

Chapter Two: Planning Your Section 1983 Suit

The main way to understand what kind of suit you can bring under Section 1983 is to look at the words of that law:

“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...”

Some of the words are perfectly clear. Others have meanings that you might not expect, based on years of different interpretation by judges. In this chapter we will explore what the words themselves and judge’s opinions from past law suits tell us about what kind of suit is allowed under Section 1983 (Section A), the impact of the PLRA (Section B) what you can sue about (Section C), what you can ask the courts to do (Sections D & E), whom to sue (Section F), settlements (Section G), and class actions (Section H).

A. YOU CAN SUE ABOUT CERTAIN VIOLATIONS OF YOUR FEDERAL RIGHTS BY STATE EMPLOYEES.

Although Section 1983 was designed especially to help African-Americans, anyone can use it, regardless of race. The law refers to “any citizen of the United States or any other person within the jurisdiction thereof.” This means that you can file a Section 1983 action even if you are not a United States citizen. *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998). All you need is to have been “within the jurisdiction” when your rights were violated. “Within the jurisdiction” just means physically present in the U.S.. The fact that you are in prison does not take away your right to sue under section 1983. *Cooper v. Pate*, 378 U.S. 546 (1964).

- **Note:** “Civil death laws,” which take away or limit a prisoner’s right to use state courts for personal injury suits, contracts, divorce, etc., also do not affect the right to sue in the federal courts on the basis of Section 1983. *Taylor v. Gibson*, 529 F.2d 709 (5th Cir. 1976).

Not every injury you suffer or every violation of your rights is covered by Section 1983. Section 1983 applies to the “*deprivation of any rights, privileges, or immunities secured by the Constitution and laws.*” This means that the actions you are suing about must violate your **federal** rights. Section 1983 also says “*under color of any statute, ordinance, regulation, custom or usage, of any State or Territory.*” Courts have developed a shorthand for this phrase. They call it “under color of state law.” This means that the violation of your rights must have been done by a state or local official. These two requirements are explained in detail below.

1. Violations of Your Federal Rights: Conditions and Treatment in Prison.

Section 1983 won’t help you with all the ways in which prison officials mistreat prisoners. There are two limits. First, you need to show that the acts you are suing about violate the U.S. Constitution or a law passed by the U.S. Congress.

Prisoners most commonly use Section 1983 to enforce rights guaranteed by the U.S. Constitution, these are called “constitutional rights.” Your constitutional rights are explained in Section C of this chapter.

You can also use Section 1983 to enforce rights in federal laws, or “statutes.” Only a very few federal laws grant rights which apply to prisoners. One such law, for example, is the **Americans with Disabilities Act**, or the “ADA”. The ADA can be found at 42 U.S.C. §§ 12101 – 12213. The ADA prevents discrimination against people with disabilities, including prisoners. If you have any sort of physical or mental disability you may be able to file a Section

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1983 lawsuit using the ADA.

Another federal statute that may be useful to prisoners is the **Religious Land Use and Institutionalized Persons Act**, or “RLUIPA,” which was passed by Congress in 2000. 42 U.S.C. § 2000cc-1(a). RLUIPA protects prisoners’ rights to exercise their religion. A second federal statute protecting the religious rights of prisoners is the **Religious Freedom Reformation Act**, or “RFRA.” 42 U.S.C. § 2000bb-1(c). Unfortunately, this act can only be used by prisoners in federal prison. It is not available to prisoners in state prison. Religious freedom is a constitutional right protected by the First Amendment, but RLUIPA and RFRA provide even *more* protection than the First Amendment. Chapter Two, Section C, Part 2 explains the protection provided by each of these sources.

Second, as a prisoner, your suit has to be about conditions or treatment in prison. You cannot use Section 1983 to challenge the fact or duration of your imprisonment or to obtain immediate or speedier release from prison. If you want to challenge your trial, your conviction, or your sentence, you need to use a completely different type of action, called a *writ of habeas corpus*. Some of the resources listed in Appendix E explain how to do this.

2. “Under Color of State Law”

The second limit is that Section 1983 only applies to actions taken “under color of state law.” This means that your rights must have been violated by a state or local official. This includes people who work for the state, city, county or other local governments. Anything done to you by a prison guard, prison doctor, or prison administrator (like the warden) is an action “under color of state law.”

The “under color of state law” requirement does **not** mean that the action has to have been *legal* under state law. This very important principle was decided in a case called *Monroe v. Pape*, 365 U.S. 167 (1961). All you need to show is that the person you sue was working for the prison system or some other part of state or local government at the time of the acts you’re suing about.

The official you sue must have been acting in “under color of state law” when he violated your rights. This just means that the official must have been “on the job” or otherwise exercising the power that comes from his position of authority. This is rarely a problem for prisoners, because any time you come into contact with a prison official, that official is exercising his power

over you.

You can’t use Section 1983 to sue over the actions of federal employees because they act “under color of federal law,” not *state* law. This is OK. As we explained in Section C of Chapter One, you can sue in federal court whenever a federal official violates your constitutional rights. This is called a “*Bivens* action.” It takes its name from the very important lawsuit that first allowed this type of action, called *Bivens v. Six Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

You can’t use Section 1983 to sue a private citizen who acted without any connection to the government or any governmental power. For example, if another prisoner assaults you, you cannot use Section 1983 to sue him, because he or she does not work for the government. You could, however, use Section 1983 to sue a guard for failing to protect you from the assault.

A person can exercise power from the government even if he or she doesn’t actually work for the state directly. You could use Section 1983 to sue a private citizen, such as a doctor, who mistreats you while he is working with or for prison officials. In a case called *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court held that a private doctor with whom the state contracts to provide treatment to a prisoner can be sued using Section 1983.

Using Section 1983 is complicated if you are incarcerated in a private prison. The Supreme Court has not yet decided whether you can sue private prison guards the way you can sue state prison guards. However, almost all of the lower courts have decided that you can. For example, in *Skelton v. PriCor, Inc.*, 963 F.2d 100 (6th Cir. 1991), a private prison employee wouldn’t let an inmate go to the law library or have a bible. The Sixth Circuit ruled that the private prison guard’s action was “under color of state law” and allowed the prisoner to sue using Section 1983. Another helpful case is *Giron v. Corrections Corporation of America*, 14 F. Supp. 2d 1245 (D.N.M. 1998), which involved a section 1983 suit by a woman who was raped by a guard at a private prison. The court held that the guard was “performing a traditional state function” by working at the prison, so his actions were “under color of state law.”

B. THE PRISON LITIGATION REFORM ACT (PLRA)

The PLRA, an anti-prisoner statute which became law in 1996, has made it much harder for prisoners to gain

relief in the federal courts. While you will learn more about the PLRA in the following chapters, we have included a brief outline of its major provisions here so that you keep them in mind as you start to structure your lawsuit. Remember that most of these provisions only apply to suits filed while you are in prison. If you want to sue for damages after you are released, you will not need to worry about these rules.

1. INJUNCTIVE RELIEF – This section limits the “injunctive relief” (also called “prospective relief”) that is available in prison cases. Injunctive relief is when you ask the court to make the prison do something differently, or stop doing something altogether. Injunctive relief and the changes in its availability under the PLRA are discussed in Section D of this chapter.
2. EXHAUSTION OF ADMINISTRATIVE REMEDIES – The PLRA states that “[n]o action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.A. § 1997e(a).

This is known as the “exhaustion” requirement. If you try to sue a prison official about *anything* he or she has done to you, the court may well dismiss your case unless you have first filed an inmate grievance or complaint form provided by your prison, and appealed that grievance all the way up. You will learn more about exhaustion in Chapter Three, Section A, Part 2.

3. MENTAL OR EMOTIONAL INJURY – The PLRA also states that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C.A. § 1997e(e).

Most courts agree that this means that if you are suing for money damages, you can not get money for mental or emotional injury alone. If you are suing for injunctive relief or to stop a violation of your constitutional or federal rights, you do not need to worry. This rule is explained in detail in Chapter 2, Section E on money damages.

4. ATTORNEYS’ FEES – As explained in Chapter One, Section D, the PLRA limits the court’s ability to make the defendants pay for “attorneys’ fees” if you win your case. If you do have a lawyer, you

should talk to them and have them explain the significance of this to you. Keep in mind, though, that the PLRA does not affect any agreement you may have made with your lawyer to pay fees yourself.

5. FILING FEES AND THE THREE STRIKES PROVISION – Courts charge everyone fees when they file a lawsuit. However, poor people who are not prisoners are not required to pay all these fees up front. Chapter Three, Section C, Part 2, describes how to file “*in forma pauperis* papers” which allow poor prisoners to pay their fees on an installment plan. If you have had three prior lawsuits dismissed as “frivolous, malicious, or failing to state a claim for relief,” 28 U.S.C.A. 1915, you may not proceed *in forma pauperis* and will have to pay your fees up front. However, there is an exception for prisoners who are “in imminent danger of serious physical injury.”
6. SCREENING, DISMISSAL & WAIVER OF REPLY – The PLRA allows for courts to dismiss prisoners’ cases very soon after filing if the case is ruled “frivolous,” “malicious,” does not state a claim, or seeks damages from a defendant with immunity. The court can do this before requiring the defendant to reply to your complaint. These provisions are explained in Chapter Four, Section B.

C. YOUR RIGHTS UNDER THE U.S. CONSTITUTION

The U.S. Constitution is the supreme law of the land. The Amendments to the Constitution provide individuals in this country with certain rights. Within the U.S. Constitution, the main protection against actions by state officials is found in the Fourteenth Amendment:

“No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

These guarantees are known as the “Due Process Clause” and the “Equal Protection Clause.” The courts have ruled that both clauses protect prisoners.

- **Equal protection** means that prison officials are not supposed to discriminate against you on the basis of your race or any other arbitrary category, such as your religion, nationality, sex, income, or political beliefs.

- **Due process** means prison officials are not supposed to restrict your access to courts or lawyers, or punish you (take away your property or your liberty, even within prison) without fair procedures.

The first ten amendments to the U.S. Constitution are known as the “Bill of Rights.” Technically, these amendments apply only to actions by the federal government, not to actions by state officials. However, the courts have ruled that the Due Process Clause of the Fourteenth Amendment “incorporates” most of the Bill of Rights. This means when a state or local official does something that is prohibited by one of the first ten amendments, it is a violation of the Due Process Clause of the Fourteenth Amendment.

In this way, the Due Process Clause protects a state prisoner’s rights under the First Amendment, including free speech, the right to associate with anyone you choose, and freedom to practice your religion. The Due Process Clause also incorporates your right under the Fourth Amendment to be free from unreasonable searches or seizure of your property. And it includes the protection of the Eighth Amendment against “cruel and unusual punishment,” including brutality and inhumane prison conditions. Appendix C gives the full text of these Amendments.

Reminder

Chapter Six explains the court system, how cases are used as grounds for court decisions, how legal citations work, and the basics for legal research. Be sure to read it if you are going to do any legal research. Remember that federal courts in one state do not always follow decisions by federal courts in other parts of the country.

This section of the Handbook will discuss the major constitutional rights that prisoners have won in the federal courts. It will indicate the key court decisions in support of each right. For more details and citations, as well as legal arguments in favor of additional constitutional rights for prisoners, check the books and resources listed in Appendix E. Be sure to keep up with new decisions by using *Shepard’s Citations* and other resources in your law library. There is more information on *Shepard’s Citations* in Chapter Six.

1. Your Right to Freedom of Speech & Expression in Prison

The First Amendment protects everybody’s right to freedom of speech and expression. Freedom of speech

and expression includes the right to read books and magazines, the right to call or write to your family and friends, the right to criticize the government or state officials you disagree with, and much more. However, in prison, those rights are restricted by the prison’s need for security and administrative ease. Because of this, it is often very hard for a prisoner to assert these rights. Almost all of the rights protected by the First Amendment are governed by the same legal standard, developed in a case called *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, prisoners in Missouri brought a class action lawsuit challenging a regulation that limited the ability of prisoners to write letters to each other. The Supreme Court used the case to establish a four-part test for First Amendment claims. Under this test, a law that restricts your freedom is ok as long as it is “reasonably related to a legitimate penological interest.” A court will decide if a law, prison regulation, or guard’s action is “reasonably related to a legitimate penological interest” by asking four questions.

