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Report Details Horrible Treatment of Prisoners in the Wake of Hurricane Katrina

Shortly before the one-year anniversary of Hurricane Katrina, the ACLU's National Prison Project released a report documenting the experiences of thousands of men, women and children who were abandoned at Orleans Parish Prison in the days after the storm. The report, *Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina*, seeks to provide a comprehensive picture of what the individuals at the jail endured. It is written to capture their experiences, so that their voices can be heard. "The prisoners inside the Orleans Parish Prison suffered some of the worst horrors of Hurricane Katrina," said Eric Balaban, a staff attorney with the National Prison Project. "Because society views prisoners as second-class citizens, their stories have largely gone unnoticed and therefore untold."

In the days following Hurricane Katrina, the public was inundated with stories of personal tragedies that were unfolding day by day in the city of New Orleans and throughout the Gulf Coast region. Some reports were of amazing rescues, but much of the coverage focused on the disaster within the disaster—the thousands of men, women, and children left stranded around New Orleans, in their homes, the Louisiana Superdome, and the Convention Center. But just a few miles away from the Superdome and the Convention Center, another disaster within the disaster was developing at Orleans Parish Prison ("OPP"), the New Orleans jail.

A Brief History of Problems at OPP

The ACLU report describes a history of neglect at OPP, one of the most dangerous and mismanaged jails in the country. Conditions at OPP have been the subject of litigation in federal court since 1969, when a prisoner named Louis Hamilton filed a class action on behalf of all of the individuals housed in OPP. *Hamilton v. Morial*, C.A. No. 69-2443 (E.D. La.). Hamilton's lawsuit complained of gross overcrowding, horrendous medical and mental health care, and the jail's complete lack of preparedness to handle a fire emergency. The Court quickly ruled in June 1970 that "the conditions of confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution." *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La 1970). In 1989, the National Prison Project became class counsel in the *Hamilton* lawsuit.

The jail's culture of neglect has long been evident in OPP's lackluster provision of medical care to detainees. In October 2004, an OPP prisoner died of a ruptured peptic ulcer. Members of the public organized a rally to highlight the problems with medical services at OPP after another prisoner died in February 2005 of tuberculosis, and an OPP deputy died of pneumonia two weeks later. On the same day as the rally, an OPP prisoner died of bacterial pneumonia. Two months later, a prisoner died nine days after his attorneys complained that he was not receiving his proper medications, and the following month a prisoner died while receiving kidney dialysis. In fact, in the two months preceding Hurricane Katrina, two more prisoners

died while under medical observation at OPP, and a third is reported to have died the day before the storm hit New Orleans, although no more information is available at this time.

There has also been a series of tragedies due to OPP's failure to treat detainees with serious mental illnesses. In 2001, a young man arrested on traffic charges died of dehydration after being left largely unsupervised in five-point restraints for 42 hours. Less than two years later, a suicidal detainee was placed in four-point restraints, supposedly under close and constant watch—twelve hours after being placed in restraints, the man was found hanging from the upper bunk by a leather belt that inexplicably had been left in his cell. Just over three weeks before Hurricane Katrina, yet another prisoner in the mental health tier committed suicide by hanging.

The Descent into Chaos

This same culture of neglect was apparent in the days before Katrina, when Orleans Parish Criminal Sheriff Marlin N. Gusman declared that the prisoners would remain "where they belong," despite the mayor's decision to order the city's first-ever mandatory evacuation. While President Bush was declaring a state of emergency for Louisiana, and the population of New Orleans was ordered to evacuate the city, OPP was still packing in its prisoners. Over 100 of the men held in the jail's receiving tiers during Hurricane Katrina had been arrested and booked on minor charges during the day or two before the storm made landfall. Quantonio Williams, whose story appears in the report, was one of those men, arrested on a charge of possession of marijuana (first offense)—that charge was ultimately refused by prosecutors. OPP even accepted prisoners from other facilities, including juveniles as young as 10, to ride out the storm.

Although Sheriff Gusman refused to evacuate the prisoners, he was unprepared to handle the consequences. Deputies and staff admit that they received no emergency training and were entirely unaware of any evacuation plan. The only emergency plan produced by the sheriff's office in response to numerous requests by the ACLU of Louisiana was a patently inadequate, two-page document. "The sheriff's office was completely unprepared for the storm," said Tom Jawetz, Litigation Fellow for the National Prison Project and one of the coauthors of the report. "The Louisiana Society for the Prevention of Cruelty to Animals did more for its 263 stray pets than the sheriff did for the more than 6,500 men, women and children left in his care."

Left to fend largely for themselves, the prisoners did what they could to survive. As floodwaters rose in the OPP buildings, power was lost, and entire buildings were plunged into darkness. Deputies left their posts wholesale, leaving behind prisoners in locked cells, some standing in sewage-tainted water up to their chests. Over the next few days, without food, water, or ventilation, prisoners broke windows in order to get air, and carved holes in the jail's walls in an effort to get to safety. Some prisoners leapt into the water, occasionally tying bed sheets together to lower themselves from higher floors. When they hit the water, deputies stationed around some buildings and on the roofs of others shot at the prisoners. Many prisoners and deputies reported seeing prisoners hanging from the rolls of razor wire lining the fences that surround the buildings. Other individuals made signs or set fire to bed sheets and pieces of clothing to signal to rescuers; without adequate ventilation, the smoke from those fires made it difficult to breathe inside the jail, especially for elderly individuals and those suffering from asthma and other respiratory illnesses. Prisoners with serious medical conditions went for extended periods of time without necessary medications; at least two prisoners died within weeks of being rescued from the jail.

Once freed from the buildings, prisoners were brought by boat to an overpass, and were later bused to receiving facilities around the state. For some, conditions got worse. At the Elayn

Hunt Correctional Center, thousands of OPP evacuees spent several days on a large outdoor field, where prisoner-on-prisoner violence was rampant and went unchecked by correctional officers. "Some prisoners at Hunt attacked other prisoners, and guards did nothing to prevent this from happening," said Katie Schwartzmann, a staff attorney for the ACLU of Louisiana. "Guards threatened prisoners with guns when they were approached for help, and shot at one prisoner who had been stabbed by a group of other prisoners." One man, Ronnie Lee Morgan, Jr., was a federal prisoner in protective custody when he was transferred from OPP to Hunt. When Mr. Morgan and other prisoners in protective custody told Hunt officials that they could not safely be placed on the field with thousands of other prisoners, Mr. Morgan was told that he should not tell the prisoners on the field that he was in protective custody, and was advised to turn his sweatshirt reading "Federal" inside out. Once on the field, gang members attacked Mr. Morgan, who was stabbed in the head and neck, and was turned away when he ran to the guards seeking help. Mr. Morgan is now represented by the ACLU of Louisiana, which has filed a federal civil rights lawsuit on his behalf.

From Hunt, prisoners went to other facilities, where some were subjected to systematic abuse and racially motivated assaults by prison guards. Ivy Gisclair was being held at OPP for several hundred dollars in traffic violations and had never before been in any serious trouble with the law. After Hunt, he was transferred to Bossier Parish Maximum Security Jail, where he saw his release date come and go. When Mr. Gisclair asked a guard whether there was anything he could do to get released, he was pepper sprayed through his cell door, and then repeatedly shocked with a Taser, beaten by multiple guards, and put in solitary confinement with no clothes. "They were saying things to me like 'You New Orleans ni**ers think you so bad.' They also said 'you all are animals. I'm gonna put you in the woods with the animals.' Three weeks after his scheduled release date, Mr. Gisclair was dropped off by the side of the road wearing an orange OPP jumpsuit—it was the day Hurricane Rita hit the Gulf Coast. "They left us at a Shell gas station in our OPP jumpsuits, fit to get shot by anyone who thought we had escaped from jail."

Recommendations

The report makes a series of recommendations to local, state, and federal authorities designed to ensure that the jail that emerges from Hurricane Katrina is more cost-effective, humane, and focused on ensuring real public safety. The ACLU recommends that state and local authorities (1) design and implement a coordinated emergency plan to ensure that all prisons and jails are capable of quickly and safely evacuating before the next disaster strikes; (2) downsize OPP by ending the practice of holding people who are serving state time; (3) implement reforms to decrease the number of pre-trial detainees held at the jail; (4) convene a Blue Ribbon Commission to develop and implement a full set of recommendations for detention reform; (5) reduce the use of juvenile detention by exploring viable alternatives to detention; (6) view detention as a process rather than a place; and (7) appoint an Independent Monitor to review OPP policies, procedures, critical incidents, complaints and quality of complaint investigations.

In conjunction with the report's release, the National Prison Project also urged the president and Congress to push for a technical audit of the jail's emergency preparedness system. Such an audit would help to ensure that the mistakes chronicled in the report are never repeated. Moreover, the ACLU is calling for a full and immediate investigation by the Department of Justice into abuses at Louisiana correctional facilities during and after the storm, and is urging the DOJ to make the findings from such an investigation public and accessible to state and federal prosecutors.

What You Can Do

Right now, you can write to your representatives in Congress—and tell your family and friends to write—and tell them that these abuses must be investigated. Tell them that the lack of emergency preparedness displayed at OPP is unacceptable, and that the Department of Justice should commission a technical audit of the jail's emergency preparedness system. If you live in Louisiana, urge your local and state officials to take action also. "These are the untold horrors of Hurricane Katrina," Balaban said. "We must preserve these stories to create a record of the tragedy and to ensure that the mistakes detailed in this report are never repeated." Various civil and human rights organizations contributed to the report, including the ACLU of Louisiana, Human Rights Watch, and the NAACP Legal Defense and Educational Fund. The report is available online at http://www.aclu.org/opp.

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Case Law Report: Highlights of the Most Important Prison Cases

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

SUPREME COURT CASES

Prison Litigation Reform Act (PLRA)

Jones v. Bock, 549 U.S. __, 127 S.Ct. 910 (2007). This case involved the combined cases of three Michigan Prisoners challenging the Sixth Circuit's glosses on the PLRA's exhaustion requirement. The Supreme Court rejected all of the Sixth Circuit procedural rules implementing the PLRA's exhaustion requirement which included: 1) the rule requiring a prisoner to allege and demonstrate exhaustion in his complaint; 2) rules permitting suit only against defendants who were identified by the prisoner in his grievance; and 3) rules requiring courts to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint. Id. at 914.

As to the issue of whether the exhaustion requirement under the PLRA is a pleading requirement that the prisoner is required to satisfy, or an affirmative defense the defendant must plead or prove, the Court finds that the onus is squarely on the defendant. Id. at 921. Significantly, the Court found that the text of the PLRA did not justify deviations from the usual pleading practices under the Federal Rules (in keeping with its line of argument in Leatherman, Swierkiewicz and Hill), and further that the provisions of the PLRA and Congress's focus on the exhaustion requirements within the PLRA supports a finding that no implicit deviation from the usual practice under the Rules is mandated. Id. at 919-21.

In rejecting the Sixth Circuit's per se rule that exhaustion is inadequate under the PLRA unless all defendants are named in the prisoner's initial grievance, the Court again noted that the

Sixth Circuit rule lacks a textual basis in the PLRA. Id. at 922-23. The Court's ruling here is narrower than might first be thought, however, because it is based on the fact that the Michigan DOC's grievance policy at the time the grievances at issue were filed did not contain a provision specifying who must be named in the grievance. Id. Citing Woodford, 548 U.S. __, the Court reiterated that proper exhaustion requires only that prisoners complete the grievance process in accordance with the rules defined by the prison grievance process itself. Thus, procedural rules for exhaustion are defined by the prison policy and not the PLRA. Id. at 922-23.

Finally, the Court found that the PLRA does not require "total exhaustion" under which no part of a suit may proceed if a single claim in the action is not properly exhausted. Id. at 923. The language of the PLRA in Section 1997e(a), "no action shall be brought," does not support the "total exhaustion" rule because it is boilerplate language, frequently used in the Federal Code. And such language has never been construed to lead to the dismissal of an entire action if a single claims fails to meet the pertinent standards. Moreover, statutory references to an "action" have not been read to mean that every claim included in an action must meet the pertinent requirements for an "action" to proceed. The Court also noted the general court practice of dismissing bad claims and not a complaint as a whole. Id. at 924. The respondents' reliance on the total exhaustion rule of habeas corpus was also unavailing because separate claims in a habeas petition generally seek the same relief and success on one is often as good as success on another. In contrast, a PLRA suit typically has multiple, disparate and discrete complaints where a failure to exhaust on one does not affect the other. Id. at 924-25.

Finally, the Court rejected the respondents' policy arguments for total exhaustion, noting that the effect of the total exhaustion rule would likely be the proliferation of prisoner suits because it will be safer for prisoners to file a separate suit on every claim in order to avoid possible dismissal of an entire suit due to one exhaustion defect. And such a result is clearly contrary to the intent of the PLRA. Id. at 925-26.

PLRA - Exhaustion of Administrative Remedies. *Woodford v. Ngo*, 126 S. Ct. 2378 (2006). The PLRA's grievance exhaustion provision requires "proper exhaustion," which "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." (2386). However, the exhaustion requirement is not jurisdictional (2392).

Assistance of Counsel

Halbert v. Michigan, 125 S.Ct. 2582 (2005). The due process and equal protection obligation to provide counsel for indigents on initial appeals as of right, if the state allows criminal appeals at all, is applicable to persons who are convicted after pleas of guilty or *nolo contendere*, notwithstanding a Michigan statute, upheld by the state Supreme Court, denying counsel in most plea appeals, and notwithstanding that intermediate appeals in Michigan plea cases are now by leave only. On the latter point, the Court says that even though defendants don't have an appeal as of right, they have an entitlement to apply for leave. At 2590 (footnote omitted): "Of critical importance, the tribunal to which [the defendant] addresses his application, the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction instance." Dispositions of leave applications entail some evaluation of the merits of the case. In effect, the Court holds such applications to be equivalent to initial appeals as of right.

Supermax/Procedural Due Process--Administrative Segregation

Wilkinson v. Austin, 125 S.Ct. 2184 (2005). The plaintiffs alleged that their

placement in the Ohio State Penitentiary (OSP), the state's "supermax" prison, denied them due process. The Supreme Court holds that placement in the supermax does create a "significant and atypical hardship" under *Sandin v. Conner*, and therefore prisoners are entitled due process protections before they are moved there.

The Court notes that the circuits have disagreed as to the proper "baseline from which to measure what is atypical and significant in any particular prison system," but says it doesn't matter here because OSP placement "imposes an atypical and significant hardship under any plausible baseline." (2394). At 2394-95: "For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . ."

The Court determines what process is due with reference to the *Mathews v. Eldridge* factors. The Court finds that Ohio's procedures established in the policy are sufficient. At 2395: "The New Policy provides that an inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivation. . . . Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason. In addition to having the opportunity to be heard at the Classification Committee stage, Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation. Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. This avoids one of the problems [sic] apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation. If the recommendation is OSP placement, Ohio requires that the decision maker provide a short statement of reasons. This requirement guards against arbitrary decision making while also providing the inmate a basis for objection before the next decision maker or in a subsequent classification review. The statement also serves as a guide for future behavior. . . ."

The Court does not actually say that any of the above is constitutionally required. Though it appears to concede that notice and opportunity to be heard are due process requirements, it does not say whether the personal appearance at the Classification Committee is required.

The Court holds that Ohio is not required to allow prisoners to call witnesses at their transfer hearing, and that "the informal, nonadversary procedures set for in *Greenholtz v. Inmates of Neb. Penal and Correctional Complex* . . . and *Hewitt v. Helms* . . . provide the appropriate model...." (2397).

Habeas Corpus/Medical Care

Nelson v. Campbell, 124 S.Ct. 2117 (2004). The plaintiff, sentenced to death, complained that the "cut-down" procedure prison officials would have to employ to get to his drug abuse-ravaged veins in order to administer the lethal injection would violate the Eighth Amendment. At 2122-23: "We have not yet had

occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution--*e.g.*, lethal injection or electrocution--fall within the core of habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the 'conditions' nor the 'fact or duration' label is particularly apt."

While enjoining a method of execution doesn't call into question the validity of the sentence, it could impose significant costs by requiring statutory amendment or variance, and could result in delay in carrying out the sentence.

The Court needn't get into this question generally since it's undisputed that a challenge to the vein cut-down procedure for purposes of medical treatment would be a proper § 1983 action. Even if a challenge to the method of execution would sound in habeas, the fact that the cut-down procedure is a prerequisite to it doesn't mean the cut-down procedure has to be brought by habeas; indeed, the plaintiff's argument is that the procedure is gratuitous. At 2123: "Merely labeling something as part of an execution procedure is insufficient to insulate it from a §1983 attack." That is especially true where, as here, the cut-down procedure is not mandated by statute and the plaintiff concedes there are alternative ways of killing him. Thus the court allows the plaintiffs to proceed.

This approach is consistent with the Court's treatment of damages actions: only suits that would "necessarily imply" the invalidity of a conviction or the length of incarceration are subject to the favorable termination requirement. Here, the question is whether the challenge to the cut-down procedure would necessarily prevent the execution.

RFRA and RLUIPA/Establishment of Religion

Cutter v. Wilkinson, 125 S.Ct. 2113 (2005). The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not violate the Establishment Clause.

RLUIPA, on its face, is "a permissible legislative accommodation of religion that is not barred by the Establishment Clause." (2121). At 2121:

> Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. . . . Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . .; and they must be satisfied that the Act's proscriptions are and will be administered neutrally among different faiths. . . .

The Court rejects the argument that privileging religion in this fashion will encourage prisoners to "get religion," noting that the argument "founders on the fact that Ohio already facilitates religious services for mainstream faiths." (2122 n.10)

The Court observes the Federal Bureau of Prisons has operated under the Religious Freedom Restoration Act (RFRA), which imposes the same standard as RLUIPA, for a decade; Congress was aware of that in enacting RLUIPA; and there is no reason to believe that there will be more problems from "abusive prisoner litigation" in state and local institutions (2125, noting PLRA provisions designed "to inhibit frivolous filings"). Should the statute impose unjustified risks or burdens, an as-applied challenge would be in order.

