LITIGATING PRISON AND JAIL CONDITIONS[1]

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Recommended Reading:

Columbia Human Rights Law Review, A Jailhouse Lawyer's Manual (available online at http://www.columbia.edu/cu/hrlr/.).

Prison Legal News – a monthly journal of legal developments regarding prisoners' rights. www.prisonlegalnews.org.

THE EIGHTH AMENDMENT – CONVICTED PRISONERS

The Eighth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments" on convicted prisoners.

To establish a violation of the Eighth Amendment, it is necessary to show two things:

1. A deprivation of a basic human need (such as food, clothing, shelter, exercise, medical care, or reasonable safety) (the objective element). Helling v. McKinney, 509 U.S. 25, 31-32 (1993).

   The Eighth Amendment protects against conditions that pose an unreasonable risk of future harm, as well as those that are currently causing harm. Helling, 509 U.S. at 33.

   It is not enough to allege that the "totality of conditions" is unconstitutional; plaintiff must allege deprivation of one or more identifiable human needs. Wilson v. Seiter, 501 U.S. 294, 304-05 (1991).

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2. "deliberate indifference" on the part of one or more defendants (the subjective element). Seiter, 501 U.S. at 303.

Exception: When use of force is involved, the Eighth Amendment is only violated if prison staff use force "maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992).

Exception: The "malicious and sadistic" standard applies only to the staff who actually apply force; supervisory staff may still be liable upon a showing of deliberate indifference to their subordinates' use of force. Madrid v. Gomez, 889 F. Supp. 1146, 1248-50 (N.D. Cal. 1995); Buckner v. Hollins, 983 F.2d 119 (8th Cir. 1993) (applying deliberate indifference standard to conduct of officer who failed to intervene in beating by another officer); cf. Riley v. Olk-Long, 282 F.3d 592, 595-97 (8th Cir. 2002) (prison warden and chief of security liable for rape of prisoner by corrections officer upon showing of deliberate indifference).

"Deliberate indifference" is a subjective, actual-knowledge standard. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

But the plaintiff need not show that defendants knew of a specific risk to her from a specific source. Farmer, 511 U.S. at 843; Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998).

Knowledge can be demonstrated by circumstantial evidence, and "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer, 511 U.S. at 842. See Vinning-El v. Long, 482 F.3d 923, 925 (7th Cir. 2007) ("a reasonable jury could infer that prison guards working in the vicinity necessarily would have known about the condition of the segregation cells"); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) ("the obvious and pervasive nature of these conditions supports the trial court's conclusion that [defendants] displayed a deliberate indifference to these conditions"); Woodward v. Corr. Medical Services, 368 F.3d 917, 930 (7th Cir. 2004) ("failure to act in the face of known violations of its written policies is relevant circumstantial evidence to show CMS' knowledge and state of mind"); Hadix v. Johnson, 367 F.3d 513, 526 (6th Cir. 2004) ("If . . . conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong, because the same information that would lead to the court's conclusion was available to the prison officials").

There is no deliberate indifference if prison officials "responded reasonably to the risk, even if the harm ultimately was not averted." Farmer, 511 U.S. at 844.

> But this does not mean that any corrective action by prison officials necessarily forecloses a finding of deliberate indifference. "Patently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it." Coleman v. Wilson, 912 F. Supp. 1282, 1319 (E.D. Cal. 1995).

Expansion of Eighth Amendment protection? Hope v. Pelzer, 536 U.S. 730 (2002) (intentional infliction of pain, discomfort, or risk of harm as punishment for past conduct violates the Eighth Amendment; cuffing prisoner to "hitching post" as punishment was a *per se* Eighth Amendment violation, even without aggravating factors such as denial of proper clothing, water, and bathroom breaks).

Medical Care

"Deliberate indifference to serious medical needs" violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Mere medical malpractice does not. Id. at 106.

What are "serious medical needs"? The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. at 104. Other definitions:

> Factors that should guide the analysis include, but are not limited to, "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment; (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003) (internal quotation marks omitted).
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> "A serious medical need is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997) (internal quotation marks omitted). But see Jones v. Minn. Dep't of Corr., 512 F.3d 478, 482 (8th Cir. 2008) (need for medical attention not sufficiently obvious where prisoner was "unable to stand or walk under her own power, was 'google-eyed' and unresponsive, was rolling on the ground while grunting and groaning, was bleeding from the mouth, smelled as if she had urinated on herself, and was breathing at a very rapid rate.").
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> "One that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's

attention." Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1187 (11th Cir. 1994) (internal quotation marks, citation omitted).

"A serious medical need is present whenever the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002).

