

Wolff v. Moore, 199 F.3d 324 (6th Cir. 1999). A claim that arose before enactment of the PLRA, expressed in a complaint filed after the PLRA, requires only "substantial compliance with the applicable administrative process." The plaintiff's participation in an investigation of the use of force met this "substantial compliance" requirement, even though the court has previously held that this investigation process is *not* sufficient to exhaust in a post-PLRA-enactment case.

The plaintiff's claim against a second officer for failing to protect him from the first is not barred by the fact that he did not name or complain about the second officer in his administrative complaint, since prison officials were on notice of the allegations and they were "not so distinct . . . as to require the filing of a separate and independent administrative grievance." (329)

PLRA: Three Strikes Provision
Medical Care

Hunt v. Uphoff, 199 F.3d 1220 (10th Cir. 1999). It was not disputed that the plaintiff's medical care claims (diabetes and hypertension) met the "imminent danger of serious physical injury" standard of the three strikes provision, perhaps because the plaintiff died of his medical problems during the proceedings.

The plaintiff complained that he had a heart attack as a result of inadequate treatment for diabetes and hypertension; that he was denied prescribed insulin for over a year, and was denied it again after his heart attack; that medically recommended procedures were not performed; that he didn't get proper diagnosis and treatment because of the lack of a primary care physician; that prescribed special diets were not provided;

that prescribed medication was confiscated; that he was not treated for elevated blood sugar or chronic hypertension. These allegations do not reflect "mere disagreement with his medical treatment." At 1224: "Nor does the fact that he has seen numerous doctors necessarily mean that he received treatment for serious medical needs, i.e., that treatment was prescribed at all or that prescribed treatment was provided."

Delay in providing medical care may violate the Eighth Amendment. At 1224:

> Delays that courts have found to violate the Eighth Amendment have frequently involved life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems. . . . Officials may also be held liable when the delay results in a lifelong handicap or a permanent loss.

Communication with Media

Kimberlin v. Quinlan, 199 F.3d 496 (D.C.Cir. 1999). The district court previously determined that it was clearly established that a prisoner has a right not to have his contact with the media interfered with on the basis of the content of his communication. That ruling is the law of the case in this proceeding, brought by the prisoner who alleged that he had sold pot to Dan Quayle and was then placed in administrative segregation so he could not talk to the media.

Procedural Due Process: Disciplinary Proceedings

Williams v. Davis, 200 F.3d 538 (8th Cir. 2000). The court reiterates its prior holding that a retaliation claim for a disciplinary charge is precluded if the prisoner was punished for an actual violation of prison rules.

Procedural Due Process: Disciplinary Proceedings

Kalwasinski v. Morse, 201 F.3d 103 (2d Cir. 1999). In determining whether a disciplinary sanction is atypical and significant under *Sandin v. Conner*, district courts must review the particular conditions of confinement to which the plaintiff was subjected, giving suitable weight to the difference between being confined 23 hours a day in segregation and half the day in general confinement, and examining the extent of interruptions of prison programming. While the frequency and duration of SHU confinement is relevant, merely calculating the percentage of prisoners in SHU confinement does not measure the likelihood that a prisoner will suffer comparable deprivation in the ordinary administration of prison life, and the basis for comparison is not the SHU sentences of other prisoners but deprivations suffered by other prisoners "in the ordinary course of prison administration" (107)--including general population and other forms of administrative and protective custody.

The court does not decide whether the plaintiff's 180 days in SHU is atypical and significant because it concludes he was not denied due process. A notice of charges that he had threatened to kill an officer sufficiently warned him that he was accused of making verbal threats against officers, even if there was no evidence at the hearing of a death threat. Due process was satisfied by having two staff witnesses testify by telephone, with the plaintiff questioning them, and having a third witness testify on tape, played at the hearing, after the hearing officer said he had asked the questions the plaintiff had asked him about. The exclusion of 14 other officers as irrelevant or unnecessary was proper, since they had not been present at the incident.

Procedural Due Process: Property

Lopez v. U.S., 201 F.3d 478 (D.C.Cir. 2000). Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane*. . . ." (480) Sending notice of civil forfeiture to a prisoner's home and the prison he was thought to be in was reasonable, but the failure to take additional steps when the notices were returned, even though the DEA "very well knew" he was in prison either in Florida or in the federal system, was unreasonable. DEA "should have attempted to locate him within the prison system." Notice to

the prisoner's wife was not sufficient, since it gave her notice only about her own interest in the property, and not about his, and did not say that she should notify him.

PLRA: In Forma Pauperis Provisions, Exhaustion of Administrative Remedies

Page v. Torrey, 201 F.3d 1136 (9th Cir. 2000). A person civilly committed after the end of his prison sentence under a sexual predators act is not a prisoner for purposes of the PLRA. At 1139: ". . . [T]he natural reading of the text is that, to fall within the definition of 'prisoner,' the individual in question must be currently detained as a result of accusation, conviction, or sentence for a criminal offense. . . . As this plain-language reading of the text produces a plausible result, we need not look further."

PLRA: In Forma Pauperis Provisions, Filing Fees

Hatchet v. Nettles, 201 F.3d 651 (5th Cir. 2000). Since prisoners have no control over withdrawals from their prison accounts, district courts should not dismiss for nonpayment of an initial partial filing fee without inquiring into the reasons for it. The district court should enter an order directing payment of the fee after receiving the prisoner's consent forms. The order should provide that if the account doesn't contain the full fee, the prison should withdraw whatever is available and send it to the district court clerk, even if the balance is less than $10; the PLRA's $10 limit applies only after the initial fee. The order should also make provision for further withdrawals in compliance with the PLRA. If it appears that the prisoner has not complied, the district court should "take reasonable steps to ascertain whether the prisoner has complied with the order by allowing objections to a magistrate judge's report, . . . issuing a show-cause order, . . . communicating by telephone, fax, or e-mail with officials of the custodial institution, issuing an order to the custodial institution, or using any other method designed to obtain the relevant information." A sworn affidavit or declaration under penalty of perjury explaining or documenting the prisoner's compliance will ordinarily suffice to avoid dismissal.

