42 U.S. Code § 1983.Civil action for deprivation of rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

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Supreme Court

356 U.S. 86

78 S.Ct. 590

2 L.Ed.2d 630

Albert L. TROP, Petitioner,
v.
John Foster DULLES, as Secretary of State of the United States and United States Department of State.

No. 70.

Reargued Oct. 28, 29, 1957.

Decided March 31, 1958.

Mr. Osmond K. Fraenkel, New York City, for the petitioner.

Sol. Gen. J. Lee Rankin, Washington, D.C., for the respondent.

Mr. Chief Justice WARREN announced the judgment of the Court and delivered an opinion, in which Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice WHITTAKER join.

1
The petitioner in this case, a nativeborn American, is declared to have lost his United States citizenship and become stateless by reason of his conviction by court-martial for wartime desertion. As in Perez v. Brownell, 356 U.S. 44, 78 S.Ct. 568, the issue before us is whether this forfeiture of citizenship comports with the Constitution.

2
The facts are not in dispute. In 1944 petitioner was a private in the United States Army, serving in French Morocco. On May 22, he escaped from a stockade at Casablanca, where he had been confined following a previous breach of discipline. The next day petitioner and a companion were walking along a road towards Rabat, in the general direction back to Casablanca, when an Army truck approached and stopped. A witness testified that petitioner boarded the truck willingly and that no words were spoken. In Rabat petitioner was turned over to military police. Thus ended petitioner's 'desertion.' He had been gone less than a day and had willingly surrendered to an officer on an Army vehicle while he was walking back towards his base. He testified that at the time he and his companion were picked up by the Army truck, 'we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry.' A general courtmartial convicted petitioner of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.

3
In 1952 petitioner applied for a passport. His application was denied on the ground that under the provisions of Section 401(g) of the Nationality Act of 1940, as amended,[1] he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion. In 1955 petitioner commenced this action in the District Court, seeking a declaratory judgment that he is a citizen. The Government's motion for summary judgment was granted, and the Court of Appeals for the Second Circuit affirmed, Chief Judge Clark dissenting. 239 F.2d 527. We granted certiorari. 352 U.S. 1023, 77 S.Ct. 591, 1 L.Ed.2d 596.

4
Section 401(g), the statute that decrees the forfeiture of this petitioner's citizenship, is based directly on a Civil War statute, which provided that a deserter would lose his 'rights of citizenship.'[2] The meaning of this phrase was not clear.[3] When the 1940 codification and revision of the nationality laws was prepared, the Civil War statute was amended to make it certain that what a convicted deserter would lose was nationality itself.[4] In 1944 the statute was further amended to provide that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged.[5] At the same time it was provided that citizenship could be regained if the deserter was restored to active duty in wartime with the permission of the military authorities.

5
Though these amendments were added to ameliorate the harshness of the statute,[6] their combined effect produces a result that poses far graver problems than the ones that were sought to be solved. Section 401(g) as amended now gives the military authorities complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to re-enter the armed forces, the military becomes the arbiter of citizenship. And the domain given to it by Congress is not as narrow as might be supposed. Though the crime of desertion is one of the most serious in military law, it is by no means a rare event for a soldier to be convicted of this crime. The elements of desertion are simply absence from duty plus the intention not to return.[7] Into this category falls a great range of conduct, which may be prompted by a variety of motives—fear, laziness, hysteria or any emotional imbalance. The offense may occur not only in combat but also in training camps for draftees in this country.[8] The Solicitor General informed the Court that during World War II, according to Army estimates, approximately 21,000 soldiers and airmen were convicted of desertion and given dishonorable discharges by the sentencing courts-martial and that about 7,000 of these were actually separated from the service and thus rendered stateless when the reviewing authorities refused to remit their dishonorable discharges. Over this group of men, enlarged by whatever the corresponding figures may be for the Navy and Marines, the military has been given the power to grant or withhold citizenship. And the number of youths subject to this power could easily be enlarged simply by expanding the statute to cover crimes other than desertion. For instance, a dishonorable discharge itself might in the future be declared to be sufficient to justify forfeiture of citizenship.

6
Three times in the past three years we have been confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country.[9] A statute such as Section 401(g) raises serious issues in this area, but in our view of this case it is unnecessary to deal with those problems. We conclude that the judgment in this case must be reversed for the following reasons.

I.

7
In Perez v. Brownell, supra, I expressed the principles that I believe govern the constitutional status of United States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

8
Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401(g) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

9
Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also a full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.

II.

10
Since a majority of the Court concluded in Perez v. Brownell that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in Perez. The Court concluded in Perez that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement these powers by decreeing loss of citizenship. The statute in Perez decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States.[10] This provision was also before the Court in Perez, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.

11
The constitutional question posed by Section 401(g) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it 'technically is not a penal law.'[11] How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401(g) is a penal law cannot be thus determined. Of course it is relevant to know the classification employed by the Cabinet Committee that played such an important role in the preparation of the Nationality Act of 1940. But it is equally relevant to know that this very committee acknowledged that Section 401(g) was based on the provisions of the 1865 Civil War statute, which the committee itself termed 'distinctly penal in character.'[12] Furthermore, the 1865 statute states in terms that deprivation of the rights of citizenship is 'in addition to the other lawful penalties of the crime of desertion * * *.'[13] And certainly it is relevant to know that the reason given by the Senate Committee on Immigration as to why loss of nationality under Section 401(g) can follow desertion only after conviction by court-martial was 'because the penalty is so drastic.'[14] Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.[15] With regard to Section 401(g) the fact is that the views of the Cabinet Committee and of the Congress itself as to the nature of the statute are equivocal, and cannot possibly provide the answer to our inquiry. Determination of whether this statute is a penal law requires careful consideration.

12
In form Section 401(g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.

13
This Court has been called upon to decide whether or not various statutes were penal ever since 1798. Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws,[16] it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties.[17] In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.[18] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal.[19] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[20] The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote.[21] If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[22]

14
The same reasoning applies to Section 401(g). The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in Perez. Here the purpose is punishment, and therefore the statute is a penal law.

15
It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations, of which perhaps the most significant is the performance of one's duty when hazardous or important service is required. But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial. During World War II the threat of this punishment was explicitly communicated by the Army to soldiers in the field.[23] If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.

16
The Government argues that the sanction of denationalization imposed by Section 401(g) is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country.[24] For example, the statute[25] authorizing deportation of an alien convicted under the 1917 Espionage Act[26] was viewed, not as designed to punish him for the crime of espionage, but as an implementation of the sovereign power to exclude, from which the deporting power is derived, Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549. This view of deportation may be highly fictional, but even if its validity is conceded, it is wholly inapplicable to this case. No one contends that the Government has, in addition to the power to exclude all aliens, a sweeping power to denationalize all citizens. Nor does comparison to denaturalization eliminate the penal effect of denationalization in this case. Denaturalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment. Rather, it is imposed in the exercise of the power to make rules for the naturalization of aliens.[27] In short, the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no basis for saying that in this case denationalization is not a punishment.

17
Section 401(g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment.[28] Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

18
At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

19
The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.[29] But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688,[30] and the principle it represents can be traced back to the Magna Carta.[31] The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793. The Court recognized in that case that the words of the Amendment are not precise,[32] and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

20
We believe, as did Chief Judge Clark in the court below,[33] that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation.[34] In short, the expatriate has lost the right to have rights.

21
This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.[35] It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.[36]

22
The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance.[37] Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.[38] In this country the Eighth Amendment forbids that to be done.

23
In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

24
We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

25
The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

26
When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

27
The judgment of the Court of Appeals for the Second Circuit is reversed and the cause is remanded to the District Court for appropriate proceedings.

28
Reversed and remanded.

29
Mr. Justice BLACK, whom Mr. Justice DOUGLAS joins, concurring.

30
While I concur in the opinion of The Chief Justice there is one additional thing that needs to be said.

31
Even if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities. If desertion or other misconduct is to be a basis for forfeiting citizenship, guilt should be determined in a civilian court of justice where all the protections of the Bill of Rights guard the fairness of the outcome. Such forfeiture should not rest on the findings of a military tribunal. Military courts may try soldiers and punish them for military offenses, but they should not have the last word on the soldier's right to citizenship. The statute held invalid here not only makes the military's finding of desertion final but gives military authorities discretion to choose which soldiers convicted of desertion shall be allowed to keep their citizenship and which ones shall thereafter be stateless. Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen.

32
Mr. Justice BRENNAN, concurring.

33
In Perez v. Brownell, 356 U.S. 44, 78 S.Ct. 568, also decided today, I agreed with the Court that there was no constitutional infirmity in § 401(e), which expatriates the citizen who votes in a foreign political election. I reach a different conclusion in this case, however, because I believe that § 401(g), which expatriates the wartime deserter who is dishonorably discharged after conviction by court-martial, lies beyond Congress' power to enact. It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war. The loss of citizenship may have as ominous significance for the individual in the one case as in the other. Why then does not the Constitution prevent the expatriation of the voter as well as the deserter?

34
Here, as in Perez v. Brownell, we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution. The Court there held that such a relevant connection exists between the power to maintain relations with other sovereign nations and the power the expatriate the American who votes in a foreign election. (1) Within the power granted to Congress to regulate the conduct of foreign affairs lies the power to deal with evils which might obstruct or embarrass our diplomatic interests. Among these evils, Congress might believe, is that of voting by American citizens in political elections of other nations.[1] Whatever the realities of the situation, many foreign nations may well view political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. In either event the reaction is liable to be detrimental to the interests of the United States. (2) Finding that this was an evil which Congress was empowered to prevent, the Court concluded that expatriation was a means reasonably calculated to achieve this end. Expatriation, it should be noted, has the advantage of acting automatically, for the very act of casting the ballot is the act of denationalization, which could have the effect of cutting off American responsibility for the consequences. If a foreign government objects, our answer should be conclusive—the voter is no longer one of ours. Harsh as the consequences may be to the individual concerned, Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations.[2] And where Congress has determined that considerations of the highest national importance indicate a course of action for which an adequate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress' power to choose. Cf. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

35
In contrast to § 401(e), the section with which we are now concerned, § 401(g), draws upon the power of Congress to raise and maintain military forces to wage war. No pretense can here be made that expatriation of the deserter in any way relates to the conduct of foreign affairs, for this statute is not limited in its effects to those who desert in a foreign country or who flee to another land. Nor is this statute limited in its application to the deserter whose conduct imports 'elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.' Perez v. Brownell, supra, 356 U.S. 61, 78 S.Ct. at page 577. The history of this provision, indeed, shows that the essential congressional purpose was a response to the needs of the military in maintaining discipline in the armed forces, especially during wartime. There can be no serious question that included in Congress' power to maintain armies is the power to deal with the problem of desertion, an act plainly destructive, not only of the military establishment as such, but, more importantly, of the Nation's ability to wage war effectively. But granting that Congress is authorized to deal with the evil of desertion, we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end and thereby designed to further the ultimate congressional objective—the successful waging of war.

36
Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft-law violations seriously threatened the effectiveness of the Union armies.[3] The 1865 Act expressly provided that expatriation was to be 'in addition to the other lawful penalties of the crime of desertion * * *.' This was emphasized in the leading case under the 1865 Act, Huber v. Reily, 53 Pa. 112, decided by the Pennsylvania Supreme Court little more than a year after passage of the Act. The court said that 'Its avowed purpose is to add to the penalties which the law had previously affixed to the offence of desertion from the military or naval service of the United States, and it denominates the additional sanctions provided as penalties.' Id., at pages 114—115.

37
But, although it imposed expatriation entirely as an added punishment for crime, the 1865 Act did not expressly make conviction by court-martial a prerequisite to that punishment, as was the case with the conventional penalties. The Pennsylvania Supreme Court felt that Huber was right in contending that this was a serious constitutional objection: '(T)he act proposes to inflict pains and penalties upon offenders before and without a trial and conviction by due process of law, and * * * it is therefore prohibited by the Bill of Rights.' 53 Pa. at page 115. The court, however, construed the statute so as to avoid these constitutional difficulties, holding that loss of citizenship, like other penalties for desertion, followed only upon conviction by court-martial.

38
This view of the 1865 Act was approved by this Court in Kurtz v. Moffitt, 115 U.S. 487, 501, 6 S.Ct. 148, 153, 29 L.Ed. 458, and, as noted there, the same view 'has been uniformly held by the civil courts as well as by the military authorities.' See McCafferty v. Guyer, 59 Pa. 109; State v. Symonds, 57 Me. 148; Gotcheus v. Matheson, 58 Barb., N.Y., 152; 2 Winthrop, Military Law and Precedents (2d ed. 1896), 1001.[4] Of particular significance, moreover, is the fact that the Congress has confirmed the correctness of the view that it purposed expatriation of the deserter solely as additional punishment. The present § 401(g) merely incorporates the 1865 provision in the codification which became the 1940 Nationality Act.[5] But now there is expressly stated what was omitted from the 1865 Act, namely, that the deserter shall be expatriated 'if and when he is convicted thereof by court martial * * *.' 54 Stat. 1169, as amended, 8 U.S.C. § 1481(a)(8), 8 U.S.C.A. § 1481(a)(8).[6]

39
It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. The deserter, moreover, does not cease to be an American citizen at the moment he deserts. Indeed, even conviction does not necessarily effect his expatriation, for dishonorable discharge is the condition precedent to loss of citizenship. Therefore, if expatriation is made a consequence of desertion, it must stand together with death and imprisonment—as a form of punishment.

40
To characterize expatriation as punishment is, of course, but the beginning of critical inquiry. As punishment it may be extremely harsh, but the crime of desertion may be grave indeed. However, the harshness of the punishment may be an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power. In its material forms no one can today judge the precise consequences of expatriation, for happily American law has had little experience with this status, and it cannot be said hypothetically to what extent the severity of the status may be increased consistently with the demands of due process. But it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable.[7] Indeed, in truth, he may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life. Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

41
In view of the manifest severity of this sanction, I feel that we should look closely at its probable effect to determine whether Congress' imposition of expatriation as a penal device is justified in reason. Clearly the severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.

42
The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.[8] However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications.

43
In the light of these considerations, it is understandable that the Government has not passed its case on the basis of expatriation of the deserter as punishment for his crime. Rather, the Government argues that the necessary nexus to the granted power is to be found in the idea that legislative withdrawal of citizenship is justified in this case because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms in a time of desperate national peril. It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other than forcing retribution from the offender—naked vengeance. But many acts of desertion certainly fall far short of a 'refusal to perform this ultimate duty of American citizenship.' Desertion is defined as 'absence without leave accompanied by the intention not return.' Army Manual for Courts-Martial (1928) 142. The offense may be quite technical, as where an officer, 'having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom * * *.' Article of War 28 (1920), 41 Stat. 792, now 10 U.S.C.A. § 885. Desertion is also committed where a soldier, without having received a regular discharge, re-enlists in the same or another service. The youngster, for example, restive at his assignment to a supply depot, who runs off to the front to be in the fight, subjects himself to the possibility of this sanction. Yet the statute imposes the penalty coextensive with the substantive crime. Since many acts of desertion thus certainly fall far short of a 'refusal to perform this ultimate duty of American citizenship,' it stretches the imagination excessively to establish a rational relation of mere retribution to the ends purported to be served by expatriation of the deserter. I simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws.

44
It seems to me that nothing is solved by the uncritical reference to service in the armed forces as the 'ultimate duty of American citizenship.' Indeed, it is very difficult to imagine, on this theory of power, why Congress cannot impose expatriation as punishment for any crime at all—for tax evasion, for bank robbery, for narcotics offenses. As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power.

45
I therefore must conclude that § 401(g) is beyond the power of Congress to enact. Admittedly Congress' belief that expatriation of the deserter might further the war effort may find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relation between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government * * *,' M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L.Ed. 579—and therefore that § 401(g) falls beyond the domain of Congress.

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Mr. Justice FRANKFURTER, whom Mr. Justice BURTON, Mr. Justice CLARK, and Mr. Justice HARLAN join, dissenting.

47
Petitioner was born in Ohio in 1924. While in the Army serving in French Morocco in 1944, he was tried by a general court-martial and found guilty of having twice escaped from confinement, of having been absent without leave, and of having deserted and remained in desertion for one day. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for three years. He subsequently returned to the United States. In 1952 he applied for a passport; this application was denied by the State Department on the ground that petitioner had lost his citizenship as a result of his conviction of and dishonorable discharge for desertion from the Army in time of war. The Department relied upon § 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, as amended by the Act of January 20, 1944, 58 Stat. 4, which provided, in pertinent part,[1] that

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'A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by:

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'(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: Provided, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom * * *.'

50
In 1955 petitioner brought suit in a United States District Court for a judgment declaring him to be a national of the United States. The Government's motion for summary judgment was

granted and petitioner's denied. The Court of Appeals for the Second Circuit affirmed, one judge dissenting. 239 F.2d 527.

51
At the threshold the petitioner suggests constructions of the statute that would avoid consideration of constitutional issues. If such a construction is precluded, petitioner contends that Congress is without power to attach loss of citizenship as a consequence of conviction for desertion. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the Constitution and the prohibition against cruel and unusual punishments in the Eighth Amendment.

52
The subsection of § 401 of the Nationality Act of 1940, as amended, making loss of nationality result from a conviction for desertion in wartime is a direct descendant of a provision enacted during the Civil War. One section of 'An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out of the National Forces, and for other Purposes,' 13 Stat. 487, 490, approved on March 3, 1865, provided that 'in addition to the other lawful penalties of the crime of desertion from the military or naval service,' all persons who desert such service 'shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens * * *.' Except as limited in 1912 to desertion in time of war, 37 Stat. 356, the provision remained in effect until absorbed into the Nationality Act of 1940. 54 Stat. 1137, 1169, 1172. Shortly after its enactment the 1865 provision received an important interpretation in Huber v. Reily, 1866, 53 Pa. 112. There, the Supreme Court of Pennsylvania, in an opinion by Mr. Justice Strong, later of this Court, held that the disabilities of the 1865 Act could attach only after the individual had been convicted of desertion by a court-martial. The requirement was drawn from the Due Process Clause of the Fifth Amendment to the Constitution. 53 Pa. at pages 116—118. This interpretation was followed by other courts, e.g., State v. Symonds, 57 Me. 148, and was referred to approvingly by this Court in 1885 in Kurtz v. Moffitt, 115 U.S. 487, 6 S.Ct. 148, 29 L.Ed. 458, without discussion of its rationale.

53
When the nationality laws of the United States were revised and codified as the Nationality Act of 1940, 54 Stat. 1137, there was added to the list of acts that result in loss of American nationality, 'Deserting the military or naval service of the United States in time of war, provided he (the deserter) is convicted thereof by a court martial.' § 401(g), 54 Stat. 1169. During the consideration of the Act, there was substantially no debate on this provision. It seems clear, however, from the report of the Cabinet Committee that had recommended its adoption that nothing more was intended in its enactment than to incorporate the 1865 provision into the 1940 codification, at the same time making it clear that nationality, and not the ambiguous 'rights of citizenship,'[2] was to be lost and that the provision applied to all nationals. Codification of the Nationality Laws of the United States, H.R.Comm.Print, Pt. 1, 76th Cong., 1st Sess. 68.

54
In 1944, at the request of the War Department, Congress amended § 401(g) of the 1940 Act into the form in which it was when applied to the petitioner; this amendment required that a dismissal or dishonorable discharge result from the conviction for desertion before expatriation should follow and provided that restoration of a deserter to active duty during wartime should have the effect of restoring his citizenship. 58 Stat. 4. It is abundantly clear from the debate and reports that the sole purpose of this change was to permit persons convicted of desertion to regain their citizenship and continue serving in the armed forces, H.R.Rep. No. 302, 78th Cong., 1st Sess. 1; S.Rep. No. 382, 78th Cong., 1st Sess. 1; 89 Cong.Rec. 10135. Because it was thought unreasonable to require persons who were still in the service to fight and, perhaps, die for the country when they were no longer citizens, the requirement of dismissal or dishonorable discharge prior to denationalization was included in the amendment. See S.Rep. No. 382, supra, at 3; 89 Cong.Rec. 3241.

55
Petitioner advances two possible constructions of § 401(g) that would exclude him from its operation and avoid constitutional determinations. It is suggested that the provision applies only to desertion to the enemy and that the sentence of a dishonorable discharge, without the imposition of which a conviction for desertion does not have an expatriating effect, must have resulted from a conviction solely for desertion. There is no support for the first of these constructions in a fair reading of § 401(g) or in its congressional history. Rigorously as we are admonished to avoid consideration of constitutional issues if statutory disposition is available, it would do violence to what this statute compellingly conveys to draw from it a meaning other than what it spontaneously reveals.

56
Section 401(g) imposes expatriation on an individual for desertion 'provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces * * *.' Petitioner's argument is that the dishonorable discharge must be solely 'the result of such conviction' and that § 401(g) is therefore not applicable to him, convicted as he was of escape from confinement and absence without leave in addition to desertion. Since the invariable practice in military trials is and has been that related offenses are tried together with but a single sentence to cover all convictions, see Jackson v. Taylor, 353 U.S. 569, 574, 77 S.Ct. 1027, 1030, the effect of the suggested construction would be to force a break with the historic process of military law for which Congress has not in the remotest way given warrant. The obvious purpose of the 1944 amendment, requiring dishonorable discharge as a condition precedent to expatriation, was to correct the situation in which an individual who had been convicted of desertion, and who had thus lost his citizenship, was kept on duty to fight and sometimes die 'for his country which disowns him.' Letter from Secretary of War to Chairman, Senate Military Affairs Committee, S.Rep. No. 382, 78th Cong., 1st Sess. 3. There is not a hint in the congressional history that the requirement of discharge was intended to make expatriation depend on the seriousness of the desertion, as measured by the sentence imposed. If we are to give effect to the purpose of Congress in making a conviction for wartime desertion result in loss of citizenship, we must hold that the dishonorable discharge, in order for expatriation to follow, need only be 'the result of' conviction for one or more offenses among which one must be wartime desertion.

57
Since none of petitioner's nonconstitutional grounds for reversal can be sustained, his claim of unconstitutionality must be faced. What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation. All power is, in Madison's phrase, 'of an encroaching nature.' Federalist, No. 48 (Earle ed. 1937), at 321. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a co-ordinate branch of the Government while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act. No wonder such a function is deemed 'the gravest and most delicate duty that this Court is called on to perform.' Holmes, J., in Blodgett v. Holden, 275 U.S. 142, 148, 48 S.Ct. 105, 107, 72 L.Ed. 206 (separate opinion). This is not a lip-serving platitude.

58
Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence—requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

59
One of the principal purposes in establishing the Constitution was to 'provide for the common defence.' To that end the States granted to Congress the several powers of Article I, Section 8, clauses 11 to 14 and 18, compendiously described as the 'war power.' Although these specific grants of power do not specifically enumerate every factor relevant to the power to conduct war, there is no limitation upon it (other than what the Due Process Clause commands). The scope of the war power has been defined by Chief Justice Hughes in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413 '(T)he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effect to preserve the nation.' See also Chief Justice Stone's opinion in Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774.

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Probably the most important governmental action contemplated by the war power is the building up and maintenance of an armed force for the common defense. Just as Congress may be convinced of the necessity for conscription for the effective conduct of war, Selective Draft Law Cases (Arver v. U.S.), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, Congress may justifiably be of the view that stern measures—what to some may seem overly stern—are needed in order that control may be had over evasions are committed to the Nation's defense, of military duty when the armed forces and that the deleterious effects of those evasions may be kept to the minimum. Clearly Congress may deal severely with the problem of desertion from the armed forces in wartime; it is equally clear from the face of the legislation and from the circumstances in which it was passed—that Congress was calling upon its war powers when it made such desertion an act of expatriation. Cf. Winthrop, Military Law and Precedents (2 ed., Reprint 1920), 647.

61
Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be 'to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense,' Jacobson v. Massachusetts, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643. Harsh as this may sound, it is no more so than the actualities to which it responds. Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship? Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.

62
Petitioner urges that imposing loss of citizenship as a 'punishment' for wartime desertion is a violation of both the Due Process Clause of the Fifth Amendment and the Eighth Amendment. His objections are that there is no notice of expatriation as a consequence of desertion in the provision defining that offense, that loss of citizenship as a 'punishment' is unconstitutionally disproportionate to the offense of desertion and that loss of citizenship constitutes 'cruel and unusual punishment.'

63
The provision of the Articles of War under which petitioner was convicted for desertion, Art. 58, Articles of War, 41 Stat. 787, 800, does not mention the fact that one convicted of that offense in wartime should suffer the loss of his citizenship. It may be that stating all of the consequences of conduct in the statutory provision making it an offense is a desideratum in the administration of criminal justice; that can scarcely be said—nor does petitioner contend that it ever has been said—to be a constitutional requirement. It is not for us to require Congress to list in one statutory section not only the ordinary penal consequences of engaging in activities therein prohibited but also the collateral disabilities that follow, by operation of law, from a conviction thereof duly resulting from a proceeding conducted in accordance with all of the relevant constitutional safeguards.[3]

64
Of course an individual should be apprised of the consequences of his actions. The Articles of War put petitioner on notice that desertion was an offense and that, when committed in wartime, it was punishable by death. Art. 58, supra. Expatriation automatically followed by command of the Nationality Act of 1940, a duly promulgated Act of Congress. The War Department appears to have made every effort to inform individual soldiers of the gravity of the consequences of desertion; its Circular No. 273 of 1942 pointed out that convictions for desertion were punishable by death and would result in 'forfeiture of the rights of citizenship,' and it instructed unit commanders to 'explain carefully to all personnel of their commands (certain Articles of War, including Art. 58) * * * and emphasize the serious consequences which may result from their violation.' Compilation of War Department General Orders, Bulletins, and Circulars (Government Printing Office 1943) 343. That Congress must define in the rubric of the substantive crime all the consequences of conduct it has made a grave offense and that it cannot provide for a collateral consequence, stern as it may be, by explicit pronouncement in another place on the statute books is claim that hardly rises to the dignity of a constitutional requirement.

65
Petitioner contends that loss of citizenship is an unconstitutionally disproportionate 'punishment' for desertion and that it constitutes 'cruel and unusual punishments' within the scope of the Eighth Amendment. Loss of citizenship entails undoubtedly severe—and in particular situations even tragic consequences. Divestment of citizenship by the Government has been characterized, in the context of denaturalization, as 'more serious than a taking of one's property, or the imposition of a fine or other penalty.' Schneiderman v. United States, 320 U.S. 118, 122, 63 S.Ct. 1333, 1335, 87 L.Ed. 1796. However, like denaturalization, see Klapprott v. United States, 335 U.S. 601, 612, 69 S.Ct. 384, 389, 93 L.Ed. 266, expatriation under the Nationality Act of 1940 is not 'punishment' in any valid constitutional sense. Cf. Fong Yue Ting v. United States, 149 U.S. 698, 730, 13 S.Ct. 1016, 1028, 37 L.Ed. 905. Simply because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follows that denationalization is a 'punishment,' any more than it can be said that loss of civil rights as a result of conviction for a felony, see Gathings, Loss of Citizenship and Civil Rights for Conviction of Crime, 43 Am.Pol.Sci.Rev. 1228, 1233, is a 'punishment' for any legally significant purposes. The process of denationalization, as devised by the expert Cabinet Committee on which Congress quite properly and responsibly relied[4] and as established by Congress in the legislation before the Court,[5] was related to the authority of Congress, pursuant to its constitutional powers, to regulate conduct free from restrictions that pertain to legislation in the field technically described as criminal justice. Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a 'non-penal' purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by § 401(g) as a 'punishment.'

66
Even assuming, arguendo, that § 401(g) can be said to impose 'punishment,' to insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. Art. 58, supra; § 6, Art. 1, Articles of War of 1776, 5 J. Cont. Cong. (Ford ed. 1906) 792. Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death? The seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance.

67
Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. See, generally, Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER.B/4 (1954). Although these provisions are often, but not always, applicable only to naturalized citizens, they are more nearly comparable to our expatriation law than to our denaturalization law.[6] Some countries have made wartime desertion result in loss of citizenship—native-born or naturalized. E.g., § 1(6), Phillipine Commonwealth Act No. 63 of Oct. 21, 1936, as amended by Republic Act No. 106 of June 2, 1947, U.N.Doc., supra, at 379; see Borchard, Diplomatic Protection of Citizens Abroad, 730. In this country, desertion has been punishable by loss of at least the 'rights of citizenship'[7] since 1865. The Court today reaffirms its decision (Mackenzie v. Hare, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297; Savorgnan v. United States, 338 U.S. 491, 70 S.Ct. 292, 94 L.Ed. 287) sustaining the power of Congress to denationalize citizens who had no desire or intention to give up their citizenship. If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner, and thus certainly not 'cruel and unusual,' it seems more than incongruous that such loss should be thought 'cruel and unusual' when it is the consequence of conduct that is also a crime. In short, denationalization, when attached to the offense of wartime desertion, cannot justifiably be deemed so at variance with enlightened concepts of 'humane justice,' see Weems v. United States, 217 U.S. 349, 378, 30 S.Ct. 544, 553, 54 L.Ed. 793, as to be beyond the power of Congress, because constituting a 'cruel and unusual' punishment within the meaning of the Eighth Amendment.

68
Nor has Congress fallen afoul of that prohibition because a person's post-denationalization status has elements of unpredictability. Presumably a denationalized person becomes an alien vis-a -vis the United States. The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in fifteenth-century England. He need not be in constant fear lest some dire and unforeseen fate be imposed on him by arbitrary governmental action—certainly not 'while this Court sits' (Holmes, J., dissenting in Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857). The multitudinous decisions of this Court protective of the rights of aliens bear weighty testimony. And the assumption that brutal treatment is the inevitable lot of denationalized persons found in other countries is a slender basis on which to strike down an Act of Congress otherwise amply sustainable.

69
It misguides popular understanding of the judicial function and of the limited power of this Court in our democracy to suggest that by not invalidating an Act of Congress we would endanger the necessary subordination of the military to civil authority. This case, no doubt, derives from the consequence of a court-martial. But we are sitting in judgment not on the military but on Congress. The military merely carried out a responsibility with which they were charged by Congress. Should the armed forces have ceased discharging wartime deserters because Congress attached the consequence it did to their performance of that responsibility? This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of his constitutional power in approving a bill and thereby making it 'a law.' To sustain it is to respect the actions of the two branches of our Government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint. Mr. Justice Holmes, one of the profoundest thinkers who ever sat on this Court, expressed the conviction that 'I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.' Holmes, Speeches, 102. He did not, of course, deny that the power existed to strike down congressional legislation, nor did he shrink from its exercise. But the whole of his work during his thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment.