> Medical conditions that fall well short of life-threatening can nevertheless constitute "serious medical needs," if they result in pain or loss of function. See Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005) (severe heartburn with frequent vomiting); Brock v. Wright, 315 F.3d 158, 163-64 (2d Cir. 2003) (painful keloids); Clement v. Gomez, 298 F.3d 898 (9th Cir. 2002) (effects of pepper spray on bystanders); Ellis v. Butler, 890 F.2d 1001, 1003 (8th Cir. 1989) (swollen, painful knee); Pulliam v. Shelby County, 902 F. Supp. 797, 801-02 (W.D. Tenn. 1995) (denial of dilantin prescribed for seizure disorder); Chaney v. City of Chicago, 901 F. Supp. 266, 270 (N.D. Ill. 1995) (post-surgical care of foot); Bouchard v. Magnusson, 715 F. Supp. 1146, 1148 (D. Me. 1989) (persistent back pain); Smallwood v. Renfro, 708 F. Supp. 182, 187 (N.D. Ill. 1989) (cut lip); Henderson v. Harris, 672 F. Supp. 1054, 1059 (N.D. Ill. 1987) (hemorrhoids); Case v. Bixler, 518 F. Supp. 1277, 1280 (S.D. Ohio 1981) (boil).
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> The Eighth Amendment can be violated when failure to treat a prisoner results in pain, even if it does not result in a worsening of the patient's condition. See Boretti v. Wiscomb, 930 F.2d 1150, 1154 (6th Cir. 1991) (denial of dressing and pain medication for wound); Ellis v. Butler, 890 F.2d 1001, 1003 (8th Cir. 1989) (nurse's failure to deliver pain medication); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of treatments that could "eliminate pain and suffering at least temporarily"); H.C. v. Jarrard, 786 F.2d 1080, 1083, 1086 (11th Cir. 1986) (denial of medical care for injured shoulder was unconstitutional, although no permanent injury resulted); Adsit v. Kaplan, 410 F. Supp. 2d 776, 783 (W.D. Wis. 2006) (failure to prescribe pain medication for four months); Lavender v. Lampert, 242 F. Supp. 2d 821 (D. Or. 2002) (failure to provide pain medication for partial spastic paralysis of the foot).
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> At least one court has held that pregnancy, at least in its later stages, constitutes a serious medical need. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1008 (E.D. Wis. 2003).

Elements of an adequate prison health care system:

> The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials

> show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff. Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems. The medical staff must be competent to examine prisoners and diagnose illnesses. It must be able to treat medical problems or to refer prisoners to others who can. Such referrals may be to other physicians within the prison, or to physicians or facilities outside the prison if there is reasonably speedy access to these other physicians or facilities. In keeping with these requirements, the prison must provide an adequate system for responding to emergencies. If outside facilities are too remote or too inaccessible to handle emergencies promptly and adequately, then the prison must provide adequate facilities and staff to handle emergencies within the prison. These requirements apply to physical, dental and mental health.

Hoptowit v. Ray, 682 F.2d 1237, 1252-53 (9th Cir. 1982) (citation omitted).

Essential principle: mere differences of medical judgment are not actionable. Stewart v. Murphy, 174 F.3d 530, 535 (5th Cir. 1999).

> But the decisions of prison doctors are not per se unassailable. See, e.g., Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005) ("a prisoner is not required to show that he was literally ignored"); Hunt v. Uphoff, 199 F.3d 1220, 1223-24 (10th Cir. 1999) (one doctor denied insulin prescribed by another doctor); Miller v. Schoenen, 75 F.3d 1305 (8th Cir. 1996) (recommendations from outside hospitals not followed).

Plaintiff's task: show that legitimate medical judgment is not at issue. For example:

> **Denial of or delay in access to medical personnel.** Estelle v. Gamble, 429 U.S. at 104; Gordon v. Frank, 454 F.3d 858, 862-64 (8th Cir. 2006) (officers ignored prisoner's complaints of breathing trouble and chest pain, despite knowing he was on medical observation); Natale v. Camden County Corr. Facility, 318 F.3d 575 (3d Cir. 2003) (delay of 21 hours in providing insulin to diabetic); Wallin v. Norman, 317 F.3d 558 (6th Cir. 2003) (delay of one week in treating urinary tract infection, and one day in treating leg injury); Weyant v. Okst, 101 F.3d 845, 856-57 (2d Cir. 1996) (delay of hours in getting medical attention for diabetic in insulin shock); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (two-month delay in getting prisoner with head injury to a doctor).

> **Denial of access to health care staff qualified to address the prisoner's problem.** LeMarbe v. Wisneski, 266 F.3d 429 (6th Cir. 2001), cert. denied, 535 U.S. 1056 (2002) (failure of surgeon to send patient to a specialist); Mandel v. Doe, 888 F.2d 783, 789-90 (11th Cir. 1989) (physician's assistant failed to diagnose broken hip, refused to order x-ray, and prevented prisoner from seeing a doctor); Washington v. Dugger, 860 F.2d 1018, 1021

(11th Cir. 1988) (failure to return prisoner to VA hospital for treatment of Agent Orange exposure); Toussaint v. McCarthy, 801 F.2d 1080, 1112 (9th Cir. 1986) (rendering of medical services by unqualified personnel is deliberate indifference); Jackson v. Fauver, 334 F. Supp. 2d 706, 728 (D.N.J. 2004) (denial of referral to neurologist unless patient agreed in advance to surgery).