Searches: Visitors and Staff/Qualified Immunity

Burgess v. Lowry, 201 F.3d 942 (7th Cir. 2000). The plaintiffs, family members of death row prisoners, were required to submit to strip searches to visit. Prison regulations authorize such searches only if the visitor consents and there is reasonable suspicion of contraband.

A right is not necessarily clearly established for immunity purposes by precedent in the circuit where the case is filed, e.g., if that circuit's only precedent is very old and every other circuit had ruled the other way. However, the absence of circuit or Supreme Court precedent is not conclusive either. The right might be so clear as so need no supporting case law or might have clear support from other jurisdictions. Here, there is a "long and unbroken series of decisions by our sister circuits stretching back to the early 1980s" establishing that "strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband." Contrary law in one state or one federal appeals court does not provide an "automatic safe harbor." The question is "whether a reasonable official in the position of these defendants, considering all relevant sources of guidance to the law, might have thought it reasonably possible that this court or eventually the U.S. Supreme Court would hold that strip searches of prison visitors are proper even without reasonable suspicion." (946) The court rejects the argument that "any time a state official could think of an argument for some position that had not been mentioned in a previous decision the contrary of that position could not be considered established law." (946)

Since these defendants did not make an argument in the district court about the special conditions of death row, they cannot do so here. At 947:

> . . . [A] general conditioning of prison visitation on subjection to a strip search is manifestly unreasonable. The prisoners themselves are subjected to such searches before the visit, and, if the prison wants, after the visit as well, . . . and the visitation is under continuous surveillance by guards.

> Whether or not there is a constitutional right either to visit a prisoner, or to be visited in a prison . . ., visits are something greatly valued both by the prisoners and by their visitors (and perhaps especially by prisoners on death row), so that the defendants' practice puts the visitors to a very painful choice--unnecessarily so, judging by the state's own regulations, which require reasonable suspicion as a predicate to conditioning a prison visit on submission to a strip search. In these circumstances, the costs of the defendants' practice seems clearly to exceed the benefits, and by a wide margin.

Procedural Due Process: Disciplinary Proceedings/Exhaustion of Remedies/Habeas Corpus

Thomas v. McCaughtry, 201 F.3d 995 (7th Cir. 2000). The petitioner appealed a disciplinary conviction, the warden remanded and the adjustment committee issued a revised but still defective decision. A state court ruled that the failure to appeal a second time to the warden was a failure to exhaust administrative remedies. The federal court in a habeas proceeding is bound by the state's decision on compliance with state procedures under the independent and adequate state grounds doctrine. Federal courts defer to the state's application of state law if it is applied in a consistent and principled way and if the prisoner had notice of the requirement.

Suicide Prevention/Medical Care: Standards of Liability, Deliberate Indifference

Williams v. Kelso, 201 F.3d 1060 (8th Cir. 2000). The decedent was admitted to jail, after a drunken assault on his wife, in a disoriented and confused state; he had hallucinations and heard voices; he got into a fight with another prisoner. He later committed suicide. No defendants could be found deliberately indifferent. There was no indication that he had given any staff person any indication that he was suicidal. He had been in the jail for several days before killing himself, without harming himself or others. There is no case law supporting a requirement of "immediate medical attention to a disoriented, confused, belligerent detainee who has the odor of alcohol about him and has been arrested on an alcohol related misdemeanor charge in the absence of any indication of harm to himself."

PLRA: Exhaustion of Administrative Remedies/Non-English Languages

Castano v. Nebraska Dept. of Corrections, 201 F.3d 1023 (8th Cir. 2000). A complaint that the prison system failed to provide interpreters at disciplinary and parole hearings was a prison conditions complaint requiring exhaustion of administrative remedies. The exhaustion requirement is not limited to frivolous cases but extends to all prison conditions

Federal Officials and Prisons/Statutes of Limitations

King v. One Unknown Federal Correctional Officer, 201 F.3d 910 (7th Cir. 2000). A previously unidentified officer cannot be joined as a defendant after the statute of limitations has run. Rule 15(c)(3), Fed.R.Civ.P., does not permit relation back in a case of delayed identification of a party; it applies only where there is a mistake as to the party's identity.

PLRA: Screening and Dismissal

Cruz v. Gomez, 202 F.3d 593 (2d Cir. 2000). Dismissal for failure to state a claim under 28 U.S.C. § 1915(e) is mandatory and not discretionary. Most courts have applied a *de novo* review standard to dismissals under 28 U.S.C. § 1915(e)(2)(B)(ii). Under either standard, the prisoner should have an opportunity to amend to cure the deficiencies in his due process claim.

Procedural Due Process: Property

United States v. McGlory, 202 F.3d 664 (3d Cir. 2000) (en banc). Notice of a civil forfeiture proceeding mailed to the United States Marshals Service, for remailing to the prisoner property owner, did not meet due process standards; notice must be sent to the property owner at the prison where the government is

holding him.

Drug Dependency Treatment

Bowen v. Hood, 202 F.3d 1212 (9th Cir. 2000). The federal Bureau of Prisons excluded from a program allowing early release of prisoners who complete a drug program persons whose crime of conviction involved the possession, carrying or use of a firearm. After it was told by the court it could not declare these to be "violent offenses," it decided it would exclude those prisoners in the exercise of its discretion. The court upholds this determination as a valid exercise of discretion. However, the Bureau may not apply it to those who had previously been notified of their eligibility for early release.

