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Prisoners' Rights

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VI. Prisoners' Rights

Although lawful imprisonment deprives prisoners of many rights,²⁸⁹⁸ they do retain certain constitutional rights.²⁸⁹⁹ Federal courts, while reluctant to interfere with the internal administration of prisons,²⁹⁰⁰ will intervene to remedy violations of those rights retained by prisoners.²⁹⁰¹ A prison regulation that infringes on a prisoner's constitutional rights is valid only if it is reasonably related to legitimate penological interests.²⁹⁰²

The Supreme Court has identified four relevant factors in determining the reasonableness of a prison regulation. Courts should consider (1) whether

2898. *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); *see Vitek v. Jones*, 445 U.S. 480, 493 (1980) (conviction and sentencing deprives person of right to freedom from confinement); *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (convicted prisoners do not have full range of freedoms available to unincarcerated individuals).

2899. *See e.g.*, *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (prisoners retain fundamental right to marry subject to substantial restrictions as result of incarceration); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (prisoners retain those rights compatible with objectives of incarceration); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (prisoners retain right of access to courts); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (prisoners retain right to due process subject to restrictions imposed by nature of penal system); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (prisoners retain limited first amendment right to free exercise of religion); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (per curiam) (prisoners retain right to equal protection); *cf. Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (prisoners may sue under § 1983 for civil damages when right to be free from cruel and unusual punishment violated).

Both convicted individuals and pretrial detainees retain constitutional rights while incarcerated, but the source of the constitutional protection depends upon the individual's status. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (eighth amendment scrutiny for cruel and unusual punishment appropriate only after constitutional guarantees associated with criminal prosecutions satisfied; until then, due process clause controls); *Berry v. City of Muskogee*, 900 F.2d 1489, 1493 (10th Cir. 1990) (eighth amendment applies to claims of incarcerated persons whose guilt has been adjudicated but who await sentencing). Although pretrial detainees enjoy greater constitutional protection than convicted prisoners, recent cases suggest that the constitutional protection afforded pretrial detainees may be diminishing.

2900. *See Turner v. Safley*, 482 U.S. 78, 85 (1987) (prison administration committed to legislative and executive branches; concern for separation of powers, as well as state sovereignty, requires judicial restraint); *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (courts should defer to "expert judgment" of prison authorities); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (in overseeing constitutional rights with respect to confinement courts cannot assume prison officials insensitive to constitutional requirements or to problems of achieving goals of penal system); *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979) (courts should defer to prison administrators' adoption and implementation of prison policies needed to ensure order and security); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (courts should give wide-ranging deference to decisions of prison officials); *cf. Washington v. Harper*, 110 S. Ct. 1028, 1042 (1990) (courts should defer to medical professionals' judgment concerning involuntary medication of prisoners).

2901. *See Hutto v. Finney*, 437 U.S. 678, 687-88 (1978) (comprehensive court order correcting many constitutional violations justified by inadequate compliance with prior court orders); *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977) (court order requiring that inmates have access to legal research facilities justified); *Tillery v. Owens*, 907 F.2d 418, 430-31 (3d Cir. 1990) (court order requiring immediate cessation of double bunking prisoners justified by egregious conditions).

2902. *Turner*, 482 U.S. at 89.

there is a "valid, rational connection" between the regulation and the legitimate interest advanced to justify it; (2) whether alternative means for exercising the asserted right remain available; (3) whether accommodation of the asserted right will adversely affect guards, other inmates, and allocation of prison resources generally; and (4) whether there is an obvious alternative to the regulation "that fully accommodates the prisoner's right at de minimis cost to valid penological interests."²⁹⁰³ The Court has rejected a "least restrictive alternative" test under which prison officials would be required to "set up and then shoot down every conceivable alternative method" of accommodating the asserted right.²⁹⁰⁴ The existence of alternatives, however, may be evidence that the regulation is an unreasonable, "exaggerated response" to prison concerns.²⁹⁰⁵

PRISONERS' SUBSTANTIVE RIGHTS

Right of Access to Courts. The Constitution guarantees prisoners the right of meaningful access to courts,²⁹⁰⁶ and prison officials may not retaliate against prisoners who exercise their right of access.²⁹⁰⁷ In *Bounds v.*

2903. *Id.* at 89-91.

2904. *Id.* at 90; *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1880 (1989) (rejecting least restrictive alternative test and adopting *Turner* reasonableness standard for regulations restricting publications sent to inmates).

2905. *Turner*, 482 U.S. at 91.

2906. *Bounds v. Smith*, 430 U.S. 817, 824, 828 (1977) (prisoners have constitutional right to adequate, effective, and meaningful access to courts to challenge violations of constitutional rights); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (prisoners' access to courts may not be denied or obstructed).

2907. *Compare Jackson v. Cain*, 864 F.2d 1235, 1249 (5th Cir. 1989) (claim stated when material issue existed as to whether inmate was transferred to "punishment crew" in retaliation for utilizing prison grievance procedures); *Harris v. Fleming*, 839 F.2d 1232, 1236-38 (7th Cir. 1988) (allegations that prisoner fired from two prison jobs within one week of remand of his suit against prison personnel, fired from third job day after refusing to settle pending lawsuit against prison officials, transferred two days later into cell with known homosexual inmate, transferred to different cell every six to eight weeks, and transferred back into general population, even though he had requested special protection, sufficient to state claim of unconstitutional retaliation); *Haley v. Dormire*, 845 F.2d 1488, 1489-91 (8th Cir. 1988) (allegation that prison officials conspired to deny prisoner access to courts in retaliation for filing previous lawsuits by preventing him from using prison library, denying him legal materials and assistance, and requiring him to purchase writing paper when he had no money, sufficient to state claim); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138-39 (9th Cir. 1989) (allegation that officials labeled inmate "snitch" in effort to subject him to harm from other prisoners in retaliation for filing grievances sufficient to state claim); *Smith v. Maschner*, 899 F.2d 940, 949 (10th Cir. 1990) (allegations that prisoner segregated immediately prior to hearings, witnesses and assistants transferred, and legal materials destroyed sufficient to state claim) and *Wildberger v. Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989) (per curiam) (allegation that disciplinary segregation was in retaliation for filing of grievances sufficient to state claim) with *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam) (allegation that guard threatened prisoner with bodily harm to dissuade him from pursuing legal redress for beatings did not state claim for constitutional deprivation of right of access because threat to do act prohibited by Constitution is not equivalent to doing act itself).

Smith,²⁹⁰⁸ the Supreme Court held that the right of access imposes an affirmative duty on prison officials to assist inmates in preparing and filing legal papers, either by establishing an adequate law library or by providing adequate assistance from persons trained in the law.²⁹⁰⁹ However, prison officials are not required to provide both, as long as access is "meaningful."²⁹¹⁰ In order to successfully allege a constitutional deprivation, most courts require prisoners to demonstrate some actual injury resulting from a denial of access.²⁹¹¹

2908. 430 U.S. 817 (1977).

2909. *Id.* at 828; see *Milton v. Morris*, 767 F.2d 1443, 1447 (9th Cir. 1985) (denial of access to both law library and legal assistant violates right of access). It is not clear which resources a library must maintain to satisfy the right of access. Compare *Blake v. Berman*, 877 F.2d 145, 146-48 (1st Cir. 1989) (prisoner from Massachusetts, who was transferred to prison in Kansas that did not have adequate materials on Massachusetts law but did have clinical legal representation program, not denied access); *Tyler v. Black*, 811 F.2d 424, 429-31 (8th Cir. 1987) (library adequate because provided nearly complete sets of regional and federal reporters, state statutes, rules, digests, federal code and federal practice digests, when missing volumes and updates on order), *cert. denied*, 490 U.S. 1027 (1989) and *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985) (state prison library adequate, although failure to provide *Shepard's Citations* was questionable) with *Morrow v. Harwell*, 768 F.2d 619, 622-23 (5th Cir. 1985) (for access to be meaningful, prisoner must be furnished research tools necessary to effectively rebut authorities cited by adversary in responsive pleadings) and *DeMallory v. Cullen*, 855 F.2d 442, 446-48 (7th Cir. 1988) (claim of inadequate library resources sufficiently stated by inmate who had no appointed counsel and had access only to 1969 edition of state statutes and specifically requested law volumes). The Eleventh Circuit has held that the availability of a law library is sufficient to satisfy *Bounds* even if the majority of prisoners in a facility are functionally illiterate. See *Hooks v. Wainwright*, 775 F.2d 1433, 1435-37 (11th Cir. 1985) (plan contemplating meaningful access through libraries sufficient despite 50% functional illiteracy rate), *cert. denied*, 479 U.S. 913 (1986).

2910. *Bounds*, 430 U.S. at 832 ("legal access program need not include any particular element"); compare *Lyons v. Powell*, 838 F.2d 28, 32 (1st Cir. 1988) (per curiam) (prisoner with access to law library not constitutionally entitled to assistance from persons trained in the law); *Childs v. Pellegrin*, 822 F.2d 1382, 1384-85 (6th Cir. 1987) (denying prisoner access to law library, legal materials, and appointed counsel did not deny meaningful access when evidentiary hearing provided and judge gave prisoner his attention and benefit of his experience, provided him with opportunity to make record for use on appeal, and reached merits of case); *Little v. Norris*, 787 F.2d 1241, 1244 (8th Cir. 1986) (limited access to law library and informal assistance of inmate writ writers provided meaningful access); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 851-56 (9th Cir. 1985) (prison plan that provides law library and aid of inmate law clerks for illiterate and non-English speaking inmates constitutionally adequate) and *Battle v. Anderson*, 788 F.2d 1421, 1424-25 (10th Cir. 1986) (furnishing of inmate law clerks provided meaningful access) with *Valentine v. Beyer*, 850 F.2d 951, 956 (3d Cir. 1988) (prison official's plan to eliminate inmates' paralegal training group denied prisoners meaningful access to courts because plan forced inmates to rely on less competent paralegals in prison law library) and *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (system allowing checkout of law books from weekly bookmobile and limited assistance from law students not meaningful access to courts).

2911. *Peterkin v. Jeffes*, 855 F.2d 1021, 1041 (3d Cir. 1988) (death row inmates, who have limited access to prison law library materials and are prohibited from utilizing jailhouse lawyers or clinical programs, must meet actual injury standard to prove unconstitutional restraint on access to courts); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989) (to prove constitutional violation prisoner must show actual injury from denial of use of 40-character memory typewriter and carbon paper); see *White v. White*, 886 F.2d 721, 723 (4th Cir. 1989) (no constitutional violation when

Courts will allow some restrictions on a prisoner's access to legal resources in order to accommodate legitimate administrative concerns, such as maintaining security and internal order,²⁹¹² preventing the introduction of contraband,²⁹¹³ preventing the domination of the library by regular users,²⁹¹⁴ and observing budgetary constraints.²⁹¹⁵ In the absence of a legitimate adminis-

prisoner's complaint failed to contain factual allegations tending to support bare assertion of deprivation by policy requiring nonindigent prisoners to pay cash for postage); *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (no constitutional violation when prisoner resubmitted habeas corpus writs without prejudice after prison officials had lost earlier copies in mail); *Hossman v. Spradlin*, 812 F.2d 1019, 1022 (7th Cir. 1987) (per curiam) (no constitutional violation when prisoner made no allegations suggesting how denial of use of law library for six days denied him "meaningful access" or how destruction of his legal papers caused him harm).

The Third Circuit uses an "actual injury" test in cases where prisoners challenge access to resources other than legal assistance itself. *Peterkin*, 855 F.2d at 1041-42. Where the challenge involves the right to legal assistance, the third circuit has held that the "actual injury" test is synonymous with the *Bounds* analysis. *Id.*

2912. *Compare* *Cookish v. Cunningham*, 787 F.2d 1, 5-6 (1st Cir. 1986) (short-term denial of access to prison library permissible if required to maintain security and internal order); *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986) (restrictions on library use as part of post-riot "lockdown" permissible); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 138 (9th Cir. 1987) (no constitutional violation in requiring inmate to be escorted to law library rather than being able to use pass) and *Solomon v. Zant*, 888 F.2d 1579, 1582 (11th Cir. 1989) (policy prohibiting death row inmate from leaving cell block to meet attorney unless shaving requirements complied with sufficiently related to security interest) with *DeMallory v. Cullen*, 855 F.2d 442, 448 (7th Cir. 1988) (generalized security concerns insufficient to support restrictions preventing inmates in segregation from going to library, conferring with inmate paralegals, participating in legal training program, and limiting them to checking out books by citation) and *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (prison policy denying prisoner contact visits and forcing him to communicate with attorney through hole in glass violated right to meaningful access).

2913. *See* *Howland v. Kilquist*, 833 F.2d 639, 641-42 (7th Cir. 1987) (no violation of right of access when prison refused to deliver mail containing legal materials that were not marked privileged and sent by prisoner's fiancée, when prisoner could have obtained documents from court or his attorney because legitimate concern that mail could contain contraband); *O'Donnel v. Thomas*, 826 F.2d 788, 790 (8th Cir. 1987) (jail officials' opening of mail in course of normal security screening did not violate right of access, even though envelopes contained legal materials when envelopes not clearly identified as privileged legal communications because legitimate concern that mail could contain contraband); *Baker v. Piggott*, 833 F.2d 1539, 1540 (11th Cir. 1987) (per curiam) (prisoner's right of access not violated when officials confiscated prisoner's contraband savings of \$317, although money intended to defray expense of hiring private attorney), *cert. denied*, 487 U.S. 1241 (1988).

2914. *See* *Flittie v. Solem*, 827 F.2d 276, 280 (8th Cir. 1987) (per curiam) (prisoner, who used library on average three days per week, not denied meaningful access by regulation that allowed him to use prison law library only after prisoners who were not "regular users" had completed their work, because regulation necessary to prevent domination of system by regular users and prisoner could show no prejudice from regulation).

2915. *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (prison authorities may reasonably attempt to balance right of prisoners to use mails with prison budgetary considerations); *compare* *Gittens v. Sullivan*, 848 F.2d 389, 390 (2d Cir. 1988) (per curiam) (denial of unlimited free mailing did not violate prisoner's right of access when prison officials provided \$1.10 per week for stamps and an additional advance of \$36 for legal mail postage) with *Smith v. Erickson*, 884 F.2d 1108, 1109-11 (8th Cir. 1989) (refusal to provide free postage or supplies for legal mail to indigent inmates and policy requiring inmates to use envelopes from prison canteen violated inmates' right of access

trative concern, however, prisoners may not be hindered from gaining access to the judicial process.²⁹¹⁶ Inmates who have been denied access to legal materials have not necessarily suffered a constitutional deprivation when they are confined for only a short period of time.²⁹¹⁷

Retained Freedoms of Speech, Religion, and Association. Prison officials may not interfere with a prisoner's exercise of first amendment rights unless such interference is reasonably related to a legitimate penological interest,²⁹¹⁸

because inmates must be provided basic material to draft and mail legal documents and prison-canteen-only-envelope policy advanced no specific penological interest).

2916. *Compare* *Wolff v. McDonnell*, 418 U.S. 539, 578 (1974) (prison officials may not prevent inmates from helping other inmates with civil rights petitions unless state provides constitutionally adequate alternative access to courts); *Procunier v. Martinez*, 416 U.S. 396, 419-22 (1973) (prison rule banning use by prisoners' attorneys of law students and legal professionals unjustifiable restriction on right of access); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (prison officials may not prevent inmates from helping other inmates with habeas corpus petitions); *Ex parte Hull*, 312 U.S. 546, 548-49 (1941) (prison officials may not prescreen prisoners' legal documents before they are filed with court); *Simmons v. Dickhaut*, 804 F.2d 182, 184 (1st Cir. 1986) (per curiam) (allegations that prison officials ignored multiple requests to retrieve legal materials needed for pending case from previous institution and that legal materials confiscated or destroyed stated claim of inadequate access to court); *Morello v. James*, 810 F.2d 344, 347 (2d Cir. 1987) (allegation that state prison officials confiscated pro se legal materials prepared for appeal of criminal convictions stated claim); *Carter v. Hutto*, 781 F.2d 1028, 1031-32 (4th Cir. 1986) (allegation that prison officials confiscated and destroyed legal materials stated claim); *Green v. McKaskle*, 788 F.2d 1116, 1126 (5th Cir. 1986) (allegation that prisoner in administrative segregation allowed only two or three law books per day stated claim); *Valandingham v. Borjorquez*, 866 F.2d 1135, 1139-40 (9th Cir. 1989) (allegation that inmate did not receive legal materials requested from library stated claim) and *Gramegna v. Johnson*, 846 F.2d 675, 676-78 (11th Cir. 1988) (prison's policy of allowing "sizeable bundle" of mail to accumulate prior to delivery violated prisoner's right of access when it resulted in prisoner not receiving notice of denial of petition in sufficient time to make timely appeal) with *Abdul-Akbar v. Watson*, 901 F.2d 329, 333-34 (3d Cir. 1990) (where prisoner abused judicial process by filing 43 civil rights claims in seven years, court justified in entering injunction prohibiting filing of future claims without leave of court).

2917. *See* *Jones v. Smith*, 784 F.2d 149, 152 (2d Cir. 1986) (denial of access to legal advance sheets during 30-day administrative confinement found de minimis); *Magee v. Waters*, 810 F.2d 451, 452 (4th Cir. 1987) (no unconstitutional denial of access when prisoners in short-term holding facility allowed limited access to library with limited contents); *Hooten v. Jenne*, 786 F.2d 692, 697 (5th Cir. 1986) (per curiam) (local jail authorities not required to furnish access to courts if, because of brevity of incarceration, not reasonably expected that inmates would have sufficient time to petition courts). *But see* *Owens v. Maschner*, 811 F.2d 1365, 1366 (10th Cir. 1987) (per curiam) (prisoner's allegation that he was denied access to courts and to legal documents while in 20-day solitary confinement stated claim of constitutional deprivation).

2918. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("when a prison regulation impinges on inmates' [first amendment] rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-30 (1977) (first amendment rights subject to restrictions legitimately required by confinement); *see* *Gibbs v. King*, 779 F.2d 1040, 1045 (5th Cir.) (prisoner's first amendment rights not violated by regulation prohibiting disrespect or cursing at other inmates or employees when purpose to prevent escalation of tension in prison), *cert. denied*, 476 U.S. 1117 (1986); *Espinoza v. Wilson*, 814 F.2d 1093, 1098 (6th Cir. 1987) (per curiam) (denial of access to homosexual publications permissible when such materials posed security problem); *Woods v. O'Leary*, 890 F.2d 883, 885-88 (7th Cir. 1989) (prisoner's first amendment rights not violated by

nor may prison officials retaliate against a prisoner for exercising first amendment rights.²⁹¹⁹

Inmates have the right to send and receive information, subject to limits "reasonably related" to legitimate penal interests.²⁹²⁰ Incoming correspon-

regulation prohibiting mailing of religious publication because regulation applied to all inmate-run business ventures); *Garza v. Carlson*, 877 F.2d 14, 16-17 (8th Cir. 1989) (denial of access to group prayer for prisoners in administrative segregation not violation of Jewish inmate's rights when action taken out of legitimate security concern; threat to force feed inmate on religious hunger strike not violation of constitutional rights because prisoner health legitimate penological concern); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (no first amendment violation when prisoner's mail from organization advocating consensual sexual relations between adult and juvenile males withheld out of concern for prison security and inmate rehabilitation).

2919. See *Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987) (prison official's interest in prison security does not justify punishment of prisoner for writing NAACP to complain about behavior of guards); *Jackson v. Cain*, 864 F.2d 1235, 1249 (5th Cir. 1989) (claim stated when material issue existed as to whether inmate transferred to "punishment crew" in retaliation for utilizing prison grievance procedures); *Murphy v. Missouri Dep't of Corrections*, 769 F.2d 502, 503 (8th Cir. 1985) (per curiam) (allegations that prisoner transferred to maximum security prison in retaliation for religious beliefs stated claim for violation of first amendment rights); *Wildberger v. Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989) (per curiam) (inmate allegation that disciplinary segregation was in retaliation for filing grievances sufficient to state claim); cf. *Meriwether v. Coughlin*, 879 F.2d 1037, 1042-44 (2d Cir. 1989) (jury could reasonably find that prisoners transferred and beaten in retaliation for attendance at grievance meeting).