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54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U.S.C. § 1481(a)(8), 8 U.S.C.A. § 1481(a)(8):

'A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

'(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: Provided, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom * * *.'

2

Act of March 3, 1865, 13 Stat. 487, 490.

3

See Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. of Pa.L.Rev. 25, 60 62. Administratively the phrase 'rights of citizenship' was apparently taken to mean 'citizenship.' See Foreign Relations 1873, H.R.Exec.Doc. No. 1, 43d Cong., 1st Sess., Pt. 1, Vol. II, p. 1187 (view of Secretary of State Fish); H.R.Doc. No. 326, 59th Cong., 2d Sess. 159 (State Department Board); Hearings before the House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. 132—133 (testimony of Richard Flournoy, State Department representative).

4

Hearings, at 133.

But it is not entirely clear, however, that the Congress fully appreciated the fact that Section 401(g) rendered a convicted deserter stateless. In this regard, the following colloquy, which occurred during hearings in 1943 before the House Committee on Immigration and Naturalization between Congressmen Allen and Kearney, members of the Committee, and Edward J. Shaughnessy, then Deputy Commissioner of Immigration, is illuminating:

'Mr. Allen. If he is convicted (of desertion) by court martial in time of war, he loses his citizenship?

'Mr. Shaughnessy. That is correct.

'Mr. Allen. In other words, that is the same thing as in our civil courts. When one is convicted of a felony and is sent to the penitentiary, one loses his citizenship.

'Mr. Shaughnessy. He loses his rights of citizenship.

'Mr. Kearney. There is a difference between losing citizenship and losing civil rights.

'Mr. Shaughnessy. He loses his civil rights, not his citizenship. Here he loses his citizenship.

'Mr. Allen. He loses his rights derived from citizenship.

'Mr. Shaughnessy. Yes; it almost amounts to the same thing. It is a technical difference.

'Mr. Allen. He is still an American citizen, but he has no rights.

'Mr. Shaughnessy. No rights of citizenship.'

Hearings before the House Committee on Immigration and Naturalization on H.R. 2207, 78th Cong., 1st Sess. 2—3.

See also id., at 7: 'Mr. Elmer. Is it not true that this loss of citizenship for desertion is a State matter and that the Government has nothing to do with it?'

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Act of January 20, 1944, 58 Stat. 4.

6

See S.Rep. No. 382, 78th Cong., 1st Sess. 1, 3; H.R.Rep. No. 302, 78th Cong., 1st Sess. 1; 89 Cong.Rec. 3241, 10135.

7

Articles of War 58, 41 Stat. 800; Article 85, Uniform Code of Military Justice, 10 U.S.C.(Supp. V) § 885, 10 U.S.C.A. § 885; Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 637.

8

The Solicitor General stated in his argument that § 401(g) would apply to desertion from such camps.

9

United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8; Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148; Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433.

10

54 Stat. 1168, as amended, 58 Stat. 746, 8 U.S.C. § 1481(a)(10), 8 U.S.C.A. § 1481(a)(10):

'A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

'(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.'

11

Codification of the Nationality Laws of the United States, H.R.Comm.Print, Pt. 1, 76th Cong., 1st Sess. 68.

12

Ibid.

13

Act of March 3, 1865, 13 Stat. 487.

14

S.Rep. No. 2150, 76th Cong., 3d Sess. 3.

15

United States v. Constantine, 296 U.S. 287, 294, 56 S.Ct. 223, 226, 80 L.Ed. 233; United States v. La Franca, 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551.

16

U.S.Const., Art. I, § 9, cl. 3, § 10, cl. 1.

17

United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252; Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648.

18

Of course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand.L.Rev. 603, 608 610; 64 Yale L.J. 712, 722—724.

19

E.g., United States v. Lovett, supra; Pierce v. Carskadon, 16 Wall. 234, 21 L.Ed. 276; Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366; Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356.

20

E.g., Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549; Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002; Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637; Murphy v. Ramsey, 114 U.S. 15, 5 S.Ct. 747, 29 L.Ed. 47.

21

See Gathings, Loss of Citizenship and Civil Rights for Conviction of Crime, 43 Am.Pol.Sci.Rev. 1228.

22

Cf. Davis v. Beason, supra; Murphy v. Ramsey, supra.

23

See War Department Circular No. 273, 1942, Compilation of War Department General Orders, Bulletins and Circulars (Government Printing Office 1943) 343.

24

Mahler v. Eby, supra; Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978; Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905.

25

Act of May 10, 1920, 41 Stat. 593, now 8 U.S.C.A. § 1251(a)(17).

26

Act of June 15, 1917, 40 Stat. 217.

27

See, e.g., Baumgartner v. United States, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796.

28

U.S.Const., Amend. VIII: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

29

See Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422; Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793; Howard v. Fleming, 191 U.S. 126, 24 S.Ct. 49, 48 L.Ed. 121; O'Neil v. Vermont, 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450; In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519; Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345.

30

1 Wm. & Mary, 2d Sess. (1689), c. 2.

31

See 34 Minn.L.Rev. 134; 4 Vand.L.Rev. 680

32

Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See Weems v. United States, supra; O'Neil v. Vermont, supra; Wilkerson v. Utah, supra. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' But cf. In re Kemmler, supra, 136 U.S. at page 443, 10 S.Ct. at page 932; United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430, 41 S.Ct. 352, 360, 65 L.Ed. 704 (Brandeis, J., dissenting). If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day.

33

'Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, The Expatriation Act of 1954, 64 Yale L.J. 1164, 1189 1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless'—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.' 239 F.2d 527, 530.

34

See discussion in Perez v. Brownell, 356 U.S. 44, 78 S.Ct. 568.

35

See Study on Statelessness, U.N.Doc. No. E/1112; Seckler-Hudson, Statelessness: With Special Reference to the United States; Borchard, Diplomatic Protection of Citizens Abroad, §§ 262, 334.

36

The suggestion that judicial relief will be available to alleviate the potential rigors of statelessness assumes too much. Undermining such assumption is the still fresh memory of Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956, where an alien, resident in this country for 25 years, returned from a visit abroad to find himself barred from this country and from all others to which he turned. Summary imprisonment on Ellis Island was his fate, without any judicial examination of the grounds of his confinement. This Court denied relief, and the intolerable situation was remedied after four years' imprisonment only through executive action as a matter of grace. See N.Y. Times, Aug. 12, 1954, p. 10, col. 4.

37

See Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER.B/4 (1954).

38

Id., at 379 and 461. Cf. Nationality Law of August 22, 1907, Art. 17(2) (Haiti), id., at 208.

1

Some indication of the problem is to be seen in the joint resolutions introduced in both houses of Congress to exempt the two or three thousand Americans who allegedly lost their citizenship by voting in certain Italian elections. See S.J.Res. 47 and H.J.Res. 30, 239, 375, 81st Cong., 1st Sess. All proposed 'to suspend the operation of section 401(e) of the Nationality Act of 1940 in certain cases.' See also H.R. 6400, 81st Cong., 1st Sess.

2

Perez v. Brownell did not raise questions under the First Amendment, which of course would have the effect in appropriate cases of limiting congressional power otherwise possessed.

3

A good description of the extent of the problem raised by desertions from the Union armies, and of the extreme measures taken to combat the problem, will be found in Pullen, The Twentieth Maine: A Volunteer Regiment of the Civil War (1957).

4

The opinion in Huber v. Reily, which was written by Mr. Justice Strong, later a member of this Court, suggested, if it did not hold, that the statutes and considerations of due process required that expatriation, to be accomplished, should be specifically included by the court-martial as part of the sentence. See 53 Pa. at pages 119—120. The court-martial, under military law, adjudges both guilt and the extent of initial sentence. Jackson v. Taylor, 353 U.S. 569, 574—575, 77 S.Ct. 1027, 1030—1031, 1 L.Ed.2d 1045; and see Article of War 58 (1920), 41 Stat. 800, now 10 U.S.C.A. § 885. However, it has not been the practice specifically to include expatriation as part of the sentence. 2 Winthrop, Military Law and Precedents (2d ed. 1896), 1001.

5

The provision was limited in 1912 to desertion in time of war, 37 Stat. 356, but otherwise was not revised until carried into the Nationality Act of 1940, 54 Stat. 1169. It was, however, first codified as part of the laws concerning citizenship as § 1998 of the 1874 Revised Statutes.

6

The reason for the addition of the proviso is stated in a report, Codification of the Nationality Laws of the United States, N.R.Comm.Print, Pt. 1, 76th Cong., 1st Sess., prepared at the request of the President by the Secretary of State, the Attorney General, and the Secretary of Labor, proposing a revision and codification of the nationality laws: 'The provisions of sections 1996 and 1998 of the Revised Statutes are distinctly penal in character. They must, therefore, be construed strictly, and the penalties take effect only upon conviction by a court martial. (Huber v. Reily, 1866, 53 Pa. 112; Krutz v. Moffitt, 1885, 115 U.S. 487 (6 S.Ct. 148, 29 L.Ed. 458)).' Id., at 68.

'The reference later in the report that § 401 'technically is not a penal law' is to the section as a whole and not to subdivision (g).

7

Adjudication of hypothetical and contingent consequences is beyond the function of this Court and the incidents of expatriation are altogether indefinite. Nonetheless, this very uncertainty of the consequences makes expatriation as punishment severe.

It is also unnecessary to consider whether the consequences would be different for the citizen expatriated under another section than § 401(g).

8

A deterrent effect is certainly conjectural when we are told that during World War II as many as 21,000 soldiers were convicted of desertion and sentenced to be dishonorably discharged. From the fact that the reviewing authorities ultimately remitted the dishonorable discharges in about two-thirds of these cases it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation.

1

The substance of this provision now appears in § 349(a)(8) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 268, 8 U.S.C. § 1481(a) (8), 8 U.S.C.A. § 1481(a)(8).

2

The precise meaning of this phrase has never been clear, see Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. of Pa.L.Rev. 25, 61—62. It appears, however, that the State Department regarded it to mean loss of citizenship, see, e.g., Hearings before the House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. 38.

3

It should be noted that a person cannot be deprived of his citizenship merely on the basis of an administrative finding that he deserted in wartime or even with finality on the sole basis of his having been dishonorably discharged as a result of a conviction for wartime desertion. Section 503 of the Nationality Act of 1940 provides:

'If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *' 54 Stat. 1137, 1171, now § 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U.S.C. § 1503, 8 U.S.C.A. § 1503. In such a proceeding it is open to a person who, like petitioner, is alleged to have been expatriated under § 401(g) of the 1940 Act to show, for example, that the court-martial was without jurisdiction (including observance of the requirements of due process) or that the individual, by his restoration to active duty after conviction and discharge, regained his citizenship under the terms of the proviso in § 401(g), supra.

4

The report of that Committee stated that the provision in question 'technically is not a penal law.' Codification of the Nationality Laws of the United States, supra, at 68. In their letter to the President covering the report, the Committee stated that none of the loss of nationality provisions was 'designed to be punitive * * *.' Id., at VII.

5

There is no basis for finding that the Congress that enacted this provision regarded it otherwise than as part of the clearly nonpenal scheme of 'acts of expatriation' represented by § 401 of the Nationality Act of 1940, supra.

6

In the United States, denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud, see Luria v. United States, 231 U.S. 9, 24, 34 S.Ct. 10, 13, 58 L.Ed. 101; the laws of many countries making naturalized citizens subject to expatriation for grounds not applicable to natural-born citizens do not relate those grounds to the actual naturalization process. E.g., British Nationality Act, 1948, 11 & 12 Geo. VI, c. 56, § 20(3).

7

See note 2, supra.

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Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

769 F.2d 700 (1985)

Carol ANCATA, individually, as natural guardian of Tara Ancata, and as personal representative of Anthony Ancata, deceased, Plaintiff-Appellant, v. PRISON HEALTH SERVICES, INC., a Delaware Corp., Susan Colligan, Karen Sutton, R. Hargrove, Henry Blady, Robert Butterworth, and George Brescher, in his capacity as Sheriff of Broward County, Defendants-Appellees.

No. 84-5923.

United States Court of Appeals, Eleventh Circuit.

August 26, 1985.

701 *701 Peter M. Siegel, Randall C. Berg, Jr., Miami, Fla., for plaintiff-appellant.

Bruce W. Jolly, Ft. Lauderdale, Fla., for R. Butterworth & G. Brescher.

Deborah Mann, Robert Klein, West Palm Beach, Fla., for H. Blady.

Edward R. Nicklaus, Miami, Fla., for Prison Health Services.

Alexander Cocalis, Ft. Lauderdale, Fla., for Broward County.

Christopher R. Fertig, Fertig & Gamble, Lawrence J. Marraffino, Ft. Lauderdale, Fla., for S. Colligan, K. Sutton, & R. Hargrove.

Before HENDERSON and CLARK, Circuit Judges and TUTTLE, Senior Circuit Judge.

CLARK, Circuit Judge:

I. FACTS

A. *Procedural History*

This is an appeal from an order of the district court dismissing all counts of plaintiff's first amended complaint based upon 42 U.S.C. § 1983.

Plaintiff is the personal representative of the deceased's, Anthony Ancata's, estate and the guardian of his minor child Tara Ancata. Defendant Prison Health Services is and was the entity responsible for providing medical care to those housed at the Broward County Jail. Defendants Colligan, Sutton, Hargrove and Blady were all medical personnel employed by Prison Health Services, Inc. Robert Butterworth was sued in his official capacity as the sheriff of Broward County at the time of the incidents forming the basis of this lawsuit. Sheriff Brescher was sued in his official capacity as the current sheriff of Broward County. Broward County was sued for its alleged failure to provide adequate funding to address the medical needs of individuals incarcerated there.

Plaintiff's original complaint was filed in August of 1984. Each defendant, other than Prison Health Services, filed a motion to dismiss.[1] Before the court ruled on the motions to dismiss, the defendants consented to the filing of an amended complaint. This took place in October of 1984. Counts 1 and 2 of the complaint alleged that all the defendants violated plaintiff's decedent's right to be free from cruel and unusual punishment by the deliberate indifference to his serious medical needs. The remaining counts raised pendent state law claims. After the amended complaint was filed, defendant Broward County and defendant Blady filed motions to dismiss. The district court entered an order on November 19, 1984 dismissing
702 all counts of the complaint against all defendants.[2] The district *702 court determined that counts 1 and 2 of the complaint as amended, alleging the constitutional violations, alleged at most, only medical malpractice. Thus, the court determined that dismissal as to all medical defendants was proper. With respect to the non-medical defendants, the district court found that the allegations against them were grounded on notions of respondeat superior and therefore were subject to dismissal. The district court dismissed the pendent state law claims as it had found no valid federal claim.

B. *The Facts as Alleged in Plaintiff's Complaint*

The facts, as alleged in the plaintiff's complaint, indicate the following. Anthony Ancata was arrested and placed in pre-trial detention at the Broward County Jail on August 20, 1982. On August 29, 1982, he began to suffer from a variety of medical symptoms including swelling of the ankle, inability to sleep, chills, lower back pain, tingling and numbness of his hands, hyperventilation, severe pain in his back and right leg, double vision, and other serious problems. Despite his complaints, Prison Health Services and its employees, defendants Blady, Colligan, Sutton and Hargrove did little or nothing to evaluate the medical needs of Mr. Ancata.[3]

The defendants did administer such non-prescription drugs as Ben Gay and Tylenol II and suggested an orthopedic or psychiatric evaluation. However, they took no steps to have Ancata examined by either an orthopedic specialist or a psychiatrist. Rather, they informed Ancata and his family that he would not be referred to a non-staff specialist without a court order. Furthermore, they refused to acquiesce in the entry of a court order unless plaintiff agreed to bear the costs of the recommended diagnostic evaluation. Mr. Ancata, however, had already been declared indigent.

Ancata's appointed public defender successfully obtained a court order compelling an evaluation by an orthopedic specialist. The orthopedist recommended a neurological evaluation. However, Prison Health Services would again not agree to a medical evaluation by a neurologist without a court order. The second court order was again obtained by the public defender representing Mr. Ancata. After the neurological examination was conducted, Anthony Ancata was hospitalized. He was soon diagnosed as having leukemia. He died in the hospital on December 30, 1982 from respiratory failure.[4]

The appellant raises the following issues on appeal: (1) whether the complaint sufficiently alleged a case of deliberate indifference to serious medical needs thus rendering dismissal improper; (2) whether the federal claims asserted against the sheriff of Broward County and Broward County itself were premised solely on notions of respondeat superior; and (3) whether the dismissal of the pendent state law claims, if the federal claims are found to state a cause of action, was premature.

II. THE LEGAL ISSUES IN CONTEXT

When reviewing an order granting a motion to dismiss for failure to state a claim, this court must accept the facts as pleaded to be true and resolve them in the light most favorable to the plaintiff. The motion to dismiss should not be granted unless it appears to a certainty, "that the plaintiff can prove no set of facts in support of his
703 claim which would entitle him to relief." *703 *Milburn v. United States,* 734 F.2d 762, 765 (11th Cir.1984). The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is, as we have stated previously, "exceedingly low." *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Devel.,* 711 F.2d 989, 995 (11th Cir.1983).

It should also be noted at the outset in this case that the defendants fall into several different groups. Prison Health Services, as was noted previously, is the entity responsible, pursuant to an agreement between it and the county, for providing medical care to those housed at the Broward County Jail. Defendants Colligan, Sutton, Hargrove and Blady were all medical personnel employed by Prison Health Services. The issue to be resolved as to Prison Health Services and its employees, i.e. the medical defendants, is whether plaintiff's allegations sufficiently stated a constitutional tort of deliberate indifference to serious medical needs.

The county and the current sheriff are sued as public bodies ultimately responsible for providing medical care to those incarcerated in Broward County. Mr. Butterworth was the sheriff at the time of Ancata's death. The issue to be resolved as to these defendants, i.e., the non-medical defendants, is whether the district court properly dismissed the claims against them when it determined that any liability they may be exposed to was based solely upon notions of respondeat superior.

A. *The Medical Defendants and the Deliberate Indifference to Serious Medical Needs Claim*

The question before us is whether the allegations of plaintiff's complaint are sufficient to permit a jury to find that the medical defendants' conduct amounted to a deliberate indifference to serious medical needs. *See* Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).[5]

The medical defendants do not contest, and there can be no serious dispute, that if their actions resulted in a deprivation of Ancata's constitutional rights, they would be subject to liability pursuant to 42 U.S.C. § 1983. Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *see also* Lawyer v. Kernodle, 721 F.2d 632 (8th Cir.1983) (private physician hired by county to perform autopsies was acting under color of state law); *Morrison v. Washington County, Alabama,* 700 F.2d 678 (11th Cir.1983) (refusing to dismiss physician employed by county from § 1983 action); Perez v. Sugarman, 499 F.2d 761 (2d Cir.1974) (holding that state action was present for private institution's acts where the City of New York removed a child from the mother's custody and placed the child in a private child care institution).

If the complaint is sufficient, then dismissal for failure to state a claim is improper. Accepting plaintiff's allegations as true, and giving the plaintiff the benefit of all legitimate inferences from the complaint as we must, we conclude that the complaint sufficiently alleges a claim of deliberate indifference to serious medical needs.

There are at least three separate although somewhat overlapping aspects to plaintiff's claim of deliberate indifference. The first is plaintiff's allegation that the
704 *704 defendants failed to provide even that level of diagnostic care that they themselves believed necessary. The knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference. *See* Robinson v. Moreland, 655 F.2d 887 (8th Cir.1981). In Ramos v. Lam, 639 F.2d 559, 575 (10th Cir.1980), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981) the court said:

> Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.

In this case the plaintiff alleged that the defendants knew that medical care was necessary but simply refused to provide it. The complaint maintains that the defendants concluded that Ancata required a psychiatric or orthopedic evaluation and refused to take the steps to see that he was properly evaluated. Instead, they placed the burden on decedent to obtain a court order for the very examination they believed necessary. Intentional failure to provide service acknowledged to be necessary is the deliberate indifference proscribed by the Constitution. *See* Woodall v. Foti, 648 F.2d 268, 272-73 (5th Cir.1981).

Second, plaintiff alleges that the defendants failed to secure medical care for Ancata because he would not pay. Delay in medical treatment cannot be justified as a means to coerce payment. *See* City of Revere v. Massachusetts General Hospital, *supra*. Furthermore, if necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out. *See* Archer v. Dutcher, 733 F.2d 14, 17 (2d Cir.1984). Plaintiff alleged that Ancata was indigent and that the defendants put the financial interest of Prison Health Services ahead of the serious medical needs of Ancata.

Third, plaintiff alleges that the defendants failed to provide proper medical care. Plaintiff's allegations go far beyond that of simple mistake or negligence. Rather, they maintain that the medical care provided was so cursory as to amount to no treatment at all. Such actions, in the case of serious medical problems, may violate the Fourteenth Amendment. *See* Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir.1970). As the Third Circuit has noted under similar facts:

> Although the plaintiff has been provided with aspirin, this may not constitute adequate medical care. If, "deliberate indifference caused an easier and less efficacious treatment" to be provided, the defendants have violated the plaintiff's Eighth Amendment rights by failing to provide adequate medical care.

West v. Keve, 571 F.2d 158, 162 (3d Cir.1978) (citations omitted).

Looking at the above-mentioned allegations in the plaintiff's complaint, as well as the other allegations contained therein, it is clear that the allegations contained in the plaintiff's complaint sufficiently state a constitutional claim that the medical defendants were deliberately indifferent to Ancata's serious medical needs. When the allegations indicate this type of indifference, dismissal prior to discovery is premature. Therefore, the decision of the district court is REVERSED as to this issue.

B. *The Non-Medical Defendants and Respondeat Superior*

As to the non-medical defendants, i.e., the two sheriffs and Broward County, the district court dismissed the claims against them as being solely based upon
705 respondeat superior.[6] We disagree. First, *705 as to Broward County. The county is responsible for insuring that adequate funds are provided to meet the medical needs of inmates. The complaint alleges that "Defendant Broward County is responsible for providing funds to insure that the medical needs of the inmates of the Broward County Jail are properly met.... The limited funds provided by the County may have contributed to deliberate indifference shown for the serious medical needs of Anthony Ancata."[7] The federal courts have consistently ruled that governments, state and local, have an obligation to provide medical care to incarcerated individuals. *See* Estelle, *supra*. This duty is not absolved by contracting with an entity such as Prison Health Services. Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the Health Service. In that sense, the county's duty is non-delegable.[8] *See generally* Wilson v. Taylor, 733 F.2d 1539, 1545 (11th Cir.1984).[9] Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates. *See* Gates v. Collier, 501 F.2d 1291 (5th Cir.1974); *see also* Miller v. Carson, 401 F.Supp. 835, 889-91 (M.D.Fla.1975), *aff'd* 563 F.2d 741 (5th Cir.1977).[10]

Additionally, if Broward County established or utilized a policy or custom requiring that inmates needing medical assistance obtain court orders and the result of that policy or custom played a role in the delay in treatment and deliberate indifference
706 *706 shown towards Anthony Ancata, then the county may be liable. *See* Berdin v. Duggan, 701 F.2d 909 (11th Cir.1983). Furthermore, if the county permitted the sheriff and/or prison health officials that it contracted with to establish such a policy or custom, it may also be liable. *See* Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir.1984).[11] Such liability would not be based upon notions of respondeat superior. The liability would be a result of the county's own policy. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

As to the defendant Robert Butterworth, he was sheriff at the time medical care was refused to Anthony Ancata. His liability, if any, would not necessarily be solely based upon respondeat superior. If plaintiff can establish, as she alleged, that the sheriff was personally involved in the acts depriving Anthony Ancata of his constitutional rights, or that he breached a duty imposed by state law and that that breach caused the plaintiff's injury, then he would be fully responsible for his own actions and/or policies. *See* Baskin v. Parker, 602 F.2d 1205 (5th Cir.1979); Douthit v. Jones, 641 F.2d 345 (5th Cir.1981). Furthermore, if Butterworth himself established or utilized a policy or custom requiring that inmates seek court orders to obtain medical services, then he would be liable if the result of that policy or custom played a role in any deliberate indifference to Ancata's medical needs. Berdin v. Duggan, 701 F.2d 909 (11th Cir.1983).

At the stage in the litigation at which Sheriff Butterworth was dismissed, i.e., prior to discovery, it is impossible to say whether Butterworth played a role in demanding the court orders as a condition of obtaining medical care. Nor is it known which, if any, of the defendants chose to place the financial interest of the county ahead of Ancata's medical needs. Thus, dismissal prior to discovery was unwarranted.

Finally, defendant George Brescher, the sheriff at the time the case was filed, was sued in his official capacity as sheriff of Broward County. The issue of which entity is fiscally responsible, i.e., the sheriff's office or the county should be resolved before either one is properly dismissed. Until that issue is resolved, Brescher should remain a party to this litigation. *See* Glover v. Alabama Department of Corrections, 734 F.2d 691, 694 (11th Cir.1984).

C. *The Pendent State Law Claims*

As we have determined that plaintiff adequately alleged a federal claim, then we must determine that the district court's dismissal of the pendent state law claims was premature. Obviously, they derive from a common nucleus of operative fact and thus because the court, at present, has jurisdiction over the parties and because the federal claims asserted by the plaintiff are substantial, the pendent law claims are properly before the court. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1136, 16 L.Ed.2d 218 (1966).

Therefore, the decision of the district court is reversed and the case is remanded to the district court for proceedings consistent with this opinion.

REVERSED and REMANDED.

HENDERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's disposition of this case except that portion of the opinion which reverses the district court's dismissal of George Brescher, the sheriff of Broward County at the time of the filing of this suit. The majority opinion accepts the appellant's argument that Brescher should not be dismissed as a party defendant until there is a resolution of which entity, the county or the sheriff, bears
707 the fiscal responsibility *707 for funding the jail's medical needs. I respectfully disagree with this conclusion.

The majority opinion states, "The county is responsible for insuring that adequate funds are provided to meet the medical needs of inmates." At 705. It notes that Broward County concedes in its brief that state law mandates that it pay the medical expenses of county prisoners. *Id.* at 705-06 n. 7. Given this admission, there is no need to inquire further into whether Brescher or Broward County would be liable for failure to provide the required funds. Since there are no other charges of liability against Brescher, he should not be required to further defend the action.

[1] Prison Health Services failed to answer and a default was entered on October 3, 1984. Its motion to set aside the default was later granted as part of the district court's order dismissing the first amended complaint as to all defendants. Appellant does not contest the vacation of the default order.

[2] Motions to dismiss by the other defendants, except Prison Health Services, were filed subsequent to the order of dismissal. However, prior to the filing of the first amended complaint, plaintiff had responded to the motions to dismiss of defendants Brescher, Butterworth and Broward County. However, plaintiff's time to respond to the motions to dismiss of the other defendants had not expired as of the time that the district court dismissed the complaint.

[3] Defendant Blady was the jail doctor. Colligan was a registered nurse in charge of medical care at the jail. Sutton and Hargrove were registered nurses employed by Prison Health Services at the jail.

[4] Plaintiff alleged that the respiratory failure was "possibly related to herpes pneumonitis and persistent bone marrow hypoplasia, possibly due to chemotherapy as well as marrow suppression by infection, possibly viral."

[5] Anthony Ancata was a pretrial detainee. *Estelle v. Gamble, supra,* dealt with individuals already convicted of a crime and incarcerated for those crimes, and thus was based upon the Eighth Amendment. Since Ancata was a pretrial detainee the due process clause and not the Eighth Amendment is the applicable constitutional provision. *See* City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). However, as the Court made clear in *City of Revere,* the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.

[6] The district court relied upon Estelle v. Gamble, 554 F.2d 653 (5th Cir.1977) (on remand from the Supreme Court decision *supra*) in its determination that the claims against the non-medical defendants were based upon respondeat superior. In *Estelle* the court stated:

[W]hile the Director and the warden are parties, not for having failed to provide treatment, but more on respondeat superior principles in line with their official capacities. We can find no evidence in the record that either exhibited "deliberate indifference" to Gamble's medical needs by means of interference with the prison doctor's performance or in any other manner which would satisfy the Supreme Court standard.

554 F.2d at 654.

The allegations in this case are different in that the plaintiff alleges that the actions and policies of the county and the sheriff's office did affect in various ways the health care received by Mr. Ancata. The actions are not solely based upon their status as a public body.

[7] Fla.Stat.Ann. § 951.032 states in pertinent part:

(1) A county detention facility or municipal detention facility incurring expenses for providing medical care, treatment, hospitalization, or transportation may seek reimbursement for the expenses incurred in the following order:

(a) From the prisoner or person receiving medical care, treatment, hospitalization, or transportation.

(b) From an insurance company, health care corporation, or other source if the prisoner or person is covered by an insurance policy or subscribes to a health care corporation or other source for those expenses.

Although the statute makes clear that the county can seek reimbursement from a person incarcerated, the plain wording of the statute indicates that the county has the responsibility for securing adequate medical treatment. A prisoner does not have to bargain for medical care. The county admits as much in its brief; "state law mandates that Broward County pay the medical expenses of prisoners incarcerated in the county jail." Brief of Appellee Broward County at 7.

[8] However, if a constitutional tort committed by an employee of Prison Health Services was not a result of the policy or custom of the entity, then the county would not be liable. Liability for the independent actions of a health service employee would be based upon respondeat superior and thus not actionable against the county under § 1983.

[9] *See also* Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir.1982). In *Hearn,* the court made clear that where a governmental entity delegates the final authority to make decisions then those decisions necessarily represent official policy. 688 F.2d at 1334. The county has a duty to provide adequate medical care both under the United States Constitution and under Florida law. Thus, if Prison Health Services and/or its employees have the responsibility to make final decisions regarding a requirement that a prisoner pay for medical attention before receiving it or obtain a court order, then their acts, policies and customs become official policy. *See also supra* note 5 (explaining that Prison Health Services and its employees act under color of state law).