Drug Dependency Treatment

Zacher v. Tippy, 202 F.3d 1039 (8th Cir. 2000). A prior misdemeanor aggravated assault conviction is reasonably construed as a "crime of violence" disqualifying the prisoner from a program allowing early release of prisoners who complete a drug program. The fact that the Bureau of Prisons had previously told the plaintiff he was provisionally entitled to early release is not a binding interpretation of the statute, on which the agency had reversed itself three times.

Access to Courts: Punishment and Retaliation/Grievances and Complaints about Prison/Inmate Legal Assistance/Res Judicata and Collateral Estoppel

Herron v. Harrison, 203 F.3d 410 (6th Cir. 2000). The right of access to courts applies only to non-frivolous claims, so the plaintiff has no claim for retaliation for actions taken in response to a complaint that was dismissed as frivolous.

The plaintiff may have a claim of retaliation for actions taken in response to his helping another prisoner argue a grievance before the prison board. At 416-17:

> . . . [A]n inmate does not generally have an independent right to help other prisoners with their legal claims. . . . Such assistance is protected, however, when the inmate receiving the assistance would otherwise be unable to pursue legal redress. Assistance is then protected as a derivative of the complainant's right of access to the courts.

Under *Thaddeus-X v. Blatter*, First Amendment retaliation claims are distinguished from "general" retaliation claims, which are governed by the "shock the conscience/egregious abuse of authority" standard. The district court erred in applying the latter standard to plaintiff's First Amendment claims.

Crowding/Modification of Judgments/Class Actions: Conduct of Litigation/PLRA: Prospective Relief Provisions

Parton v. White, 203 F.3d 552 (8th Cir. 2000). The district court did not abuse its discretion in modifying a consent decree prison cap. There had been an unanticipated increase in prison population, staff had been increased and placed in greater proximity to prisoners to offset the increase in violent incidents after the previous population increase, and physical conditions had been improved. At 556 n.4: Failure to make the need/narrowness/intrusiveness findings required to preserve relief under the PLRA was irrelevant, because neither defendants nor plaintiffs made any arguments based on the PLRA.

PLRA: Screening and Dismissal/Medical Care: Denial of Ordered Care, Serious Medical Needs/Recreation and Exercise

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc). Prisoners should generally get leave to amend when their complaints are dismissed under 28 U.S.C. § 1915(e)(2). The statutory language parallels the language of Rule 12(b)(6), Fed.R.Civ.P., under which the notion of dismissal with leave to amend is well established. The court is reluctant to presume that Congress has overturned the established policy of liberal amendment. This result will not defeat the intent to curb meritless lawsuits, since courts retain discretion to dismiss without leave to amend if the complaint cannot be saved.

The plaintiff's broken jaw was a serious medical need, since it "affected his daily activities and ability to eat, . . . was the kind of injury a doctor would find noteworthy . . . [and] was likely

painful as well." (1131-32)

The plaintiff alleged that he was not provided a prescribed liquid diet (resulting in his losing 22 pounds), and was not returned to the clinic for follow-up as ordered. These allegations "are sufficient to support a finding that prison officials intentionally interfered with his previously prescribed medical treatment" (1132), which can constitute deliberate indifference. *Id.*: "A prisoner need not prove that he was completely denied medical care."

An allegation of the denial of all access to outdoor exercise for six and a half weeks meets the objective requirement for Eighth Amendment claims.

Pre-Trial Detainees/False Imprisonment

Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000). A prisoner arrested in one county, transferred to a second county pursuant to an agreement to avoid overcrowding, and then held for nine months without ever going to court, could proceed against the first county. Both state and federal law make the first county responsible for his custody and for failing to ensure that he was taken to court in that county.

The plaintiff had no Fourth Amendment claim because a facially valid bench warrant had been issued and no Eighth Amendment claim because he was not complaining about the conditions of his incarceration but merely the fact of incarceration. The defendants were not entitled to qualified immunity on the plaintiff's Sixth Amendment claim for denial of the right to counsel and to be informed of the charges against him.

> At 880-81:
> Prohibition against improper use of the "formal restraints imposed by the criminal process" lies at the heart of the liberty interests protected by the Fourteenth Amendment due process clause. . . . The Fourteenth Amendment's protection of Jones's liberty interest was clearly established in 1994-95, and Jones's alleged nine month detention without proper due process protections was not objectively reasonable in light of the clearly established legal rules.

Rehabilitation/Procedural Due Process: Classification/Ex Post Facto Laws/Habeas Corpus

Chambers v. Colorado Dept. of Corrections, 205 F.3d 1237 (10th Cir. 2000), *cert. denied*, 121 S.Ct. 391 and 121 S.Ct. 419 (2000). A state sex offender statute which reduces the accrual of earned time credit for alleged sex offenders who do not participate in treatment is not an *ex post facto* law because it does not increase the plaintiff's punishment (i.e., does not extend his maximum term of incarceration), and he has no vested right in a particular parole date or parole hearing eligibility date.

The plaintiff, classified as a sex offender based on an allegation of rape for which he was not prosecuted, was denied due process. In concluding that due process requirements apply, the court first cites the fact that the plaintiff received earned time credit at the higher rate for several years despite his classification, then says that "it is the label replete with inchoate stigmatization--here based on bare allegations which are vigorously denied and which have never been tested--which requires some procedural scrutiny. The consequences of that label, then, are not a privilege as the CDOC insists, but something of value entitled to procedural due process." (1242-43, footnote omitted).

This appears to be a holding that there is a liberty interest based on the Constitution in avoiding classification as a sex offender, as in *Neal v. Shimoda*. But the court goes on to say "it is the mandatory assignment of the label which forms the substantive predicate," and that CDOC "provided Mr. Chambers a liberty interest in the consequences of the *mandatory* label which it then arbitrarily removed without affording him" due process, suggesting it is finding a state-created liberty interest.