THE TURNER TEST

The four questions are as follows:

- **Is the regulation reasonably related to a legitimate, neutral government interest?** “Reasonably related” means that the rule is a least somewhat likely to do whatever it is intended to do. A rule banning a book on bomb-making is reasonably related to the prison’s goal of security. However, a rule banning all novels is not reasonably related to security. “Neutral government interest” means that the prison’s goal must not be related to its dislike of a particular idea or group. The prison can’t pick and chose certain books or ideas or people unless it has a “neutral” reason, like security, for doing so.
- **Does the regulation leave open another way for you to exercise your constitutional rights?** This means the prison can’t have a rule that keeps you from expressing yourself in all ways. For example, prison officials can keep the media from conducting face-to-face interviews with prisoners, as long as prisoners have other ways (like by mail) to communicate with the media. *Pell v. Procunier* 438 U.S. 1 (1978)
- **How does the regulation impact other prisoners, prisons guards or officials and prison resources?** This is most often about how much any change would cost, in terms of money and staff time. For example, one court held that it is constitutional to prevent prisoners from calling anyone whose

number is not on their list of ten permitted numbers, because it would take prison staff a long time to do the necessary background checks on additional numbers. *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996). This question is not always just about money though, it also requires the court to take into consideration whether changing the regulation would pose a risk to other prisoners or staff or create a “ripple effect” in the prison. *Fraise v. Terhune*, 283 F.3d 506, 520 (3d Cir. 2002).

- **Are there obvious, easy alternatives to the regulation that would not restrict your right to free expression?** This part of the test offers a chance for the prisoner to put forward a suggestion of an obvious and easy way for a prison to achieve its desired goal. For example, one court held that it is constitutional to ban correspondence between a pair of prisoners in two different facilities after one sent a threatening letter to the other’s Superintendent, because monitoring their correspondence is **not** an obvious or easy alternative to banning it. *U.S. v. Felipe*, 148 F.3d 101 (2d Cir. 1998).

You will want to keep these four questions in mind as you read the following sections on the First Amendment.

(a) Access to Reading Materials

The Basics: Prison Officials can keep you from getting or reading books that they think are dangerous or pornographic. They can also make you get all books straight from the publisher.

The First Amendment protects your right to receive and keep reading material like books and magazines. This doesn’t mean that you can have any books you want. Your right is limited by the interest of prison officials in maintaining order and security and promoting prisoner rehabilitation. Until 1989, the Supreme Court required prisons to prove that banning material was necessary to meet government interests in prison order, security, and rehabilitation before they could violate a prisoner’s legal rights. This standard, developed in *Procunier v. Martinez*, 416 U.S. 396 (1974), gave prisoners fairly strong protection of their access to reading materials. Today, however, the Supreme Court has become much more conservative, and has given prisons greater power to restrict your First Amendment rights. Now a prison can keep you from having

Why Read Cases?

Sometimes in this Handbook we suggest that you read Supreme Court and other court cases. While we have tried to summarize the law for you, the cases we suggest will give you much more detailed information, and will help you figure out whether you have a good legal claim. Chapter Six explains how to find cases in the law library based on their “citation.” You can also ask the library clerk for help finding a case. Chapter Six also gives helpful tips on how to get the most out of reading a case.

magazines and books as long as it fulfills the *Turner* test, explained above. This was decided in an important Supreme Court case called *Thornburgh v. Abbot*, 490 U.S. 401, 404 (1989). If you feel that your right to have reading materials is being violated, you should try reading *Thornburgh v. Abbot*.

While the *Turner* standard is less favorable to prisoners, it still guarantees you a number of important rights. Prison officials still need to justify their policies in some convincing way. If they can’t, the regulation may be struck down. For example, one court overturned a ban on all subscription newspapers and magazines for prisoners in administrative segregation, because it meant that prisoners were kept from reading all magazines, a problem under the second question in *Turner*, and because the rule wasn’t reasonably related to the prison’s interest in punishment and cleanliness, a problem under *Turner* Question 1. *Spellman v. Hopper*, 95 F. Supp. 2d 1267 (M.D. Ala., 1999).

Prisons can’t just ban books and magazines randomly. Courts require prisons to follow a certain procedure to ban a publication. A prison cannot maintain a list of excluded publications, or decide that no materials from a particular organization will be allowed in. It must decide about each book or magazine on a case-by-case basis. This is true even if prison official already knows that the book or magazine comes from an organization they don’t approve of. *Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997). Also, some prisons require the warden to tell you when he or she rejects a book or magazine sent to you, and to give the publisher or sender a copy of the rejection letter. Courts may require that the prison have a procedure so that you, or the publisher or sender, can appeal the decision.

Prison officials cannot censor material just because it contains religious, philosophical, political, social, sexual, or unpopular or repugnant content. They can

only censor material if they believe it will incite disorder or violence, or will hurt a prisoner's rehabilitation. Unfortunately, the *Thornburgh* standard gives prison wardens broad discretion in applying these rules, and sometimes decisions are inconsistent among different courts. Courts have allowed censorship of materials that advocate racial superiority and violence against people of another race or religion. *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996); *Chriceol v. Phillips*, 169 F.3d 313 (5th Cir. 1999). One court allowed special inspection of a prisoner's mail after he received a book with a suspicious title, even though the book was just an economics textbook. *Duamutef v. Hollins*, 297 F.3d 108 (2nd Cir. 2002). Prison officials are normally allowed to ban an entire offending publication, as opposed to just removing the sections in question. *Shabazz v. Parsons*, 127 F.3d 1246 (10th Cir. 1997). However, prisons must abide by the Fourteenth Amendment, which guarantees equal protection of the laws to all citizens. This means that, for example, a prison cannot ban access to materials targeted to an African-American audience, if they do not ban similar materials popular among white people.

You do not have a right to all kinds of sexually explicit materials. But most courts have said that you do have a right to non-obscene, sexually explicit material that is commercially produced (as opposed to, for example, nude pictures of spouses or lovers). *Thornburgh*, 490 U.S. at 405. Recently, however, some courts have allowed total bans on any publication portraying sexual activity, or featuring frontal nudity. *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999). Courts do not allow prisoners access to child pornography because it is against federal law, and usually will not allow access to sexually explicit sadomasochistic materials on the grounds that they may incite violence. Courts have also upheld bans on homosexually explicit material when the material depicts individuals of the same sex as the prison population, arguing that a prisoner might be identified as homosexual when he receives the material and attacked by others as a result. *Espinoza v. Wilson*, 814 F.2d 1093 (6th Cir. 1987). Homosexual material that is not sexually explicit is allowed in at least some circuits. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

A prison can usually require that publications come directly from a publisher or bookstore. *Bell v. Wolfish*, 441 U.S. 520, 550 (1979). Courts have justified this by arguing that materials from sources other than the publisher or bookstore may contain contraband, and that the cost of searching all of these materials would be too great.

(b) Free Expression of Political Beliefs

The Basics: You can believe whatever you want, but the prison *may* be able to stop you from some writing, talking or organizing.

You also have the right to express your political beliefs. This means that prison officials may not punish you simply because of your political beliefs. *Sczerbaty v. Oswald*, 341 F. Supp. 571 (S.D.N.Y. 1972). To justify any restriction on your right to free expression, prison officials need to satisfy the *Turner* test by showing that the restriction is "reasonably related to legitimate governmental interests." The *Turner* test was explained earlier in this section.

Prison officials may be able to limit what you write and publish in prison, but not all of these limitations will pass the *Turner* standard. For example, one court found a rule that kept prisoners from carrying on businesses or professions in prison to be not reasonably related to legitimate governmental interests when it kept Mumia Abu-Jamal from continuing his journalism career. *Abu-Jamal v Price*, 154 F.3d 128 (3rd Cir. 1998). The court relied on evidence that (1) the rule was enforced against Mumia, at least in part, because of the content of his writing, and not because of security concerns; (2) his writing did not create a greater burden within the prison than any other prisoner's writing; and (3) there were obvious, easy alternatives to the rule that would address security concerns.

However, regulations limiting prisoners from publishing their work may be constitutional in other situations. In a case called *Hendrix v. Evans*, 715 F. Supp. 897 (N.D. Ind. 1989), the court held that a ban on publishing leaflets to be distributed to the general public on the topic of a new law was constitutional, because prisoners still had other ways to inform the public about the issue, such as by individual letters.

Often the prison will rely on "security concerns" to justify censorship. In *Pittman v. Hutto*, 594 F.2d 407 (4th Cir. 1979), the court held that prison officials did not violate the constitution when they refused to allow publication of an issue of a prisoners' magazine because they had a reasonable belief that the issue might disrupt prison order and security.

Some courts will examine the "security" reason more closely than others to see if it is real or just an excuse. For example, in *Castle v. Clymer*, 15 F. Supp. 2d 640 (E.D. Pa. 1998), the court held that prison officials

violated the constitution when they transferred a prisoner in response to letters he had written to a journalist. The letters mentioned the prisoner's view that the proposed prison regulations would lead to prison riots. The court found that since there was no security risk, the transfer was unreasonable.

Prison officials are permitted to ban petitions, like those asking for improvements in prison conditions, as long as prisoners have other ways to voice their complaints. *Duamutef v. O'Keefe*, 98 F.3d 22 (2d Cir. 1996). Officials can ban a prisoner from forming an association or union of inmates, because it is reasonable to conclude that such organizing activity would involve threats to prison security. *Brooks v. Wainwright*, 439 F. Supp. 1335 (M.D. Fl. 1977). In one very important case, the Supreme Court upheld the prison's ban on union meetings, solicitation of other prisoners to join the union, and bulk mailings from the union to prisoners, as long as there were other ways for prisoners to communicate complaints to prison officials and for the union to communicate with prisoners. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

(c) Limits on Censorship of Mail

The Basics: The prison usually can't stop you from writing whatever you want to people outside the prison. The prison can keep other people from writing you things it considers dangerous. Prison guards can look in your letters, to make sure there is no contraband inside.

The First Amendment also protects your right to send and receive letters. Until 1989, prison officials were required to meet a relatively strict test to justify their needs and interests before courts would allow them to interfere with mail. Today, the court still uses this test for outgoing mail, but allows prison officials more flexibility in controlling incoming mail.

In order to censor the letters you send to people outside the prison, prison officials must be able to prove that the censorship is necessary to protect an "important or substantial" interest of the prison. Examples of important interests are: maintaining prison order, preventing criminal activity and preventing escapes. The prison officials must be able to show that their regulations are actually "necessary and essential" to achieving this important goal, not just that the regulation is intended to achieve that goal. The regulations cannot restrict your rights any more than is

required to meet the goal. *Procunier v. Martinez*, 416 U.S. 396 (1974).

This means that prisons cannot restrict or censor your outgoing mail without meeting the "important" and "necessary" test. A prison official cannot censor your mail just because it makes rude comments about the prison or prison staff. *Bressman v. Farrier*, 825 F.Supp. 231 (N.D. Iowa 1993).

However, courts have usually allowed guards to look in your outgoing mail, especially for contraband. Courts explain that looking in a letter is different from censorship. *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999); *Stow v. Grimaldi*, 993 F.2d 1002 (1st Cir. 1993).

Some restrictions on outgoing mail are allowed. Courts have allowed bans on "letter kiting," which means including a letter from someone else with your letter, or sending a letter to someone in an envelope with another prisoner's name. *Malsh v. Garcia*, 971 F. Supp 133. (S.D.N.Y. 1997). Some courts have allowed prisons to refuse prisoner correspondence with anyone not on an approved mailing list, while other courts have not.