2920. *Turner v. Safley*, 482 U.S. 48, 91, 93 (1987); *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); compare *Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979) (regulation prohibiting receipt of books from sources other than publishers, book clubs, or bookstores held constitutional because of possibility that contraband being smuggled in hardbound books from unidentified sources); *Wolf v. McDonnell*, 418 U.S. 539, 574-77 (1974) (opening of prisoner's mail justified by legitimate need of prison officials to search for contraband); *Guyer v. Beard*, 907 F.2d 1424, 1428 (3d Cir. 1990) (order requiring prisoner to sign limited power of attorney form authorizing Warden to receive and open court orders and notices justified by legitimate need of prison officials to search for contraband); *Hernandez v. Estelle*, 788 F.2d 1154, 1155-56 (5th Cir. 1986) (per curiam) (prison official's refusal to distribute bilingual revolutionary publication during period of prison turmoil justified); *Burton v. Nault*, 902 F.2d 4, 5 (6th Cir.) (opening of letter to prisoner's attorney justified when letter found next to prisoner after attempted suicide), *cert. denied*, 111 S. Ct. 198 (1990); *Martin v. Tyson*, 845 F.2d 1451, 1456-57 (7th Cir.) (per curiam) (no constitutional violation in opening and inspecting pretrial detainee's mail because inspection of personal mail for contraband serves legitimate security purpose), *cert. denied*, 488 U.S. 863 (1988); *Holloway v. Pigman*, 884 F.2d 365, 367 (8th Cir. 1989) (prison regulations that did not require notice to inmates on punitive status of receipt of mail and did not provide opportunity to protest mail returned to sender for violations of prison regulations not constitutional violation); *Mann v. Adams*, 846 F.2d 589, 590-91 (9th Cir.) (per curiam) (mail sent to prisoners from public agencies, public officials, recognized civil rights groups, and news media not entitled to special deference ordinarily given to legal correspondence in face of prison security concerns; thus, prisoners do not have right to be present when such mail is opened), *cert. denied*, 488 U.S. 898 (1988) and *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir. 1990) (no constitutional violation when prison officials returned incoming mail, labels, and stickers to sender; accidental opening of mail from IRS, absent evidence of improper motive or interference with right to counsel, not a constitutional violation) with *Farid v. Smith*, 850 F.2d 917, 925-26 (2d Cir. 1988) (confiscation of two Tarot books and home-made cassette tape mailed to prisoner constitutional violation when prison officials offered no evidence that materials posed legitimate threat to security); *Brooks v. Seiter*, 779 F.2d 1177, 1180-81 (6th Cir. 1985) (magazine subscription constitutes form of inmate correspondence and cannot be curtailed in absence of legitimate penal interest) and

dence, whether from other inmates or non-inmates, may be rejected if "detrimental to the security, good order, or discipline of the institution or if [it] might facilitate criminal activity."²⁹²¹ Thus, inmate-to-inmate correspondence may be banned completely to protect legitimate security interests.²⁹²² Outgoing correspondence usually poses no threat to internal prison security or other legitimate penological interests and therefore may not be prohibited.²⁹²³

The first amendment also affords prisoners some freedom of communication and association, which may be curtailed by legitimate penal concerns.²⁹²⁴ Prison officials must afford prisoners reasonable opportunities to

Sizmore v. Williford, 829 F.2d 608, 610 (7th Cir. 1987) (allegation that prison officials repeatedly and intentionally withheld unobjectionable reading material, including sports and entertainment periodicals and daily newspaper, stated claim of first amendment deprivation).

2921. *Abbott*, 109 S. Ct. at 1883. Federal regulations prohibit inmates from receiving hardcover books and publications from sources other than the publisher, a book club, or a bookstore. 28 C.F.R. § 540.71(a) (1989). Inmates may receive softcover publications from any source, however. *Id.* The Warden of a facility may reject an incoming publication only if it is detrimental to the "security, good order, or discipline" of the facility or if it facilitates criminal activity. *Id.* § 570.71(b). The Warden may reject incoming legal materials only if there is a *compelling* reason in the interest of "institution security, good order, or discipline." *Id.* § 543.11(d) (emphasis added).

2922. *Turner v. Safley*, 482 U.S. 78, 91, 93 (1987) (prison officials may prohibit correspondence between inmates at different facilities because of legitimate security concerns relating to potential for communication of escape plans and other violent acts); see *Vester v. Rogers*, 795 F.2d 1179, 1183 (4th Cir. 1986) (prison officials may prohibit correspondence between inmates in different prisons because it only limits and does not deny prisoners right to free speech), *cert. denied*, 482 U.S. 916 (1987).

2923. *Procunier v. Martinez*, 416 U.S. 396, 414-16 (1974) (regulations prohibiting inmate correspondence containing undue complaints or magnified grievances invalid because not necessary to further government interest); see *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989) (limiting *Martinez* to outgoing correspondence). In *Martinez*, the Court held that restrictions on outgoing correspondence are valid only if they are "generally necessary" to further a valid penological interest. *Martinez*, 416 U.S. at 414. In *Abbott*, the Court rejected the proposition that the *Martinez* standard imposed a least restrictive means test. *Abbott*, 109 S. Ct. at 1880. In addition, *Abbott* rejected the use of a separate standard for regulations implicating the rights of non-inmates to receive correspondence. *Id.* at 1879 n.9. The *Martinez* Court indicated that only outgoing correspondence concerning escape plans, ongoing criminal activity, or threats of blackmail pose a threat to prison security justifying censorship. 416 U.S. at 412-13.

2924. See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977) (rights associated with promoting unionization in prison give way to interests in preserving order and authority); *Hadden v. Howard*, 713 F.2d 1003, 1006-07 (3d Cir. 1983) (no constitutional protection for prisoner's maliciously false complaints about prison guards); *Thorne v. Jones*, 765 F.2d 1270, 1272-75 (5th Cir. 1985) (denial of visitation privileges between inmate and mother justified by security concerns based on reliable information that inmate receiving narcotics through visiting room and mother's refusal to submit to strip search prior to visit), *cert. denied*, 475 U.S. 1016 (1986); *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir.) (prison officials justified in denying visitation rights to inmate's girlfriend when she violated prison rules), *cert. denied*, 469 U.S. 845 (1984); *Rios v. Lane*, 812 F.2d 1032, 1034-37 (7th Cir.) (imposition of disciplinary sanctions against prisoner who communicated revolutionary slogans to known gang member justified by compelling need to contain and eliminate organized gang activity), *cert. denied*, 483 U.S. 1001 (1987); *Benzel v. Crammer*, 869 F.2d 1105, 1109 (8th Cir.) (prison telephone policy that prohibits inmates in segregation unit from calling non-attorney, non-relative males serves legitimate penological interests of

exercise their religious freedom, subject to limits reasonably related to legitimate institutional concerns. In *O'Lone v. Estate of Shabazz*,²⁹²⁵ the Supreme Court upheld a prison regulation prohibiting prisoners who worked outside prison buildings from returning to those buildings during the day, even though the regulation had the effect of prohibiting some Muslim inmates from attending services, because (1) the regulation was rationally related to legitimate concerns of rehabilitation, institutional order, and security; (2) no ready alternatives to the regulations existed; (3) prisoners retained some freedom of religious expression, being allowed to celebrate Muslim holidays; and (4) accommodation of prisoners' practices would require extra supervision, threaten prison security, and create perceptions of favoritism.²⁹²⁶ A prisoner

security and rehabilitation and does not violate first amendment rights), *cert. denied*, 110 S. Ct. 244 (1989); *Evans v. Johnson*, 808 F.2d 1427, 1428 (11th Cir. 1987) (*per curiam*) (visitation privileges subject to discretion of prison authorities if policies serve legitimate penological objectives); *Robinson v. Palmer*, 841 F.2d 1151, 1156-57 (D.C. Cir. 1988) (prison sanction permanently banning prisoner's wife from visiting after she was caught attempting to smuggle marijuana into prison did not violate first amendment rights because sanction reasonable response to threat of future smuggling and prisoner had other ways to communicate with wife).

2925. 482 U.S. 342 (1987).

2926. *Id.* at 350-53; see *Benjamin v. Coughlin*, 905 F.2d 571, 577-78 (2d Cir. 1990) (requirement that religious congregation be supervised by non-inmate spiritual leader served valid penological interest in security and did not violate free exercise rights of Rastafarian inmate); *Cooper v. Tard*, 855 F.2d 125, 128-30 (3d Cir. 1988) (prohibition against unsupervised group activities serves valid penological interest in security and does not violate free exercise rights of Muslim inmates who wish to engage in unsupervised group prayer); *Dettmer v. Landon*, 799 F.2d 929, 932-34 (4th Cir. 1986) (regulation denying prisoner access to worship materials, such as white robe, candles, incense, kitchen timer, and small hollow statue, upheld because of legitimate security concerns and difficulty of supervising prisoner's use of objects in religious rites), *cert. denied*, 483 U.S. 1007 (1987); *Mumin v. Phelps*, 857 F.2d 1055, 1057-58 (5th Cir. 1988) (refusal to transport Muslim inmates from out-camps to main building for weekly services not impermissible limitation on right to freedom of religion when decision content neutral and based on legitimate concern regarding resource allocation and security); *Pollock v. Marshall*, 845 F.2d 656, 658-60 (6th Cir.) (forcibly cutting prisoner's hair did not violate free exercise rights, even though prisoner's Lakota American Indian religion believes hair is sacred and should not be cut, because regulation served legitimate penological objectives, including permitting quick identification of prisoners, removing place to hide contraband, preventing sanitary problems and homosexual attacks, and reducing contact between prisoners and guards), *cert. denied*, 488 U.S. 987 (1988); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (because of valid security concerns, prison not required to allow either ex-convict or current inmate to conduct religious services; however, prison officials may not arbitrarily obstruct inmates' religious observance on basis of sect to which prisoner belongs); *Iron Eyes v. Henry*, 907 F.2d 810, 816 (8th Cir. 1990) (grooming regulation requiring all prisoners to wear hair above collar did not violate free exercise rights of Sioux inmate because regulation designed to further security interest); *Reimers v. Oregon*, 863 F.2d 630, 631-32 (9th Cir. 1988) (no first amendment violation when minister, with whom prisoner preferred to worship, terminated, because free exercise clause does not grant right to visit clergyman of choice outside prison, nor to have clergyman of choice provided within prison); *McCorkle v. Johnson*, 881 F.2d 993, 995 (11th Cir. 1989) (*per curiam*) (denial of inmate's request for access to Satanic materials did not violate free exercise rights because of violence and potential disruption inherent in Satanic worship).

Prisoners have, nevertheless, successfully stated claims of unconstitutional infringement on their exercise of religion. See *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (*per curiam*) (Buddhist prisoner

asserting her right of religious liberty must establish that her beliefs are sincerely held²⁹²⁷ and religious in nature.²⁹²⁸

Retained Rights Related to Searches, Seizures, and Personal Privacy. Although prisoners retain certain fundamental rights of personal privacy,²⁹²⁹

denied use of chapel available to fellow prisoners and prohibited from corresponding with religious advisor alleged palpable discrimination); *Benjamin v. Coughlin*, 905 F.2d 571, 577 (2d Cir. 1990) (requirement that all male inmates receive haircut upon entry of prison violated free exercise rights of Rastafarian inmate when pulling hair back in pony tail adequately accommodated penological interest in prisoner identification); *Beck v. Lynaugh*, 842 F.2d 759, 761 (5th Cir. 1988) (excluding all segregated prisoners from chapel services unconstitutional because not all such prisoners potential troublemakers); *Whitney v. Brown*, 882 F.2d 1068, 1077-78 (6th Cir. 1989) (prison policy that eliminated Jewish inmates' intercomplex travel to weekly Sabbath services and annual Passover Seders impermissible infringement upon free exercise rights); *Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990) (allegation that prison policy requiring serving meals containing pork to inmates in disciplinary segregation violated free exercise rights of Islamic prisoner raised sufficient factual issues to avoid summary judgment); *Salaam v. Lockhart*, 905 F.2d 1168, 1173-74 (8th Cir. 1990) (inmate who changed name after incarceration upon conversion to Muslim faith entitled to delivery of mail under that name, and addition of Muslim name to clothing, because use of "a/k/a" available), *cert. denied*, 111 S. Ct. 677 (1991).

Prison officials need not provide all religious groups with identical facilities for worship. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (special chapel or place of worship need not be provided for every faith regardless of size); *Butler-Bey v. Frey*, 811 F.2d 449, 451-52 (8th Cir. 1987) (even if prohibited from using chapel, religious group had access to comparable prison facilities and thus inmates afforded reasonable opportunity to exercise religious freedom); *cf. Thompson v. Kentucky*, 712 F.2d 1078, 1080-82 (6th Cir. 1983) (Muslim prisoners, constituting only 25 of approximately 190 inmates using chapel, need not be given equal time in prison chapel).

2927. *See Farid v. Smith*, 850 F.2d 917, 926 (2d Cir. 1988) (when prisoner did not allege or submit proof that sincerely held religious beliefs mandated use of Tarot cards, confiscating Tarot cards did not violate free exercise rights); *Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986) (prisoner's failure to attend religious services while in general prison population and failure to designate spiritual adviser while in administrative segregation supported inference of insincerity that justified dismissal of claim), *cert. denied*, 483 U.S. 1032 (1987); *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (dictum) (evidence of Rastafarian prisoner's eating meat and shaving, both of which prohibited by his religion, relevant to whether religious beliefs sincerely held); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987) (per curiam) (dictum) (appropriate to deny special diet if inmate not sincere in religious beliefs); *Dunn v. White*, 880 F.2d 1188, 1197-98 (10th Cir. 1989) (per curiam) (no violation of freedom of religion when prisoner objected to AIDS test on unspecified religious grounds and was threatened with disciplinary segregation if he did not submit), *cert. denied*, 110 S. Ct. 871 (1990).

2928. *Compare Africa v. Pennsylvania*, 662 F.2d 1025, 1030, 1036 (3d Cir. 1981) (although prisoner's beliefs were truly held, court found that MOVE organization not religion), *cert. denied*, 456 U.S. 908 (1982) *with Dettmer v. Landon*, 799 F.2d 929, 931-32 (4th Cir. 1986) (church based on witchcraft occupied place in lives of its members parallel to that of more conventional religions and thus entitled to first amendment protection), *cert. denied*, 483 U.S. 1007 (1987); *cf. Martinelli v. Dugger*, 817 F.2d 1499, 1503-05 (11th Cir. 1987) (although prisoner must be sincere in religious beliefs, no requirement that belief be held by majority of believers in particular religion in order to have first amendment protection), *cert. denied*, 484 U.S. 1012 (1988).

2929. *Compare Monmouth County Correctional Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 344-49 (3d Cir. 1987) (prison policy requiring court order before permitting elective non-therapeutic abortions unconstitutionally interfered with prisoners' right to have abortions and constituted deliberate indifference to serious medical need in violation of eighth amendment), *cert. denied*, 486 U.S. 1006

their cells can be searched at random without violating the fourth amendment²⁹³⁰ because they have no reasonable expectation of privacy within their cells.²⁹³¹ Further, the seizure by prison officials of an inmate's property does not constitute a fourth amendment violation if the seizure serves legitimate institutional interests.²⁹³²

Courts will closely scrutinize the reasonableness of strip searches and body cavity searches.²⁹³³ The constitutionality of these searches will be determined by balancing the state's need for a particular search against the extent

(1988) *and* *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987) (prisoner's challenge to practice of according female guards unrestricted access to all areas of housing unit stated claim under fourth amendment because "common experience . . . leads inexorably to the conclusion that there must be a fundamental right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason") *with* *U.S. v. Willoughby*, 860 F.2d 15, 20-21 (2d Cir. 1988) (monitoring and taping of inmate telephone calls did not violate constitutional rights when signs posted notifying inmates of monitoring and inmate signed acknowledgement of prison's monitoring policy), *cert. denied*, 488 U.S. 1033 (1989); *Southerland v. Thigpen*, 784 F.2d 713, 715-17 (5th Cir. 1986) (goals of penal system outweigh female inmate's interest in breastfeeding her child); *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990) (prison prohibition on inmate procreation, denying inmate opportunity to artificially inseminate his non-inmate wife, not constitutional violation); *Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988) (no violation of prisoner's privacy rights when female officers able to view body cavity searches) *and* *Dunn v. White*, 880 F.2d 1188, 1196 (10th Cir. 1989) (*per curiam*) (non-consensual AIDS test did not violate prisoner's fourth amendment rights because prison's interest in responding to AIDS outweighs invasion of privacy).

The Court has also upheld the right of prisoners to marry. *Turner v. Safley*, 482 U.S. 78, 97-98 (1987) (although prison officials may regulate time and circumstances of marriage ceremony itself, prohibiting inmates from marrying other inmates or civilians, unless superintendent determined "compelling reasons," exaggerated response to security concerns and not reasonably related to legitimate penological objectives). However, the right to marry is subject to substantial restrictions as a result of incarceration and the pursuit of legitimate correctional goals. *Id.* at 95.

2930. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). *But cf.* *U.S. v. Cohen*, 796 F.2d 20, 22-24 (2d Cir. 1986) (when purpose of search is to uncover criminal evidence, not to further institutional security, prisoner's fourth amendment rights violated by warrantless search), *cert. denied*, 479 U.S. 854 (1987).

2931. *Hudson*, 468 U.S. at 530. The *Hudson* Court reasoned that the need for institutional security outweighed the prisoner's privacy interest within his cell. *Id.* at 527. The Court indicated that prisoners would retain an action for cruel and unusual punishment if cell searches are conducted in a particularly egregious manner. *Id.* at 530. The Court added that while prison officials have the power to conduct seizures, this "does not mean that an inmate's property can be destroyed with impunity." *Id.* The Court suggested, however, that a prisoner's redress for such wrongful destruction lies with administrative grievance procedures or state remedies, not the fourth amendment. *Id.* at 530 n.9.

2932. *Id.* at 528 n.8; *see* *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986) (prison security interests concerning unauthorized use of narcotics justified policy requiring periodic urinalysis); *Davis v. Bucher*, 853 F.2d 718, 720-21 (9th Cir. 1988) (no violation of inmate's right to privacy when officer removed nude photos of inmate's wife from inmate's possessions, displayed them to at least two other inmates, and subsequently made derogatory remarks about photos); *Rodriguez-Mora v. Baker*, 792 F.2d 1524, 1526 (11th Cir. 1986) (*per curiam*) (seizure of prisoner's ring during routine inventory search does not implicate fourth amendment rights).

2933. *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979) (court sensitive to degree to which such searches invade personal privacy of inmates and may prove abusive).

of the invasion suffered by the prisoner.²⁹³⁴

Retained Rights Related to Living Conditions, Disciplinary Treatment, and Medical Care. The eighth amendment protects prisoners against cruel and unusual punishment during confinement.²⁹³⁵ Cruel and unusual punishment involves “the unnecessary and wanton infliction of pain,”²⁹³⁶ but the Supreme Court has stated that harsh conditions and rough disciplinary treatment are part of the price that convicted individuals must pay for their offenses against society.²⁹³⁷ Therefore, the actions of prison officials will not constitute cruel and unusual punishment if they further legitimate penal interests.²⁹³⁸

2934. *Id.* at 559 (“courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted”); compare *Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (strip search policy requiring in-cell visual body cavity search each time administrative segregation inmate enters or leaves cell justified because many administrative segregation inmates violent or potential victims of violence); *Bruscino v. Carlson*, 854 F.2d 162, 164-65 (7th Cir. 1988) (prison policy of subjecting inmates returning to cells to rectal searches not unconstitutional when body cavity searches continued to turn up “astounding quantity” of contraband, including knives and hacksaw blades, and statistical evidence suggested that amount of violence at prison had declined since institution of policy), *cert. denied*, 109 S. Ct. 3193 (1989); *Franklin v. Lockhart*, 883 F.2d 654, 656 (8th Cir. 1989) (policy of visual body cavity strip searches of inmates on punitive status, in administrative segregation, and in need of protection, held reasonable because of security concerns) and *Rickman v. Avani*, 854 F.2d 327, 328 (9th Cir. 1988) (maintaining prison safety and preventing introduction of contraband into prison justify visual strip and body cavity searches of administrative segregation inmates when entering or leaving their cells) with *Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir.) (transsexual inmate’s allegations of strip searches before guards and other inmates for purpose of “calculated harassment unrelated to prison needs” stated claim of eighth amendment violation), *cert. denied*, 484 U.S. 935 (1987) and *Tribble v. Gardner*, 860 F.2d 321, 325-26 (9th Cir.) (digital rectal searches conducted for punitive purposes violated prisoner’s constitutional rights), *cert. denied*, 490 U.S. 1075 (1989).

2935. U.S. CONST. amend. VIII. The eighth amendment is also the appropriate standard for reviewing the conditions of pretrial detainees. For further discussion, see *Rights Retained by Pretrial Detainees* in this part.

2936. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); cf. *Ivey v. Wilson*, 832 F.2d 950, 954-56 (6th Cir. 1987) (jury instruction that verbal abuse, harassment, or arbitrariness in dealing with inmates or their property amounts to cruel and unusual punishment “grossly overinclusive”).

2937. *Whitley v. Albers*, 475 U.S. 312, 319 (1986); see *Battle v. Anderson*, 788 F.2d 1421, 1426-27 (10th Cir. 1986) (courts must remember that conditions to be evaluated involve “large, confined population of convicted felons, not a nursery school”); cf. *Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir.) (dictum) (exposure to environmental tobacco smoke not cruel and unusual punishment because eighth amendment does not protect against conditions causing mere discomfort or inconvenience), *cert. denied*, 110 S. Ct. 417 (1989).