The court concludes by directing the district court to enjoin defendants from withholding the plaintiff's earned time credits because of his refusal to admit being a sex offender. The *Heck/Balisok* rule is not mentioned.

Medical Care: Standards of Liability, Deliberate Indifference

Jolly v. Knudsen, 205 F.3d 1094 (8th Cir. 2000). At 1097: ". . . [M]ultiple contacts with medical personnel do not always preclude a finding of deliberate indifference," though there is no deliberate indifference in this case.

PLRA: In Forma Pauperis Provisions

Feliciano v. Selsky, 205 F.3d 568 (2d Cir. 2000). The PLRA costs provision, 28 U.S.C. § 1915(f), says that if a judgment against a prisoner includes payment of costs, costs are collected in the same manner as filing fees. However, unless the court actually awards costs, no costs may be taxed. The court retains discretion to award costs or not, in full or in part, against an indigent prisoner, and may consider "any factor the court deems relevant, including 'the purpose of the forma pauperis statute, the history of the party as litigator, good faith and the actual dollars involved.'" [Citation omitted]

Rights of Staff/Communication and Expression

Anderson v. McCotter, 205 F.3d 1214 (10th Cir. 2000). The plaintiff, a student intern at a halfway house for sex offenders, was terminated for criticizing a proposal for privatizing services. The plaintiff's speech addressed a matter of public concern, but defendants' interest in promoting the efficiency of the facility's operations outweighed the plaintiff's interest in stating her views, since prisoners "have an irrational fear of any changes in their treatment regimen" which may affect the effectiveness of the program.

Pro Se Litigation

Bennett v. King, 205 F.3d 1188 (9th Cir. 2000). The plaintiff missed a deadline to amend his complaint because he was disciplined and placed where he did not have access to his legal papers and legal work. The district court erred in not accepting the plaintiff's uncontroverted explanation and granting an extension of time.

DISTRICT COURT CASES

Privacy/Deference/Personal Involvement and Supervisory Liability

MacDonald v. Angelone, 69 F.Supp.2d 787 (E.D.Va. 1999). A prison policy forbidding covering cell observation windows while prisoners use the toilet is upheld under *Turner v. Safley*. There is a valid, rational connection between defendants' rule and security. The plaintiff has an alternative: he can cover his body with a sheet or towel. Requiring staff to move a window covering to see inside would require them "to take steps (literally)." Prior holdings that the involuntary exposure of prisoners' genitals to members of the opposite sex is unconstitutional when not "reasonably necessary" do not establish what is reasonably necessary. At 763: "While inmates have a right to be protected from gratuitous and unnecessary observation while they use their cell toilets, prison officials have an overriding responsibility to take whatever steps may be reasonably necessary, including surveillance of inmates, to maintain prison security."

The Commissioner could not be sued over this policy because it originated at the prison, not at the department level, and there was no indication of the Commissioner's personal involvement.

Procedural Due Process: Disciplinary Proceedings/PLRA: Mental or Emotional Injury, Exhaustion of Administrative Remedies/Pendent and Supplemental Claims; State Law in Federal Courts/Grievances and Complaints about Prison/Verbal Abuse/Personal Involvement and Supervisory Liability/Classification: Race/Work Assignments

Shabazz v. Cole, 69 F.Supp.2d 177 (D.Mass. 1999). Neither the PLRA exhaustion requirement nor the mental/emotional injury provision apply to pre-PLRA claims.

Retaliatory intent can be inferred from circumstantial evidence, including a chronology suggesting retaliation. However, since deference is due to the expert judgment of prison administrators, the plaintiff "cannot get to the jury if defendants produce evidence of a legitimate reason such that they would have disciplined Shabazz even in the absence of the grievance." (198)

Verbal harassment, including racial epithets, does not violate the Eighth Amendment, the due process clause, or the Massachusetts Civil Rights Act. (But, at 209: racial slurs and epithets may be evidence of a racially discriminatory motive for other actions.) However, an allegation of retaliatory discipline states a claim under the Massachusetts Civil Rights Act.

Prisoners have no property or liberty interest in their prison jobs, and loss of a job doesn't create atypical and significant hardship.

The Superintendent of the prison could not be held liable for retaliatory conduct by line staff where the information he received (e.g., through review of disciplinary charges) suggested only that there was a factual dispute about what had occurred and did not state the retaliation claim.

Procedural Due Process: Disciplinary Proceedings/Pendent and Supplemental Claims; State Law in Federal Courts

Shabazz v. Cole, 69 F.Supp.2d 210 (D.Mass. 1999). Massachusetts disciplinary proceedings are governed by a standard of substantial evidence, which means evidence which "a reasonable mind might accept as adequate to support a conclusion, or, stated otherwise, evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." (219, internal quotation marks and citation omitted).

Federal Officials and Prisons/Drug Dependency Treatment

Whipple v. Herrera, 69 F.Supp.2d 1310 (D.Colo. 1999). The plaintiff, convicted of unarmed bank robbery, was declared eligible to get his sentence reduced by participating in a residential drug program, but the standards were changed while he was waiting to get into a program. However, the earlier standards were wrong under the authorizing statute, so the plaintiff was never really eligible. Equitable estoppel will not be applied against the government to frustrate the purpose of a statute.

Homosexuals and Transsexuals/Federal Officials and Prisons/AIDS

Farmer v. Hawk-Sawyer, 69 F.Supp.2d 120 (D.D.C. 1999). The Bureau of Prisons' policy requiring documentation of pre-incarceration hormone therapy before the BOP will provide hormone therapy in prison is upheld. It meets the rational basis test, since patients' self-reporting of condition and current level of treatment cannot be taken at face value, but must be verified to protect the patient's health and safety.