Censorship of incoming mail, on the other hand, is governed by the *Turner* test, which was explained earlier in this chapter. As you learned earlier, the *Turner* test only requires that the regulation in question be "reasonably related" to a "legitimate" government interest, as opposed to "necessary" to meet an "important interest." This means that while your rights are still protected to some extent, prisons can put restrictions on incoming mail for a variety of reasons. Courts have allowed restrictions on incoming packages on the grounds that they can easily hide contraband and would use up too many prison resources on inspection. *Weiler v. Purkett*, 137 F.3d 1047 (8th Cir. 1998). Courts have also generally upheld restrictions on mail between prisoners. *Farrell v. Peters*, 951 F.2d 862 (7th Cir. 1992).

A prison must follow special procedures to censor your mail. You should be notified if a letter addressed to you is returned to the sender or if your letter is not sent. The author of the letter should have a chance to protest the censorship. The official who responds to a protest cannot be the person who originally censored the mail in question. *Procunier*, 416 U.S. at 419-20.

Courts have generally upheld limitations on the amount of postage you can have at one time and the amount of postage they will provide to prisoners who cannot afford it for non-legal mail. *Van Poyck v. Singletary*, 106 F.3d 1558 (11th Cir. 1997); *Davidson v. Mann*, 129

F.3d 700 (2d Cir. 1997).

Special rules apply to mail between you and your attorney, and to mail you send to non-judicial government bodies or officials. This mail is called “privileged mail” and is protected by your constitutional right of access to the courts, as well as by the attorney-client privilege. When this mail is clearly marked as “privileged,” and is related to your case, prison officials cannot read it. They can only open it in your presence to inspect it for contraband. *Castillo v. Cook County Mail Room*, 990 F.2d 304 (7th Cir. 1993). If you wish to protest reading or censorship of your mail in court, however, you may have to show that the acts you are complaining about actually affected your case or injured you in some way. *John v. N.Y.C. Dept. of Corrections*, 183 F. Supp. 2d 619 (S.D.N.Y. 2002). Even if a prison restricts most of your correspondence with other prisoners, you may be allowed to correspond by mail with a prisoner serving as a jailhouse lawyer.

A number of courts have decided that incoming mail from an attorney must bear the address of a licensed attorney and be marked as “legal mail.” If not, it will not be treated as privileged. In addition, you must have requested that legal mail be opened only in your presence, and according to some courts your attorney must have identified himself to the prison in advance. *U.S. v. Stotts*, 925 F.2d 83 (4th Cir. 1991); *Boswell v. Mayor*, 169 F.3d 384 (6th Cir. 1999); *Gardner v. Howard*, 109 F.3d 427 (8th Cir. 1997).

(d) Your Right to Telephone Access

The Basics: Most of the time, you have a right to make some phone calls, but the prison can limit the amount of calls you can make. They can probably also listen in while you talk.

Your right to talk with friends and family on the telephone is also protected by the First Amendment. However, courts do not all agree on how much telephone access prisoners must be allowed. Prisons may limit the number of calls you make. The prison can also limit how long you talk. Courts disagree on how strict these limits can be. Most courts agree that prison officials can restrict your telephone privileges in “a reasonable manner.” *McMaster v. Pung*, 984 F.2d 948, 953 (8th Cir. 1993).

Courts also disagree on how much privacy you can have when you make phone calls. Some courts have held that prisoners have no right to make private phone

calls. *Cook v. Hills*, 3 Fed.Appx. 393 (6th Cir. 2001) (unpublished). Others have held that prisoners who are told that they are being monitored consent to giving up their privacy. *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000); *U.S. v. Workman*, 80 F.3d 688, 693-694 (2d Cir. 1996). In other words, if there is a sign under the phone saying that “all calls are monitored” you can’t complain about it. Prisons are generally allowed to place more severe restrictions on telephone access for prisoners who are confined to Special Housing Units for disciplinary reasons, as long as they can show that these restrictions are reasonably related to legitimate security concerns about these prisoners.

In general, prisons are allowed to limit the number of different people whom you can call, and to require you to register the names of those people on a list to be approved by the prison. *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996); *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994).

Courts have upheld prison requirements that prisoners pay for their own telephone calls. This can impose a serious burden on prisoners, especially when states enter into private contracts with phone companies that force prisoners to pay far more for their phone calls than people using pay phones in the outside world must pay. Successful challenges to these types of contracts or excessive telephone charges in general have been rare, but several organizations are suing over this issue in hopes of ending this exploitation of prisoners and their families and friends.

2. Freedom of Religious Activity

The Basics: You have the right to practice your religion if it doesn’t interfere with prison security.

Your freedom of religion is protected by the First and Fourteenth Amendments of the U.S. Constitution and several federal statutes. There are five ways you can challenge a restriction on your religious freedom. The most important way is the “Free Exercise Clause” of the First Amendment.

The First Amendment to the United States Constitution states: “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...*”

The second half of that sentence is known as the **Free Exercise Clause**, and it protects your right to practice your religion. You must be able to show the court that

your belief is both religious and sincere. Different courts have different definitions of “religion,” but they generally agree that your beliefs do not have to be associated with a traditional or even an established religion to be religious. *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000). It is important to understand how “religion” is defined in your District or Circuit before bringing your case.

Courts judge your religious “sincerity” by looking at how well you know the teachings of your religion and how closely you follow your religion’s rules. However, you don’t have to follow every single rule of your religion. And your belief doesn’t have to be the same as everyone else’s in your religion. *LaFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991). Courts will usually listen to what a prison chaplain or clergy person says about your religious sincerity. *Montano v. Hedgepeth*, 120 F.3d 844 (8th Cir. 1997).

If a court determines that your belief is both religious and sincere, it will next balance your constitutional right to practice your religion against the prison’s interests in order, security, and efficiency. Prison officials cannot prohibit you from practicing your religion without a real reason. They have to show that a restriction is “reasonably related to a penological interest,” under the *Turner* test described in Section C, Part 1 of this chapter. Courts often follow the decisions of prison officials, but any restriction on the free exercise of religion is still required to meet the four-part *Turner* test before it will be upheld.

The first clause in the First Amendment is called the **Establishment Clause**, and it says that the government can’t encourage people to be religious, or chose one religion over another. The Circuit Courts currently rely on two different standards in deciding whether a prison has violated the Establishment Clause.

For both tests, you must first show that the prison or its officials acted in a way that endorsed, supported, or affiliated themselves in some way with a religion.

The **first test** was developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test that says to be valid under the Constitution, a regulation or action

- 1) must be designed for a purpose that is not religious;
- 2) cannot have a main effect of advancing or setting back any religion; and

Ways to Protect Your Religious Freedom

- 1) The **Free Exercise Clause** of the First Amendment protects your right to follow the practices of your religion, like eating kosher food, covering your hair, or praying at a certain time;
- 2) The **Establishment Clause** of the First Amendment keeps the government from encouraging you to follow a certain religion, or be religious at all;
- 3) The **Fourteenth Amendment** means that the government can’t discriminate against you or treat you poorly because of your religion;
- 4) The **Religious Freedom Restoration Act** provides added protection for prisoners in federal custody;
- 5) The **Religious Land Use and Institutionalized Persons Act** provides additional protection for all prisoners.

For each type of challenge, a court will balance your constitutional rights against prisons’ interest in security and administration.

- 3) cannot encourage excessive government entanglement with religion.

The **second test**, developed in *Lee v. Weisman*, 505 U.S. 577 (1992), can be stated more simply: it prohibits the government from forcing you to support or participate in any religion.

- ❑ **Note:** A claim under the Establishment Clause is rare in prison, so you should probably try one of the other four options first.

Another source of protection for religion is the **Fourteenth Amendment**. It provides all individuals, including prisoners, with “equal protection under the law.” This means that a prison cannot make special rules or give special benefits to members of only one religion or group of religions without a reason. The prison can treat members of one religion differently if it has a reason that isn’t about the religion. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990). For example, a prison cannot treat members of one religious affiliation differently just because they are few in number or hold non-traditional beliefs, but they can have better facilities and services for religions that have more followers. *Cruz v. Beto*, 405 U.S. 319 (1972).

The following is a brief description the type of problems that often come up in cases about prisoners' constitutional rights to religious freedom.

- Religious services and meetings with clergy: You have the right to meet with a religious leader and to attend religious services of your faith. You may meet with a clergy person of a particular faith even if you weren't a member of that faith before entering prison. However, courts have allowed prisons to restrict your rights based on the prison's interests in order, security, and efficiency. The bottom line is that while you are not entitled to unlimited meetings, you have a right to a "reasonable opportunity" to attend services or meet with a religious leader. The prison gets to decide what a "reasonable opportunity" means. For example, courts have allowed work requirements that prevent prisoners from attending some weekly services of their faith, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). The prison can keep you from visiting a sweat lodge for religious practice at certain times of day, *Thomas v. Gunter*, 103 F.3d 700 (8th Cir. 1997). The prison can also require that all religious services be led by a non-prisoner religious leader, *Anderson v. Angelone*, 123 F.3d 1197 (9th Cir. 1997).
- Personal grooming, hygiene, and headgear: Courts have taken different approaches to prisoners who maintain certain hairstyles or facial hair or wear headgear. Prisons can only keep you from doing this if they have a good reason based on security or hygiene, *Swift v. Lewis*, 901 F.2d 730 (9th Cir. 1990). However, courts often agree with whatever the prison says is a "good reason." *Young v. Lane*, 922 F.2d 370 (7th Cir. 1991).
- Special diets: Special religious diets often raise issues of cost, and sometimes also raise questions related to the Establishment Clause, which prohibits endorsement of one religion above others. Courts have often required prisons to accommodate prisoners' religious diets, but usually allow them to do so in a way that is least costly for them. *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997); *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002); *Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205 (10th Cir. 1999). Courts will often not require prisons to provide special diets if they are not absolutely required by a prisoner's religion.

Courts have also addressed such issues as religious name changes, *Hakim v. Hicks*, 223 F.3d 1244 (11th

Cir. 2000); access to religious literature, *Chriceol v. Phillips*, 169 F.3d 313 (5th Cir. 1999); *Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997); prison requirements for medical procedures that violate religious principles, *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); and the right to possess religious objects, *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001).

In addition to the protections provided by the constitution, there are two statutes that protect the religious rights of prisoners. If you look at cases about your right to religious freedom in prison that were decided between 1993 and 1997, you may notice references to the **Religious Freedom Restoration Act (RFRA)**.

The RFRA provided prisoners with substantially more protection of religious freedom than does the First Amendment. Specifically, the Act stated that the government can only "substantially burden a person's exercise of religion" if two conditions are met. First, the government restriction must be "in furtherance of a compelling governmental interest." This is a much stricter test than that upheld in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), where the Supreme Court said that government restrictions need only be "reasonably related to legitimate penological interests" (under the four-part *Turner* test). Second, the government must prove that its restriction is the "least restrictive means of furthering that compelling interest." This also provides prisoners with more protection than *Shabazz* did, since the Court in *Shabazz* allowed certain restrictions on religious practice as long as prisoners were still offered alternative means of practicing their religion. For example, if they could attend worship services on some days but not on others.

However, the Supreme Court struck down the RFRA as it applies to state prisoners in a 1997 case, *City of Boerne v. Flores*, 521 U.S. 507 (1997). This means that you cannot use the RFRA if you are a state prisoner. You must rely on the four-part *Turner* test instead. However, the Supreme Court did not explicitly overrule the RFRA as it applies to the federal government and most courts have held it is still valid as to federal agencies like the Federal Bureau of Prisons.

- **HINT**: If you are a federal prisoner and you think your right to practice your religion has been violated, write a separate claim in your "complaint" under the Religious Freedom Restoration Act.

Finally, in 2000, Congress passed the **Religious Land Use and Institutionalized Persons Act (RLUIPA)**,

another law that protects prisoners' rights to practice their religion. Like the RFRA, RLUIPA states that a prison cannot "impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden is: (1) "in furtherance of a compelling governmental interest" and (2) "the least restrictive means of furthering that compelling interest."