2938. *Rhodes*, 452 U.S. at 346-47; compare *Pressly v. Gregory*, 831 F.2d 514, 517-18 (4th Cir. 1987) (coercive force used against prisoner resisting efforts to handcuff him not constitutional violation, especially when medical examination conducted next day revealed no evidence of injury); *Martin v. Tyson*, 845 F.2d 1451, 1456 (7th Cir.) (per curiam) (refusing to permit inmate to exercise outdoors did not constitute cruel and unusual punishment when inmate faced criminal charges for prior escape and therefore posed security risk, no exercise facilities were located outside, and inmate had enough room for exercise inside own cell), *cert. denied*, 488 U.S. 863 (1988); *Knight v. Armontrout*, 878 F.2d 1093, 1095-96 (8th Cir. 1989) (no eighth amendment violation when inmates were

Living conditions inside prisons must not fall below a constitutional minimum. Prison officials must provide inmates with adequate food and safe, sanitary shelter.²⁹³⁹ Prison overcrowding may rise to the level of cruel and unusual punishment.²⁹⁴⁰ In *Rhodes v. Chapman*,²⁹⁴¹ the Supreme Court rejected the use of mechanical rules for determining whether overcrowding vio-

in segregation for 13 days longer than 10-day disciplinary time, because excess time due to lack of beds and not disciplinary); *Michenfelder v. Sumner*, 860 F.2d 328, 336 (9th Cir. 1988) (use of "taser gun" to force inmate to submit to legitimate strip search does not constitute cruel and unusual punishment); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam) (transfer of prisoner who had murdered another inmate to maximum security unit segregated from prison's general population and allowance of only one hour of outdoor exercise per week did not violate eighth amendment rights) and *Brown v. Smith*, 813 F.2d 1187, 1189-90 (11th Cir. 1987) (per curiam) (prison guard's use of riot stick against prisoner's neck so that head pinned against wall, in response to prisoner's refusal to return to cell, not cruel and unusual punishment, because use of force necessary to get prisoner into cell and resulting injury minimal) with *Jackson v. Cain*, 864 F.2d 1235, 1247 (5th Cir. 1989) (inmate stated eighth amendment claim when material issue existed as to whether prison officials knowingly assigned him to work detail that would aggravate serious medical ailment); *Kent v. Johnson*, 821 F.2d 1220, 1227-28 (6th Cir. 1987) (allegations that female guards repeatedly watched prisoner in states of undress without legitimate penological interest stated eighth amendment claim); *Lewis v. Lane*, 816 F.2d 1165, 1171 (7th Cir. 1987) (prisoner's allegation that guards would regularly bang on bars to harass inmates stated claim for constitutional deprivation, even though prison officials claimed procedure necessary to test strength of bars, because eighth amendment implicated if officials use otherwise legitimate security measure in manner designed to harass prisoners) and *Fruit v. Norris*, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (forcing inmates to work in wet-well portion of prison's sewage lift-pump station without protective clothing and equipment violated inmates' eighth amendment rights).

2939. Compare *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (allegation that prisoner exposed to sub-freezing temperatures for three months in fall and winter because of large empty windows in cellblock stated claim of cruel and unusual punishment); *Beck v. Lynaugh*, 842 F.2d 759, 760-61 (5th Cir. 1988) (allegations that from November through April prison authorities failed to replace broken windows in segregation unit, rain water collected on floor in puddles, and no blankets or coats given to prisoners to cope with sub-freezing temperatures stated claim of cruel and unusual punishment); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (allegations that prisoner placed in segregation unit for three days without running water and in which feces smeared on walls sufficient to state claim of cruel and unusual punishment) and *Howard v. Adkinson*, 887 F.2d 134, 136-37 (8th Cir. 1989) (eighth amendment violated where inmate placed in cell covered with human waste and denied cleaning supplies and laundry service for two-year period) with *Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir.) (dictum) (no eighth amendment violation when inmate claimed exposure to environmental tobacco smoke constituted health threat), *cert. denied*, 110 S. Ct. 417 (1989); *Wilson v. Seiter*, 893 F.2d 861, 865 (6th Cir.) (claims of exposure to temperatures as high as 95 degrees, housing mentally ill inmates with other inmates, and double bunking insufficient to establish eighth amendment violation), *cert. granted*, 111 S. Ct. 41 (1990) (No. 89-7376); *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990) (no eighth amendment violation when noise and fumes caused by remodeling of prison alleged to give rise to inmate's migraine headaches) and *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) (allegations of slippery floors and dried beans served for meals did not state claim of cruel and unusual punishment).

2940. Compare *Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981) (double ceiling at prison housing 38% more inmates than its design capacity not cruel and unusual punishment) with *Hutto v. Finney*, 437 U.S. 678, 682, 687 (1978) (confinement of an average of four, and sometimes as many as 10 or 11 prisoners in 8-by-10 foot cell for more than 30 days in punitive isolation constituted cruel and unusual punishment).

2941. 452 U.S. 337 (1981).

lates the eighth amendment.²⁹⁴² Instead, courts must examine the totality of the conditions under which inmates live.²⁹⁴³ Double celling, by itself, does not make prison conditions cruel or unusual.²⁹⁴⁴

The eighth amendment also places certain affirmative duties on prison officials. Failure to provide adequate medical care amounting to a "deliberate indifference" to prisoners' needs violates the eighth amendment.²⁹⁴⁵ Both failure to meet an adequate standard of care²⁹⁴⁶ and failure to provide ade-

2942. *Id.* at 346-47 (no static test can determine whether conditions of confinement constitute cruel and unusual punishment).

2943. *Id.* at 347 (prison conditions, "alone or in combination, may deprive inmates of minimal civilized measure of life's necessities"); compare *Tillery v. Owens*, 907 F.2d 418, 427 (3d Cir. 1990) (double celling constituted eighth amendment violation when record indicated almost every element of prison plant and provision of services fell below constitutional minimum) with *Hassine v. Jeffies*, 846 F.2d 169, 172-75 (3d Cir. 1988) (no constitutional violation when prison provided basic necessities, although prison population exceeded design capacity by 25%, prisoners subjected to double bunking for indeterminate duration in cells designed for single occupancy, close proximity of inmates caused increase in rapes and other violent assaults, growth in prison population not countered by increase in staff, and persistent dampness caused by leaking roof and poorly ventilated cell created health risk); *Wilson v. Seiter*, 893 F.2d 861, 865 (6th Cir. 1990) (double bunked inmates having only 50 square feet of living space not exposed to cruel and unusual punishment when inmates had access to television, lounge, gymnasium, yard, weight room, billiards table and library), *cert. granted*, 111 S. Ct. 41 (1990) (No. 89-7376); *Hamm v. DeKalb County*, 774 F.2d 1567, 1575-76 (11th Cir. 1985) (totality of conditions at prison, including overcrowding and unsanitary food, did not amount to constitutional violation), *cert. denied*, 475 U.S. 1096 (1986) and *Inmates of Occoquan v. Barry*, 844 F.2d 828, 839 (D.C. Cir. 1988) (if food, shelter, health care and personal security provided, eighth amendment satisfied).

2944. *Rhodes v. Chapman*, 452 U.S. at 347-50; see *Wilson v. Seiter*, 893 F.2d 861, 865 (6th Cir. 1990) (double bunked inmates having only 50 square feet of living space not exposed to cruel and unusual punishment where inmates had access to television, lounge, gymnasium, yard, weight room, billiards table and library), *cert. granted*, 111 S. Ct. 41 (1990) (No. 89-7376); *French v. Owens*, 777 F.2d 1250, 1253 (7th Cir. 1985) (practice of double celling not per se unconstitutional), *cert. denied*, 479 U.S. 817 (1986); *Cody v. Hillard*, 830 F.2d 912, 916 (8th Cir. 1987) (en banc) (double celling did not violate constitution), *cert. denied*, 485 U.S. 906 (1988); cf. *Akao v. Shimoda*, 832 F.2d 119, 120 (9th Cir. 1987) (per curiam) (while overcrowding in and of itself not constitutional violation, eighth amendment violated when overcrowding "engenders violence, tension, and psychiatric problems"), *cert. denied*, 485 U.S. 993 (1988).

2945. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); see *Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct" prohibited by eighth amendment).

2946. Compare *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (sufficient evidence for jury to find failure to transfer epileptic prisoner to hospital was deliberate indifference and constituted eighth amendment violation); *Hathaway v. Coughlin*, 841 F.2d 48, 50-51 (2d Cir. 1988) (allegation that prison officials took two years to arrange prisoner's surgery for broken hip pins sufficient to state claim of deliberate indifference to prisoner's medical needs); *White v. Napoleon*, 897 F.2d 103, 110-11 (3d Cir. 1990) (allegation that prison physician refused to prescribe medication previously prescribed by inmate's physician under express "no substitution" order sufficient to state claim of deliberate indifference); *Miltier v. Beorn*, 896 F.2d 848, 852-53 (4th Cir. 1990) (evidence sufficient to support inference of deliberate indifference where three doctors failed to act on inmate's complaints of chest pain, blackouts, and shortness of breath, and inmate later died of heart attack); *Jackson v. Cain*, 864 F.2d 1235, 1247 (5th Cir. 1989) (eighth amendment claim sufficiently stated when material issue existed as to whether prison officials knowingly assigned inmate to work detail

quate medical facilities²⁹⁴⁷ may rise to the level of "deliberate indifference" to a prisoner's medical needs. In addition, failure to protect a prisoner from fellow inmates may constitute cruel and unusual punishment.²⁹⁴⁸

that would aggravate serious medical condition); *Kelly v. McGinnis*, 899 F.2d 612, 617 (7th Cir. 1990) (allegations that prisoner's requests to see doctor concerning foot problems repeatedly denied and ineffective treatment given for three years sufficient to state claim of deliberate indifference); *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (nine-year delay since original recommendation of surgery on forearm injured in prison evidence of deliberate indifference); *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (survivors of prisoner stated claim of deliberate indifference where doctors and nurses knew of prisoner's head injury, but disregarded evidence of complications and prescribed sedatives when inadvisable) *and* *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (eighth amendment violation when guard saw prisoner collapse, and physician's assistant observed pain and dragging of leg, ignored repeated indications of worsening condition, and refused to conduct x-ray, necessitating replacement of hip joint) *with* *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (no eighth amendment violation when prisoner with stomach ulcer assigned to work detail which may have aggravated condition because prison officials did not knowingly assign prisoner to detail they knew would worsen condition); *Taylor v. Turner*, 884 F.2d 1088, 1090 (8th Cir. 1989) (no deliberate indifference when prisoner injured by another inmate examined by six physicians, received surgery for correction of vision, and underwent psychological and educational testing); *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (failure of prison officials to provide prisoner's medical records to transferee prison, causing confiscation of prisoner's sling, further injury, and delay in treatment did not rise to level of deliberate indifference) *and* *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (medical decision not to administer estrogen to transsexual inmate, because of controversial nature of treatment and disagreement among medical staff, not deliberate indifference to inmate's serious medical needs).

2947. *Compare* *LaFaut v. Smith*, 834 F.2d 389, 392-94 (4th Cir. 1987) (prison officials' failure to provide inmate with handicap bar near toilet in paraplegic prisoner's cell or in carpentry shop where prisoner worked, with adequate therapy after contracting kidney infection and suffering broken leg, and with adequate rehabilitation therapy constituted deliberate indifference to serious medical needs) *with* *Jackson v. Fair*, 846 F.2d 811, 817-18 (1st Cir. 1988) (no claim of deliberate indifference to serious medical needs when prisoner transferred from high security psychiatric hospital to general prison population of another institution, because treatment at new facility was adequate and prisoner does not have right to treatment of choice); *Donald v. Wilson*, 847 F.2d 1191, 1194 (6th Cir. 1988) (no claim of deliberate indifference to serious medical needs when prisoner's prosthesis temporarily confiscated because prosthesis not medically necessary, prisoner given crutches, and prisoner had used prosthesis at another prison to carry contraband and as weapon) *and* *Murphy v. Lane*, 833 F.2d 106, 107-08 (7th Cir. 1987) (*per curiam*) (no claim of deliberate indifference to serious medical needs when suicidal prisoner received adequate psychiatric treatment, had prompt medical attention following suicide attempt, placed in "crisis care watch" upon arrival, and placed in segregation pending transfer to facility more properly staffed to care for his psychiatric needs).

2948. *Compare* *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558-61 (1st Cir.) (placement of psychologically disturbed prisoner into general population where conditions chaotic and prison under federal court decree requiring segregation of severely mentally ill prisoners constituted deliberate indifference to inmates' health and safety when prisoner subsequently killed and dismembered), *cert. denied*, 488 U.S. 823 (1988); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 29-30 (2d Cir. 1988) (prisoner who had been attacked and seriously injured by other inmate after prisoner had obtained order sequestering inmate stated claim of deliberate indifference); *Frett v. Virgin Islands*, 839 F.2d 968, 978-79 (3d Cir. 1988) (guard's failure to ensure that inmate placed in lockdown following assault on prisoner, which enabled inmate to return within 10 minutes and attack prisoner again, stabbing him five times, constituted reckless disregard for prisoner's rights when attacking inmate known to be dangerous and involved in numerous previous attacks on guards and inmates); *Pressley v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987) (allegations that officials

The use of force by prison officials may constitute cruel and unusual punishment. Force amounting to the wanton and unnecessary infliction of pain is unconstitutional.²⁹⁴⁹ In the context of quelling prison disturbances, how-

ignored prisoner's request to be separated from cellmates following previous altercation and that he subsequently was assaulted by cellmates stated claim for deliberate indifference to specific known risk of harm); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1226 (5th Cir. 1986) (level of violence and sexual assault constituted cruel and unusual punishment when over 1200 acts of violence were reported every year in institution with total capacity of 4000 inmates, and evidence indicated reported violence might have been only "tip of the iceberg"); *Santiago v. Lane*, 894 F.2d 218, 222-23 (7th Cir. 1990) (allegation that prison officials failed to sufficiently notify transferee prison of inmate's special security needs sufficient to state claim of deliberate indifference to known risk); *Thomas v. Booker*, 784 F.2d 299, 306 (8th Cir.) (eighth amendment violated when prison guard knew of fight between inmates and did not intercede to prevent it), *cert. denied*, 476 U.S. 1117 (1986) and *Morgan v. District of Columbia*, 824 F.2d 1049, 1058-61 (D.C. Cir. 1987) (allegations that prison officials knew inmate, a convicted murderer with history of psychological problems and physical violence, posed serious danger to fellow prisoners and yet allowed him to remain in open population, even after uncovering his plan to kill another inmate, resulting in inmate's attacking and injuring another prisoner, sufficient to state claim of deliberate indifference) with *Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (no eighth amendment violation when prison officials failed to protect prisoner from assault, resulting in broken cheekbone and loss of eye, because complaint did not sufficiently allege deliberate indifference to specific known risk of harm); *Johnston v. Lucas*, 786 F.2d 1254, 1260 (5th Cir. 1986) (no eighth amendment violation when prison officials, without conscious indifference, allowed prisoner to be jailed in same unit with inmate with known animosity to prisoner, which resulted in stabbing incident); *Jones v. Hamelman*, 869 F.2d 1023, 1024-26 (7th Cir. 1989) (case properly dismissed when inmate claimed he had requested not to be released from his cell, was released, and was assaulted by inmate with ice pick, because inmate could not prove request, officials denied oral or written notice, and magistrate found that security procedures were reasonably adequate); *Bailey v. Wood*, 909 F.2d 1197, 1200 (8th Cir. 1990) (warden not deliberately indifferent to inmate's safety when he transferred threatening inmate to complex at other end of prison, but failed to anticipate guard would leave post resulting in stabbing); *Blankenship v. Meachum*, 840 F.2d 741, 742-43 (10th Cir. 1988) (*per curiam*) (no constitutional violation when protective custody prisoner transferred to another facility, placed in general population, and subsequently attacked by inmate, because prisoner alleged no more than inadvertence or good faith error and did not allege that prison officials acted in wanton or obdurate manner) and *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir.) (*per curiam*) (no eighth amendment violation when inmate, who indicated "racial problem" in cell, returned to cell voluntarily and was later attacked), *cert. denied*, 110 S. Ct. 2624 (1990).

2949. *Ingraham v. Wight*, 430 U.S. 651, 670 (1977) ("After incarceration, only the 'unnecessary and wanton infliction of pain' constitutes cruel and unusual punishment forbidden by the Eighth Amendment"); compare *Miller v. Leathers*, 913 F.2d 1085, 1088-89 (4th Cir. 1989) (*en banc*) (inmate stated sufficient claim of excessive force to escape summary judgment where guard removed prisoner from cell outside supervision of higher authority and struck him three times on arms and wrists after prisoner refused to proceed through obstructed cellblock exit and provoked guard with racial taunts and sexual insults about guard's mother); *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986) (excessive force used by prison guards to remove prisoner from cell violated prisoner's civil rights); *Franklin v. Aycock*, 795 F.2d 1253, 1258-59 (6th Cir. 1986) (beating and shackling prisoner to bed during disturbance in administrative segregation unit violated eighth amendment); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (inmates' eighth amendment rights violated when guards intentionally sprayed them with high-powered fire hose while extinguishing fires started by inmates) and *Gaut v. Sunn*, 810 F.2d 923, 924-25 (9th Cir. 1987) (*per curiam*) (prisoner's allegations that he was severely beaten, kicked, choked, and thrown against wall by several guards during prison shakedown and beaten again while handcuffed in holding unit, stated claim of deprivation of constitutional rights) with *Henry v. Perry*, 866 F.2d 657, 659 (3d Cir. 1989) (guard who

ever, prison officials may use the force they believe in good faith to be necessary to maintain or restore control of the prison, provided that it is not applied maliciously or sadistically for the purpose of causing harm.²⁹⁵⁰ Factors to be considered in determining whether force was applied in good faith include the need for the application of force, the relationship between the need and the amount of force used and the extent of the injury inflicted, as well as the extent of the threat to the safety of the prison staff and the other inmates, as reasonably perceived by the responsible official.²⁹⁵¹ The use of force does not amount to cruel and unusual punishment simply because it appears, in retrospect, that the degree of force authorized or applied was unreasonable or unnecessary.²⁹⁵² The judgment of prison officials as to the policies and actions needed to preserve or restore a prison's internal order is given wide-ranging deference by courts.²⁹⁵³

Retained Rights to Procedural Due Process. The fifth and fourteenth amendments prohibit the government from depriving persons of life, liberty or property without due process of law.²⁹⁵⁴ The threshold question in any due process case is whether a protected liberty or property interest is involved.²⁹⁵⁵ Liberty interests can be created by the Constitution,²⁹⁵⁶ a court

used deadly force to halt escape of prisoner convicted of crime involving serious bodily harm, did not violate prisoner's eighth amendment rights); *Huguet v. Barnett*, 900 F.2d 838, 840-41 (5th Cir. 1990) (no claim of excessive force where leg irons applied to recalcitrant prisoner; prisoner must prove significant injury, resulting directly from use of force clearly excessive to need, objectively unreasonable, and constituting unnecessary and wanton infliction of pain) and *Michenfelder v. Sumner*, 860 F.2d 328, 336 (9th Cir. 1988) (use of "taser gun" to force compliance with orders does not constitute cruel and unusual punishment). A prisoner must proffer evidence of significant injuries to establish a claim of excessive force. See *Wise v. Carlson*, 902 F.2d 417, 417-18 (5th Cir. 1990) (per curiam) (prisoner who suffered only superficial injuries failed to state claim of unlawful use of excessive force by guards); *Bennett v. Parker*, 898 F.2d 1530, 1533-34 (11th Cir. 1990) (allegation that officers pushed inmate against bars and struck him with nightstick on side of head failed to state claim of excessive force absent physical evidence or medical records indicating severe injuries), *cert. denied*, 111 S. Ct. 1003 (1991).

2950. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (no constitutional violation when prisoner shot in leg while in apparent pursuit of correctional officer during quelling of prison riot).

2951. *Id.*

2952. *Id.* at 319.

2953. *Id.* at 321-22; see *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981) ("prison's internal security is peculiarly a matter normally left to the discretion of prison administrators").

2954. U.S. CONST. amends. V, XIV. The due process clauses are designed to protect the individual against arbitrary government action. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

2955. *Kentucky Dept. of Corrections v. Thompson*, 109 S. Ct. 1904, 1908 (1989); *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976). The due process clause is an independent basis for protection of a liberty or property interest only if the "conditions or degree of confinement" are not within the sentence imposed upon the inmate. *Thompson*, 109 S. Ct. at 1908-09.

2956. Compare *Washington v. Harper*, 110 S. Ct. 1028, 1036 (1990) (liberty interest in avoiding unwanted administration of antipsychotic drugs); *Kentucky Dept. of Corrections v. Thompson*, 109 S. Ct. 1904, 1911 (1989) (Kennedy, J., concurring) (suggesting due process implication in prison

order,²⁹⁵⁷ a statute,²⁹⁵⁸ a regulation,²⁹⁵⁹ or a standard practice, policy, or

regulation completely prohibiting visitation); *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (liberty interest in not being transferred to mental hospital); *Domegan v. Fair*, 859 F.2d 1059, 1063 (1st Cir. 1988) (liberty interest implicated when conditions imposed in non-emergency situations outside bounds of sentence, even though temporary in nature); *Chambers v. Ingram*, 858 F.2d 351, 359-60 (7th Cir. 1988) (liberty interest in ability to refuse ingestion of psychotropic drugs; however, interest may give way in medical emergency) and *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (liberty interest in freedom from terror of instant and unexpected death) with *Kentucky Dept. of Corrections v. Thompson*, 109 S. Ct. 1904, 1910-1911 & n.4 (1989) (no liberty interest in prisoner's access to particular visitor); *Montayne v. Haymes*, 427 U.S. 236, 242-43 (1976) (no liberty interest in freedom from intrastate transfer to different facility); *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976) (same); *Matiyn v. Henderson*, 841 F.2d 31, 34 (2d Cir.) (no liberty interest in freedom from transfer to another prison), *cert. denied*, 487 U.S. 1220 (1988); *James v. Quinlan*, 866 F.2d 627, 630 (3d Cir.) (no liberty interest in job assignment), *cert. denied*, 110 S. Ct. 197 (1989); *Moody v. Baker*, 857 F.2d 256, 257-58 (5th Cir.) (no liberty or property interest in classification as disabled), *cert. denied*, 488 U.S. 985 (1988); *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir.) (no liberty interest in freedom from prolonged confinement in administrative segregation), *cert. denied*, 484 U.S. 935 (1987) and *Tyler v. Black*, 811 F.2d 424, 427 (8th Cir. 1987) (no liberty interest in remaining in general prison population), *vacated in part*, 865 F.2d 181 (8th Cir.) (en banc), *cert. denied*, 490 U.S. 1027 (1989).