The Bureau of Prisons says it would not provide hormone therapy in any case because this plaintiff has AIDS and complications might result.

Protection from Inmate Assault/Pleading

Edney v. Karrigan, 69 F.Supp.2d 540 (S.D.N.Y. 1999). The plaintiff's allegation that officers were off their posts when he was attacked by another prisoner does not state a claim absent allegations of deliberate indifference on their part. At 546: ". . . [A]n inmate must do more than allege a generalized danger or negligent failure to respond to such danger. Rather, [he] must provide a court with particularized allegations from which it could be concluded that the Defendants' failure to offer protection was accompanied by a sufficiently culpable state of mind." (This holding appears inconsistent with the Federal Rules of Civil Procedure's allowance of "notice pleading.")

Pre-Trial Detainees/Use of Force: Restraints/Protection from Harm/Searches: Person, Arrestees/Negligence, Deliberate Indifference and Intent

Warren v. Swanson, 69 F.Supp.2d 1047 (N.D.Ill. 1999). The plaintiff was arrested, handcuffed to a wall in a police station, and left alone; a cigarette lighter in her coat pocket caught fire, and she was severely burned. Her claim of a Fourth Amendment right to be reasonably searched for her protection is dismissed on qualified immunity grounds. However, her allegation that the defendants did not respond to her cries for help stated a claim under the Fourth Amendment's reasonableness standard, which applies to this arrestee's case. Deliberate indifference is not applicable.

Ex Post Facto Laws

Viserto v. Goord, 69 F.Supp.2d 435 (W.D.N.Y. 1999). A state statute provides that

when a prisoner is serving indeterminate sentences concurrently, the minimum terms of the two sentences are added together to determine the date of parole eligibility. Previously the law provided that the longer of the two minimums determined eligibility. One of the petitioner's sentences--the one with the longer minimum--antedated the change in the law, so when he was later convicted of a second crime, his parole eligibility on the first sentence was postponed. This does not violate the Ex Post Facto Clause; it was his own conduct in committing another crime, not the changed law, that caused the delay in his parole eligibility date.

Federal Officials and Prisons/Psychotropic Medication/Pre-Trial Detainees

United States v. Weston, 69 F.Supp.2d 99 (D.D.C. 1999). Where government seeks to medicate to render a defendant competent to stand trial, its conduct must pass strict scrutiny under existing case law. *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998). However, in this case the government seeks both to render the defendant competent and to protect his and others' safety, and need meet only the *Riggins v. Nevada* standard: "that treatment with anti-psychotic medication is medically appropriate and, considering less intrusive alternatives, essential for the sake of the defendant's own safety or the safety of others."

The court reviews the decision to medicate as a final agency action subject to a reasonableness standard under the Administrative Procedures Act, rather than reviewing *de novo* as has been required in connection with medication for competency restoration only.

The defendant does not have a Sixth Amendment right to counsel at such a hearing, since the decision is essentially medical in nature. The involvement of counsel that was permitted (allowing him to submit evidence, and consultation with the client before the hearing) was sufficient to protect his Sixth Amendment rights.

AIDS/Pre-Trial Detainees

Roop v. Squadrito, 70 F.Supp.2d 868 (N.D.Ind. 1999). The plaintiff was arrested and was told that because he had AIDS, he would be locked down. He was put in a shower room, which had no toilet. After five days, he was placed in a cell, but without toilet or shower (he went four days without a shower). After four days he was put in a more standard cell.

Furnishings (874): Sleeping on a mattress on a concrete floor is not unconstitutional.

Exercise and Recreation (875): Lack of exercise is not unconstitutional because the plaintiff could have done push-ups and sit-ups in his cell. "A lack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point where an inmate's health is threatened."

Hygiene (875): "Complaints about not being able to shower more often than he did would not hold water . . . since the deprivation of a mere cultural amenity is not cruel and unusual punishment. . . . Indeed, the Seventh Circuit has held that just one shower per week is constitutionally significant."

Sanitation (875): "Plaintiff's complaint that his cell was 'filthy with dirt and fuzz on the floor' cannot be swept into a constitutional claim. . . ."

Hygiene, Plumbing (875): The lack of a toilet in plaintiff's cell did not violate the Constitution.

Disabled (877): The plaintiff was not treated as a normal inmate, and the reason he was not is a factual issue not resolvable on summary judgment.

PLRA: Exhaustion of Administrative Remedies

Onapolis v. LaManna, 70 F.Supp.2d 809 (N.D.Ohio 1999). A prisoner who did not use the administrative remedy procedures did not exhaust, notwithstanding his hiring a law firm to try to resolve his issues, his writing letters, and telephone conferences between the defendants, another attorney, and his wife.

At 814: Failure to exhaust also constitutes failure to state a claim upon which relief can be granted.

A complaint of failure to act on a detainer is a "civil action with respect to prison conditions" (812 n. 6) for purposes of the PLRA.

Rehabilitation/Drug Dependency Treatment/Religion/Judicial and Prosecutorial Immunity

Yates v. Cunningham, 70 F.Supp.2d 47 (D.N.H. 1999). The plaintiff alleged that he was denied early release because of his refusal to participate in a religion-based alcohol treatment program (Alcoholics Anonymous). His damage claim is barred by absolute immunity, because he objects to defendants' reports and recommendations made to a court pursuant to court order.

Sexual Abuse/Cruel and Unusual Punishment/Negligence, Deliberate Indifference and Intent/Waiver of Rights

Carrigan v. Davis, 70 F.Supp.2d 448 (D.Del. 1999). Claims of sexual harassment or abuse are challenges to the conditions of confinement analyzed under the deliberate indifference standard of the Eighth Amendment. Vaginal intercourse and/or fellatio between a prison inmate and a prison guard, consensual or not, is a per se violation of the Eighth Amendment. Since such acts serve no legitimate penological purpose, are illegal and thus contrary to the goals of law enforcement, such conduct is per se sufficient to establish a culpable mental state.