[10] Plaintiff also maintains that if she prevails, she will be entitled to recover attorney's fees and costs pursuant 42 U.S.C. § 1988. She maintains the county is ultimately responsible for any attorney's fees or costs assessed against the sheriff. For this reason alone, she maintains that dismissal of the county is inappropriate, relying upon Glover v. Alabama Board of Corrections, 734 F.2d 691, 694 (11th Cir.1984). However, in light of Supreme Court's recent pronouncement in *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) this contention appears to be without merit.

[11] As we noted above, if, either expressly or by default, Broward County permitted others to decide or determine policy, it is liable for their actions if these policies prove unconstitutional. *Wilson v. Taylor, supra* (holding that when a municipality gives a police chief the final authority to make a decision *Monell* standards for official policy are satisfied).

U.S. Supreme Court

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)
Anderson v. Liberty Lobby, Inc.
No. 84-1661
Argued December 3, 1985
Decided June 23, 1986
477 U.S. 242
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In libel, New York Times v. Sullivan, 376 U. S. 254, it was held that, a libel suit brought by a public official threatened by state law or public figure, the First Amendment requires the plaintiff to show that, in publishing the allegedly libelous matter, the defendant acted with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Respondent, Liberty Lobby, Inc., a nonprofit corporation that lobbies for "patriotic" causes, and its chairman, sued petitioner, a syndicated columnist and publisher, alleging that certain statements in a paragraph published by petitioners were false and defamatory. The District Court granted petitioners' motion for summary judgment, concluding that, in accordance with New York Times, because respondents were public figures, they were required to prove that a libel suit under the New York Times standard, and that summary judgment was proper because actual malice could not be established by the requisite clear and convincing evidence. The Court of Appeals held that the District Court had erred in granting the motion for summary judgment. Noting the motion, respondents claimed that an issue of actual malice was presented because the author had relied on a "biased and prejudiced" witness and had "deliberately" or "recklessly" published "false statements" when respondents were treated as groups of persons. The Court of Appeals reversed summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources, including the witness, did not "as a matter of law" establish his lack of actual malice. Petitioners contend that the Court of Appeals held that the requisite clear and convincing evidence of actual malice must be shown at the summary judgment stage, and that, so construed, the decision is in conflict with decisions of other federal courts of appeals, which have held that the New York Times standard is a factor to be considered in determining whether there is a genuine issue for trial. Petitioners contend that, so construed, summary judgments have been improperly granted, because a jury could reasonably have concluded that the allegations were deliberately false and malicious.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of petitioners' motion for summary judgment. (pp. 477 U. S. 247-257.)

(a) Summary judgment will lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. There is no genuine issue if the evidence presented in opposition to the motion for summary judgment is merely colorable, or is not significantly probative. (pp. 477 U. S. 247-249.)

(b) A fact is not critical to a claim or defense for summary judgment in a case such as this must be guided by the New York Times standard, taking into consideration the substantive evidentiary burden that applies to the underlying substantive claim, whether the evidence is such that a jury could reasonably find that the plaintiff can prove the allegation with "convincing clarity." 477 U. S. 252-256.

(c) A judge ruling on a motion for summary judgment in a case such as this must be guided by the New York Times standard, taking into consideration the substantive evidentiary burden that applies to the underlying substantive claim, whether the evidence is such that a jury could reasonably find that the plaintiff can prove the allegation with "convincing clarity." 477 U. S. 252-256.

(d) Contrary to the Court of Appeals' view, the "genuine issue" standard governing summary judgment is not a lesser burden than the "clear and convincing evidence" standard governing the merits of a New York Times case. Rather, the "genuine issue" standard is a more demanding one, because it requires that the judge not only determine that the evidence is sufficient to support a verdict, but also that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. (pp. 477 U. S. 257-258.)

(e) The Court of Appeals's opinion in this case should be read in conjunction with the Court, decided by the same date, which, in the context of a motion for summary judgment, rejected the contention that a reasonable jury could return a verdict for the nonmoving party, in the summary judgment stage, on the ground that the evidence was "implausible." (pp. 477 U. S. 258-259.)

Reversed and remanded.

Justice POWELL delivered the opinion of the Court.

In libel, New York Times v. Sullivan, 376 U. S. 254, 376 U. S. 279-280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires that the plaintiff show, in publishing the defamatory statement, the defendant acted with actual malice -- with knowledge that it was false, or with reckless disregard of whether it was false or not. We have since held that the standard applies to libel actions by public officials, Rosenblatt v. Baer, 383 U. S. 75, 383 U. S. 85-86 (1966), and by public figures, Curtis Publishing Co. v. Butts, 388 U. S. 130, 388 U. S. 155 (opinion of Harlan, J., joined by three members of the plurality); id. at 388 U. S. 164 (WARREN, C. J., concurring in the result).

This case presents the question whether the trial judge's evidentiary ruling in a motion for summary judgment in a libel action brought by a public figure or public official, such as the New York Times case, must be guided by the New York Times standard, taking into consideration the substantive evidentiary burden that applies to the underlying substantive claim, whether the evidence is such that a jury could reasonably find that the plaintiff can prove the allegation with "convincing clarity," or whether the judge's ruling should be based on other standards. We hold that the trial judge's ruling must be guided by the New York Times standard, so construed, and that the Court of Appeals's contrary view is in conflict with decisions of several other federal courts of appeals, which have held that the New York Times standard is a factor to be considered in determining whether there is a genuine issue for summary judgment. [Footnote 1] We also review

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The investigator inquiries published two articles: "The Private World of Willis Carto" and "Young Profiles of an American Hitler." These articles provided the basis for a libel suit against Liberty Lobby and its chairman, Willis Carto (hereinafter collectively "Liberty Lobby"), and Carto's publication, the Spotlight, a weekly newspaper.

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Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by the articles. In support of opposing the articles, Bennett had relied on statements and inferences in numerous sources provided in Bennett's affidavit. Bennett's affidavit was based on the information he had received from the sources before publishing. Respondents also presented evidence that William McLaren, an aide to Carto, had "participated in the preparation of the articles." Id. at 5. Respondents also presented evidence that Carto had "a strong and prejudiced bias against the Anderson Family." Id. at 6.

In ruling on the motion for summary judgment, the District Court first held that respondents were limited to arguments that the articles were false and defamatory. Respondents argued that the articles were false and defamatory because the investigation and research and the reliance on numerous sources provided a "substantial basis" for the allegations. The District Court granted petitioners' motion for summary judgment, concluding that, in accordance with New York Times, because respondents were public figures, they were required to prove that a libel suit under the New York Times standard, and that summary judgment was proper because actual malice could not be established by the requisite clear and convincing evidence. The Court of Appeals reversed the District Court's grant of petitioners' motion for summary judgment. Noting the motion, respondents claimed that an issue of actual malice was presented because the author had relied on a "biased and prejudiced" witness and had "deliberately" or "recklessly" published "false statements" when respondents were treated as groups of persons. The Court of Appeals reversed summary judgment for petitioners on the ground that the author's investigation and research and the reliance on numerous sources, including the witness, did not "as a matter of law" establish his lack of actual malice. Petitioners contend that the Court of Appeals held that the requisite clear and convincing evidence of actual malice must be shown at the summary judgment stage, and that, so construed, the decision is in conflict with decisions of other federal courts of appeals, which have held that the New York Times standard is a factor to be considered in determining whether there is a genuine issue for summary judgment. [Footnote 1] We review

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In ruling on the motion for summary judgment, the District Court first held that respondents were limited to arguments that the articles were false and defamatory. Respondents argued that the articles were false and defamatory because the investigation and research and the reliance on numerous sources provided a "substantial basis" for the allegations. The District Court granted petitioners' motion for summary judgment, concluding that, in accordance with New York Times, because respondents were public figures, they were required to prove that a libel suit under the New York Times standard, and that summary judgment was proper because actual malice could not be established by the requisite clear and convincing evidence. The Court of Appeals reversed the District Court's grant of petitioners' motion for summary judgment. Noting the motion, respondents claimed that an issue of actual malice was presented because the author had relied on a "biased and prejudiced" witness and had "deliberately" or "recklessly" published "false statements" when respondents were treated as groups of persons. The Court of Appeals reversed summary judgment for petitioners on the ground that the author's investigation and research and the reliance on numerous sources, including the witness, did not "as a matter of law" establish his lack of actual malice. Petitioners contend that the Court of Appeals held that the requisite clear and convincing evidence of actual malice must be shown at the summary judgment stage, and that, so construed, the decision is in conflict with decisions of other federal courts of appeals, which have held that the New York Times standard is a factor to be considered in determining whether there is a genuine issue for summary judgment. [Footnote 1] We review

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of a material fact. Specifically, we held that, because Kress failed to negate plaintiff's materials suggesting that a policeman was in fact in the store at the time of the refusal to serve,

"it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds,' and thus reached an understanding that petitioner should be refused service."

Id. at 398 U. S. 158.

In *Adickes,* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached, and did not consider, whether the evidence was "one-sided," and, had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since, in that case, there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante* at 477 U. S. 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an

unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service, Adickes* suggests that, on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service,* we found, in effect, that the plaintiff had failed to make out a *prima facie* case; in *Adickes,* we held that the moving defendant had failed to rebut the plaintiff's *prima facie* case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that, once a nonmoving plaintiff has made out a *prima facie* case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases. [Footnote 2/3]

As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, *see post* at 477 U. S. 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise

akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but, with each repetition, the original understanding is increasingly distorted.

But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

"[I]t is clear enough from our recent cases that, at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter. . . ."

Ante at 477 U. S. 249.

"Our holding . . . does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Ante at 477 U. S. 255.

But the Court's opinion is also full of language which could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would:

"When determining if a genuine factual issue . . . exists . . a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability. . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence."

Ante at 477 U. S. 254 (emphasis added).

"[T]he inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury, or whether *it is so one-sided* that one party must prevail as a matter of law."

Ante at 477 U. S. 251-252 (emphasis added).

"[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

Ante at 477 U. S. 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.,* the importance and value, of the evidence in light of the "quantum," *i.e.,* amount "required," could *only* be performed by weighing the evidence.

If, in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule -- for this surely would be a brand new procedure -- will transform what is meant to provide an expedited "summary"

procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then, in my view, grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, *see post* at 477 U. S. 270-271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury -- *i.e.,* that a *prima facie* case had been made out -- but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante* at 477 U. S. 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission

to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante* at 477 U. S. 251-252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a *prima facie* case, and a defendant's motion for summary judgment must fail, regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

[Footnote 2/1]

The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that,

"in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."

Ante at 477 U. S. 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder v. Jones,* 465 U. S. 783 (1984), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i.e.,* those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times, ante* at 477 U. S. 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision, by its terms, applies to *all* summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

[Footnote 2/2]

Writing in dissent in *Matsushita,* JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that

"[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"

475 U.S. at 475 U. S. 599. Whether the shift, announced today, from looking to a "reasonable," rather than a "rational," jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

". . . [T]he Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . .'"

Ante at 477 U. S. 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence, standing alone, was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

"If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language."

Id. at 475 U. S. 600-601 (footnote omitted). In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita.*

[Footnote 2/3]

I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that

"[i]f . . . evidence is merely colorable, *Dombrowski v. Eastland,* 387 U. S. 82 (1967) (per curiam), . . . summary judgment may be granted."

Ante at 477 U. S. 249-250. In *Dombrowski,* we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate because there was "controverted evidence in the record . . . which affords more than merely colorable substance" to the petitioners' allegations. 387 U.S. at 387 U. S. 84. *Dombrowski* simply cannot be read to mean that summary judgment may be *granted* if evidence is merely colorable; what the case actually says is that summary judgment will be *denied* if evidence is "*controverted,*" because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think is is actually a procedural

requirement engrafted onto Rule 56, contrary to our statement in *Calder v. Jones,* 465 U. S. 783 (1984), that

"[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Id. at 465 U. S. 790-791. The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story, and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says when it states:

"Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Ante at 477 U. S. 255.

The case proceeds to trial, and, at the close of the plaintiff's evidence, the defendant moves for a directed verdict on the

ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court, at this stage, grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations. "

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in standards

make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City,* 470 U. S. 564, 470 U. S. 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States v. Feinberg,* 140 F.2d 592, 594 (CA2), *cert. denied,* 322 U.S. 726 (1944), that "[w]hile at times it may be practicable" to

"distinguish between the evidence which should satisfy reasonable men and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run, the line between them is too thin for day-to-day use."

The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States v. Taylor,* 464 F.2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case, because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced *prima facie* evidence of guilt beyond

a reasonable doubt for every element of the offense, but only whether it has established probable cause. *See United States v. Mechanik,* 475 U. S. 66, 475 U. S. 70 (1986). Thus, in a criminal case, the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

"Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable,* given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence."

Addington v. Texas, 441 U. S. 418, 441 U. S. 424-425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law, rather than a question of fact, *see, e.g., La Riviere v. EEOC,* 682 F.2d 1275, 1277-1278 (CA9 1982) (Wallace, J.)), will do great mischief, with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be

more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

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AMERICAN PSYCHIATRIC ASSOCIATION

Gender Dysphoria

In the upcoming fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), people whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria. This diagnosis is a revision of DSM-IV's criteria for gender identity disorder and is intended to better characterize the experiences of affected children, adolescents, and adults.

Respecting the Patient, Ensuring Access to Care

DSM not only determines how mental disorders are defined and diagnosed, it also impacts how people see themselves and how we see each other. While diagnostic terms facilitate clinical care and access to insurance coverage that supports mental health, these terms can also have a stigmatizing effect.

DSM-5 aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. It replaces the diagnostic name "gender identity disorder" with "gender dysphoria," as well as makes other important clarifications in the criteria. It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.

Characteristics of the Condition

For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.

The DSM-5 diagnosis adds a post-transition specifier for people who are living full-time as the desired gender (with or without legal sanction of the gender change). This ensures treatment access for individuals who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition.

Gender dysphoria will have its own chapter in DSM-5 and will be separated from Sexual Dysfunctions and Paraphilic Disorders.

Need for Change

Persons experiencing gender dysphoria need a diagnostic term that protects their access to care and won't be used against them in social, occupational, or legal areas.

When it comes to access to care, many of the treatment options for this condition include counseling, cross-sex hormones, gender reassignment surgery, and social and legal transition to the desired

gender. To get insurance coverage for the medical treatments, individuals need a diagnosis. The Sexual and Gender Identity Disorders Work Group was concerned that removing the condition as a psychiatric diagnosis—as some had suggested—would jeopardize access to care.

Part of removing stigma is about choosing the right words. Replacing "disorder" with "dysphoria" in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is "disordered."

Ultimately, the changes regarding gender dysphoria in DSM-5 respect the individuals identified by offering a diagnostic name that is more appropriate to the symptoms and behaviors they experience without jeopardizing their access to effective treatment options.

DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The American Psychiatric Association (APA) will publish DSM-5 in 2013, culminating a 14-year revision process.

APA is a national medical specialty society whose more than 37,000 physician members specialize in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders. Visit the APA at www.psychiatry.org . For more information, please contact APA Communications at 703-907-8640 or press@psych.org.

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Brown v. Zavaras

Case Details

Full title: JOSEPHINE BROWN, Plaintiff-Appellant, v. ARISTEDES ZAVARAS, ROBERT...

Court: United States Court of Appeals, Tenth Circuit

Date published: Aug 18, 1995

Citations Copy Citation

63 F.3d 967 (10th Cir. 1995)

Citing Cases

Oakleaf v. Frawner

Id. at 9-16. Following Brown v. Zavaras, 63 F.3d 967, 969-70 (10th Cir. 1995), Judge Vidmar found that...

Robertson v. Las Animas County Sheriff's Department

Plaintiff's response consists solely of conclusory allegations unsupported by any citation to the record or...

258 Citing Cases

Summary

Holding that even pro se litigants must do more than advance conclusory allegations regarding constitutional claims

Summary of this case from Gillison v. Hand

See 25 Summaries

Opinion

No. 94-1537.

968 Filed August 18, 1995. *968

Submitted on the briefs:–

– After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. The case therefore is ordered submitted without oral argument.

Josephine Brown, Plaintiff-Appellant, pro se.

Cristina Valencia, Assistant Attorney General, Tort Litigation Section (Gale A. Norton, Attorney General, Stephen K. Erkenbrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Timothy R. Arnold, Deputy Attorney General, and Gregg E. Kay, First Assistant Attorney General, with her on the briefs), Office of the Attorney General, Denver, Colorado for Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado.

(D.C. No. 94-M-1142)

Before SEYMOUR, Chief Judge, McKAY and HENRY, Circuit Judges.

Red flags, copy-with-cite, case summaries, annotated statutes and more.

Compare with Westlaw

HENRY, Circuit Judge.

Pro se plaintiff Josephine Brown appeals the summary judgment order of the district court dismissing his 42 U.S.C. § 1983 civil rights action.[1] We have jurisdiction pursuant to 28 U.S.C. Section(s) 1291 and remand to the district court for further proceedings consistent with this opinion.

[1] Although plaintiff identifies his true gender as female, plaintiff is biologically male and refers to himself with masculine pronouns throughout his pleadings. As is our practice, we refer to litigants as the record suggests they prefer to be addressed.

I. BACKGROUND

Mr. Brown is an inmate at the Limon Correctional Facility, a Colorado state prison. In his complaint against two corrections
969 officials, Mr. Brown states that he is a transsexual. *969 The medical term for transsexuality is "gender dysphoria," and gender dysphoria is a medically recognized psychological disorder resulting from the "disjunction between sexual identity and sexual organs." *Farmer v. Haas,* 990 F.2d 319, 320 (7th Cir.) (collecting medical literature), *cert. denied,* ___ U.S. ___, 114 S.Ct. 438 (1993); *see also White v. Farrier,* 849 F.2d 322, 325-26 (8th Cir. 1988) (noting that gender dysphoria is a medically recognized psychological disorder); *Meriwether v. Faulkner,* 821 F.2d 408, 412 n. 5 (7th Cir.) (same), *cert. denied,* 484 U.S. 935 (1987); Jan Morris, *Conundrum* (1974) (autobiographical narrative of the life of a transsexual).

Mr. Brown alleged in his complaint that the defendants have violated his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment equal protection rights. Specifically, he alleged that defendants have withheld medical care with deliberate indifference to his serious medical needs by not providing him with the female hormone estrogen and other medical treatment in contravention of the rule in *Estelle v. Gamble,* 429 U.S. 97, 104 (1976).

After reviewing the complaint, a federal magistrate issued a show cause order stating that he would dismiss the complaint if Mr. Brown did not explain how the defendants personally participated in the alleged constitutional violations and why Mr. Brown felt he was entitled to hormone treatment. Mr. Brown responded that the named defendants were involved in his Section(s) 1983 claim, that he was entitled to hormone treatment and "therapy," and that he had an equal protection right to hormone therapy. Rec. vol. I, doc. 5, at 2.

Defendants then filed a motion to dismiss, attaching the Department of Corrections grievance process forms to the motion. Mr. Brown responded to the motion to dismiss with a further explanation of his action. After reviewing the motion and the materials outside the pleadings, the magistrate converted the motion to dismiss into a summary judgment proceeding pursuant to Fed.R.Civ.P. 12(b). The magistrate recommended that Mr. Brown's Eighth Amendment claim be dismissed because Mr. Brown had alleged only that Colorado had failed to provide estrogen treatment.

In his response to the magistrate's recommendation, Mr. Brown asserted that "[t]here has been a total failure by the defendants to provide any kind of medical attention to the plaintiff for his transsexual condition," and argued that the magistrate had not addressed his equal protection argument. Rec. vol. I, doc. 14, at 3. The district court accepted the magistrate's recommendation regarding the Eighth Amendment claim. The district court further noted that Mr. Brown was not a member of a "protected class" and dismissed the equal protection claim. On appeal, Mr. Brown argues that the district court erred in dismissing both his Eighth Amendment and Equal Protection claims.

II. DISCUSSION *A. Summary Judgment Conversion*

We begin by noting that it appears that the magistrate made a procedural mistake in this case by not notifying Mr. Brown that the magistrate was converting the motion to dismiss into a summary judgment motion. A court may convert a Rule 12(b)(6) motion to dismiss into a summary judgment proceeding in order to consider matters outside of the plaintiff's complaint. *Jackson v. Integra Inc.,* 952 F.2d 1260, 1261 (10th Cir. 1991); *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir. 1991). In so doing, however, a court must follow Fed R. Civ. P. 12 and 56, which require "`the trial court [to] give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56.'" *Miller,* 948 F.2d at 1565 (quoting *Ohio v. Peterson, Lowry, Rall, Barber Ross,* 585 F.2d 454, 457 (10th Cir. 1978)).

In this case, the magistrate relied upon matters outside of the complaint. However, there is no indication in the record that the court notified Mr. Brown of the conversion to a summary judgment proceeding or that he had the opportunity to introduce evidence
970 *970 supporting his claims. We therefore will not review the district court's grant of summary judgment.

Nevertheless, a district court's failure to comply with Rule 56 is harmless if the dismissal can be justified under Rule 12(b)(6) without reference to matters outside of the plaintiff's complaint. *Miller,* 948 F.2d at 1566. We therefore review this case only under Fed.R.Civ.P. 12(b)(6) and determine whether Mr. Brown's complaint states a cause of action for which relief can be granted.

B. Eighth Amendment

Mr. Brown argues that the defendants have provided inadequate medical care under the Eighth Amendment. Deliberate indifference by prison officials to a prisoner's serious medical need constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Estelle,* 429 U.S. at 104.

This circuit was one of the first to consider whether transsexuals had an Eighth Amendment right to estrogen. *See Supre v. Ricketts,* 792 F.2d 958, 962-63 (10th Cir. 1986). We held in the context of that case, where the provision of estrogen was medically controversial, that although prison officials must provide treatment to address the medical needs of transsexual prisoners, the law did not require prison officials to administer estrogen or provide any other particular treatment. *Id.* at 963. Since *Supre,* most courts have reached the same conclusion. *Farmer,* 990 F.2d at 321; *White,* 849 F.2d at 327-28; *Meriwether,* 821 F.2d at 414; *Long v. Nix,* 877 F. Supp. 1358, 1364 (S.D. Iowa 1995); *see also* Connie Mayer, *Survey of Case Law Establishing Constitutional Minima for the Provision of Mental Health Services to Psychiatrically Involved Inmates, 15 New Eng. J. on Crim. Civ. Confinement* 243 (1989) (discussing transsexual prisoner cases).[2]

[2] However, in addressing the Eighth Amendment claim of a preoperative transsexual who had taken estrogen before entering prison, the United States District Court for the Western District of Michigan has issued a preliminary injunction ordering prison officials to provide female hormones to the prisoner. *Phillips v. Michigan Dep't of Corrections,* 731 F. Supp. 792, 794 (W.D. Mich. 1990), *aff'd,* 932 F.2d 969 (6th Cir. 1991). The court reasoned that the plaintiff "suffer[ed] from a serious medical need," *id.* at 800, and that the denial of hormone treatment constituted cruel and unusual punishment.

Unlike the plaintiff in *Phillips,* however, Mr. Brown has not alleged that he received hormone treatment for gender dysphoria prior to his incarceration. *Phillips* is therefore inapplicable to this case.

The defendants' sole response to Mr. Brown's Eighth Amendment claim is that Mr. Brown failed to raise the issue in the district court. In light of our obligation to construe pro se pleadings liberally, *see Haines v. Kerner,* 404 U.S. 519 (1972), we cannot agree. In our view, Mr. Brown claimed a medical need and therefore a general right to medical treatment for gender dysphoria in his complaint. In addition, Mr. Brown clarified his pleadings, specifically alleging that he has not been offered *any treatment at all,* in his response to the magistrate's recommendation. *Cf. Green v. Johnson,* 977 F.2d 1383, 1388-91 (10th Cir. 1992) (remanding case to district court for factual development of issues raised in pro se supplemental brief).[3]

[3] Although the documents defendants attached to their motion to dismiss suggest that it is the policy of the Colorado Department of Corrections to provide preoperative transsexual prisoners who have not taken hormones with counseling rather than hormones, we review Mr. Brown's claim under the Rule 12 standard, referring only to his complaint.

We therefore remand to the district court to properly determine whether Mr. Brown is being offered medical care consistent with *Supre.*

C. Equal Protection

Mr. Brown also asserts that he is being denied the equal protection of the laws because *some* prisoners receive estrogen treatment.[4] In
971 this case, the district court *971 observed that transsexuals are not a protected class and dismissed Mr. Brown's equal protection claim.

[4] The documents that defendants attached to their motion to dismiss suggest that Colorado provides hormones to prisoners with low hormone levels and that the state will therefore give estrogen to postoperative transsexuals who suffer from a hormone imbalance. However, as we have noted, we review Mr. Brown's claim under the Rule 12 standard, referring only to his complaint.

The Ninth Circuit has held that transsexuals are not a protected class. *Holloway v. Arthur Andersen Co.,* 566 F.2d 659, 663 (9th Cir. 1977). In *Holloway,* the court reasoned that transsexuality did not meet the traditional indicia of a suspect classification because transsexuals are not a discrete and insular minority, and because the plaintiff did not establish that "`transsexuality is an immutable characteristic determined solely by the accident of birth' like race, or national origin." *Id.* (quoting *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973)). A number of courts have adopted the *Holloway* court's holding. *See, e.g., Doe v. Alexander,* 510 F. Supp. 900, 904 (D. Minn. 1981); Russell J. Davis, Annotation, *Refusal to Hire, or Dismissal from Employment, on Account of Plaintiff's Sexual Lifestyle or Sexual Preference as Violation of Federal Constitution or Federal Civil Rights Statutes,* 42 A.L.R. Fed. 189, Section(s) 5 (1979) (collecting transsexual prisoner cases).

Recent research concluding that sexual identity may be biological suggests reevaluating *Holloway. See Equality Found. v. City of Cincinnati,* 860 F. Supp. 417, 437 (S.D. Ohio 1994) (concluding that sexual orientation is an issue beyond individual control), *aff'd in part and vacated in part,* 54 F.3d 261 (6th Cir. 1995); *Dahl v. Secretary of the United States Navy,* 830 F. Supp. 1319, 1324 n. 5 (E.D. Cal. 1993) (collecting research suggesting that sexual identity is biological). However, we decline to make such an evaluation in this case because Mr. Brown's allegations are too conclusory to allow proper analysis of this legal question. We therefore follow *Holloway* and hold that Mr. Brown is not a member of a protected class in this case. When the plaintiff is not a member of a protected class and does not assert a fundamental right, we determine only whether government classifications have a rational basis. *See Stephens v. Thomas,* 19 F.3d 498, 501 (10th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 516 (1994).

Competing standards for resolving a plaintiff's equal protection claim under Rule 12 complicate our analysis when we review a plaintiff's claim under the rational basis standard. In *Wroblewski v. City of Washburn,* 965 F.2d 452 (7th Cir. 1992), the Seventh Circuit identified and considered this issue:

> A perplexing situation is presented when the rational basis standard meets the standard applied to a dismissal under Fed R. Civ. P. 12(b)(6). The rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if "relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984). The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim.

Id. at 459-60. The court then adopted a hybrid approach to reconcile the standards, holding that a plaintiff pursuing an equal protection claim must allege facts sufficient to overcome a presumption of government rationality.

> While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

Id. at 460. Finally, the *Wroblewski* court reviewed possible government rationales for the actions at issue, noted that a court must presume that government actions are rational, and held that the plaintiff's "conclusionary assertions" were insufficient to state a claim under that standard. *Id.; see also Shanks v. Forsyth County Park*
972 *Auth., Inc.,* 869 F. Supp. 1231, 1236 (M.D.N.C. 1994) (applying *972 *Wroblewski*). We find the Seventh Circuit's analysis sound and apply *Wroblewski* here.

It is a close question as to whether Mr. Brown's complaint raises an equal protection claim under the *Wroblewski* standard. *See Wroblewski,* 965 F.2d at 460 (affirming dismissal, but noting that an allegation that the city acted out of personal animosity towards the plaintiff creates a closer question). However, Mr. Brown's allegations are merely conclusory in that they do not allege the factual basis for an equal protection claim, and even pro se litigants must do more than make mere conclusory statements regarding constitutional claims. *See United States v. Fisher,* 38 F.3d 1144, 1147 (10th Cir. 1994) (holding that conclusory allegations are insufficient to support a claim for relief); *Petrick v. Maynard,* 11 F.3d 991, 995 (10th Cir. 1993) (holding that a pro se prisoner must do more than make conclusory allegations regarding access to a law library). Thus, even assuming the truth of Mr. Brown's allegation that some prisoners are given hormones and others are not, we hold that his conclusory allegations simply do not state a cause of action for which relief can be granted under an equal protection theory.

We REVERSE and REMAND this matter to the district court for proceedings consistent with this opinion regarding Mr. Brown's Eighth Amendment claim, but AFFIRM the decision of the district court regarding Mr. Brown's equal protection claim.

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Buffington v. Baltimore County

Summary

Holding that a party had abandoned its qualified immunity defense in a § 1983 action by not raising the issue clearly in the motion for summary judgment

Summary of this case from Noel v. Artson

See 25 Summaries

Citing Cases

Victor Stanley, Inc. v. Creative Pipe, Inc.

For reasons that are much more fully explained below, this sanction is not a form of criminal contempt, which...

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This determination is important from the outset as it "may bear on the type of notice required, the...

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558 Citing Cases

Opinion

Nos. 88-1161, 89-1021, 89-1040, 89-1054 and 89-1055.

Argued January 8, 1990.

Decided July 31, 1990. As Amended September 19, 1990. Rehearing
115 and Rehearing In Banc Denied October 15, 1990. *115

Carter G. Phillips, Sidley Austin, Washington, D.C.; Robert Belknap Green, Irwin, Kerr, Green, McDonald Dexter, Baltimore, Md., argued (Mark D. Hobson, Kevin L. Kimball, Sidley Austin, Washington, D.C., Charles M. Kerr, Irwin, Kerr, Green, McDonald Dexter, Baltimore, Md., Arnold Jablon, County Atty., Michael J. Moran, Asst. County Atty., Thomas K. Farley, Asst. County Atty., Baltimore County Office of Law, Towson, Md., on brief), for appellants.

William Francis Gately, Daniel Warren Whitney, Sr., Semmes, Bowen Semmes, Baltimore, Md., argued (Janet M. Truhe, Semes, Bowen Semmes, Baltimore, Md., on brief), for plaintiffs-appellees.