Use of Force--Restraints

Deck v. Missouri, 125 S.Ct. 2007 (2005). The petitioner, a capital defendant, was shackled with leg irons, handcuffs, and a belly chain during the sentencing phase. At 2012: Based on prior Supreme Court decisions, "Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal

defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." At 2014: "The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." These considerations obviously include the interference of physical restraints with attorney-client communication and participation in defense, and maintaining a dignified judicial process. In a capital case, the concern for the presumption of innocence is no longer applicable, but the penalty phase implicates related concerns, since the decision between life and death is of equal importance to the determination of innocence or guilt.

Habeas Corpus/PLRA--Exhaustion of Administrative Remedies

Rhines v. Weber, 125 S.Ct. 1528 (2005). District courts have the discretion to stay their consideration of a "mixed" (i.e., partly exhausted) habeas petition pending exhaustion of state court remedies for unexhausted claims.

When the Court imposed a total exhaustion rule on habeas petitions in *Rose v. Lundy*, there was no statute of limitations on such petitions. Now there is, under the Antiterrorism and Effective Death Penalty Act (AEDPA), and consequently dismissal of a partly exhausted petition may result in the petitioner's claims becoming time-barred, since there may not be time to go to state court, exhaust, and return to federal court within the limitations period, especially since it may take the federal court some time to resolve the exhaustion question. At 1534: "District courts do ordinarily have authority to issue stays. . . . AEDPA does not deprive district courts of that authority."

The Court holds that federal courts' power to stay an exhausted claim has limits. At 1535:

> [S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. . . . Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. . . . Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. . . .

The Court concludes, "if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the prisoner's right to obtain federal relief."

The PLRA is not mentioned but it is difficult to see why these rules should not apply in any circuit that has adopted a total exhaustion rule under the PLRA (a question that is before the Supreme Court).

Habeas Corpus/Procedural Due Process

Wilkinson v. Dotson, 125 S.Ct. 1242 (2005). Two Ohio prisoners brought § 1983 actions challenging parole procedures. Both of them challenged retroactive application of new parole guidelines, and one alleged that his parole release hearing otherwise denied due process. They sought new hearings applying lawful procedures, and an injunction requiring Ohio to comply with legal requirements in the future.

The plaintiffs' claims need not be brought via habeas corpus. At 1247-48:

> Throughout the legal journey from *Preiser* to *Balisok,* the Court has focused

> on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement--either *directly* through an injunction compelling speedier release or *indirectly* though a judicial determination that necessarily implies the unlawfulness of the State's custody. . . . These cases, taken together, indicate that a state prisoner's § 1983 action is barred absent prior invalidation--no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)--if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

These plaintiffs' claims "do not fall within the implicit habeas exception." At 1248: "Success for Dotson does not mean immediate release from confinement or a shorter stay in prison; it means at most new eligibility review, which at most will speed consideration of a new parole application. Success for Johnson means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term. . . . Because neither prisoner's claim would necessarily spell speedier release, neither lies at the core of habeas corpus."

The Court rejects the argument that parole proceedings themselves are part of the prisoners' sentences, since *Heck* uses "sentence" to refer to substantive determination of length of confinement, not procedures.

Classification--Race/Equal Protection

Johnson v. California, 125 S.Ct. 1141 (2005). Prison officials assigned newly admitted prisoners (including transferees) to double cells for up to 60 days by factors including race. The Court holds that the classification policy is subject to strict scrutiny analysis. At 1146 (emphasis supplied, citations omitted): "We have held that 'all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" That means "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests." That is to "smoke out illegitimate uses of race" by making sure that the goal is important enough to justify it.

Prison officials' claim that their policy is neutral doesn't exempt it from that rule, since it "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.'" (1147, citation omitted) The Court has previously applied heightened review in evaluating prison segregation in *Lee v. Washington*, which held that prison authorities may "acting in good faith and in particularized circumstances" (emphasis supplied) take racial tensions into account.

California's policy is unique or close to it. The Federal Bureau of Prisons relies on individualized consideration, and there's no indication why California can't do that, especially as to transferees whom they have evaluated already at least once.

The Court declines to make an exception to the strict scrutiny rule and apply the *Turner* standard. At 1149:

> We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee*. We think this is unsurprising, as we have applied *Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.' . . . . . The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Racial discrimination is 'especially pernicious in the administration

> of justice.' . . . And public respect for our system of justice is undermined when the system discriminates based on race. . . . When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers.

The Court doesn't buy the argument that deference to prison officials' expertise requires a more lenient standard, since strict scrutiny has been applied in other areas where officials traditionally exercise substantial discretion, e.g., prosecutors' peremptory challenges and electoral redistricting plans. At 1150: "*Turner* is too lenient a standard to ferret out invidious uses of race. . . . *Turner* would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance the goal."

The case is remanded for application of strict scrutiny by the lower court.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Muhammad v. Close, 124 S.Ct. 1303 (2004) (per curiam). The plaintiff challenged a disciplinary proceeding that resulted in segregated confinement but not in loss of good time. The *Heck v. Humphrey* favorable termination rule (requiring exhaustion of state remedies followed by federal habeas corpus before a § 1983 suit may be filed) does not apply. At 1304: "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . .; requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Regardless of relief sought, where the action "impl[ies] the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement," the litigant must obtain favorable termination in a state or federal habeas corpus proceeding. At 1304 n.1: The assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in *Preiser* . . . that such a prisoner subject to "additional and unconstitutional restraint" might have a habeas claim independent of § 1983, and the contention is not raised by the State here.

The Court rejects (at 1306) "the mistaken view expressed in Circuit precedent that *Heck* applies categorically to all suits challenging prison disciplinary proceedings."

Visiting

Overton v. Bazzetta, 123 S.Ct. 2162 (2003). In response to increasing prison population and volume of visits, with the attendant problems of maintaining order, supervising children, and preventing drug smuggling and trafficking, the prison system introduced new restrictions on visiting. This challenge to the restrictions applies only to the non-contact visits to which the highest security prisoners are limited.

The regulations do not infringe a constitutional right of association. At 2167:

> We have said that the Constitution protects certain kinds of highly personal relationships, . . . And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents. . . . This is not an appropriate case for further elaboration of those matters. The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. . . . And, as our cases have established, freedom of association is among the rights least compatible with incarceration. . . . We do not hold, and we do not imply, that any right to intimate association is

> altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question. *Turner v. Safley*, . . . (internal citation and quotation marks omitted)

The regulations barring minors unless they are children, stepchildren, grandchildren, or siblings of the prisoner; barring children if the prisoner's parental rights have been terminated; and requiring them to be accompanied by parent or legal guardian "bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals, . . . by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal. . . ." (2168)

Requiring the presence of adults charged with protecting the child's best interests is reasonable, as is the consanguinity limit. Id.: "To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. . . . The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings." The ban on former inmates, except for those who are members of the prisoner's immediate family and have been approved by the warden, "bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes." (2168)

The ban on visits for prisoners with two substance-abuse violations serves the legitimate goal of deterring use of drugs and alcohol in prison. "Drug smuggling and drug use in prison are intractable problems." (2168) The Court does say "if faced with evidence that MDOC's regulation is treated as a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation" (2169), but that situation is not presented here.

Prisoners have alternative means of exercising their claimed constitutional rights of association by passing messages through those who are allowed to visit, write letters, and telephone. (2169). Accommodating the prisoners' demands "would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls," facts which invoke "particularly deferential" review. (2169)

The prisoners have not suggested an alternative that "fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal. Respondents have not suggested alternatives meeting this high standard for any of the regulations at issue." (2169) (internal citation omitted). Proposals that would increase the number of child visitors "surely would have more than a negligible effect on the goals served by the regulation" (i.e., reducing the number of child visitors). The ban on former prisoners could be time limited, "but we defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions." Shortening the suspension of visits for those with substance abuse offenses or limiting it to the most serious violations "do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner's* high standard." (2170)

The ban on visits for those with substance abuse offenses does not violate the Eighth Amendment. At 2170:

> Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted

> standards for conditions of confinement. . . . Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety.

Justice Stevens (with Souter, Ginsburg, and Breyer) concurs, stating that the *Turner* standard is still in the saddle and nothing here suggests that the Eighth Amendment is the outer boundary of prisoners' constitutional rights.

Justice Thomas (with Scalia) concurs in the judgment, seeming to argue that states can make deprivation of constitutional rights part of their criminal sentencing limited only by the Eighth Amendment. At 2172: "Here, if the prisoners' lawful sentences encompassed the extinction of any right to intimate association as a matter of state law, all that would remain would be respondents' (meritless . . .) Eighth Amendment claim."

Sex Offenders/Procedural Due Process

Connecticut Dept. of Public Safety v. Doe, 123 S.Ct. 1160 (2003). The state sex offender registration statute, which provides for posting of the registry on the Internet and making it available in state offices, does not deny due process. The court does not reach the question whether under *Paul v. Davis*, there is a liberty interest in avoiding stigmatization as a sex offender. Even if there is, sex offenders are not entitled to a hearing to determine whether or not they are likely to be currently dangerous, since current dangerousness is irrelevant under the state statute, which operates solely on the basis of a criminal conviction. Only if that rule is substantively unconstitutional is there a due process problem, and the plaintiff disavowed any substantive due process argument.

Sex Offenders/Ex Post Facto Laws/Punishment

Smith v. Doe I, 123 S.Ct. 1140 (2003). Convicted sex offenders and the wife of one of them brought an Ex Post Facto Clause challenge to the Alaska Sex Offender Registration Act (SORA), which requires the usual panoply of registration, verification, photography, fingerprinting, notification of changes of address, etc., with information on the offenders and their whereabouts made public.

The statute does not violate the Ex Post Facto Clause. At 1146-47:

> The framework for our inquiry is well established. We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" .. Because we "ordinarily defer to the legislature's stated intent," . . . "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." (internal citations omitted).

Here the legislature made it clear that sex offenders pose a high risk of reoffending and it wanted to protect the public from them, a legitimate nonpunitive objective. The fact that protecting the public is also one of the purposes of the criminal justice system does not mean that pursuing that purpose in a regulatory scheme makes the scheme punitive. Nor does the fact that the registration provisions are codified in the state criminal procedure code; plenty of other noncriminal provisions (e.g., civil forfeiture) appear there too. Requirements to notify offenders of the civil consequences when they plead guilty and at sentencing don't make the scheme criminal either.

Absent an identifiable punitive intent, the court examines the statute's effects under the punishment analysis of *Kennedy v. Mendoza-Martinez*. At 1149: "The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of

punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." Sex offender notification doesn't have much history, and the Court rejects the analogy to historical punishments involving public shaming, humiliation, and banishment. (1150).

The publicity may cause adverse consequences for the convicted defendant, but that isn't an integral part of the scheme's objective. Internet notification doesn't change that conclusion. Id.: "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation."

The scheme does not impose an affirmative disability, since the offender need not update his registration in person. The scheme is not analogous to parole or probation or supervised release, since persons subject to it can go where they want and generally do as they wish, though they must report some actions to police.

At 1152: "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Alaska could conclude that a sex offense conviction itself is evidence of a substantial risk of recidivism; no case-by-case assessment of risk is necessary. At 1153: "The Ex Post Facto Clause does not preclude a state from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." The scheme in *Kansas v. Hendricks* required individual assessment because the restraint was much more serious than here.

LOWER COURT CASES

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

Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004). The plaintiff was arrested, started having sharp abdominal pains, was given antacids, continued to have pain, was moved to an observation cell but given no treatment, and finally on Monday morning, after more than 48 hours in jail, was diagnosed by a nurse with "classic signs of appendicitis" and taken to the hospital for surgery.

There was a material factual issue of deliberate indifference precluding summary judgment, based on the plaintiff's complaints of sharp abdominal pain and the facts that he was given antacids by non-medical personnel, that he vomited, that he was placed in an observation cell, and that he received no medical attention for over 50 hours after his arrest.

The lack of "verifying medical evidence" does not negate a serious medical need on these facts. At 899-900: "[W]e hold today that where a plaintiff's claims arise from an injury or illness so obvious that even a layperson would easily recognize the necessity for a doctor's attention, . . . the plaintiff need not present verifying medical evidence to show that, even after receiving the delayed necessary treatment, his medical condition worsened or deteriorated. Instead, it is sufficient to show that he actually experienced the need for medical treatment, and that the need was not addressed within a reasonable time frame."

Sex Offenders/Civil Commitment

Brock v. Seling, 390 F.3d 1088 (9th Cir. 2004) (per curiam). A jury finding that a prisoner suffered from some combination of mental abnormality and personality disorder which made him likely to engage in predatory acts of sexual violence satisfied the constitutional requirements for commitment as a sexual offender at the conclusion of his prison term. It is not necessary for the jury to identify the mental abnormality (there was evidence here both of paraphilia and of a personality disorder).

Good Time/Federal Officials and Prisons

White v. Scibana, 390 F.3d 997 (7th Cir. 2004). The court upholds the federal Bureau of Prisons' policy of calculating good time based on time actually served rather than the number of years imposed. The court applies "full *Chevron* deference" since the interpretation at issue was adopted pursuant to notice and comment

rulemaking. *Accord, Sash v. Zenk*, 428 F.3d 132 (2d Cir. 2005); *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005); *Yi v. Federal Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005).

Publications/Procedural Due Process--Disciplinary Proceedings

Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004). The plaintiff complained of the confiscation of "New Afrikan political literature" which the officer in question characterized as "Nubian gang materials." The plaintiff was charged with violating Rule 105.12, which prohibits possessing "unauthorized organizational insignia or materials." An "unauthorized organization" is "any gang or any organization which has not been approved by the deputy commissioner for program services." The plaintiff's request that the material be forwarded to the Facility Media Review Committee was refused. The same thing happened a second and third time. Then on a fourth occasion, the seizing officer's superior sent the materials to Media Review, where it was found that three pages were objectionable, and the plaintiff was given the rest of the materials. On initial screening, the district court dismissed with prejudice the prisoner's complaint.

The Second Circuit reversed. The plaintiff stated a First Amendment freedom of speech claim under the *Turner* standard as to the facial constitutionality of Rule 105.12. The rule appears to ban all literature from outside organizations unless they have been officially approved. At 115: "Assuming that Rule 105.12 is targeted at the legitimate goal of securing prisons, we are not sure how a complete ban on the materials of 'unauthorized organizations' is rationally related to that goal." In *Thornburgh v. Abbott*, the Supreme Court noted in upholding censorship regulations that it was "comforted" by the "individualized" determinations required and the fact that the regulations rejected "shortcuts that would lead to needless exclusions." Those "needless exclusions" included creation of an excluded list of subscription publications. Rule 105.12 "appears to take a much more serious shortcut. It seems to ban all the publications of unlisted organizations and allow only a discrete set of enumerated organizational materials. This 'shortcut' greatly circumscribes the universe of reading materials accessible to inmates. It thus appears that Rule 105.12's ban is not sufficiently related to any legitimate and neutral penological objective."

There is no record to show the alternative means by which the plaintiff might exercise his right, or how widely Rule 105.12 has been applied. However, the third *Turner* factor favors the plaintiff, since there is an obvious alternative: send the publications to the Media Review Committee, whose purpose is to review inmates' reading materials. This alternative is supported by the fact that on the fourth occasion, his materials were sent there. It is unlikely that its cost is prohibitive since it is already in place.

Assuming Rule 105.12 did not authorize the challenged confiscations, the plaintiff also states an as applied claim, since the first *Turner* factor requires a "neutral" objective, and that doesn't include personal prejudice, which is the gravamen of the plaintiff's allegation that the confiscations were "arbitrary and unjustifiable." At 116: "Our precedent indicates that a failure to abide by established procedures or standards can evince an improper objective." Bypassing the Media Review Committee suggests that the confiscation was not done for legitimate and neutral reasons.

PLRA–Filing Fees

Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004). The district judge declared that prisoners would no longer be able to file joint complaints because of the PLRA and problems resulting from multi-plaintiff litigation, notwithstanding the permissive joinder regime of Fed. R. Civ. P. 20. The court rejects the argument that the PLRA modifies or repeals Rule 20 and holds joint complaints are permissible.

The question of filing fees is separate. Although "one case, one filing fee" is the norm in litigation, the PLRA requires every plaintiff to pay a filing fee. At 856: "A per-litigant approach

is a natural concomitant to a system that makes permission to proceed in forma pauperis (and the amount and timing of payments) contingent on certain person-specific findings, see § 1915(a), §1915A, including the number of unsuccessful suits or appeals the prisoner has pursued in forma pauperis, see § 1915(g), and the balance in the prisoner's trust account, see § 1915(b)." Contradictions between the PLRA and multiple-plaintiff litigation vanish if all plaintiffs have to pay a fee.

On remand, the district judge has just interpreted the above quoted language about § 1915(g), the "three strikes" provision, as requiring that a plaintiff in a dismissed multi-plaintiff suit receive as many strikes as there are plaintiffs whose claims were entirely dismissed. *Boriboune v. Berge*, 2005 WL 1320345 (W.D.Wis., June 1, 2005).

Protection from Inmate Assault

Pierson v. Hartley, 391 F.3d 898 (7th Cir. 2004). The plaintiff was badly beaten in an open dormitory "meritorious assignment" unit that required the prisoners to have been in general population for one year and to have been free for ten years from convictions or conduct violations that would be considered a serious security threat. The assailant had been placed there despite having spent no time in the general population, having had a history of violent conduct in the local jail he came from, and having arrived with a letter from the Sheriff describing him as an "escape and assault risk." He remained in the unit despite a disciplinary conviction for possessing a weapon.

There was evidence that the two prison officials who were found liable knew of the risk the assailant posed to other inmates--i.e., that they knew of the letter concerning the assailant's aberrant behavior, that they would have known of his weapons conviction based on their job descriptions, and that they knew he was in the unit in violation of prison policy. At 903: "Whether the defendants knew that Wilkinson posed a specific risk to Pierson--rather than all the members of 'E' dorm--is unimportant; for in order to establish a constitutional violation, it does not matter 'whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.'" (903, citations omitted) The jury could have found that the defendants disregarded that risk by assigning the assailant to the dorm and then by allowing him to remain after the weapons conviction. At 904: "Such inaction in the face of a substantial risk is sufficient to demonstrate deliberate indifference under the Eighth Amendment."

Medical Care--Standards of Liability--Deliberate Indifference, Access to Outside Services

Rosado v. Alameida, 349 F. Supp.2d 1340 (S.D. Cal. 2004). The plaintiff has a life-threatening liver condition (Hepatitis C with cirrhosis) and sought injunctive relief to be placed on a liver transplant list and receive other necessary care.