There is no consent defense to a sexual abuse claim in a prisoner civil rights action, unlike a tort case. As a constitutional matter, waiver and consent are most often litigated in connection with consent to search, waiver of the right to counsel, and waiver of *Miranda* rights. Because there is a "special relationship" between prisoners and their custodians, the court adopts the "more difficult waiver standard" rather than the "more lenient consent standard." Since waivers must be voluntary, knowing, and intelligent, and since voluntariness cannot exist for a prisoner, the plaintiff was incapable of giving a voluntary waiver.

PLRA: Mental or Emotional Injury,- Exhaustion of Administrative Remedies/Sanctions/Federal Officials and Prisons/Immunity

Marrie v. Nickels, 70 F.Supp.2d 1252 (D.Kan. 1999). The plaintiffs, military prisoners, complained of various revolting conditions at the United States Disciplinary Barracks. The *Feres* doctrine, which prohibits suits by military personnel against their superiors for matters "incident to service," does not bar these claims, because these prisoners have been officially discharged.

Plaintiffs' action is subject to the mental/emotional distress provision. One plaintiff seeks damages for emotional distress from retaliation. His compensatory damages claim is barred by § 1997e(e), but his nominal and punitive damages claims may not be. As to sexual assault claims, the court adopts the *Siglar* holding applying the Eighth Amendment requirement of injury that is not *de minimis*, and then adopts the Second Circuit *Liner* holding that sexual assaults are physical injuries as a matter of common sense.

Mental Health Care/Pendent and Supplemental Claims/State-Federal Comity/Disabled/State Officials and Agencies/Pendent and Supplemental Claims; State Law in Federal Courts

Neiberger v. Hawkins, 70 F.Supp.2d 1177 (D.Colo. 1999). Persons confined to an institution for those found not guilty by reason of insanity complained about the conditions of their confinement. Defendants removed the case from state to federal court.

The court declines to abstain on plaintiffs' claim under the state Care and Treatment of the Mentally Ill Act, since this suit deals with conditions of confinement of the entire population, and while the state courts retain jurisdiction over the treatment of particular individuals forced to take medication.

Removal to federal court is not an unequivocal waiver of sovereign immunity, since the notice of removal disavowed such a waiver. The court allows the injunctive claim to go forward notwithstanding defendants' claim that it is an improper collateral attack on the actions of state courts in the patients' individual cases.

Telephones/Visiting/Criminal Proceedings

United States v. Peoples, 71 F.Supp.2d 967 (W.D.Mo. 1999). Tape recording conversations in the jail visiting area and over the telephone did not violate the Fourth Amendment. Prison telephone recordings are routinely admissible on an implied consent theory. A recorded warning that the calls

are "subject to monitoring and recording" is sufficient notice to support that theory. At 978: ". . . [O]nce the government establishes that its intrusion is for a justifiable purpose of prison security, the fourth amendment question is essentially resolved in its favor."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 does not bar these recordings, since prisoners were warned that they will be recorded and might be monitored, and this defendant had actual knowledge of the warnings in the inmate handbook, printed above the telephones, and heard before each call began. The defendant's in-person conversations carried through an intercom system (apparently as part of a non-contact visiting regime) are not wire communications within the meaning of the statute.

Medical Care: Standards of Liability, Deliberate Indifference/Color of Law/Federal Officials and Prisons

Nunez v. Horn, 72 F.Supp.2d 24 (N.D.N.Y. 1999). A doctor who did not work for the Bureau of Prisons and was not under contract to provide medical services to prisoners, but just took referrals from prison physicians, did not act under color of state law. (The court ignores that the question is whether he acted under color of federal law.)

A doctor who removed synovial and scar tissue from the plaintiff's elbow but did not remove a bony block which restricted his range of movement did not violate the Eighth Amendment since the treatment "was reasonable and was not administered with the intent to unnecessarily and wantonly inflict pain upon the plaintiff." Not performing more major surgery was an exercise of medical judgment.

PLRA: Exhaustion of Administrative Remedies/Work Assignments

Howard v. Headly, 72 F.Supp.2d 118 (E.D.N.Y. 1999). The PLRA exhaustion requirement is not jurisdictional. The court in dictum raises the question "whether administrative exhaustion is an affirmative defense that is waived by the defendants' failure to raise the issue in their initial moving papers" (123 n. 3).

At 123:

> To establish an Eighth Amendment claim based on unsafe working conditions, a plaintiff must establish that 1) he was incarcerated under conditions which posed a serious risk of serious harm, and 2) prison officials acted with deliberate indifference to his health or safety.

The plaintiff had sciatica and back and neck injuries, could not perform sanitation duties without suffering pain and agony, and had been ordered by the prison physician not to do so. He sufficiently alleged deliberate indifference in that the defendants knew of his medical condition and the work restriction but made him do the work anyway.

Women/Searches: Person, Convicts

Carlin v. Manu, 72 F.Supp.2d 1177 (D.Or. 1999). Male officers who viewed female prisoners being strip searched were entitled to qualified immunity because no prior case law made it clear that such conduct was unconstitutional.