2957. See *Chitwood v. Dowd*, 889 F.2d 781, 786 (8th Cir. 1989) (trial court discretion to sentence defendant created liberty interest in expectation that liberty lost only to extent determined by court), *cert. denied*, 110 S. Ct. 2219 (1990).

2958. Compare *Board of Pardons v. Allen*, 482 U.S. 369, 372-80 (1987) (statute mandating that parole board release prisoner, subject to certain restrictions, created liberty interest in parole release); *Vitek v. Jones*, 445 U.S. 480, 487-90 (1980) (statute specifying preconditions for prison transfer to mental institution created liberty interest in freedom from transfer); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7-11 (1979) (statute requiring parole in absence of findings in accordance with designated criteria created liberty interest in parole); *Domegan v. Fair*, 859 F.2d 1059, 1064 (1st Cir. 1988) (statute creating absolute right to full and regular meals, light, ventilation, and sanitation facilities created liberty interest); *Bonner v. Lewis*, 857 F.2d 559, 561-65 (9th Cir. 1988) (statute granting deaf mute sensory aids created liberty interest, but no liberty interest in "qualified interpreters") and *Barfield v. Brierton*, 883 F.2d 923, 935-37 (11th Cir. 1989) (statutes establishing segregated detention facilities for youthful offenders created liberty interest) with *Dixon v. Fox*, 893 F.2d 1556, 1557 (8th Cir.) (no liberty interest in special diet created by statute prohibiting food restriction from being used as disciplinary measure), *cert. denied*, 111 S. Ct. 262 (1990); cf. *Gillihan v. Shillinger*, 872 F.2d 935, 938-39 (10th Cir. 1989) (per curiam) (statute guaranteeing return of unused money created property interest in funds); *Moss v. Clark*, 886 F.2d 686, 692 (4th Cir. 1989) (no liberty interest created by statute providing good time credit at selected facilities because assignment to facility discretionary).

2959. Compare *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (state regulation promulgating mandatory procedures for administrative segregation created liberty interest in freedom from administrative detention); *Lanier v. Fair*, 876 F.2d 243, 248 (1st Cir. 1989) (halfway house operation manual created liberty interest in remaining at house); *Russell v. Coughlin*, 910 F.2d 75, 77 (2d Cir. 1990) (regulation mandating disciplinary hearing within seven days of confinement created liberty interest); *Todaro v. Boomer*, 872 F.2d 43, 48 (3d Cir. 1989) (regulation limiting confinement to 24 hours created liberty interest in freedom from confinement for longer period); *Dzana v. Foti*, 829 F.2d 558, 560-61 (5th Cir. 1987) (regulation mandating sanctions only for certain offenses created liberty interest in remaining free from disciplinary segregation unless offense committed); *Edwards v. Lockhart*, 908 F.2d 299, 301-03 (8th Cir. 1990) (regulation governing work release program outside correctional facility like parole and thus created liberty interest) and *McQueen v. Tabah*, 839 F.2d 1525, 1528 (11th Cir. 1988) (regulations governing administrative segregation created liberty interest in remaining in general prison population) with *Kentucky Dept. of Corrections v.*

custom.²⁹⁶⁰

Whether a liberty interest is created will often depend on the amount of discretion afforded prison officials by a statute or regulation. In order to create a liberty interest, the statute or regulation must establish "substantive predicates" for the official's decision and must employ mandatory language governing the outcome.²⁹⁶¹ When either of these elements are missing, no liberty interest is created.²⁹⁶² The presence of procedural guidelines applica-

Thompson, 109 S. Ct. 1904, 1910-11 (1989) (regulation containing "substantive predicates" guiding exclusion of visitors from prison but lacking mandatory language did not create liberty interest in admittance of particular visitor); *Stephany v. Wagner*, 835 F.2d 497, 501-02 (3d Cir. 1987) (regulations specifying four occasions for administrative segregation but lacking mandatory language did not create liberty interest in freedom from administrative segregation), *cert. denied*, 487 U.S. 1207 (1988); *Colon v. Schneider*, 899 F.2d 660, 668-69 (7th Cir. 1990) (regulations prioritizing other actions over use of mace did not create liberty interest because mace use discretionary) and *Muhammad v. Carlson*, 845 F.2d 175, 178 (8th Cir. 1988) (no liberty interest in freedom from transfer to AIDS unit when no substantive limits placed on official discretion once medical evaluation made), *cert. denied*, 489 U.S. 1068 (1989); *cf. Toussaint v. McCarthy*, 801 F.2d 1080, 1092 (9th Cir. 1986) (repeal of state regulation controlling administrative segregation destroyed liberty interest in remaining in general population), *cert. denied*, 481 U.S. 1069 (1987).

2960. *Compare* *Washington v. Harper*, 110 S. Ct. 1028, 1033-34, 1036 (1990) (state correction center policy of involuntary administration of antipsychotic drugs only where inmate suffers from "mental disorder" that renders inmate "gravely disabled" or likely to cause "serious harm" and only with procedural protections including independent medical review and adversarial hearing created liberty interest); *Vitek v. Jones*, 445 U.S. 480, 489-90 (1980) (practice of transferring only prisoners suffering from mental disease or disorder to mental hospital created liberty interest in remaining free from transfer); *Clark v. Brewer*, 776 F.2d 226, 230-31 (8th Cir. 1985) (policy requiring periodic status review of inmates placed in "close management" created liberty interest) and *Bergen v. Spaulding*, 881 F.2d 719, 722 (9th Cir. 1989) (recommendation of superintendent in regard to parole date created liberty interest in date) with *Kentucky Dept. of Corrections v. Thompson*, 109 S. Ct. 1904, 1910-11 (1989) (procedures memorandum indicating policy to respect inmate visitation rights did not create interest in visitation with particular visitors because mandatory language lacking); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466-67 (1981) (state's past practice of commuting life sentences did not create protected liberty interest in commutation because pardons board given "unfettered discretion") and *Burgin v. Nix*, 899 F.2d 733, 734-35 (8th Cir. 1990) (policy specifying "sack" meals for incorrigible inmates did not create liberty interest in specific type of meal because prison officials maintained discretion over meals served).

2961. *Kentucky Dept. of Corrections v. Thompson*, 109 S. Ct. 1904, 1909-10 (1989); *see* *Bd. of Pardons v. Allen*, 482 U.S. 369, 377-80 (1987) (although parole release decision "necessarily subjective and predictive," statute stating Board "shall release" prisoner when substantive predicates met created liberty interest); *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (statute governing administrative segregation that established factual predicates for segregation and mandated certain procedures created liberty interest); *Lanier v. Fair*, 876 F.2d 243, 252-53 (1st Cir. 1989) (language in regulation limiting rescission of assigned reserve parole date created liberty interest in date); *Franco v. Moreland*, 805 F.2d 798, 800 (8th Cir. 1986) (county directive establishing substantive prerequisites before inmate could be placed in administrative segregation and defining length and condition of segregation created liberty interest); *Bergen v. Spaulding*, 881 F.2d 719, 721-22 (9th Cir. 1989) (state law giving superintendent control over entitlement to good time credits and Parole Board power over revocation created liberty interest in parole date); *McQueen v. Tabah*, 839 F.2d 1525, 1528 (11th Cir. 1988) (rules and regulations that contained mandatory language and substantive predicates governing administrative segregation created liberty interest).

2962. *Thompson*, 109 S. Ct. at 1910-11 (visitation regulations providing substantive predicates

ble to a decision is insufficient by itself to create a liberty interest.²⁹⁶³

Once an interest is classified as protected, a court must balance "the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the fourteenth amendment."²⁹⁶⁴ The nature of the procedural safeguards required depends on the relative weights accorded the private and governmental interests.²⁹⁶⁵ Thus, the Supreme Court has held

for exclusion of visitors, but lacking mandatory language compelling admittance or exclusion did not create liberty interest); *see* *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (prisoner transfer regulation did not create liberty interest when no standards governed decision and prison administrator free to accept or reject committee's recommendation); *Jackson v. Fair*, 846 F.2d 811, 816 (1st Cir. 1988) (no liberty interest in remaining in prison mental hospital because statute did not limit prison officials' discretion to discharge); *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987) (statute stating officials "may" provide jobs for prisoners did not create liberty interest); *Stephany v. Wagner*, 835 F.2d 497, 501-02 (3d Cir. 1987) (regulations specifying four occasions for administrative segregation but lacking mandatory language did not create liberty interest in freedom from administrative segregation), *cert. denied*, 487 U.S. 1207 (1988); *Paoli v. Lally*, 812 F.2d 1489, 1492-93 (4th Cir.) (statutes and regulations lacking mandatory language did not create liberty interest in remaining in minimum security facility), *cert. denied*, 484 U.S. 864 (1987); *Scales v. Mississippi State Parole Bd.*, 831 F.2d 565, 566 (5th Cir. 1987) (*per curiam*) (no liberty interest in parole because statute conferred absolute discretion on parole board); *Canterino v. Wilson*, 869 F.2d 948, 953 (6th Cir. 1989) (no right to work release, study release, or particular classification when officials given great discretion); *Russ v. Young*, 895 F.2d 1149, 1153 (7th Cir. 1990) (no liberty interest in remaining free from temporary lockup because regulation contained discretionary rather than mandatory language); *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir. 1990) (no liberty interest in improving inmate job class status where prison officials' discretion for classification not limited); *Francis v. Fox*, 838 F.2d 1147, 1149-50 (11th Cir. 1988) (no liberty interest in work release because statute framed in discretionary terms).

2963. *Hewitt*, 459 U.S. at 471; *Olim*, 461 U.S. at 250.

2964. *Washington v. Harper*, 110 S. Ct. 1028, 1041 (1990) (quoting *Hewitt*, 459 U.S. at 473); *Jackson v. Cain*, 864 F.2d 1235, 1251-52 (5th Cir. 1989) (prison's failure to follow own procedures not due process violation when action comports with constitutional minimums); *Brown v. Frey*, 889 F.2d 159, 166 & n.12 (8th Cir. 1989) (prison's failure to comply with statute requiring hearing within 72 hours of confinement not due process violation if hearing within reasonable time of segregation), *cert. denied*, 110 S. Ct. 1156 (1990).

2965. *Hewitt*, 459 U.S. at 473 (1983); *compare Lanier v. Fair*, 876 F.2d 243, 248-50 (1st Cir. 1989) (due process not violated when former halfway house resident afforded notice of charges, received post-transfer hearing justified by violent history, and notified of reasons why reserve parole date rescinded); *Bolden v. Alston*, 810 F.2d 353, 357 (2d Cir.) (due process not violated when administrative detainee, confined for five days pending disciplinary hearing, received less procedural protection than detainee in disciplinary confinement), *cert. denied*, 484 U.S. 896 (1987); *Moody v. Miller*, 864 F.2d 1178, 1179-81 (5th Cir. 1989) (due process not violated when inmate unable to attend hearing due to hospitalization); *McCullum v. Williford*, 793 F.2d 903, 908 (7th Cir. 1986) (due process not violated when cross-examination denied in maximum security prison disciplinary hearing, because witness found reliable, statement under oath, and witness' safety at stake); *Malek v. Camp*, 822 F.2d 812, 815 (8th Cir. 1987) (due process not violated during disciplinary hearing when calling of 13 witnesses denied, because prisoner's testimony and written statement of one witness sufficiently protected prisoner's interest); *Bonner v. Lewis*, 857 F.2d 559, 562-64 (9th Cir. 1988) (due process not violated when deaf mute with fourth grade reading level deprived of interpreter in order to communicate with disciplinary committee); *Ort v. White*, 813 F.2d 318, 326-27 (11th Cir. 1987) (due process not violated when inmate "punished" without hearing when guard

that the decision to administer antipsychotic drugs to a prisoner without his consent need not be made by a judge.²⁹⁶⁶ It has also held that an inmate's liberty interest in freedom from administrative detention²⁹⁶⁷ can be adequately protected by a nonadversarial review of the evidence as long as the prisoner receives some notice and an opportunity to present her views.²⁹⁶⁸ If

denied water to him outside prison walls after spontaneous disruption, because immediate action necessary to maintain discipline) *and* Crosby-Bey v. District of Columbia, 786 F.2d 1182, 1185 (D.C. Cir. 1986) (due process not violated when inmate moved from administrative to disciplinary segregation because minimal loss of liberty interest not enough to require full panoply of due process protections) *with* Sample v. Diecks, 885 F.2d 1099, 1115-16 (3d Cir. 1989) (due process violated because interest in avoiding wrongful detention outweighed administrative burden of having person hear inmate's claim that held beyond sentence).

2966. *Harper*, 110 S. Ct. at 1042. The decision to administer the drugs was made by a panel of medical experts after the prisoner received notice, an opportunity to be present at an adversary hearing, and an opportunity to present and cross-examine witnesses. *Id.*; *see* *Chambers v. Ingram*, 858 F.2d 351, 353, 359-60 (7th Cir. 1988) (inmate involuntarily placed in psychiatric ward and determined to have suicidal tendencies had liberty interest in ability to refuse psychotropic drugs, but interest yielded without procedural protections in medical emergency).

2967. Administrative segregation is used to protect a prisoner's safety, to break up groups of potentially disruptive inmates, or to confine a prisoner awaiting reclassification. *Hewitt*, 459 U.S. at 468 (1983) (distinguishing between administrative and disciplinary segregation); *cf.* *Todaro v. Bowman*, 872 F.2d 43, 47-49 (3d Cir. 1989) (administrative segregation that is extensive and imposed as punishment, or becomes punishment because of lack of privileges, can result in due process violation if punishment procedures not followed); *Abdul-Wadood v. Duckworth*, 860 F.2d 280, 285 (7th Cir. 1988) (confinement labelled administrative segregation can be disciplinary if restriction on inmate not same as on other inmates during emergency lockdown).

2968. *Hewitt*, 459 U.S. at 476. In *Hewitt*, an inmate was placed in administrative segregation pending completion of an investigation of his role in a prison riot. *Id.* at 463-64. The Court found the prisoner's liberty interest in remaining in the general prison population, which arose from state statutes and regulations, was sufficiently protected by his receipt of notice of the charges and an opportunity to present a statement. *Id.* at 470-72. It also concluded that any more elaborate procedures would not have assisted the determination of whether to place the individual in administrative segregation, because the decision was based largely on subjective criteria. *Id.* at 474; *see* *Abdul-Wadood v. Duckworth*, 860 F.2d 280, 283-84 (7th Cir. 1988) (inmate placed in detention as part of unit lockdown entitled to notice and opportunity to express view at classification hearing but no right to have lay advocate); *Rust v. Grammer*, 858 F.2d 411, 412-13 (8th Cir. 1988) (non-punitive administrative lockdown without formal charge or hearing did not violate due process despite restrictions on clothing, bedding, visitation, laundry, recreation, and meals). The *Hewitt* Court established some requirements for the proceedings: the decisionmaker must review the charges and the available evidence against the prisoner, 459 U.S. at 474, and the proceedings must take place within a reasonable time after an inmate's transfer. *Id.* at 476 n.8. Reasonableness turns on the relatively insubstantial private interests at stake and the traditionally broad discretion of prison officials. *Id.*; *see* *Russell v. Coughlin*, 910 F.2d 75, 78 (2d Cir. 1990) (10-day confinement of inmate without providing notice of charge or hearing violates "reasonable time" standard of *Hewitt*); *Abernathy v. Perry*, 869 F.2d 1146, 1147-48 (8th Cir. 1989) (placement of inmate in administrative segregation for 35 days without notice of charge violated due process); *Bostic v. Carlson*, 884 F.2d 1267, 1270, 1274 (9th Cir. 1989) (no due process violation where inmate had disciplinary hearing postponed twice because hearing held within reasonable time after administrative segregation). In addition, prison officials must engage in periodic review of the inmates transferred to administrative segregation. *Hewitt*, 459 U.S. at 477 n.9; *see* *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986) (purported justifications for continuing prison inmate's administrative confinement examined in perfunctory manner at monthly reviews denied inmate due process), *cert. denied*, 483 U.S. 1032

the governmental decision involves the involuntary transfer of a prisoner from a prison to a mental hospital, however, due process requires greater procedural safeguards, including an adversarial hearing.²⁹⁶⁹

Due process questions frequently arise when a prisoner is subject to disciplinary action. In *Wolff v. McDonnell*,²⁹⁷⁰ the Supreme Court held that certain minimum procedural safeguards must be provided if a disciplinary hearing could deprive a prisoner of good time credits or result in disciplinary segregation.²⁹⁷¹ The procedural requirements include at least 24 hour advance written notice of the claimed violation, an opportunity to be heard, the opportunity to call witnesses unless doing so would jeopardize prison security, and a written statement detailing evidence relied on and reasons for the disciplinary action.²⁹⁷² Due process requires that "some evidence" support the disciplinary board's decision.²⁹⁷³

(1987); *Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) (annual review of prisoner's status in administrative segregation did not adequately protect prisoner's liberty interest), *cert. denied*, 481 U.S. 1069 (1987).

2969. *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980). The prisoner in *Vitek* was transferred to a mental hospital after the prison psychiatrist determined the prisoner was suffering from a mental illness. *Id.* at 484. The Court found that the liberty interest in freedom from transfer to a mental hospital, created by statute and prison practice, required the procedural safeguards of notice and an adversary hearing. *Id.* at 489-90, 494-96. Although the state has a strong interest in segregating and treating mentally ill patients, the Court concluded that the prisoner's interest "in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment," when combined with the risk of error in the transfer determination, is "substantial enough to warrant the increased procedural safeguards." *Id.* at 495.

2970. 418 U.S. 539 (1974).

2971. *Id.* at 557-58; *see* *Bergen v. Spaulding*, 881 F.2d 719, 721-22 (9th Cir. 1989) (inmate deprived of full benefit from accumulated good time credits entitled to procedural due process protections).

2972. *Wolff*, 418 U.S. at 563-67; *compare* *Smith v. Maschner*, 899 F.2d 940, 946 (10th Cir. 1990) (no due process violation where prisoner provided with written transcript containing evidence supporting disciplinary action in lieu of written statement of evidence) *with* *Gittens v. LeFevre*, 891 F.2d 38, 40-41 (2d Cir. 1989) (administrative segregation regulations not allowing confined inmate opportunity to make statement until adjudication of disciplinary charge violated procedural due process).

The due process right to an opportunity to be heard does not include an absolute right to be present at the hearing. *Moody v. Miller*, 864 F.2d 1178, 1180-81 (5th Cir. 1989) (*per curiam*) (presence of counsel for inmate not required in absence of inmate). There is no requirement that prison officials reschedule a hearing when they know the inmate is in the hospital. *Id.* They also need not assure that an inmate will avail herself of her rights. *Id.*

An inmate's due process rights are violated if she is punished for conduct that is not proscribed by rules or policy. *Coffman v. Trickey*, 884 F.2d 1057, 1060 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1523 (1990). In *Coffman*, an inmate was sentenced to administrative detention for waving at a visitor through a security fence. *Id.* at 1058. The inmate was charged with "[k]nowingly failing to abide by any published institutional rule," but the charge did not specify which rule was violated. *Id.* at 1058 & n.1. The court held that the inmate had been deprived of liberty without due process. *Id.* at 1059-60.

2973. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). The Court reasoned that the standard would "help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens." *Id.* The "some evidence" standard was satisfied by eyewitness

Although prison officials must provide an explanation if they refuse to allow an inmate to call a witness at a disciplinary hearing, they may do so on the record during the hearing or in court if the denial is subsequently challenged.²⁹⁷⁴ The reasons for denying permission to present witnesses must be logically related to institutional safety or correctional goals.²⁹⁷⁵ Due process does not require prison officials to reveal an informant's identity to an inmate.²⁹⁷⁶ Nevertheless, the informant's testimony must show sufficient indicia of reliability.²⁹⁷⁷

testimony of a prison guard who testified he saw the defendants fleeing from an area where an inmate had just been assaulted. *Id.* at 456-57; *see* *Peranzo v. Coughlin*, 850 F.2d 125, 126 (2d Cir. 1988) (per curiam) (drug test that was 98% accurate sufficient evidence to warrant prison discipline); *Baker v. Lyles*, 904 F.2d 925, 932-33 (4th Cir. 1990) (hearsay statement that inmate in possession of escape tools combined with knowledge of inmate's prior escape sufficient evidence); *Viens v. Daniels*, 871 F.2d 1328, 1335-36 (7th Cir. 1989) (testimony of informant verified by polygraph test sufficient evidence, despite physician's testimony questioning reliability and unrepresented evidence in conflict with informant); *Rudd v. Sargent*, 866 F.2d 260, 262 (8th Cir. 1989) (per curiam) (report of official who did not witness incident, which included charges and evidence, sufficient evidence to support committee's conclusion, even though report would be inadmissible hearsay if trial); *Zimmerlee v. Keeney*, 831 F.2d 183, 186-87 (9th Cir. 1987) (per curiam) (unidentified informant's testimony sufficient evidence to satisfy due process when informant witnessed drug smuggling, previously supplied reliable information, passed polygraph examination, and testimony corroborated by disciplined inmate's testimony), *cert. denied*, 487 U.S. 1207 (1988); *cf.* *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987) (per curiam) (unverified statements elicited from confidential informant and two misread polygraph tests did not constitute "any" evidence to find inmate guilty of assault).