The RLUIPA is different than the RFRA because it applies only to programs or activities that receive money from the federal government. This financial assistance gives Congress the right to pass laws that it might not otherwise be able to pass. So far, several courts that have considered the RLUIPA have found it constitutional. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002); *Charles v. Verhagen*, -- F.3d ---, No. 02-3572, 2003 WL 22455960 (7th Cir. Oct. 30, 2003). At least two other courts have found it unconstitutional. *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003); *Cutter v. Wilkinson*, --F.3d --, 2003 WL 22513973 (6th Cir. Nov. 7, 2003).

Although some people believe the law will eventually be held unconstitutional by the Supreme Court, just as the RFRA was, RLUIPA is currently good law in many jurisdictions. You should therefore consider bringing a claim under RLUIPA if you believe that your right to exercise your religion freely has been inappropriately restricted by authorities at your prison.

3. Freedom from Racial Discrimination

The Basics: Prison officials cannot treat you differently because of your race and the prison can't segregate prisoners by race except in very limited circumstances. However, proving racial discrimination or segregation is hard.

Racial discrimination and racial segregation by prison authorities are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966). For example, prisons cannot prevent black prisoners from subscribing to magazines and newspapers aimed at a black audience. *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968). Nor can they segregate prisoners by race in their cells. *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994).

When bringing a racial discrimination claim, it is important to understand that it is not enough to show that prison rules had the **effect** of discriminating against

you; you must show that a discriminatory **purpose** was at least part of the reason for the rules. *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988). One way you can do this is by showing that discrimination is the only possible reason for a policy. For example, a federal court in Alabama decided that the constitution had been violated because it could not find any non-discriminatory reason for the fact that African-Americans consistently made up a greater proportion of those detained in Alabama's segregation unit than of those detained in Alabama's prisons generally. *McCray v. Bennett*, 467 F. Supp. 187 (M.D. Ala. 1978).

However, proving a case like this is not easy, and will probably require expert witnesses and statistical analysis. For example, another court held that prison officials did not violate the constitution when they censored certain cassettes, most of which were African-American rap music, because there was not enough evidence that they intended to discriminate against African-Americans. *Betts v. McCaughtry*, 827 F. Supp. 1400 (W.D. Wisc. 1993).

Even if you get past this first hurdle, and successfully prove discriminatory intent, courts may allow racial segregation or discrimination if prison officials show that it is **essential** to prison security and discipline. *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966). This exception to the general rule is narrow. Racial segregation must be in response to an obvious danger to security, discipline, and good order, and it may only be "limited and isolated." *U.S. v. Wyandotte County, Kan.*, 480 F.2d 969 (10th Cir. 1973). A vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. For example, one court did not accept the argument that there might be an increase in violence if people of different races shared two-person cells, since the rest of the prison was integrated. *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994).

Most courts have held that racial discrimination in the form of occasional verbal abuse does not violate the Constitution.

4. Protection from Sexual Discrimination

The Basics: Women have a right to programs that are as good as the programs in prisons for men, but this right is very hard to enforce.

The Equal Protection clause of the Fourteenth Amendment also prohibits discrimination based on

gender against prisoners and non-prisoners alike. While it protects both men and women from discrimination, gender discrimination is a bigger problem for women.

In addition to the sexism toward women that exists outside prison, women prisoners often experience discrimination because they are a minority population in prison. Unlike men, who make up the majority of prisoners, women will often be lumped together in one prison with other prisoners from all levels of security classification because there are so few women's prisons. They will sometimes be sent much farther away from their homes than men because there are no women's prisons nearby. States that provide treatment and educational programs for male prisoners usually provide fewer programs for women, because it is very expensive to provide so many programs for so few women.

Faced with these inequalities, women prisoners in some states have brought successful suits against state prison officials using an Equal Protection argument. For example, in a landmark class action case in Michigan, *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), female prisoners challenged the educational opportunities, vocational training, prison industry and work pass programs, wage rates, and library facilities they were provided as compared to those male prisoners were provided. Although prison officials tried to argue that it was impractical and too expensive to provide the same level of services to such a small population of women that they provided to men, the court ruled in favor of the women. The judge ordered the prison to undertake a series of reforms, and the court oversaw these reform efforts for close to twenty years, often stepping in to enforce its decision when it became evident that the prison was not following the *Glover* court's orders.

While women in other states have also effectively challenged gender discrimination under the Equal Protection clause, relatively few cases by women prisoners have succeeded. As they do in other cases involving constitutional rights of prisoners, the courts like to leave the decisions to prison officials. There are a number of things a court takes into account when deciding a gender discrimination case, and each raises its own obstacles for female prisoners trying to bring an Equal Protection action. The following section addresses these considerations and the challenges they create.

(a) The “similarly situated” argument

To make an Equal Protection claim, you must first show that the male and female prisoners you wish to compare are “similarly situated” for the purposes of the claim you are bringing. “Similarly situated” means that there are no differences between male and female prisoners that could explain the different treatment they receive. While it is unconstitutional to treat prisoners in the same situation differently, it is acceptable to treat prisoners in different situations differently. Courts will look at a number of factors in determining whether male and female prisoners are “similarly situated,” including number of prisoners, average sentence, security classification, and special characteristics such as violent tendencies or experiences of abuse. Unfortunately, courts very often decide on the basis of these factors that male and female prisoners are *not* similarly situated. *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996); *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994).

(b) The Equal Protection test for gender discrimination

If you successfully show that male and female prisoners are “similarly situated” for the purposes of the challenge you are making, you must then show that prison officials discriminated between the groups on the basis of gender, and not for a different, legitimate reason. Courts will use a different test for this depending on whether the action you are challenging is **gender-based** or **gender-neutral**. These two terms are explained below.

- ❑ **Gender-based classifications:** A rule or practice is “gender-based” if it states one thing for men, and another for women. For example, a policy that says all women will be sent to child care training and all men will be sent to vocational training is “gender-based.” Judges look very carefully at gender-based rules. The government must show that the distinction between men and women is “**substantially related to important governmental objectives.**” *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Jackson v. Thornburgh*, 907 F.2d 194 (D.C. Cir. 1990). Note that this is a much stricter standard than the “reasonable relationship” *Turner* test that is used with respect to other constitutional rights, described in Part 1 of this Section.
- ❑ **Gender-neutral classifications:** A “gender-neutral” classification may still have the effect of discriminating against women in practice, but it does not actually say anything about gender. If the action challenged is “gender-neutral” then the

courts use a less strict standard of review. The court must determine whether the action is in fact gender-neutral, and, if it is, examine whether the different treatment of men and women that results is “**rationally related to legitimate government interests**” (the *Turner* test) or whether, instead, it reflects an **intent to discriminate** on the basis of gender. *Jackson v. Thornburgh*, 907 F. 2d 194 (D.C. Cir. 1990).

In distinguishing between the tests, there are two important considerations to keep in mind.

First, whether you are looking for an important governmental objective or just a legitimate governmental objective, these objectives are not acceptable if they are proven to be the result of stereotyping or outdated ideas about proper gender roles. *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). For example, the court will not accept an objective of protecting one gender because it is “inherently weaker” than the other gender. *Glover v. Johnson*, 478 F. Supp 1075 (E.D. Mich. 1979).

Second, it is not always obvious whether an action is gender-based or gender-neutral, and courts disagree on how to read certain types of regulations or policies. Very often, there will be two regulations at play. The first assigns men and women to specific prisons on the basis of their gender. Courts have rarely held that this kind of segregation is discrimination. The second regulation assigns certain programs or facilities to prisons on the basis of such factors as size, security level, or average length of prisoner sentence. These second types of regulations do not appear to be gender-based; they seem instead to be based on characteristics of the prisons alone. However, they often result in different treatment of male and female prisoners.

Some courts have taken the requirement that an action be gender-based to get heightened scrutiny very literally. These courts have argued that when a statute or policy does not explicitly distinguish between men and women in how the prison facility is run, it is basically gender-neutral. *Klinger v. Dep’t of Corrections*, 31 F. 3d 727 (8th Cir. 1994); *Jackson v. Thornburgh*, 907 F. 2d 194 (D.C. Cir. 1990). Other courts, however, have read the requirement more favorably to prisoners. They see that in reality, gender-neutral regulations about programming interact with gender-based assignment of prisoners to specific prisons, which makes the regulations gender-based. “Programming” means how a prison is run by officials. Even where the statute or policy about programming decisions does not actually mention gender, these

courts will apply the higher standard of scrutiny detailed above. *Pitts v. Thornburgh*, 866 F. 2d 1450 (D.C. Cir. 1989).

5. Due Process Rights Regarding Punishment, Administrative Transfers, and Segregation

The Basics: You can only challenge a transfer or punishment in prison if it is extremely and unusually harsh, or if it is done to get back at you for something you have the right to do.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving “any person of life, liberty or property without due process of law.” Discipline, placement in segregation, transfers to different prisons, and loss of good time credit are all things that the prison can do to you that might violate “procedural due process.” Procedural due process defines the amount of protection you get before the prison can do something that harms your life, liberty, or property. Procedural due process has two parts: first you have to show a “**liberty interest**” and second, you have to show that you should have gotten **more procedure** than you received.

You have a “**liberty interest**” when the prison’s actions interfere with or violate your constitutionally protected rights.

Two important Supreme Court cases govern due process rights for prisoners:

- ❑ In the first case, *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court found that, when prisoners lose good time credits because of a disciplinary offense, they are entitled to: (1) written notice of the disciplinary violation; (2) the right to call witnesses at their hearing; (3) assistance in preparing for the hearing; (4) a written statement of the reasons for being found guilty; and (5) a fair and impartial decision-maker in the hearing.
- ❑ The second important Supreme Court case, *Sandin v. Conner*, 515 U.S. 472 (1995), however, sharply limits the holding of *Wolff* and sets a higher standard that you have to meet in order to show that you have a “liberty interest.” If you don’t have a “liberty interest,” then the prison doesn’t have to provide you with any process at all. Any prisoner alleging a violation of due process should first read *Sandin*. In *Sandin*, a prisoner was placed in disciplinary segregation for 30 days and was not

allowed to have witnesses at his disciplinary hearing. But the Court in *Sandin* found that, unless the punishment an inmate receives is an “**atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,**” then there is no right to the five procedures laid out above, taken from *Wolff*. “Atypical” means that the way you were treated has to be much different than the way most prisoners are treated. “Significant hardship” means that treatment must be really awful, not just uncomfortable or annoying.

This means that if you want to argue that you should have been given the rights laid out in *Wolff*, you must show that your punishment was extremely harsh. Frequently, short periods of solitary confinement, “keeplock,” or loss of privileges will not be considered harsh enough to create a liberty interest. For example, in *Key v. McKinney*, 176 F.3d 1083 (8th Cir. 1999), the court found that 24 hours in shackles was not severe enough to violate due process. On the other hand, the Second Circuit has found that 305 days in solitary confinement in one case, and 762 days in another, were severe enough to create a liberty interest. You can read *Giano v. Selsky*, 238 F.3d 223 (2d Cir. 2001) and *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000) to get a sense of how to make this type of claim.

Although *Sandin* changed the law in important ways, the Supreme Court did not say they were overruling *Wolff*. This means that, when you can show that there is a “liberty interest” at stake (much harder to prove under *Sandin*), the rights guaranteed by *Wolff* still apply. In other words, if a decision by prison officials results in conditions that are severe enough to meet the “significant and atypical” standard, the prison must give the inmate procedures like a hearing and a chance to present evidence.

Courts have found due process violations when prisoners are disciplined without the chance to get witness testimony, have a hearing, or present evidence. Courts have also found due process violations when punishment is based on vague claims of gang affiliation. Some cases in which these types of claims were successfully made are: *Ayers v. Ryan*, 152 F.3d 77 (2d Cir. 1998); *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001); and *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999). On the other hand, it is also true that courts will not require the prison to call witnesses when calling additional witnesses would be unnecessary or irrelevant. *Kalwasinski v. Morse*, 201 F.3d 103 (2d Cir. 1999).

If you are transferred to a different facility or to a

BEWARE!