Differences of opinion about appropriate treatment are not actionable. At 1344-45: "In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the course of treatment the doctors chose was medically unacceptable in light of the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff's health."

It is undisputed that a liver transplant is the only thing that will keep the plaintiff alive for long. The defendants argue only that they have provided a lot of medical care. The plaintiff demonstrates a strong likelihood of proving that a liver transplant is medically necessary.

The plaintiff shows more than a mere possibility of irreparable harm, i.e. death. On a preliminary injunction motion, "the Ninth Circuit expects lower courts to protect physical harm [sic] to an individual over monetary costs to government entities." (1348) Where budgetary impact is more speculative and physical harm to plaintiffs is "uncertain only in timing and severity," the balance of hardship tips in the plaintiff's favor.

The court therefore grants a preliminary injunction requiring the defendants to contact the ten liver transplant centers in California that have not already seen the plaintiff to determine whether they will accept a prisoner. Of those who will, the defendants shall choose the two that are likely to accept the plaintiff in the shortest time frame, and then arrange for evaluations at those facilities. If none of this works out, plaintiff may return to court.

Religion--Practices/Sex Offenders

Wares v. Simmons, 392 F.3d 1141 (10th Cir. 2004). The plaintiff refused to enroll in the Sexual Abuse Treatment Program. As a result, his security classification was increased and various restrictions were imposed on him, including denial of religious texts and study materials. The district court dismissed his case under the reasoning of *McKune v. Lile*, which involved the same program. The Tenth Circuit holds that *McKune* is irrelevant, since the issue there was whether the Fifth Amendment barred any restrictions on prisoners who refused to participate in the program, and the issue here is whether a particular restriction violates the First Amendment.

The court concludes that on this pleading-stage record all the evidence must be viewed in a light most favorable to the plaintiff, and remands for further proceedings, since the record does not permit the court to conclude that the prisoner has failed to state a claim upon which relief can be granted.

Publications/Deference

Jacklovich v. Simmons, 392 F.3d 420 (10th Cir. 2004). Prisoners and the publisher of Prison Legal News challenged a rule banning the receipt of gift publications and subscriptions, a limit of $30 a month on publication purchases, and a complete ban on purchase of publications by "Level I" inmates (which includes all prisoners for the first 120 days after completing intake). In addition, notice of non-delivery was given only to the recipient and not to the sender. The district court concluded that the policies were rationally related to security, deterrence, and rehabilitation, and are content neutral.

The Tenth Circuit holds that the district court erred in failing to consider the other three *Turner* standard factors; that is proper only when there is no rational relationship between the challenged prison practice and legitimate penological ends. In addition, there are factual disputes concerning the existence of a rational relationship. Plaintiff's expert opined that the policies served no legitimate interest and might undermine rehabilitation. The *McKune v. Lile* holding endorsing the use of "incentives to behave" does not "equate with an endorsement of every aspect of the privilege and incentive system; review under the *Turner* factors is still appropriate." (429) The complete ban on publications, except for a primary religious text, in Level I "appears to be a function of status, not behavior. . . . We fail to see how a four-month complete denial of access to constitutionally protected materials (regardless of behavior) furthers behavior management or rehabilitation." (429) The limitation on expenditures is not adequately linked to increased payment of restitution, child support, or court filing fees; if prisoners are required to meet these obligations first, the $30 limit doesn't seem to be a factor. The fact that prisoners are permitted to spend $180 a month for canteen items raises further questions. The central rationale for the policy is the prevention of strong-arming, but there is no limit on the funds from outside that can be put in an inmate's account, facility canteen purchases are permitted up to $180 a month, and those items (which include TVs) would appear more likely prospects for strong-arming.

As to alternative means of exercising the right, access to radio or TV "is not an adequate substitute for reading newspapers and magazines." (431) The question is whether the challenged policies permit a broad range of publications to be read, and the cost of subscriptions may foreclose such access absent gift subscriptions; even if it's easy for friends and relatives to send money, the $30 limitation is restrictive.

As to the effect of accommodation, it is questionable whether removing the $30 limit would affect the strong-arming policy in view of the high limit on canteen purchases and the ability to receive items such as radios and TVs from outside. Delivering gift publications given that they already deliver authorized publications would not seem burdensome. At 432: "Also relevant, other institutions apparently permit receipt of gift publications, including the Federal Bureau of Prisons."

As to the availability of ready alternatives, the prison system maintains a database allowing it to check every publication entering the facility, so it already spends significant time and effort tracking publications and presumably could track more.

The failure to give notice of nondelivery to the sender of publications presents factual issues under the *Turner* standard. Under *Procunier v. Martinez*, both inmates and correspondents have a qualified liberty interest in uncensored communication, and *Thornburgh v. Abbott* held that publishers have a First Amendment right in access to prisoners. At 433: "Other courts have recognized that both inmates and publishers have a right to procedural due process when publications are rejected." This one agrees. Most rejections, under present policy, will be for lack of a prison purchase order; there is evidence in the record of at least one error in this regard. Providing individualized notice "would appear to impose a minimal burden. . . . On remand, the district court may fashion an appropriate procedure. The district court may consider any changed circumstances in imposing a remedy." Thus the appeals court appears to be directing summary judgment for the plaintiffs.

Sex Offenders/Civil Commitment Pre-Trial Detainees/Due Process--Conditions of Confinement as Punishment

Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004), *cert. denied*, 126 S.Ct. 351 (2005). The plaintiff completed his criminal sentence but was held in jail pending proceedings to commit him civilly under the state Sexually Violent Predator Act, which requires confinement in a "secure facility" separate from convicts and detainees held for criminal proceedings, and in "administrative segregation," which means "separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff." The plaintiff wound up spending two years at the Sacramento County Jail, for the first year in the general criminal detainee population, and for the second year in administrative segregation, where he endured numerous strip searches, some conducted outdoors, some at gunpoint in the middle of the night, and some in the sight of many staff members of both sexes.

The plaintiff's substantive claims are governed by the "more protective" Fourteenth Amendment standard and not by the Eighth Amendment standard. At 932: ". . . [T]he conditions of confinement for an individual detained under civil process but not yet committed must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual accused but not convicted of a crime." Further (at 932), "when a SVPA detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to punishment. The court also held it is also relevant to "compare confinement conditions of civil detainees pre-adjudication to conditions post-commitment. . . . Or, to put it more colorfully, purgatory cannot be worse than hell. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive." (932).

Religion--Practices--Diet

Searles v. DeChant, 393 F.3d 1126 (10th Cir. 2004). The Jewish plaintiff was assigned to work in food service, where he said he was subject to "aroma, ingestion, and contact with non-kosher food."

To the extent defendants argue that avoidance of "aroma, ingestion, and contact with non-kosher food" is a "non-central religious practice" and therefore entitled to less protection than "central or core tenets," the court disagrees, citing the Supreme Court's statement, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." (1131 n. 6, citation omitted) The court further notes that the plaintiff's interpretation of kosher is "not far-fetched," citing the fact that he had twice subjected himself to prison discipline over it.

The plaintiff loses anyway. At 1132: "The district court relied on the two penological interests advanced by defendants: budgetary concerns, and the need for a nondiscriminatory and consistent prison staffing. These appear to be legitimate penological interests."

Legal Correspondence/Emergencies and Liability/Deference/Qualified Immunity

Allah v. Brown, 351 F.Supp.2d 278 (D.N.J. 2004), *aff'd*, 461 F.3d 353 (3d Cir. 2006). After 9/11/01, the Acting Governor of New Jersey issued an executive order authorizing state agencies to suspend or modify existing rules to the extent they jeopardized public welfare, so the prison system stopped opening legal mail in prisoners' presence to check for contraband and anthrax contamination and did so elsewhere on the prison grounds.

Wolff v. McDonnell upheld a regulation prescribing opening of legal mail in the prisoner's presence, but did not say whether opening it outside the prisoner's presence is unconstitutional. However, in the Third Circuit "it is clear that as a general matter, prisoners have a constitutional right to be present when their legal mail is opened." The question is whether that is still the case "in the context of today's heightened terrorism concerns, and more specifically, the threat of anthrax contamination through the mail." (281)

Applying the *Turner* standard, the court finds there is no reasonable connection between the new legal mail policy and the asserted interest. Defendants offer no evidence of an elevated risk of anthrax contamination in prisons or of any attempt to expose prisoners to anthrax in the past three years. The new procedure doesn't lessen the risk of exposure, it just changes who is subjected to it. At 282: "A policy requiring that legal mail be opened in an enclosed area would be reasonable, and a policy providing that any suspicious letters marked as legal mail be opened outside the inmates' presence might also be appropriate." But the blanket policy overreaches the legitimate interest in safety and security.

There are no alternatives for inmates freely to communicate with attorneys and courts, but defendants argue that the policy is only a "minor burden" on prisoners' rights since they say they don't read the mail. However, as *Wolff* said, the only way to insure the mail is not read is to require the prisoner's presence, and the plaintiffs' allegations suggest that they believe the mail is being read. This is precisely the "chilling effect" the Third Circuit warned about, so opening the mail outside prisoners' presence could have a significant effect on communication with attorneys and courts and is not a "minor burden."

Defendants have not shown that opening the mail in the prisoners' presence is burdensome. The fact that they have centralized mail opening on the prison grounds and bringing the prisoners there would cause a "logistical nightmare" is not persuasive because there are surely other mail processing procedures, such as doing it within the prison building.

The defendants are entitled to qualified immunity, since the policy was "enacted at a very uncertain time in our history" for legitimate purposes, and a reasonable official could believe it was constitutional.

Pre-Trial Detainees/Hygiene/Dental Care/Medical Care--Serious Medical Needs, Deliberate Indifference/Heating and Ventilation/Hazardous Conditions and Substances

Board v. Farnham, 394 F.3d 469 (7th Cir. 2005). The two plaintiffs, detained for 126 days, alleged that they were not provided with toothpaste, respectively, for 90% of that period, despite repeated requests to the Sheriff; one plaintiff said he lost several teeth as a result.

The court says that only the plaintiff who lost teeth has a claim for deliberate indifference to medical needs because "significant harm or injury" must be shown. The plaintiff's testimony that he suffered dental pain throughout his incarceration and that teeth which should have been surgically removed were merely broken off below the gum line, posing further risk of serious, even life-threatening infection and possibly death, sufficiently established a serious medical need. The testimony that he complained to the Sheriff about 15 times supported a deliberate indifference claim. The law forbidding deliberate indifference to serious medical needs was well established and a reasonable officer would have understood he was violating it; qualified immunity is denied.

Both plaintiffs argued that the denial of oral hygiene supplies was an Eighth Amendment violation independent of resulting injury. At 482: "This is a distinct and cognizable constitutional claim under the Eighth Amendment." Therefore the court analyzes it "in the context of the constitutional right of pretrial detainees to receive necessary and proper personal hygiene items as preventative of future medical and physical harm." (482) While the court said in *Harris v. Fleming* that 10 days without toothpaste doesn't violate the Eighth Amendment, other circuits have recognized a right to toothpaste. At 482: "Indeed, the right to toothpaste as an essential hygienic product is analogous to the established right to a nutritionally adequate diet" since it helps prevent future potentially serious dental problems. Since the plaintiffs said they complained repeatedly to the Sheriff, they have sufficiently alleged deliberate indifference. The right to adequate dental care is clearly established; it's a basic human need.

The plaintiffs also said they suffered frequent nosebleeds as a result of the jail's ventilation system, which issued a "constant flow of black fiberglass dust," a claim corroborated by a contractor who inspected the system. One plaintiff further claimed that the poor ventilation exacerbated his asthma, and he was deprived of his inhaler on several occasions:

At 484. . . [A]sthma can be, and frequently is, a serious medical condition depending on the severity of the attacks." The defendant officers "knew or should have known that Duke was suffering from asthma, a serious medical condition, and to refuse the man his inhaler putting Duke [sic] at a 'serious risk of being harmed'; both guards made a conscious decision not to act when they easily could have." The right to treatment for serious medical needs was clearly established and the defendants were or should have been on notice that their conduct could violate it.

At 485-86: There is a constitutional right to adequate ventilation. The conditions alleged by the plaintiffs constitute an objectively serious harm. Evidence that a contractor found the duct system contaminated with black mold and fiberglass liner which constituted a health hazard, and defendants when notified did nothing but vacuum the grates, sufficiently supported a deliberate indifference claim. The "right to adequate and healthy ventilation" has been clearly established for almost two decades.

Sex Offenders/Procedural Due Process

Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004). The plaintiff, on parole, was charged with child molestation but pled guilty only to misdemeanor assault. He was released on mandatory supervision. A month later the parole board required him to register as a sex offender and attend sex offender therapy, without notice or hearing. His parole was revoked for failure to comply. At 222-23 (footnotes omitted):

> Applying *Vitek [v. Jones]* in the sex offender arena, the Ninth and

> Eleventh Circuits have held that prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions. We agree. . . . As in *Vitek*, the state imposed stigmatizing classification and treatment on Coleman without providing him any process. The state's sex offender therapy, involving intrusive and behavior-modifying techniques, is also analogous to the treatment provided for in *Vitek*.. . . . Texas's sex offender therapy program is "qualitatively different" from other conditions which may attend an inmate's release. Accordingly, the Due Process Clause, as interpreted in *Vitek*, provides Coleman with a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned, and the state was required to provide procedural protections before imposing such conditions.

The court says the state courts' decision to the contrary contravenes clearly established federal law and can support habeas relief under AEDPA.

The imposition of sex offender treatment without a sex offense conviction does not "shock the conscience" and therefore does not deny substantive due process; conscience-shocking conduct is likely to be conduct intended to injure which is unjustifiable by any government interest, and sex offender treatment does serve a purpose and doesn't seem intended to injure.

FLSA/Private Prisons

Bennett v. Frank, 395 F.3d 409 (7th Cir. 2005). At 409: "The Fair Labor Standards Act is intended for the protection of employees, and prisoners are not employees of their prison, whether it is a public or a private one. So they are not protected by the Act." At 410: "We cannot see what difference it makes if the prison is private."

Publications/Qualified Immunity

Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005). The court affirms the district court's holding that a prohibition on receipt of non-subscription bulk mail and catalogs violates the First Amendment. At 699: "Publishers have a First Amendment right to communicate with prisoners by mail, and inmates have a First Amendment right to receive this mail."

Defendants' policy does not satisfy the *Turner* standard. It lacks a rational relationship to reducing the volume of mail that may contain contraband; the court thinks it is far more likely that contraband would be contained in first class mail than in bulk mail. The prohibition has no rational relationship to reducing the risk of fire because defendants already regulate the total amount of property prisoners may have in their cells. For the same reason, the prohibition is not rationally related to increasing the efficiency of cell searches.

The fact that in this case the prisoners did not pay for the mail sent them does not matter; "it is the fact that a request was made by the recipient, and not the fact that the recipient is paying to receive the publication, that is important." (700). The same procedural protections must be observed as for first class, periodical, or subscription bulk mail: "notice and review of rejections." (701)

The prison system's policy regarding "third-party legal material" prohibits delivery of "mail containing information which, if communicated, could create a risk of violence and/or physical harm to any person," and permits delivery of judicial opinions and orders and litigation documents consistently with that restriction. This policy is constitutional on its face. Prison officials are not entitled to qualified immunity from a claim that they applied this policy in a discriminatory fashion to suppress materials that would embarrass the agency and educate prisoners on how to file their claims. For this claim, their bad motivation itself would violate the First Amendment.

PLRA--Three Strikes Provision/PLRA--In Forma Pauperis Provisions--Applicability

Andrews v. King, 398 F.3d 1113 (9th Cir. 2005). Plaintiffs don't have to plead inapplicability of the three strikes provision, defendants have to produce documentary evidence of three dismissals that fit the statutory definition of strikes. Once they do that, the burden shifts to the prisoner to show that the prior dismissals should not count as strikes.

At 1121: "Not all unsuccessful cases qualify as a strike under § 1915(g). Rather, § 1915(g) should be used to deny a prisoner's IFP status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim."

The fact that the plaintiff had 22 prior dismissals did not shift the burden to the plaintiff to show that they were not strikes.

Dismissals of cases filed when the prisoner was in INS detention are not strikes unless the detainee also faces criminal charges. The statute addresses only "prisoners," who are people held in connection with criminal matters. INS detainees are civil detainees and not prisoners. "On remand, Andrews bears the burden of establishing that he was in INS custody and that he was not facing criminal charges at the time he filed the action." (1122)

Dismissed habeas petitions are not strikes (1122). But (at 1123 n.12), "[w] e recognize, however, that some habeas petitions may be little more than 42 U.S.C. § 1983 actions mislabeled as habeas petitions so as to avoid the penalties imposed by 28 U.S.C. § 1915(g). In such cases, the district court may determine that the dismissal of the habeas petition does in fact count as a strike for purposes of § 1915(g)."

Protection from Inmate Assault/Classification--Race

Brown v. Budz, 398 F.3d 904 (7th Cir. 2005). The plaintiff, who is white, was held at the Sexually Violent Persons and Detention Facility awaiting a civil commitment trial as a sexually violent person. There he was assaulted by an African-American resident who had attacked other white residents and, it is alleged, whose propensity for violence and history of attacking white prisoners were known to the defendants, along with the general tendency of African-Americans in the Facility to attack whites.

The plaintiff's allegations state a constitutional claim under the deliberate indifference standard. The court rejects the argument that the plaintiff suffered "no more than a generalized risk of violence experienced by all Caucasian residents in a facility predominantly populated by Caucasians." Under *Farmer v. Brennan*, a risk need not be personal to the plaintiff. This plaintiff "has alleged a risk posed by a specific assailant, with known propensities of violence toward a specific class of persons . . . who was left in his presence unsupervised." At 915:

> While we have often found deliberate indifference where custodians know of threats to a *specific detainee* posed by a *specific source*, we have not been constrained by this fact pattern. It is well settled that deliberate indifference may be found though the specific identity of the ultimate assailant is not known in advance of assault. . . . Indeed, the converse is also true. . . . [D]eliberate indifference can be predicated upon knowledge of a victim's particular vulnerability (though the identity of the ultimate assailant not known in advance of attack), or, in the alternative, an assailant's predatory nature (though the identity of the ultimate victim not known in advance of attack).
>
> Thus a deliberate indifference claim may be predicated on custodial officers' knowledge that a specific individual poses a heightened risk of assault to even a large class of detainees--notwithstanding the officials' failure or inability to comprehend in advance the particular identity of this individual's ultimate victim. . . . Deliberate

indifference may also be predicated on the custodian's knowledge of an assailant's predatory nature.