Procedural Due Process: Disciplinary Proceedings, Temporary Release

Quartararo v. Catterson, 73 F.Supp.2d 270 (E.D.N.Y. 1999). There is a liberty interest in staying on temporary release, and the due process requirements are taken from *Wolff* and *Morrissey*. The plaintiff was denied due process by the failure to give him 24 hours' notice of the temporary release committee hearing. Due process also requires a written statement of the evidence relied on and the reasons for removal. A letter stating only that the plaintiff's continued participation was not in the best interest of the community in light of his parole hold was insufficient. Admittedly the parole hold itself was not sufficient reason to revoke temporary release, so the statement could not have been complete and accurate. It also omitted the fact that the defendants considered both the notoriety of the plaintiff's offense and the community's "demonstrated concern." (276)

Classification/Habeas Corpus/Personal Involvement and Supervisory Liability/Pre-Trial Detainees/Judicial and Prosecutorial

Immunity

Moore v. Speybroeck, 74 F.Supp.2d 850 (N.D.Ind. 1999). An allegation that prosecutors conspired with sheriffs to impose unlawful conditions of confinement did not state a claim. Jail conditions are under the control of county sheriffs under state statutes, and the plaintiff's conspiracy claim is unsupported by facts and barred by prosecutorial immunity. (The court doesn't explain how conspiring about jail conditions would be governed by immunity for initiating and pursuing a criminal prosecution.)

Denial of placement in a credit classification that would speed the plaintiff's release from custody affects the duration of custody, and habeas corpus is the exclusive federal remedy for challenging it.

Equal Protection/Ex Post Facto Laws

Woodley v. Department of Corrections, 74 F.Supp.2d 623 (E.D.Va. 1999). A policy change by the Parole Board requiring all persons who violated parole after a certain date to serve the entire unserved portion of their sentence did not deny equal protection because parole decisions are individualized and therefore no two parolees could ever be similarly situated for purposes of equal protection review.

The policy change by the Parole Board is not an *ex post facto* law because it did not involve the development of legislative rules, just guidelines. Also, it is only a procedural change, because it does not change the potential maximum sentence of the prisoner. The prisoner was on notice at the time he committed the crime that such an amendment might occur.

Procedural Due Process: Temporary Release/Habeas Corpus

Weller v. Grant County Sheriff, 75 F.Supp.2d 927 (N.D.Ind. 1999). A claim of removal from work release without due process is not barred by *Heck v. Humphrey*, since the action complained of did not affect the duration of plaintiff's confinement. However, the plaintiff had no liberty interest under state law; participation in work release was at the Sheriff's discretion. The 1984 decision in *Smith v. Stoner*, holding that there is a constitutionally based liberty interest in work release, is overruled by *Sandin*. This plaintiff was in a work release program in which he lived in jail and went to work during the day; post-*Sandin* decisions finding a liberty interest involved programs in which the prisoners lived outside the prison.

PLRA: Exhaustion of Administrative Remedies

Diezcabeza v. Lynch, 75 F.Supp.2d 250 (S.D.N.Y. 1999). Use of force claims are prison conditions claims governed by the PLRA exhaustion requirement. The definition of conditions of confinement in 18 U.S.C. § 3626(g)(2) governs interpretation of the phrase "prison conditions."

The court considers the affidavits from defendants attached to their motion to dismiss and treats the motion as one for summary judgment, giving appropriate notice to the plaintiff that he must submit affidavits showing exhaustion in support of his pleading, which alleged exhaustion.

Hazardous Conditions and Substances/Color of Law

Abarca v. Chevron U.S.A., Inc., 75 F.Supp.2d 566 (E.D.Tex. 1999). Plaintiff prisoners and prison employees brought suit over a leak in a liquefied petroleum gas pipeline operated by the defendant. However, the defendant did not act under color of state law, and there was no allegation of subjective deliberate indifference. The fact that the defendant operates under regulation by federal law does not mean that there is a federal claim.

Procedural Due Process: Disciplinary Proceedings

Ramirez v. McGinnis, 75 F.Supp.2d 147 (S.D.N.Y. 1999). A prisoner confined in SHU for 60 days sufficiently alleged atypical and significant hardship to create a material factual dispute under *Sandin* about the actual conditions in the Sing Sing SHU. The court weighs the entire gamut of SHU restrictions and indignities, including allegations by the plaintiff of conditions that are not consistent with defendants' regulations, and the loss to the plaintiff of programs that were interrupted by his placement.

Disabled

Yeskey v. Pennsylvania, 76 F.Supp.2d 572 (M.D.Pa. 1999). On remand from the Supreme Court, the court holds that the strenuous physical exercise required by a prison boot camp program is not a "major life activity" under the Americans with Disabilities Act. Whether a life activity is "major" depends on whether it is "significant or important relative to other activities" (577), e.g., walking, seeing, hearing, speaking, breathing, learning, and working. Also, major life activities are those that the average person in the general population can perform with little or no difficulty. Therefore disqualifying the plaintiff because of his high blood pressure did not violate the ADA.

Individual defendants cannot be held liable for violating Title II of the ADA.

CT Officials Move Prisoners Out of Notorious Virginia Supermax

In a victory for prisoners' rights, Connecticut officials said in July they will move prisoners under their care out of the notorious supermax prison in rural Virginia where two Connecticut prisoners died in the last 18 months. The move came less than six months after the American Civil Liberties Union filed a federal civil rights lawsuit charging that the state acted with "deliberate indifference" by knowingly allowing the brutal mistreatment of prisoners under its care at Wallens Ridge State Prison in Virginia.

"It is unfortunate that two prisoners had to die and a lawsuit had to be filed before Connecticut officials decided to act," said David Fathi, an attorney with the National Prison Project. "Despite officials' statements that the change was made for administrative costs and reasons," Fathi stated, "It's hard to interpret the decision as anything but a direct result of mounting legal pressures on the Department of Correction."

In addition to the ACLU lawsuit, those pressures included a scathing report from the Connecticut Commission on Human Rights and Opportunities, a multimillion dollar lawsuit by the family of a prisoner who committed suicide, the investigation of mental health conditions by the Connecticut Office of Protection and Advocacy for Persons with Disabilities, and ongoing protests by families of the Wallens Ridge prisoners.