2974. *Ponte v. Real*, 471 U.S. 491, 497 (1985). The Court reasoned that the additional administrative burden created by requiring contemporaneous reasons would "detract from the ability to perform the principal mission of the institution." *Id.* at 498.

2975. *Id.* at 497; *compare* *Brooks v. Andolina*, 826 F.2d 1266, 1269 (3d Cir. 1987) (prison officials' refusal to permit inmate to call witnesses at disciplinary hearing violated due process when officials made no showing of hazard to safety or correctional goals) *with* *Malek v. Camp*, 822 F.2d 812, 815 (8th Cir. 1987) (officials could deny inmate's request to call 13 witnesses when written statement of one witness taken because allowing inmates to call witnesses "as a matter of course" would make disciplinary proceedings unmanageable) *and* *Bostic v. Carlson*, 884 F.2d 1267, 1271, 1273 (9th Cir. 1989) (number of witnesses may be limited if additional testimony would be repetitive).

2976. *See* *Wolff*, 418 U.S. at 567-69 (decision whether to allow inmate to confront and cross-examine inmate accusers left to "sound discretion" of prison officials). The Court noted that the possibility of prison disruption may be greatest when an accused is allowed to examine an informant because it creates a risk of reprisal. *Id.* at 568-69; *cf.* *Wells v. Israel*, 854 F.2d 995, 999 (7th Cir. 1988) (officials must consider inmate informant's safety when making decision relating to testimony or identity).

2977. *Wells v. Israel*, 854 F.2d 995, 998-99 (7th Cir. 1988) (disciplinary committee must ascertain reliability of inmate informer to assure "full and meaningful hearing" without jeopardizing prison security or informant safety; inmate not entitled to any minimum process in challenging reliability of confidential information); *see* *Freitas v. Auger*, 837 F.2d 806, 810-11 (8th Cir. 1988) (statements of two informants at disciplinary hearing had sufficient indicia of reliability when consistent with each other, contained some factual background, and against informants' penal interest); *Zimmerlee v. Keeney*, 831 F.2d 183, 187 (9th Cir. 1987) (per curiam) (testimony of unidentified inmate informant who was eyewitness to drug smuggling reliable enough to satisfy due process at disciplinary hearing when informant previously supplied reliable information and passed polygraph

If a disciplinary hearing could result in parole revocation, courts require greater procedural protections.²⁹⁷⁸ In addition to the minimal protections outlined in *Wolff*, parole revocation proceedings must provide a prisoner the opportunity to cross-examine witnesses²⁹⁷⁹ and, under some circumstances, to receive the assistance of counsel.²⁹⁸⁰

The due process clause may also be implicated when a prisoner suffers personal injury or a loss of property. Merely negligent conduct by officials toward prisoners or their property cannot give rise to a procedural due process claim even when no remedy exists under state law;²⁹⁸¹ instead, a prison official must act oppressively or abusively.²⁹⁸² Due process is not violated by

examination), *cert. denied*, 487 U.S. 1207 (1988); *cf.* *Hensley v. Wilson*, 850 F.2d 269, 276-77, 282-83 (6th Cir. 1988) (disciplinary committee must make independent determination of informant reliability rather than accept investigative officer's conclusions; due process required contemporaneous recording of evidence of informant reliability at disciplinary hearing).

2978. *Wolff*, 418 U.S. at 559-62; *see Green v. McCall*, 822 F.2d 284, 290-92 (2d Cir. 1987) (due process requires that inmate with parole date be allowed representation by counsel, opportunity to call and cross-examine witnesses, and *de novo* hearing into charges before release date changed); *cf. Lanier v. Fair*, 876 F.2d 243, 250 (1st Cir. 1989) (in determination of parole date, no due process violations when prisoner had written notice of charges, represented by law student, and able to address charges); *Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir. 1987) (in determination of parole date, no due process violation for prisoner who received written notice of hearing, was represented by paralegal, and submitted materials for board's consideration), *cert. denied*, 484 U.S. 1017 (1988).

2979. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (prisoner in parole revocation proceedings has right to confront and cross-examine witnesses, unless hearing officer specifically finds good cause for denying confrontation).

2980. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (right to counsel required by fundamental fairness in certain parole revocation proceedings); *cf. Damiano v. Florida Parole & Probation Comm'n*, 785 F.2d 929, 932 (11th Cir. 1986) (no right to counsel at hearings that determine rather than revoke parole).

2981. *See Daniels v. Williams*, 474 U.S. 327, 335-36 (1986) (due process not implicated when prisoner slipped on pillow left on stairway by negligent prison official); *Gill v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987) (requiring inmate to climb ladder to paint after complaints by inmate of dizziness and nausea negligent act by prison official but not violation of due process); *Simmons v. Poppell*, 837 F.2d 1243, 1244 (5th Cir. 1988) (*per curiam*) (failure to investigate adequately and locate radio removed from cell by another prison official negligent but not violation of due process); *Chambers v. Ingram*, 858 F.2d 351, 359-60 (7th Cir. 1988) (erroneously invoking medical emergency for patient and forcing ingestion of psychotropic drugs that resulted in headaches and seizures negligent but not violation of due process); *Abernathy v. Perry*, 869 F.2d 1146, 1148 (8th Cir. 1989) (failure to give notice of extension to inmate in administration segregation lack of due care but not violation of due process); *Hernandez v. Johnston*, 833 F.2d 1316, 1319 (9th Cir. 1987) (failure to provide adequate training or supervision of prison employees negligent but not violation of due process); *cf. Freedman v. City of Allentown, Pa.*, 853 F.2d 1111, 1113-14, 1116 (3d Cir. 1988) (failure of police to recognize "suicidal hesitation cuts" on pretrial detainee who committed suicide negligent but did not violate due process); *Ortega v. Rowe*, 796 F.2d 765, 768 (5th Cir. 1986) (although *Daniels* applies to pretrial detainees, due process not violated when state did not know of unsanitary conditions of jails), *cert. denied*, 481 U.S. 1013 (1987).

2982. *Daniels*, 474 U.S. at 331-32; *compare Colburn v. Upper Darby Twp.*, 838 F.2d 663, 669-70 (3d Cir. 1988) (allegation that custodial officials acted with reckless indifference stated due process claim when pretrial detainee, who was known by officials to have suicidal tendencies, committed suicide), *cert. denied*, 489 U.S. 1065 (1989) and *Klinge v. Eikenberry*, 849 F.2d 409, 413 (9th Cir.

unauthorized, intentional deprivations of property if state law provides an adequate post-deprivation remedy.²⁹⁸³

Retained Rights to Equal Treatment. Although prisoners do not forfeit all equal protection rights upon incarceration, practices that result in unequal treatment among prisoners are permissible if they bear a rational relation to a legitimate penal interest.²⁹⁸⁴ Strict scrutiny is inappropriate because prisoners are not a suspect class for equal protection purposes.²⁹⁸⁵ Separation by

1988) (failure of officials to protect inmate from stabbing by fellow inmate, allegedly on guard's instructions, after inmate warned of attack, more than negligence and stated due process claim) *with* *Edwards v. Gilbert*, 867 F.2d 1271, 1272, 1275-76 (11th Cir. 1989) (officials did not exhibit deliberate indifference in failing to prevent suicide when inmate had never threatened or attempted suicide).

Deliberate indifference by prison officials to a prisoner's serious injury or illness may also state a claim of cruel and unusual punishment in violation of the eighth amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). The eighth amendment's "reckless disregard" standard is discussed in *Retained Rights Related to Living Conditions, Disciplinary Treatment, and Medical Care* in this part.

2983. *Hudson v. Palmer*, 468 U.S. 517, 533, 536 (1984). In *Hudson*, a prisoner brought suit under § 1983 claiming that a prison guard had intentionally destroyed noncontraband property confiscated in a "shakedown" search of his prison cell. *Id.* at 520. The Court held that if a state does not provide a meaningful post-deprivation remedy for the loss occasioned by intentional official misconduct, the state will have deprived a prisoner of property in violation of the fourteenth amendment. *Id.* at 533.

Hudson only applies when the conduct is unauthorized. The post-deprivation hearing is appropriate because the state could not have otherwise prevented the deprivation. See *Gillihan v. Shillinger*, 872 F.2d 935, 937-40 (10th Cir. 1989) (per curiam) (inmate required to pay for return at his request to original prison deprived of property in funds). If the deprivation is a result of a state policy, the state has the power to prevent the deprivation and must provide a pre-deprivation hearing. *Id.*

2984. Compare *Dickerson v. Latessa*, 872 F.2d 1116, 1119-20 (1st Cir. 1989) ("gatekeeper" statute, giving one justice of state supreme court ability to approve or reject appeals of capital defendants, did not violate equal protection because rationally related to goals of giving highest court last word and preventing frivolous appeals); *Mikeska v. Collins*, 900 F.2d 833, 837 (3d Cir. 1990) (administrative segregation creating unequal privileges, exercise periods, and education programs did not violate equal protection because policy rationally related to problems created by inmate's refusal to work); *Moss v. Clark*, 886 F.2d 686, 689 (4th Cir. 1989) (awarding different good time credits to inmates based solely on situs of incarceration not violative of equal protection because rationally related to government interest in alleviating prison overcrowding and not in violation of fundamental right nor involving suspect class) and *Kalka v. Vasquez*, 867 F.2d 546, 547 (9th Cir. 1989) (awarding full work credits to inmates who work while half credit per day to inmates who want but are not given work rationally related to penal objective of rehabilitation because actual workers better able to integrate into society) *with* *Fullan v. Commissioner of Corrections*, 891 F.2d 1007, 1011-12 (2d Cir. 1989) (statute denying free transcript to indigent inmate whose family and friends hired his counsel violated equal protection clause because state not entitled to treat family's funds as those of inmate), *cert. denied*, 110 S. Ct. 3229 (1990); *Williams v. Lane*, 851 F.2d 867, 881-82 (7th Cir. 1988) (provisions for programming and living conditions for protective custody inmates violated equal protection because unequal in comparison with general population and not justified by security concerns), *cert. denied*, 488 U.S. 1047 (1989) and *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir. 1990) (dictum) (disciplinary actions falsely filed against disabled inmates to prevent advancement into preferential classification violated equal protection).

2985. See *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir. 1989) (capital defendants not

race does not always constitute an equal protection violation,²⁹⁸⁶ nor do policies that involve unequal treatment of prisoners based on religious preference,²⁹⁸⁷ gender,²⁹⁸⁸ or physical handicaps.²⁹⁸⁹ Furthermore, prisoners may

suspect class for equal protection purposes); *Zipkin v. Heckler*, 790 F.2d 16, 18 (2d Cir. 1986) (incarcerated persons not suspect class for equal protection purposes); *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir.) (capital defendants not suspect class for equal protection purposes), *cert. denied*, 484 U.S. 935 (1987); *Thornton v. Hunt*, 852 F.2d 526, 527 (11th Cir. 1988) (per curiam) (statute that denies good time accumulation for prisoners sentenced to more than 10 years not violation of equal protection because no singling out of suspect class or impinging on fundamental right).

2986. See *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) ("prison authorities have the right . . . in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order"). Although the Court has not dealt with this issue since *Lee*, it has, in dictum, cited *Lee* for the proposition set forth in Black's concurrence. See *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

Unlike Title VII actions, claims of equal protection violations require allegations of intentional discrimination. See *David K. v. Lane*, 839 F.2d 1265, 1273 (7th Cir. 1988) (prison policy of limiting gang activity while permitting gang membership, which had disproportionate impact on white inmates, did not violate equal protection absent showing of intentional discriminatory motive); *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987) (allegation that facially neutral prison employment practices have discriminatory impact on black inmates did not state equal protection claim when no allegation of intentional discrimination).

2987. Compare *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (although prisoners guaranteed reasonable opportunity to exercise religion under free exercise clause, every religious sect need not be granted identical personnel or facilities); *Benjamin v. Coughlin*, 905 F.2d 571, 579 (2d Cir. 1990) (prison policy that granted Rastafarians limited right to wear crowns but granted Jews and Muslims unlimited right to wear religious headgear did not violate equal protection because differential treatment due to greater security concern with crown's larger size); *Thompson v. Kentucky*, 712 F.2d 1078, 1082 (6th Cir. 1983) (policy denying Muslim prisoners equal time with Christian prisoners in prison chapel did not violate equal protection because justified by administrative convenience); *Butler-Bey v. Frey*, 811 F.2d 449, 454 (8th Cir. 1987) (withholding of portion of funds allocated to members of Moorish Science Temple due to schism in group not equal protection violation because reasonable opportunity to practice faith still available) and *Allen v. Toombs*, 827 F.2d 563, 568-69 (9th Cir. 1987) (weekly access to Pipe Bearer for Native Americans in disciplinary segregation not violation of equal protection, even though Catholic and Protestant inmates had immediate access to spiritual guidance) with *Udey v. Kastner*, 805 F.2d 1218, 1220 n.2 (5th Cir. 1986) (dictum) (providing acceptable dietary alternatives to practitioners of "majority" religions but failing to do so for practitioners of less common religions would raise serious equal protection concerns) and *Reed v. Faulkner*, 842 F.2d 960, 962, 964 (7th Cir. 1988) (application of hair length regulation to Rastafarians but not to American Indians, without reason, violated equal protection). The religious rights of prisoners are discussed in this section in *Retained Freedoms of Speech, Religion, and Association*.

2988. Compare *Morrow v. Harwell*, 768 F.2d 619, 626 (5th Cir. 1985) (no equal protection violation when greater time for public visit granted for males when males constituted greater proportion of population and no individual inmate received more time based on gender) and *Jackson v. Thornburgh*, 907 F.2d 194, 196-98 (D.C. Cir. 1990) (no equal protection violation where men sentenced to District of Columbia penal facilities benefit from early release statute while female inmates do not because women serving more than one year must be sentenced to federal facility not covered by statute and statute rationally related to alleviating overcrowding in facilities) with *Glover v. Johnson*, 855 F.2d 277, 281 (6th Cir. 1988) (dictum) (affording male inmates education and training opportunities not afforded to female inmates violated equal protection).

2989. See *Bonner v. Lewis*, 857 F.2d 559, 560, 565 (9th Cir. 1988) (prison officials' failure to provide deaf mute with interpreter services did not violate equal protection).

be treated differently based on the nature of their crimes.²⁹⁹⁰

Retained Rights to Assistance of Counsel. Prisoners retain a sixth amendment right to counsel for criminal prosecutions arising while they are incarcerated.²⁹⁹¹ The right does not extend to disciplinary actions,²⁹⁹² nor does it apply to administrative segregation based on suspected criminal activity unless the prisoner has been charged with a crime.²⁹⁹³ Assistance of counsel may be provided at a court's discretion once the prisoner has established a prima facie case in a civil rights action²⁹⁹⁴ or if required for fundamental fairness in parole revocation proceedings.²⁹⁹⁵

Rights Retained by Pretrial Detainees. Pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that are enjoyed by convicted prisoners.²⁹⁹⁶ The due process clause prohibits

2990. See *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir. 1989) (special status for appeals of capital defendants to protect from frivolous actions not equal protection violation); *U.S. v. Roy*, 830 F.2d 628, 639 (7th Cir. 1987) (more severe maximum penalty for escape by prisoner charged with felony than for one charged with misdemeanor not violation of equal protection), *cert. denied*, 484 U.S. 1068 (1988); *Mahfouz v. Lockhart*, 826 F.2d 791, 794 (8th Cir. 1987) (denying sex offenders access to work-study release program does not violate equal protection); *Mayner v. Callahan*, 873 F.2d 1300, 1302 (9th Cir. 1989) (more severe treatment of life inmates who escape late in mandatory minimum sentence as opposed to those who escape early in sentence rationally related to penal objectives); *Hendking v. Smith*, 781 F.2d 850, 852 (11th Cir. 1986) (differential treatment of sex offenders does not violate equal protection because nature of crime different).

2991. *U.S. v. Gouveia*, 467 U.S. 180, 187, 192 (1984). The right attaches only at or after the initiation of adversary judicial proceedings against the defendant. *Id.*

A prisoner's sixth amendment right differs from her right of access to courts. The sixth amendment right consists of the right to counsel in criminal matters that occur while the prisoner is incarcerated. The right of access consists of the right to judicial proceedings to challenge convictions or the duration and conditions of confinement. *Bounds v. Smith*, 430 U.S. 817, 827 (1977). The extent to which a prisoner's right of access includes a right to the assistance of counsel is discussed in *Right of Access to Courts* in this section.

2992. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1975); see *Brown v. Frey*, 889 F.2d 159, 169 (8th Cir. 1989) (no constitutional right to counsel substitute for literate inmate not facing complex charges in disciplinary hearing), *cert. denied*, 110 S. Ct. 1156 (1990); *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990) (no right to specific inmate's legal assistance if other assistance available in disciplinary hearing); cf. *Bostic v. Carlson*, 884 F.2d 1267, 1274 (9th Cir. 1989) (inmate cannot claim ineffective assistance of counsel at disciplinary hearing).

2993. See *U.S. v. Gouveia*, 467 U.S. 180, 182, 192 (1984) (no right to counsel when prisoner suspected of murder placed in administrative segregation because not yet charged with crime). The lower court in *Gouveia* had held that the sixth amendment's guarantee of a speedy trial is violated unless prisoners are supplied with attorneys within 90 days of placement in administrative segregation. *Id.* at 186, 189-90. The Supreme Court expressly declined to rule on when the sixth amendment speedy trial right attaches in this context. *Id.* at 190 n.6.

2994. This issue is discussed in PROCEDURAL MEANS OF ENFORCEMENT UNDER 42 U.S.C. § 1983 in this part.

2995. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (fundamental fairness may require right to counsel in certain parole revocation proceedings).

2996. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); see *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1982) (pretrial detainees enjoy same due process right to medical treatment as

punishment of pretrial detainees²⁹⁹⁷ and protects them from the use of excessive force that amounts to punishment.²⁹⁹⁸ To determine whether a particular hardship imposed on a pretrial detainee comports with due process, a court must determine whether the disability imposed is for the purposes of punishment or whether it is reasonably related to a legitimate governmental purpose.²⁹⁹⁹

The due process clause also imposes affirmative obligations on the state in the treatment of pretrial detainees. In *City of Revere v. Massachusetts General Hospital*,³⁰⁰⁰ the Supreme Court held that pretrial detainees must receive at least the same standard of medical treatment as prisoners.³⁰⁰¹ Further, in

prisoners); *Dzana v. Foti*, 829 F.2d 558, 562 (5th Cir. 1987) (detainee facing disciplinary segregation and loss of bond entitled to same level of process guaranteed to prisoner in disciplinary hearing); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (pretrial detainee has substantial interest in effective communication with counsel and in access to legal materials); *Bee v. Greaves*, 910 F.2d 686, 688 (10th Cir. 1990) (liberty interest of inmate in remaining free from unwanted administration of antipsychotic drugs indisputably extends to pretrial detainee). The rights of pretrial detainees must be analyzed under the due process clause rather than the eighth amendment because guilt has not been adjudicated. *Wolfish*, 441 U.S. at 535; see *Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir.) (per curiam) (limitation on detainee's telephone access and monitoring of calls for security reasons not violative of due process), *cert. denied*, 488 U.S. 863 (1988).

2997. *Wolfish*, 441 U.S. at 535 n.16; compare *Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988) (detainee confined to cell for 22-23 hours per day for 27-day period and forced to sleep on floor mattress stated claim under due process clause); *Cooper v. Dyke*, 814 F.2d 941, 948-49 (4th Cir. 1987) (pretrial detainee whose gunshot wound overlooked by police need only show punishment, not cruel and unusual punishment); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir.) (dictum) (fugitive arrested in Honduras and tortured during flight to United States would state due process claim if tortured during pretrial detention), *cert. denied*, 111 S. Ct. 209 (1990); *Gobel v. Maricopa County*, 867 F.2d 1201, 1206 (9th Cir. 1989) (detainee confined in cell for four to seven hours in 108 degree heat without food, water, or adequate ventilation stated due process claim) and *Hewitt v. Jarrard*, 786 F.2d 1080, 1085-86 (11th Cir. 1986) (juvenile in pretrial detention suffered due process deprivation when physically abused, denied medical attention, and placed in isolation) with *Van Cleave v. U.S.*, 854 F.2d 82, 84 (5th Cir. 1988) (per curiam) (locking property of pretrial detainee in safe until next morning did not violate due process because action served legitimate government interest of securing property and not intended as punishment) and *Green v. Baron*, 879 F.2d 305, 310 (8th Cir. 1989) (deprivation of light, heat, ventilation, sanitation, and proper diet not violation of due process if for legitimate penal goals and not punishment).