Grievances and Complaints about Prison

Hasan v. U.S. Dep't of Labor, 400 F.3d 1001 (7th Cir. 2005). The plaintiff filed a grievance accusing a guard of having tampered with his typewriter; after an investigation found the accusation to be groundless, the plaintiff was disciplined for lying. Although prisoner grievances, unless frivolous, are protected by the First Amendment, the plaintiff's claim fails because he did not dispute the defendants' evidence that he was punished not for filing a grievance, but instead for lying.

The court rejects the notion that a retaliation plaintiff must prove that "but for" the retaliation, the adverse action would not have occurred; in employment cases, the plaintiff need only show that the protected speech was a "motivating factor," at which point the burden shifts under *Mt. Healthy* and the defendant must show that the adverse action would have been taken anyway. At 1006:

> We cannot think of a reason why a stricter standard for proof of causation should apply when the plaintiff is a prisoner rather than an employee. A prisoner has less freedom of speech than a free person, but less is not zero, and if he is a victim of retaliation for the exercise of what free speech he does have, he should have the same right to a remedy as his free counterpart. *Cf. Turner v. Safley*, *supra*, 482 U.S. at 84. . . .

Searches--Person--Convicts/Pendent and Supplemental Claims; State Law in Federal Courts

Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005). The Georgia statute requiring DNA sampling of all convicted incarcerated felons is not unconstitutional. Federal appeals courts have unanimously upheld such statutes, under either the "special needs" analysis or the traditional Fourth Amendment balancing test. This court adopts the general balancing test and relies on prisoners' reduced expectations of privacy in their identities.

The statute does not violate the due process right to bodily privacy. The Supreme Court has recognized two types of interests protected by this right: "an individual's interest in avoiding disclosure of certain personal matters" and "an individual's autonomy in making certain important decisions, such as those involving marriage, contraception, and procreation." (1280) The plaintiffs waived their argument concerning disclosure of personal information. The court declines to extend its decision in *Fortner v. Thomas*, which held that being viewed in the nude by officers of the opposite sex may violate the right to privacy, beyond compelled nudity. The right at issue here is not "fundamental" or "implicit in the concept of ordered liberty"; the intrusion is similar to drug testing, which is done routinely.

The statute does not violate the Georgia constitution, even though that constitution protects a privacy right broader than that recognized by the federal Constitution and governed by a compelling state interest/narrow tailoring standard. Law enforcement is a compelling state interest and the statute is narrowly tailored to promote it, limiting DNA profiling to incarcerated felons and limiting release of information to law enforcement purposes.

Other decisions upholding DNA collection requirements include *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005); *Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004) (per curiam).

Grievances and Complaints about Prison/Work Assignments/Pleading

McElroy v. Lopac, 403 F.3d 855 (7th Cir. 2005) (per curiam). Under the federal notice pleading standards, the prisoner sufficiently stated a retaliation claim by alleging that he was falsely charged with disciplinary offenses for exercising his right of free speech. It was sufficient to state the retaliatory conduct and the

allegedly constitutionally protected activity that motivated it. However, the plaintiff's speech to his work supervisor was not protected by the First Amendment, because it pertained to a "matter of 'purely individual economic importance' and not of public concern." Some other circuits have refused to apply public employee standards to prisoner First Amendment claims. *Compare Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000).

Hazardous Substances and Conditions

Talal v. White, 403 F.3d 423 (6th Cir. 2005). The plaintiff alleged that he is allergic to tobacco smoke, that defendants failed to enforce the no-smoking rule in his non-smoking housing unit, and that when he complained about it they retaliated against him by exposing him to even more tobacco smoke. He stated an Eighth Amendment claim. At 427 (footnote omitted):

> [The plaintiff] alleges that he has been subjected to excessive levels of smoke at the hands of both staff and other inmates and that TCIP's ventilation system merely re-circulates smoke-filled air. Additionally, he has substantiated that he suffers from ETS allergy. The record contains medical documentation evidencing this fact and establishing that smoke causes Talal sinus problems and dizziness. On several occasions, medical staff recommended that Talal have a non-smoking cell partner. On at least one occasion, medical staff recommended that he be placed in a non-smoking unit. Based upon these facts, we conclude that Talal has alleged that he has a medical condition which is sufficiently serious to satisfy the objective component of the *Helling* test.

The plaintiff also sufficiently alleged deliberate indifference, since prison records attached to the Complaint show that his allergy was known to prison officials; he alleged that officers smoked and allowed prisoners to smoke; and he filed grievances and requested a cell change. This case is in stark contrast to one in which prison officials made good-faith efforts to enforce a no-smoking policy. The allegations here reflect both knowledge and obduracy and wantonness. At 428: "Contrary to the district court's opinion, the mere existence of non-smoking pods does not insulate a penal institution from Eighth Amendment liability where, as here, a prisoner alleges and demonstrates deliberate indifference to his current medical needs and future health."

Food/Hygiene/Cruel and Unusual Punishment

Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). A prison rule that requires prisoners to stow certain of their personal property in a box whenever they leave the cell can be enforced by not letting them leave the cell if they don't comply. The plaintiff repeatedly refused to comply, and therefore missed 75 showers and 300 to 350 meals in 18 months, losing 90 pounds. At 952: "Not that he needed those 90 pounds, since, before he started skipping meals, he weighed between 250 and 300 pounds and he is only 5 feet 8 inches tall." There is no Eighth Amendment violation. At 952-53: ". . . [W]e think that deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment. Rodriguez punished himself." The court analogizes to civil contempt. At 953: "At some point, refusal to eat might turn suicidal and then the prison would have to intervene. . . . Likewise if noncompliance with the rule were a product of insanity."

Sexual Abuse/Municipalities

Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005). The female plaintiff alleged that she was raped at knife point by the administrator of the Huerfano County Jail on the same day that another female prisoner was sexually assaulted by the senior detention officer. The prisoners complained immediately and the two staff members were suspended and criminally convicted.

The plaintiff's municipal liability claim was supported by evidence from the preceding year that tended to show that the jail was out of

control; some of it had nothing to do with sexual misconduct by staff. At 1186-87: "[V]iewing the evidence in a light most favorable to [the plaintiff], it may be fairly inferred Sheriff Salazar's purported ignorance of the dangerous conditions in the jail was a direct result of his lackadaisical attitude toward his responsibility to run the institution." The Court found that an "inference of the sheriff's lack of responsiveness" could be drawn from other factors as well. First, the Sheriff stated that the jail administrator did not want to investigate allegations of problems at the jail. Second, the evidence demonstrated the Sheriff's "consistent willingness to ignore inmate complaints by attributing them to attitudes of the complainants, characterizing them as 'troublemakers' or 'conjuring up' incidents to 'discredit' his deputies, allowed him to excuse his failure to pursue the issues any further." (1187). Third and "most astonishing," after being advised that two visibly upset female prisoners alleged sexual abuse by jailers, the Sheriff left them in the custody and control of the men accused of the assaults.

The court adds that the district court misread *Farmer*, believing it required the plaintiff to show that the Sheriff "specifically knew [the assailant] posed a substantial risk of harm to *her*." Under *Farmer*, if the prison official knows of an "an obvious, substantial risk to inmate safety," it is immaterial that the prison official "did not know that *the complainant* was especially likely to be assaulted *by the specific prisoner* who eventually committed the assault." (1187 quoting *Farmer*). Knowledge of a substantial risk may be shown by inference from circumstantial evidence.

Disabled/Transfers/Special Diets/Medical Care--Standards of Liability--Deliberate Indifference/Summary Judgment/Statutes of Limitations

Scott v. Garcia, 370 F.Supp.2d 1056 (S.D.Cal. 2005). The plaintiff developed severe stomach and digestive problems and was diagnosed with esophageal erosion, possible Barrett's esophagus, multiple gastric erosions, gastric ulcer, pyloric channel ulcer, duodenal bulb ulcer and multiple second duodenum ulcers. He was prescribed anti-reflux medication and told to avoid fatty and spicy foods. The chief medical officer said that he needed a transfer to an institution with medical hospital facilities. By the time he actually got transferred, the medical officer had issued three more recommendations for "*immediate* transfer" and five months had passed while classification and other personnel shuffled papers. At one point the recommendation was overruled by a chief medical officer in Sacramento, who said an outpatient facility would be sufficient, without explanation of the basis for his opinion or evidence that he examined the plaintiff or reviewed his medical records. When he was finally transferred, it was determined that he needed surgery, and three months later half of his stomach was removed.

Members of the classification committee could be found deliberately indifferent, notwithstanding their claim that they could not transfer inmates but only make recommendations to transfer, because they didn't make recommendations consistent with the chief medical officer's direction, and that recommendation was necessary in order for the transfer to happen. They kept trying to arrange a transfer to Corcoran or Pelican Bay. At 1068-69: "The fact that the Defendants were considering a transfer to Pelican Bay indicates that they were not concerned with, or failed to consider, Plaintiff's medical needs given that Pelican Bay does not have an on-site acute care hospital." Further, there is evidence that the plaintiff suffered from extreme anxiety over his condition and from extreme abdominal pain before having the surgery, showing that "Defendants were aware of a risk of serious injury to Plaintiff when they denied him transfer to a licensed hospital for a period of five months." (1069)

The warden could not be found deliberately indifferent based on evidence that the plaintiff told her about his problem, she displayed compassion and said she would see what she could do, and he was transferred a month later.

A doctor who refused to transfer the plaintiff to a prison that could accommodate his dietary requirements and who denied requests to receive an extra lunch and dietary supplement drinks pursuant to his own prior medical recommendations could be held deliberately indifferent. (He said the plaintiff needed more time to eat, then said it was a "custody issue" when correction staff wouldn't allow it, and wouldn't readmit him to a medical facility where his needs could be met.)

The plaintiff raises a material factual issue under the Americans with Disabilities Act. He is disabled. Eating is a major life activity, and the plaintiff's dietary restrictions are serious enough to substantially limit it. He provides evidence that he was denied access to the prison meal service because of his disability in that he was not given enough time to eat or to eat small frequent meals.

Telephones/Equal Protection

Gilmore v. County of Douglas, State of Nebraska, 406 F.3d 935 (8th Cir. 2005). A 45% commission paid to the county by the jail telephone provider and surcharged to prisoners' relatives did not deny them equal protection relative to other telephone users who receive collect calls from non-prisoners. The district court held there was no violation because the recipients of inmate calls are not similarly situated to recipients of non-inmate calls. The appeals court says the plaintiff loses even accepting her view of the proper comparison, since the disparity is reasonably related to defraying the costs of providing telephone service to prisoners. The absence of evidence that defraying the costs was actually the reason for the disparity doesn't matter under the rational basis test, which requires only a showing that there is a reasonably conceivable basis that could justify the classification.

> At 983: "Under rational basis review, a plaintiff must show more than that the government treated two classes differently for some irrational reason, a plaintiff must show that the government intended to discriminate against the class."

Correspondence--Legal and Official/Access to Courts

Simkins v. Bruce, 406 F.3d 1239 (10th Cir. 2005). The plaintiff was temporarily transferred (for a year) from prison to a local jail for court proceedings, and his legal mail was held rather than being forwarded, resulting in his not receiving notice of a summary judgment motion in a civil case and the granting of that motion as uncontested.

> At 1242: . . . [T]he plaintiff's claim that a right of access to the courts has been impeded requires him to allege intentional conduct interfering with his legal mail, and does not require an additional showing of malicious motive. Negligence is not sufficient. The mail room supervisor's affidavit stating she held the mail "in accordance with her training" shows intentional conduct. (The prison regulation requires forwarding, but she said she was trained to forward mail only within the state, and the plaintiff was held in another state). This conduct violated clearly established law.
>
> At 1243: "Indeed, the principle that unimpeded transmission of inmate legal mail is the 'most obvious and formal manifestation' of the right of access to the courts, . . . has been clearly established for some time now."

The plaintiff sustained "actual injury" as required by *Lewis v. Casey*. At 1243-44 (footnote omitted):

> Given that plaintiff's failure to receive the summary judgment motion and order in the prior action resulted in (1) admission of the defendants' version of the facts, (2) inability to argue the legal issues, and (3) loss of an opportunity to appeal, this case presents a compelling example of an impediment or hindrance demonstrating actual injury under *Lewis*. . .

> . . . *Lewis* does not suggest that the plaintiff must prove a case within a case to show that the claim hindered or impeded by the defendant necessarily would have prevailed. The Court took pains to explain that '[d]epriving someone of an arguable (though not yet established) claim inflicts actual injury,' *Lewis*. . . . Moreover, the Court explained that cognizable harm arises not only when a claim is lost or rejected on account of the defendant's misconduct, but also when the plaintiff's efforts to pursue a claim are impeded. . . . Consistent with these points, a plaintiff need not show that a claim with which a defendant interfered would have prevailed, but only that it was not frivolous. . . .

(Internal citations omitted)

Pre-Trial Detainees/Personal Property/Procedural Due Process--Property

Slade v. Hampton Roads Regional Jail, 407 F.3d 243 (4th Cir. 2005). The plaintiff challenged the constitutionality of a statutorily authorized charge of one dollar a day to pre-trial detainees to defray the costs of incarceration. Those adjudicated not guilty on all charges can get the money back if they ask within 60 days.

The charge does not violate substantive due process because it is not "punishment" under *Bell v. Wolfish*. The plaintiff does not show that its express purpose is to punish; that it lacks rational relationship to the legitimate governmental interests of defraying jail expenses and contributing to effective jail management; or that at one dollar a day, it is excessive for that goal.

The plaintiff did not sufficiently plead his procedural due process claim, and even if he did he loses. Defendants concede that the plaintiff has a property interest in the money in his account. However, it is a limited one, since Virginia requires trial within five months of a probable cause hearing, so the charge will be imposed only for a limited time. There is also little risk of erroneous deprivation that would be remedied by a pre-deprivation hearing, since "the daily deduction of the charge from the prisoner's account is a ministerial matter with no discretion and minimal risk of error." (253) The court does not say what if any process is due if a pre-deprivation hearing is not required.

The plaintiff did not sufficiently plead his Takings Clause claim either, but even if he did, its merits are "dubious." (254) There is a strong argument that the charge is a "reasonable user fee" and not a taking. Further, since the court can deprive a person of liberty before trial upon a showing of probable cause, it is likely that probable cause could also support this minimal charge, "depending upon the lawfulness of the arrest and a close link between the charge and the cost of pretrial detention."

Grievances and Complaints about Prison/Access to Courts--Punishment and Retaliation

Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2005), *amending and superseding* 380 F.3d 1123 (9th Cir. 2004). At 562-63: "We must resolve a legal quandary that only Joseph Heller, the author of *Catch-22*, could have imagined: Do the exhaustive efforts of an incarcerated prisoner to remedy myriad violations of his First Amendment rights demonstrate that his First Amendment rights were not violated at all?" The court holds that the fact that the plaintiff continued to make complaints after he was retaliated against did not mean he suffered no First Amendment violation. The question is whether the retaliation "would chill or silence a person of ordinary firmness from future First Amendment activity" (568-69), not whether the particular plaintiff was actually silenced. At 569:

> The consequences of a contrary holding would be remarkably perverse. It would keep all retaliation claims out of court, since the PLRA requires exhaustion of administrative remedies, but exhaustion would be deemed to show that the prisoner had not been chilled. The district court's holding that filing this lawsuit itself defeats the retaliation claim would create "an even more vicious Catch-22."

Federal Officials and Prisons/Medical Care/Habeas Corpus/Appeal

Glaus v. Anderson, 408 F.3d 382 (7th Cir. 2005). The plaintiff, who has Hepatitis C, was treated with interferon for a year, and his viral load dropped from more than 21 million to a little over one million. However, he was deemed a "non-responder" and treatment was stopped because under the Federal Bureau of Prisons' policy, interferon treatment will continue only if the viral load drops below one million. Six months after treatment was stopped, his viral load had reached 189 million. The plaintiff filed a habeas petition under § 2241 asking for release from prison, which the district court dismissed without prejudice.

Dismissals without prejudice are generally not appealable because the plaintiff is free to amend and re-file. However, the plaintiff can't amend *this* petition and re-file it in light of the district court's ruling, so the dismissal is appealable.

> At 386: "If a prisoner is not challenging the fact of his confinement, but instead the conditions under which he is being held, we have held that she must use a § 1983 or *Bivens* theory: . . ." The court notes it has said that habeas can be used to get out of solitary confinement, but the Supreme Court has never said so. (387 n.**.) Release from prison is not a possible remedy for an Eighth Amendment deliberate indifference claim; proper treatment or damages are. His conditions of confinement claim must be brought either as a civil rights claim, a Federal Tort Claims Act claim, or "an Administrative Procedures Act challenge to the BOP guidelines on treatment for hepatitis C." (387)

Legal Assistance Programs/Personal Involvement and Supervisory Liability/Damages--Access to Courts, Punitive/Injunctive Relief

White v. Kautzky, 386 F.Supp.2d 1042 (N.D. Iowa 2005). Iowa has stopped updating its law libraries and has instituted a system of "contract attorneys." The plaintiff went to the contract attorney with a question about the validity of his conviction in light of the handling of his extradition. The contract attorney gave him a post-conviction relief application form and told him to complete it and send it in immediately. However, the plaintiff was afraid to do so without legal research about the merits of his claim because pursuant to his plea agreement, filing such an application would have allowed the prosecutor to reinstate additional charges bearing additional potential sentences of up to 150 years. The contract attorney said that it was his understanding he was not to do research, he didn't have time to do research given the number of prisoners he had to assist, and a sign in the law library said that the contract attorney's duties did not include doing research.