Failure to inquire into facts necessary to make a professional judgment. Liscio v. Warren, 901 F.2d 274, 276-77 (2d Cir. 1990) (physician failed to inquire into the cause of arrestee's delirium and thus failed to diagnose alcohol withdrawal); Miltier v. Beorn, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 867-68 (D.D.C. 1989) (failure to perform adequate health screening on intake).

Interference with medical judgment by non-medical factors. McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (denial of treatment for hepatitis C because plaintiff might be released within a year); Boswell v. Sherburne County, 849 F.2d 1117, 1123 (8th Cir. 1988) (budgetary restrictions); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (same); Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); Wilson v. VanNatta, 291 F. Supp. 2d 811, 816 (N.D. Ind. 2003) (cost).

Failure to carry out medical orders. Estelle v. Gamble, 429 U.S. at 105 ("intentionally interfering with treatment once prescribed"); Phillips v. Jasper County Jail, 437 F.3d 791, 796 (8th Cir. 2006) ("the knowing failure to administer prescribed medicine can itself constitute deliberate indifference"); Lawson v. Dallas County, 286 F.3d 257 (5th Cir. 2002) (failure to follow medical orders for care of paraplegic prisoner); Walker v. Benjamin, 293 F.3d 1030 (7th Cir. 2002) (refusal to provide prescribed pain medication); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (denial of prescription eyeglasses); Erickson v. Holloway, 77 F.3d 1078, 1080 (8th Cir. 1996) (officer's refusal of emergency room doctor's request to admit the prisoner and take x-rays); Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing changes).

Judgment so egregiously bad that it really isn't medical. Spann v. Roper, 453 F.3d 1107, 1108-09 (8th Cir. 2006) (leaving prisoner unconscious in his cell for three hours knowing that he had erroneously been given a large dose of another prisoner's medication); Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (treatment "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate [plaintiff's] condition"); id. at 655 ("doggedly persist[ing] in a course of treatment known to be ineffective"); Adams v. Poag, 61 F.3d 1537, 1543-44 (11th Cir. 1995) (medical treatment that is "so grossly incompetent, inadequate, or excessive as to shock the conscience" constitutes deliberate indifference); Hughes v. Joliet Corr. Center, 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance").

Mental Health Care

The same Eighth Amendment principles apply to mental health care. See Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) ("mental health needs are no less serious than physical needs"); Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995) (gender dysphoria); Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) ("deliberate indifference to an inmate's serious mental health needs violates the eighth amendment"); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) ("[t]reatment of the mental disorders of mentally disturbed inmates is a serious medical need") (internal quotation marks omitted); Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

> A "severe" mental illness is one "that has caused significant disruption in an inmate's everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself." Tillery v. Owens, 719 F. Supp. 1256, 1286 (W.D. Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990).

Elements of an adequate mental health system:

> > First, there must be a systematic program for screening and evaluating inmates in order to identify those who require mental health treatment. Second, . . . treatment must entail more than segregation and close supervision of the inmate patients. Third, treatment requires the participation of trained mental health professionals, who must be employed in sufficient numbers to identify and treat in an individualized manner those treatable inmates suffering from serious mental disorders. Fourth, accurate, complete, and confidential records of the mental health treatment process must be maintained. Fifth, prescription and administration of behavior-altering medications in dangerous amounts, by dangerous methods, or without appropriate supervision and periodic evaluation, is an unacceptable method of treatment. Sixth, a basic program for the identification, treatment and supervision of inmates with suicidal tendencies is a necessary component of any mental health treatment program.
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> Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) (citations omitted), aff'd in part and rev'd in part on other grounds, 679 F.2d 1115 (5th Cir.), amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982); accord Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984); Coleman v. Wilson, 912 F. Supp. 1282, 1298 n. 10 (E.D. Cal. 1995).

Examples of deficiencies in mental health care that have been found to violate the Eighth Amendment:

> **Lack of adequate mental health screening on intake.** Woodward v. Corr. Medical Services, 368 F.3d 917 (7th Cir. 2004); Olsen v. Layton Hills Mall, 312 F.3d 1304, 1319-20

(10th Cir. 2002); Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1189 (9th Cir. 2002); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989); Inmates of the Allegheny County Jail v. Pierce, 487 F. Supp. 638, 642, 644 (W.D. Pa. 1980).

Failure to follow up on prisoners with known or suspected mental health disorders. Woodward v. Corr. Medical Services, 368 F.3d 917 (7th Cir. 2004) (failure to respond to signs that prisoner was suicidal); De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003) (failure to treat prisoner's compulsion to self-mutilate); Olsen v. Bloomberg, 339 F.3d 730 (8th Cir. 2003) (failure to take reasonable steps to prevent prisoner suicide); Cavalieri v. Shepard, 321 F.3d 616, 621-22 (7th Cir. 2003) (failure to respond to warnings that prisoner was suicidal); Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001); Sanville v. McCaughtry, 266 F.3d 724, 738 (7th Cir. 2001); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989); Mombourquette v. Amundson, 469 F. Supp. 2d 624, 655 (W.D. Wis. 2007) (deliberate indifference to risk that plaintiff would attempt suicide); Arnold v. Lewis, 803 F. Supp. 246, 257-58 (D. Ariz. 1992).