The failure to provide detainees with mattress and bed or bunks violates due process. See *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981) (prison's use of floor mattresses for pretrial detainees unconstitutional regardless of length of use by a detainee); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (county jail's failure to provide pretrial detainee with bed or mattress violated due process).

2998. *Wolfish*, 441 U.S. at 535-39.

2999. *Id.* at 538-39. The Court warned that courts should ordinarily defer to the expert judgment of corrections officials as to whether a restriction is reasonably related to security interests, absent substantial evidence in the record to indicate that the responses are exaggerated. *Id.* at 540-41 n.23; see *Masters v. Crouch*, 872 F.2d 1248, 1253-57 (6th Cir. 1989) (detainee arrested for traffic violation stated due process claim when strip searched for contraband), *cert. denied*, 110 S. Ct. 503 (1989).

3000. 463 U.S. 239 (1982).

3001. *Id.* at 244. The Court refrained from delineating the scope of the duty under due process to provide medical care to pretrial detainees. *Id.* The Court noted, without elaboration, that the

City of Canton v. Harris,³⁰⁰² the Court held that a "deliberate indifference" standard would govern the failure of adequate medical attention resulting from a failure to train officials.³⁰⁰³

state had "fulfilled its constitutional obligation" by providing the detainee with prompt medical treatment following his injury. *Id.* at 245; compare *Boring v. Kozakiewicz*, 833 F.2d 468, 473-74 (3d Cir. 1987) (no due process violation when elective surgery deferred safely for brief detention period prior to trial, because not serious medical need requiring prompt medical attention), *cert. denied*, 485 U.S. 991 (1988); *Mitchell v. Aluisi*, 872 F.2d 577, 578-79, 581 (4th Cir. 1989) (no due process violation when medication of hypertensive detainee confiscated, despite confinement for 3 and 1/2 days resulting in nausea and headaches) and *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989) (no due process violation when detainee not screened for suicidal tendencies because not included in general right to medical care and no right to suicide prevention facilities), *cert. denied*, 110 S. Ct. 1473 (1990) with *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988) (per curiam) (allegation of denial of "mental medication" to detainee adequate to establish due process claim); *Boswell v. County of Sherburne*, 849 F.2d 1117, 1122 (8th Cir. 1988) (failure of prison officials to provide medical assistance to pregnant pretrial detainee who was bleeding, cramping, and crying, stated due process claim), *cert. denied*, 488 U.S. 1010 (1989); *Martin v. Bd. of County Commissioners*, 909 F.2d 402, 406 (10th Cir. 1990) (per curiam) (alleged deliberate disregard for information on detainee's serious medical condition and refusal to contact detainee's doctor before arresting and moving her grounds for due process claim); *Thomas v. Town of Davie*, 847 F.2d 771, 772-73 (11th Cir. 1988) (accident victim stated claim of due process violation when alleged that handcuffed, received roadside sobriety test, and detained until bail posted rather than receiving medical attention obviously necessary).

3002. 109 S. Ct. 1197 (1989).

3003. *Id.* at 1204. When a detainee was asked if medical care was needed, she responded unintelligibly, and, after falling to the floor, was taken to the hospital and diagnosed as having emotional problems. *Id.* at 1200-01. The detainee claimed that the lack of adequate police training resulted in her injury and complications. *Id.* at 1201. The Court held that the "deliberate indifference" standard must govern claims asserting a failure to train adequately. *Id.* at 1204. The Court concluded the detainee sufficiently stated a due process claim because the level of training was obviously deficient, and in light of the official's duties, the inadequacies were likely to result in violation of the rights of detainees. *Id.* at 1205; see *Burns v. City of Galveston, Texas*, 905 F.2d 100, 104 (5th Cir. 1990) (no deliberate indifference where police inadequately trained in suicide prevention because no absolute right of detainees to psychological screening for suicide prevention); *Redman v. County of San Diego*, 896 F.2d 362 (9th Cir. 1990) (no deliberate indifference where prison officials suspected possible attack on inmate with "young and tender" profile by aggressive homosexual cellmate).

There is no general requirement to evaluate all detainees for suicidal potential. See *Williams v. Board of West Chester*, 891 F.2d 458, 465-66 (3d Cir. 1989) (jail officials lacking knowledge of detainee's suicidal tendencies not liable when for failure to remove belt used in suicide); *Belcher v. Oliver*, 898 F.2d 32, 35-36 (4th Cir. 1990) (jail officials lacking reason to believe intoxicated detainee would commit suicide not liable for suicide); *Gagne v. City of Galveston, Texas*, 805 F.2d 558, 559-60 (5th Cir. 1986) (officers entitled to qualified immunity for suicide of arrestee where they failed to "uncover" his suicidal tendencies), *cert. denied*, 483 U.S. 1021 (1987); *Danese v. Asman*, 875 F.2d 1239, 1243-44 (6th Cir. 1989) (officials entitled to qualified immunity where no knowledge that intoxicated detainee was seriously contemplating suicide), *cert. denied*, 110 S. Ct. 1473 (1990); *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir.) (knowledge that prisoner acting violently or freakishly not "synonymous with having reason to know that the violence might become self-directed"), *cert. denied*, 464 U.S. 995 (1983); *Estate of Cartwright v. City of Concord*, 856 F.2d 1437, 1438 (9th Cir. 1988) (city officials not liable for suicide of pretrial detainee where no reason to believe detainee suicidal); *Edwards v. Gilbert*, 867 F.2d 1271, 1274-76 (11th Cir. 1989) (officers entitled to qualified immunity for failing to prevent suicide of prisoner where no suicide threatened or attempted). If the police have knowledge of a detainee's suicide potential, however, the failure to protect against a suicide can constitute deliberate indifference. See *Buffington v. Balti-*

The Supreme Court has stated that courts should usually defer to prison officials in determining whether a particular regulation is reasonably related to a legitimate interest other than punishment.³⁰⁰⁴ The Court stressed its hesitancy to substitute its "judgment on these difficult and sensitive matters of institutional administration and security for that of 'the persons who are actually charged with and trained in the running' of such facilities."³⁰⁰⁵ The Court has held that neither blanket prohibitions on contact visits for pretrial detainees³⁰⁰⁶ nor routine body cavity searches after contact visits³⁰⁰⁷ violate the Constitution. Furthermore, neither "double celling"³⁰⁰⁸ nor random "shakedown" searches of a detainee's cell without observance by the detainee³⁰⁰⁹ violate due process.³⁰¹⁰

PROCEDURAL MEANS OF ENFORCEMENT UNDER 42 U.S.C. § 1983

Provisions and Applicability. Under section 1983 of the Civil Rights Act of 1871,³⁰¹¹ a prisoner may seek redress when a person acting under color of

more County, 913 F.2d 113, 120 (4th Cir. 1990) (deliberate indifference when police, who apprehended detainee for attempted suicide, placed detainee unmonitored in cell where he committed suicide), *cert. denied*, 111 S. Ct. 1106 (1991).

3004. *Bell v. Wolfish*, 441 U.S. 520, 540-41 n.23 (1979); *Block v. Rutherford*, 468 U.S. 576, 587-88 (1984); *see Mitchell v. Aluisi*, 872 F.2d 577, 581 (4th Cir. 1989) (court defers to officials on questions of taking of contraband, possessions of detainees, and training of employees absent deliberate indifference).

3005. *Block*, 468 U.S. at 588 (quoting *Wolfish*, 441 U.S. at 562); *cf. Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051-53 (8th Cir. 1989) (no deference when officials restricted detainee's right to effective communication with counsel and access to legal materials).

3006. *Block*, 468 U.S. at 589. In *Block*, contact visits were prohibited but private, unmonitored noncontact visits were permitted. *Id.* The Court upheld this distinction because it was not arbitrary and served valid penal interests. *Id.*; *see O'Bryan v. County of Saginaw*, 741 F.2d 283, 285 (6th Cir. 1984) (pretrial detainees have no constitutional right to contact visits; no violation when jailers terminated contact visits and reimposed "barrier" visitation); *Martin v. Tyson*, 845 F.2d 1451, 1455 (7th Cir.) (per curiam) (policy limiting number of visitors and length of visits to pretrial detainees and prohibiting contact visits justified by small size of jail and number of people), *cert. denied*, 488 U.S. 863 (1988).

3007. *Wolfish*, 441 U.S. at 558-60.

3008. *Id.* at 543; *see Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985) (ban on double bunking not constitutionally mandated and must give way to larger community interests).

3009. *Wolfish*, 441 U.S. at 555-57; *see Block v. Rutherford*, 468 U.S. 576, 591 (1984) (discretion to search individual cells during inmates' absence justified by security concerns for prisoners and guards).

3010. The fourth amendment implications of these activities when applied to prisoners are discussed in *Retained Rights Related to Searches, Seizures, and Personal Privacy* in this section.

3011. 42 U.S.C. § 1983 (1988). This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

state law³⁰¹² deprives the prisoner of rights guaranteed by the Constitution or federal laws.³⁰¹³ Section 1983 supplements available state remedies designed to vindicate violations of constitutional rights.³⁰¹⁴

Section 1983 is not a substitute for a writ of habeas corpus.³⁰¹⁵ In *Preiser v. Rodriguez*,³⁰¹⁶ the Supreme Court explained that a prisoner seeking damages for deprivation of constitutional or federally created rights may properly bring suit under section 1983,³⁰¹⁷ whereas a prisoner challenging "the fact or

Id.

3012. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court enunciated a two-part test for determining whether a private individual has acted under color of state law. First, the claimed deprivation must result from the exercise of a right or privilege having its source in state authority, and second, under the facts of the instant case, the private party must be fairly characterized as a state actor. *Id.* at 937. The Court has provided at least three examples of conduct that satisfies the "under color of state law" requirement of § 1983. First, in *U.S. v. Classic*, 313 U.S. 299 (1941), the Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326; see *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (prison official considered state actor under § 1983); *Monroe v. Pape*, 365 U.S. 167, 184-87 (1961) (police officer considered state actor under § 1983). Second, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court held that to act under color of state law, a defendant need not be an officer of the state; it is sufficient that she "is a willful participant in joint activity with the State or its agents." *Id.* at 152 (quoting *U.S. v. Price*, 383 U.S. 787, 794 (1966)). Third, the Court has held that private persons who are authorized to exercise state authority are deemed to be acting "under color of state law". *West v. Atkins*, 487 U.S. 42 (1988). In *Atkins*, the Court held that a private physician under contract with North Carolina to provide medical services for prisoners was acting "under color of state law." *Id.* at 57. The Court has held, however, that a public defender does not act "under color of state law" when performing the traditional functions of counsel on behalf of a criminal defendant, despite the fact that the attorney derives her authority from state law. *Polk County v. Dodson*, 454 U.S. 312, 315, 321 (1981); *cf. Tower v. Glover*, 467 U.S. 914, 919-20 (1984) (although appointed counsel in state criminal prosecution not acting under color of state law in normal course of conducting defense, one who conspires with state officials to deprive client of constitutional rights may be found to act under color of state law); *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985) (*per curiam*) (dictum) (although allegations that public defender conspired with judges to deprive inmate of federally protected rights may satisfy "under color of state law" requirement in § 1983 action, claim dismissed because no conspiracy pleaded).

3013. 42 U.S.C. § 1983 (1988). Prisoners who are deprived of constitutional rights by a person acting under color of federal authority may seek redress directly under the Constitution. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396-97 (1971).

3014. *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled on other grounds by Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). A § 1983 action must allege a violation of federal law. *Oklahoma City v. Tuttle*, 471 U.S. 808, 817 n.4 (1984). Mere torts committed by government officials are not a sufficient basis for a suit under this section. See *Paul v. Davis*, 424 U.S. 693, 700-01 (1976) (state tort of defamation not cognizable under § 1983 merely because state official committed tort). The constitutional standards of care controlling prison officials are discussed in PRISONER'S SUBSTANTIVE RIGHTS in this part.

3015. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

3016. 411 U.S. 475 (1973).

3017. *Id.* at 499 & n. 14; see *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (prisoner's § 1983 suit for damages and injunctive relief proper when claim alleged unconstitutionality of disciplinary proceedings, inmate legal assistance program, and mail inspection regulations).

length of his custody" must pursue his claim through a writ of habeas corpus.³⁰¹⁸ The appellate courts have generally applied *Preiser* to bar a section 1983 claim if the suit affects the fact or duration of confinement in any manner.³⁰¹⁹

Generally, a properly formulated section 1983 suit does not require a claimant to exhaust available state judicial or administrative remedies before seeking federal judicial relief.³⁰²⁰ In 42 U.S.C. § 1997e, however, Congress

3018. *Preiser*, 411 U.S. at 500 (action seeking restoration of good time credits improperly brought under § 1983). The Court also noted that a federal habeas corpus claim may "also be available to challenge . . . prison conditions." *Id.* at 499 (dictum).

3019. *Compare* *Dickerson v. Walsh*, 750 F.2d 150, 153-54 (1st Cir. 1984) (prisoner challenging state post-conviction review procedures on basis of trial by jury and equal protection rights violations must proceed through habeas corpus because relief ultimately sought is release); *Brown v. Fauver*, 819 F.2d 395, 397 (3d Cir. 1987) (prisoner seeking restoration of good time credits taken from him as result of conviction must proceed through habeas corpus); *Leonard v. Hammond*, 804 F.2d 838, 840 (4th Cir. 1986) (prisoner challenging imprisonment for civil contempt arising out of failure to pay court-ordered child support must proceed through habeas corpus); *Johnson v. Texas*, 878 F.2d 904, 905 (5th Cir. 1989) (prisoner claiming false arrest and use of perjured testimony must exhaust state remedies because suit amounted to habeas corpus claim); *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987) (prisoner seeking damages for loss of good time credits essentially challenging duration of sentence and must proceed through habeas corpus) and *Smith v. Maschner*, 899 F.2d 940, 951 (10th Cir. 1990) (same) with *Georgevich v. Strauss*, 772 F.2d 1078, 1087 (3d Cir. 1985) (prisoner challenging state parole statute on equal protection grounds properly brought suit under § 1983 because suit challenged process, not actual duration of confinement), *cert. denied*, 475 U.S. 1028 (1986); *Alexander v. Ware*, 714 F.2d 416, 418-19 (5th Cir. 1983) (prisoner's systematic challenge to prison disciplinary procedures of charging minor violations, entering summary guilty findings, and giving prisoners unfavorable good time classifications properly brought under § 1983); *Hensley v. Wilson*, 850 F.2d 269, 271-72 (6th Cir. 1988) (prisoner challenging prison disciplinary hearings properly brought suit under § 1983 when hearings conducted without any investigation into reliability of informants); *Smith v. Springer*, 859 F.2d 31, 33-34 (7th Cir. 1988) (prisoner alleging police fabricated evidence properly brought suit under § 1983) and *Young v. Armontrout*, 795 F.2d 55, 56 (8th Cir. 1986) (prisoner's habeas corpus suit claiming violation of eighth amendment right to adequate psychiatric care remanded with instructions to district court to treat as § 1983 claim of deliberate indifference to prisoner's medical needs).

The Third Circuit has held that when a prisoner seeks both release from confinement and damages for violations of his constitutional rights in a section 1983 suit, a court should not dismiss the damage claim merely because the petition for release should be brought in an habeas corpus action. *Harper v. Jeffries*, 808 F.2d 281, 283 (3d Cir. 1986). In such a case, the court should stay the § 1983 proceedings pending the outcome of the petition for habeas corpus. *Id.* at 285. The Eighth Circuit has held that a § 1983 suit which, if successful, would have the effect of releasing a prisoner is in effect a habeas proceeding and should be stayed pending exhaustion of state remedies. *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987).

3020. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982); *see* *Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985) (prisoner need not exhaust state remedies in suit claiming prison officials violated due process rights by not according adequate hearing before final disciplinary decision), *cert. denied*, 474 U.S. 1100 (1986); *Georgevich v. Strauss*, 772 F.2d 1078, 1085-87 (3d Cir. 1985) (prisoners need not exhaust state remedies when challenging state parole statute on equal protection grounds), *cert. denied*, 475 U.S. 1028 (1986); *Bressman v. Farrier*, 900 F.2d 1305, 1307 (8th Cir. 1990) (prisoners need not exhaust state remedies when challenging conditions of confinement and retaliatory discipline), *cert. denied*, 111 S. Ct. 1090 (1991); *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447-48 (9th Cir. 1986) (plaintiff need not exhaust existing state remedies in order to bring

created an exception to this rule, granting courts discretion to continue the section 1983 cases of adult prisoners up to ninety days pending the exhaustion of available administrative remedies.³⁰²¹ A court may order exhaustion under this section only if the United States Attorney General has certified or the court has established that the state administrative procedures are in substantial compliance with the standards set forth in section 1997e.³⁰²²

Federal district courts have jurisdiction to hear section 1983 claims under

§ 1983 case against police for brutality); *Gwin v. Snow*, 870 F.2d 616, 624 (11th Cir. 1989) (prisoner need not exhaust state remedies in suit challenging parole board's procedure of allegedly considering race as a factor in its parole decisions).

The circuits are split, however, on the issue of the exhaustion requirement in hybrid petitions involving both habeas corpus and section 1983 claims. *Compare* *Lyons v. U.S. Marshals*, 840 F.2d 202, 204-05 (3d Cir. 1988) (exhaustion required in every hybrid case unless administrative remedies futile, unambiguous violation exists, or administrative procedure would cause irreparable injury) *and* *Hernandez v. Spencer*, 780 F.2d 504, 505 (5th Cir. 1986) (exhaustion required when allegations of complaint could give rise to either habeas corpus or § 1983 remedy) *with* *Veins v. Daniels*, 871 F.2d 1328, 1334 (7th Cir. 1989) (prisoner seeking damages as well as restoration of good-time credits may proceed with damages claim in federal court while exhausting remedies in state court with regard to restoration of good time). The exhaustion requirement for habeas corpus relief is discussed in *HABEAS RELIEF FOR STATE PRISONERS* and *HABEAS RELIEF FOR FEDERAL PRISONERS* in Part V.

3021. 42 U.S.C. § 1997e(a)(1) (1988). In *Patsy*, the Supreme Court stated that section 1997e is a "narrow exception to the general no-exhaustion rule" for suits brought under section 1983. 457 U.S. at 510. The Court expressly limited exhaustion to those cases falling under the specifications of section 1997e and refused to sanction judicial discretion to impose a general exhaustion requirement. *Id.* at 509-12; *see* *Francis v. Marquez*, 741 F.2d 1127, 1128 (9th Cir. 1984) (error to dismiss prisoner's suit claiming segregation without proper hearing for failure to exhaust state remedies without granting continuance required under § 1997e to afford prisoner chance to exhaust administrative remedies); *Kennedy v. Herschler*, 655 F.2d 210, 211-12 (10th Cir. 1981) (*per curiam*) (error to dismiss prisoner's suit claiming harassment, denial of access to court, and denial of right to assist other inmates with legal matters for failure to exhaust state remedies without allowing continuance for ninety days to give prisoner opportunity to pursue administrative remedies); *cf.* *Lay v. Anderson*, 837 F.2d 231, 233 (5th Cir. 1988) (*per curiam*) (no error to dismiss after continuance granted when prisoner failed to exhaust prison remedies during interim by pursuing § 1997e prison grievance proceeding).

3022. 42 U.S.C. § 1997e(a)(2) (1988); *see* *Lewis v. Meyer*, 815 F.2d 43, 46 (7th Cir. 1987) (premature for court to certify Wisconsin's administrative remedies as in substantial compliance with acceptable minimal standards when Attorney General had not certified and court did not inquire into extent of inmate participation in grievance procedures). Section 1997e(b)(2) requires that the minimum standards shall provide:

- (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;
- (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
- (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
- (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
- (E) for independent review of the disposition of grievances, including alleged reprisals,

28 U.S.C. § 1343.³⁰²³ A prisoner filing in federal court need not satisfy any jurisdictional amount.³⁰²⁴ Venue is determined under the same statutory provision that applies to all civil actions.³⁰²⁵

Federal courts are authorized under 28 U.S.C. § 1915 to allow a prisoner to file claims under section 1983 in forma pauperis and without the assistance of counsel.³⁰²⁶ Courts hold such pro se complaints to less stringent standards than formal pleadings drafted by an attorney³⁰²⁷ and liberally construe such complaints when determining whether they state a cause of action.³⁰²⁸

by a person or other entity not under the direct supervision or direct control of the institution.

Id.; see 28 C.F.R. §§ 40.1-22 (1989) (detailing specific minimum standards for inmate grievance procedures and method for obtaining certification).

In *Mann v. Adams*, 846 F.2d 589 (9th Cir.) (per curiam), *cert. denied*, 488 U.S. 898 (1988), the Ninth Circuit held that although section 1997e provides that states may voluntarily submit grievance procedures for certification, a state's failure to do so does not give the prisoner a cause of action. *Id.* at 590; see 42 U.S.C. § 1997e(d) (failure of state to adopt grievance procedure shall not constitute basis for action under § 1997e(a) or (c)).