The contract attorney's contract provided that he will "confer with" and "advise" prisoners about the merits of and proper parties to proposed litigation. This obligation to "confer and advise" "necessarily and reasonably requires provision of *competent* advice." Where circumstances warrant, "confer and advise" includes at least the minimal level of legal research reasonably required to provide professionally competent advice. (1053) The failure to satisfy this requirement is not the fault of the contract attorney but of the legal assistance system, given the attorney's instructions, lack of time, and the fact that he wasn't being paid to do the research. This is not a *respondeat superior* theory but one in which the defendant prison officials can be held liable for their own actions, which impeded the plaintiff's access to the court. (1055)

The court is not holding that the plaintiff is entitled to the level of research that would permit the attorney to represent him, but to the level of research needed to render reasonably competent advice. At 1056:

> Wherever the line must be drawn to provide the minimum level of research required by an inmate's specific legal problem in order to provide that inmate with adequate legal advice to permit the

> inmate to file a claim, a legal assistance system that effectively precludes *any and all* legal research by the legal advisor, whatever the nature of the claim raised by the prisoner, is constitutionally deficient." At 1057: The defendants are responsible for the deficiency "because they instituted that system, defined the obligations of the contract attorneys under the system, and defendant Ault told the contract attorney . . . that he could not research inmates' claims.

The plaintiff showed actual injury. The court is not convinced he would have won his claim but that isn't the question; it is whether the claim was frivolous. The plaintiff has shown he was so stymied by the system's inadequacies that he could not even file a complaint.

The plaintiff is not entitled to compensatory damages for the cost of the legal services he didn't get because he didn't pay for them. His damages are limited to nominal damages. There is no basis for punitive damages. At 1061: "The court declines to read a sinister motive into what appears to be shortsighted cost-cutting measures that simply failed to contemplate realistically what would be necessary to provide inmates with unusual claims with 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'"

Medical Care--Standards of Liability--Deliberate Indifference

Johnson v. Wright, 412 F.3d 398 (2d Cir. 2005). A reasonable jury could find that application of New York State's policy of categorically excluding from hepatitis C treatment anyone with a recent history of drug use constituted deliberate indifference where the plaintiff's treating physicians, including prison physicians, unanimously believed that the medically appropriate course of action was to provide treatment in the form of Rebetron therapy, and the defendants did nothing to investigate or verify whether that was the case. The question is not whether the policy is generally justifiable but whether its application to the plaintiff could have constituted deliberate indifference.

The court has previously held that "a deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's treating physicians." (404) It finds that principle applicable here, even though the defendants in the prior case were not medical personnel with responsibility for implementing treatment policies, as are the present defendants. Here, the only justification for denying treatment is concern about drug users' compliance with the therapeutic regime, and the fact that all the treating physicians expressly recommended treatment notwithstanding compliance concerns creates an issue of fact barring summary judgment. At 406: ". . . [A] jury could find that the defendants acted with deliberate indifference by reflexively relying on the medical soundness of the Guideline's substance abuse policy when they had been put on notice that the medically appropriate decision could be, instead, to depart from the Guideline and prescribe Ribavirin to the plaintiff."

Privacy/Evidentiary Questions

U.S. v. Romo, 413 F.3d 1044 (9th Cir. 2005). The defendant was convicted of threatening the President. His confession to a prison counselor that he had written a threatening letter was not protected by the psychotherapist-patient privilege. The privilege applies when the communication is made to a licensed psychotherapist, is confidential, and is made during the course of diagnosis or treatment. The meeting between the defendant and the therapist was not a counseling, treatment, or therapy session, even though the counselor had previously provided mental health care to the defendant and the defendant had asked to see him. No therapy was provided at this encounter, and the counselor (whose title was "program director") had a wide variety of duties besides counseling.

Religion--Practices/Federal Officials and Prisons

U.S. v. Baker, 415 F.3d 1273 (11th Cir. 2005) (per curiam). The criminal defendant moved for a new commitment order to reflect his religious name change. He was not entitled to it. Prisoners are entitled to have religious name changes recognized prospectively via a dual-name policy (which the Federal Bureau of Prisons has), but not to have records changed retroactively.

RFRA and RLUIPA/Habeas Corpus/Religion--Practices--Beards, Hair, Dress/Injunctive Relief--Preliminary/Deference

Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005). The plaintiff alleged that the state prisons' three-inch limit on hair length violated his Native American religious belief that he should cut his hair only upon the death of a loved one. He was repeatedly disciplined for noncompliance.

The district court should have granted the injunction, and the appeals court granted one pending appeal. The plaintiff showed a likelihood of success on his claim. A "substantial burden" under RLUIPA means "a significantly great restriction or onus" on religious exercise (995). Cell confinement, imposition of additional duty hours, reclassification into a work group receiving no time credits and lesser privileges, loss of phone call privileges, expulsion from programs and the Inmate Advisory Council, exclusion from the main yard, and reduction in commissary purchases meet that standard, notwithstanding the state's argument that as long as they don't physically force the plaintiff to cut his hair, his religious practice has not been restricted. At 996: "Because the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair," a substantial burden is imposed.

The state cited as justifications for its policy the security needs for quick and accurate identification, making contraband searches easier, and reducing animosity and tension by removing methods of signaling gang affiliation. They also cited the health and safety concerns of reducing the spread of head-borne parasites, the risk of injury while using heavy machinery, and the public safety concerns of easy identification of escapees. Security clearly is a compelling interest, but the state does not show its rule is the least restrictive alternative, supporting its position only by conclusory statements and out-of-circuit cases, all of which dealt with maximum security prisons rather than the minimum security institution the plaintiff is held in. At 998-99: "Inmates at facilities such as ACCF have a greater degree of freedom than inmates at higher security facilities precisely because they pose fewer security risks. . . . [999] Given the reduced security pressures at such minimum security facilities, the least restrictive means in a maximum security facility may not be identical to what is required for a minimum security facility."

At 999: "Moreover, even outside the context of a minimum security facility, CDC cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Possible alternatives include the creation of religious exemptions, which defendants dismiss without explanation. Other prison systems, including the Federal Bureau of Prisons, either do not have such hair length policies or, if they do, provide religious exemptions. The state doesn't explain why those prison systems can get along without such restrictive rules but California can't. At 1000: "Contrary to CDC's argument, we have found comparison between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means."

CDC also fails to explain why it does not have a similarly restrictive policy at its women's prisons, since the interests in health and security

are no less compelling for female inmates. The court rejects the claim that women are less violent than men; CDC's data show that women commit assaults and/or batteries at a rate of 3.2 per 100 inmates, compared to 4.7 per 100 among men. Equal protection decisions upholding different treatment of the genders for grooming purposes are not persuasive, since they were decided under intermediate scrutiny or less and not the strict scrutiny required by RLUIPA. Forcing the plaintiff to choose between following his religious beliefs and being punished or abandoning them satisfies the irreparable harm argument. In the Ninth Circuit, the existence of a colorable First Amendment claim can constitute irreparable harm for this purpose. (1001-01)

The balance of hardships favors the plaintiff. The fact that he is scheduled to be released in 18 days does not alter that conclusion, since the loss of First Amendment freedoms for even brief periods constitutes irreparable injury. (Apparently this was as of the district court's decision, and subsequently he has been denied good time and remains in prison).

Religion--Services Within Institution/Establishment of Religion/Publications

Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005). Prison officials denied the plaintiff's request to form an atheist study group, applying the less flexible policy that pertains to non-religious inmate groups.

The court declares that atheism is a religion for First Amendment purposes. However, the refusal to permit the plaintiff to meet with other atheist inmates to study and discuss their beliefs does not violate the Free Exercise Clause. The plaintiff did not provide evidence that he would be unable to practice atheism effectively without the benefit of a weekly study group. He can study atheist literature on his own, consult informally with other atheist inmates, and correspond with members of outside atheist organizations, and he has offered no evidence that these alternatives are inadequate. (683)

Id.: "Moreover, an inmate is not entitled to follow every aspect of his religion; the prison may restrict the inmate's practices if its legitimate penological interests outweigh the prisoner's religious interests." The defendants said that allowing any group of inmates to congregate raises security concerns and a need for supervision, and their denial of the plaintiff's request was "rationally related to that [security] interest." (683) The court does not discuss all the *Turner/O'Lone* factors and does not discuss whether other groups are allowed to congregate.

The plaintiff prevails on his Establishment Clause claim. The district court erred in assuming that the plaintiff was seeking to form a non-religious group. If that were the case, he would lose; "no one says that a person who wants to form a chess club at the prison is entitled under the Establishment Clause to have the application evaluated as if chess were a religion. . . ." (684) Id.: "It is undisputed that other religious groups are permitted to meet at Kaufman's prison, and the defendants have advanced no secular reason why the security concerns they cited as a reason to deny his request for an atheist group do not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates."

PLRA--Exhaustion of Administrative Remedies

Barnes v. Briley, 420 F.3d 673 (7th Cir. 2005). The plaintiff exhausted one set of claims against one set of defendants, then he got counsel, and filed an amended complaint asserting a second set of claims against different defendants, after exhausting those claims. The district court dismissed on the grounds that the second set of claims was not exhausted at the time suit was filed on the first set.

The district court's dismissal was erroneous. The plaintiff "complied with the purpose and letter of the PLRA." At 678: "It is evident, therefore, that Mr. Barnes did not attempt to re-plead improperly exhausted claims in his amended complaint. Rather, he asserted properly exhausted FTCA claims in his original

complaint, and later he raised new, properly exhausted § 1983 claims against new defendants." He also complied with the purpose of the PLRA by making repeated requests for a hepatitis test and any necessary treatment through the prison grievance process before suing the new defendants. At 678: "He therefore afforded those defendants the opportunity to address his grievances before he filed suit against them." The plaintiff filed a grievance naming defendant Dr. Smith, which was denied as untimely. He later filed a grievance not naming Smith but asserting that his medical needs were being ignored, and noting that he had asked for TB, Hepatitis, and HIV tests for several years. This grievance "restarted the grievance process" (679), and the grievance system did not require naming of defendants, so the plaintiff did not abandon his claim against Dr. Smith by not naming him.

Procedural Due Process--Disciplinary Proceedings/Punishment

Porter v. Coughlin, 421 F.3d 141 (2d Cir. 2005). Prison disciplinary proceedings are civil in nature and do not implicate the Double Jeopardy Clause.

PLRA--Exhaustion of Administrative Remedies

Brown v. Valoff, 422 F.3d 926 (9th Cir. 2005). The court considers at what point exhaustion is completed when a grievance is referred into a separate "staff complaint" process under the aegis of the Office of Internal Affairs. Bottom line: for anything referred to Internal Affairs, the prisoner has to wait until the Internal Affairs investigation is finished, assuming he or she can find out. If there is any aspect that is not referred to Internal Affairs, the prisoner must continue with the grievance process.

Transfers/Group Activities/Administrative Segregation--High Security/PLRA--Exhaustion of Administrative Remedies/Ex Post Facto Clause/Discovery/Procedural Due Process--Administrative Segregation

Westefer v. Snyder, 422 F.3d 570 (7th Cir. 2005). The plaintiffs complained of their transfer to Tamms, a super-high-security prison designed to be unpleasant for deterrent purposes. The "gang plaintiffs" alleged that they were placed there solely because of their gang affiliation, and the "litigation plaintiffs" say they were transferred in retaliation for their lawsuits.

The claims of the gang plaintiffs about transfer based on gang affiliation were properly dismissed, since gang affiliation is not protected by the First Amendment (575) and there is no violation of the Ex Post Facto Clause of the Constitution (576).

The district court dismissed the claims of several of the litigation plaintiffs for non-exhaustion. At 578: "Although exhaustion is a precondition to the prisoners' suit, failure to exhaust is an affirmative defense that IDOC has the burden of proving."

Defendants fail to meet their burden. Inmates who are in administrative detention when they arrive get a transfer review hearing within 10 days. Those in disciplinary segregation get a hearing only when their segregation time is up. There is a 90-day review of continued placement at which the prisoner has no opportunity to be heard. For administrative detention prisoners, the transfer review committee conducts an additional hearing annually at which there is an opportunity to present evidence. Defendants alleged that prisoners must seek review both through the transfer review process and through the grievance process to exhaust. The transfer review process is not available to disciplinary segregation prisoners, and defendants don't argue that its existence after their segregation ends is an available remedy. At 579:

> IDOC's position that the transfer review process affords an administrative remedy is

> unconvincing for another reason. Many of the prisoners contend that they were not told the reasons for their transfer to Tamms; indeed, several prisoners filed grievances to complain about this problem. IDOC regulations do not require the department to notify prisoners why they have been transferred. We doubt whether the transfer review process is effective for prisoners who do not know the grounds for their transfer and who thus have no basis with which to contest their transfer. More importantly, if a prisoner discovers the reasons for his transfer shortly after completing the initial transfer review hearing and wishes to contest the transfer because, for instance, the reasons are based on incorrect facts, he must wait at least one more year before he can present evidence at his annual review hearing. For all these reasons, with respect to the transfer review process, IDOC has not carried its burden of establishing that the prisoners have not satisfied PLRA exhaustion requirements.

This holding seems to be implicitly contrary to all the cases that say a remedy must merely be "available" and any complaints about its adequacy are beside the point.

Defendants also say the grievance process is an avenue for challenging transfer to Tamms, but the grievance regulations say that process can't be used for complaints regarding "decisions that have been rendered by the Director." (579) At 579: "There seems to be significant confusion within IDOC, presumably caused by the 'or decisions that have been rendered by the Director' clause . . . , as to whether a Tamms prisoner may grieve his transfer. . . ." Plaintiffs who have filed grievances have received inconsistent responses. At 580:

> IDOC does not point to any regulation or department policy that clearly identifies how a prisoner challenges his transfer to Tamms. . . . If the ARB took consistent positions on its authority to address a transfer grievance, a clear route for the prisoner at least would be evident and we could proceed to determine its effectiveness. But, as this case comes to us, we find the record "hopelessly unclear . . . whether any administrative remedy" remained open for the prisoners to challenge their transfers through the grievance process. . . .

So now the court says there is no available remedy. It also notes that the district court erred in holding the grievances that were filed inadequate. All the PLRA requires is to "alert[] the prison to the nature of the wrong for which redress is sought." (580) At 580-81:

> Although their purported [581] placement challenges were made within substantive complaints about Tamms conditions, each prisoners' [sic] grievance expressed concern about not being told the reason for his transfer to Tamms or listed something to the effect of "Transfer from Tamms" as the requested remedy. These complaints were sufficient to alert prison officials that Mr. Felton and Mr. Horton challenged their transfers, even though the grievance officers in each case addressed the prison condition complaints without mentioning their transfers to Tamms.

Religion--Practices--Beards, Hair, Dress/RFRA and RLUIPA/Deference

Hoevenaar v. Lazaroff, 422 F.3d 366 (6th Cir. 2006). The Native American plaintiff challenged a prison restriction on hair length, and the district court granted a preliminary injunction under RLUIPA allowing him to grow a kouplock, an area at the back of the head about two inches square where the hair is permitted to grow longer than elsewhere. It found that although the warden was likely to show that the regulation served compelling interests in identifying prisoners and suppressing contraband, he was

unlikely to show that a blanket ban on long hair was the least restrictive means; prison officials must consider both accommodations such as the kouplock and the security risk posed by each individual, just as they consider that women generally pose less of a security risk than men. It mentioned that the plaintiff was a medium security prisoner and also that he has diabetic neuropathy in his feet.

The Sixth Circuit finds that the district court "improperly substituted its judgment for that of prison officials" in applying the least restrictive means test. Under RFRA, "courts must give due deference to the judgment of prison officials, given their expertise and the significant security concerns implicated by prison regulations." (370) The same rule applies under RLUIPA. This court held before *Turner*, applying a least restrictive means test under the First Amendment, that "once prison officials have provided expert testimony sufficient to justify the security regulation and resultant impingement of prisoner rights, 'the courts must defer to the expert judgment of the prison officials unless the prisoner proves by "substantial evidence . . . that the officials have exaggerated their response" to security considerations.'" (370) At 371: "While the district court is not required to blindly accept any policy justification offered by state officials, the district court's analysis does not reflect the requisite deference to the expertise and experience of prison officials, as required by case law interpreting the RFRA and RLUIPA." As an example, the court cites the district court's discounting the warden's testimony about the resentment and enforcement problems arising from individualized exemptions, on the ground that there was no showing of increased escapes and contraband from the period when they allowed individualized exemptions. Another official testified that contraband was a problem regardless of security level, and a kouplock could conceal an ice pick or other small items that the plaintiff had been found in possession of.

There's a pretty direct conflict between this decision and *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005).

PLRA--Exhaustion of Administrative Remedies/Res Judicata and Collateral Estoppel

Brengettcy v. Horton, 423 F.3d 674 (7th Cir. 2005). The plaintiff alleged that he was beaten; he filed a grievance within 15 days as the policy required. He did not get a reply within 30 days as policy provided nor was he notified that his grievance would take longer than 30 days to resolve. Two months later he asked about the status of his grievance and was told that sometimes grievances get torn up. The next month he filed another grievance. Again, he received neither a decision nor a notification that it would take longer than 30 days to resolve.

The court has said that prisoners must exhaust at the time and in the manner prescribed by prison rules. At 682: "Nevertheless, we have also held that prison officials' failure to respond to a prisoner's claim can render administrative remedies unavailable. . . ." Here the plaintiff filed a grievance in compliance with CCDOC's internal timetables, and the policy does not tell prisoners what to do when they don't get a response and don't have a decision to appeal. *Id.*

Habeas Corpus

Osborne v. District Attorney's Office for the Third Judicial District, 423 F.3d 1050 (9th Cir. 2005). The plaintiff's § 1983 action to compel the state to release the DNA evidence against him for more sophisticated testing than available when he was convicted was not barred by *Heck v. Humphrey*, since a ruling in his favor would not "necessarily imply" the invalidity of his conviction. The fact that he is trying to "set the stage" for a challenge to his conviction does not bring this action within the *Heck* rule. *Dotson v. Wilkinson* removes "[a]ny remaining doubt as to the propriety of this approach." (1055)

PLRA–Exhaustion of Administrative Remedies

Braham v. Clancy, 425 F.3d 177 (2d Cir. 2005). The plaintiff made numerous written and oral requests to officers and lieutenants for a cell

change because he was afraid of his cell mate. He was moved only after his cell mate assaulted him.

The plaintiff did not file a grievance. He argued that he had initiated the informal process required before a grievance is filed, and that he was assaulted before the filing deadline of 30 days after denial of a request; therefore, he said, he "no longer had a viable grievance that could be filed or acted upon."