Appeal from the United States District Court for the District of Maryland.

Before PHILLIPS and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

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116 *116

PHILLIPS, Circuit Judge:

Baltimore County, Baltimore County Chief of Police Cornelius Behan, and Baltimore County Police Officers Donald Gaigalas and Ronald Tucker appeal the district court's judgment for David and Barbara Buffington in the Buffingtons' action under 42 U.S.C. § 1983 and state law, asserting the defendants' liability for failing to prevent the Buffingtons' son's suicide while he was being held in a county jail. The appellants also challenge separate orders of the district court awarding attorneys' fees to the Buffingtons and imposing civil contempt sanctions on their trial counsel. We affirm the judgments against Tucker and Gaigalas, reverse the judgments against Behan and Baltimore County, vacate and remand the award of attorneys' fees and expenses, and vacate and remand the contempt sanctions.

I

At about 4:30 a.m. on March 19, 1987, David Buffington, Jr., was awakened by the sound of his father's car pulling out of the driveway of his parents' house, next door to his. Knowing that his younger brother, James Buffington, 24, was the only person home that night, and that James did not have a valid driver's license, David rushed next door and discovered a handwritten suicide note and guns missing from his father's gun closet, which had been forced open. David immediately called the police emergency line, then set off in search of his brother. Officer Lewis Harvey of the Wilkens precinct of the Baltimore County Police Department, responding to a broadcast over the police radio describing James as suicidal, went to David's house and met David's wife, Kathryn, who showed him the suicide note. Kathryn described James' history of emotional problems and drug and alcohol abuse, particularly as a teenager. These problems had led to a number of encounters with the Wilkens precinct police, and in fact Officer Harvey acknowledged to Kathryn that he knew of James' background. Acting Shift Lieutenant Joseph Gribbin soon arrived at the house and also read the note. Officer Harvey called the Wilkens station and advised that James was suicidal and armed.

The county police apprehended James at 5:47 a.m. When he was seized, James appeared to be intoxicated and had in his possession two rifles and three handguns, all loaded. At 6:25 a.m., Officer Harvey called Kathryn Buffington and informed her that James had been found and was being held at the Wilkens station in protective custody. He told her that James had said that he had not committed suicide "because he couldn't decide which gun to use." J.A. at 1112. David Buffington returned from his search minutes later and called Officer Harvey to confirm that James was being held and to remind him of James' history of emotional problems. David stressed his sense that James was at extreme risk of committing suicide. Officer Harvey stated that preparations were currently being made to take
117 James to Greater *117 Baltimore Medical Center for an emergency psychiatric evaluation. On Officer Harvey's advice, David decided to press criminal charges against his brother in order to enable the police to hold James in custody in the event that the hospital would not take him on an emergency commitment basis. At the time he spoke to David, Officer Harvey had already prepared the paperwork for arrest and charging.

From the time he was first brought into the station, Buffington was handcuffed to a rail beside the booking desk in the receiving room of the police station so he could be observed by the desk officers. Several police officers testified at trial that it was standard practice to handcuff suicidal detainees to the rail by the booking desk rather than place them in the lockup, where they might be able, quietly and unnoticed, to hang themselves. *See, e.g.,* J.A. at 1160-63 (testimony of Officer Harvey). At approximately 6:15 a.m. that morning, Officers Donald Gaigalas and Ronald Tucker had taken over as desk officers, relieving Officers William Maeser and Patrick Kamberger from that post. Officer Gaigalas, at about 6:25 a.m., unhitched Buffington from the rail and took him to an isolation cell, without removing any of his clothing. Although there were numerous detainees in the male lockup, Gaigalas placed Buffington alone in the female lockup area, and made no provision to keep him under observation. At 7:15 a.m., Buffington was found, hanged from the cell's horizontal bars by a noose fashioned from his pants.

David and Barbara Buffington, as James' parents, and Barbara as James' personal representative, then brought this action alleging claims of constitutional violation under 42 U.S.C. § 1983, and pendent state claims under the wrongful death and survival statutes. Named as defendants were Baltimore County, Chief of Police Cornelius Behan, Sergeant Daniel Yuska, Corporal Joseph Gribbin, Captain Kenneth Kramer, and Officers Lewis Harvey, Donald Gaigalas, Ronald Tucker, and William Maeser.

There was conflicting evidence at trial about Buffington's emotional state while handcuffed to the rail and about how much the desk officers knew concerning Buffington's intention to commit suicide. Outgoing desk officer Kamberger testified that Buffington told him that he wanted to shoot himself, and Kamberger further stated that he passed this information on to Officer Tucker when Tucker and Gaigalas took over at the desk. J.A. at 1357-60. Tucker denied that Kamberger told him this. J.A. at 1391. Officer Gaigalas admitted that he knew Officer Harvey was preparing forms for Buffington's emergency commitment. J.A. at 1412. Though he later equivocated on the point, Gaigalas admitted in original testimony that he knew Buffington was suicidal before he took him to the cell. J.A. at 1407-08. Gaigalas also admitted that a prior deposition statement that he did not know that Buffington was suicidal and was being held for emergency psychiatric treatment had been "deliberately and knowingly false." J.A. at 1406.

At trial, the Buffingtons presented expert testimony about the County's deficiencies in suicide prevention at correctional facilities. Since 1977, there had been 57 suicide attempts in the County jails, twelve of which had been "successful." Although the County had adopted in 1984 one of the nationally recognized suicide prevention standards, known as "CALEA" (Commission on Accreditation for Law Enforcement Agencies), it did not have any written policies or regulations implementing the standards. As noted, however, the department's officers did operate under a "standing order" that suicidal detainees should remain handcuffed to the rail by the front desk. The evidence at trial also showed that County police officers received no training in identifying suicidal detainees and in preventing suicide attempts. J.A. at 1627. Dr. Joseph Rowan, one of the Buffingtons' experts on jail and lockup suicide prevention, testified that "I strongly feel that this is the worst case of handling of a suicide case that I have ever seen." J.A. at 1662-63.

After a first trial ended in mistrial, a second jury found Officers
118 Tucker and Gaigalas liable under § 1983 for deliberate *118 indifference to Buffington's serious need for some measure of suicide prevention. The County, through its policymaker Chief Behan, and Behan himself were found liable under § 1983 on the theory that their failure to train county police officers in suicide prevention evidenced a deliberate indifference to the rights of suicidal detainees. The jury awarded a total of $185,000 in damages against the appellants.[1] Following denial of the defendants' motions for j.n.o.v. and alternatively for a new trial, the court awarded over $430,000 in attorneys' fees and costs to plaintiffs. The court also found that the defendants' attorneys' failure to produce some crucial witnesses' statements was a knowing concealment under Fed.R.Civ.P. 26(e)(2)(B), and held them in civil contempt, ordering them to pay the court almost $7,000 each.

[1] The jury did not award recovery on the Buffingtons' claims against the precinct captain and four other police officers and rejected the claim that the County, Behan, and the precinct captain, Kramer, had participated in a conspiracy to cover-up the investigation of the suicide.

These appeals followed.

By way of preview, in Part II we address all the appellants' challenges to the existence of any constitutional right for whose violation they could be found liable on the § 1983 claims. In Part III, we consider whether Officers Tucker and Gaigalas have raised a separate issue of their qualified immunity from § 1983 liability. Although the judgment against Tucker and Gaigalas is supported independently by the jury's finding of liability on the state law claims, Parts II and III are necessary because Tucker's and Gaigalas' liability under § 1983 has important ramifications for the award of attorneys' fees. In Parts IV and V, we address the judgments against the County and Chief Behan, respectively, on the § 1983 claims. Parts VI and VII discuss the County's and Behan's separate claims of state law immunity from the state law claims on which they were found liable. Part VIII sets out the facts relevant to the district court's award of attorneys' fees and expenses to the prevailing parties, the Buffingtons, and addresses that award. Finally, Part IX discusses the facts relevant to and reviews the district court's order holding the County's attorneys in civil contempt and imposing monetary sanctions on them.

II

All the appellants challenge the primary judgments under 42 U.S.C. § 1983 on the ground that the asserted constitutional right to some measure of protection from suicide under these circumstances does not exist. Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide when the state has intervened not to enforce the criminal law, but at the request of family members to protect the person from causing harm to himself. We reject this argument.

For the proposition that Buffington had no substantive due process right to affirmative aid from the state, the appellants rely primarily on *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In *DeShaney,* the Supreme Court held that the substantive component of the fourteenth amendment's due process clause creates no affirmative obligation in the state to protect individuals from "private violence." *Id.* at 1004. The petitioners in *DeShaney* argued that it violated substantive due process for state social workers to fail to protect a child from physical abuse at the hands of his father when the workers knew of the abuse but "stood by and did nothing." *Id.* at 1007. The Court rejected the petitioners' contention, reasoning that, as a general matter, the due process clause is "not . . . a guarantee of certain minimal levels of safety and security," *id.* at 1003; it is only after the state has taken custody of a person that the due process clause imposes certain affirmative obligations of care on the state. *Id.* at 1005; *see Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (eighth amendment, applicable to states through the fourteenth amendment's due process clause, requires
119 *119 state to provide adequate medical care to prisoners where failure to do so would amount to deliberate indifference to serious medical needs); *Youngberg v. Romeo,* 457 U.S. 307, 319, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28 (1982) (fourteenth amendment's due process clause requires state to provide involuntarily committed mental patients with "minimally adequate or reasonable training to ensure safety and freedom from undue restraint"); *Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (fourteenth amendment's due process clause requires state to provide medical care to injured suspects in police custody). Because the child in *DeShaney* was still in the custody of his natural father — in "the free world" — the state was under no affirmative obligation enforceable through the due process clause to protect him.

The appellants argue that under the rationale of *DeShaney,* there was no affirmative duty of care on the part of any state actor in this case because the intervention to protect Buffington was at the instance of private parties. This is a misreading of *DeShaney.* Distinguishing prior cases in which it had found affirmative constitutional duties of protection from the situation in *DeShaney,* the Court explained that in those earlier cases it was the fact of state *custody* that triggered at least some duty of care on the part of the state:

> [W]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. 109 S.Ct. at 1005-06 (citations omitted). Nothing in the Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody. Such duties have been found both where the state takes custody incident to enforcement of its criminal laws, *see Estelle,* 429 U.S. 97, 97 S.Ct. 285, and *Revere,* 463 U.S. 239, 103 S.Ct. 2979, and where the custody serves civil, regulatory purposes, *see Youngberg,* 457 U.S. 307, 102 S.Ct. 2452. Nor do we read *DeShaney* or the other cases as implying that it is relevant to the existence of the duty whether a state or private actor brought the need for custody to the state's attention. *See Youngberg,* 457 U.S. at 309, 102 S.Ct. at 2454 (involuntarily committed mental patient's mother sought son's commitment because she was unable to care for him or control his violence). In short, we see no basis for adopting the categorical rule urged by appellants that the state owed no duty of care to Buffington under the circumstances of this case. We hold that the due process clause did impose an affirmative obligation on the state to provide some measure of care here.

That leads to the question of the nature of the duty owed. The district court instructed the jury that it could find the individual officers liable under 42 U.S.C. § 1983 for their deprivation of a constitutionally protected liberty interest if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nonetheless acted with deliberate indifference in failing to take any steps to prevent the suicide. The court noted, however, that liability could not be premised on a finding that these officers failed to act on a speculative suicide risk — by not screening for suicidal tendencies or taking other preventive measures — if they had no knowledge that Buffington was suicidal. This instruction defined the duty in terms of the recognized duty of care owed to pretrial detainees, and we think this was proper.

The due process clause guarantees a pretrial detainee the right to adequate medical care at least where the state's failure to provide such care would amount to deliberate indifference to a serious medical need. *See Martin v. Gentile,* 849 F.2d 863, 871 (4th Cir. 1988) (noting that the precise scope of the pretrial detainee's right to medical care is uncertain but is at least as great as a convicted
120 prisoner's eighth amendment right under *Estelle v. Gamble* *120 to be free from "deliberate indifference" to "serious" medical needs). A serious psychological impairment can qualify as such a medical need. *See, e.g., Bowring v. Godwin,* 551 F.2d 44, 47-48 (4th Cir. 1977); *Partridge v. Two Unknown Police Officers,* 791 F.2d 1182, 1187 (5th Cir. 1986); *Greason v. Kemp,* 891 F.2d 829 (11th Cir. 1990).

More narrowly, we have recently recognized that where police know that a pretrial detainee is on the verge of suicide, that psychological condition can constitute the kind of serious medical need to which state officials must, under the due process clause, not be deliberately indifferent. In *Belcher v. Oliver,* 898 F.2d 32 (4th Cir. 1990), we found no due process violation where a pretrial detainee hung himself with his belt after police officers placed him in a jail without removing his belt or shoes. Because the plaintiff in *Belcher* had presented "no objective evidence that [he] even had a serious need for such attention . . . [to] suicidal tendencies," *id.* at 35, we held that he had not stated a claim for a violation of his substantive due process rights. In *Belcher,* we declined to impose on the police officers a duty to screen detainees for suicidal tendencies, but we did not imply that officers would have had no constitutional duty at all if they demonstrably knew or had reason to know that a suicide was imminent. Other courts of appeals have recognized this distinction and the viability of a claim for official indifference to known suicidal tendencies. *See Colburn v. Upper Darby Township,* 838 F.2d 663, 669 (3d Cir. 1988) ("custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide [but] if such officials know or should know of the particular vulnerability to suicide of an inmate," fourteenth amendment imposes duty not to act with "reckless indifference" to the risk); *Danese v. Asman,* 875 F.2d 1239, 1244 (6th Cir. 1989) (no duty to screen pretrial detainee for suicidal tendencies, but "[t]he story might be different if the police were certain that [the detainee] would attempt suicide and just ignored it").

Whether or not the court's characterization of Buffington in the instruction as a "pretrial detainee" was strictly accurate — and we note that evidence that backup criminal charges were in place in the event Buffington could not be admitted to the hospital supports the court's characterization — it was not plain error for the court's instruction to describe the substantive due process protection he enjoyed as coextensive with that afforded a pretrial detainee. Put another way, the appellants have not suggested, and we cannot conceive of, any reason why the Constitution might forbid deliberate indifference to the serious medical needs of pretrial detainees but permit such indifference to the needs of one in custody pending emergency psychiatric care.

III

We next consider a worrisome problem arising from the confused litigation position taken by the individual officers respecting their possible entitlement in any event to qualified immunity from the § 1983 claims. Part II of the appellants' brief mentions qualified immunity for the officer-defendants, but hinges the argument wholly on the lack of a constitutional violation — it does not assert that these defendants were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. The full text of this argument states:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist. Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

Brief of Appellants at 16-17 (citations omitted). Even under a
121 generous reading of this argument, it does no more than assert *121 that these individual defendants were entitled to qualified immunity because, *on the merits,* there was no constitutional violation. While the appellants' reply brief might be read as raising a distinct issue of qualified immunity, we decline to give the appellants the benefit of such a liberal reading. *See* 9 J. Moore B. Ward, *Moore's Federal Practice,* ¶ 228.02[2.-1] (1990) (appellant must raise all issues he wishes to be considered in his initial brief); *Mississippi River Corp. v. FTC,* 454 F.2d 1083, 1093 (8th Cir. 1972) (error relied on should not be asserted for the first time in the reply brief).

We think this the proper disposition for at least two reasons. The Buffingtons understandably did not think that the individual defendants had raised the distinct contention that they were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. Perceiving that the qualified immunity argument was simply a reformulation of these defendants' argument on the merits, the Buffingtons responded accordingly in Part II of their brief. The full text of that argument states: "Appellants next argue that `[a]bsent a constitutionally secured right, . . . the state officer may assert and prevail upon the doctrine of qualified immunity.' Appellants, however, have failed to establish the absence of such a right. Thus there is no basis for asserting this defense." Brief of Appellees at 32. In other words, the Buffingtons justifiably interpreted the qualified immunity issue raised by these defendants as simply duplicative of the merits issue, and so addressed only the merits.

More generally, the appellants' presentation of the qualified immunity defense throughout this litigation has been a chronicle of confusion and misapprehension. In their first responsive pleading, a motion to dismiss or for summary judgment, the appellants as defendants asserted "[t]hat the individual Defendants are immune with respect to the claims presented in the within Complaint." J.A. at 116. In their supporting brief, they argued that the plaintiffs had not alleged a violation of a clearly established constitutional right, because the defendants had no duty to screen for latent suicidal tendencies, as alleged. Finding that the plaintiffs had plainly alleged more than a failure to screen for latent tendencies, the court denied the motion in a memorandum and order. After denial of a motion to reconsider, the defendants sought an amendment to the court's interlocutory order to certify other questions for immediate appeal under 28 U.S.C. § 1292(b). Over a week after that motion was denied, and about a week before trial, the defendants noted an appeal from the denial of qualified immunity under 28 U.S.C. § 1291, *see Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and moved for a stay of the impending trial. The district judge denied that motion, and Judge Winter, in chambers, also denied a motion for stay directed to him. Both judges found that the defense of qualified immunity had not been raised, and Judge Winter opined further that in any event he thought the defense inapplicable. From all indications in the record, that appeal of the qualified immunity issue was thereafter abandoned and, on the first day of trial, the defendants filed an answer to the plaintiffs' amended complaint and finally included good faith qualified immunity as a defense distinct from the constitutional violation.

The first trial ended in a mistrial because of a hung jury. At the close of evidence in the second trial, the defendants moved for directed verdict. The court reserved its ruling on that motion and submitted the case to the jury. The defendants requested an instruction on qualified immunity, which the court refused to give for reasons not contained in the record. The defendants/appellants have not on appeal assigned error to that refusal. After the jury returned verdicts under § 1983 against some of the individual defendants, those defendants moved for j.n.o.v., asserting, *inter alia,* in the motion itself that they were entitled to qualified immunity. In their supporting brief, however, they made no argument
122 whatsoever on this point and made no mention of the refusal *122 to instruct on qualified immunity. As with the refusal to give the qualified immunity instruction, the appellants have not on appeal assigned error to the denial of the motion for directed verdict or j.n.o.v.

In sum, we do not think the appellants have properly preserved and raised in this court an issue of qualified immunity distinct from the question of whether a constitutional violation occurred. We decline to consider such an issue *sua sponte.*

IV

Appellant Baltimore County argues separately that it was entitled in any event to judgment as a matter of law on the § 1983 claim against it. Specifically, the County contends that the district court erred in submitting that claim to the jury because there was no evidence that its failure to train its officers in suicide prevention proximately caused Buffington's suicide. We agree that under the Supreme Court's decision in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the judgment against the County on the § 1983 claim must be reversed.

In *Canton,* the Supreme Court outlined the circumstances under which a municipality can be held liable under § 1983 for constitutional violations resulting from a policy of failing to train municipal employees. Under general principles of § 1983, a municipality can be liable only when the municipality itself, through one of its policies or customs, causes the constitutional violation; municipal liability cannot be premised on *respondeat superior* or vicarious liability. *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 691-92, 98 S.Ct. 2018, 2036-37, 56 L.Ed.2d 611 (1978). Moreover, the municipal policy or custom must be the direct cause of — the "moving force" behind — the constitutional violation. *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981). The *Canton* Court, addressing the peculiar context of a claim that a municipality's policy of omission, *i.e.,* its failure to train, was the cause of the constitutional violation, considered both the degree of fault and the causal link required under § 1983 to sustain that type claim.

The Court held first that § 1983 requires a showing that the failure to train amounts to "deliberate indifference to the rights of persons with whom the police come in contact."[2] *Canton,* 109 S.Ct. at 1204. This degree of fault was thought necessary to reconcile the failure-to-train theory of liability, which alleges a policy of omission, with the principle that § 1983 municipal liability can attach only when the municipality's policy represents "a deliberate choice [by the municipality's authorized policymakers] to follow a course of action . . . made from among various alternatives." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986) (Brennan, J., plurality opinion). In addition to the "deliberate indifference" culpability standard, the Court explained that a direct causal link must exist between a specific deficiency in training and the particular violation alleged: "the identified deficiency in [a] training program must be closely related to the ultimate injury." *Canton,* 109 S.Ct. at 1206. The pertinent question on causation will be "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id.* It will not

[2] This requirement of "deliberate indifference" arises under § 1983 itself and stands independent of any culpability requirement that may be necessary to prove the underlying constitutional violation. *Canton,* 109 S.Ct. at 1204 n. 8. This does not of course displace the firmly established rule that § 1983 contains no independent state-of-mind requirement governing the liability of the immediate wrongdoer. *See Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989).

> suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond
> 123 properly to the usual *123 and recurring situations with which they must deal.

Id.

We do not think the evidence was sufficient under *Canton* to permit a jury to find that a policy of failure to train officers in suicide

prevention actually and proximately caused the particular harm that occurred here. Immediately before the suicide, Buffington was handcuffed to the rail by the precinct's booking desk, in conformance with the standard procedure used as a matter of policy for suicidal detainees at the precinct. Buffington would have remained handcuffed there until moved to the hospital but for desk officer Gaigalas's decision, unchecked by his fellow desk officer Tucker, to take him to an isolation cell without removing any of his clothing, arranging for monitoring, or taking some other preventive measure. It may well be, as the Buffingtons contend, that better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or some combination of these would have served to avoid what occurred here. But *Canton* has made clear that municipal liability under § 1983 may not rest on such proof. *Id.* 109 S.Ct. at 1206. This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail, *i.e.*, by showing more than the deliberate indifference that the jury found.[3] In so holding, we need not determine whether the Wilkens precinct's standards and procedures for handling suicidal detainees necessarily met constitutional standards in all possible respects. Rather, in light of *Canton's* instruction on causation, we hold only that the normal practice of handcuffing such detainees to the rail, which was a part of those procedures, was "sufficient to equip [Gaigalas and Tucker] to avoid the particular injury causing conduct" in this case. *Canton*, 109 S.Ct. at 1206; *see Dorman v. District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989) (reversing § 1983 judgment against District of Columbia for failure to train in suicide prevention on grounds that *Canton's* fault and causation standards were not met).

3 Indeed, the district court has held and the Buffingtons themselves, in their appellate brief, have acknowledged that it was Gaigalas's critical dereliction that directly caused this suicide. The court stated that it was not "necessary for the police officers at Wilkens Police Station to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated jail cell with his pants on. A semi-clear head and a normal degree of common sense would have sufficed." J.A. at 964-65. Similarly, the Buffingtons' statement of facts notes that "[t]his suicide was the direct, proximate, and inevitable result of the utter failure of Gaigalas and Tucker to constantly observe James while he was in their custody." Brief of Appellees at 10.

V

The judgment against Chief Behan under § 1983 must also be reversed. Behan may not be held liable for § 1983 violations for the acts of Officers Gaigalas and Tucker under a theory of *respondeat superior. See Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Vinnedge v. Gibbs,* 550 F.2d 926 (4th Cir. 1977). Here, the theory of Behan's individual liability alleged and submitted to the jury was that he had authority for implementing training or other suicide prevention standards and failed to do so, directly and proximately causing Buffington's suicide. For the reasons stated in the preceding section, there was insufficient evidence that any failure to train on Behan's part caused this particular injury.

VI

The County next contends that the district court erred in holding it liable for the state law negligence claims for wrongful death and survival because Baltimore County has never waived its governmental immunity. The district court denied the County's motion for j.n.o.v. on this ground, reasoning that the County's creation of a self-insurance fund constituted a limited waiver of governmental immunity. We agree with the County that its adoption of a self-insurance fund did not operate to waive the
124 County's governmental immunity *124 and that the judgment against it on the state claims must therefore be reversed.

As a "home rule" county chartered under Article XI-A, § 2, of the Maryland Constitution, Baltimore County may exercise only the powers granted to such counties in the Express Powers Act, Md.Ann. Code Art. 25A (1987).[4] One such express power the County possessed at the time relevant to this case was the power to waive its governmental immunity.[5] In 1977, the County created a self-insurance fund designed, among other things, "to pay on behalf of the county [and its employees] . . . any sum which the county [and its employees] may become legally obligated to pay for liability claims, including but not limited to personal injury and/or property damage." Baltimore County Code, § 2-131(b). The question is whether Maryland law would view this legislative action as a waiver of the County's governmental immunity.

4 Md. Const. art. XI-A, § 2 (1981), provides: "The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article." Pursuant to this mandate, the General Assembly enacted the Express Powers Act.

5 Section 5(CC) of the Express Powers Act authorized a charter county

> [t]o provide by ordinance or inclusion in the county charter for the waiver of sovereign immunity so that the county may be sued in tort actions in the same manner and to the same extent that any private person may be sued. Any chartered county [that so provides] shall carry comprehensive liability insurance to protect itself, its agents and its employees.

Md.Ann. Code Art. 25A, § 5(CC) (1987). The General Assembly has now repealed this subsection and all waivers enacted under it. Acts 1987, ch. 594, § 2. This repeal, however, is irrelevant to the waiver issue here, because the repeal applies only to actions arising on or before July 1, 1987. *Id.* § 3.

Under Maryland law, a court may find a waiver of sovereign or governmental immunity only in "positive consent given, or by necessary or compelling implication." *Jackson v. Housing Opportunities Comm'n,* 289 Md. 118, 422 A.2d 376, 378 (1980).[6] Maryland uses a two-pronged test for determining whether the relevant legislature, be it the state's General Assembly or a county governing body, has waived sovereign or governmental immunity: "[a]n asserted waiver of immunity is ineffective 'unless specific legislative authority to sue the agency [or municipality] has been given, and unless there are funds available for the satisfaction of the judgment, or power reposed in the agency [or municipality] for the raising of funds necessary to satisfy a recovery against it.'" *Jackson,* 422 A.2d at 378-79 (quoting *Katz v. Washington Suburban Sanitary Comm'n,* 284 Md. 503, 397 A.2d 1027, 1033 (1979)). Both prongs of this test must be satisfied. *Id.* 422 A.2d at 378-80. The general rule in Maryland is that the mere procurement of liability or indemnity insurance by a governmental unit has no effect on its immunity from tort liability. *See id.* at 380; *Quecedo v. Montgomery County,* 264 Md. 590, 287 A.2d 257, 260 (1972); *Jones v. Scofield Bros.,* 73 F. Supp. 395, 398 (D.Md. 1947).

6 Through the Maryland cases have frequently used the terms interchangeably, "sovereign" immunity refers to the tort immunity of the State and its agencies, which is total, while "governmental" immunity refers to the immunity of counties and municipalities, which turns on whether the suit is based on "governmental" or "proprietary" functions; tort immunity exists, unless waived, in the former case, but not in the latter.

The first prong of the waiver test is not met in this case, because the County has never consented to be sued. The provision for self-insurance cannot by itself support a finding of such consent. *Jackson,* 422 A.2d at 380. In the Maryland cases where waiver has been found, the legislative intent that a county or a state agency may be sued has been expressed in explicit and unmistakable language. *See, e.g., James v. Prince George's County,* 288 Md. 315, 418 A.2d 1173 (1980) (tracking language of Express Powers Act, county's charter provided "[t]he County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued"); *Katz v. Washington Suburban Sanitary*
125 *Comm'n,* 284 Md. 503, 397 A.2d 1027 (1979) (state agency "shall *125 be a body corporate . . . with the right . . . to sue and be sued"); *cf. O B, Inc. v. Maryland-Nat'l Capital Park and Planning Comm'n,* 279 Md. 459, 369 A.2d 553 (1977) (legislative authorization that state agency may "sue and be sued" is not alone sufficient to find waiver of sovereign immunity). Nowhere in the language of § 2-131 has Baltimore County expressly authorized that suits may be brought against it, and the creation of the self-insurance fund cannot take the place of the necessary legislative authorization.

The district court believed that a county would not create an insurance fund to pay claims for which it might become liable unless it intended thereby to waive its immunity from all claims. This analysis is flawed in at least two respects. First, the district court, quoting *Jackson,* 422 A.2d at 382, stated that "a legislative mandate to carry liability insurance is a strong indication of legislative intent that sovereign immunity is waived to the extent of the insurance." On that basis, the court found that the County had effected "a limited waiver of sovereign immunity."[7] This reasoning, however, ignored the context of the Court of Appeals' statement in *Jackson*. In that case, the court had already concluded that the first prong of the immunity waiver test was satisfied by language in Md.Ann. Code Art. 44A, § 8(a) stating that the housing authority has power "[t]o sue and be sued." *Id.* 422 A.2d at 379. The quoted language from *Jackson* was stated in the context of considering whether, notwithstanding the express provision for suits, the particular insurance provision in that case sufficed under the second prong of the waiver inquiry. *Id.* at 381-82.

7 If the district court had been correct that the waiver of immunity accomplished by this enactment was "limited," the waiver would have violated the Express Powers Act. A chartered county's waiver of governmental immunity under that Act is ineffective if "limited." *See Prince George's County v. Fitzhugh,* 308 Md. 384, 519 A.2d 1285 (1987).

Second, the district court's premise that a county would not insure itself unless it had waived its governmental immunity reflects a misapprehension of the nature of the county's pre-existing immunity. Though counties in Maryland are immune, absent waiver, from suits based on actions taken in the exercise of their "governmental" functions, they are not immune from suits alleging conduct in the exercise of "proprietary" functions.[8] *Austin v. City of Baltimore,* 286 Md. 51, 405 A.2d 255, 256 (1979). It would certainly be permissible to infer that the County's creation of the self-insurance fund was motivated by a need to fund liabilities arising from suits based on "proprietary" functions. This inference is supported by the fact that the County enacted § 2-131 under the express power conferred by Md.Ann. Code Art. 25A, § 5(S) (1987), which permits amendment of the county charter, rather than under the now-repealed express power in § 5(CC) to waive immunity. In short, apart from its failure to meet the first prong of the immunity test, the provision for the insurance fund, viewed in context, contains no necessary or compelling implication of waiver of governmental immunity.

8 The Buffingtons have not argued that the County's conduct in this case could qualify as a "proprietary" function, and we express no opinion on the proper characterization. *See Austin,* 405 A.2d at 272 (distinction between "governmental" and "proprietary" functions "is probably one of the most unsatisfactory known to the law" (quoting 3 K. Davis, Administrative Law Treatise, § 25.07, at 460 (1958)).

We hold that Baltimore County was immune from the state law claims alleged in this case and that the judgment against it on those claims must be reversed.