Failure to provide adequate numbers of qualified mental health staff. Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (non-psychiatrist was not qualified to evaluate significance of prisoner's suicidal gesture); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988), vacated, 490 U.S. 1087 (1989), reinstated, 886 F.2d 235 (9th Cir. 1989); Wellman v. Faulkner, 715 F.2d 269, 272-73 (7th Cir. 1983) ("a psychiatrist is needed to supervise long term maintenance" on psychotropic medication); Ramos v. Lamm, 639 F.2d 559, 577-78 (10th Cir. 1980); United States v. Terrell County, Ga., 457 F. Supp. 2d 1359, 1363, 1369 (M.D. Ga. 2006) ("improper delays in mental health treatment due to lack of staff").

Housing mentally ill prisoners in segregation or "supermax" units. Jones'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); Ruiz v. Johnson, 37 F. Supp. 2d 855, 913-15 (S.D. Tex. 1999), rev'd on other grounds, 243 F.3d 941 (5th Cir. 2001), adhered to on remand, 154 F. Supp. 2d 975 (S.D. Tex. 2001); Coleman v. Wilson, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995); Madrid v. Gomez, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995); Casey v. Lewis, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993); Finney v. Mabry, 534 F. Supp. 1026, 1036-37 (E.D. Ark. 1982); see also Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (noting evidence that "the isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment 'toxic' to the prisoners' mental health").[2]

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[2]Indeed, the U.S. Supreme Court has acknowledged the devastating effects of prolonged isolation even on "normal" prisoners.

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal

Failure to transfer seriously mentally ill prisoners to more appropriate facilities. Morales Feliciano v. Rossello Gonzalez, 13 F. Supp. 2d 151, 209, 211 (D.P.R. 1998); Madrid, 889 F. Supp. at 1220; Coleman, 912 F. Supp. at 1309; Arnold v. Lewis, 803 F. Supp. 246, 257 (D. Ariz. 1992).

Improper use of restraints. Wells v. Franzen, 777 F.2d 1258, 1261-62 (7th Cir. 1985); Campbell v. McGruder, 580 F.2d 521, 551 (D.C. Cir. 1978); Glisson v. Sangamon County Sheriff's Dep't, 408 F. Supp. 2d 609, 621-22 (C.D. Ill. 2006) (plaintiff was strapped into a wheelchair for several hours, forced to urinate on himself, and left sitting in his urine for several hours while in a manic state).

Excessive use of force against mentally ill prisoners. Coleman, 912 F. Supp. at 1321-23; Kendrick v. Bland, 541 F. Supp. 21, 25-26 (W.D. Ky. 1981).

Lack of training of custody staff in mental health issues. Olsen v. Layton Hills Mall, 312 F.3d 1304, 1319-20 (10th Cir. 2002).

Dental Care

"Dental care is one of the most important medical needs of inmates." Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980); accord Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001); Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989).

"Dental care" that consists of pulling teeth that can be saved is constitutionally inadequate. Chance v. Armstrong, 143 F.3d 698, 700-02 (2d Cir. 1998); Dean v. Coughlin, 623 F. Supp. 392, 405 (S.D.N.Y. 1985); Heitman v. Gabriel, 524 F. Supp. 622, 627 (W.D. Mo. 1981).

Delays in dental care can also violate the Eighth Amendment, particularly if the prisoner is suffering pain in the interim. Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (six weeks); Canell v. Bradshaw, 840 F. Supp. 1382, 1387, 1393 (D. Or. 1993), aff'd, 97 F.3d 1458 (9th Cir. 1996) (several days); Fields v. Gander, 734 F.2d 1313, 1315 (8th Cir. 1984) (three weeks); Farrow v. West, 320 F.3d 1235 (11th Cir. 2003) (fifteen-month delay in providing dentures).

> better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890) (describing effects of solitary confinement as practiced in the early days of the United States). See also Chambers v. Florida, 309 U.S. 227, 237-38 (1940) (referring to "solitary confinement" as one of the techniques of "physical and mental torture" that have been used by governments to coerce confessions); Grassian, Psychopathological Effects of Solitary Confinement, 140 Am. J. Psychiatry 1450 (1983); Kupers, Prison Madness (1999).

Prolonged deprivation of toothpaste can violate the Eighth Amendment. Board v. Farnham, 394 F.3d 469 (7th Cir. 2005).

One court has held that some minimal level of prophylactic dental care is constitutionally required. Barnes v. Government of Virgin Islands, 415 F. Supp. 1218, 1235 (D.V.I. 1976).

Excessive Force

The Eighth Amendment is violated when prison officials "maliciously and sadistically use force to cause harm," even if the prisoner does not suffer serious injury. Hudson v. McMillian, 503 U.S. 1, 9 (1992). See also Treats v. Morgan, 308 F.3d 868, 872 (8th Cir. 2002) (use of pepper spray on prisoner who "had not jeopardized any person's safety or threatened prison security").