The plaintiff did not exhaust available remedies, since prison officials could have taken some action if he had filed a grievance. However, on remand the court must consider whether Braham's filing of request forms, his complaint about prison officials' responsiveness to them during his disciplinary appeal, or some combination, "provided sufficient notice to the prison officials 'to allow [them] to take appropriate responsive measures,' thereby satisfying the exhaustion of administrative remedies requirement. . . .." (183) The plaintiff "appears to have a colorable argument" that he was trying to exhaust at the time he was attacked, so prison officials may have had sufficient notice of Braham's concerns to deal with them administratively. He also raised prison officials' unresponsiveness to his request forms in his disciplinary appeal process. The district court may consider his submissions in the disciplinary appeal process sufficiently put prison officials on notice of his concerns. It may also wish to consider whether the fact that the plaintiff got his cell change is a "special circumstance" that might have led the plaintiff reasonably to conclude that he had prevailed in the grievance process and need not proceed further.

PLRA–Exhaustion of Administrative Remedies/Transportation to Court

Thornton v. Snyder, 428 F.3d 690 (7th Cir. 2005). The plaintiff alleged the conditions of his cell were dangerous and filed an emergency grievance to the warden requesting a transfer; this form of grievance is an alternative to the ordinary grievance process. The warden responded that he did not think it was an emergency, and the plaintiff neither appealed the warden's response, nor filed a non-emergency grievance. Nevertheless, he got the requested transfer within the time limit for an appeal. Defendants argue that the plaintiff failed to exhaust, because he neither filed a new grievance, nor did he attempt to appeal the warden's response. The court notes that "nothing in the current regulatory text . . . requires an inmate to file a new grievance after learning only that it will not be considered on an emergency basis." (694) The court also rejects defendants' argument that the plaintiff should have appealed even though he got the relief he sought. "Unlike the defendants . . . we do not take the requirement to exhaust 'all available' remedies to mean Thornton must appeal grievances that were resolved as he requested and where money damages were not available." (695) The court also reviews the policy justifications behind the exhaustion requirement to conclude that "the defendants' notion that Thornton should have appealed to higher channels after receiving the relief he requested in his grievances is not only counter-intuitive, but it is not required by the PLRA." (697)

Sexual Minorities

Praylor v. Texas Dep't of Criminal Justice, 430 F.3d 1208 (5th Cir. 2005) (per curiam). At 1209:

> This circuit has not addressed the issue of providing hormone treatment to transsexual inmates. Other circuits that have considered the issue have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need. . . . Assuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference.

> In Praylor's case, the record reflects that he did not request any form of treatment other than hormone therapy. Testimony from the medical director at the TDCJ revealed that the TDCJ had a policy for treating transsexuals, but that Praylor did not qualify for hormone because of the length of his term and the prison's inability to perform a sex change operation, the lack of medical necessity for the hormone, and the disruption to the all-male prison. . . . Moreover, the director testified that Praylor had been evaluated on two occasions and denied eligibility for hormone treatment and that the TDCJ did provide mental health screening as part of its process for evaluating transsexuals. . . . Accordingly, based upon the instant record and circumstances of Praylor's complaint, the denial of his specific request for hormone therapy does not constitute deliberate indifference. . . .

Procedural Due Process--Administrative Segregation/Access to Courts--Punishment and Retaliation

Bruce v. Ylst, 351 F.3d 1283 (9th Cir. 2003). The plaintiff alleged that he was "validated" as a gang member in retaliation for his activities as a jailhouse lawyer and in filing grievances, and that he was denied due process.

The plaintiff's due process claim is governed by the "some evidence" standard of *Superintendent v. Hill* and not the "heightened standard of *Wolff v. McDonnell*" because segregating gang members is an administrative protective strategy and not a disciplinary measure. The court doesn't explain what this "heightened standard" is; *Superintendent v. Hill's* "some evidence" standard was asserted in a disciplinary case governed by *Wolff*. A Los Angeles Sheriff's Department report indicating the plaintiff's membership in the Black Guerrilla Family and the Crips, a probation report indicating that his criminal co-defendant was also validated as a BGF member, and the statement of a confidential informant were sufficient to meet the some evidence standard; any of the three would have sufficed since each has "sufficient indicia of reliability." (1288)

> At 1288: . . . [A] chilling effect on a prisoner's First Amendment rights to file prison grievances is sufficient to raise a retaliation claim." The plaintiff's retaliation claim raises material factual issues barring summary judgment. The "suspect timing of the validation--coming soon after his success in the prison conditions grievances" is circumstantial evidence. The fact that the same evidence now used to validate the plaintiff was previously determined to be insufficient, and the plaintiff's account of statements made by the person who validated him that he had "pissed off higher-ups" with his complaints, also supported his claim.

The existence of some evidence of gang membership did not dispose of the retaliation claim. At 1289: "The 'some evidence' standard applies only to due process claims attacking the result of a disciplinary board's proceeding, not the correctional officer's retaliatory accusation." Although the plaintiff must show the absence of legitimate correctional goals for the challenged conduct, if defendants used the validation process "as a cover or a ruse to silence and punish Bruce because he filed grievances, they cannot assert that Bruce's validation served a valid penological purpose, even though he may have arguably ended up where he belonged." (1289) Id.: "This comports with other circuits [sic] holdings that prison officials may not defeat a retaliation claim on summary judgment simply by articulating a general justification for a neutral process, where there is a genuine issue of material fact as to whether the action was taken in retaliation for the exercise of a constitutional rights."

The court declines to enjoin the defendants from relying on the same evidence in

the future and declines to make a declaration whether the plaintiff is in fact a gang member.

PLRA--Mental or Emotional Injury/Sanitation/Hygiene

Alexander v. Tippah County, Miss.; 351 F.3d 626 (5th Cir. 2003). Confinement under disgusting and unsanitary conditions did not support an award of compensatory damages under the PLRA's mental or emotional injury provision. At 631:

> The district court found that the only physical injury suffered by either Alexander or Carroll was nausea: Carroll allegedly vomited from the smell of the raw sewage covering the floor of the isolation cell. While we recognize that vomiting is an unpleasant experience, there is no indication that Carroll's nausea was severe enough to warrant medical attention. Furthermore, Carroll has not alleged that his nausea was a symptom of some more serious malady, or had any lasting effects. . . . Furthermore, we note that Alexander never claimed to have suffered a physical injury from confinement in the isolation cell. Therefore, we find that § 1997e(e) precludes Alexander and Carroll from recovering for their emotional and mental injuries.

PLRA--Exhaustion of Administrative Remedies

Mojias v. Johnson, 351 F.3d 606 (2d Cir. 2003). Plaintiff filed a form complaint and checked the boxes indicating that the institution had a grievance process but that he did not present his complaint to it. The district court dismissed for non-exhaustion at initial screening. The Second Circuit reversed. At 610 (footnote omitted): "As we held in *Snider*, a court considering dismissal of a prisoner's complaint for non-exhaustion must first establish from a legally sufficient source that an administrative remedy is applicable and that the particular complaint does not fall within an exception." The Second Circuit held that the district court erred in relying solely on the plaintiff's responses on the form complaint.

Pre-Trial Detainees/Use of Force--Beating, Chemical Agents/Medical Care/Special Diets/Intake/Personal Involvement and Supervisory Liability

Lolli v. County of Orange, 351 F.3d 410 (9th Cir. 2003). The plaintiff was stopped for a bicycle infraction and then arrested for an unpaid parking ticket. He told the arresting officer and the jail nurse that he was diabetic, felt ill, and needed to eat as soon as possible. Instead he was put in a holding cell for about four hours. He then complained about the lack of food, to which a deputy responded, "Where the fuck do you think you are, the Holiday Inn?" The plaintiff alleged that he was thrown to the ground and kicked, punched, poked with batons, and pepper sprayed, even after he was handcuffed and taken to a mental observation cell. He never received food or insulin. The officers said he was violently resisting, denied kicking him or striking him with batons, and denied knowing he was a diabetic or needed food or insulin. He was later found to have a variety of injuries including a perforated eardrum and three fractured ribs.

Pre-trial detainees' claims of excessive force are governed by the Fourth Amendment standard articulated in *Graham v. Connor*. (This is contrary to most decisions, which apply the Due Process Clause to such claims.) Here the plaintiff submitted sufficient evidence for a jury to find excessive force, based on the type and amount of force used and the apparent lack of need for any force.

Though the plaintiff could not identify which deputy inflicted which blow, he presented evidence that they all participated in the beating. At 417: "Lolli has done more than simply place the officers at the scene of the altercation and assert a group liability theory. . . . Instead, he has properly relied on the deputies' own admissions that they were involved in the altercation and that they exerted some physical force on him to create the necessary inference that the deputies were 'integral participants in the alleged unlawful act.'"

The plaintiff's allegations that he put jail staff on notice that he was diabetic and needed food supported a deliberate indifference claim.

While there is no direct evidence that the officers inferred that there was a serious risk to the plaintiff, their indifference to the plaintiff's extreme behavior, his sickly appearance, and his explicit statements about his condition could support a finding of actual knowledge. At 421: "Much like recklessness in criminal law, deliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm."

Religion--Practices--Services Within Institution, Diet

Ford v. McGinnis, 352 F.3d 582 (2d Cir. 2003). The Muslim plaintiff complained that he was denied the Eid ul Fitr feast, which marks the successful completion of Ramadan, because he was in the secured housing unit (SHU) in connection with a transfer.

Since courts are ill-equipped to judge the verity of religious beliefs, a free exercise complainant need only demonstrate that the beliefs at issue are sincerely held and "in the individual's 'own scheme of things, religious.'" (588, citation omitted). The Supreme Court has said that any "sincerely held religious belief" is protected.

The court assumes, since the plaintiff doesn't argue otherwise, that Free Exercise claims require a showing of a "substantial burden" on religious exercise. The circuits are divided over whether such a requirement applies to prisoners' First Amendment free exercise claims.

Whether a burden is substantial does not turn on whether the practice is mandated by the religion. At 593:

> To confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine. . . . . The relevant question . . . [is whether the practice] is considered central or important to [the plaintiff's] practice of [religion]. The testimony of DOCS' religious experts is not dispositive in light of the plaintiff's insistence that the practice at issue is critical to his religious beliefs, is a claim which is not "so bizarre . . . as not to be entitled to protection under the Free Exercise Clause." (593-94, *quoting Thomas v. Review Board*).

PLRA--Three Strikes Provision

Ciarpaglini v. Saini, 352 F.3d 328 (7th Cir. 2003). The plaintiff alleged that his medication for attention deficit hyperactivity disorder and panic disorder was improperly terminated. His allegation that his resumed panic attacks cause him to suffer heart palpitations, chest pains, labored breathing, choking sensations, and paralysis in his legs and back sufficiently alleges "imminent danger of serious physical injury" under 28 U.S.C. § 1915(g) and allows him to proceed in forma pauperis despite having three "strikes."

Religion--Practices and Diet/RLUIPA

Lindell v. McCallum, 352 F.3d 1107 (7th Cir. 2003). The plaintiff alleged that he is a follower of Wotanism, a/k/a Odinism or Asatru ("It is an obscure religion, but he didn't make it up."), but that prison officials refuse to acknowledge it on the ground that it is racist and disruptive of prison life. Therefore, he says, they have destroyed Wotanist mail, ignored dietary restrictions, housed Wotanists separately so they can't congregate or discuss their beliefs, and excluded Wotanist literature and videos from the religious materials available to prisoners. This complaint states a claim under the Religious Land Use and Institutionalized Persons Act. At 1110: "We are given no reason to think that the fact that Wotanism is not a mainstream religion is disqualifying," and while defendants might show it is racist and they have a compelling interest in suppressing it, they haven't done so yet.

Sex Offenders/Procedural Due Process--Classification

Gwinn v. Awmiller, 354 F.3d 1211 (10th Cir. 2004). The plaintiff, whose sexual assault charge had been dismissed, was classified as a sex offender and required to complete a treatment program, which in turn required that he admit guilt of the dismissed charge. He was also required to register as a sex offender after release and attend a community treatment program.

Damage to reputation alone does not implicate due process protections. A plaintiff raising such a claim must show that the government made a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, that he or she asserts it is false, and that the plaintiff experienced some "governmentally imposed burden that 'significantly altered [his or] her status as a matter of state law.'" (1216) Under the court's prior authority, the reduction in ability to earn good time resulting from sex offender status meets that standard (1218-19). The process due is the same as for prison disciplinary proceedings: *Wolff v. McDonnell* rights plus the requirement of "some evidence." Here the hearing panel relied on a detailed written account of the alleged sexual assault; the plaintiff presented no more than a general written denial; the hearing panel did not deny his due process rights by "applying an improper presumption" and finding that he had engaged in sexually violent and abusive conduct. The lack of counsel did not deny due process.

"More troubling" is the allegation that the panel wasn't impartial because it included one of the people already named as a defendant in this litigation, a fact which "raises at least the possibility that the Hearing Panel was not fair and impartial." However, honesty and integrity are presumed on the part of a tribunal, exposure to evidence in nonadversary investigative procedures doesn't impugn the fairness of a later hearing, so allegations of bias like these "should be decided on a case-by-case basis." (1220) The court concludes that there is no impartiality problem; the fact that the panel member had told the plaintiff he was a sex offender based on the dismissed charge doesn't mean he can't fairly weigh evidence to determine whether he actually committed the crime.

After release from prison, a registration requirement for sex offenders may be sufficient to implicate a liberty interest under the "stigma-plus" test. The district court should determine what process is due if in fact a liberty interest is created.

The denial of a higher rate of good time accrual because the plaintiff would not admit to the dismissed sex offense did not violate the Fifth Amendment privilege against self-incrimination under *McKune v. Lile*; withholding of good time is not sufficiently serious to compel him to be a witness against himself.

The court summarily rejects the plaintiff's ex post facto, Eighth Amendment, First Amendment and equal protection claims. At 1228: ". . . [A]bsent an allegation of a suspect classification, our review of prison officials' differing treatment of various inmates is quite deferential: in order to withstand an equal protection challenge, those classifications must be reasonably related to a legitimate penological purpose."

Publications

Bahrampour v. Lampert, 356 F.3d 969 (9th Cir. 2004). The plaintiff was denied receipt of Muscle Elegance magazine under a rule prohibiting "any '[p]ortrayal of actual or simulated' penetration or stimulation, sexual violence, sexual contact between two people, or sexual contact between a person and an animal," unless it has "scholarly value, or general social or literary value." The magazine contains "advertisements for videos where a bikini-clad woman applies 'Brutal Scissors Domination' to a man's face between her legs, and where a woman has locked a man's torso in what is described as 'Painful, Erotic Domination.'" The rule was justified by the Superintendent's assertion that the materials "would be highly valued as barter and 'may result in prohibited sexual activity or unwanted sexual behavior, including rape,'" and by an expert witness who said sexually explicit

materials would present risks of "increasing aggressive and inappropriate tendencies and behaviors by inmates," risks amplified in the prison setting by the "lack of 'socially sanctioned sexual outlets,' and the lack of the moderating influences of family and nonaggressive peers." (972)

The plaintiff was also denied receipt of White Dwarf magazine under a rule prohibiting material that "contains role-playing or similar fantasy games or materials." The Superintendent said that this rule "is intended to prevent inmates from placing themselves in fantasy roles that reduce accountability and substitute raw power for legitimate authority," and also that role-playing materials often contain dice, which are prohibited gambling paraphernalia. (973)

The court declares that defendants' "evidence adequately demonstrates that the regulations support the legitimate penological interests of reducing prohibited behaviors such as sexual aggression and gambling, and maintaining respect for legitimate authority" (973) with no further comment. As to the "valid, rational connection" requirement, the only question is whether the magazines contained prohibited content, which they do; White Dwarf fits the definition of role-playing because "it simulates violent battles in an imaginary fantasy world in which the roll of dice determines which leaders have the power to crush their enemies." (976). The court also held that the restrictions were neutral "because they target the effects of the particular types of materials, rather than simply prohibiting broad selections of innocuous materials." (976).

Procedural Due Process--Disciplinary Proceedings

Luna v. Pico, 356 F.3d 481 (2d Cir. 2004). The plaintiff was convicted of assaulting another prisoner who wrote an initial statement that the plaintiff did it but then refused to testify. There was no evidence of guilt that did not derive from the victim's statement.

Under the Supreme Court's "some evidence" standard, the Second Circuit has not construed "any evidence" literally but has "looked to see whether there was 'reliable evidence' of the inmate's guilt." (488) Here, the only evidence was a bare accusation by a victim who then refused to confirm it, and no apparent effort was made to confirm the assailant's identity or to evaluate the victim's credibility. At 490: "We conclude, as a matter of law, that a prisoner's due process rights are violated, as in the confidential informant context, when he is punished solely on the basis of a victim's hearsay accusation without any indication in the record as to why the victim should be credited."

Verbal Abuse; Cruel and Unusual Punishment

Johnson v. Dellatifa, 357 F.3d 539 (6th Cir. 2004). The plaintiff alleged that an officer continuously bangs and kicks his cell door, throws his food trays through the bottom slot of his cell door so hard the top flies off, makes aggravating remarks to him, insults him about his hair length, growls and snarls through his window, smears his window to keep him from seeing out, behaves in a racially prejudicial manner towards him and jerks and pulls him unnecessarily hard when escorting him from his cell. At 546: ". . . [W]hile the allegations, if true, demonstrate shameful and utterly unprofessional behavior by [the officer], they are insufficient to establish an Eighth Amendment violation." Harassment and verbal abuse do not violate the Eighth Amendment.

Sex Offenders/PLRA--Exhaustion of Administrative Remedies

Kalinowski v. Bond, 358 F.3d 978 (7th Cir. 2004). A person held under the Illinois Sexually Dangerous Persons Act is subject to the PLRA for purposes of exhaustion, etc., because under that statute, criminal charges are deferred while the defendant undergoes treatment, and so he remains a pre-trial detainee.

Federal Officials and Prisons/FTCA–Discretionary Function Exception/Accidents

Bultema v. U.S., 359 F.3d 379 (6th Cir. 2004). The plaintiff fell out of an upper bunk and severely injured his knee. He sued under the Federal Tort Claim Act, and the government invoked the discretionary function exception. At 383:

> Where a particular government action is a deliberate or necessary result of a discretionary general policy, such that a tort suit based on the particular act or omission would amount to a challenge to the protected across-the-board policy, then the discretionary function exception applies. . . . But where a particular government action is not a necessary result of such a general policy, the act does not necessarily amount to an exercise of a discretionary function merely because carrying out the general policy provided the opportunity for the negligent act. . . . A fortiori, if a particular act violates a governmental policy, the act cannot be protected under the discretionary function exception by the fact that the violated policy itself was an exercise of a discretionary function.