VII

We also agree with Police Chief Behan that the judgment against him on the state law claims for wrongful death and survival must be reversed. The district court erred in denying his motion for directed verdict or j.n.o.v., made on the ground that Maryland law provided him with public official immunity from the state law claims.

A government official in Maryland is entitled to public official
126 immunity if "(1) the individual actor, whose alleged negligent *126 conduct is at issue, is a *public official* rather than a *mere government employee or agent;* and (2) his tortious conduct occurred while he was performing *discretionary,* as opposed to *ministerial,* acts in furtherance of his official duties." *James v. Prince George's County,* 288 Md. 315, 418 A.2d 1173, 1178 (1980) (emphasis in original). It is not contested that Behan qualifies as a "public official" under the first prong of the test. *See Duncan v. Koustenis,* 260 Md. 98, 271 A.2d 547 (1970) (among the factors to considered are whether the individual has ongoing responsibilities, performs an important public duty, and exercises ome portion of the government's sovereign power). Rather, the parties disagree over whether the acts subjecting Behan to state law liability were "discretionary" or "ministerial."

The Buffingtons' state law claims against Behan alleged, *inter alia,* that his negligent failure to train, supervise, or otherwise guide the conduct of individual police officers in their handling of suicidal detainees caused James Buffington's suicide. Implicit in this allegation, and in the related allegation that Behan was a policymaker for the purposes of imposing § 1983 liability on the County through him, is the recognition that Behan had discretion to implement more effective suicide prevention standards than he did.[9] It is precisely his failure to exercise available discretion that forms the basis of the state law claims against him. This type of failure, however, is the prototypical "discretionary" choice of a policymaking public official that the state law immunity protects. *See Restatement (Second) of Torts* § 895D comment f (1979).

9 Throughout their appellate brief, the Buffingtons acknowledge the breadth of Behan's authority as the police department's policymaker. *See, e.g.,* Brief of Appellees at 15 n. 8 ("Chief Behan has the final say in determining the rules and regulations of the department.").

The Buffingtons contend, consistent with the district court's analysis, that because Chief Behan had adopted, at least nominally, the CALEA national standards for jail suicide prevention, his duty to see these standards rigidly maintained involved performance of only a ministerial duty. While it is certainly true that discretion means only the "`freedom to act according to one's judgment in the absence of a hard and fast rule,'" *James,* 418 A.2d at 1179 (quoting *Schneider v. Hawkins,* 179 Md. 21, 16 A.2d 861, 864 (1940)), the CALEA standards did not have the force of law in Baltimore County and were not binding on Behan's discretion to shape department policy on suicide prevention; indeed, the Buffingtons specifically complain about the *lack* of any written regulations governing suicide prevention. As the official who adopted the CALEA standards, Behan would presumably have had the discretion to modify or even abandon them, at peril, as always, of liability for any resulting violations of federal constitutional rights. As Behan's state law liability was founded on discretionary acts, the judgment against him on the state law claims is reversed.

VIII

The appellants also challenge a separate order of the district court awarding the prevailing plaintiffs $430,658.78 in attorneys' fees and costs under 42 U.S.C. § 1988.[10] Because we have altered the disposition of some of the § 1983 claims, we must remand the award of fees and costs to the district court for reconsideration in light of the Buffingtons' now more limited success. *See Lenard v. Argento,* 699 F.2d 874, 898 (7th Cir. 1983). We think it appropriate, however, to discuss some of appellants' specific challenges to the award as it came to us, and some principles of § 1988 fee awards applicable in the present posture of this case, to guide the district court's exercise of discretion on remand. *See id.; Muscare v. Quinn,* 680 F.2d 42 (7th Cir. 1982).

10 Title 42 U.S.C. § 1988 provides, in relevant part: "In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

A

In their unsupplemented motion for attorneys' fees, the plaintiffs
127 requested that *127 the "lodestar"[11] calculation of the fees for their lawyers — members of the Baltimore firm of Semmes Bowen Semmes — and two paralegals be made as follows: for lead counsel and senior partner William Gately, 893.7 hours at an hourly rate of $175; for partner Daniel Whitney, 1,150.6 hours at an hourly rate of $135; for associate Janet Truhe, 281.5 hours at an hourly rate of $120; for associate Denise Grieg, 36 hours at an hourly rate of $70; and for paralegals Nancy Kozak and Amy Dagold, 202.4 and 2.6 hours, respectively, both at an hourly rate of $58. The total fee requested under this calculation was $359,918.50. The district court modified this request in only a few minor respects. Though the court rejected challenges to the hourly rates submitted for Gately and Whitney and the paralegals (the rates for Truhe and Grieg were not challenged), it reduced the hours expended. First, it noted 26 billing entries, totalling 4.55 hours, designated "Telephone conversation with judge or judge's staff." The court noted that these conversations were probably with the chambers law clerk, and because, it reasoned, that clerk would not have spoken more than six minutes at any one time, each of the 26 entries should have been for no more than 0.1 hours. The court thus reduced those 4.55 hours to 2.6. J.A. at 936-37. The court also noted that certain of the interrogatories were substantially similar, "which raise[d] the spectre of duplicity [sic]," J.A. at 939, and accordingly reduced the 14.65 hours spent on them to 8. Finally, the court was troubled by the numerous billing entries generically describing the billed time, e.g., "legal research regarding substantive issue." Though admitting that the billing sheets gave the court no basis for evaluating the reasonableness of a very substantial portion of the requested hours, it found that "almost all of what counsel did was reasonable" because they "left no stone unturned in proving [the] case and in providing the Court with pertinent authority." J.A. at 944. Nonetheless, the court followed the approach used in *Spell v. McDaniel,* 616 F. Supp. 1069 (E.D.N.C. 1985), *aff'd in part, vacated in part,* 824 F.2d 1380 (4th Cir. 1987), and made an "across-the-board" 5% reduction in the hours expended on the ground of inadequate documentation. After these modest reductions, the court awarded $340,739.60 of the $359,918.50 sought in this unsupplemented petition. The court also approved all of the $71,513.70 sought as expenses, $39,470.68 of which was spent on four expert witnesses.

11 The "lodestar" figure represents "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). This figure will normally represent the reasonable fee contemplated by § 1988, though in cases of "exceptional success" an upward adjustment may be appropriate, or in cases of partial or limited success some reduction may be in order. *Id.* at 435, 103 S.Ct. at 1940.

The court dealt separately with a supplement to the motion for attorneys' fees covering fees and expenses incurred after the submission of the initial motion. This supplement requested an additional $20,383.48 for work in connection with the response to defendants' motion for j.n.o.v. and the preparation of the fee petition. At the same hourly rates, the court approved Gately's requested 30 hours, but reduced Whitney's 58.6 by 10 hours, Truhe's 47.5 by 5% (to 42.75 hours), and paralegal Kozak's 3.3 to 2.3 hours. The resulting reply fee awarded was $17,074.40. The court did not alter the $1,331.08 requested for "reply expenses" of copying, use of Westlaw and Lexis, and word processor time. The total award, after supplementation, of $430,658.78 thus comprised $357,814.00 for attorneys' fees and $72,844.78 for expenses.

B

The most significant issue the district court will have to consider on remand is whether the now unsuccessful claims against Chief Behan and Baltimore County were sufficiently unrelated to those against the individual officers that the hours expended in pursuit of the former claims must be excluded in the fee award calculation. *See*
128 *Hensley v. Eckerhart,* 461 U.S. 424, 434-35, 103 S.Ct. 1933, 1939-40, *128 76 L.Ed.2d 40 (1983). In *Hensley,* the Supreme Court admonished district courts that where a plaintiff brings in a single lawsuit "distinctly different claims that are based on different facts and legal theories," work on unsuccessful claims cannot be thought to have contributed to the ultimate result and must be excluded from the fee award. *Id.* As discussed, the successful claims against the two individual police officers involved allegations of deliberate indifference to a particular, known, serious need for psychiatric care, and focused exclusively on the officers' conduct at the booking desk in the early morning of March 19, 1987. The ultimately unsuccessful claims against Chief Behan and the County, on the other hand, rested on what appears to us to have been altogether separate conduct — that of failing, over a number of years, to train police officers and equip the Wilkens precinct to handle the recurring problem of suicidal detainees. In other words, the legal theories of a county's custom and policy of indifference to suicidal detainees and the facts needed to prove them might arguably be thought formally unrelated to the facts and theories on which Gaigalas and Tucker were held liable. Nonetheless, we decline to make a first instance assessment of the relatedness of these claims, in light of the Supreme Court's direction that the calculation of a fee award, including questions of the relatedness of multiple claims, lies primarily within the district court's equitable discretion. *Id.* at 436-37, 103 S.Ct. at 1941-42. If the district court determines that the unsuccessful claims against Chief Behan and the County were indeed unrelated to the successful ones, the burden of showing which hours are recoverable for work on the successful claims will of course rest with the fee applicant, and the court is entitled to expect that the applicant's time records will provide some guidance in identifying the recoverable hours. *Id.* at 437, 103 S.Ct. at 1941 (plaintiff's counsel "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.").[12]

12 The appellants object on various grounds to the award of expenses for some of the plaintiffs' expert witnesses. If the district court determines on remand that the claims against Behan and the County were distinct from the successful ones, it should give careful consideration to which, if any, of these experts' expenses should be awarded.

In this connection, we note that the testimony of two of the experts, Joseph Rowan and George Kirkham, appears to have related exclusively to the unsuccessful theory that the police chief's and County's failure to maintain suicide prevention standards was the deliberate indifference that caused the suicide. A third reimbursed expert, Lindsay Hayes, never testified but advised the plaintiffs on the same subject matter. The fourth expert, Robert DiGrazia, a veteran in the field of police administration, testified to the deficiencies in the police's internal "command" investigation of Buffington's suicide. His testimony therefore related to the conspiracy/coverup theory on which the plaintiffs did not prevail at trial. The district court, however, rejected the argument that those particular unsuccessful claims were wholly distinct from the others against the County and Behan and accordingly refused to exclude attorneys' fees and expenses relating to them. Our disposition of the claims against the County and Behan will obviously necessitate reconsideration of the award for DiGrazia's expenses, which related to unsuccessful claims previously found to be intertwined with the now unsuccessful custom and policy claims against the County.

Though the district court should reconsider the relatedness of the claims and the award of expert fees, it need not revisit the argument, correctly rejected by the court and renewed by appellants here, that fees and expenses attributable to the first trial, which ended in mistrial, should be excluded on the ground that the plaintiffs did not prevail in that proceeding. Section 1988 rewards a plaintiff who ultimately prevails — who wins the war — without deducting for lost battles along the way. *See Spell v. McDaniel I,* 824 F.2d 1380 (4th Cir. 1987) (approving lodestar that included hours spent on the first trial, even though second trial on damages was granted).

In the event that the district court decides that the unsuccessful claims are "inextricably intermingled" with the successful ones, *see Plyler v. Evatt,* 902 F.2d 273, 280 (4th Cir. 1990), the court should undertake a renewed assessment of the "significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation." *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940. Although the court earlier found that the plaintiffs were entitled to a fully compensatory fee because their attorneys achieved an excellent
129 result, this conclusion rested substantially on *129 the judgment that "two of the defendants who lost — Chief Behan and Baltimore County — were the most important." J.A. at 943. We anticipate that, if the court does not determine that the claims against Behan and the County were distinctly different, its assessment of the ultimate result of the litigation will nonetheless be substantially affected by our disposition of those claims. We doubt that, in these changed circumstances, a fully compensatory award would be appropriate, but as with the preliminary question of the relatedness of the claims, the district court should make the judgment on that question in the first instance, with close attention to "the relationship between the amount of the fee awarded and the results obtained," *Hensley,* 461 U.S. at 437, 103 S.Ct. at 1941, and the need for a "clear explanation" of that relationship as perceived by the court, *id.*

C

The appellants have also challenged the hourly rates awarded the two lawyers who served as the Buffingtons' lead counsel, David Gately and Daniel Whitney. In the course of reconsidering the fee award on remand, the district court should revisit this challenge, with due regard for the following observations.

As part of his broad oversight of the case, Gately developed the plaintiffs' strategy and tactics, took numerous depositions, and examined most of the witnesses at trial. Whitney was primarily responsible for pleadings, papers, and legal research, but also handled the presentation of the plaintiffs' expert witnesses and developed the claims against the County and its policymakers. As noted, the court set the hourly rates for Gately and Whitney at $175 and $135 per hour, respectively. Both men were partners in the prominent Baltimore law firm of Semmes Bowen Semmes and had extensive litigation experience, but no experience in civil rights litigation, apparently having become involved in this case because David Buffington, James' father, was also a partner in that law firm.

The district court should reconsider whether the hourly rates for these attorneys comport with the underlying purpose of the Civil Rights Attorney's Fees Awards Act of 1976, which was to establish a fee-shifting regime that would enable civil rights plaintiffs to gain effective access to the federal courts. *See Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. 711, 731 n. 12, 107 S.Ct. 3078, 3089 n. 12, 97 L.Ed.2d 585 ("`[A]n attorney's fee award should be only as large as necessary to attract competent counsel' ") (quoting *Lewis v. Coughlin,* 801 F.2d 570, 576 (2d Cir. 1986)). Without implying any impropriety, we think it a relevant inquiry whether but for the unusual circumstance that found the decedent's father a partner in this law firm, these particular lawyers of undoubtedly great general competence would have been retained to handle this action, given their inexperience in the complexities of § 1983 litigation. While there is affidavit evidence that Gately's and Whitney's hourly rates were in line with market rates charged private clients for complex civil litigation in the Baltimore community, the affidavits do not provide specific information about market rates in Baltimore for comparable civil rights cases. *See Perkins v. Mobile Housing Bd.,* 847 F.2d 735, 737 (11th Cir. 1988) (nothing that the "market rate for federal civil litigation is too over-inclusive" for setting hourly rates under § 1988). We are unable to tell from the district court's memorandum opinion whether the hourly rates for Gately and Whitney were influenced by the fact that, as partners in a leading local firm, they customarily billed at the high end of the private market rates; such a factor would be impermissible under the Supreme Court's direction in *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984), that private firms and nonprofit legal service organizations should be treated equally in setting hourly rates under § 1988. *See Norman v. Housing Authority,* 836 F.2d 1292, 1305 (11th Cir. 1988) ("While it is no doubt true that law firms of established lineage and reputation can charge substantial fees, that is not really the question."); *Daggett v.*
130 *Kimmelman,* *130 811 F.2d 793, 799 (3d Cir. 1987) ("there . . . comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries.").

Here, the district court accepted as reasonable under § 1988 the proffered rates that these two skilled attorneys charged in other civil litigation matters. These rates should not have been mechanically accepted in the absence of more specific corroborating evidence of rates charged for civil rights litigation in the Baltimore community. *See Shakopee Mdewakanton Sioux v. City of Prior Lake,* 771 F.2d 1153, 1161 (8th Cir. 1985) (an attorney's own billing rate is not a reliable measure where he does not specialize in the area of law that is the subject matter of the lawsuit). In *Spell v. McDaniel I,* 824 F.2d 1380, 1402 (4th Cir. 1987), we noted that hourly rates could be proved by "affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." We did not imply, however, that the rates charged by a private attorney without civil rights experience could be determinative of a § 1988 hourly rate without some other evidence corroborating those rates as reasonable for § 1983 litigation in the relevant community. The Supreme Court has strongly intimated that the primary justification for awarding high-end hourly rates for experienced counsel in § 1983 litigation is that their very experience and skill will result in economies of time because of their lack of need for extensive background legal research. *Blum,* 465 U.S. at 898, 104 S.Ct. at 1548. Where, as here, counsel is indeed experienced in general but not in the special field of civil rights litigation, that justification may upon careful analysis be found lacking. Here as a matter of fact the record at least suggests the likelihood that an inordinate amount of legal research effort was necessitated by these undoubtedly fine lawyers' lack of specific experience in this field.[13]

13 By way of illustration, we note that the district court credited over

300 hours for legal research performed by two associates who assisted Gately and Whitney. Although the district court observed that this case was largely fact-intensive, it approved the more than 300 hours of associates' research, in addition to the substantial research performed by Whitney, on the ground that "legal research is necessary to master the vermiform aspects of § 1983." J.A. at 939. The district court should reconsider on remand whether these were hours reasonably expended in light of plaintiffs' choice not to retain counsel with experience in civil rights litigation. *Cf. Hensley,* 461 U.S. at 434, 103 S.Ct. at 1939 (counsel for the prevailing party should use the same "billing judgment" he would use in the private sector and "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."); *Spell v. McDaniel II,* 852 F.2d 762, 768-70 (4th Cir. 1988).

In conclusion of this issue, we reiterate that we are mindful of the necessity of — and sound policy reasons for — according substantial deference in § 1988 fee matters to the discretion of the district court, which has "close and intimate knowledge of the efforts expended and the value of the services rendered." *McManama v. Lukhard,* 616 F.2d 727, 729 (4th Cir. 1980); *see Hensley,* 461 U.S. at 436-37, 103 S.Ct. at 1940-41. In exercising that discretion on remand, the district court should attend to the informing legal principles on exclusion of hours for unsuccessful distinct claims or reduction based on limited overall success, relevant market hourly rates in civil rights cases, and the attorneys' use of private-sector quality "billing judgment."

IX

Finally, the appellants challenge an order of the district court holding their trial counsel in contempt for violating a court order requiring production of several witness statements. As explained more fully below, the court appointed a private prosecutor after the conclusion of the second trial to investigate the possibility of bringing criminal contempt charges against Baltimore County Attorneys John Austin and James Beach for their refusal to produce
131 certain crucial witness statements. *131 Though the court later denied the private prosecutor's application for a show cause order under Fed.R.Crim.P. 42(b), thus aborting the criminal investigation, it held Austin and Beach in civil contempt and imposed sanctions under Fed.R.Civ.P. 37(b)(2)(D) and the court's inherent authority. The court ordered Austin and Beach each to pay to the clerk of the court $6,785.37, an amount representing a quarter of the costs incurred in the private prosecution. On appeal, the appellants contend that these sanctions were in substance based on a finding of criminal contempt made without the necessary procedural requirements. We agree with the appellants that the order imposing sanctions must be vacated and remanded.

A

In December 1987, shortly after the filing of the complaint, the Buffingtons served on the County a request for production of documents. The following requests are relevant here:

> 2. Any and all documents concerning or relating to the arrest, booking, detention, and death of James E. Buffington.
>
> 3. Any and all documents concerning or relating to any investigation by the Baltimore County Police department as to the death of James E. Buffington.

. . . .

> 19. Any and all documents concerning or relating to any oral or written statement given by any witness to the arrest, booking, treatment, incarceration, or death of James E. Buffington.
>
> 20. Any and all written or recorded statements given by any witness to the arrest, booking, treatment, incarceration or death of James E. Buffington.
>
> 21. Any and all documents, reports, and other printed or written materials concerning or relating to each individual who was detained, arrested, or incarcerated at the Wilkens Avenue Police Station lockup facility from 12:01 p.m. on March 18, 1987 through 10 a.m. on March 19, 1987.

J.A. at 979-80.

In a February 17, 1988, order, the district court denied the County's motion for a protective order and ordered production of all requested documents. The County then answered the documents request, stating that it was producing or had already produced all responsive documents and that it "reserve[d] the right to supplement this answer in the event additional documents and/or tangible property requested herein are discovered or becomes [sic] available." J.A. at 459.

Concerned about some evidence presented at the first trial, County Attorney James Beach asked the police department to reopen their earlier command investigation to the extent of locating and interviewing the detainees at the Wilkens precinct on the morning of the Buffington suicide. During the renewed investigation, seven detainees were interviewed, and four gave taped statements that, contrary to police testimony at the first trial, Buffington was not docile and calm while being held, but was instead screaming and openly threatening suicide. County Attorneys Austin and Beach received transcribed copies of these statements before the second trial, but did not supplement their earlier response to the document request with these statements.

At the second trial, several police officers again testified that James was docile while in custody at the station. This testimony supported the defendants' argument at trial that the individual defendant officers could not have known that Buffington was about to commit suicide. During trial, plaintiffs' counsel learned of the possible existence of the detainees' contradictory statements and pointedly asked Austin about them. Austin stated only that he would "look into the matter." On the day after the jury returned its verdict, plaintiffs' counsel demanded that Austin and Beach produce any detainees' statements they might have in their possession. The next day, after further demand, Austin and Beach
132 finally produced the seven witness *132 statements obtained in the internal investigation.

On February 9, the Buffingtons filed a motion for sanctions against Austin and Beach. The Buffingtons asserted that the refusal to produce the witness statements was a violation of the court's February 17, 1988, discovery order and that the statements would have had a significant impact on the jury's consideration of possible punitive damages, none of which were awarded. Acknowledging that "[t]he normal remedy for a party aggrieved by opposing counsel's concealment of material evidence is to move for a new trial," J.A. at 458, the Buffingtons nonetheless declined to seek a new trial to prove punitive damages. Instead, they urged the court to impose sanctions on Austin and Beach pursuant to a finding of criminal contempt or, in the alternative, civil contempt because "failure to impose an appropriate fine would only encourage Baltimore County and its counsel to flout court orders and hide evidence in future litigation." *Id.*

The district court considered the suggestion of criminal contempt to have merit and, following the procedure outlined in *Young v. United States ex rel. Vuitton et Fils, S.A.,* 481 U.S. 787, 801, 107 S.Ct. 2124, 2134, 95 L.Ed.2d 740 (1987), initially referred the matter to the United States Attorney for the District of Maryland. After the U.S. Attorney declined to prosecute, the court, citing *Young,* appointed a private prosecutor on March 9. The court later granted the private prosecutor's motions, made under seal, for an order to take depositions, Fed.R.Crim.P. 17(f), and for early production of documents, Fed.R.Crim.P. 17(c), and denied Austin's and Beach's motions to quash subpoenas. On May 23, the private prosecutor filed under seal an application for an order under Fed.R.Crim.P. 42(b) requiring Austin and Beach to appear and show cause why they should not be held in criminal contempt. The proposed order specified the conduct alleged to constitute criminal contempt under the federal criminal contempt statute, 18 U.S.C. § 401. The district court held a hearing on the application for the show cause order on June 9. On June 26, the court denied the application, bringing to a halt the criminal contempt proceedings.

On the same day, however, the court issued an order granting the Buffingtons' motion for sanctions pursuant to a finding, "[b]y clear and convincing evidence," J.A. at 1009, of civil contempt. The court held Austin and Beach in contempt for violating the February 17, 1988, discovery order by failing to supplement their response to the documents request with the later-discovered witness statements. The court reasoned that Fed.R.Civ.P. 26(e)(2)(B) [14] imposed on Austin and Beach an obligation under the circumstances to supplement their earlier response. Drawing a "weighty inference of knowing concealment from the sheer importance of these witness statements to the issues at trial," J.A. at 1001, the court found the failure to supplement to constitute a violation of Rule 26(e)(2)(B) and the court's February 17 order. Citing its authority under Fed.R.Civ.P. 37(b)(2)(D) to issue a contempt order for failure to obey a court order and its inherent authority to control discovery, the court held Austin and Beach in civil contempt.[15] The sanction
133 *133 imposed on each attorney was a fine of $6,785.37, payable to the clerk of the court, representing one-fourth of the costs incurred in the private prosecutor's truncated investigation.[16] The court characterized this sanction as "strictly compensatory." J.A. at 1009.

[14] Fed.R.Civ.P. 26(e)(2)(B) provides, in pertinent part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except . . . [that a] party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

[15] The court's attempt to invoke Rule 37(b)(2) as a source of its authority to sanction this conduct was inappropriate, but its alternative reliance on the court's inherent power to control discovery was proper. Rule 37(b) sanctions apply only to violations of a court order to permit or provide discovery, or one in regard to a discovery conference. They do not apply to a violation of the duty, arising in limited circumstances under Rule 26(e), to supplement a discovery response, *See, e.g., Outley v. City of New York,* 837 F.2d 587, 589 (2d Cir. 1988). The February 17 order in this case did not impose a duty to supplement the earlier response to the documents request, though the order could have so provided. *See* Fed.R.Civ.P. 26(e)(3); *United States v. IBM Corp,* 83 F.R.D. 92, 96 (S.D.N.Y. 1979). Rather, the duty to supplement arose, if at all, under Rule 26(e)(2)(B). Because Rule 37 sanctions are not available to sanction violations of Rule 26(e), courts and commentators have recognized that reliance on the inherent power of the court to sanction violations of this discovery rule is fitting. *See Outley,* 837 F.2d at 589; *Bradley v. United States,* 866 F.2d 120, 124 n. 6 (5th Cir. 1989) (power to sanction for violation of Rule 26(e) either implicit in rule or derived from court's inherent power); *Campbell Indus. v. M/V Gemini,* 619 F.2d 24, 27 (9th Cir. 1980) ("Few would question a court's inherent power to discipline breaches of Rule 26(e), even in the absence of a court order"); 8 C. Wright A. Miller, *Federal Practice and Procedure: Civil* § 2050, at 325-26 (1970) ("In the absence of a rule speaking to the question [of sanctions for Rule 26(e) violations], reliance must be on the inherent power of the court.").

[16] The Administrative Office of the United States Courts has adopted a policy of reimbursing attorneys appointed as private prosecutors in contempt actions. *See Young,* 481 U.S. at 806 n. 17, 107 S.Ct. at 2137 n. 17. The district court was aware of this policy and noted that half of the prosecutor's fees in this case would come from that source.

B

The appellants contend that the district court's ruling was in substance a finding of criminal contempt and that the sanctions are invalid because they were imposed without the procedural protections required for a criminal contempt finding. We agree, and accordingly vacate and remand the order imposing sanctions.

The first issue in reviewing a contempt sanction is whether the contempt sanction is properly characterized as civil or criminal, as this determination may bear on the type of notice required, the applicable standard of proof, and other issues. *Smith v. Sullivan,* 611 F.2d 1050, 1052 (5th Cir. 1980). A district court's description of a contempt sanction as either civil or criminal is not determinative and must be scrutinized independently by the appellate court. *See Shillitani v. United States,* 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Although the distinctions between civil and criminal contempt often become blurred when applied to particular cases, they are clear enough in the abstract: When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal. *See United States v. United Mine Workers,* 330 U.S. 258, 302-04, 67 S.Ct. 677, 700-02, 91 L.Ed. 884 (1947); 3 C. Wright, *Federal Practice Procedure: Criminal 2d* § 704, at 823-24 (1982). In treating a particular contempt sanction as civil or criminal, "the critical features are the substance of the proceeding and the character of the relief of that the proceeding will afford." *Hicks v. Feiock,* 485 U.S. 624, 631, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988). In *Hicks,* the Supreme Court clarified "a few straightforward rules" for ascertaining "the character of the relief":

> If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who
> 134 has not been afforded the protections that the *134 Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

Id. at 631-32, 108 S.Ct. at 1429-30 (citations omitted).

The contempt sanction in this case was punitive — a fine payable to the court, not conditioned on compliance with a court order. (As the court noted, compliance with the discovery order, or, more precisely, the duty to supplement arising under Rule 26(e), had now become impossible.) There is no doubt that the district court can impose a fixed, monetary, civil contempt sanction to compensate for losses sustained by violation of a discovery order or of Rule 26(e). Fed.R.Civ.P. 37(b)(2) (discovery order violation); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (same); *Perkinson v. Gilbert-Robertson, Inc.,* 821 F.2d 686 (D.C. Cir. 1987) (Rule 26(e) violation). In such cases, however, the sanctions are payable to the complaining adverse party, and the amount is determined by losses flowing from expenses incurred as a result of the violation. The relief in this case, however, was not tailored to compensate the complaining party — the Buffingtons — for any losses incurred by them as a result of the defendants' failure to comply with their duty to supplement their earlier response to the court order. Rather, it compensated for half of the expenses incurred in the court's effort to "vindicate its authority" by setting in motion the private prosecutor's investigation and was payable directly to the court. *See Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 779 (9th Cir. 1983) (judgment of contempt was criminal where fine paid to court had purpose of punishing plaintiff for completed acts of disobedience in failing to return confidential documents). The fact that this punitive fine had the incidental effect of compensating for the costs of prosecuting the violation is neither surprising nor determinative of its character. *See Gompers v. Buck's Stove Range Co.,* 221 U.S. 418, 443, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911) ("It is true that either form of [sanction] has also an incidental effect" that can be viewed as promoting the purpose of the alternate form of sanction).

We derive our conclusion that requiring contemnors to fund their own halted criminal contempt prosecution constitutes a punitive, criminal sanction, imposed as an incident of the court's effort to vindicate its authority, from the nature of the relief itself. *See Hicks,* 485 U.S. at 636, 108 S.Ct. at 1432. Moreover, the substance of the proceedings and the court's express statement of its reason for imposing sanctions corroborate this conclusion. *See id.* at 635, 108 S.Ct. at 1431 ("the purposes that lie behind the particular kinds of relief are germane to understanding their character."). It is undisputed that the contempt proceedings were initiated to vindicate the authority of the court and to punish the actions of the alleged contemnors. *See, e.g.,* J.A. at 797 (letter of district court seeking appointment of U.S. Attorney stating that "[w]hile reviewing the matter, the prosecutor's duty is clear: He 'is appointed solely to pursue the public interest in vindication of the court's authority'" (quoting *Young,* 481 U.S. at 804, 107 S.Ct. at 2135)). Nor is there any dispute that the "substance of the proceeding[s]," *Hicks,* 485 U.S. at 631, 108 S.Ct. at 1429, as they progressed through the early stages of investigation, was criminal — the private prosecutor had obtained discovery authorization under rules of criminal procedure and had reached the stage of applying to the court for a show cause order, pursuant to Fed.R.Crim.P. 42(b). That application was denied on the same day that the court issued its order holding Austin and Beach in contempt.[17] Furthermore the district court's statements of its reasons for imposing the sanctions discloses a predominately
135 punitive intent, consistent with the nature of *135 the relief actually imposed — an unconditional fine payable to the court: "In this case, as well as in future cases where counsel do not comply with an order requiring production of documents, counsel can ultimately produce one of two things: the documents or a negotiable instrument payable to the Clerk of the Court." J.A. at 1008. We hold, therefore, that the district court imposed a criminal contempt sanction in this case.