> Sexual abuse or rape of a prisoner by staff is, by definition, a "malicious and sadistic" use of force. Smith v. Cochran, 339 F.3d 1205, 1212-13 (10th Cir. 2003).

Protection From Assault

The Eighth Amendment requires prison officials to protect prisoners from violence at the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 833 (1994). "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." Id. at 834.

> Failure to protect claims are governed by the deliberate indifference standard. See, e.g., Odom v. South Carolina Dep't of Corr., 349 F.3d 765, 772 (4th Cir. 2003) (plaintiff warned officer that other prisoners would try to kill him); Scicluna v. Wells, 345 F.3d 441, 445 (6th Cir. 2003) (plaintiff testified he had told unit manager of risk of assault by his co-defendant); Cottone v. Jenne, 326 F.3d 1352 (11th Cir. 2003) (failure to monitor prisoner known to be violent is deliberate indifference); Peate v. McCann, 294 F.3d 879 (7th Cir. 2002) (plaintiff attacked twice by the same prisoner); Cantu v. Jones, 293 F.3d 839 (5th Cir. 2002) (guards allowed prisoner out of his cell to attack another prisoner); Horton v. Cockrell, 70 F.3d 397 (5th Cir. 1995) (staff failed to protect prisoner from attack despite his grievances requesting protection); Skinner v. Uphoff, 234 F. Supp. 2d 1208 (D.Wyo. 2002) (de facto policy of failing to investigate assaults constitutes deliberate indifference).

Exercise

Prisoners are constitutionally entitled to out-of-cell exercise. Delaney v. DeTella, 256 F.3d 679 (7th Cir. 2001) (denial of all out-of-cell exercise for six months violates Eighth Amendment); Perkins v. Kansas Dep't of Corr., 165 F.3d 803, 810 (10th Cir. 1999); Divers v. Dep't of Corr., 921 F.2d 191, 194 (8th Cir. 1990) (recreation of only 45 minutes per week stated a claim).

> Most courts have held that five hours a week is the constitutional minimum. See, e.g., Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988) (five hours); Spain v.

Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979) (five hours); Toussaint v. McCarthy, 597 F. Supp. 1388, 1402, 1412 (N.D. Cal. 1984) (eight hours); aff'd in part and rev'd in part on other grounds, 801 F.2d 1080 (9th Cir. 1986).

> Most courts have upheld curtailment, or even total elimination, of out-of-cell exercise for short periods under emergency circumstances.

Courts differ on whether prisoners are entitled to outdoor exercise. See Fogle v. Pierson, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (yes); Toussaint v. Yockey, 722 F.2d 1490, 1492-93 (9th Cir. 1984) (yes); Spain, 600 F.2d at 199-200 (yes); Martin v. Tyson, 845 F.2d 1451, 1456 (7th Cir. 1988) (no); Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980) (no).

Environmental Health and Safety

Prisoners are constitutionally entitled to environmental conditions that do not pose serious risks to health and safety. Among the conditions that have been found to violate the Eighth Amendment are:

Inadequate ventilation. Board v. Farnham, 394 F.3d 469 (7th Cir. 2005); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996); Ramos v. Lamm, 639 F.2d 559, 569-70 (10th Cir. 1980).

Excessive heat. Gates v. Cook, 376 F.3d 323, 339-40 (5th Cir. 2004); Reece v. Gragg, 650 F. Supp. 1297, 1304 (D. Kan. 1986); Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974). But see Chandler v. Crosby, 379 F.3d 1278, 1297-98 (11th Cir. 2004) (cell temperatures that occasionally approached 100 degrees did not violate the Eighth Amendment).

Excessive cold. Gaston v. Coughlin, 249 F.3d 156, 164-65 (2d Cir. 2001); Palmer v. Johnson, 193 F.3d 346, 352-53 (5th Cir. 1999); Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997); Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987).

Lack of drinkable water. Hearns v. Terhune, 413 F.3d 1036, 1043 (9th Cir. 2005) (lack of cold water where yard temperatures reached 100 degrees); Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989) (finding an allegation that drinking water was polluted was not a frivolous claim); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992).

Toxic or noxious fumes. Johnson-El v. Schoemehl, 878 F.2d 1043, 1054-55 (8th Cir. 1989) (pesticides sprayed into housing units); Cody v. Hillard, 599 F. Supp. 1025, 1032 (D.S.D. 1984) (inadequate ventilation of toxic fumes in inmate workplaces), aff'd in part and rev'd in part on other grounds, 830 F.2d 912 (8th Cir. 1987) (en banc). But see Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (no Eighth Amendment violation where prisoner suffered migraine headaches as a result of noise and fumes during three week long housing unit renovation).

Exposure to sewage. DeSpain v. Uphoff, 264 F.3d 965, 977 (10th Cir. 2001) (exposure to flooding and human waste).

Exposure to second-hand tobacco smoke. Helling v. McKinney, 509 U.S. 25, 35 (1993) (prisoner stated an Eighth Amendment claim where his cellmate smoked 5 packs of cigarettes a day); Powers v. Snyder, 484 F.3d 929, 933 (7th Cir. 2007); Atkinson v. Taylor, 316 F.3d 257 (3d Cir. 2003); Reilly v. Grayson, 310 F.3d 519 (6th Cir. 2002).