Controversy over Connecticut's use of Wallens Ridge has centered over the past year on the death of two inmates: David Tracy and Lawrence Frazier. Tracy committed suicide in April 2000 and Frazier died from a medical condition that the Virginia state medical examiner concluded was aggravated by the repeated use of an electric stun gun in July 2000.

The ACLU's class-action lawsuit named Department of Correction Commissioner John J. Armstrong as the sole defendant, citing his "deliberate indifference" to "the risk that [Connecticut prisoners] will suffer serious physical injury or death" at the hands of Wallens Ridge guards. "We are pleased that Connecticut prisoners are being moved out of Wallens Ridge, and we remind the Commissioner that no matter where Connecticut inmates are housed, he is responsible for their health and safety," said Toya Alek Graham, an attorney with the Connecticut Civil Liberties Union.

The last Connecticut prisoners were removed from Wallens Ridge on August 14, 2001. In September, the Connecticut Department of Correction entered into a settlement agreement, promising not to house Connecticut prisoners at Wallens Ridge or at its nearby twin institution, Red Onion State Prison. The only exception is that the Department may house prisoners at these institutions in cases of emergency, but only on a short-term basis. The Department must give immediate notice to the ACLU if it transfers prisoners to Red Onion or Wallens Ridge in the future. The Department also agreed to pay $4,000 toward the ACLU's costs in bringing the lawsuit. In accordance with this settlement agreement, the lawsuit was dismissed on October 9, 2001.

The case, *Joslyn v. Armstrong*, was filed in U.S. District Court in Connecticut by David Fathi of the ACLU's National Prison Project; Toya Alek Graham and Philip D. Tegeler of the Connecticut Civil Liberties Union; and cooperating attorney Alan Neigher of the firm Byelas and Neigher in Westport.

District Court Agrees: DC Violated Prisoner's Rights

In September, a federal judge upheld a jury award of $174,178 for a District of Columbia prisoner who was denied treatment for skin cancer and glaucoma and whose pleas were ignored by prison officials and the mayor.

The ruling by U.S. District Judge Gladys Kessler denied two post-trial motions filed by the District seeking to overturn the jury's verdict in a case brought by the National Prison Project on behalf of Lawrence Caldwell. "Because the jury returned a verdict for Plaintiff [Caldwell], it obviously found his testimony credible and concluded that the exposure to feces in his cell, foul water, filth, excessive heat, smoke, and mace, and the lack of outdoor exercise, resulted in a substantial risk of serious harm to Plaintiff," wrote Judge Kessler.

"The City conducted a shotgun attack on the jury's verdict against the District. Judge Kessler's decision shows that the jury's verdict is fully supported by the evidence," said Elizabeth Alexander, Director of the National Prison Project.

Caldwell sued the District of Columbia and Department of Corrections officials for injuries suffered while being held in the Maximum Security Facility at the Lorton Correctional Complex beginning in May 1997. The facility has since been shut down under the terms of the DC Revitalization Act. In January 2001, a jury found that Corrections officials failed to comply with doctor-ordered treatment of Caldwell's glaucoma and skin cancer, in violation of the Eighth Amendment's ban against cruel and unusual punishment. "Our client waited a year for medical treatment that he should have received in a month," said David C. Fathi, an attorney with the National Prison Project. "Mr. Caldwell's health has deteriorated because of the deliberate indifference of the D.C. Department of Corrections."

Attorneys Alexander and Fathi of the ACLU National Prison Project were appointed by Judge Kessler to represent Caldwell in his case, *Lawrence Caldwell v. District of Columbia.*

"Not Part of the Penalty": Ending Prisoner Rape

Despite numerous clear pronouncements from the federal courts that prisoner rape is constitutionally unacceptable, sexual abuse of prisoners continues to be a serious and largely unaddressed problem in U.S. prisons and jails. On October 19 and 20, the National Prison Project, American University's Washington College of Law, Amnesty International, Human Rights Watch, Interlock Media and Stop Prisoner Rape hosted the first ever national conference to focus on this human rights violation. The event sought ways to give real meaning to the principle that rape is "not part of the penalty that criminal offenders pay for their offenses against society."

Held at AU's Washington College of Law, the conference addressed both prisoner-on-prisoner sexual abuse and custodial sexual misconduct (sexual abuse of prisoners by guards and other custodial staff). Panels consisting of activists, rape survivors, lawyers, corrections professionals, academic experts, public health specialists, and others covered topics ranging from the incidence of prisoner rape, to its effects on survivors, to its impact on the spread of HIV/AIDS.

The two-day conference also included an awards ceremony honoring Tom Cahill, president of Stop Prisoner Rape, and Cassandra Collins, founder of Stop Inmate Rape and Abuse. Both recipients are survivors of rape in prison and are unyielding advocates for improving current conditions for prisoners.

In order to build on the success of the conference and provide a venue for sharing materials and keeping participants informed of ongoing developments, plans are underway to create an email listserv. The listserv will be open to everyone. To join, email Kara Gotsch at kgotsch@npp-aclu.org.

SEXUALLY ASSAULTED IN PRISON OR JAIL?

The National Prison Project of the American Civil Liberties Union wishes to bring lawsuits on behalf of persons who have been sexually assaulted while in prison or jail, either by other prisoners or by staff. We are interested in hearing from both former prisoners and persons who are still incarcerated.

Please write to the address below and provide as many details as possible, including when and where the assault took place, whether you reported the assault, and what action, if any, was taken by prison, jail, or law enforcement authorities.

Legal representation, if provided, will be free of charge. Write to:

PR Project
Craig Cowie, Attorney
ACLU National Prison Project
733 15th St. N.W., Suite 620
Washington, DC 20005

Prisoners should send their letters by legal mail.

The National Prison Project
American Civil Liberties Union Foundation
733 15th Street, NW, Suite 620
Washington, DC 20005