You cannot bring a procedural due process challenge to a disciplinary proceeding resulting in the loss of good time credits if winning would result in the Court necessarily reversing the judgment you received in the disciplinary proceeding.

This important but confusing concept comes from a Supreme Court case called *Edwards v. Balisok*, 520 U.S. 641 (1997). In *Edwards*, a prisoner challenged the conduct of the hearing examiner, stating that the examiner hid evidence that would have helped him and didn’t question witnesses adequately. At the hearing, the prisoner was sentenced to time in solitary and loss of good time credits. The Court held that, if what the prisoner said was true, it would mean that the result of his disciplinary hearing would have to be reversed and his good time credits would have to be given back to him. This would affect the length of his confinement, and a challenge like that can only be brought if the prisoner can show that his/her disciplinary conviction has already been overturned in a state proceeding.

If you are just challenging a disciplinary decision that does not affect the length of your confinement, you are probably O.K. Read *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997) for more on this issue.

different location within a prison, the same standard set out under *Sandin v. Connor* applies: you must show that the transfer resulted in conditions that were a significant or atypical departure from the ordinary instances of prison life. Given the fact that the new prison will likely be similar to prisons everywhere, it is very hard to win on such a claim. In *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997), for example, the court said that transfer from a minimum-security facility to a maximum-security facility did not create conditions that gave rise to a claim of due process violation. However, you may have a case if you are transferred to a supermaximum security facility without the due process protections described above, especially if the conditions there are much harsher than most prisons.

If you are placed in administrative segregation, as opposed to disciplinary segregation, you still have some due process rights, but these rights are more limited. The Supreme Court has found that, in general, a formal or “adversarial” hearing is not necessary for putting prisoners in administrative segregation and that all you get is notice and a chance to present your views informally. This was decided in *Hewitt v. Helms*, 459

U.S. 460 (1983), the most important case on administrative segregation. Some courts believe that, after *Sandin*, there is no longer an obligation on the part of prisons to follow any procedures at all before placing an inmate in administrative segregation. An example of this precedent can be found in *Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). One case that provides a useful argument against this holding is *Sealey v. Giltner*, 197 F.3d 578 (2d Cir. 1999).

Although it has become more difficult in recent years for prisoners to bring claims of due process violations involving transfers or administrative segregation, there may be other ways of challenging such decisions. For example, a prison can't transfer you to punish you for complaining or to keep you from filing a lawsuit. Prison officials must not use transfers or segregation to restrict your access to the courts. For an example of this type of claim, read *Allah v. Seiverling*, 229 F.3d 220 (3d Cir. 2000).

6. Fourth Amendment Limits on Prison Searches and Seizures

The Basics: Prison officials can usually search your cell whenever they want but there are some limits on when and how they can strip search you.

The Fourth Amendment forbids the government from conducting "unreasonable searches and seizures." Outside of prison, this means that a police officer or F.B.I. agent cannot come into your home or search your clothing without your consent or a search warrant unless it is an emergency. However, the Fourth Amendment only protects places or things in which you have a "reasonable expectation of privacy." In the outside world, this means that if you have your window shades wide open, you can't expect somebody not to look in, so a cop can too. In *Hudson v. Palmer*, 468 U.S. 517, 530 (1984), the Supreme Court held that prisoners don't have a reasonable expectation of privacy in their cells, so prison officials can search them as a routine matter without any particular justification, and without having to produce anything like a search warrant.

This doesn't mean that *all* cell searches are permissible. If a prison official searches your cell with the purpose of harassing you or for some other reason that is not justified by a penological need, this may be a Eighth Amendment violation. However, to get a court to believe that the "purpose" was harassment, you will need some truly shocking facts. For example, in *Scher*

v. Engelke, 943 F.2d 921, 923-24 (8th Cir. 1991) a prison guard searched a prisoner's cell 10 times in 19 days and left the cell in disarray after three of these searches.

Some states have passed laws or interpreted their constitutions to require officers to have a warrant before searching your cell, or to require that you be allowed to watch while the search occurs. Check out the law in your state to learn more about this issue.

Prisoners have more protection from searches of their bodies. While they have no expectation of privacy in their cells, they retain a "limited expectation of privacy" in their bodies. In analyzing body cavity searches, strip searches, or any invasions of bodily privacy, courts will balance the need for the search against the invasion of privacy the search involves. Prisoners seem to have had the most success when the searches were conducted by, or in front of, guards of the opposite gender. For example, in *Hayes v. Marriott*, 70 F.3d 1144, 1147-48 (10th Cir. 1995), the court held that a body cavity search of a male prisoner in front of female guards stated a claim for a Fourth Amendment violation absent the showing of a security need; in *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), the court recognized a claim by male inmates who were observed by female guards while they showered and went to the bathroom; in *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992), the court recognized a male prisoner's Fourth Amendment claim based on a strip search done outdoors, in front of several female guards; and in *Kent v. Johnson*, 821 F.2d 1220, 1226-27 (6th Cir. 1987), the Sixth Circuit refused to dismiss a complaint stating that female prison guards routinely saw male prisoners naked, showering, and using the toilet. Even when the search is not done by or in front of the other gender, however, you may be able to show a Fourth Amendment violation if there was no reasonable justification for the invasive search.

There is especially good case law on this issue in some circuits with respect to searches of pretrial detainees. The Second Circuit, for example, has held that strip searches of pretrial detainees who are in custody for misdemeanor or other minor offenses are unconstitutional unless the guard or officer has a reasonable suspicion that the detainee has a concealed weapon or contraband of some sort. One case that explains this issue is *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001).

7. Eighth Amendment Protection from Physical Brutality

The Basics: Guards do NOT have the right to beat you or harm you unless their action is considered reasonable given the situation.

The Eighth Amendment forbids “cruel and unusual punishment” and is probably the most important amendment for prisoners. It has been interpreted to prohibit excessive force and guard brutality, as well as unsanitary, dangerous or overly restrictive conditions. It is also the source for your right to medical care in prison.

Courts have held that “excessive force” by guards in prisons constitutes cruel and unusual punishment. In a very important Supreme Court case called *Hudson v. McMillian*, 503 U.S. 1 (1992) the Supreme Court found a violation of the Eighth Amendment when prison officials punched and kicked a prisoner, leaving him with minor bruises, swelling of his face and mouth, and loose teeth. The Court held that a guard’s use of force violates the Eighth Amendment when it is **not** applied “in a good faith effort to maintain or restore discipline” but instead is used to “maliciously and sadistically cause harm.” In other words, “excessive force” is any physical contact by a guard that is meant to cause harm, rather than keep order. To decide what force is excessive, judges consider:

- (1) The need for force
- (2) Whether the amount of force used was reasonable given the need
- (3) How serious the need for force appeared to the guards
- (4) Whether the guard made efforts to use as little force as necessary, and
- (5) How badly you were hurt

To win on an excessive force claim, you will have to show that force was used against you, but you do not have to show a serious injury or harm. It is usually enough to show some actual injury, even if it is relatively minor. Not all courts agree with this though, so you should check the law in your circuit. For example, one court found that there was no violation of the Eighth Amendment when a prisoner’s ear was bruised during a search. *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997).

- **Remember:** Under the PLRA, you cannot recover compensatory money damages for mental or

emotional injury, unless you can also claim some physical injury. This rule can be very harsh. It means that if a guard threatens you, or assaults you in some way, but does not injure you, you will not be able to get money damages for the very real emotional and mental distress that you feel as a result of this brutality. However, you may be able to get “punitive damages” or “nominal damages.” We explain this issue, and the difference between the three types of damages, in Section E of this Chapter.

The state of mind of the prison officials is important in excessive force cases. Courts have found a violation of the Eighth Amendment where prison officials were responsible for “the unnecessary and wanton infliction of pain.” “Wanton” means malicious, or uncalled-for. You can meet this requirement by showing that the force used was not a necessary part of prison discipline. For example, one court found an Eighth Amendment violation when an officer repeatedly hit a prisoner even though the prisoner had immediately obeyed an order to lie face down on the floor, and was already being restrained by four other officers. *Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388 (8th Cir. 1997). However, the Ninth Circuit held that there was no Eighth Amendment violation when a prisoner was shot in the neck during a major prison disturbance, because the court found that the officer was trying to restore order. *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001).

8. Your Right to Decent Conditions in Prison

The Basics: You have a right to safe conditions in prison.

The Eighth Amendment’s prohibition of cruel and unusual punishment also protects your right to safe and somewhat decent conditions in prison. You can challenge prison conditions that deprive you of a “**basic human need**,” such as shelter, food, exercise, clothing, sanitation, and hygiene. However, the standard for unconstitutional conditions is high—courts allow conditions that are “restrictive and even harsh.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). You must have evidence of conditions that are serious and extreme and cause more injury than discomfort alone.

To challenge prison conditions using the Eighth Amendment, you must provide *both* objective evidence and subjective evidence. *Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991). **Objective evidence** is factual evidence that you were

deprived of a basic human need. **Subjective evidence** is evidence that the prison official you are suing knew you were being deprived and did not respond reasonably. You must show how you were injured and prove that the deprivation of a basic need caused your injury.

When you provide **objective evidence**, you must show that the condition(s) you are challenging could seriously affect your health or safety. In considering a condition, a court will think about how bad it is and how long it has lasted. *Barney v. Pulsipher*, 143 F.3d 1299, 1311 (10th Cir. 1998). You must show that you were injured either physically or psychologically, though courts do not agree on how severe the injury must be. You may challenge conditions even without an injury if you can show that the condition puts you at serious risk for an injury in the future. *Helling v. McKinney*, 509 U.S. 25 (1993).

When you provide **subjective evidence**, you must show that the official you are suing acted with “deliberate indifference.” *Wilson v. Seiter*, 501 U.S. 294 (1991). This means that the official knew of the condition and did not respond to it in a reasonable manner. *Farmer v. Brennan*, 511 U.S. 825 (1994). One way to show this is by proving that the condition was so obvious that the official must have purposefully ignored it to not know about it. Courts will also consider any complaints or grievance reports that you or other prisoners have filed, *Vance v. Peters*, 97 F.3d 987 (7th Cir. 1996), as well as prison records that refer to the problem. Prison officials cannot ignore a problem once it is brought to their attention. Prison officials may try to argue that the prison does not have enough money to fix problems, but courts have generally *not* accepted this defense (although the Supreme Court has not clearly addressed this defense yet). *Spain v. Proconier*, 600 F.2d 189 (9th Cir. 1979). It is important to note that while there is a subjective component to Eighth Amendment claims, you do *not* need to show *why* prison officials acted as they did.

As explained in other sections of this Handbook, the PLRA bars claims for damages that rely on a showing of emotional or mental injury without a showing of physical injury. This provision should not affect your claim for injunctive relief from poor conditions. However it may be quite difficult to get money damages for exposure to unsafe or overly restrictive conditions unless they have caused you a physical injury. The courts are not in agreement on this issue, so you may want to just include these claims anyway, and hope for the best.

Here are some of the most common Eighth Amendment challenges to prison conditions:

- ❑ **Food:** Prisons are required to serve food that is nutritious and prepared under clean conditions. *Robles v. Coughlin*, 725 F.2d 12 (2d Cir. 1983). As long as the prison diet meets nutritional standards, prisons can serve pretty much whatever they want. They must, however, provide a special diet for prisoners whose health requires it and for prisoners whose religion requires it. See Part 2 of this section, on religious freedom.
- ❑ **Exercise:** Prisons must provide prisoners with opportunities for exercise outside of their cells. *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996); *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001). Courts have not agreed upon the minimum amount of time for exercise required, and it may be different depending on whether you are in the general population or segregation. One court has considered three hours per week adequate, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996), while another has approved of just one hour per week for a maximum security prisoner. *Bailey v. Shillinger*, 828 F.2d 651 (10th Cir. 1987). Some circuits have determined that prisoners cannot be deprived of *outdoor* exercise for long periods of time. *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993). Prisons must provide adequate space and equipment for exercise, but again, there is not clear standard for this. It is generally acceptable to limit exercise opportunities for a short time or during emergencies.
- ❑ **Air Quality and Temperature:** Prisoners have successfully challenged air quality when it posed a serious danger to their health, particularly in cases of secondhand smoke, *Reilly v. Grayson*, 310 F.3d 519 (6th Cir. 2002), *Alvarado v. Litscher*, 267 F.3d 648 (7th Cir. 2001) and asbestos, *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998). While you are not entitled to a specific air temperature, you should not be subjected to extreme hot or cold, and should be given bedding and clothing appropriate for the temperature. *Gaston v. Coughlin*, 249 F.3d 156 (2d Cir. 2001).
- ❑ **Sanitation and Personal Hygiene:** Prisoners are entitled to sanitary toilet facilities, *DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001), proper trash procedures, and basic supplies such as toothbrushes, toothpaste, soap, sanitary napkins, razors, and cleaning products.