Excessive noise. Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996).

Sleep deprivation. Gates v. Cook, 376 F.3d 323, 340 (5th Cir. 2004); Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999).

Sleeping on the floor. Thompson v. City of Los Angeles, 885 F.2d 1439, 1448 (9th Cir. 1989) ("a jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment").

Lack of fire safety. Hadix v. Johnson, 367 F.3d 513, 525 (6th Cir. 2004); Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985); Gates v. Collier, 501 F.2d 1291, 1300, 1305 (5th Cir. 1974).

Risk of injury or death in the event of an earthquake. Jones v. City and County of San Francisco, 976 F. Supp. 896, 909-10 (N.D. Cal. 1997).

Inadequate food or unsanitary food service. Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002); Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980); Wilson v. VanNatta, 291 F. Supp. 2d 811, 817 (N.D. Ind. 2003); Drake v. Velasco, 207 F. Supp. 2d 809 (N.D. Ill. 2002).

Inadequate lighting or constant lighting. Gates v. Cook, 376 F.3d 323, 341-42 (5th Cir. 2004) (inadequate lighting); Keenan, 83 F.3d at 1090-91 (constant illumination).

Exposure to insects, rodents, and other vermin. Gates v. Cook, 376 F.3d 323, 340 (5th Cir. 2004); Gaston v. Coughlin, 249 F.3d 156, 166 (2d Cir. 2001); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); Williams v. Griffin, 952 F.2d 820, 825 (4th Cir. 1991); Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987).

Defective plumbing. Jackson, 955 F.2d at 22; Williams, 952 F.2d at 825; McCord v. Maggio, 927 F.2d 844, 847 (5th Cir. 1991).

Deprivation of basic sanitation. Gillis v. Litscher, 468 F.3d 488, 493 (7th Cir.2006) (prisons must provide "reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities" (quotation marks and citation omitted)); Gates v. Cook, 376 F.3d 323, 337-38 (5th Cir. 2004); McBride v. Deer, 240 F.3d 1287, 1292 (10th Cir. 2001); Palmer

v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999); Harper v. Showers, 174 F.3d 716, 717, 720 (5th Cir. 1999); Bradley v. Puckett , 157 F.3d 1022, 1025 (5th Cir. 1998); Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989).

Denial of adequate toilet facilities. Gates v. Cook, 376 F.3d 323, 340-41(5th Cir. 2004); Masonoff v. DuBois, 336 F. Supp. 2d 54 (D. Mass. 2004); Mitchell v. Newryder, 245 F. Supp. 2d 200 (D. Me. 2003).

Exposure to asbestos. Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990). But see McNeil v. Lane, 16 F.3d 123, 125 (7th Cir. 1994) (exposure to "moderate levels of asbestos" did not violate the Eighth Amendment).

Exposure to the extreme behavior of severely mentally ill prisoners. Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (exposure to constant screaming and feces-smearing of mentally ill prisoners "contributes to the problems of uncleanliness and sleep deprivation, and by extension mental health problems, for the other inmates").

Miscellaneous unhealthy or dangerous conditions. Ambrose v. Young, 474 F.3d 1070 (8th Cir. 2007) (prisoner electrocuted while working on DOC work crew); Morgan v. Morgensen, 465 F.3d 1041 (9th Cir. 2006) (prisoner required to work with defective printing press); Hall v. Bennett, 379 F.3d 462 (7th Cir. 2004) (unsafe conditions for prisoner performing electrical work); Brown v. Missouri Dep't of Corr., 353 F.3d 1038, 1040 (8th Cir. 2004) (prisoner injured in vehicle accident after transport officers refused to fasten his seat belt).

THE FOURTEENTH AMENDMENT – PRETRIAL DETAINEES

The Eighth Amendment applies only to convicted prisoners. Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment against any conditions that constitute "punishment." Bell v. Wolfish, 441 U.S. 520, 535 (1979).

> Persons civilly detained or committed under "sexually violent predator" statutes are similarly protected by the Fourteenth Amendment against conditions that constitute "punishment," and to prevail in a challenge to conditions of confinement, need not prove deliberate indifference. Jones v. Blanas, 393 F.3d 918, 933-34 (9th Cir. 2004).
>
> Persons in juvenile detention facilities are also protected by the Fourteenth Amendment. A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572 (3d Cir. 2004).