Under these standards, the prison's policies of not having rails on upper bunks and of relying on inmates to notify officials of previously issued lower bunk passes were protected by the discretionary function exception. At 384: "The decision generally not to have bed rails, and the decision to have inmates notify unit management of a bunk pass, both involve the type of across-the-board policy-making judgment that the discretionary function exception was meant to leave to federal administrators."

The allegation that officials were negligent in not giving the plaintiff the proper number of forms and instructions to notify unit management of his approval for a lower bunk was not barred by the discretionary function exception, since the policy involved did not allow any discretion, and even if it did, the discretion wasn't protected by the exemption, since it was not required by the across-the-board policy of requiring the prisoners to give notice.

Sex Offenders/Visiting/Self-Incrimination/Equal Protection

Wirsching v. Colorado, 360 F.3d 1191 (10th Cir. 2004). The plaintiff, a convicted sex offender, challenged various measures taken against him for refusing to participate in a treatment program.

The prison's denial to the plaintiff of visitation with his child does not violate his right of familial association under the *Turner* standard as illuminated by *Overton v. Bazzetta*. The ban is reasonably related to the legitimate penological interests of protecting his children and furthering his rehabilitation. The state's evidence (an affidavit from a social worker) may be debatable, and a particular sex offender may pose no threat, but the plaintiff offered no evidence to show that the defendants' objectives were invalid. The plaintiff has alternatives: he can write and telephone his children, and defendants need not provide him the best method of communication.

The prison's actions did not violate the plaintiff's Fifth Amendment privilege against self-incrimination. The total denial of visits with his children and the denial of opportunity to earn good time at the rate available to other prisoners are not serious enough to constitute coercion. The fact that the plaintiff was convicted by *Alford* plea made no difference to the self-incrimination analysis.

Treating sex offenders differently from other offenders does not deny equal protection because it is rationally related to a legitimate state penological objective.

Sexual Minorities/Protection from Inmate Assault

Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004). The plaintiff, a pre-operative male-to-female transsexual, was assaulted in the protective custody unit by a "predatory inmate" placed there because he had testified against other prisoners involved in a riot.

Under *Farmer v. Brennan*, prison officials can't escape liability by showing that they didn't know the complainant was particularly likely to be victimized by an obvious, substantial risk. At 294:

> [W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance. . . . Therefore, . . . Greene need only point to evidence from which a finder of fact could conclude that her vulnerability made her placement in the PCU with high-security inmates a substantial risk to her safety, of which Warden Brigano was aware, or alternatively, evidence from which that finder of fact could conclude that Frezzell's placement in the PCU without segregation or other protective measures presented a substantial risk to other inmates in the PCU, of which Warden Brigano was aware.

Evidence that the warden was aware that the plaintiff was potentially in danger because of her physical appearance, that transgendered prisoners are often placed in protective custody for that reason, that the plaintiff was put in PC for that reason, that the assailant had a lengthy prison misconduct record, including convictions for violent assault, that he was a "predatory inmate" and had a long history of being disruptive and violent was sufficient to create a factual issue barring summary judgment.

PLRA--Exhaustion of Administrative Remedies

Ford v. Johnson, 362 F.3d 395 (7th Cir. 2004). The plaintiff filed a grievance, the review board called him in for an interview, and he refused to go, saying he had a federal suit going. The court affirms dismissal for non-exhaustion. He did exhaust, regardless of procedural failings, because the review board decided the merits. However, he sent in his complaint before the process was completed. It doesn't matter that the initial review process was delayed and complaint was not formally filed until after exhaustion was completed; prisoners must complete exhaustion before the complaint is tendered to the clerk.

The court rejects the claim that no remedies were "available" because the plaintiff had waited six months for a decision and prison regulations said a decision should be rendered within 60 days "whenever possible." At 400: "Some appeals are simple and will be wrapped up within two months; others are more complex. . . . Even six months is prompt compared with the time often required to exhaust appellate remedies from a conviction."

Dismissal for non-exhaustion should always be without prejudice, since states may allow cure of failure to exhaust; or a state may allow litigation in state court without the exhaustion rule that § 1997e(a) adopts for federal litigation. In either case, dismissal with prejudice blocks what may be an appropriate suit.

Publications

Clement v. California Dep't of Corrections, 364 F.3d 1148 (9th Cir. 2004) (per curiam). The appeals court affirms the injunction against the Pelican Bay State Prison rule forbidding receiving information downloaded from the Internet unless it is re-typed. At 1151: "The First Amendment 'embraces the right to distribute literature, and necessarily protects the right to receive it.' . . . It protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era. . . . " At 1152: "Prohibiting all internet-generated mail is an arbitrary way to achieve a reduction in mail volume. . . . CDC did not support its assertion that coded messages are more likely to be inserted into internet-generated materials than word-processed documents. Moreover, Clement submitted expert testimony that it is usually easier to determine the origin of a printed email than to track handwritten or typed mail."

Federal Officials and Prisons/Publications

Ramirez v. Pugh, 379 F.3d 122 (3d Cir. 2004). The plaintiff, a federal prisoner at the low-

security institution in Allenwood, challenged the Ensign Amendment, which prohibits the use of federal funds to distribute or make available commercially published material that "is sexually explicit or features nudity." Though rehabilitation is a legitimate interest, the lower court in upholding the statute did not adequately describe "the specific rehabilitative goal or goals furthered by the restriction on sexually explicit materials." The connection between the statute and rehabilitation that seemed obvious in prior litigation about sex offenders "becomes attenuated" upon consideration of the entire prison population. On remand, the district court "must first identify with particularity the specific rehabilitative goals advanced by the government to justify the restriction at issue, and then give the parties the opportunity to adduce evidence sufficient to enable a determination" whether there is a rational connection between ends and means (128). The other three prongs of the *Turner* analysis are "fact-intensive" requiring a "contextual, record-sensitive analysis." At 130: "Where the link between the regulation at issue and the legitimate government interest is sufficiently obvious, no evidence may be necessary to evaluate the other *Turner* prongs." Here, however, the *Turner* factors involving whether accommodating the asserted right would have an adverse effect on guards, other inmates, and the allocation of prison resources, and whether there are *de minimis* cost alternatives, require factual development. (No factual development is required concerning alternative means for prisoners to exercise their rights: obviously they can just read something else). The right at issue must be viewed "sensibly and expansively." (131)

The scope of the interest in rehabilitation has never been defined by the Supreme Court. Policies targeting the specific behavioral patterns that led to a prisoner's incarceration, or that emerge during incarceration and present a threat of lawbreaking, are certainly legitimate. At 128: "To say, however, that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners' First Amendment rights are subject to the pleasure of their custodians."

Procedural Due Process--Disciplinary Proceedings/Summary Judgment

Sira v. Morton, 380 F.3d 57 (2d Cir. 2004). The Second Circuit deals comprehensively with confidential informants in disciplinary proceedings. Disciplinary convictions must be supported by "some evidence," which means "some 'reliable evidence'." (69)

> At 70: [D]ue process requires more than a conclusory charge; an inmate must receive notice of at least some "specific facts" underlying the accusation. . . . Such notice is especially important where, as in this case, large parts of the disciplinary hearing are conducted outside the inmate's presence. The law recognizes that legitimate concerns for inmate safety may sometimes require confidential proceedings, . . . but in such circumstances, there is a particular due process interest in requiring some factual specificity in the misconduct notice.

The Constitution does not demand painstaking detail, "but there must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense." (72) At 72: "[W]e are doubtful that inadequate written notice can be cured merely through oral disclosures at the hearing. Certainly such curative disclosures would be insufficient unless the inmate was also afforded the meaningful opportunity to prepare a response to the new information."

> At 74: An inmate's due process right to know the evidence upon which a discipline ruling is based is well established. . . . Such disclosure affords the inmate a reasonable opportunity to explain his actions and to alert officials to

possible defects in the evidence. However, hearing officers may decline to inform a prisoner of evidence when it would present a risk of violence or intimidation. A need to keep informants' identities confidential does not support keeping the substance of their testimony confidential when it can be disclosed without identifying the informant. Non-disclosure of that information supports a due process claim and defendants are not entitled to qualified immunity.

The credibility of confidential informants must be supported by an independent assessment of credibility for their testimony to be relied on. (78). Conclusory assertions even by credible informants--here, that an informant saw the plaintiff "coerce inmates through strong arm tactics and threats of violence to participate in certain stages of the planned strike"--do not by themselves qualify as "some reliable evidence of inmate misconduct." (80)

PLRA--Exhaustion of Administrative Remedies

Giano v. Goord, 380 F.3d 670 (2d Cir. 2004). The plaintiff alleged that he was subjected to retaliatory discipline and evidence was tampered with. He pursued a disciplinary appeal.

The court follows its prior decisions "which make clear that there are certain 'special circumstances' in which, though administrative remedies may have been available and though the government may not have been estopped from asserting the affirmative defense of non-exhaustion, the prisoner's failure to comply with administrative procedural requirements may nevertheless have been justified." In such cases, the present unavailability of remedies doesn't serve to keep the suit from going forward.

This plaintiff "reasonably interpreted" (676) prison regulations to mean that his only administrative recourse was a disciplinary appeal. The court doesn't "attempt any broad statement of what constitutes justification," but this plaintiff has sufficiently alleged it, given his reasonable belief that prison regulations foreclosed his grieving his complaint. At 679: Defendants argue that he misread the regs, but even assuming that's correct, "his interpretation was hardly unreasonable." The regulations "do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the 'decisions or dispositions' of such proceedings." After all, a "learned" district court judge has endorsed an interpretation nearly identical to plaintiff's.

At 680: If it seems that prison grievance procedures are still available to Giano, the district court should dismiss without prejudice, subject to reinstatement if the prison does not allow him to file and pursue his grievance.

PLRA--Exhaustion of Administrative Remedies/Federal Officials and Prisons

Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004). At 695: "The failure to exhaust available administrative remedies is an affirmative defense. At least two other circuits have explicitly held that the PLRA's exhaustion requirement may be waived . . . .We today join them and hold that this defense is waiveable."

The plaintiff's other claim involved an inmate-inmate assault allegedly provoked by staff, and he said he exhausted through the appeal of the resulting disciplinary proceeding, which he won. The court has held that a prisoner who acts reasonably in the face of unclear regulations has exhausted. This plaintiff "contends that because under BOP regulations the appellate process for disciplinary rulings and for grievances is one and the same, he reasonably believed that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies." (696) This argument "cannot be dismissed out of hand, especially since the district court has not had the opportunity to examine it." (696-97)

The court then asks whether the plaintiff's administrative submission was substantively sufficient. The exhaustion requirement is designed to provide "time and opportunity to address complaints internally" before suit, per *Porter*. At 697:

> [T]he Seventh Circuit has held that, if prison regulations do not prescribe any particular content for inmate grievances, "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." . . . We believe that this formulation is a sound one. . . . In order to exhaust, therefore, inmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures. (internal citation omitted)

PLRA--Exhaustion of Administrative Remedies

Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004). The plaintiff complained of a use of force. He didn't file a grievance, but wrote a letter to the Superintendent. He said officers including one of the defendants had assaulted him again and threatened him if he complained in any fashion. At 686:

> Read together, our recent decisions, and our holdings today in the other consolidated cases, suggest that a three-part inquiry is appropriate in cases where a prisoner plaintiff plausibly seeks to counter defendants' contention that the prisoner has failed to exhaust available administrative remedies as required by the PLRA, 42 U.S.C. § 1997e(a). Depending on the inmate's explanation for the alleged failure to exhaust, the court must ask whether administrative remedies were in fact 'available' to the prisoner. *Abney v. McGinnis*, No. 02-0241. The court should also inquire as to whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, *Johnson v. Testman*, No. 02-0145, or whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense, *Ziemba*, 366 F.3d at 163. If the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether "special circumstances" have been plausibly alleged that "justify 'the prisoner's failure to comply with administrative procedural requirements.'" *Giano v. Goord*, No. 02-0105 (*citing Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir.2003); *Rodriguez* order).

Here, the grievance process was available to Hemphill at the outset. However, threats by staff may make remedies unavailable–either all remedies, or the usual grievance remedy. At 688:

> The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would a similarly situated individual of ordinary firmness" have deemed them available. *Cf. Davis v. Goord*, 320 F.3d 346, 353 (2d Cir.2003) (articulating the "individual of ordinary firmness" standard in the context of a prisoner retaliation claim). Moreover it should be pointed out that threats or other intimidation by prison officials may well deter a prisoner of "ordinary firmness" from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts.

As to special circumstances, the plaintiff alleges that his writing directly to the Superintendent "comported with DOCS procedural rules, or, at a minimum, reflected a reasonable interpretation of those regulations." (689) DOCS had issued a "clarification" of the rules which, plaintiff said, showed that the previous version was not clear. These arguments

"are not manifestly meritless. Accordingly, having held in *Giano* that reliance on a reasonable interpretation of prison grievance regulations may justify an inmate's failure to follow procedural rules to the letter," the court remands for consideration of the claim.

On remand, if the district court finds that the failure to exhaust as per DOCS regulations was justified, it should "ask whether administrative remedies are still available to the plaintiff." If so, it should dismiss without prejudice, and subject to reinstatement if the remedies turn out to be unavailable. If remedies are no longer available, Hemphill may simply proceed "without further ado." (691)

PLRA--Exhaustion of Administrative Remedies

Abney v. McGinnis, 380 F.3d 663 (2d Cir. 2004). The plaintiff filed repeated grievances about his orthopedic footwear, was repeatedly told by the same physician that he would receive services, but he never got shoes that fit. The court characterizes: "Each [grievance] resulted in a favorable ruling by the IGRC and the Superintendent." (666)

> At 668: prison regulations say the superintendent should verify compliance with favorable grievance decisions, but there's nothing in the regulations to allow inmates to enforce that. "Indeed, there is no mechanism in DOCS regulations that allows inmates to appeal a favorable decision where prison officials fail to implement that decision. " There is no time within the four-day appeal deadline to assess whether prison officials have implemented a favorable decision. The court rejects the argument that prisoners should always appeal favorable decisions to allow for the possibility of noncompliance. Absent any remedy for implementation failures, the only thing to do is file another grievance, and Abney did just that. At 669: "Despite his dogged pursuit of repeated grievances over two years, Abney was mired in a Catch-22. The defendants' failure to implement the multiple rulings in Abney's favor rendered administrative relief 'unavailable' under the PLRA. . . . Once Abney received a favorable ruling from the Superintendent on his IGP grievances, no further administrative proceedings were available to propel him out of stasis. Consequently, there was no further 'possibility of some relief' for Abney. *See Booth*, 532 U.S. at 738.

Where, as here, prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in Abney's situation have fully exhausted their available remedies. A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion.

Personal Property/Temporary Release

Givens v. Alabama Dep't of Corrections, 381 F.3d 1064 (11th Cir. 2004). The plaintiff challenged a rule prohibiting work release prisoners from receiving the interest on that portion of their wages placed by the state in bank accounts as an unlawful taking. The rule is upheld. To state a Takings Clause claim, a plaintiff must first show a property interest that is constitutionally protected. The court evades Supreme Court and Ninth Circuit precedent relying on the common law maxim that interest follows principal by holding (following Blackstone) that "at common law an inmate not only did not have a property right in the product of his work in prison, but he could also be forced to forfeit all rights to personal property." (1068) Further, contrary authority assumes that a "complete property right" exists in the principal; but here, as a prisoner, the plaintiff was not free to receive the deposits in cash, make withdrawals whenever he wanted, or spend money without prison officials' approval.

Absent a common law property right, the court asks whether there is a state-created property right based on statute, regulation, or policy. None of the relevant statutes mentions

interest, so they don't vest the plaintiff with a property right in it.

Protection from Inmate Assault/PLRA--Exhaustion of Administrative Remedies/Personal Involvement and Supervisory Liability/Equal Protection; Sexual Minorities

Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004). The plaintiff alleged that he was repeatedly raped and bought and sold among prison gangs despite his repeated complaints to prison officials, who did nothing. He claimed racial discrimination as well as Eighth Amendment violations and discrimination based on sexual orientation.

Prison grievances "should give prison officials 'fair notice' of the problem that will form the basis of the prisoner's suit." (516) At 517:

> Further, as a practical matter, the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining. If an inmate claims that a guard acted improperly, we can assume that the administrators responding to the grievance would want to know--and a prisoner could ordinarily be expected to provide--details regarding who was involved and when the incident occurred, or at least other available information about the incident that would permit an investigation of the matter. . . Beyond those general practical considerations, the prison system's own rules regarding grievances provide both inmates and the courts with more specific guidance. Since prisoners are generally required to follow the procedures adopted by the state prison system, the specificity requirement should be interpreted in light of the grievance rules of the particular prison system, here the [Texas Department of Criminal Justice] TDCJ. . . .

At 517-18: Legal theories need not be presented in grievances. However, the plaintiff's failure even to mention race in his grievances precludes him from pursuing a racial discrimination claim in his lawsuit. As to sexual orientation, his references to it are intertwined with his complaints about lack of protection, so he may pursue that claim.

The grievance deadline is 15 days and the plaintiff complained about a sequence of events. At 519: Anything that happened more than 15 days before the first grievance is not exhausted; to hold otherwise just because the complaints were similar "would effectively negate the state's fifteen-day rule and frustrate the prison system's legitimate interest in investigating complaints while they are still fresh." However, once officials were on notice from that grievance that the plaintiff was being subjected to repeated assaults and was not receiving any protection from the system, he was not required to file repeated grievances about the same issue.

The court refuses to require grievances to name each defendant in all cases. The purpose is to alert prison officials to a problem, not to notify particular officials that they may be sued. But the grievance must give officials a fair opportunity under the circumstances to address the problem, and for some problems this will often require, as a practical matter, identifying the relevant staff members. Here, the plaintiff failed to mention two officers who allegedly failed to protect him on a few discrete occasions. He didn't exhaust against them.