- ❑ **Overcrowding:** Although overcrowding is one of the most common problems in U.S. prisons, it is not considered unconstitutional on its own. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *C.H. v. Sullivan*, 920 F.2d 483 (8th Cir. 1990). If you wish to challenge overcrowding, you must show that it has caused a serious deprivation of basic human needs such as food, safety, or sanitation. *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985); *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984).
- ❑ **Rehabilitative Programs:** In general, prisons are not required to provide counseling services like drug or alcohol rehabilitation to prisoners unless they are juveniles, mentally ill, or received rehabilitative services as part of their sentence. *Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910, 927. (D.C. Cir. 1996).
- ❑ **Other Conditions:** Prisoners have also successfully challenged problems with lighting, *Hoptowitz v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985), fire safety, *Id.* at 784, furnishings, *Brown v. Bargery*, 207 F.3d 863 (6th Cir. 2000), accommodation of physical disabilities, *Bradley v. Puckett*, 157 F.3d 1022, (5th Cir. 1998), and unsafe work requirements. *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990), as well as other inadequate or inhumane conditions.

Instead of challenging a particular condition, you may also bring an Eighth Amendment suit on a “totality of the conditions” theory, either on your own or as part of a class action lawsuit. Using this theory, you can argue that even though certain conditions might not be unconstitutional on their own, they add up to create an overall effect that is unconstitutional. *Palmer v. Johnson*, 193 F.3d 346, (5th Cir. 1999). The Supreme Court has limited this argument to cases where multiple conditions add up to create a single, identifiable harm. *Wilson*, 501 U.S. at 305, but the courts are in disagreement as to what exactly that means.

9. Your Right to Medical Care

The Basics: The prison must provide you with medical care if you need it, but the Eighth Amendment does not protect you from medical malpractice.

The Eighth Amendment also protects your right to medical care. The Constitution guarantees prisoners this right, even though it does not guarantee medical

care to individuals outside of prison because, as one court explained, “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

If you feel that your right to adequate medical care has been violated, the Constitution is not the only source of your legal rights. You can bring claims under your state constitution or state statutes relating to medical care or the treatment of prisoners or bring a medical malpractice suit in state courts. You might also bring a claim in federal court under the Federal Tort Claims Act or a federal statute such as the Americans With Disabilities Act. This section, however, will focus exclusively on your rights to medical care under the U.S. Constitution.

Unfortunately, the Eighth Amendment does not guarantee you the same level of medical care you might choose if you were not in prison. To succeed in an Eighth Amendment challenge to the medical care in your prison, you must show that:

- (a) You had a serious medical need;
- (b) Prison officials showed “deliberate indifference” to your serious medical need; and
- (c) This deliberate indifference caused your injury.

Estelle v. Gamble, 429 U.S. 97 (1976). These requirements are described in more detail below.

(a) Serious Medical Need

Under the Eighth Amendment, you are only entitled to medical care for “serious medical needs.” Courts do not all agree on what is or isn’t a serious medical need; you should research the standard for a serious medical need in your circuit before filing a suit.

Some courts have held that a serious medical need is “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.” *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994). Courts usually agree that the medical need must be “one that, if left unattended, ‘pos[es] a substantial risk of serious harm.’” *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000). In other words, if a doctor says you need treatment, or your need is obvious, than it is probably “serious.”

Courts generally agree that the test for serious medical need is highly individual. *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003). A condition may not be a serious medical need in one situation but could be a serious medical need in another. Furthermore, a prisoner may suffer from a serious underlying medical condition, but not have a serious medical need for Eighth Amendment purposes:

“it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes.” *Id.* at 186; *Chance v. Armstrong*, 143 F.3d 698, 702-703 (2d Cir. 1998).

In considering whether you have a serious medical need, the court will consider several factors, including:

- (1) Whether a reasonable doctor or patient would consider the need worthy of comment or treatment,
- (2) Whether the condition significantly affects daily activities, and
- (3) Whether you have chronic and serious pain.

For more on these factors, one good case to read is *Brock v. Wright*, 315 F.3d 158 (2d Cir. 2003).

It is important that you keep detailed records of your condition and inform your prison medical staff of exactly how you are suffering.

Mental health concerns can qualify as serious medical needs. For example, several courts have held that a risk of suicide is a serious medical need for the purposes of the Eighth Amendment. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 (7th Cir. 1996); *Gregoire v. Class*, 236 F.3d 413 (8th Cir. 2000).

(b) Deliberate Indifference

The standard for “deliberate indifference” in medical care cases is the same two-part standard used in cases challenging conditions of confinement in prison, explained in Part 8 of this chapter. To prove deliberate indifference, you must show that (1) prison officials knew about your serious medical need and (2) failed to respond reasonably to it. *Estelle*, 429 U.S. at 104. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). This means that you cannot bring an Eighth Amendment challenge to medical care just because it was negligent (just because a doctor should have

known about your medical need) or because you disagree with the type of treatment a doctor gave you. You must bring these sorts of claims through other means, such as state medical malpractice laws.

To increase your chances of receiving proper care and succeeding in a constitutional challenge to your medical care, you should keep careful records of your condition and your efforts to notify prison officials. You should take advantage of sick call procedures at your prison and report your condition even if you do not think officials will help you. Although courts will not find deliberate indifference just because a prison “should have known” that you had a serious medical need, they will assume that prison officials knew about your condition when it was very obvious. *Farmer v. Brennan*, 511 U.S. 825, 842 (1995).

Courts most often find deliberate indifference when:

- ❑ a prison doctor fails to respond appropriately or does not respond at all to your serious medical needs
- ❑ prison guards or other non-medical officials intentionally deny or delay your access to treatment,
- ❑ or when these same non-medical officials interfere with the treatment that your doctor has ordered. *Estelle*, 429 U.S. at 104-105; *Meloy v. Bachmeier*, 302 F.3d 845, 849 (8th Cir. 2002).

Unfortunately, courts do not usually require prison medical staff to give you the best possible care. For example, courts have not found a violation when prison medical staff sent a patient who was severely beaten by another patient to a doctor and then followed that doctor’s orders despite the prisoner’s continued complaints, even though the prisoner’s condition was more serious than the doctor had recognized. *Perkins v. Lawson*, 312 F.3d 872 (7th Cir. 2002). Another court found that there could not have been deliberate indifference in a case where a patient received thirteen medical examinations in one year, even though he claimed that a muscular condition in his back did not improve. *Jones v. Norris*, 310 F.3d 610 (8th Cir. 2002).

(c) Causation

Finally, you must show that you suffered some harm or injury **as a result** of the prison official's deliberate indifference. If officials failed to respond to your complaints about serious pain but the pain went away on its own, you will not succeed in a constitutional challenge. For example, one court failed to find a constitutional violation when a prison did not give a prisoner with HIV his medication on two occasions, because even though HIV is a very serious condition, the missed medication did not cause him any harm. *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003).

In some situations, you may wish to challenge your prison's medical care system as a whole, and not just the care or lack of care that you received in response to a particular medical need. These systemic challenges to prison medical care systems are also governed by the deliberate indifference standard. Successful cases have challenged the medical screening procedures for new prisoners used by prisons, the screening policies or staffing for prisoners seeking care, and the disease control policies of prisons, *Hutto v. Finney*, 437 U.S. 678 (1978).

10. The Rights of Pretrial Detainees

The Basics: Pretrial detainees have most of the same rights as prisoners.

Not everybody who is incarcerated in a prison or jail has been convicted. Many people are held in jail before their trial. Special issues arise with respect to these "pretrial detainees." As you know from the above sections, the Eighth Amendment prohibits *cruel and unusual punishment* of people who have already been **convicted**. Since detainees are considered innocent until proven guilty however, they may not be punished at all. One legal result of this is that conditions for pretrial detainees are reviewed under the Fifth or Fourteenth Amendment Due Process Clause as opposed to the Eighth Amendment prohibition of cruel and unusual punishment.

The most important case for pretrial detainees is *Bell v. Wolfish*, 441 U.S. 520 (1979), which was a challenge to the conditions of confinement in a federal jail in New York. In *Bell*, the Court held that only jail conditions that amount to **punishment** of the detainee violate Due Process. The Court explained that there is a difference between punishment, which is unconstitutional, and regulations that, while unpleasant, have a valid

Immigration Detainees

In the wake of September 11, 2001, more and more non-citizens are being held in prisons or jails, even though they are not convicted criminals or even pretrial detainees. These people are "immigration detainees." Like pretrial detainees, immigration detainees can challenge the conditions of their confinement under the Due Process Clause. Some courts have held that such challenges should be analyzed under the *Bell* standard. For an example of this point of view, read *Edwards v. Johnson*, 209 F.3d 772 (5th Cir. 2000) or *Medina v. O'Neil*, 838 F.2d 800 (5th Cir. 1988).

However, other courts have acknowledged that it is not yet clear how immigration detainees' claims should be treated. In *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000) the Fourth Circuit reversed a lower court ruling on a case brought by immigration detainees because the district court had dismissed their claims using the standard for pretrial detainees, without giving the detainees the opportunity to argue about the correct standard. If you are an immigration detainee, you may want to argue that you deserve a standard that is more protective of your rights than the standard for pretrial detainees, because you have not gotten the usual protections that courts give defendants in the criminal justice system. You may also want to argue that, because the correct standard is unclear, the court should appoint an attorney to represent you.

Another important issue for immigration detainees is whether the PLRA applies to them. While the Supreme Court has not considered this issue yet, the lower courts have held that the sections of the PLRA which specifically apply to "prisoners" **do not** apply to immigration detainees. This includes the exhaustion requirement, the mental & emotional injury requirement, and the filing fee provision. See *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002). On the other hand, the section of the PLRA on the requirements for and termination of injunctive relief apply to "all civil actions with respect to prison conditions." This section may apply to immigration detainees. See *Vasquez v. Carver*, 18 F. Supp. 2d 503 (E.D. Penn. 1998).

administrative or security purpose. It held that restraints that are "reasonably related" to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they cause discomfort.

You can prove that poor conditions or restrictive regulations are really punishment in two different ways:

(1) by showing that the prison administration or individual guard intended to punish you, or

(2) by showing that the regulation is not reasonably related to a legitimate goal, either because it doesn't have any purpose, or because it is overly restrictive or an exaggerated response to a real concern.

As with the *Turner* standard for convicted prisoners, courts defer to prison officials in analyzing what is a "legitimate concern."

Although the *Bell* standard for analyzing the claims of pretrial detainees is well-established, the circuits are not in agreement as to whether the content of that standard is any different from the content of the Eighth Amendment standard explained above. In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983) the Supreme Court held that pretrial detainees have due process rights that are "at least as great" as the Eighth Amendment protection available to prisoners. However, when faced with claims by pretrial detainees, many courts simply compare the cases to Eighth Amendment cases.

If you are a pretrial detainee, you should start by reading *Bell v. Wolfish*, and then research how courts in your circuit have applied that standard.

D. INJUNCTIONS

Now that you know your rights under the Constitution, the next step is figuring out how to put together your lawsuit. You will need to decide whom to include as plaintiffs, what you want the court to do, and whom to sue.