Many courts have held that the two standards are equivalent in the context of challenges to conditions of confinement. See Natale v. Camden County Corr. Facility, 318 F.3d 575, 581-82 (3d Cir. 2003) (medical care); Craig v. Eberly, 164

F.3d 490, 495 (10th Cir. 1998); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); cf. Jacobs v. West Feliciana Sheriff's Dep't, 228 F.3d 388, 393 (5th Cir. 2000) ("A pretrial detainee's due process rights are at least as great as the Eighth Amendment protections available to a convicted prisoner"); Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (same). Some circuits have inconsistent authority. Compare Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998) (standards are equivalent) with Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1188 n. 9 (9th Cir. 2002) ("[i]t is quite possible ... that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment"). So check for authority in your Circuit applying a less demanding standard to the claims of pretrial detainees. See, e.g., Hubbard v. Taylor, 399 F.3d 150, 166 (3d Cir. 2005) (district court erred in applying Eighth Amendment standard to non-medical conditions claims of pretrial detainees); Benjamin v. Fraser, 343 F.3d 35, 50, 51 (2d Cir. 2003) (deliberate indifference "may generally be presumed from an absence of reasonable care" in constitutional challenge to pretrial detainee environmental conditions; pretrial detainees need not show Eighth Amendment deliberate indifference when challenging "a protracted failure" to provide safe living conditions); Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1120-21 (9th Cir. 2003) ("deliberate indifference" standard does not apply to incapacitated criminal defendants' Fourteenth Amendment challenge to conditions of confinement).

PROPERTY

Interest on money in prisoners' trust accounts is a property interest protected by the Takings Clause, and appropriation of that interest by prison officials may be a taking for public use that requires "just compensation." McIntyre v. Bayer, 339 F.3d 1097 (9th Cir. 2003).

THE FIRST AMENDMENT

With exceptions discussed below, restrictions on prisoners' First Amendment rights are governed by the test set forth in Turner v. Safley, 482 U.S. 78, 89 (1987): the restriction is valid "if it is reasonably related to legitimate penological interests."

The Turner standard is deferential, but "not toothless." Thornburgh v. Abbott, 490 U.S. 401, 414 (1989). Prison officials may not "pil[e] conjecture upon conjecture" to justify their policies. Reed v. Faulkner, 842 F.2d 960, 963-64 (7th Cir. 1988); see also Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (prison officials cannot avoid scrutiny under Turner "by reflexive, rote assertions"); cf. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("deference does not imply abandonment or abdication of judicial review").

One Circuit has suggested that the Turner test does not apply to pretrial detainees. Demery v. Arpaio, 378 F.3d 1020, 1028-29 (9th Cir. 2004).

Religion

There are two **exceptions** to the general rule that the Turner test applies:

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., declared unconstitutional as to the states, still applies to the claims of federal and District of Columbia prisoners. O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (federal prisoners); Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001) (same); Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002) (prison grooming policies requiring Muslim and Rastafarian prisoners to shave their beards and cut their hair subject to scrutiny under RFRA).

As to the states, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq., re-establishes the compelling state interest/least restrictive means test that existed under RFRA for the religious claims of prisoners. The Supreme Court has upheld the statute against an Establishment Clause challenge. Cutter v. Wilkinson, 544 U.S. 709 (2005).

Cases in which prisoners have prevailed under RLUIPA include Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) (finding likelihood that Native American prisoner would prevail in challenge to hair length regulation); Shakur v. Selsky, 391 F.3d 106, 120 (2d Cir. 2004) (refusal to allow prisoner to attend Muslim religious feast states a claim under RLUIPA).

Under the Turner standard, the following restrictions on religious exercise have been found to violate the First Amendment:

Restrictions on ability to attend religious services. Mayweathers v. Newland, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); Omar v. Casterline, 288 F. Supp. 2d 775, 781 (W.D. La. 2003) (refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim); Youngbear v. Thalacker, 174 F. Supp. 2d 902 (N.D. Iowa 2001) (one year delay in providing sweat lodge for Native American religious activities violates First Amendment).

Denial of religious literature. Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003) (denial of Nation of Islam texts).

Requiring violation of the Sabbath or other religious duties. McEachin v. McGuinnis, 357 F.3d 197, 204-05 (2d Cir. 2004) (intentionally giving Muslim prisoner an order while he was praying); Hayes v. Long, 72 F.3d 70 (8th Cir. 1995)

(requiring Muslim prisoner to handle pork); Murphy v. Carroll, 202 F. Supp. 2d 421 (D.Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

Failure to accommodate religious dietary rules. Ford v. McGinnis, 352 F.3d 582, 597 (2d Cir. 2003) ("We ... have clearly established that a prisoner has a right to a diet consistent with his or her religious scruples"); Lomholt v. Holder, 287 F.3d 683 (8th Cir. 2002) (punishing plaintiff for religious fasting); Beerheide v. Suthers, 286 F.3d 1179, 1192 (10th Cir. 2002) (requiring co-pay from prisoners requesting Kosher meals); Makin v. Colorado Dep't of Corr., 183 F.3d 1205 (10th Cir. 1999) (failure to accommodate Muslim prisoner's fasting requirements during Ramadan); Ashelman v. Wawrzaszek, 111 F.3d 674, 678 (9th Cir. 1997) (failure to provide Kosher meals); see also Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners' challenge to denial of communion wine).

Under the Turner standard, challenges to grooming requirements and bans on religious objects have generally been unsuccessful. But such rules may be vulnerable if they are not enforced equally against all religions. See Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) (First Amendment violated where prison banned the wearing of Protestant crosses but allowed Catholic rosaries); Swift v. Lewis, 901 F.2d 730, 731-32 (9th Cir. 1990) (where prison permitted long hair and beards for some religions but not others, it must present evidence justifying this unequal treatment); Wilson v. Moore, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003) (Native Americans allowed to wear religious headgear only during religious services, while prisoners of other religions were allowed to wear their headgear at all times).