3023. 28 U.S.C. § 1343(a)(3)-(4) (1988); see *Maher v. Gagne*, 448 U.S. 122, 129 n.11 (1980) (federal district courts have original jurisdiction over § 1983 claims only when substantive right allegedly violated is secured by the Constitution or federal statute providing for civil rights); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 602-03 & n.1 (1979) (federal district courts have original jurisdiction over § 1983 claims).

3024. 28 U.S.C. § 1343(a)(3)-(4) (1988); see also *id.* § 1331(a). A state court that has jurisdiction over state law actions similar to section 1983 may not decline to entertain a section 1983 action in the absence of a "valid excuse." *Howlett v. Rose*, 110 S. Ct. 2430, 2439-42 (1990). Although the Court did not delineate a list of "valid excuses," it did note that on each of the three occasions in which the Court found an excuse to be valid, the excuse "involved a neutral rule of judicial administration," such as lack of personal jurisdiction or forum non conveniens. *Id.* at 2442.

3025. 28 U.S.C. § 1391(b) (1988). A party seeking redress in federal court under § 1983 may file only in the judicial district where all the defendants reside or in which the claim arose, unless otherwise provided by law. *Id.*

3026. *Id.* § 1915(a)-(c).

3027. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); compare *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986) (even though prisoner made "thin" claim that officials acted with deliberate indifference to pending violence, cause of action exists because pro se complaint held to more lenient standard than those prepared by attorneys and claim could be supported with aid of discovery) with *Glick v. Gutbrod*, 782 F.2d 754, 755 n.1, 756-57 (7th Cir. 1986) (per curiam) (court properly dismissed case when defendant exhibited flagrant disregard of court orders, complaint alleged meritless claims, and brief "woefully inadequate," despite fact that court should hold pro se complaints to lesser standards) and *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) (court properly dismissed pro se complaint when any amendment would not overcome judicial and prosecutorial immunities, despite fact that pro se complaints held to lesser standard).

3028. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaint should not be dismissed for failure to state claim unless it appears beyond doubt that plaintiff can prove no facts in support of claim that would entitle him to relief; prisoner should be allowed to introduce evidence of injuries and deprivation of rights caused by solitary confinement to support § 1983 claim); *Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988) (per curiam) (pro se complaint alleging deprivation of liberty without due process of law improperly dismissed for failure to state claim when plaintiff alleged confinement to cell for 22 to 23 hours per day for 27-day period); *Holloway v. Lockhart*, 792 F.2d 760, 761-62 (8th Cir. 1986) (pro se complaint alleging prison officials arbitrarily revoked prisoner's privileges to possess radio and carbon paper improperly dismissed for failure to

Moreover, courts are reluctant to dismiss a claim solely on procedural grounds,³⁰²⁹ and they usually allow prisoners to correct deficiencies by amendment.³⁰³⁰ Nevertheless, courts will dismiss pro se complaints that are frivolous or malicious,³⁰³¹ or that are brought by an inmate who lacks standing.³⁰³²

state claim); *Moreland v. Wharton*, 899 F.2d 1168, 1170-71 (11th Cir. 1990) (pro se complaint alleging inadequate medical care improperly dismissed without conducting "sufficient inquiry" into realistic chances of success when complaint presents "arguable basis in law"); *cf. Neitzke v. Williams*, 490 U.S. 319, 326-29 (1989) (pro se complaint alleging denial of medical treatment not automatically frivolous when fails to state claim; § 1915 (d) "refers to a more limited set of claims than does rule 12(b)(6)").

3029. *See Villante v. Dep't of Corrections*, 786 F.2d 516, 523 (2d Cir. 1986) (district court erred in granting summary judgment when prisoner not given adequate discovery opportunity); *Kelley v. McGinnis*, 899 F.2d 612, 615 (7th Cir. 1990) (district court erred in granting summary judgment against prisoner without giving prisoner notice or opportunity to present counter-affidavits); *Reynolds v. Foree*, 771 F.2d 1179, 1181 (8th Cir. 1985) (per curiam) (district court abused discretion by dismissing complaint when prisoner failed to appear at pretrial hearing, because incarcerated in another state); *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988) (district court erred in failing to provide pro se claimant with fair notice of requirements of summary judgment rule before granting defendant's motion for summary judgment).

3030. *See Elliott v. Bronson*, 872 F.2d 20, 22 (2d Cir. 1989) (per curiam) (district court abused discretion in dismissing complaint without leave to file amended pleading when prisoner's pro se complaint failed to make short and plain statement of claim as required by rule 8 of the *Federal Rules of Civil Procedure*); *Mills v. Criminal Dist. Court*, 837 F.2d 677, 679-80 (5th Cir. 1988) (district court erred in dismissing with prejudice pro se conspiracy complaint that failed to state claim upon which relief could be granted; court should have dismissed without prejudice to allow plaintiff to amend complaint); *Karim-Panahi v. Los Angeles Police Dep't.*, 839 F.2d 621, 623-25 (9th Cir. 1988) (district court erred in dismissing amended complaint without leave to amend and in failing to notify plaintiff of deficiencies in allegations under § 1983).

3031. 28 U.S.C. § 1915(d) (1988); *compare Pugh v. Parish of St. Tammany*, 875 F.2d 436, 439 (5th Cir. 1989) (pro se complaint properly dismissed as frivolous when defendants absolutely immune from damages); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir.) (pro se complaint alleging that conspiracy abrogates absolute immunity clearly frivolous and properly dismissed), *cert. denied*, 484 U.S. 832 (1987) *and Harris v. Menendez*, 817 F.2d 737, 741 (11th Cir. 1987) (probationer's suit claiming perjury and conspiracy to revoke probation correctly dismissed when defendants enjoyed immunity from damages and action frivolous) *with Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (in forma pauperis complaint not automatically frivolous so as to warrant sua sponte dismissal merely because it fails to state claim); *Brooks v. Seiter*, 779 F.2d 1177, 1181 (6th Cir. 1985) (prisoner's complaint alleging deprivation of mail order materials stated colorable claim of first amendment violation and not frivolous) *and Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989) (pro se complaint alleging unsanitary conditions at prison constituted cruel and unusual punishment not frivolous even though allegation "highly improbable").

3032. *Compare Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (prisoner lacked standing to bring claims alleging mistreatment of fellow prisoners when no personal injury alleged); *Darring v. Kincheloe*, 783 F.2d 874, 877-78 (9th Cir. 1986) (prisoner lacked standing to challenge institutional order on ground that it violated other inmate's rights when no legally cognizable injury alleged by plaintiff) *and Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir. 1985) (per curiam) (prisoner lacked standing to bring claims alleging improper jail conditions after transfer because past exposure to illegal conduct does not provide standing in suit seeking injunctive relief if no present harm to plaintiff exists) *with Gometz v. Henman*, 807 F.2d 113, 115 (7th Cir. 1986) ("jailhouse lawyer" had standing to assert rights of another prisoner with whom he wished to communicate concerning legal matters).

Indigent prisoners seeking relief under section 1983 may petition a federal court to appoint counsel to represent them.³⁰³³ Before a court may exercise its discretion to appoint counsel, it must be satisfied that the petitioner's claim is colorable.³⁰³⁴

Affirmative Defenses. Various affirmative defenses may prevent a prisoner from obtaining relief in a section 1983 action. A claim is normally barred, by the running of the statute of limitations.³⁰³⁵ Furthermore, a prisoner may

3033. 28 U.S.C. § 1915(d) (1988).

3034. *Id.*; compare *Sours v. Norris*, 782 F.2d 106, 107 (8th Cir. 1986) (per curiam) (appointment of counsel appropriate when § 1983 claim that prisoner transferred in violation of Interstate Corrections Compact not malicious or frivolous, as evidenced by claim's survival of motion to dismiss) and *McCarthy v. Weinberg*, 753 F.2d 836, 838-39 (10th Cir. 1985) (per curiam) (appointment of counsel appropriate when pro se prisoner suffering from severe physical handicaps presented colorable claim that doctor failed to provide physical therapy and medication to treat prisoner's multiple sclerosis) with *Childs v. Pellegrin*, 822 F.2d 1382, 1384-85 (6th Cir. 1987) (appointment of counsel inappropriate for claim asserting denial of access to courts when prisoner given opportunity to go before trial judge and review facts of case and when court determined claim lacked merit).

In determining the appropriateness of appointing counsel, the circuit courts also consider the complexity of the legal issues involved. Compare *Cookish v. Cunningham*, 787 F.2d 1, 4 (1st Cir. 1986) (per curiam) (court properly denied appointment of counsel for indigent civil litigant when claims did not involve difficult or complex issues); *Jackson v. Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989) (court did not abuse discretion in refusing to appoint counsel in prisoner's § 1983 case when case not particularly complex and prisoner proved capable of self-representation) and *Wahl v. McIver*, 773 F.2d 1169, 1172-74 (11th Cir. 1985) (per curiam) (appointment of counsel inappropriate when essential facts of case and legal doctrines of immunity, mootness, and acting under color of state law ascertainable to inmate without assistance of counsel) with *Hodge v. Police Officers*, 802 F.2d 58, 59-61 (2d Cir. 1986) (court improperly denied appointment of counsel in civil rights case claiming police brutality when court failed to consider plaintiff's chance of success, complexity of factual issues, and plaintiff's ability to present case); cf. *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam) (although appointment of fellow inmate to assist with preparation of lawsuit permissible, court generally will not allow same inmate to serve as trial counsel when that appointment would allow him to leave prison to participate in trial). The Ninth Circuit requires a demonstration of both the "likelihood of success and the complexity of legal issues involved." *Burns v. County of King*, 883 F.2d 819, 824 (9th Cir. 1989).

The Supreme Court has held that 28 U.S.C. § 1915(d) does not authorize a federal court to compel an attorney to represent an indigent litigant in a civil proceeding. *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 300-02 (1989).

3035. In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held that because section 1983 has no statute of limitations of its own, courts should apply the statute of limitations pertaining to personal injury actions in the jurisdiction in which the claim arose. *Id.* at 275-80. In *Owens v. Okure*, 488 U.S. 235 (1989), the Court held that if the state in which the cause of action arose has more than one statute of limitations, the federal court should apply the residual or general personal injury statute of limitations rather than the statute of limitations for specific intentional torts. *Id.* at 236; see *Meade v. Grubbs*, 841 F.2d 1512, 1522-23 (10th Cir. 1988) (all § 1983 claims in Tenth Circuit will be uniformly held to two-year state statute of limitations for injury to personal rights of another and not to one-year statute of limitations for assault and battery). Moreover, in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the Court held that in addition to applying the state statute of limitations, federal courts are obligated to apply the state's tolling rules unless doing so would produce results that are inconsistent with the policies underlying § 1983. *Id.* at 483-86; see *Hardin v. Straub*, 490 U.S. 536, 543 (1989) (plaintiff entitled to benefit of Michigan provision suspending limitations period for those under legal disability because statute consistent with § 1983);

release the defendants from liability by knowingly, willingly, and voluntarily agreeing not to pursue her section 1983 claim.³⁰³⁶ The doctrines of res judicata and collateral estoppel may also bar a section 1983 action.³⁰³⁷

Under section 1983, liability is imposed only on *persons* responsible for the deprivation of rights secured by the Constitution and federal laws.³⁰³⁸ In *Will v. Michigan Department of State Police*,³⁰³⁹ the Supreme Court held that a state is not a person within the meaning of section 1983.³⁰⁴⁰ The Court

Rose v. Bartle, 871 F.2d 331, 348 (3d Cir. 1989) (plaintiff entitled to tolling provision because favorable termination of underlying proceeding necessary element in § 1983 claim); *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532, 533 (8th Cir. 1987) (plaintiff entitled to benefit of South Dakota tolling provision despite express exclusion of federal civil rights suits in state statute); *Marks v. Parra*, 785 F.2d 1419, 1420 (9th Cir. 1986) (plaintiff entitled to benefit of Arizona tolling provision that excludes time when plaintiff in prison); *Turner v. Evans*, 721 F.2d 341, 341-42 (11th Cir. 1983) (per curiam) (plaintiff entitled to benefit of Georgia tolling provision suspending statute of limitations).

3036. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Supreme Court held that a person arrested for witness tampering who agrees to release any section 1983 claims against the city in exchange for the city's dismissal of charges would be barred by the release from filing a subsequent section 1983 claim. *Id.* at 397-98. At a minimum, the release must be voluntary. *Id.* at 398; compare *Sexton v. Ryan*, 804 F.2d 26, 27 (2d Cir. 1986) (per curiam) (release inherently suspect and unenforceable against suspect who claimed he was coerced into signing in exchange for police dismissing charges) with *Hammond v. Bales*, 843 F.2d 1320, 1322-23 (10th Cir. 1988) (release-dismissal agreement valid when not coerced and executed under judicial supervision); cf. *Lynch v. City of Alhambra*, 880 F.2d 1122, 1127 (9th Cir. 1989) (remanding for determination of whether release-dismissal agreement served public interest even though agreement voluntary).

3037. *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980); compare *Pasterczyk v. Fair*, 819 F.2d 12, 13-14 (1st Cir. 1987) (prisoner's § 1983 suit for damages barred by res judicata when prisoner, who was returned to Massachusetts after escaping and serving sentence for subsequent crime in Arizona, prevailed in state suit claiming credit for original time served but failed to seek monetary remedy at time of first suit); *Cameron v. Fogarty*, 806 F.2d 380, 388-89 (2d Cir. 1986) (prisoner's false arrest conviction had preclusive effect on later § 1983 suit claiming police had no probable cause for arrest), *cert. denied*, 481 U.S. 1016 (1987); *Walker v. Schaeffer*, 854 F.2d 138, 142-43 (6th Cir. 1988) (prisoners in § 1983 suit for false arrest and imprisonment collaterally estopped from relitigating issue of probable cause when prisoners had been convicted in state court and were given "reasonable and fair opportunity" to litigate claims); *Ayers v. City of Richmond*, 895 F.2d 1267, 1272 (9th Cir. 1990) (prisoner's § 1983 action estopped by denial of motion to suppress) and *Newcomb v. Ingle*, 827 F.2d 675, 677 (10th Cir. 1987) (per curiam) (plaintiff may not bring § 1983 claims for unconstitutional search and seizure when plaintiff had full and fair opportunity to litigate claims in suppression stage of state criminal action) with *Haring v. Prosser*, 462 U.S. 306, 316 (1983) (prisoner's guilty plea in criminal trial did not collaterally estop subsequent § 1983 claim of unlawful search); *Brown v. Edwards*, 721 F.2d 1441, 1448 (5th Cir. 1984) (prisoner's guilty plea no bar to litigation of probable cause issue in subsequent § 1983 action when issue not actually litigated in prior proceeding) and *Heath v. Cast*, 813 F.2d 254, 258-59 (9th Cir.) (order suppressing evidence not final judgment for purposes of res judicata or collateral estoppel), *cert. denied*, 484 U.S. 849 (1987).

3038. 42 U.S.C. § 1983 (1988).

3039. 109 S.Ct. 2304 (1989).

3040. This holding has its roots in the eleventh amendment, which prohibits a suit in federal court against a nonconsenting state or a state official when relief is in fact against the state. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Because of the amendment's prohibition and the congressional purpose of providing a federal forum for civil rights claims in enacting section 1983, the *Will* Court found that Congress could not have intended to include an

also concluded that a suit against a state official in her official capacity is “no different from a suit against the state,” and thus exempted such individuals from the definition of “person” unless the action involved a prayer for injunctive relief.³⁰⁴¹ Despite these limitations, the Court has included a municipality within the definition of “person” under section 1983.³⁰⁴²

If an alleged violator enjoys official immunity, the prisoner may be barred

entity with eleventh amendment immunity within the definition of “person” under section 1983, which would have created a cause of action against a state only in state court. 109 S. Ct. at 2309.

The scope of immunity to section 1983 actions is a question of federal law that cannot be overridden by the states. *Howlett v. Rose*, 110 S. Ct. 2430, 2442 (1990); see *Martinez v. California*, 444 U.S. 277, 284 & n.8 (1980) (California statute immunizing public entities and employees from liability for parole release decisions preempted by § 1983).

3041. *Id.* at 2311 & n.10. The critical issue in a suit against a state official in her official capacity, then, is whether prospective or retroactive relief is sought, because only the former can be obtained under § 1983. This distinction arises because an entity with eleventh amendment protection is not a “person” within the meaning of § 1983, but the entity’s eleventh amendment immunity varies depending upon the nature of the relief sought: while relief that serves to compensate a party injured in the past is barred, relief that serves “to bring an end to a violation of federal law is not barred even though accompanied by a substantial ancillary effect” on a state’s treasury. *Papasan v. Allain*, 478 U.S. 265, 278 (1986). The conclusion that suits seeking prospective relief are not against the state permits the use of § 1983 when such relief is sought. *Will*, 109 S. Ct. at 2311 n.10; cf. *Hutto v. Finney*, 437 U.S. 678, 695-95 (1978) (eleventh amendment no bar to claim for attorney’s fees under 42 U.S.C. § 1988 to prevailing party when governmental entity liable on the merits; *Missouri v. Jenkins*, 109 S. Ct. 2463, 2469 (1989) (eleventh amendment no bar to enhancement of fee award against state to compensate plaintiffs for delay in payment).

3042. *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 690 (1978). In *Monell*, the Supreme Court held that a municipality or local government entity is not immune from section 1983 suits claiming monetary, declaratory, or injunctive relief when the policy or custom, which is the subject of the suit, was adopted or implemented by the governing body’s officials. *Id.* at 690-91. A local government may not be held liable, however, merely because it employed the tortfeasor. *Id.* at 691-92. The employee must be acting under color of official policy before the municipality may be found liable. *Id.* at 694; compare *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986) (county held liable for prosecutor’s actions when prosecutor acting as final decisionmaker for county); *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) (municipality may be held liable under § 1983 for failure to train police officers only when failure to train amounts to deliberate indifference to rights of persons with whom police interact); *Krulik v. Bd. of Educ.*, 781 F.2d 15, 23 (2d Cir. 1986) (dictum) (municipality may be held liable when municipal supervisors knowingly acquiesced to official’s behavior because individual official’s act rises to level of “policy” for purposes of § 1983); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442-43 (11th Cir. 1985) (city may be held liable because allegation that city adopted custom of allowing use of excessive force fulfilled requirement that custom be “moving force behind the constitutional deprivation” before § 1983 liability attaches) and *Parker v. District of Columbia*, 850 F.2d 708, 712-13 (D.C. Cir. 1988) (municipality liable under § 1983 when evidence of deliberate indifference to constitutional rights manifested by systematic and grossly inadequate training, discipline, and supervision of its police officers resulting in shooting of plaintiff by police officer during extra-jurisdictional arrest and disarmament), *cert. denied*, 109 S. Ct. 1339 (1989) with *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988) (plurality opinion) (municipality may not be held liable under § 1983 unless plaintiff proves the existence of an unconstitutional policy promulgated by officials having final policymaking authority) and *Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987) (city may not be held liable under § 1983 because plaintiff’s showing of single incident not sufficient evidence of policy or custom of unnecessary force or wrongfully discharging weapon).

In *Howlett v. Rose*, 110 S. Ct. 2430 (1990), the Supreme Court held that a state court may not

from obtaining relief under section 1983. Judges,³⁰⁴³ prosecutors,³⁰⁴⁴ and

grant immunity to a municipality in state court because this entity, under federal law, does not have immunity in federal court. *Id.* at 2443.

3043. In *Forrester v. White*, 484 U.S. 219 (1988), the Supreme Court stated that although judges enjoy absolute immunity from liability and damages for their judicial or adjudicatory acts, they are not absolutely immune for their administrative and executive functions. *Id.* at 227. The *Forrester* Court held that when a judge demoted and dismissed a probation officer, he was acting in an administrative capacity and was therefore not absolutely immune from liability and damages. *Id.* at 229; compare *Malachowski v. City of Keene*, 787 F.2d 704, 710 (1st Cir.) (per curiam) (judge absolutely immune from damages when acting with jurisdiction over parental custody case), *cert. denied*, 479 U.S. 828 (1986); *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.) (judge absolutely immune in suit alleging that he filed letter with board of parole recommending denial of prisoner's parole in retaliation for prisoner bringing civil rights suits), *cert. denied*, 109 S. Ct. 3250 (1989); *John v. Barron*, 897 F.2d 1387, 1392 (7th Cir.) (judge absolutely immune from suit based on handling of trial), *cert. denied*, 111 S. Ct. 69 (1990) and *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989) (judge absolutely immune from liability when he had subject matter jurisdiction and acted in judicial capacity when appointing receiver for corporation) with *Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir. 1989) (state court judge not entitled to absolute immunity for executive action as Chief Judge of judicial district declaring moratorium on issuance of writs of restitution) and *Kurowski v. Krajewski*, 848 F.2d 767, 775 (7th Cir.) (judge not absolutely immune when he terminated employment of former public defenders who did not share judge's political beliefs), *cert. denied*, 488 U.S. 926 (1988).

Absolute judicial immunity extends only to suits for damages. It does not prevent a prisoner from seeking injunctive relief or attorneys fees in section 1983 actions. See *Pulliam v. Allen*, 466 U.S. 522, 541-44 (1984) (judicial immunity no bar to prospective injunction against judge who imposed bail on individuals charged with nonjailable offenses); *Hollins v. Wessel*, 819 F.2d 1073, 1074 (11th Cir. 1987) (per curiam) (judicial immunity no bar to petition for injunction against mortgage foreclosure action on prisoner's property when prisoner not notified of proceedings or appointment of guardian ad litem).