[17] Because the proceedings were criminal in nature until the court's denial of the application for the show cause order and concurrent imposition of "civil" sanctions, there is no merit to the Buffingtons' contention that the appellants failed to preserve their objection to the lack of criminal contempt procedural protections. The denial of those protections first occurred when the sanction was imposed, at which point this appeal was noted.

C

The Buffingtons argue that if we hold, as we have, that these contempt sanctions were criminal, we could nonetheless affirm them because the district court substantially complied with the procedural protections necessary for a judgment of criminal contempt. We disagree. Regardless of whether Austin and Beach had sufficient notice of the charges and the institution of a criminal contempt proceeding, there is no indication in this record that they ever had or waived a hearing on the charges. *See In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (party charged with contempt has constitutional right to be heard by way of defense or explanation); *Yates v. United States,* 316 F.2d 718, 725 (10th Cir. 1963) (right to hearing may be waived). The June 9 hearing on the private prosecutor's application for a show cause order does not satisfy this requirement.[18] Most fundamentally, however, the criminal contempt finding here is flawed because it was based only on "clear and convincing evidence." J.A. at 1009. A finding of criminal contempt must be based on proof beyond a reasonable doubt. *Hicks,* 485 U.S. at 632, 108 S.Ct. at 1430.

[18] The contents of this closed hearing have never been transcribed.

D

Although we agree with the appellants that the contempt sanctions imposed in this case were criminal in nature and must be vacated because they were not imposed under proper procedures, we reject the appellants' alternative argument that the district court erred in imposing any sanction because no obligation to produce the witness statements existed. As we understand their argument, the appellants' first contention is that the February 17 order did not obligate them to produce the later-created witness statements. But, as noted, *see supra* n. 15, sanctions for a violation of Rule 26(e) may be imposed under the court's inherent power even though no order compelling the discovery was violated. Appellants' next point — that they did not breach any duty created by Rule 26(e) — deserves little attention. There was no clear error in the district court's subsidiary fact findings that Austin and Beach had possession of the detainees' witness statements before the second trial and that the refusal to apprise the Buffingtons of those critical statements permitted drawing the "weighty inference of knowing concealment."[19] Accordingly, the district court did not abuse its discretion to the extent that it found a sanctionable violation of Rule 26(e)(2)(B).

[19] The appellants' highly debatable assertion that the Buffingtons could have found and interviewed these detainee-witnesses themselves is irrelevant to whether they breached their duty under the discovery rules. The further contention that these witness statements obtained in an internal police investigation were protected work product is equally meritless. *See, e.g., Mercy v. County of Suffolk,* 93 F.R.D. 520, 522 (E.D.N.Y. 1982) (work product doctrine does not apply to statements made in internal police investigation).

Any monetary sanction the court might impose on remand without reinstituting criminal proceedings must be civil in character: it must be designed to compensate the complaining party — the Buffingtons — for losses they incurred as a result of the violation of the discovery duty. Of course, any compensatory sanction payable to the Buffingtons must not overlap with the district court's award of attorneys' fees and expenses, a matter that must also be addressed on remand. Any reinstituted criminal contempt proceedings must of course comply with the requisites of the
136 Federal Rules of Criminal Procedure and *136 the constitutional protections afforded defendants in such proceedings. *See Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); 3 C. Wright, *supra,* §§ 709-14.[20]

[20] A renewed prosecution of Austin and Beach would not raise double jeopardy concerns. Jeopardy did not attach in the prior proceedings because neither a jury was impanelled, the point at which jeopardy attaches in a jury trial, nor evidence heard, the point at which jeopardy attaches in a bench trial. *See Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

X

For the foregoing reasons, we affirm the judgments against Officers Tucker and Gaigalas, reverse the judgments against Chief Behan and Baltimore County on both the § 1983 and state law claims, vacate and remand the award of the Buffingtons' attorneys' fees, and vacate and remand the contempt sanctions against County Attorneys Austin and Beach.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

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Not Followed on State Law Grounds Hannan v. Alltel Publishing Co., Tenn., October 31, 2008

106 S.Ct. 2548
Supreme Court of the United States

CELOTEX CORPORATION, Petitioner
v.
Myrtle Nell CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased.

No. 85–198.
|
Argued April 1, 1986.
|
Decided June 25, 1986.

Synopsis
Administratrix of estate of deceased worker brought action against asbestos manufacturer. The United States District Court for the District of Columbia granted manufacturer's motion for summary judgment and administratrix appealed. The Court of Appeals for the District of Columbia Circuit, 756 F.2d 181, reversed. The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Reversed and remanded.

Justice White filed an opinion concurring in the Court's opinion and judgment.

Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined.

Justice Stevens filed a dissenting opinion.

Opinion on remand, 826 F.2d 33.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (10)

[1] **Federal Civil Procedure** Lack of cause of action or defense

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

74226 Cases that cite this headnote

[2] **Federal Civil Procedure** Absence of genuine issue of fact in general

Federal Civil Procedure Materiality and genuineness of fact issue

Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

136589 Cases that cite this headnote

[3] **Federal Civil Procedure** Burden of proof

Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

123557 Cases that cite this headnote

[4] **Federal Civil Procedure** Affidavits

There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3955 Cases that cite this headnote

[5] **Federal Civil Procedure** Affidavits

Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may and should be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment set forth in Rule 56(c) is satisfied. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

10850 Cases that cite this headnote

[6] **Federal Civil Procedure** Affidavits
Federal Civil Procedure Burden of proof

Where nonmoving party will bear burden of proof at trial on a dispositive issue, summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file and such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule" so that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

152321 Cases that cite this headnote

[7] **Federal Civil Procedure** Admissibility

Nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

3979 Cases that cite this headnote

[8] **Federal Civil Procedure** Affidavits
Federal Civil Procedure Burden of proof

Last two sentences of Rule 56(e) precluding a nonmoving party from resting on its pleadings to avoid summary judgment were added to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings and were not intended to reduce the burden of the moving party or to add to that burden. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

17888 Cases that cite this headnote

[9] **Federal Civil Procedure** Summary Judgment

Summary judgment procedure is properly regarded not a disfavored procedural shortcut but, rather, as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. Fed.Rules Civ.Proc.Rules 1, 56, 28 U.S.C.A.

6613 Cases that cite this headnote

[10] **Federal Civil Procedure** Summary Judgment

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

1939 Cases that cite this headnote

****2549 *317** *Syllabus* *

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his

exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule 56(e) of Civil Procedure and the decision in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary ****2550** judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 2552–2559.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to ***318** make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 2552–2553.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes v. S.H. Kress & Co., supra,* explained. Pp. 2553–2554.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). Pp. 2554–2555.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. P. 2555.

244 U.S.App.D.C. 160, 756 F.2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. ——. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, *post,* p. ——. STEVENS, J., filed a dissenting opinion, *post,* p. ——.

Attorneys and Law Firms

Leland S. Van Koten argued the cause for petitioner. With him on the briefs were *H. Emslie Parks* and *Drake C. Zaharris*.

Paul March Smith argued the cause for respondent. With him on the brief were *Joseph N. Onek, Joel I. Klein, James F. Green,* and *Peter T. Enslein.**

* *Stephen M. Shapiro, Robert L. Stern, William H. Crabtree, Edward P. Good,* and *Paul M. Bator* filed a brief for the Motor Vehicle Manufacturers Association et al. as *amici curiae* urging reversal.

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Opinion

***319** Justice REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.,* 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese* ****2551** *Electronic Products,* 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).[1] We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product ... was the proximate cause of the injuries alleged within the jurisdictional ***320** limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970–1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Respondent ***321** appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's ****2552** summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." ***322** 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.,* at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.,* at 166, 756 F.2d, at 187.

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[1] **[2]** We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, ***323** there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." ****2553** *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

[3] **[4]** **[5]** Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported ***324** claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

[6] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

***325** The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively ****2554** show that it was not intended to modify the burden of the moving party ... to

show initially the absence of a genuine issue concerning any material fact." *Id.,* at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes,* the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

[8] The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes,* to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to ***326** *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C., at 167–168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28–29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was ***327** made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if ****2555** reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[9] **[10]** The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

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***328** The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, concurring.
I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect ***329** of the case, I agree that the case should be remanded for further proceedings.

Justice BRENNAN, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, dissenting.
This case requires the Court to determine whether Celotex satisfied its initial ****2556** burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

***330** I

Summary judgment is appropriate where the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.Rule Civ.Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15 [3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante,* at 2551; *ante,* at 2553 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright, Miller & Kane § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the Court finds that the moving party has discharged its initial ***331** burden of production. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157–161, 90 S.Ct. 1598, 1608–10, 26 L.Ed.2d 142 (1970); 1963 Advisory Committee's Notes on Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626.

****2557** The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright, Miller & Kane § 2727. The manner in which this showing can be made depends upon which party will bear the burden of

persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.;* Fed.Rules Civ.Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *non-moving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright, Miller & Kane § 2727, pp. 130–131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, ——, 91 L.Ed.2d 202 (1986).

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party—who will bear the burden of persuasion at trial—has ***332** no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante,* at 2551 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750–751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante,* at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the record disclosed that the ****2558** moving ***333** party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the Court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes v. S.H. Kress & Co., supra,* is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U.S.C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, ... it would be open to a jury, in light of the sequence that followed, ***334** to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service."

398 U.S., at 158, 90 S.Ct., at 1609. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.,* at 157–158, 98 S.Ct., at 1608–1609.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her ****2559** decedent had ever been exposed to Celotex asbestos. [4] App. 170. Celotex supported this motion with a ***335** two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.,* at 171–176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least ... demonstrate that there is a genuine factual dispute for trial," *id.,* at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.,* at 160; (2) a letter from T.R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.,* at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.,* at 164. Plaintiff also apparently indicated ***336** at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6–7, 27–29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167. [5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence—including at least one witness—supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5–7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence—noting that it had already been provided to counsel for Celotex in connection with the first motion—and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial ****2560** burden of production under Rule 56, and thereby rendered summary judgment improper. [6]

***337** This case is indistinguishable from *Adickes.* Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production. [7]

Justice STEVENS, dissenting.

As the Court points out, *ante,* at 2551, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1] ***338** Respondent made an adequate showing —albeit possibly not in admissible form[2]—that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia,* the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written ****2561** opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the ***339** District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

All Citations

477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 54 USLW 4775, 4 Fed.R.Serv.3d 1024

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot v. Upjohn Co.,* 780 F.2d 1190 (1986).

2 Justice STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia.* See *post,* at 2560–2561. According to Justice STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970–1971. See *Ibid.*

Justice STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere.*" App. 217 (emphasis added). Unlike Justice STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by Justice STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.' " *Catrett v. Johns-Manville Sales Corp.,* 244 U.S.App.D.C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares Justice STEVENS' view of the District Court's decision.

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3 Rule 56(e) provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

4 Rule 56(c) provides:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

5 See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U.Chi.L.Rev. 72, 79 (1977).

6 Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

1 It is also unclear what the Court of Appeals is supposed to do in this case on remand. Justice WHITE—who has provided the Court's fifth vote—plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, Justice WHITE's understanding would seem to be controlling. Cf. *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

2 The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], pp. 56–466; 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, ——, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved

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against the moving party, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158–159, 90 S.Ct. 1598, 1608–09, 26 L.Ed.2d 142 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright, Miller & Kane § 2721, p. 44; see, *e.g., Stepanischen v. Merchants Despatch Transportation Corp.,* 722 F.2d 922, 930 (CA1 1983); *Higgenbotham v. Ochsner Foundation Hospital,* 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...." 723 F.2d, at 258.

3 Once the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, Miller & Kane § 2727, pp. 138–143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e.g., First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

4 Justice STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post,* at 2561 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante,* at 2560, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post,* at 2560 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

5 Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

6 If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

7 Although Justice WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found

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it unnecessary to address this aspect of the case." *Ante,* at 2555–2556 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6–7. Under the circumstances, then, remanding is a waste of time.

1 See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.,* at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.,* at 211 ("Our position is ... there has been no product identification of any Celotex products ... that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

2 But cf. *ante,* at 2553 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3 See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.,* at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.,* at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

4 See *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

5 Cf. n. 2, *supra.* The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante,* at 2555, is bewildering because there is no question of local law to be decided. Cf. *Bishop v. Wood,* 426 U.S. 341, 345–347, 96 S.Ct. 2074, 2077–2079, 48 L.Ed.2d 684 (1976). The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, *e.g., New York v. P.J. Video, Inc.,* 475 U.S. 868, 884, 106 S.Ct. 1610, 1619, 89 L.Ed.2d 871 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc., v. Worthington,* 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986) (STEVENS, J., dissenting); *City of Los Angeles v. Heller,* 475 U.S. 796, 800, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) (STEVENS, J., dissenting); *Pennsylvania v. Goldhammer,* 474 U.S. 28, 31, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

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De'lonta v. Angelone

Case Details

Full title: Ophelia Azriel DE'LONTA, a/k/a M. Stokes, Plaintiff-Appellant, v. Ronald...

Court: United States Court of Appeals, Fourth Circuit

Date published: May 27, 2003

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330 F.3d 630 (4th Cir. 2003)

Citing Cases

Morris v. Fletcher

In order to be sufficiently serious, the deprivation must pose "a serious or significant physical or...

Morris v. Fletcher

In order to be sufficiently serious, the deprivation must pose "a serious or significant physical or...

1,359 Citing Cases

Summary

Holding that, as alleged, prison officials' denial of treatment for an inmate's compulsion to self-mutilate constitutes deliberate indifference violating the Eighth Amendment

Summary of this case from Denney v. Berkeley Cnty.

See 25 Summaries

Opinion

No. 01-8020.

Argued: April 3, 2003.

Decided: May 27, 2003.

Appeal from the United States District Court for the Western
631 District of Virginia, James C. Turk, Senior District Judge. *631

ARGUED: Kelly Marie Baldrate, Victor M. Glasberg Associates, Alexandria, Virginia, for Appellant. Peter Duane Vieth, Wootenhart, P.C., Roanoke, Virginia, for Appellees. **ON BRIEF:** Victor M. Glasberg, Victor M. Glasberg Associates, Alexandria, Virginia; Rebecca K. Glenberg, American Civil Liberties Union Foundation of Virginia, Richmond, Virginia, for Appellant. George W. Wooten, Wootenhart, P.C., Roanoke, Virginia; William W. Muse, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellees.

Before WILKINS, Chief Judge, and MOTZ and KING, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge WILKINS wrote the opinion, in which Judge DIANA GRIBBON MOTZ and Judge KING joined.

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OPINION

WILKINS, Chief Judge:

Virginia inmate Ophelia Azriel De'lonta (born Michael A. Stokes) appeals a district court order dismissing for failure to state a claim, *see* 28 U.S.C.A. § 1915(e)(2)(B)(ii) (West Supp. 2002), her complaint under 42 U.S.C.A. § 1983 (West Supp. 2002) claiming prison officials have denied her adequate medical treatment in violation of the Eighth Amendment. Because we conclude that it does not appear beyond doubt that De'lonta cannot prove facts to support her claim, we reverse and remand for further proceedings.

I.[1]

1 Because the district court dismissed De'lonta's complaint for failure to state a claim, we accept all of the allegations in her complaint as true, construing her pro se complaint liberally. *See Estelle v. Gamble,* 429 U.S. 97, 99, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *DeWalt v. Carter,* 224 F.3d 607, 611-12 (7th Cir. 2000) (stating that same standards apply to dismissals under § 1915(e)(2)(B)(ii) as apply to dismissals under Fed.R.Civ.P. 12(b)(6)).

De'lonta suffers from gender identity disorder (GID) (also known as gender dysphoria or transsexualism), a disorder characterized by a feeling of being trapped in a body of the wrong gender. She[2] has
632 undergone *632 various procedures to make herself appear more feminine, including dermabrasions and a chemical face peel. She has also received estrogen treatment to slow hair growth, soften her skin, and develop breasts and other female characteristics.

2 We use feminine pronouns to refer to De'lonta, as did the district court.

De'lonta has been in the custody of the Virginia Department of Corrections (VDOC) since 1983. Since the beginning of her imprisonment, VDOC doctors have consistently diagnosed her as suffering from GID, and De'lonta received estrogen therapy for the disorder in 1993 while in Greensville Correctional Center. This treatment continued until 1995, when De'lonta was transferred to Mecklenburg Correctional Center and her hormone treatment was terminated pursuant to a then-recently created VDOC policy ("the Policy"). The Policy is outlined in a memo dated September 19, 1995, from VDOC Chief Physician M. Vernon Smith:

> It is the policy of the Department of Corrections that neither medical nor surgical interventions related to gender or sex change will be provided to inmates in the management of [GID] cases.
>
> If an inmate has come into prison and/or is currently receiving hormone treatment, he is to be informed of the department['s] policy and the medication should be tapered immediately and thence discontinued.
>
> Inmates presenting with [GID] should be referred to the institution[']s mental health staff for further evaluation.

J.A. 28.

In contravention of the directive that hormone treatment be tapered off, De'lonta's hormone treatment was terminated abruptly, causing De'lonta to suffer nausea, uncontrollable itching, and depression.

The most harmful effect of the cessation of the hormone treatment, however, was that De'lonta developed an uncontrollable urge to mutilate her genitals. Although she had engaged in some self-mutilation previously, it had consisted primarily of cutting her arms and hands. Since termination of the hormone treatment, however, she has stabbed or cut her genitals on more than 20 occasions. She has repeatedly requested resumption of the hormone therapy and treatment by a gender specialist. To date, however, her requests have been denied, and her self-mutilation has continued.

In 1999, De'lonta filed suit against Dr. Smith, other Virginia prison doctors, and VDOC Director Ron Angelone (collectively, "Appellees"), alleging that Appellees have inflicted cruel and unusual punishment on her, in violation of her Eighth Amendment rights, by denying her adequate medical treatment for her GID. She sought an injunction requiring Appellees to arrange for her to be treated by a doctor with expertise in transsexualism and to allow her to resume her hormone therapy until that treatment commenced. She also requested declaratory and monetary relief, including punitive damages.

Angelone responded by filing a summary judgment motion with an attached affidavit. The other Appellees moved to dismiss for failure to state a claim. The district court dismissed De'lonta's claims against all Appellees pursuant to 28 U.S.C.A. § 1915(e)(2)(B)(ii), concluding that the record demonstrated beyond doubt that she could not plead facts that would state a valid Eighth Amendment claim. Regarding De'lonta's entitlement to adequate treatment for her GID, the court ruled that the record was clear that De'lonta was receiving some treatment. The court concluded that the gravamen of De'lonta's claim was simply a disagreement with the medical judgment concerning what treatment was appropriate and that
633 such a disagreement did not state a *633 claim under the Eighth Amendment. The court also concluded that the failure of the VDOC to follow its tapering policy in 1995 did not rise to the level of an Eighth Amendment violation. The court further ruled that any claim for equitable relief from that conduct had become moot, and any legal claim was time-barred.

In addition, the court denied a motion by De'lonta to amend her complaint, concluding that amendment would be futile. Finally, although the court stated that it was "unable to conceive of any set of facts under which the Eighth Amendment would entitle" De'lonta to relief, the court dismissed her complaint without prejudice "[t]o avoid complicating any future actions with issues of collateral estoppel or claim preclusion."[3] J.A. 183, 188.

3 Although a dismissal without prejudice is not normally appealable, because the grounds provided by the district court for dismissal "clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case," we conclude that the order dismissing De'lonta's complaint is an appealable final order. *Domino Sugar Corp. v. Sugar Workers Local Union 392,* 10 F.3d 1064, 1066-67 (4th Cir. 1993) (alteration internal quotation marks omitted).

II.

De'lonta has not challenged the district court ruling that the abruptness of the termination of her hormone therapy did not violate the Eighth Amendment. She does argue, however, that the district court erred in dismissing her remaining claims. The standards for reviewing a dismissal under § 1915(e)(2)(B)(ii) are the same as those for reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6). *See DeWalt v. Carter,* 224 F.3d 607, 611-12 (7th Cir. 2000). Thus, we review a § 1915(e)(2)(B)(ii) dismissal de novo. *See id.* "A complaint should not be dismissed for failure to state a claim upon which relief may be granted unless after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Veney v. Wyche,* 293 F.3d 726, 730 (4th Cir. 2002) (internal quotation marks omitted). Additionally, the allegations in pro se complaints should be liberally construed.[4] *See Hughes v. Rowe,* 449 U.S. 5, 9-10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam).

4 In dismissing this action, the district court considered all documents attached to De'lonta's complaint and to her proposed amended complaint. Because the parties agree that such consideration was appropriate, we have also used the materials to the extent that they clarify the allegations in the complaint.

De'lonta's claim arises under the Eighth Amendment. Scrutiny under the Eighth Amendment is not limited to those punishments authorized by statute and imposed by a criminal judgment. *See Wilson v. Seiter,* 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The Amendment also provides protection with respect to "the treatment a prisoner receives in prison and the conditions under which he is confined." *Helling v. McKinney,* 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). Those conditions include the adequacy of the medical care that the prison provides. *See Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

The showing necessary to demonstrate that particular conduct by prison officials is sufficiently serious to constitute cruel and unusual punishment "varies according to the nature of the alleged constitutional violation." *Hudson v. McMillian,* 503 U.S. 1, 5, 112 S.Ct.
634 995, *634 117 L.Ed.2d 156 (1992). In order to establish that she has been subjected to cruel and unusual punishment, a prisoner must prove (1) that "the deprivation of [a] basic human need was *objectively* `sufficiently serious,'" and (2) that " *subjectively* `the officials act[ed] with a sufficiently culpable state of mind.'" *Strickler v. Waters,* 989 F.2d 1375, 1379 (4th Cir. 1993) (second alteration in original) (quoting *Wilson,* 501 U.S. at 298, 111 S.Ct. 2321). Only extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement. *See Hudson,* 503 U.S. at 8-9, 112 S.Ct. 995. In order to demonstrate such an extreme deprivation, a prisoner must allege "a serious or significant physical or emotional injury resulting from the challenged conditions," *Strickler,* 989 F.2d at 1381, or demonstrate a substantial risk of such serious harm resulting from the prisoner's exposure to the challenged conditions, *see Helling,* 509 U.S. at 33-35, 113 S.Ct. 2475. The subjective component of an Eighth Amendment claim challenging the conditions of confinement is satisfied by a showing of deliberate indifference by prison officials. *See Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). "[D]eliberate indifference entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 835, 114 S.Ct. 1970. It requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm. *See id.* at 837, 114 S.Ct. 1970; *Shakka v. Smith,* 71 F.3d 162, 166 (4th Cir. 1995).

Here, De'lonta contends that her complaint, when liberally construed, alleges facts sufficient to establish that the denial of treatment for her compulsion to mutilate herself constitutes deliberate indifference to her medical needs. In particular, she claims she could prove that (1) Appellees know that she suffers from GID; (2) she was receiving treatment until 1995, when it was abruptly terminated for no legitimate reason; (3) the termination of the therapy has resulted in compulsive, repeated self-mutilation of her genitals; and (4) after Appellees terminated the hormone treatment, they have refused to provide any treatment to prevent her from mutilating herself, leaving her at continued risk for serious, self-inflicted injuries. We agree with De'lonta that such allegations adequately state a claim for relief and that the record does not demonstrate beyond doubt that De'lonta could not prove those allegations.

First, De'lonta's need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent. *See Lee v. Downs,* 641 F.2d 1117, 1121 (4th Cir. 1981) (explaining that "prison officials have a duty to protect prisoners from self-destruction or self-injury"). And, nothing in the record refutes the allegation that Appellees know that De'lonta's compulsive self-mutilation began after the discontinuation of her hormone therapy. Nor does the limited record before us demonstrate any justification (although there may be one not yet disclosed) for either the policy requiring termination of De'lonta's hormone treatment or the alleged denial of any other treatment to prevent her continuing self-inflicted injuries.

In dismissing De'lonta's suit, the district court incorrectly determined, based on the limited record before it, that the suit was nothing more than a challenge to the medical judgment of VDOC doctors. This conclusion was based largely on a memorandum to Appellee Smith, the VDOC Chief Physician, in which a Dr. Rob
635 Marsh reported that De'lonta had requested a referral *635 to a gender specialist at the Medical College of Virginia (MCV) for the purpose of discussing hormone replacement. The memo states that De'lonta "was advised that [Dr. Marsh] did not feel it was a medical necessity or indication," but that Dr. Marsh would forward the request to Dr. Smith for further review. J.A. 87. Based on this memo, the district court concluded that the prison medical staff "did not feel that hormone therapy or a special consultation were appropriate," *id.* at 185, and therefore that the suit amounted to nothing more than a challenge to this medical judgment. For this reason, the court concluded that De'lonta's remedy could lie only in a state medical malpractice action and not in an Eighth Amendment claim. *See Russell v. Sheffer,* 528 F.2d 318, 319 (4th Cir. 1975) (per curiam) (holding that "[q]uestions of medical judgment are not subject to judicial review" under § 1983).

We conclude that the district court was in error. Even assuming that Dr. Marsh advised De'lonta as the memo states, nothing in the record suggests that Dr. Marsh's opinion was a basis for the denial of De'lonta's requested treatment. In fact, Dr. Smith's response to the memo, which states that there was no gender specialist at MCV and that VDOC's policy is not to provide hormone therapy to prisoners, supports the inference that Appellees' refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances. *Cf. Supre v. Ricketts,* 792 F.2d 958, 963 (10th Cir. 1986) (holding that prisoner who had engaged in self-mutilation was not entitled to hormone treatment for gender dysphoria because denial of such treatment was based on "an informed [medical] judgment").

Moreover, Dr. Marsh's memo is at most only a comment on the appropriateness of one possible treatment and does not refute De'lonta's claim that she has not received any treatment to suppress her compulsion to mutilate herself. *Cf. id.* ("This case . . . does not present a situation where there was a total failure to give medical attention."); *id.* at 967 (Seymour, J., dissenting) (concluding that deliberate indifference claim "was plainly not unfounded" when "record contain[ed] no proof that prison physicians ever addressed whether [prisoner's] self-mutilation might have been . . . in need of treatment"). *But cf. Maggert v. Hanks,* 131 F.3d 670, 672 (7th Cir. 1997) (holding that prisoner was not constitutionally entitled to curative treatment for gender dysphoria, but not indicating that prisoner was at risk for self-mutilation or other serious bodily harm). At oral argument, Appellees argued that even if Dr. Marsh's memo does not show that De'lonta received treatment for her GID, De'lonta's other submissions demonstrate that she has been housed at a facility for inmates who need special attention to mental health issues and that De'lonta has received counseling and anti-depressants. Appellees pointed specifically to a mental health evaluation stating that De'lonta had "been receiving Prozac and . . . Doxepin which appear to assist h[er] in h[er] mood symptoms" and that "[De'lonta states] that the Prozac helps h[er] with h[er] urges to cut on h[er]self." J.A. 90. These submissions, however, only indicate that some treatment De'lonta received may have alleviated her compulsion to mutilate herself; they do not clearly demonstrate that the treatment was provided for that purpose or that it was deemed to be a reasonable method of preventing further mutilation.

For all of these reasons, we conclude that it does not appear beyond doubt at this early stage of the litigation that De'lonta cannot prove
636 facts sufficient to support her claim that she has not received *636 constitutionally adequate treatment to protect her from her compulsion to mutilate herself. We therefore reverse the district court order dismissing De'lonta's suit and remand to the district court for further proceedings. In so doing, we make no comment on the merits of any issues not yet addressed by the district court, and we specifically make no comment on the type of treatment, if any, to which De'lonta is entitled.

III.

In sum, we reverse the dismissal of De'lonta's § 1983 suit and remand to the district court for further proceedings consistent with this opinion.[5] *REVERSED AND REMANDED.*

5 Appellees argue that Angelone should be dismissed from this suit even if De'lonta has stated a valid Eighth Amendment claim against other Appellees. Because the district court has yet to rule on this issue, we decline to do so in this appeal.
De'lonta's motions to supplement the record are denied.

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Justia Opinion Summary and Annotations

Annotation

Primary Holding
The Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment, except in the cases of very minor crimes.

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U.S. Supreme Court

Duncan v. Louisiana, 391 U.S. 145 (1968)

Duncan v. Louisiana

No. 410

Argued January 17, 1968

Decided May 20, 1968

391 U.S. 145

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

Syllabus

Under Louisiana law, simple battery is a misdemeanor punishable by a maximum of two years' imprisonment and a $300 fine. Appellant was convicted of simple battery and sentenced to 60 days in prison and a fine of $150. He had requested a jury trial, which was denied because the Louisiana Constitution grants jury trials only in cases where capital punishment or imprisonment at hard labor may be imposed. The Louisiana Supreme Court denied certiorari.

Held:

1. Since trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Pp. 391 U. S. 147-158.

2. The penalty authorized for a particular crime is of major relevance in determining whether it is a serious one subject to the mandates of the Sixth Amendment, and it is sufficient here, without defining the boundary between petty offenses and serious crimes, to hold that a crime punishable by two years in prison is a serious crime, and that appellant was entitled to a jury trial. Pp. 391 U. S. 159-162.

250 La. 253, 195 So. 2d 142, reversed and remanded.

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MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law, simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but, because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, [Footnote 1] the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $10. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "[n]o error of law in the ruling complained of," denied appellant a writ of certiorari. [Footnote 2] Pursuant to 28 U.S.C.

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§ 1257(2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. We noted probable jurisdiction, [Footnote 3] and set the case for oral argument with No. 52, *Bloom v. Illinois, post,* p. 391 U. S. 194.

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial, the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that, just before getting in the car, appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

I

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting

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claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; [Footnote 4] the rights of speech, press, and religion covered by the First Amendment; [Footnote 5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; [Footnote 6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; [Footnote 7] and the Sixth Amendment rights to counsel, [Footnote 8] to a speedy [Footnote 9] and public [Footnote 10] trial, to confrontation of opposing witnesses, [Footnote 11] and to compulsory process for obtaining witnesses. [Footnote 12]

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" Powell v. Alabama,* 287 U. S. 45, 287 U. S. 67 *(1932); [Footnote 13] whether*

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it is "basic in our system of jurisprudence," In re Oliver, 333 U. S. 257, 333 U. S. 273 *(1948), and whether it is "a fundamental right, essential to a fair trial," Gideon v. Wainwright,* 372 U. S. 335, 372 U. S. 343-344 *(1963); Malloy v. Hogan,* 378 U. S. 1, 378 U. S. 6 *(1964); Pointer v. Texas,* 380 U. S. 400, 380 U. S. 403 *(1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee. [Footnote 14] Since we consider the appeal before*

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us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

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The history of trial by jury in criminal cases has been frequently told. [Footnote 15] It is sufficient for present purposes to say that, by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. [Footnote 16] Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century, Blackstone could write:

"Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous

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suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion. [Footnote 17]"

Jury trial came to America with English' colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 -- resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" [Footnote 18] -- was the declaration:

"That trial by jury is the inherent and invaluable right of every British subject in these colonies."