A grievance can sufficiently identify a person even if it doesn't provide a name; "functional descriptions and the like--e.g., a reference to 'the guards in the shower room' on a certain date would suffice." (523) Referring to classification committees is sufficient to "put the prison administrators on notice that members of the UCCs were connected, indeed most closely connected, with Johnson's problem" (id.).

The Executive Director, the Senior Warden, and the Director of Classification, who had notice of the plaintiff's claims and were obliged under *Farmer* to take reasonable measures to protect inmates, are all entitled to qualified immunity. They can't be expected to intervene personally in response to every inmate letter; "referring the matter for further

investigation or taking similar administrative steps" was "a reasonable discharge of their duty to protect the inmates in their care." (526) Courts have not delineated what supervisory officials must do in these circumstances, so they did not violate clearly established law.

Members of the Unit Classification Committee who did nothing in response to the plaintiff's claims except to tell him to fight off his attackers ("learn to f--- or fight") were not entitled to qualified immunity. While *Farmer* does not spell out officials' obligations, it "does make it abundantly clear that an official may not simply send the inmate into the general population to fight off attackers." (527) The defendants' argument that no single person could have granted the plaintiff's requests "does not transform this deliberately indifferent failure to take any action into a reasonable method of discharging their duty to protect the prisoners in their care." (527)

The plaintiff's equal protection claim is not based on verbal comments; it is based on a failure to protect because of his sexual orientation, and the comments are relevant to the defendants' motivation. The failure to identify non-homosexual prisoners who were similarly situated but treated better does not require dismissal, since the plaintiff pled generally that he qualified for safekeeping status, but didn't get it while other vulnerable inmates did, because of his sexual orientation. Further, where (as here) the plaintiff has direct evidence of intentional discrimination, he need not present such group comparisons.

Procedural Due Process--Transfers/Private Prisons

Overturf v. Massie, 385 F.3d 1276 (10th Cir. 2004). The petitioners were convicted in Hawaii, transferred to a private prison in Oklahoma, which was then bought by Oklahoma for operation as a state-owned prison. Their due process claim is foreclosed by *Olim v. Wakinekona*; notwithstanding various factual distinctions from that case, they clearly don't have a liberty interest in where they are confined. The petitioners argued that Hawaii constructively pardoned them by failing to transfer them out of the private prison when Oklahoma bought it. At 1279: "Petitioners' claim that Hawaii lost jurisdiction over them is legally incorrect." Criminal jurisdiction remains with the sentencing jurisdiction regardless of transfers. The "constructive pardon" rationale of a case where a state released a prisoner erroneously and waited 28 years to do anything about it has nothing to do with this case. Nor is there an Eighth Amendment claim for banishment: *Olim* specifically holds that transfer of a prisoner to another state does not constitute banishment. (1279)

Medical Care--Standards of Liability--Deliberate Indifference/Personal Involvement and Supervisory Liability

McKenna v. Wright, 386 F.3d 432 (2d Cir. 2004). The plaintiff asked for Hepatitis C treatment but was deemed ineligible since he had an upcoming parole hearing and might not be in the system for 12 more months. After he was denied parole, he asked for treatment again, but was denied because he was not enrolled in an Alcohol and Substance Abuse program; he had previously been deemed ineligible for ASAT because of his medical condition. A year later, by which time his disease had progressed to cirrhosis, he was denied treatment because his cirrhosis was decompensated, i.e., accompanied by complications such as jaundice, ascites, and hemorrhaging. When he asked for a liver transplant, however, Chief Medical Officer Wright denied the request because the cirrhosis was probably compensated. The next year, he was denied treatment again because he wasn't in ASAT. So he enrolled in ASAT, but he still did not receive treatment. Finally, the next year (four years after he had started asking), he was approved for treatment, but by then his disease was so advanced that the side effects rendered him too weak to continue treatment.

Based on the pleadings, the court rejects the defendants' argument that they can't be found liable because the plaintiff's condition was "continuously assessed and monitored" and any lack of treatment resulted from the plaintiff's

failure to meet applicable treatment guidelines. The complaint "alleges a series of failures to test for his condition despite known danger signs of his disease, failure to initiate treatment when the need for treatment was apparent, failure to send McKenna for follow-up visits ordered by doctors at the Albany Medical Center, and denial of treatment on the basis of inapplicable or flawed policies." (437) The plaintiff's allegation that "he was denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment" sufficiently alleged deliberate indifference. *Id.*

Various medical supervisors, including the Chief Medical Officer, are alleged to have participated in the denial of treatment and are not entitled to dismissal. The non-medical defendants were prison superintendents who were not merely linked in the prison chain of command, or faulted for failing to dictate specific medical treatment, but were "adequately alleged to have had responsibility for enforcing or allowing the continuation of the challenged policies that resulted in the denial of McKenna's treatment." *Id.* While "it is questionable whether an adjudicator's rejection of an administrative grievance would make him liable for the conduct complained of," a Deputy Superintendent for Administration not only rejected the grievance but was alleged to have been responsible for the prison's medical program. At 438: "When allegations of improperly denied medical treatment come to the attention of a supervisor of a medical program, his adjudicating role concerning a grievance cannot insulate him from responsibility for allowing the continuation of allegedly unlawful policies within his supervisory responsibility."

Pre-Trial Detainees/Assistance of Counsel/Law Libraries and Law Books

Bourdon v. Loughren, 386 F.3d 88 (2d Cir. 2004). A prisoner who has a criminal defense lawyer has received the "adequate assistance from persons trained in the law" prescribed in *Bounds v. Smith* as one of the two means of satisfying the right of court access. (94). Therefore this former criminal defendant, subsequently convicted, was not denied access to courts by being denied materials from the jail law library, by the failure to have an adequate and current law library, and by the failure to provide timely notarial services. (He was trying to file a motion to dismiss the indictment pro se.) His claim that his lawyer was ineffective adds nothing, because the right of access to courts (notwithstanding the "adequate assistance" language of *Bounds*) does not incorporate the Sixth Amendment inquiry into effectiveness of counsel. (95)

Federal Officials and Prisoners/Temporary Release

Elwood v. Jeter, 386 F.3d 842 (8th Cir. 2004). Contrary to the abruptly announced policy limiting prisoners' placement in community confinement to the last six months or 10% of sentence, the Bureau of Prisons has discretion to transfer prisoners to community incarceration at any time during incarceration. A community corrections center is a "place of imprisonment" under the relevant statute, and the other statute referring to 10% or six months defined the Bureau of Prisons' pre-discharge obligations, not its discretion in placing prisoners. The court grants relief on the statutory argument and doesn't reach the plaintiff's Administrative Procedures Act and Ex Post Facto Clause arguments.

PLRA–Three Strikes Provision/Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference

Brown v. Johnson, 387 F.3d 1344 (11th Cir. 2004). The defendants argued that the plaintiff's complaint should be dismissed under the three strikes provision; the court holds that it falls within the "imminent danger of serious physical injury" exception. The plaintiff alleged that his prescribed medications for HIV and Hepatitis C were stopped, and, as a result he suffered prolonged skin and newly developed scalp infections, severe pain in the eyes and vision problems, fatigue and prolonged stomach pains, and alleged that without treatment he would be exposed to opportunistic infections,

such as pneumonia, esophageal candidiasis, salmonella, and wasting syndrome, which would shorten his life. At 1350: "Liberally construed, Brown alleges a total withdrawal of treatment for serious diseases, as a result of which he suffers from severe ongoing complications, is more susceptible to various illnesses, and his condition will rapidly deteriorate."

Prisoner Accounts/Procedural Due Process--Property/Grievances and Complaints about Prison/Work Assignments

Vance v. Barrett, 345 F.3d 1083 (9th Cir. 2003). A state statute provided for crediting monies earned by and sent to prisoners to their prison accounts. The Department of Prisons required all prisoners to sign an agreement in order to be eligible for prison employment which provided that their savings accounts would not accrue interest for their sole benefit. The plaintiffs refused to sign the agreement, were fired, and brought this suit alleging retaliation for exercising their constitutional rights.

The plaintiffs raised claims under the Takings Clause and the Due Process Clause. At 1089 (footnotes and citations omitted): "[T]he protections afforded by each are distinct. The Takings Clause limits the government's ability to confiscate property without paying for it. It is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." . . . "The Due Process Clause, on the other hand, requires that the government provide appropriate procedural protections when taking such property--with or without compensation."

Both these claims depend on the existence of an underlying constitutionally protected property interest. The court has previously held that interest on prisoner accounts is a constitutionally protected property interest, both as a result of state statute and as an independent constitutional matter.

The Takings Clause analysis is confined to those deductions that were authorized by statute; actions officials took without statutory authorization are analyzed under the Due Process Clause.

Officials have the right to deduct expenses incurred in creating and maintaining the prisoners' accounts. Reasonable user fees for the reimbursement of the cost of government services are permissible, and absent any allegation that the charges were unreasonable or unrelated to administration of the accounts, the Takings Clause challenge fails. At 1090: "Without underlying authority and competent procedural protections, NDOP could not have constitutionally confiscated the net accrued interest." Since officials had neither statutory authority nor a procedure, the plaintiff's due process claim is valid.

The "well-settled doctrine of unconstitutional conditions" says that government may not require a person to give up a constitutional right in exchange for a discretionary benefit that has little or no relationship to the property. That doctrine applies in prison, but the law is unclear whether the standard "essential nexus/rough proportionality" test or the *Turner* standard governs. Also, the standard test is directed towards Takings Clause claims, not procedural due process claims, and they may be different. So the defendants are entitled to qualified immunity on the unconstitutional conditions claims.

The plaintiff prevails on his claim of retaliation for refusing to waive protected rights. Defendants could prevail if their action advanced legitimate goals and was tailored narrowly to them, but here they don't have a legitimate goal. Their interest in recouping costs and running the prisons efficiently "does not extend to avoiding the limits placed upon them by the state legislature and failing to provide constitutionally adequate procedural protections." (1093) They are not entitled to qualified immunity, since the court had held in 1994 that prisoners have a right to interest and officials cannot make deductions from prisoner accounts without statutory authority, and since the law of retaliation for assertion of constitutional rights is well

developed. Prison officials say past precedent deals only with retaliation for affirmatively exercising a right, and there's no precedent concerning refusal to waive a right, but that is "a distinction without a difference." (1094) The fact that defendants received misguided advice from the state Attorney General's office doesn't help them.

Procedural Due Process--Disciplinary Proceedings/Disabled/Equal Protection/Classification-- Race/

Serrano v. Francis, 345 F.3d 1071 (9th Cir. 2003). The wheelchair-bound plaintiff alleged that prison officials refused to allow him to present live witness testimony at a disciplinary hearing.

There is no single standard for determining whether a prison hardship is atypical and significant; the court looks to (1) "whether the challenged condition "mirrored those conditions imposed upon inmates in administrative segregation and protective custody," and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will inevitably affect the duration of the prisoner's sentence. . . . Typically, administrative segregation in and of itself does not implicate a protected liberty interest. . . ." (1079). However, the plaintiff "wallowed in a non-handicapped-accessible SHU for nearly two months--25 days of which immediately followed" his being sentenced to a year in SHU. *Id.* He was denied use of his wheelchair and alleges he could not take a proper shower, had to drag himself onto the toilet with his arms, could not go to the yard, and had to drag himself around a vermin-infested floor. Here, "the conditions imposed on Serrano in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him." *Id.* (footnote omitted)

A blanket denial of live witnesses at a disciplinary hearing is impermissible, even where authorities allowed interviewing of witnesses outside the disciplinary procedure. The hearing officer cannot rely on a regulation that says witnesses will be called unless the appearance would endanger the witness, the official determines the witness has no relevant additional information, or the witness is unavailable. This regulation provides no defense, since it also calls for the hearing officer to document the reasons for refusing.

The hearing officer is entitled to qualified immunity because the court has never dealt with the question of the effect of disabilities on the existence of liberty interests in segregation.

The plaintiff alleged sufficient facts to go to trial on a claim that the decision to disallow live testimony was racially motivated. The hearing officer said that he didn't "know how black people think" and made references to the ongoing O.J. Simpson trial.

Personal Property/Procedural Due Process--Property

Schneider v. California Dep't of Corrections, 345 F.3d 716 (9th Cir. 2003). California prisoners are allowed to establish savings accounts that pay interest and Inmate Trust Accounts (ITAs) that do not pay interest; a prisoner must have an ITA to make canteen purchases and must keep at least $25 in it to maintain a savings account. Interest earned on the ITA money is not paid to the prisoners but to an Inmate Welfare Fund.

Allocation of interest on the ITAs to the Inmate Welfare Fund is a taking of property "because it appropriates the interest earned by the ITAs and allocates them [sic] for a public use." (720) The district court found that the expense of administering an interest-bearing ITA system would be larger than the interest generated, leaving nothing for distribution. At 720: "Notwithstanding the district court's reliance on these average cost estimates, there remains the fundamental question for takings purposes of whether an individual inmate was deprived of any net interest." At 721:

> For takings purposes, . . . the relevant inquiry is not the overall effect on fund administration but whether any of the individual inmates themselves have been

> deprived of their accrued net interest. The government is not absolved of its constitutional duty to pay 'just compensation' to an individual whose property has been taken for public use merely because the same government has benevolently conferred value on another affected property owner. Indeed, even if the total costs of operating a pooled fund outweigh the total interest generated, individual account holders in that fund are not precluded, on a proper showing, from enjoyment of their constitutionally protected property rights.

The relevant law has been in a "state of flux," so the defendants are entitled to qualified immunity.

The court notes that the state has stopped putting the ITA money in an interest-bearing account. At 722 n.3: "Curiously, California appears concerned that it would actually have to compensate individual prisoners for their net accrued interest and sought to forestall such calamity by eliminating deposits of ITA funds to the State treasury system altogether." The court reserves comment on the propriety of that action.

Religion--Practices/RFRA and RLUIPA/Pro Se Litigation/Deference

Hammons v. Saffle, 348 F.3d 1250 (10th Cir. 2003). The plaintiff challenged a prohibition on possessing Muslim oils in his cell or purchasing them from the canteen; prisoners were allowed only to obtain them from volunteer chaplains, or to keep them in designated worship areas. They were still allowed to buy "imitation designer colognes and oils," which were chemically the same as the Muslim oils. Later these, too, were prohibited.

The policy meets the *Turner* standard. The legitimate penological interests at stake are preventing the use and possession of drugs, maintaining order and safety, crime deterrence, and rehabilitation. The policy is rationally related to them. At 1255: "Constraining prayer oil use to supervised, communal areas decreased the likelihood that these oils could have been used by inmates to mask the odor of drugs or to slip out of handcuffs." The failure to ban other oils at the same time does not render the policy irrational. Government "can, in some circumstances, implement policies that are logical but yet experiment with solutions and address problems one step at a time." *Id.*

The plaintiff has alternative means to exercise his rights, since he can get oils through a volunteer chaplain. He can't get it five times a day, but admits that oil-less prayers "did not completely eradicate the value of his prayers." (1256)

Accommodating the plaintiff's prayer oil needs five times a day "would likely have heavily burdened prison resources and other inmates' religious interests" since other groups also require access to chapel and chaplain. (1256-57)

There was no evidence in the record of a way to accommodate the plaintiff five times a day at *de minimis* cost to valid penological interests. Though he had been allowed to use the oils in his cell "without incident" under former policy, "[t]he mere lack of incident under the former policy . . . does not establish that such an incident would not occur in the future." (1257)

At 1258: "*Pro se* plaintiffs are required to allege the necessary underlying facts to support a claim under a particular legal theory." However, RLUIPA did not exist when the plaintiff filed his complaint, and he didn't raise it in the district court, so the defendants didn't have an opportunity to defend against the claim. "Given the unique facts and procedural posture," the district court should consider the RLUIPA claim.

Protection from Inmate Assault

Odom v. South Carolina Dep't of Corrections, 349 F.3d 765 (4th Cir. 2003). The plaintiff was attacked after prisoners started a fire in order to create an opportunity to attack him. He told an officer that they would try to kill him if he was put on the recreational field, but the officer put him there anyway, and when inmates started trying to get into the cage he was in, the

officers ignored him and did nothing. Eventually the assailants got to him and injured him badly.

The defendants were not entitled to qualified immunity. At 772: "Odom presents evidence that Powell saw the inmates destroying the fence between them and Odom, and did nothing; that Evans realized Odom was in danger, but walked away from Odom when Evans was personally threatened by one of the inmates; and that Taylor told Odom, in effect, that Odom was going to get what he deserved." It was clearly established that doing nothing in response to an assault or violent threats violates the Eighth Amendment.

PLRA--Prospective Relief Restrictions--Entry of Relief/Publications

Ashker v. California Dep't of Corrections, 350 F.3d 917 (9th Cir. 2003). The defendants required all incoming books and magazines sent to secure housing unit (SHU) inmates to have "approved vendor" labels and stamps affixed to them, making it difficult or impossible for the prisoners to get books.

The policy fails the *Turner* standard because it lacks a rational relationship to the asserted legitimate interest in security and order. The evidence refutes any common-sense connection and the defendants fail to produce evidence that the connection is not so remote as to make the policy arbitrary or irrational (923). Defendants' policy already requires that material be sent directly from approved vendors, and compliance can be readily determined; the approved vendor label and stamp add nothing for security purposes. All personal property mailed to prisoners is searched before delivery; even though there are instances where contraband is missed because of human error, defendants have "articulated no scenario" in which their policy adds any security. The notion that the lack of a label can be a "red flag" alerting staff to books from non-vendors is unsupported by evidence. Nor is there any rational basis for applying the label policy to books but not tennis shoes, thermal clothing, or appliances. At 923: "CDC has made no effort to explain why books are more susceptible to being used to deliver contraband than other items."

Having failed the rational connection test, the policy need not be tested against the other *Turner* factors, but those favor the plaintiff. The prisoners have no alternatives because they can't force the vendor to use the labels. Accommodating the right doesn't have much impact on the prison because they already search all incoming packages. There are obvious and easy alternatives, such as examining package address labels and invoices, suggesting that requiring a special label is an exaggerated response.

Private Prison

Rosborough v. Management and Training Corp., 350 F.3d 459 (5th Cir. 2003) (per curiam). A private entity acts under color of state law under the public function doctrine when it performs a function which is traditionally the exclusive province of the state. At 461: "We agree with the Sixth Circuit and with those district courts that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury. Clearly, confinement of wrongdoers--though sometimes delegated to private entities--is a fundamentally governmental function."

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