If you bring a lawsuit under Section 1983, you can ask for one, two, or all of the following: **money damages**, a **declaratory judgment**, and an **injunction**.

- "**Money damages**" is when the court orders the defendants to pay you money to make up for a harm you suffered in the past.
- An **injunction** is a court order that directs prison officials to make changes in your prison conditions and/or stop on-going conduct that the court finds to be illegal.
- A "**declaratory judgment**" lies somewhere in between: it is when a court makes a decision that explains your legal rights and the legal duties and obligations of the prison officials. However, the court doesn't order the prison to do or stop doing anything. If you get a declaratory judgment and the prison doesn't follow it, you can then ask the court for an injunction to make them do so.

Although a court usually issues a declaratory judgment and an injunction together, it is also possible for a court to issue only the declaratory judgment and let the prison officials decide what actions will comply with the court's declaratory judgment.

A court will only issue an injunction if it feels that money damages will not fix whatever has harmed you. For instance, if you have to continue living in the unsafe conditions you sued over, money damages will not make those conditions any safer.

This section talks about injunctions in more detail, including when you can get an injunction, what it can cover, and how to enforce it. Section E of this Chapter explains money damages, Section F explains whom you can sue (the "defendants") and Section G explains settlements.

If you are part of a group of prisoners who are seeking a declaratory judgment and injunctive relief (and sometimes money damages) from a court, you can ask the court to make the lawsuit a "class action." This kind of lawsuit joins together all plaintiffs, both present and future, that have been harmed in the same manner as you at the same prison or jail. There are very specific requirements for bringing a class action lawsuit. These requirements will be discussed in Section H of this chapter.

When you think about what kind of relief you want, it is important to keep in mind that in a Section 1983 suit, a federal court cannot release you from prison or reduce your sentence.

Additionally, you cannot use a Section 1983 suit to request the reinstatement of good-conduct-time credits that have been unconstitutionally taken from you. *Presier v. Rodriguez*, 411 U.S. 475 (1973). You can only

What is an Injunction?

An injunction is an order issued by a court that tells the defendant to do or not do something. You can get an injunction to stop the defendants from harming you. Or, you can get an injunction to make the defendants do something to improve conditions or care in the prison. Sometimes an injunction is referred to as "**prospective relief**." You can ask for an injunction if you are experiencing any of the following:

1. Overcrowded, unsafe, or extremely harsh conditions;
2. A pattern of guard brutality or harassment;
3. Inadequate medical care;
4. Continuing violation of any of your rights.

challenge the fact or the length of your prison sentence through a *writ of habeas corpus*, which requires that you go through your state court system before seeking relief from a federal court. A detailed discussion of the writ of *habeas corpus* is beyond the scope of this Handbook. But see Appendix E for some books and resources on *habeas corpus*.

You may use a Section 1983 suit to get money damages to challenge the unconstitutionality of disciplinary sanctions and convictions, including the loss of good-conduct-time credits. However, because of a case called *Edwards v. Balisok*, 520 U.S. 641 (1997), you cannot bring a Section 1983 suit to challenge a disciplinary proceeding that **extends your time** in prison **until** you have had your disciplinary conviction or sanction set aside in state court.

Your options when filing a Section 1983 suit

You can get one, two or all of the following:

- (1) **Money damages,**
- (2) **An injunction,**
- (3) **A declaratory judgment**

1. When You Can Get an Injunction

An injunction is an order issued by a court that tells the defendant to do or not do some act or acts. It can order the defendants to stop doing harmful and unconstitutional things to you or require the defendants to act in a way that will prevent them from violating your rights in the future. If the defendants don't follow the court's order, as set out in the injunction, they can be held in "contempt" by the court that issued the injunction and can be fined or jailed.

In considering whether to ask for an injunction in your lawsuit, you should think about the harm you have suffered and figure out if it happened just once, is still happening or is likely to happen again soon. You may be able to get an injunction if the harm is continuing or is very likely to happen again soon.

The Supreme Court in *Lewis v. Casey*, 518 U.S. 343 (1996), stated that in order to get an injunction, a prisoner must show "actual or imminent injury." This means that you have to show the court that you were really harmed in some way, or that it is likely that you will be harmed very soon. It is not enough to show that there is something wrong in your prison, you must have been harmed by whatever is wrong.

In this context, "injury" does not have to mean actual physical damage to your body. It just means that you are, or will be, worse off because of the illegal acts of the prison staff, such as: your mail wasn't sent out, your books were taken away, or you have to live in a strip cell.

If your suit is about living conditions in prison, you should ask for an injunction. For instance, if you are suing about overcrowding, unless your living situation has changed since you filed the lawsuit, you are still living in overcrowded conditions, so you are suffering an "ongoing harm" and you can request an injunction.

On the other hand, if the overcrowding just happened for a week or two, and you do not have a good reason to believe that it is likely to happen again in the near future, you should not request an injunction. An example of harm that is *not ongoing* is being beaten once by a guard. Unless the guard threatens to beat you again, or engages in a pattern of violence, there is nothing that the court can order the prison officials to do that will fix the abuses that you suffered in the past.

- **Remember:** Even if the abuse you suffered does not fit the standard discussed here, you can still sue for monetary damages. This is discussed in Part E of this chapter.

2. Preliminary Injunctions

Most injunctions are called **permanent injunctions**. The court can only give you a permanent injunction at the end of your lawsuit. However, sometimes prisoners can't wait a long time, sometimes years, for the court to decide whether to grant them a permanent injunction. Perhaps you are facing serious injury or even death. In a case like that, you can ask the court for a **preliminary injunction**. You can get a preliminary injunction much faster than a permanent injunction and it protects you while the court is considering your case, and deciding whether or not you will get a permanent injunction.

There are four things that you have to show to win a preliminary injunction:

- (1) You are likely to show at trial that the defendants violated your rights;
- (2) You are likely to suffer irreparable harm if you do not receive a preliminary injunction "Irreparable harm" means an injury that can never be fixed;

- (3) The threat of harm that you face is greater than the harm the prison officials will face if you get a preliminary injunction; and
- (4) A preliminary injunction will serve the public interest.

The next chapter and legal resources that you can find in your library will assist you with writing a complaint that includes all of the necessary information to get a preliminary injunction.

If you are successful in winning your preliminary injunction, the battle is unfortunately not over. Because of the PLRA, the preliminary injunction lasts only 90 days from the date that the court issues it. This usually means that you have to hope that you are able to win your permanent injunction within those 90 days. As stated before, lawsuits take a long time and it is unlikely that this will happen. You can get the preliminary injunction extended for additional 90-day periods if you can show that same conditions still exist. *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001).

You must also consider the “exhaustion” requirements of the PLRA. In Chapter Three, Section A, Part 2 you will learn that the PLRA requires you to use the prison grievance system before filing a lawsuit. If you have an emergency situation, and you do not have time to use the prison grievance system, you can request a preliminary injunction. The courts are split on whether you will have to exhaust your prison’s administrative remedies while you are getting relief through the injunction. One case to read on this issue is *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001). Either way, you will have to show the court that if you were forced to wait to file after using the prison grievance system, you would face “irreparable harm.” “Irreparable harm” is an injury that would cause permanent harm that can not be fixed.

What all this means is that you need to carefully take a look at the law in your Circuit. To be safe, you should use the prison grievance system while are working on your lawsuit. In your complaint, you should state what you have done to file a grievance.

There is another means of relief that you can get even faster than a preliminary injunction, called a “temporary restraining order” or “TRO.” Sometimes you can get a TRO before the prison officials are even aware of the lawsuit. These are issued in emergency situations and only last for a short period of time. However, unless you are working with a lawyer, you may have trouble getting a TRO. So, it might be best

to focus on preliminary and permanent injunctions. You will learn more about preliminary injunctions and TROs in Chapter Three, Section E.

3. Termination of an Injunction

The PLRA also states that court-ordered injunctions may be terminated, or ended, after two years, unless the court finds that an injunction is “necessary to correct a current or ongoing violation” of your rights and that the injunction still satisfies the requirements for an injunction set forth above. After the first two years of an injunction, it may be challenged every year. To keep the injunction, you will have to show that without it, your rights would still be violated. Don’t worry about this for now. It is very likely that if you are faced with this issue, you will also have a lawyer to help you.

E. MONEY DAMAGES

In a Section 1983 suit the court can order prison officials to give you money to make up for the harm you suffered when those officials violated your federal rights. You can get money damages instead of, or in addition to, an injunction. You may want an injunction against some of the people you sue and damages from others, or both. This section explains when and how to get damages.

There are three types of money damages. The first type of damage award that an individual can get in a Section 1983 suit is an award of **nominal damages**. Nominal damages are frequently just \$1, or some other very small sum of money. Nominal damages are awarded when you have proven a violation of your rights, but you have not shown any actual harm that can be compensated.

You are most likely to win a significant amount of money if you suffered an actual physical injury. The officials who are responsible should pay you for medical and other expenses, for any wages you lost, for the value of any part of your body or physical functioning which cannot be replaced or restored, and for your “pain and suffering.” These are called **compensatory damages**. The purpose of these damages is to try and get you back to the condition you were in before you received the injury.

Another type of damages you may be able to get is **punitive damages**. To get punitive damages, you need to show that the defendants’ actions were “motivated by evil motive or intent” or involved “reckless or callous indifference to [your] rights.” In other words, the officials had to either hurt you on purpose, or do

something so clearly dangerous, they must have known it was likely to hurt you. An example of a prisoner getting punitive damages can be found in *Smith v. Wade*, 461 U.S. 30 (1983). In this case, Mr. Wade had been moved into protective custody in his prison after having been assaulted by other prisoners. A prison guard moved two other prisoners into Mr. Wade's cell, one of whom had recently beaten and killed another prisoner. Mr. Wade's cellmates harassed, beat, and sexually assaulted him. The court found that the guard's conduct in placing Mr. Wade in a situation the guard knew was likely to expose him to serious physical harm, satisfied the standard for punitive damages.

<p>MONEY DAMAGES</p> <ul style="list-style-type: none"> ❑ You can get nominal damages if your rights have been violated ❑ You can get compensatory damages to make up for the physical harm you were caused. ❑ You can get punitive damages to punish guards who hurt you on purpose.
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The point of punitive damages is to punish members of the prison staff who violate your rights and to set an example to discourage other prison staff from acting illegally in the future. Therefore, the court usually won't impose punitive damages for one incident. You will have to show there has been a pattern of abuse or that there is a threat of more abuse in the near future.

Just because you are able to prove your case and win compensatory damages, does not automatically mean you will win punitive damages. For instance, in *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997), Ms. Coleman was able to win compensatory damages by proving that she was illegally denied medical treatment, but she did not win punitive damages. In this case, Ms. Coleman had a history of premature and complicated pregnancies and was experiencing severe pain and bleeding in connection with her premature labor. Nurse Rahija, the nurse on duty at Ms. Coleman's prison, was aware of Ms. Coleman's medical history. Nurse Rahija examined Ms. Coleman and determined that Ms. Coleman could be in early labor. However, she delayed Ms. Coleman's transfer to a hospital for several hours. The court ruled that Nurse Rahija's actions reached the standard of "deliberate indifference" and therefore violated the Eighth Amendment of the Constitution, but were not bad enough to show that she acted with the "callous indifference" required for punitive damages.

Even though you may not always get punitive damages, if you are suing for a violation of your rights and you have to prove **deliberate indifference** or **excessive force** to win your claim (these standards are discussed earlier in the Handbook), it probably makes sense to ask for punitive damages too. It can't hurt.

If you have not been physically hurt, the PLRA has made it much harder to get any kind of award of monetary damages. The PLRA states that a prisoner must show "physical injury" in order to file a lawsuit for "mental or emotional injury". Different courts have different standards as to what qualifies as physical injury. The physical injury has to be greater than "*de minimis*" (very minor), but it does not have to be severe. For example, In a case called *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997), a guard twisted a prisoner's ear, and it was bruised and sore for three days. The court held that this was not enough of a physical injury. However, the court noted that a prisoner does not need to show a "significant" injury. Many courts do not have clear precedent on what kind of injury is enough.