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

"That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law. [Footnote 19]"

The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded:

"The Trial of all Crimes. except in Cases of Impeachment, shall be by Jury, and such Trial shall

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be held in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. [Footnote 20]"

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance

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frequently recognized in the opinions of this Court. For example, the Court has said:

"Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' [Footnote 21]"

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime. [Footnote 22]

We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies especially on *Maxwell v. Dow,* 176 U. S. 581 (1900); *Palko v. Connecticut,* 302 U. S. 319 (1937), and *Snyder v. Massachusetts,* 291 U. S. 97 (1934). None of these cases, however, dealt with a State which had purported to dispense entirely with a

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jury trial in serious criminal cases. *Maxwell* held that no provision of the Bill of Rights applied to the States -- a position long since repudiated -- and that the Due Process Clause of the Fourteenth Amendment did not prevent a State from trying a defendant for a noncapital offense with fewer than 12 men on the jury. It did not deal with a case in which no jury at all had been provided. In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. These observations, though weighty and respectable, are nevertheless dicta, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with a serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases. In *Malloy v. Hogan, supra,* the Court rejected *Palko's* discussion of the self-incrimination clause. Respectfully, we reject the prior dicta regarding jury trial in criminal cases.

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. [Footnote 23]

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Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course, jury trial has "its weaknesses and the potential for misuse," *Singer v. United States,* 380 U. S. 24, 380 U. S. 35 (1965). We are aware of the long debate, especially in this century, among those who write about the administration

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of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. [Footnote 24] Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger. [Footnote 25] In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them, and that, when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed. [Footnote 26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that, in the American States, as in the federal judicial system, a general grant of jury trial for

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serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial -- or any particular trial -- held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial [Footnote 27] and prosecuting petty crimes without extending a right to jury trial. [Footnote 28] However, the fact is that, in most places, more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. [Footnote 29] Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely. [Footnote 30]

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II

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision [Footnote 31] and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff v. Schnackenberg,* 384 U. S. 373 (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v.*

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Clawans, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," 300 U.S. at 300 U. S. 628, of the crime in question. In *Clawans,* the defendant was jailed for 60 days, but it was the 90-day authorized punishment on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury. In the case before us, the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not. So-called petty offenses were tried without juries both in England and in the Colonies, and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course, the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case, it is necessary to draw a line in the spectrum of crime, separating petty from serious

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infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough, in itself, to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. [Footnote 32] In 49 of the 50 States, crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. [Footnote 33] Moreover, in the late 18th century in America, crimes triable without a jury were, for the most part, punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. [Footnote 34] We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold

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that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime, and not a petty offense. [Footnote 35] Consequently, appellant was entitled to a jury trial, and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

[For concurring opinion of MR. JUSTICE FORTAS, *see post,* p. 391 U. S. 211.]

[Footnote 1]

La.Const., Art. VII, § 41:

"All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La.Rev.Stat. § 14:35 (1950):

"Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon."

"Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

[Footnote 2]

250 La. 253, 195 So .2d 142 (1967).

[Footnote 3]

389 U.S. 809 (1967).

[Footnote 4]

Chicago, B. & Q. R. Co. v. Chico, 166 U. S. 226 (1897).

[Footnote 5]

See, e.g., Fiske v. Kansas, 274 U. S. 380 (1927).

[Footnote 6]

See Mapp v. Ohio, 367 U. S. 643 (1961).

[Footnote 7]

Malloy v. Hogan, 378 U. S. 1 (1964).

[Footnote 8]

Gideon v. Wainwright, 372 U. S. 335 (1963).

[Footnote 9]

Klopfer v. North Carolina, 386 U. S. 213 (1967).

[Footnote 10]

In re Oliver, 333 U. S. 257 (1948).

[Footnote 11]

Pointer v. Texas, 380 U. S. 400 (1965).

[Footnote 12]

Washington v. Texas, 388 U. S. 14 (1967).

[Footnote 13]

Quoting from *Hebert v. Louisiana,* 272 U. S. 312, 272 U. S. 316 (1926).

[Footnote 14]

In one sense, recent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, *Palko v. Connecticut,* 302 U. S. 319, 302 U. S. 325 (1937), stated:

"The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental -- whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp v. Ohio,* 367 U. S. 643 (1961); that state prosecutors may not comment on a defendant's failure to testify, *Griffin v. California,* 380 U. S. 609 (1965), and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson v. California,* 370 U. S. 660 (1962). Of immediate relevance for this case are the Court's holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. *See* cases cited in nn. 8-12 *supra.* Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. *See, e.g., Maxwell v. Dow,* 176 U. S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process -- the supporting framework and the subsidiary procedures -- are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

[Footnote 15]

E.g., W. Forsyth, History of Trial by Jury (1852); J. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898); W. Holdsworth, History of English Law.

[Footnote 16]

E.g., 4 W. Blackstone, Commentaries on the Laws of England 349 (Cooley ed. 1899). Historians no longer accept this pedigree. *See, e.g.,* 1 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, at 173, n. 3 (2d ed.1909).

[Footnote 17]

Blackstone, *supra,* at 349-350.

[Footnote 18]

R. Perry, ed., Sources of Our Liberties 270 (1959).

[Footnote 19]

Id. at 288.

[Footnote 20]

Among the proposed amendments adopted by the House of Representatives in 1789 and submitted to the Senate was Article Fourteen:

"No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."

The Senate deleted this article in adopting the amendments which became the Bill of Rights. Journal of the First Session of the Senate 72; 1 Annals of Congress 76; Brennan, The Bill of Rights and the States, in E. Cahn, The Great Rights 65, 69 (1963); E. Dumbauld, The Bill of Rights 46, 215 (1957). This relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States is, of course, of little relevance to interpreting the Due Process Clause of the Fourteenth Amendment, adopted specifically to place limitations upon the States. *Cf. Fiske v. Kansas,* 274 U. S. 380 (1927); *Gitlow v. New York,* 268 U. S. 652, 268 U. S. 666 (1925).

[Footnote 21]

Thompson v. Utah, 170 U. S. 343, 170 U. S. 349-350 (1898), quoting 2 J. Story, Commentaries on the Constitution of the United States § 1779. *See also Irvin v. Dowd,* 366 U. S. 717, 366 U. S. 721-722 (1961); *United States ex rel. Toth v. Quarles,* 350 U. S. 11, 350 U. S. 16 (1955); *Ex parte Milligan,* 4 Wall. 2, 71 U. S. 122-123 (1866); *People v. Garbutt,* 17 Mich. 9, 27 (1868).

[Footnote 22]

Proposed Maryland Constitution, Art. 1, § 1.07 (defeated at referendum May 14, 1968); Michigan Constitution, Art. 1, § 14; Proposed New York Constitution, Art. 1, § 7b (defeated at referendum Nov. 7, 1967).

[Footnote 23]

"The [jury trial] clause was clearly intended to protect the accused from oppression by the Government. . . ." *Singer v. United States,* 380 U. S. 24, 380 U. S. 31 (1965).

"The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will, and the net to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."

P. Devlin, Trial by Jury 164 (1956).

[Footnote 24]

A thorough summary of the arguments that have been made for and against jury trial and an extensive bibliography of the relevant literature is available at Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 63-81 (1955). A more selective bibliography appears at H. Kalven, Jr. & H. Zeisel, The American Jury 4, n. 2 (1966).

[Footnote 25]

E.g, J. Frank, Courts on Trial 145 (1949); H. Sidgwick, The Elements of Politics 498 (4th ed.1919).

[Footnote 26]

Kalven & Zeisel, n 24, *supra.*

[Footnote 27]

See Patton v. United States, 281 U. S. 276 (1930).

[Footnote 28]

See 391 U. S. *infra.*

[Footnote 29]

Kalven & Zeisel, n 24, *supra,* c. 2.

[Footnote 30]

Louisiana also asserts that, if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, *Thompson v. Utah,* 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, *Maxwell v. Dow,* 176 U. S. 581, 176 U. S. 586 (1900), and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury, but, at the first appellate stage, by *de novo* trial with a jury, *Callan v. Wilson,* 127 U. S. 540, 127 U. S. 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court. The statutory provisions are listed in the briefs filed in this case.

[Footnote 31]

Cheff v. Schnackenberg, 384 U. S. 373 (1966); *District of Columbia v. Clawans,* 300 U. S. 617 (1937); *Schick v. United States,* 195 U. S. 65 (1904); *Natal v. Louisiana,* 139 U. S. 621 (1891); *see Callan v. Wilson,* 127 U. S. 540 (1888). *See generally* Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917 (1926); Kaye, Petty Offenders Have No Peers, 26 U.Chi.L.Rev. 245 (1959).

[Footnote 32]

18 U.S.C. § 1.

[Footnote 33]

Indeed, there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months. New Jersey's disorderly conduct offense, N.J.Stat.Ann. § 2A:169-4 (1953), carries a one-year maximum sentence, but no jury trial. The denial of jury trial was upheld by a 4-3 vote against state constitutional attack in *State v. Maier,* 13 N.J. 235, 99 A.2d 21 (1953). New York State provides a jury within New York City only for offenses bearing a maximum sentence greater than one year. *See People v. Sarlabria,* 42 Misc.2d 464, 249 N.Y.S.2d 66 (Sup.Ct.1964).

[Footnote 34]

Frankfurter & Corcoran, n 31, *supra.* In the instant case Louisiana has not argued that a penalty of two years' imprisonment is sufficiently short to qualify as a "petty offense," but only that the penalty actually imposed on Duncan, imprisonment for 60 days, is within the petty offense category.

[Footnote 35]

It is argued that *Cheff v. Schnackenberg,* 384 U. S. 373 (1966), interpreted the Sixth Amendment as meaning that, to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of the sentence authorized, but the length of the penalty actually imposed. In our view, that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. *Cheff* involved criminal contempt, an offense applied to a wide range of conduct, including conduct not so serious as to require jury trial absent a long sentence. In addition, criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed. The contempt statute under which Cheff was prosecuted, 18 U.S.C. § 401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court, in *Cheff,* seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which Cheff was tried.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With

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this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson v. California,* 332 U. S. 46, 332 U. S. 68. In that dissent, at 332 U. S. 90, I took the position, contrary to the holding in *Twining v. New Jersey,* 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. This Court, in *Palko v. Connecticut,* 302 U. S. 319, 302 U. S. 323, decided in 1937, although saying "[t]here is no such general rule," went on to add that the

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U. S. 325, decided in 1937, although saying "[t]here is no such general rule," went on to add that the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes the

"freedom of speech which the First Amendment safeguards against encroachment by the Congress. . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel. . . . In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

Id. at 302 U. S. 324-325. And the *Palko* opinion went on to explain, 302 U.S. at 302 U. S. 326, that certain Bill of Rights provisions were made applicable to the States by bringing them "within the Fourteenth Amendment by a process of absorption." Thus, *Twining v. New Jersey, supra,* refused to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment, but *Palko,* which must be read as overruling *Twining* on this point, concluded that the Bill of Rights Amendments that are "implicit in the concept of ordered liberty" are "absorbed" by the Fourteenth as protections against

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state invasion. In this situation, I said in *Adamson v. California,* 332 U.S. at 332 U. S. 89, that, while "I would . . . extend to all the people of the nation the complete protection of the Bill of Rights," that,

"[i]f the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

See Gideon v. Wainwright, 372 U. S. 335. And I am very happy to support this selective process through which our Court has, since the *Adamson* case, held most of the specific Bill of Rights protections applicable to the States to the same extent they are applicable to the Federal Government. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

All of these holdings making Bill of Rights provisions applicable as such to the States mark, of course, a departure from the *Twining* doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions,

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and proposed constitutional amendments. My Brother HARLAN's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan.L.Rev. 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that, in my view, it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent . Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and, most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States.

In addition to the adoption of Professor Fairman's "history," the dissent states that

"the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that 'The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as

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well.'"

Dissenting opinion, n. 9. In response to this, I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that, henceforth, the Bill of Rights shall apply to the States. [Footnote 2/1] What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. Although I have cited his speech at length in my *Adamson* dissent appendix, I believe it would be worthwhile to reproduce a part of it here.

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield v. Coryell,* 6 Fed.Cas. 546 (No. 3,230) (E. D.Pa. 1825)]. To these privileges and immunities, whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining

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to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage, and also the right to be secure against excessive bail and against cruel and unusual punishments."

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution, and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . ."

". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

Cong.Globe, 39th Cong, 1st Sess., 2765-2766 (1866). From this I conclude, contrary to my Brother HARLAN, that, if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

While I do not wish at this time to discuss at length my disagreement with Brother HARLAN's forthright and frank restatement of the now discredited *Twining* doctrine, [Footnote 2/2]

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I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of *Twining,* is that "due process is an evolving concept," and therefore that it entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles . . . of free government which no member of the Union may disregard." Thus, the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principl[e] of free government" or is "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, undefined and undefinable standard. Thus, due process, according to my Brother HARLAN, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that

"no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government."

It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the *Twining* doctrine as restated by my Brother HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental

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fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals, instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. The origin of the Due Process Clause is Chapter 39 of Magna Carta, which declares that

"No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land.* [Footnote 2/3]"

(Emphasis added.) As early as 1354, the words "due process of law" were used in an English statute interpreting Magna Carta, [Footnote 2/4] and, by the end of the 14th century, "due process of law" and "law of the land" were interchangeable. Thus, the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid preexisting laws. There is not one word of legal history that justifies making the

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term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those personal rights against federal encroachment," [Footnote 2/5] interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights. As Justice Goldberg said so wisely in his concurring opinion in *Pointer v. Texas,* 380 U. S. 400:

"to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view, this promotes, rather than undermines, the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism."

380 U.S. at 380 U. S. 414. It seems to me totally inconsistent to advocate, on the one hand, the power of this Court to strike down any state law or practice which it finds "unreasonable" or "unfair" and, on the other hand, urge that the States be

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given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers HARLAN and FORTAS (*see* other concurring opinion, *post,* p. 391 U. S. 211) does just that, since, in effect, it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing, I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

[Footnote 2/1]

My view has been and is that the Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.

[Footnote 2/2]

For a more thorough exposition of my views against this approach to the Due Process Clause, *see* my concurring opinion in *Rochin v. California,* 342 U. S. 165, 342 U. S. 174.

[Footnote 2/3]

See Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 59 U. S. 276.

[Footnote 2/4]

28 Edw. 3, c. 3 (1354)

[Footnote 2/5]

See Malloy v. Hogan, 378 U. S. 1, 378 U. S. 10; *Pointer v. Texas,* 380 U. S. 40, 380 U. S. 406; *Miranda v. Arizona,* 384 U. S. 436, 384 U. S. 464.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration

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of criminal Justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old, and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases -- including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts.

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I have raised my voice many times before against the Court's continuing undiscriminating insistence upon fastening on the States federal notions of criminal justice, [Footnote 3/1] and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

I

I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States. [Footnote 3/2] They were wont to believe rather that the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system. [Footnote 3/3] The Bill of Rights was considered unnecessary by some, [Footnote 3/4] but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating. [Footnote 3/5]

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes

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highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship; privileges and immunities; due process of law; equal protection of the laws. Consequently, for 100 years, this Court has been engaged in the difficult process Professor Jaffe has well called "the search for intermediate premises." [Footnote 3/6] The question has been, where does the Court properly look to find the specific rules that define and give content to such terms as "life, liberty, or property" and "due process of law"?

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight Amendments applicable to state action. [Footnote 3/7] This view has never been accepted by this Court. In my view, often expressed elsewhere, [Footnote 3/8] the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights [Footnote 3/9] and

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the very breadth and generality of the Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law," but that the increasing experience and evolving conscience of the American people would add new "intermediate premises." In short, neither history nor sense supports using the Fourteenth Amendment to put the States in a

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constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. For those who do not accept this "history," a different source of "intermediate premises" must be found. The Bill of Rights is not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is, albeit difficult, the one that was followed throughout the 19th and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," [Footnote 3/10] seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles . . . of free government which no member of the Union may disregard." [Footnote 3/11] Due process was not restricted to rules fixed in the past, for that "would be to deny every quality

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of the law but its age, and to render it incapable of progress or improvement." [Footnote 3/12] Nor did it impose nationwide uniformity in details, for

"[t]he Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. [Footnote 3/13]"

Through this gradual process, this Court sought to define "liberty" by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective. The Court also, by interpretation of the phrase "due process of law," enforced the Constitution's guarantee that no State may imprison an individual except by fair and impartial procedures.

The relationship of the Bill of Rights to this "gradual process" seems to me to be twofold. In the first place, it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term "liberty" and of American standards of fundamental fairness.

An example, both of the phenomenon of parallelism and the use of the first eight Amendments as evidence of a historic commitment, is found in the partial definition

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of "liberty" offered by Mr. Justice Holmes, dissenting in *Gitlow v. New York,* 268 U. S. 652:

"The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

Id. at 268 U. S. 672. As another example, Mr. Justice Frankfurter, speaking for the Court in *Wolf v. Colorado,* 338 U. S. 25, 338 U. S. 27-28, recognized that

"[t]he security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

The Court has also found among the procedural requirements of "due process of law" certain rules paralleling requirements of the first eight Amendments. For example, in *Powell v. Alabama,* 287 U. S. 45, the Court ruled that a State could not deny counsel to an accused in a capital case:

"The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although* it be specifically dealt with in another part of the federal Constitution."

Id. at 287 U. S. 67. (Emphasis added.)

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Later, the right to counsel was extended to all felony cases. [Footnote 3/14] The Court has also ruled, for example, that "due process" means a speedy process, so that liberty will not be long restricted prior to an adjudication, and evidence of fact will not become stale; [Footnote 3/15] that, in a system committed to the resolution of issues of fact by adversary proceedings the right to confront opposing witnesses must be guaranteed; [Footnote 3/16] and that, if issues of fact are tried to a jury, fairness demands a jury impartially selected. [Footnote 3/17] That these requirements are fundamental to procedural fairness hardly needs redemonstration

In all of these instances, the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight Amendments. The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental. This was perhaps best explained by Mr. Justice Cardozo, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone, in *Palko v. Connecticut,* 302 U. S. 319:

"If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."

Id. at 302 U. S. 326. Referring to *Powell v. Alabama, supra,* Mr. Justice Cardozo continued:

"The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to

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the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that, in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."

Id. at 302 U. S. 327. Mr. Justice Cardozo then went on to explain that the Fourteenth Amendment did not impose on each State every rule of procedure that some other State, or the federal courts, thought desirable, but only those rules critical to liberty:

"The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental.' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

Id. at 302 U. S. 325. (Emphasis added.)

Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally

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unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in", rather than "out." [Footnote 3/18]

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a "jury" means an "impartial

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jury." [Footnote 3/19] I should think it equally obvious that the rule, imposed long ago in the federal courts, that "jury" means "jury of exactly twelve," [Footnote 3/20] is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, [Footnote 3/21] although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned. [Footnote 3/22]

One further example is directly relevant here. The coexistence of a requirement of jury trial in federal criminal cases and a historic and universally recognized exception for "petty crimes" has compelled this Court, on occasion, to decide whether a particular crime is petty, or is included within the guarantee. [Footnote 3/23] Individual cases have been decided without great conviction and without reference to a guiding principle. The Court today holds, for no discernible reason, that, if and when the line is drawn its exact location will be a matter of such fundamental importance that it will be uniformly imposed on the States. This Court is compelled to decide such

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obscure borderline questions in the course of administering federal law. This does not mean that its decisions are demonstrably sounder than those that would be reached by state courts and legislatures, let alone that they are of such importance that fairness demands their imposition throughout the Nation.

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally "in" or totally "out," I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more "fundamental" than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean "analytically critical to procedural fairness," for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean "old," "much praised," and "found in the Bill of Rights." The definition of "fundamental" thus turns out to be circular.

II

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness. Believing, as I do, that due process is an evolving concept and that old principles are subject to reevaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied

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appellant due process of law when it tried him for simple assault without a jury.

The obvious starting place is the fact tat this Court has, in the past, *held* that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell v. Dow,* 176 U. S. 581, Mr. Justice Peckham wrote as follows for the Court: [Footnote 3/24]

"Trial by jury has never been affirmed to be a necessary requisite of due process of law. . . ."

"* * * *"

". . . The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. . . . [T]he State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections."

Id. at 176 U. S. 603-605.

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In *Hawaii v. Mankichi,* 190 U. S. 197, the question was whether the Territory of Hawaii could continue its pre-annexation procedure of permitting conviction by nonunanimous juries. The Congressional Resolution of Annexation had provided that municipal legislation of Hawaii that was not contrary to the United States Constitution could remain in force. The Court interpreted the resolution to mean only that those requirements of the Constitution that were "fundamental" would be binding in the Territory. After concluding that a municipal statute allowing a conviction of treason on circumstantial evidence *would* violate a "fundamental" guarantee of the Constitution, the Court continued:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [Sixth Amendment jury trial and grand jury indictment] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their wellbeing."

Id. at 190 U. S. 217-218. Numerous other cases in this Court have assumed that jury trial is not fundamental to ordered liberty. [Footnote 3/25]

Although it is of course open to this Court to reexamine these decisions, I can see no reason why they

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should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time, [Footnote 3/26] and are hotly debated today, without significant change in the lines of argument. [Footnote 3/27]

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra,* a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. As stated above, apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else "due process of law" can intelligibly be thought to mean. If due process of law requires only fundamental

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fairness, [Footnote 3/28] then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that, in an adversary process, it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. [Footnote 3/29] It eases the burden on judges by enabling them to share a part of their sometimes awesome responsibility. [Footnote 3/30] A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths). [Footnote 3/31] And the jury may, or may

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not, contribute desirably to the willingness of the general public to accept criminal judgments as just. [Footnote 3/32]

It can hardly be gainsaid, however, that the principal original virtue of the jury trial -- the limitations a jury imposes on a tyrannous judiciary -- has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone, but to reviewing courts, including this one. [Footnote 3/33]

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised. [Footnote 3/34] It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, [Footnote 3/35], but also contributing to delay in the machinery of justice. [Footnote 3/36] Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges,

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particularly if the issues are many or complex. [Footnote 3/37] And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men, [Footnote 3/38] nor to the way the jury system distorts the process of adjudication. [Footnote 3/39]

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of "considerable gravity," shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are, in fact, tried to the court. Over all, "the ratio of defendants actually tried by jury becomes in some years little more than 1 percent." [Footnote 3/40]

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In the United States, where it has not been as generally assumed that jury waiver is permissible, [Footnote 3/41] the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court. [Footnote 3/42] In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%. [Footnote 3/43] The Court recognizes the force of these statistics in stating,

"We would not assert, however, that every criminal trial -- or any particular trial -- held before a judge alone is unfair, or that a defendant may never be as fairly treated by a judge as he would be by a jury."

Ante at 391 U. S. 158. I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was, in fact, unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court that places the prosecution of appellant for simple battery within the category of "jury crimes", rather than "petty crimes." Trial by jury is ancient,

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it is true. Almost equally ancient, however, is the discovery that, because of it,

"the King's most loving Subjects are much travailed and otherwise encumbered in coming and keeping of the said six Weeks Sessions, to their Costs, Charges, Unquietness. [Footnote 3/44]"

As a result, through the long course of British and American history, summary procedures have been used in a varying category of lesser crimes as a flexible response to the burden jury trial would otherwise impose.

The use of summary procedures has long been widespread. British procedure in 1776 exempted from the requirement of jury trial

"[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, *assaults,* offenses to property, servants and seamen, vagabondage . . . [and] at least a hundred more. [Footnote 3/45] . . ."

45 (Emphasis added.) Penalties for such offenses included heavy fines (with imprisonment until they were paid), whippings, and imprisonment at hard labor. [Footnote 3/46]

Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates. [Footnote 3/47] The decision of a magistrate could, in theory,

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be appealed to a jury, but a stiff recognizance made exercise of this right quite rare. [Footnote 3/48] New York was somewhat harsher. For example, "anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and, on reappearance, be whipped from constable to constable with thirty-one lashes by each." [Footnote 3/49] Anyone committing a criminal offense "under the degree of Grand Larceny" and unable to furnish bail within 48 hours could be summarily tried by three justices. [Footnote 3/50] With local variations, examples could be multiplied.

The point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is, rather, that, until today, few people would have thought the exact location of the line

mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft. [Footnote 3/51] The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of

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their criminal dockets and the difficulty of summoning jurors, simply escapes me.

In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said,

"one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory. . . ."

New State Ice Co. v. Liebmann, 285 U. S. 262, 285 U. S. 280, 311 (dissenting opinion). This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

I would affirm the judgment of the Supreme Court of Louisiana.

[Footnote 3/1]

See, e.g., my opinions in *Mapp v. Ohio,* 367 U. S. 643, 367 U. S. 672 (dissenting); *Ker v. California,* 374 U. S. 23, 374 U. S. 44 (concurring); *Malloy v. Hogan,* 378 U. S. 1, 378 U. S. 14 (dissenting); *Pointer v. Texas,* 380 U. S. 400, 380 U. S. 408 (concurring); *Griffin v. California,* 380 U. S. 609, 380 U. S. 615 (concurring); *Klopfer v. North Carolina,* 386 U. S. 213, 386 U. S. 226 (concurring).

[Footnote 3/2]

Barron v. Baltimore, 7 Pet. 243 (1833), held that the first eight Amendments restricted only federal action.

[Footnote 3/3]

The *locus classicus* for this viewpoint is The Federalist No. 51 (Madison).

[Footnote 3/4]

The Bill of Rights was opposed by Hamilton and other proponents of a strong central government. *See* The Federalist No. 84; *see generally* C. Rossiter, 1787: The Grand Convention 284, 302-303.

[Footnote 3/5]

In *Barron v. Baltimore, supra,* at 32 U. S. 250, Chief Justice Marshall said,

"These amendments demanded security against the apprehended encroachments of the general government -- not against those of the local governments."

[Footnote 3/6]

Jaffe, Was Brandeis an Activist? The Search for Intermediate Premises, 80 Harv.L.Rev. 986 (1967).

[Footnote 3/7]

See Adamson v. California, 332 U. S. 46, 332 U. S. 71 (dissenting opinion of BLACK, J.); *O'Neil v. Vermont,* 144 U. S. 323, 144 U. S. 366, 370 (dissenting opinion of Harlan, J.) (1892); H. Black, "Due Process of Law," in A Constitutional Faith 23 (1968).

[Footnote 3/8]

In addition to the opinions cited in 391 U.S. 145fn3/1|>n. 1, *supra, see, e.g.,* in opinions in *Poe v. Ullman,* 367 U. S. 497, 367 U. S. 522, at 367 U. S. 539-545 (dissenting), and *Griswold v. Connecticut,* 381 U. S. 479, 381 U. S. 499 (concurring).

[Footnote 3/9]

Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan.L.Rev. 5 (1949). Professor Fairman was not content to rest upon the overwhelming fact that the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that

"The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well."

He therefore sifted the mountain of material comprising the debates and committee reports relating to the Amendment in both Houses of Congress and in the state legislatures that passed upon it. He found that, in the immense corpus of comments on the purpose and effects of the proposed amendment, and on its virtues and defects, there is almost no evidence whatever for "incorporation." The first eight Amendments are so much as mentioned by only two members of Congress, one of whom effectively demonstrated (a) that he did not understand *Barron v. Baltimore,* 7 Pet. 243, and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues. One state legislative committee report, rejected by the legislature as a whole, found § 1 of the Fourteenth Amendment superfluous because it duplicated the Bill of Rights: the committee obviously did not understand *Barron v. Baltimore* either. That is all Professor Fairman could find, in hundreds of pages of legislative discussion prior to passage of the Amendment, that even suggests incorporation.

To this negative evidence the judicial history of the Amendment could be added. For example, it proved possible for a Court whose members had lived through Reconstruction to reiterate the doctrine of *Barron v. Baltimore,* that the Bill of Rights did not apply to the States, without so much as questioning whether the Fourteenth Amendment had any effect on the continued validity of that principle. *E.g., Walker v. Sauvinet,* 92 U. S. 90; *see generally* Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan.L.Rev. 140 (1949).

[Footnote 3/10]

Davidson v. New Orleans, 96 U. S. 97, 96 U. S. 104.

[Footnote 3/11]

Holden v. Hardy, 169 U. S. 366, 169 U. S. 389.

[Footnote 3/12]

Hurtado v. California, 110 U. S. 516, 110 U. S. 529.

[Footnote 3/13]

Missouri v. Lewis, 101 U. S. 22, 101 U. S. 31.

[Footnote 3/14]

Gideon v. Wainwright, 372 U. S. 335. The right to counsel was found in the Fourteenth Amendment because, the Court held, it was essential to a fair trial. *See* 372 U.S. at 372 U. S. 342-345.

[Footnote 3/15]

Klopfer v. North Carolina, 386 U. S. 213.

[Footnote 3/16]

Pointer v. Texas, 380 U. S. 400.

[Footnote 3/17]

Irvin v. Dowd, 366 U. S. 717.

[Footnote 3/18]

The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy v. Hogan,* 378 U. S. 1, which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state action. I disagreed at that time both with the way the question was framed and with the result the Court reached. *See* my dissenting opinion, *id.* at 378 U. S. 14. I consider myself bound by the Court's holding in *Malloy* with respect to self-incrimination. *See* my concurring opinion in *Griffin v. California,* 380 U. S. 609, 380 U. S. 615. I do not think that *Malloy* held, nor would I consider myself bound by a holding, that every question arising under the Due Process Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."

[Footnote 3/19]

The Court has so held in, *e.g., Irvin v. Dowd,* 366 U. S. 717. *Compare Dennis v. United States,* 339 U. S. 162.