3044. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); compare *Barr v. Abrams*, 810 F.2d 358, 360-61 (2d Cir. 1987) (prosecutor acting within jurisdiction absolutely immune from damage action alleging violation of fifth amendment right to silence, although without jurisdiction, prosecutor would have been accorded only qualified immunity); *Grant v. Hollenbach*, 870 F.2d 1135, 1138-39 (6th Cir. 1989) (prosecutors absolutely immune from suit alleging failure to investigate facts before and after indictment for child abuse and for knowingly bringing false charges); *Myers v. Morris*, 810 F.2d 1437, 1445-47 (8th Cir.) (prosecutor absolutely immune even when plaintiff claimed that prosecutor acted recklessly, maliciously, fraudulently, and without proper investigation when multiple suits filed against plaintiff for sexual activities with minors), *cert. denied*, 484 U.S. 828 (1987); *Lerwill v. Joslin*, 712 F.2d 435, 439-40 (10th Cir. 1983) (prosecutor absolutely immune even when acting beyond the scope of authority by invoking local statute under which not empowered to prosecute; prosecutor may lose absolute immunity, however, if actions are "so clearly beyond the bounds of a prosecutor's authority" that liability would not deter prosecutor from performing job) and *Marx v. Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988) (prosecutor absolutely immune when rendering legal advice regarding existence of probable cause) with *Allen v. Lowder*, 875 F.2d 82, 86 (4th Cir. 1989) (prosecutor not absolutely immune in suit alleging prosecutor attempted to secure continued incarceration of defendant after reversal of conviction because acting in administrative capacity); *Wolfenbarger v. Williams*, 826 F.2d 930, 937 (10th Cir. 1987) (district attorney not entitled to absolute immunity for advice regarding existence of probable cause).

Like judges, prosecutors are not immune from section 1983 cases seeking injunctive relief or attorney's fees. See *Wilson v. Stocker*, 819 F.2d 943, 950 (10th Cir. 1987) (prosecutor absolutely immune from damage suits but not from claims for injunctive relief or attorney's fees in suit charging constitutional violation of arrestee's right to distribute campaign literature).

other judicial officials³⁰⁴⁵ acting in their official capacities enjoy absolute immunity from monetary damages. "Even if absolute immunity is unavailable, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a rea-

3045. Parole board members and grand jurors have also been accorded absolute immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 423 & n.20 (1976) (grand jurors immune when acting within scope of their duties); *Harper v. Jeffries*, 808 F.2d 281, 284 (3d Cir. 1986) (state parole board examiner absolutely immune in § 1983 damage action alleging parole revocation based on false information); *Johnson v. Kegans*, 870 F.2d 992, 995 & n.2 (5th Cir.) (parole board members absolutely immune for actions taken in performance of official duties), *cert. denied*, 109 S. Ct. 3250 (1989); *Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 975 (5th Cir. 1988) (parole revocation hearing officer absolutely immune in § 1983 damage suit by parolee alleging revocation procedure violated right to due process because it did not afford opportunity to confront adverse witnesses); *cf. Fendler v. U.S. Parole Comm'n*, 774 F.2d 975, 979-80 (9th Cir. 1985) (parole board members accorded absolute quasi-judicial immunity from *Bivens* claim for allegedly withholding documents during parole hearing). *But see Lanier v. Fair*, 876 F.2d 243, 253 (1st Cir. 1989) (parole board members entitled to qualified immunity with respect to rescission of reserve parole date).

Like judges and prosecutors, parole board members and grand jurors are not immune from section 1983 cases seeking injunctive relief or attorney's fees. *See Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987) (although absolute immunity of parole officer no bar to plaintiff's petition for injunction against use of false information in presentencing report, complaint properly dismissed when no imminent danger of harm indicated).

Other individuals accorded absolute immunity because of their judicially related activities include court-appointed psychiatrists, social workers, hearing examiners, federal and state probation officers, and court clerks and reporters. *See Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987) (federal probation officers absolutely immune from claims of including false information in presentencing reports); *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.) (court reporter absolutely immune from suit alleging falsification of transcript), *cert. denied*, 110 S. Ct. 371 (1989); *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir.) (court clerk absolutely immune from claim of falsification of docket records when judge ordered alterations), *cert. denied*, 484 U.S. 847 (1987); *Moses v. Parwatarikar*, 813 F.2d 891, 892 (8th Cir.) (court-appointed psychiatrist absolutely immune when she testified to plaintiff's competency to stand trial for burglary and murder), *cert. denied*, 484 U.S. 832 (1987); *Coverdell v. Dept. of Social and Health Servs.*, 834 F.2d 758, 764-65 (9th Cir. 1987) (court appointed child protective services worker entitled to judicial immunity when acting pursuant to court order); *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1986) (state probation officer absolutely immune from suit alleging probation officer filed false presentence report); *Turner v. Barry*, 856 F.2d 1539, 1540 (D.C. Cir. 1988) (*per curiam*) (District of Columbia probation officer absolutely immune from suit alleging probation officer filed false presentence report). Court appointed receivers and trustees in bankruptcy also enjoy absolute immunity. *See New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1302-05 (9th Cir. 1989) (receiver appointed by state court to manage business assets of estate during marital dissolution normally enjoys absolute immunity; receiver not immune when actions involve theft and slander because not part of receiver function); *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987) (court appointed trustee in bankruptcy enjoys absolute immunity from liability when acting within "ambit" of official duties).

Witnesses, including police officers, are also granted absolute immunity. *See Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983) (police officer absolutely immune from liability for perjured testimony); *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir.) (*per curiam*) (police officer absolutely immune in role as witness), *cert. denied*, 479 U.S. 828 (1986); *Daloia v. Rose*, 849 F.2d 74, 75-76 (2d Cir. 1988) (police officers absolutely immune from liability for testimony at pretrial suppression hearing); *Holt v. Castaneda*, 832 F.2d 123, 125 (9th Cir. 1987) (same).

sonable person would have known."³⁰⁴⁶ This qualified immunity applies to prison personnel³⁰⁴⁷ and police officers.³⁰⁴⁸

3046. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (plaintiff can only overcome qualified immunity by showing that rights clearly established at time of violation; no showing made when right to pretermination hearing or prompt post-termination hearing not clear from precedent).

3047. Compare *Cleavinger v. Saxner*, 474 U.S. 193, 206-07 (1985) (federal prison disciplinary committee members and warden granted qualified immunity in suit claiming administrative detention for inciting work stoppage violated prisoner's constitutional rights); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (state prison officials accorded qualified immunity); *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 829-30 (1st Cir. 1987) (prison officials and guards entitled to qualified immunity from damages in case alleging emotional and psychological damages due to transfer to different prison without timely hearing); *Henry v. Perry*, 866 F.2d 657, 659 (3d Cir. 1989) (prison guard entitled to qualified immunity in case claiming guard used deadly force to prevent escape of prisoner who had committed murder) and *Hudson v. Edmonson*, 848 F.2d 682, 686-87 (6th Cir. 1988) (prison official entitled to qualified immunity for failure to state criteria used in enforcing particular sentence when he would not have known that disciplinary report and hearing would violate plaintiff's due process rights) with *Walsh v. Mellas*, 837 F.2d 789, 800-01 (7th Cir.) (prison official not entitled to qualified immunity because constitutional duty to prevent inmate attacks violated by placing him in cell with known gang member), *cert. denied*, 486 U.S. 1061 (1988) and *Greason v. Kemp*, 891 F.2d 829, 836 (11th Cir. 1990) (prison officials denied summary judgment on issue of qualified immunity when jury question existed as to whether conduct amounted to deliberate indifference to prisoner's medical needs).

3048. Compare *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (police officer entitled to qualified immunity if acts reasonable in eyes of reasonable officer in case charging that law enforcement official made warrantless search of respondent's home on belief that bank robbery suspect hiding therein); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (police entitled to qualified immunity in case claiming that arrest warrant, charging illegal drug possession, violated fourth and fourteenth amendments for failure to establish probable cause, unless warrant so lacking in indicia of probable cause that reasonable officer would not believe probable cause present); *Burns v. Loranger*, 907 F.2d 233, 236 (1st Cir. 1990) (police entitled to qualified immunity when strip search of plaintiff objectively reasonable because reasonable officer would not believe search violated clearly established right); *Turner v. Dammon*, 848 F.2d 440, 447 (4th Cir. 1988) (police officer entitled to qualified immunity from any claim arising out of search of premises conducted pursuant to valid search warrant because conduct objectively reasonable); *Coon v. Ledbetter*, 780 F.2d 1158, 1164 (5th Cir. 1986) (police officer entitled to qualified immunity when conduct, although perhaps technically illegal, did not violate clearly established federal rights of which reasonable person would have known); *Danese v. Asman*, 875 F.2d 1239, 1245 (6th Cir. 1989) (police supervisors entitled to qualified immunity when prisoner hung himself in jail cell because not subject to clearly established constitutional duty to diagnose pretrial detainee's condition as prone to suicide), *cert. denied*, 110 S. Ct. 1473 (1990); *Lowrance v. Pflueger*, 878 F.2d 1014, 1019-20 (7th Cir. 1989) (sheriff accorded qualified immunity in case where application for arrest warrant had objectively reasonable basis that probable cause existed) and *Los Angeles Protective League v. Gates*, 907 F.2d 879, 888 (9th Cir. 1990) (police department employees entitled to qualified immunity with respect to issuance of administrative search warrant for officer's garage because they sought legal advice before obtaining warrant and legal issue "complex and unclear") with *Fields v. City of Omaha*, 810 F.2d 830, 835-36 (8th Cir. 1987) (police officer not entitled to qualified immunity for violating investigatory stop requirements clearly established in *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968), because officer unconstitutionally applied city's loitering and prowling ordinance when he stopped and detained plaintiff without reasonable suspicion); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475-76 (10th Cir.) (police officer not accorded qualified immunity arising from nighttime search pursuant to daytime bench warrant because officers should have known nighttime execution of warrant unreasonable under fourth amendment), *cert. denied*, 110 S. Ct. 280 (1989).

Available Remedies. Federal courts may award section 1983 claimants the full range of remedies available to civil litigants. Monetary relief may include nominal,³⁰⁴⁹ compensatory,³⁰⁵⁰ and punitive damages.³⁰⁵¹ If an inmate continues to be deprived of her rights, federal courts may also grant injunctive relief if there is a real and immediate threat that the prisoner will be the victim of an unconstitutional action.³⁰⁵² In addition, 42 U.S.C. § 1988 ex-

3049. See *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 829 (1st Cir. 1987) (inmate entitled to nominal damages as compensation for constitutional injury even if unable to prove actual damages for emotional distress); *Patterson v. Coughlin*, 905 F.2d 564, 568 (2d Cir. 1990) (victim entitled to nominal damages for any violation of due process rights); *Sahagian v. Dickey*, 827 F.2d 90, 100 (7th Cir. 1987) (prisoner entitled to nominal damages for violation of prisoner's right to legal materials despite absence of actual harm); *Wiggins v. Rushen*, 760 F.2d 1009, 1011-12 (9th Cir. 1985) (same).

3050. Compare *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (compensatory damages awarded only for actual injuries; abstract value of violated constitutional rights cannot form basis for § 1983 damages); *Ismail v. Cohen*, 899 F.2d 183, 184 (2d Cir. 1990) (jury award of \$650,00 as compensation for physical injuries caused by police officer upheld); *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987) (jury award of \$900,000 as compensation for police brutality upheld), *cert. denied*, 484 U.S. 1027 (1988); *Hale v. Fish*, 899 F.2d 390, 403 (5th Cir. 1990) (court's award of compensatory damages to arrestees upheld); *Mairena v. Foti*, 816 F.2d 1061, 1065-66 (5th Cir. 1987) (jury award of \$30,000 against district attorney as compensation for erroneously incarcerating plaintiff for 23 days based on material witness warrant upheld), *cert. denied*, 484 U.S. 1005 (1988) and *Jackson v. Crews*, 873 F.2d 1105, 1109 (8th Cir. 1989) (jury award of \$5,000 as compensation for physical pain and suffering caused by police officer allegedly slamming plaintiff's face into pavement following arrest upheld) with *Bailey v. Andrews*, 811 F.2d 366, 375-76 (7th Cir. 1987) (jury award of \$80,000 excessive when plaintiff suffered only scratched boots, torn pants, and bent glasses and submitted no bills for medical or psychological treatment).

A prisoner's section 1983 claim for damages against a correctional facility does not become moot because he is later transferred to another facility. *Boag v. MacDougall*, 454 U.S. 364, 364-65 (1982) (*per curiam*).

3051. See *Smith v. Wade*, 461 U.S. 30, 51 (1983) (punitive damages proper in § 1983 case when there is "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law"); *Acosta-Sepulveda v. Hernandez-Purcell*, 889 F.2d 9, 13 (1st Cir. 1989) (punitive damage award to wrongfully terminated public employee proper when employer had blatant disregard for plaintiff's rights); *O'Neill v. Krzeminski*, 839 F.2d 9, 13-14 (2d Cir. 1988) (punitive damage award of \$185,000 upheld in § 1983 action against police officers who denied plaintiff medical attention after breaking his nose while using excessive force); *Cooper v. Dyke*, 814 F.2d 941, 943-48 (4th Cir. 1987) (punitive damage award proper when police ignored boy's pleas for assistance for nearly two hours before obtaining medical assistance for gunshot wounds); *Melear v. Spears*, 862 F.2d 1177, 1187 (5th Cir. 1989) (punitive damage award proper against deputy sheriff when kicked in apartment doors during search for suspect who was seen running toward apartment building); *Wright v. Jones*, 907 F.2d 848, 852 (8th Cir. 1990) (punitive damage award proper if inmates can show that guards acted in reckless disregard of prisoner's rights; no showing of malice needed to obtain punitive damages); *cf. Hale v. Fish*, 899 F.2d 390, 404 (5th Cir. 1990) (court has discretion not to award punitive damages when performing role of factfinder). *But see City of Newport v. Fact Concerts*, 453 U.S. 247, 259-66 (1981) (punitive damages cannot be awarded in § 1983 suit against municipality).

3052. Compare *Estrada-Izquierdo v. Aponte-Roque*, 850 F.2d 10, 18-19 (1st Cir. 1988) (injunctive order to reinstate plaintiff proper when plaintiff unconstitutionally dismissed because of her political affiliation); *Green v. McCall*, 822 F.2d 284, 293 (2d Cir. 1987) (injunctive relief requiring compliance with regulations proper when history of noncompliance exists, even though parole commission had regulations in place for parole rescission hearing) and *Williams v. Lane*, 851 F.2d 867,

pressly provides that courts may award attorney's fees to the prevailing party.³⁰⁵³

883-84 (7th Cir. 1988) (injunction and appointment of special master to implement just remedy upheld when inmates successfully claimed denial of free exercise of religion, meaningful access to the courts, and freedom from cruel and unusual punishment), *cert. denied*, 488 U.S. 1047 (1989) with *Preiser v. Newkirk*, 422 U.S. 395, 401-03 (1975) (injunctive relief dismissed as moot when potential for recurrence of allegedly unconstitutional transfers between prisons slight); *cf.* *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986) (injunctive relief governing conditions of confinement and segregation procedures at state prison modified when determined to be broader than necessary to remedy constitutional violation), *cert. denied*, 481 U.S. 1069 (1987).

3053. 42 U.S.C. § 1988 (1988) provides that "[i]n any action or proceeding to enforce a provision [of certain statutes, including section 1983,] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs." *Id.*; see *Smith v. Robinson*, 468 U.S. 992, 1006 (1984) (section 1988 gives courts broad authority to make § 1988 awards of attorney's fees); *cf.* *North Carolina Dep't. of Transp. v. Crest St. Community Council*, 479 U.S. 6, 12 (1986) (courts may grant attorney's fees under § 1988 only for action to enforce an enumerated civil rights statute).

The party requesting attorney's fees must be the "prevailing party." 42 U.S.C. § 1988. In *Texas State Teachers v. Garland Independent School District*, 489 U.S. 782 (1989), the Supreme Court held that a plaintiff is a "prevailing party" if she "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Id.* at 791-92 (quoting *Nadeau v. Helgemo*, 581 F.2d 275, 278-79 (1st Cir. 1978)). The Court also indicated that the plaintiff must point "to a resolution of the dispute which changes the legal relationship between itself and the defendant," insuring that the judgment was not merely a "technical victory." *Id.* at 792. Similarly, in *Rhodes v. Stewart*, 488 U.S. 1 (1988) (*per curiam*), the Supreme Court stated that a party meets the "prevailing party" requirement if, and only if, the judgment affects the behavior of the defendant towards the plaintiff. The Court held that plaintiffs who won a declaratory judgment against prison officials did not prevail for purposes of section 1988 because the judgment did not affect the behavior of the defendant towards the plaintiffs when one plaintiff had died and the other plaintiff had been released by the time the district court entered its order. *Id.* at 2; see *Rogers v. Okin*, 821 F.2d 22, 25-26 (1st Cir. 1987) (plaintiffs deemed "prevailing party" and awarded attorney's fees even though only injunctive relief granted), *cert. denied*, 484 U.S. 1010 (1988); *Cobb v. Miller*, 818 F.2d 1227, 1233-35 (5th Cir. 1987) (plaintiff deemed "prevailing party" even though only one of three defendants held liable and plaintiff only recovered nominal damages).

In *Hewitt v. Helms*, 482 U.S. 755 (1987), the Supreme Court also stated that in certain circumstances defendants may perform voluntary acts that afford the plaintiff all the relief sought without having a court enter a final judgment. *Id.* at 760-61. In such a case, the plaintiff should be deemed the "prevailing party." *Id.* (dictum); compare *Heath v. Brown*, 807 F.2d 1229, 1233 (5th Cir. 1987) (*per curiam*) (dictum) (court must find suit was "substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior" in order for plaintiff to "prevail" without obtaining legal relief (quoting *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1152 (5th Cir. 1985))); *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 312-13 (6th Cir.) (plaintiff "prevailed" when lawsuit resulted in landmark Supreme Court case which served as catalyst for change in board practices even though plaintiff did not win individual relief), *cert. denied*, 488 U.S. 941 (1988) and *Foremaster v. City of St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989) (plaintiff entitled to attorney's fees absent judicial relief when lawsuit causally linked to relief obtained and defendant's response to lawsuit required by law), *cert. denied*, 110 S. Ct. 1937 (1990) with *Quinn v. Missouri*, 891 F.2d 190, 194 (8th Cir. 1989) (plaintiffs not entitled to attorney's fees in suit challenging state statute later declared unconstitutional because plaintiffs gained nothing from suit).

A prevailing defendant in a civil rights case may recover section 1988 attorney's fees when the suit is vexatious, frivolous, or brought to harass the defendant. *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983); compare *Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (*per curiam*) (defend-

ant awarded attorney's fees as sanction for plaintiff's "frivolous appeals to harass") and *V-1 Oil Co. v. Wyoming Dep't. of Env'tl. Quality*, 902 F.2d 1482, 1490 (10th Cir.) (prevailing defendant entitled to attorney's fees covering both trial work and work on appeal of fee award since appeal frivolous), *cert. denied*, 111 S. Ct. 295 (1990) with *Coats v. Pierce*, 890 F.2d 728, 733-34 (5th Cir. 1989) (defendants entitled to attorney's fees only when plaintiff's action frivolous, unreasonable or without foundation), *cert. denied*, 111 S. Ct. 70 (1990) and *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1411-12 (9th Cir.) (defendant board of medical examiners not awarded attorney's fees even though plaintiff's claims barred by res judicata and collateral estoppel), *cert. denied*, 111 S. Ct. 177 (1990); *cf. Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985) (plaintiff not awarded attorney's fees as sanction for vexatious suit), *cert. denied*, 475 U.S. 1067 (1986). *But see Popham v. City of Kenesaw*, 820 F.2d 1570, 1582-83 (11th Cir. 1987) (defendant not awarded attorney's fees even though possible that plaintiff brought suit to harass city because prevailed on claims against other defendant).

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court established guidelines for calculating attorney's fees under section 1988. Courts should first multiply the number of hours reasonably expended by an attorney on the litigation by a reasonable hourly rate. *Id.* at 433; *see Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987) (number of hours expended multiplied by hourly rate frequently referred to as "lodestar"). If the plaintiff did not prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claim should be excluded when calculating the fee. *Hensley*, 461 U.S. at 435; *see Allen v. Higgins*, 902 F.2d 682, 684 (8th Cir. 1990) (inmate awarded only 50% of requested attorney's fees when plaintiff prevailed on only one claim and received only nominal damages); *Williams v. Mensey*, 785 F.2d 631, 640 (8th Cir. 1986) (inmate awarded only 10% of requested attorney's fee when he prevailed on only one of seven claims); *Kurowski v. Krajewski*, 848 F.2d 767, 776-77 (7th Cir.) (inmate awarded 100% of requested attorney's fees when suit completely successful, even though fees were 25% of total recovery), *cert. denied*, 488 U.S. 926 (1988); *Iqbal v. Golf Course Superintendent's Ass'n. of America*, 900 F.2d 227, 228 (10th Cir. 1990) (30% reduction of lodestar fee appropriate given limited success of plaintiff).