What is a "mental or emotional injury?"

Some courts have held a "mental or emotional" injury is any claim for *any* constitutional violation that does not include a physical injury. For a case like this, read *Thompson v. Carter*, 284 F.3d 411 (2^d Cir. 2002). However, this section of the PLRA does not apply to claims for injunctive or declaratory relief or claims for nominal and punitive damages. *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) discusses injunctive relief and *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2003) discusses nominal and punitive damages.

It is difficult to know for sure how much in compensatory and/or punitive damages you should request from the court. You should think carefully about asking for huge amounts of money, like millions of dollars, because the judge will be less likely to take your claim seriously if you do not ask for an appropriate amount. You can estimate a number for your compensatory damages by thinking about what your injury cost you. For example, try and come up with the amount of medical expenses you are likely to face in the future, or wages you have lost or will lose because you can not work. Also, think about the effect your injury has had on your life. How long have you suffered? Are you permanently injured? In what specific ways were you harmed? You can look up cases in your Circuit involving injuries that are similar

to your own and see what the court awarded those prisoners.

F. WHOM YOU CAN SUE

In your complaint you will name at least one defendant. You should include all of the people or entities that were responsible for the harm that you suffered. However, you do not want to go too far and name uninvolved people in the hopes of increasing your chances of winning; there must be a good reason to sue someone.

First, as you learned in Chapter Two, Section A, Part 2, every defendant you sue must have acted “under color of state law.” What this means is that each prison official who was responsible for your injury must have acted while working at your prison or “on duty.” This can include anyone who is involved in running your prison. You can sue the people who work in your prison, such as guards, as well as the people that provide services to prisoners, such as nurses or doctors.

You have to prove that each defendant in your case acted in a way or failed to act in a way that led to the violation of your rights. This is called “causation.” For example, if a guard illegally beats you and violates your rights, he or she causes your injury. In this example, the guard’s supervisor could also be liable for violating your rights if you can show that the supervisor made or carried out a “policy” or “practice” that led to the violation of your rights. So, let’s say that the prison warden, the supervisor of the guard who beat you, instructed his guards to beat prisoners anytime that they did not follow orders. In this instance, the warden didn’t actually beat you himself, but he can be held responsible for creating a policy that led to the beatings. A supervisor can also be sued for ignoring and failing to react to a widespread health or safety problem. For example, if the warden was aware that guards refused to let prisoners eat on a regular basis and did not do anything to stop it, you should sue the warden as well as the guards.

There are legal differences between whom you can sue in an action for an injunction and who you can sue for money damages. A discussion of these differences follows below. It is important to keep in mind that you can still sue for an injunction and money damages together in one lawsuit.

First, you have to decide whether to sue a prison official in his or her “individual capacity” or “official capacity”. If you are suing John Doe, supervising guard at “X” State Prison, in his **individual capacity**,

Naming Your Defendants:

- ❑ Sue prison guards or administrators in their “individual capacity” if you want **money damages**.
- ❑ Sue prison guards or administrators in their “official capacity” if you want an **injunction**.

If you want both, sue everybody in their “individual and official capacities.”

*You will learn how to state that you are suing someone in his or her individual or official capacity in **Chapter Three**.*

that means you are suing John Doe personally. In contrast, if you are suing John Doe, supervising guard at X State Prison, in his **official capacity**, that means that you are suing whoever is the supervising guard at the time of your lawsuit, whether or not that person happens to be John Doe.

1. Whom You Can Get An Injunction Against

To get an injunction from the court, you will need to sue prison guards and officers in their “official capacity.” The purpose of an injunction is to change your prison by making prison officials take some action or stop doing something that violates your rights. So, in this kind of lawsuit you would want to sue the officials in charge. You cannot sue a state or a state agency directly, so you can’t sue “X State Department of Corrections” for either an injunction or for money damages. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The law does allow you to sue state-employed prison officials in their official capacity, and this can force the state and its state agencies respect your rights. So, if you are asking for an injunction, you want to make sure that you sue high-ranking officials at your prison, and mention the titles of the prison officials that you are suing as well as each of their names.

Although you can’t sue a state, you can sue a municipality directly for an injunction. A “municipality” is a city, town, county or other kind of local government. This is called a “*Monell claim*” because it first succeeded in an important case called *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 659 (1978). You can sue a city, or any other municipality, for an injunction or damages where the violation of your rights was the product of a **policy or custom** of the city. *Pembaur v. Cincinnati*, 475 U.S.

469 (1986). Be warned that proving a “policy or custom” is hard unless the policy is actually written down. For example, in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), Ms. Brown was not able to win her case against a municipality when she tried to prove that the municipality was responsible for a police officer’s illegal use of excessive force in connection with her arrest. The court stated that the municipality’s decision to hire one police officer was not “deliberate conduct” that was the “moving force” behind the violation of Ms. Brown’s rights.

You will be in a better position to win against a municipality if you can show that the municipality was guilty of some pattern of abuse that resulted in the violation of your rights. You are unlikely to win against a municipality if your injury happened once or was caused by one prison or jail official.

2. Whom You Can Get Money Damages From

If you want to sue for money damages in your lawsuit, you have to sue the prison officials that violated your rights in their individual capacity (personally). As with injunctions, you cannot sue your state or its agencies. The biggest hurdle in suing prison officials for money damages is the doctrine of **qualified immunity**.

Qualified immunity is a form of legal protection given to government officials. If a court rules that the prison officials you are suing are protected by qualified immunity, that will be the end of your lawsuit for damages. However, **qualified immunity does not protect defendants from an injunction!**

To overcome qualified immunity, your complaint (explained in detail in Chapter Four) must include facts that show that:

- ❑ Your rights were violated;
- ❑ The right that was violated was “clearly established; and
- ❑ The defendant was *personally responsible* for the violation of your rights.

For a right to be “clearly established,” a prison official must have warning that his or her actions in a situation were illegal. Under the law, a prison official is allowed to make mistakes. Prison officials may act illegally and still be free from liability if he or she couldn’t be expected to know better because the law in that area is unclear. However, an official can be held responsible if he or she knew (or should have known) that he or she was acting illegally.

The **personal involvement** requirement means that prison supervisors or other high level officials (like the state prison commissioner) cannot be held liable for a violation of your rights *just because* they are responsible for supervising or employing the guards who actually violated your rights. This type of supervisory liability is called “*respondeat superior*” and it is not enough **not** for Section 1983 liability. However, you can hold supervisors responsible on the following theories:

- (1) The supervisor directly participated;
- (2) The supervisor learned of the violation of your rights and failed to do anything to fix the situation;
- (3) The supervisor created a policy or custom allowing or encouraging the illegal acts; OR
- (4) The supervisor was **grossly negligent** in managing the people he or she was supposed to supervise.

For a case explaining this kind of liability, read *Meriweather v. Coughlin*, 879 F.2d 1037 (2d Cir. 1989).

Some public officials have what is called **absolute immunity**. Unlike qualified immunity, absolute immunity is a complete bar to suit. Because of this doctrine, you cannot sue a judge, a legislator, or anyone else acting “as an integral part of the judicial or legislative process” no matter what he or she has done.

You may be worried that the prison officials you want to sue do not seem to have enough money to pay you. But, in most cases any money damages that the court orders the prison officials to pay will be paid by their employers: the prison or the state or state agency that runs the prison.

Finally, although there are different rules as to which remedies you can ask for from specific defendants, you can still ask for an injunction and money damages in the same complaint. For example, you can sue a guard in his or her individual capacity (for money damages) and his or her official capacity (for an injunction) in the same lawsuit.

3. What Happens to Your Money Damages

If you win money damages, the PLRA contains rules that may dip into your award before you get it. The PLRA states: “*any compensatory damages...shall be paid directly to satisfy any outstanding restitution*”

orders pending against the prisoner. The remainder....shall be forwarded to the prisoner.”

This means that if you are awarded compensatory damages after a successful suit, any debts you have towards the victim of your crime will be automatically paid out of your award before you get your money. This rule does not apply to punitive damages.

The PLRA also states that if you are awarded damages, “reasonable efforts” will be made to notify the “victims of the crime” for which you were convicted. However, there have been no rulings regarding these provisions so far, so it is hard to say whether and how they will affect suits and prisoners.

G. SETTLEMENTS

Before a judge rules on your case, the defendants may want to “settle,” which means both parties involved give in to some of each others’ demands and your suit will end without a trial. In a settlement, an injunction can still be issued against the defendant, and damages can be awarded to you. **No one, not even the judge, can force you to settle.**

The PLRA describes some rules on settlements. Settlements which include any kind of prospective relief (or injunctions) are often called “consent decrees.” Consent decrees must meet strict requirements: the settlement must be narrowly drawn, necessary to correct federal law violations, and do so in the least intrusive way. The court will approve and make sure PLRA restrictions are enforced. This means that a court can only approve a settlement or a consent decree if it is shown evidence or admissions by the defendants that your rights were violated by the prison officials that you are suing. This is a pretty hard task, since you would have to go to court and prove to the court all of the requirements for an injunction.

Some prisoners have been successful in having their consent decrees approved by a court when both the prisoner and the prison officials being sued agree that it meets all of the requirements of the PLRA. There is no guarantee that this will work in all cases.

Parties can enter into “private settlement agreements” that may not meet PLRA standards, but these agreements cannot be enforced by federal law. These agreements are very risky if your rights are being violated.

The PLRA does not restrict settlements that only deal with money, and do not include prospective relief.

H. CLASS ACTIONS

One prisoner, or a small group of prisoners, can sue on behalf of all other prisoners who are in the same situation. This is called a “class action.” The requirements for a “class action” are found in Rule 23 of the Federal Rules of Civil Procedure. Rule 23 requires:

- (1) The class must be so large that it would not be practical for everyone in it to bring the suit and appear in court.
- (2) There must be “questions of law or fact common to the class.”
- (3) The claims made by the people who bring the suit must be similar to the claims of everyone in the class.
- (4) The people who bring the suit must be able to “fairly and adequately protect the interests of the class.”
- (5) The defendants “must have acted or refused to act on grounds generally applicable to the class,” so that it would be appropriate for a court to issue one injunction or declaratory judgment “with respect to the class as a whole.”

A class action has two big advantages. First, any court order will apply to the entire class. Anyone in the class can ask the court to hold the officials in contempt of court and fine or jail them if they disobey the court order. If the suit were not a class action, prisoners who were not a part of the suit would have to start a new suit if prison officials continued to violate their rights.

Second, a class action cannot be dismissed as “moot” because the prisoners who start the suit are released from prison or transferred to a prison outside the court’s jurisdiction, or because the prison stops abusing those particular prisoners. The case will still be alive for the other prisoners in the class. *Sosna v. Iowa*, 419 U.S. 393 (1975) (the problem of “mootness” is discussed in Chapter Four, Section E).

A class action has one very big disadvantage. If you lose a class action, the judgment binds all the class members, so individuals cannot successfully challenge conditions that were upheld in the class action. On the other hand, if you lose a suit that is not a class action, you merely establish a bad precedent. Other prisoners can still raise the same legal issues in another suit, and they may be able to convince a different judge to ignore or overrule your bad precedent. Chapter Six explains how precedent works.

This is why the Federal Rules require that the people who bring a class action must be able to “fairly and adequately protect the interests of the class.” Protecting the interests of a class requires resources that are not available to prisoners, such as a staff of investigators, access to a complete law library, and the opportunity to interview potential witnesses scattered throughout the state. **As a result, courts require that classes are represented by an attorney.**

You can start a suit under Section 1983 for yourself and a few other prisoners and send copies to some lawyers to see if they’ll help. If a lawyer agrees to represent you or the court appoints a lawyer, your lawyer can “amend” your legal papers to change your suit into a class action.

- ❑ **Chapter One, Section D**, explains how to try and find a lawyer.
- ❑ **Chapter Three, Section C, Part 3** explains how to ask the court to appoint a lawyer to represent you.