One court has held that atheism is a religion, and that a prison's refusal to allow formation of an atheist study group, while allowing other religious groups, violates the Establishment Clause. Kaufman v. McCaughtry, 419 F.3d 678, 684 (7th Cir. 2005).

Mail/Publications

Restrictions on prisoners' mail and their access to books, publications, and other reading material are governed by Turner.

> **Exception:** Restrictions on prisoners' outgoing correspondence must meet a more demanding standard: they must be "no greater than is necessary or essential" to protect an "important or substantial" government interest. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); Nasir v. Morgan, 350 F.3d 366 (3d Cir. 2003). But see Ortiz v. Fort Dodge Corr. Facility, 368 F.3d

1024, 1026 n. 2 (8th Cir. 2004) (applying Turner standard to restrictions on outgoing correspondence).

Publications may be censored, subject to certain procedural safeguards, if they contain material harmful to prison security. Thornburgh v. Abbott, 490 U.S. 401, 414-19 (1989).

One circuit has upheld a ban on sexually explicit publications on the ground that they encourage sexual harassment of female staff. Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999). But see Cline v. Fox, 319 F. Supp. 2d 685 (N.D.W.Va. 2004) (policy barring from prison library all books depicting "explicit sexual activity" violates First Amendment).

Both the sender and the intended recipient must receive notice of the censorship and an opportunity to appeal. Jacklovich v. Simmons, 392 F.3d 420 (10th Cir. 2004); Montcalm Publ'g Corp. v. Beck, 80 F.3d 105, 109-10 (4th Cir. 1996); see also Krug v. Lutz, 329 F.3d 692, 697-98 (9th Cir. 2003) (censorship decision must be reviewed by someone other than the original decisionmaker).

Before the prison authorities censor materials, they must review the content of each particular item received. Murphy v. Missouri Dep't of Corr., 372 F.3d 979, 986 (8th Cir. 2004).

"Publisher only" rules, requiring that books and other reading materials be sent directly from the publisher or an approved vendor, have generally been upheld. Other restrictions on prisoners' ability to receive books and publications have been struck down. See, e.g., King v. Federal Bureau of Prisons, 415 F.3d 634 (7th Cir. 2005) (prison's refusal to allow prisoner to order book on computer programming states a First Amendment claim); Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005) (prison may not prohibit prisoners from receiving non-subscription bulk mail and catalogs); Ashker v. California Dep't of Corr., 350 F.3d 917 (9th Cir. 2003) (prison may not require that special shipping label be affixed to books ordered from approved vendors); Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002) (prison may not ban gift publications for which prisoner has not paid); Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001) (prison may not ban receipt of subscription publications sent by bulk, third, or fourth class mail). But see Beard v. Banks, 548 U.S. 521 (2006) (denial of virtually all magazines and newspapers to prisoners in state's most restrictive long-term segregation unit did not violate First Amendment).

Prisons may not ban mail simply because it contains material downloaded from the internet. Clement v. California Dep't of Corr., 364 F.3d 1148 (9th Cir. 2004).

Prisoners may not be punished for posting material on the internet with the assistance of non-incarcerated third parties. Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199 (D. Ariz. 2003).

Visiting

The Supreme Court has stopped short of holding that prisoners have no rights of association, but has upheld severe limits on visiting by children and ex-prisoners, and an indefinite denial of all non-legal visiting for prisoners convicted of infractions relating to substance abuse. Overton v. Bazzetta, 539 U.S. 126 (2003). Cf. Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002) (reversing dismissal of equal protection challenge to prison's ban on same-sex kissing and hugging between prisoners and their visitors).

STATUTORY CLAIMS

Prisoners are protected by § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and by Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. See Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) (ADA); Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999) (en banc) (§ 504); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (§ 504).

One court has held that limitations on prisoners' statutory rights may be justified under the Turner standard. Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994); compare Yeskey v. Penn. Dep't of Corr., 118 F.3d 168, 174-75 (3d Cir. 1997), aff'd on other grounds, 524 U.S. 206 (1998) (recognizing but declining to decide the question).

The Supreme Court has held that prisoners can seek damages under Title II if the conditions they are challenging would also violate the Constitution. U.S. v. Georgia, 546 U.S. 151 (2006). The Court has not yet decided whether damages are available for conditions that violate Title II, but not the Constitution; one lower court has held that they are. Phiffer v. Columbia River Corr. Institute, 384 F.3d 791 (9th Cir. 2004), cert. denied, 546 U.S. 1137 (2006). Lower courts have held in non-prison cases that injunctive relief is available under Title II. See, e.g., McCarthy v. Hawkins, 381 F.3d 407, 417 (5th Cir. 2004); Chaffin v. Kansas State Fair Bd., 348 F.3d 850, 866-67 (10th Cir. 2003); Henrietta D. v. Bloomberg, 331 F.3d 261, 288 (2d Cir. 2003).

July 14, 2008