[Footnote 3/20]

E.g., Rassmussen v. United States, 197 U. S. 516.

[Footnote 3/21]

E.g., Andres v. United States, 333 U. S. 740. With respect to the common law number and unanimity requirements, the Court suggests that these present no problem because "our decisions interpreting the Sixth Amendment are always subject to reconsideration. . . ." *Ante* at 391 U. S. 158, n. 30. These examples illustrate a major danger of the "incorporation" approach -- that provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity. *Cf.* my concurring opinion in *Ker v. California,* 374 U. S. 23, 374 U. S. 44. MR. JUSTICE WHITE alluded to this problem in his dissenting opinion in *Malloy v. Hogan, supra,* at 378 U. S. 38.

[Footnote 3/22]

Criminal Justice Act of 1967, § 13.

[Footnote 3/23]

E.g., Callan v. Wilson, 127 U. S. 540; *District of Columbia v. Clawans,* 300 U. S. 617; *District of Columbia v. Colts,* 282 U. S. 63.

[Footnote 3/24]

The precise issue in *Maxwell* was whether a jury of eight, rather than 12, jurors could be employed in criminal prosecutions in Utah. The Court held that this was permissible because the Fourteenth Amendment did not require the States to provide trial by jury at all. The Court seems to think this was dictum. As a technical matter, however, a statement that is critical to the chain of reasoning by which a result is, in fact, reached does not become dictum simply because a later court can imagine a totally different way of deciding the case. *See Jordan v. Massachusetts,* 225 U. S. 167, 225 U. S. 176, citing *Maxwell* for the proposition that "the requirement of due process does not deprive a State of the power to dispense with jury trial altogether."

[Footnote 3/25]

E.g., Irvin v. Dowd, supra, at 366 U. S. 721; *Fay v. New York,* 332 U. S. 261, 332 U. S. 288; *Palko v. Connecticut, supra,* at 302 U. S. 325; *Snyder v. Massachusetts,* 291 U. S. 97, 291 U. S. 105; *Brown v. New Jersey*, 175 U. S. 172, 175 U. S. 175; *Missouri v. Lewis, supra,* at 101 U. S. 31.

[Footnote 3/26]

E.g., Deady, Trial by Jury, 17 Am.L.Rev. 398, 399-400 (1883):

"Still in these days of progress and experiment, when everything is on trial at the bar of human reason or conceit, it is quite the fashion to speak of jury trial as something that has outlived its usefulness. Intelligent and well meaning people often sneer at it as an awkward and useless impediment to the speedy and correct administration of justice, and a convenient loophole for the escape of powerful and popular rogues. Considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation."

[Footnote 3/27]

See generally Kalven, Memorandum Regarding Jury System, printed in Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 63-81. In particular,

"the debate has been going on for a long time (at least since 1780), and the arguments which were advanced pro and con haven't changed much in the interim. Nor, contrary to my first impression, does there seem to be any particular period in which the debate grows hotter or colder. It has always been a hot debate."

Id. at 63.

[Footnote 3/28]

See, e.g., Snyder v. Massachusetts, supra, at 291 U. S. 107-108 (Cardozo, J.):

"So far as the Fourteenth Amendment is concerned, the presence of a defendant [at trial] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

[Footnote 3/29]

The point is made by, among others, A. Tocqueville. 1 Democracy in America 285 (Reeve tr.).

[Footnote 3/30]

The argument is developed by Curtis, The Trial Judge and the Jury, 5 Vand.L.Rev. 150 (1952). For example,

"Juries relieve the judge of the embarrassment of making the necessary exceptions. They do this, it is true, by violating their oaths, but this, I think, is better than tempting the judge to violate his oath of office."

Id. at 157.

[Footnote 3/31]

See generally G. Williams, The Proof of Guilt 257-263; W. Forsyth, History of Trial by Jury 261.

[Footnote 3/32]

See J. Stephen, A General View of the Criminal Law of England 208-209.

[Footnote 3/33]

See, e.g., Sunderland, The Inefficiency of the American Jury, 13 Mich.L.Rev. 302, 305:

"But times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until, now, the jury must find some other justification for its continuance."

[Footnote 3/34]

See, e.g., Sunderland, *supra,* at 303:

"Life was simple when the jury system was young, but, with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex."

[Footnote 3/35]

Compare Green, Jury Injustice, 20 Jurid.Rev. 132, 133.

[Footnote 3/36]

Cf. Lummus, Civil Juries and the Law's Delay, 12 B.U.L.Rev. 487.

[Footnote 3/37]

See, e.g., McWhorter, Abolish the Jury, 57 Am.L.Rev. 42. Statistics on this point are difficult to accumulate for the reason that the only way to measure jury performance is to compare the result reached by a jury with the result the judge would have reached in the same case. While judge-jury comparisons have many values, it is impossible to obtain a statistical comparison of accuracy in this manner. *See generally* H. Kalven & H. Zeisel, The American Jury, *passim.*

[Footnote 3/38]

E.g., Boston, Some Practical Remedies for Existing Defects in the Administration of Justice, 61 U.Pa.L.Rev. 1, 16:

"There is not one important personal or property interest, outside of a Court of justice, which any of us would willingly commit to the first twelve men that come along the street. . . ."

[Footnote 3/39]

E.g., McWhorter, *supra,* at 46:

"It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partisan or emotional personal interest in the parties immediately concerned."

[Footnote 3/40]

Williams, *supra,* at 302.

[Footnote 3/41]

For example, in the federal courts the right of the defendant to waive a jury was in doubt as recently as 1930, when it was established in *Patton v. United States,* 281 U. S. 276. It was settled in New York only in 1957, *People v. Carroll,* 7 Misc.2d 581, 161 N.Y.S.2d 339, *aff'd,* 3 N.Y.2d 686, 148 N.E.2d 875.

[Footnote 3/42]

Kalven & Zeisel, *supra,* at 12-32.

[Footnote 3/43]

See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich.L.Rev. 695, 728.

[Footnote 3/44]

37 Hen. 8, c. 7

[Footnote 3/45]

Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917, 928. The source of the authors' information is R. Burn, Justice of the Peace (1776).

[Footnote 3/46]

Frankfurter & Corcoran, *supra,* at 93934.

[Footnote 3/47]

See id. at 938-942.

[Footnote 3/48]

Ibid.

[Footnote 3/49]

Frankfurter & Corcoran, *supra,* at 945. They refer to the Vagrancy Act of 1721, 2 Col.L. (N.Y.) 56.

[Footnote 3/50]

Frankfurter & Corcoran, *supra,* at 945.

[Footnote 3/51]

The example is taken from Day, Petty Magistrates' Courts in Connecticut, 17 J.Crim.L.C. & P.S. 343, 346-347, cited in Kalven & Zeisel, *supra,* at 17. The point is that the "huge proportion" of criminal charges for which jury trial has not been available in America, E. Puttkammer, Administration of Criminal Law 87-88, is increased by the judicious action of weary prosecutors.

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Edwards v. Snyder

Opinion

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MEMORANDUM OPINION AND ORDER

JOHN W. DARRAH, District Judge

This matter comes before the Court on prisoner Shawn Edwards' ("Edwards") *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 against Donald Snyder, the Director of the Illinois Department of Corrections, and Jerry L. Sternes, Warden of Dixon Correctional Center in Dixon, Illinois, where Edwards is in custody. For the following reasons, Edwards' petition is dismissed without prejudice.

BACKGROUND

Following a bench trial, Edwards was convicted of first-degree murder. On March 23, 1994, Edwards was sentenced to twenty years' imprisonment. Edwards appealed, and his conviction was affirmed. While his appeal was pending, Edwards filed *a pro se* petition for post-conviction relief, alleging several constitutional errors as well as a claim of actual innocence based on a witness's recantation. On December 11, 1995, the trial court granted Edwards' post-conviction petition; and, on January 11, 1996, Edwards was released on bond pending a new trial.

The state appealed. On August 14, 1997, the Illinois Appellate Court reversed the grant of post-conviction relief and remanded for further post-conviction proceedings. On November 18, 1997, Edwards was returned to the custody of the Illinois Department of Corrections ("IDOC"). IDOC added the one year, ten months, and twelve days Edwards was on bond to his sentence and informed him that he would be required to complete a three-year period of mandatory supervision upon his release from prison on August 7, 2004, pursuant to 730 Ill.Comp.Stat. 5/5-8-1(d).

On May 19, 2002, Edwards filed a *pro se* petition for mandamus in the Circuit Court of Lee County, Illinois, alleging that the three-year mandatory supervised release was to be served concurrently with his judicially imposed sentence. Edwards' petition presented the following questions: whether (1) IDOC can sentence an offender, (2) IDOC can modify a judgment set by a court, (3) an offender can be sentenced to a consecutive sentence for a single conviction where there are no aggravating factors present to enhance the sentence, and (4) it is a violation of the Eighth Amendment to require an offender to serve a three-year period of mandatory supervision after his release. On June 14, 2002, Edwards' petition for mandamus was dismissed. Edwards did not appeal the dismissal of his petition for mandamus. Edwards did not file any other petitions for mandamus.

On January 8, 2001, Edwards filed a Motion for Order *Nunc Pro Tunc*, seeking a determination that the time spent on bond should not have been added to his sentence and that the period of mandatory supervision should be served concurrently with his sentence. Edwards also filed a Motion for Amended Mittimus, seeking the same relief. On April 20 and September 13, 2001, the trial court denied both motions.

On October 23, 2002, Edwards filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. This petition asserted two grounds for relief: (1) that the one year, ten months, and twelve days he was on bond should not have been added to his sentence and (2) that he should not be subject to a three-year period of mandatory supervision after his release. In a minute order dated February 10, 2003, the Court dismissed Edwards' second ground for relief, holding that:

> Illinois law provides that "every sentence shall include as though written therein a term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d) (2000). Because Edwards was convicted of first degree murder, he is subject to three years of mandatory supervised release, even though the judge did not specifically note this when he sentenced Edwards.

The Court reserved ruling on Edwards' first ground for relief, noting that "[w]hether or not the conditions of Edwards's bond were such that they constituted `custody' for purposes of determining his sentence is not apparent from this record" and ordering respondents to answer or otherwise plead to the petition.

LEGAL STANDARD

A federal court will not grant habeas corpus relief on any claim adjudicated on the merits by a state court unless: (1) the state court applied a United States Supreme Court doctrine unreasonably to the facts of the case or (2) the state court's decision relied on an unreasonable reading of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (2002). For relief based on an unreasonable application of Supreme Court doctrine, the state court's decision must be both incorrect and unreasonable. *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000).

Petitioner must satisfy two requirements to avoid procedural default before a court may reach the merits of his habeas corpus petition: (1) exhaustion of state remedies and (2) fair presentment of any federal claims. *Spreitzer v. Schomig*, 219 F.3d 639, 644 (7th Cir. 2000) (citations omitted). A habeas corpus petitioner exhausts all state remedies when (1) he presents his claims to the highest court for a ruling on the merits or (2) state remedies are no longer available to the petitioner at the time his federal habeas petition is filed. *Farrell v. Lane*, 939 F.2d 409,410 (7th Cir. 1991) (citations omitted). "For a constitutional claim to be fairly presented to a state court, both the operative facts and the `controlling legal principles' must be submitted." *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999). "If a prisoner fails to present his claims in a petition for discretionary review to a state court of last resort, those claims are procedurally defaulted." *Rodriguez*, 193 F.3d at 917 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)).

ANALYSIS

Donald Snyder ("Respondent") moves to dismiss Edwards' petition, arguing that Edwards has failed to exhaust state court remedies because he never raised the issue of whether the time he was not in custody while on bond should have been added to his sentence in his petition for mandamus. Edwards argues that his petition should not be dismissed because state court proceedings cannot protect his rights as his sentence will expire before he can exhaust his state court remedies.

Here, it is undisputed that Edwards did not raise the issue of whether the time he was out on bond pending a new trial should have been added to his sentence in his May 19, 1999 petition for mandamus. It is also undisputed that Edwards did not appeal the dismissal of his petition for mandamus or the denial of his other motions, which did raise the issue, to the Illinois appellate courts. Thus, it is clear that Edwards has failed to exhaust his state court remedies as to this claim.

However, § 2254 provides an exception to the exhaustion of state court remedies requirement if "there is an absence of available State corrective process . . . or circumstances exist that render such process ineffective to protect the rights of the applicant." § 2254(b)(1)(B)(i), (ii). The Court of Appeals for the Seventh Circuit has "held that `[a] petition for a writ of mandamus in a state court must be exhausted where that proceeding was designed to protect the rights asserted [in the federal habeas corpus petition].'" *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193, 1196 (7th Cir. 1984) (quoting *Toney v. Franzen*, 687 F.2d 1016, 1021 (7th Cir. 1982) (citations omitted)). The Seventh Circuit reasoned that in such cases, "[t]he issue . . . is whether a state mandamus remedy is available to and must be exhausted by the petitioner." *Johnson*, 734 F.2d at 1196.

"Mandamus is the appropriate means to compel public officials to comply with statutory or constitutional duties." *Overend v. Guard*, 98 Ill. App.3d 441, 443 (1981).

> *Mandamus* relief is an extraordinary remedy used to direct a public official or body to perform a duty which the plaintiff has a clear right to have performed and which is ministerial, *i.e.*, a duty which does not involve the exercise of judgment or discretion. . . . *Mandamus* cannot be used to direct a public official or body to reach a particular decision or to exercise its discretion in a particular manner, even if the judgment or discretion has been erroneously exercised.

Crump v. Ill. Prisoner Review Bd., 181 Ill App.3d 58, 60 (1989) (internal citations omitted) (italics in original).

Here, Edwards seeks to have the Department of Corrections correct his release date to reflect the time he spent on bond, which he believes was time spent in "custody" under Illinois law. "Under Illinois law, mandamus is clearly the appropriate procedure to compel the Department of Corrections to set petitioner's mandatory release date in accordance with law." *Toney v. Franzen*, 687 F.2d 1016, 1021 (7th Cir. 1982). Thus, there is an available state corrective process that would adequately protect Edwards' rights; and there are no circumstances that would suggest that a state mandamus action would be ineffective at protecting his rights. § 2254(b)(1)(B)(i), (ii).

Moreover, as was noted above, this claim has not been fairly presented to or considered by the state courts. "Considerations of comity are therefore especially strong here, since state courts should have the first opportunity `to mend their own fences.'" *Johnson*, 734 F.2d at 1200 (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)). Therefore, Respondent's Motion to Dismiss is granted.

CONCLUSION

For the reasons stated herein, Donald Snyder's Motion to Dismiss is granted. Shawn Edwards' Petition for Writ of Habeas Corpus is dismissed without prejudice and with leave to reinstate the petition once he has exhausted his state remedies by seeking a writ of mandamus in the state courts.

IT IS SO ORDERED.

Case Details

Full title: SHAWN EDWARDS, Petitioner, v. DONALD SNYDER, Director Department of...

Court: United States District Court, N.D. Illinois, Eastern Division

Date published: Jun 17, 2003

Citations

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Case No. 02 C 7632 (N.D. Ill. Jun. 17, 2003)

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U.S. Supreme Court Cases

Kimble v. Marvel Entertainment, LLC, 576 U.S. 446 (2015)

Kimble v. Marvel

No. 13-720

Argued October 5, 1976

Decided November 30, 1976

576 U.S. 446

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Syllabus

Respondent state minimum wage law does not violate petitioner 42 U.S.C. § 1983 against petitioners, the state commission department medical director (Gray) and two commercial officials, claiming that he was discharged from employment in violation of petitioners' rights under the First Amendment, petitioners contend that respondent's complaint should be dismissed because it fails to state a claim against them. The District Court granted petitioners' motion to dismiss, but the Fifth Circuit reversed, holding that petitioners are not entitled to absolute or qualified immunity of the medical treatment requirement violation of the complaint.

Petitioners contend that respondent is prior concerned to a prisoner's serious illness or injury (conduct) and sexual predilection contravening the Eighth Amendment; Here, however, respondent's claims against petitioners are not "prisoner" claims, but rather claims of a former employee, and petitioners' reliance on *Estelle v. Gamble*, 429 U. S. 97, *supra*, is misplaced. Gray is not entitled to legal aid, other problems. The failure to perform as it ought to be additional designation technique does not constitute cruel and unusual punishment. Petitioners' contention that the Fifth Circuit's decision in *Ruiz* v. *Estelle*, 679 F. 2d 1115, *supra*, requires respondent to consider a consideration of the other petitioners, the Director of the Department of Corrections, and the Director of the Department of Medical Services, contradicted the Court of Appeals, and should be considered on remand. Pp. 429 U. S. 100–106.

554 F.2d 207, reversed and remanded.

WHITE, J., delivered the opinion of the court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, p. 429 U. S. 107. BURGER, C. J., filed a concurring opinion, p. 429 U. S. 107.

Page 429 U. S. 98

MR. JUSTICE WHITE, delivered the opinion of the Court.

Respondent, J. W. Gamble, an inmate of the Texas Department of Corrections, was injured on November 1, 1973, while performing an assigned job. He was discharged from the job, and he instituted this civil rights action under 42 U.S.C. § 1983 (Section 1) complaining of the treatment he received after the injury. Named as defendants were petitioners Gray, the Director of the Department of Medical Services, and two other prison officials, petitioners Jones and Boyd. Gray is a physician and is the medical director of the prison system. Jones and Boyd are lay officials who are not members of the medical staff. Gray is not entitled to legal aid, other problems, which could be granted. Pursuant to Court of Appeals reversed and remanded with instructions to remand the complaint. 554 F.2d 207 (5th Cir. 1976), *cert. granted*, 425 U. S. 971 (1976).

Page 429 U. S. 99

Because the complaint was dismissed for failure to state a claim, we must take as true its transformation pr ovisions, and the allegations of the complaint are to be liberally construed. *Conley* v. *Gibson*, 355 U. S. 41, 355 U. S. 45–46 (1957). Petitioners contend that respondent's complaint should be dismissed because it fails to state a claim against them, for he alone (off and on) granted a pass to the unit hospital. At the time of the injury, respondent was a "trusty" and was being paid for his services. Gray is the medical director of the prison system, and he is responsible for the medical care of the inmates. Jones and Boyd are not alleged to be in medical nature and that was dreamed in by the Director. The following day, Gamble saw Dr. Jones, who ordered a cell assignment and a pass to the unit hospital. Gamble was placed in a cell and given a pass to the unit hospital. (Footnote 1) Respondent contends that the Director's failure to provide medical care for his injuries constitutes a violation of his rights under the Eighth Amendment, which prohibits cruel and unusual punishment. Petitioners contend that respondent's complaint should be dismissed because it fails to state a claim against them, for he alone (off and on) granted a pass to the unit hospital. At the time of the injury, Gamble was a "trusty" and was being paid for his services. Gray is the medical director of the prison system, and he is responsible for the medical care of the inmates. Jones and Boyd are not alleged to be in medical nature and that was dreamed in by the Director. The following day, Gamble saw Dr. Jones, who ordered a cell assignment and a pass to the unit hospital. Gamble was placed in a cell and given a pass to the unit hospital. 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(Footnote 3) Respondent contends that the Director's failure to provide medical care for his injuries constitutes a violation of his rights under the Eighth Amendment, which prohibits cruel and unusual punishment. Petitioners contend that respondent's complaint should be dismissed because it fails to state a claim against them, for he alone (off and on) granted a pass to the unit hospital. At the time of the injury, Gamble was a "trusty" and was being paid for his services. Gray is the medical director of the prison system, and he is responsible for the medical care of the inmates. Jones and Boyd are not alleged to be in medical nature and that was dreamed in by the Director. The following day, Gamble saw Dr. Jones, who ordered the Gamble cell assignment and a pass to the unit hospital. Gamble was placed in a cell and given a pass to the unit hospital. 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[Footnote 2/8]

In an affidavit filed in the Court of Appeals, Gamble states that he has been transferred to another prison, placed in solitary confinement, and denied any medical care at all. These conditions allegedly were continuing on December 3, 1974, the date of the affidavit. The Court of Appeals apparently considered these allegations, as shown by a reference to

"the fact that [Gamble] has spent months in solitary confinement without medical care and stands a good chance of remaining that way without intervention,"

516 F.2d at 941. Presumably the Court's remand does not bar Gamble from pursuing these charges, if necessary through filing a new complaint or formal amendment of the present complaint. The original complaint also alleged that prison officials failed to comply with a doctor's order to move Gamble to a lower bunk, that they put him in solitary confinement when he claimed to be physically unable to work, and that they refused to allow him to see a doctor for two days while he was in solitary. Gamble's medical condition is relevant to all these allegations. It is therefore probable that the medical records will be produced and that testimony will be elicited about Gamble's medical care. If the evidence should show that he in fact sustained a serious injury and received only *pro forma* care, he would surely be allowed to amend his pleading to reassert a claim against one or more of the prison doctors.

[Footnote 2/9]

"The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well settled principles to a familiar situation, and has little significance except for the respondent. Why certiorari was granted is a mystery to me -- particularly at a time when the Court is thought by many to be burdened by too heavy a caseload."

Butz v. Glover Livestock Comm'n Co., 411 U. S. 182, 411 U. S. 189 (STEWART, J., dissenting).

[Footnote 2/10]

As this Court notes, *ante* at 429 U. S. 100 n. 5, even the meaning of some of the terms used in the complaint is unclear.

[Footnote 2/11]

If this was the reason for granting certiorari, the writ should have been dismissed as improvidently granted when it became clear at oral argument that the parties agreed on the constitutional standard and disagreed only as to its application to the allegations of this particular complaint. *See* Tr. of Oral Arg. 38, 48.

[Footnote 2/12]

As the four dissenting Justices in *Resweber* pointed out:

"The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure."

329 U.S. at 329 U. S. 477 (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ.).

[Footnote 2/13]

The Court indicates the Eighth Amendment is violated "by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Ante* at 429 U. S. 104-105. If this is meant to indicate that intent is a necessary part of an Eighth Amendment violation, I disagree. If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.

Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim, but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty.

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OCTOBER TERM, 1993

Syllabus

FARMER v. BRENNAN, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-7247. Argued January 12, 1994-Decided June 6, 1994

Petitioner, a preoperative transsexual who projects feminine characteristics, has been incarcerated with other males in the federal prison system, sometimes in the general prison population but more often in segregation. Petitioner claims to have been beaten and raped by another inmate after being transferred by respondent federal prison officials from a correctional institute to a penitentiary-typically a higher security facility with more troublesome prisoners-and placed in its general population. Filing an action under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, petitioner sought damages and an injunction barring future confinement in any penitentiary, and alleged that respondents had acted with "deliberate indifference" to petitioner's safety in violation of the Eighth Amendment because they knew that the penitentiary had a violent environment and a history of inmate assaults and that petitioner would be particularly vulnerable to sexual attack. The District Court granted summary judgment to respondents, denying petitioner's motion under Federal Rule of Civil Procedure 56(f) to delay its ruling until respondents complied with a discovery request. It concluded that failure to prevent inmate assaults violates the Eighth Amendment only if prison officials were "reckless in a criminal sense," i. e., had "actual knowledge" of a potential danger, and that respondents lacked such knowledge because petitioner never expressed any safety concerns to them. The Court of Appeals affirmed.

Held:

1. A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. Pp.832-851.

(a) Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners. However, a constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious," Wilson v. Seiter, 501 U. S.

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Syllabus

294, 298, and the official has acted with "deliberate indifference" to inmate health or safety. Pp. 832-834.

(b) Deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Thus, it is the equivalent of acting recklessly. However, this does not establish the level of culpability deliberate indifference entails, for the term recklessness is not self-defining, and can take subjective or objective forms. Pp.835-837.

(c) Subjective recklessness, as used in the criminal law, is the appropriate test for "deliberate indifference." Permitting a finding of recklessness only when a person has disregarded a risk of harm of which he was aware is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in this Court's cases. The Eighth Amendment outlaws cruel and unusual "punishments," not "conditions," and the failure to alleviate a significant risk that an official should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment under the Court's cases. Petitioner's invitation to adopt a purely objective test for determining liability-whether the risk is known or should have been known-is rejected. This Court's cases "mandate inquiry into a prison official's state of mind," *id.,* at 299, and it is no accident that the Court has repeatedly said that the Eighth Amendment has a "subjective component." Pp.837-840.

(d) The subjective test does not permit liability to be premised on obviousness or constructive notice. Canton v. Harris, 489 U. S. 378, distinguished. However, this does not mean that prison officials will be free to ignore obvious dangers to inmates. Whether an official had the requisite knowledge is a question of fact subject to demonstration in the usual ways, and a factfinder may conclude that the official knew of a substantial risk from the very fact that it was obvious. Nor may an official escape liability by showing that he knew of the risk but did not think that the complainant was especially likely to be assaulted by the prisoner who committed the act. It does not matter whether the risk came from a particular source or whether a prisoner faced the risk for reasons personal to him or because all prisoners in his situation faced the risk. But prison officials may not be held liable if they prove that they were unaware of even an obvious risk or if they responded reasonably to a known risk, even if the harm ultimately was not averted. Pp.840-845.

(e) Use of a subjective test will not foreclose prospective injunctive relief, nor require a prisoner to suffer physical injury before obtaining

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prospective relief. The subjective test adopted today is consistent with the principle that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." Pennsylvania v. West Virginia, 262 U. S. 553. In a suit for prospective relief, the subjective factor, deliberate indifference, "should be determined in light of the prison authorities' current attitudes and conduct," Helling v. McKinney, 509 U. S. 25, 36: their attitudes and conduct at the time suit is brought and persisting thereafter. In making the requisite showing of subjective culpability, the prisoner may rely on developments that postdate the pleadings and pretrial motions, as prison officials may rely on such developments to show that the prisoner is not entitled to an injunction. A court that finds the Eighth Amendment's objective and subjective requirements satisfied may grant appropriate injunctive relief, though it should approach issuance of injunctions with the usual caution. A court need not ignore a prisoner's failure to take advantage of adequate prison procedures to resolve inmate grievances, and may compel a prisoner to pursue them. Pp.845-847.

2. On remand, the District Court must reconsider its denial of petitioner's Rule 56(f) discovery motion and apply the Eighth Amendment principles explained herein. The court may have erred in placing decisive weight on petitioner's failure to notify respondents of a danger, and such error may have affected the court's ruling on the discovery motion, so that additional evidence may be available to petitioner. Neither of two of respondents' contentions-that some of the officials had no knowledge about the confinement conditions and thus were alleged to be liable only for the transfer, and that there is no present threat that petitioner will be placed in a penitentiary-is so clearly correct as to justify affirmance. Pp.848-851.

Vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, SCALIA, KENNEDY, and GINSBURG, JJ., joined. BLACKMUN, J., post, p. 851, and STEVENS, J., post, p. 858, filed concurring opinions. THOMAS, J., filed an opinion concurring in the judgment, post, p. 858.

Elizabeth Alexander argued the cause for petitioner.

With her on the briefs were Alvin *J.* Bronstein, by appointment of the Court, 510 U. S. 941, and Steven R. Shapiro.

Deputy Solicitor General Bender argued the cause for respondents. With him on the brief were Solicitor General

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Days, Assistant Attorney General Hunger, Amy L. Wax, Barbara L. Herwig, and Robert M. Loeb. *

JUSTICE SOUTER delivered the opinion of the Court.

A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. See Helling v. McKinney 509 U. S. 25 (1993); Wilson v. Seiter, 501 U. S. 294 (1991); Estelle v. Gamble, 429

*Briefs of amici curiae urging reversal were filed for the Montana Defender Project by Jeffrey T. Renz; for the D. C. Prisoners' Legal Services Project, Inc., by Alan A. Pemberton and Jonathan M. Smith; and for Stop Prisoner Rape by Frank M. Dunbaugh.

J. Joseph Curran, Jr., Attorney General of Maryland, and Andrew H. Baida, Assistant Attorney General, filed a brief for the State of Maryland et al. as amici curiae urging affirmance, joined by the Attorneys General and other officials for their respective States as follows: Jimmy Evans, Attorney General of Alabama, Charles E. Cole, Attorney General of Alaska, Grant Woods, Attorney General of Arizona, Winston Bryant, Attorney General of Arkansas, Daniel E. Lungren, Attorney General of California, Charles M. Oberly III, Attorney General of Delaware, Michael *J.* Bowers, Attorney General of Georgia, Robert A. Marks, Attorney General of Hawaii, Pamela Carter, Attorney General of Indiana, Robert T. Stephan, Attorney General of Kansas, Chris Gorman, Attorney General of Kentucky, Scott Harshbarger, Attorney General of Massachusetts, Frank *J.* Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Jay Nixon, Attorney General of Missouri, Don Stenberg, Attorney General of Nebraska, Frankie Sue Del Papa, Attorney General of Nevada, Jeffrey R. Howard, Attorney General of New Hampshire, Fred DeVesa, Acting Attorney General of New Jersey, Michael F. Easley, Attorney General of North Carolina, Heidi Heitkamp, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, Theodore R. Kulongoski, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, T. Travis Medlock, Attorney General of South Carolina, Mark Barnett, Attorney General of South Dakota, Charles W Burson, Attorney General of Tennessee, Jan Graham, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, Stephen D. Rosenthal, Attorney General of Virginia, James E. Doyle, Attorney General of Wisconsin, and Joseph B. Meyer, Attorney General of Wyoming.

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u. S. 97 (1976). This case requires us to define the term "deliberate indifference," as we do by requiring a showing that the official was subjectively aware of the risk.

I

The dispute before us stems from a civil suit brought by petitioner, Dee Farmer, alleging that respondents, federal prison officials, violated the Eighth Amendment by their deliberate indifference to petitioner's safety. Petitioner, who is serving a federal sentence for credit card fraud, has been diagnosed by medical personnel of the Bureau of Prisons as a transsexual, one who has "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex," and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change. American Medical Association, Encyclopedia of Medicine 1006 (1989); see also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 74-75 (3d rev. ed. 1987). For several years before being convicted and sentenced in 1986 at the age of 18, petitioner, who is biologically male, wore women's clothing (as petitioner did at the 1986 trial), underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful "black market" testicle-removal surgery. See Farmer v. Haas, 990 F.2d 319, 320 (CA7 1993). Petitioner's precise appearance in prison is unclear from the record before us, but petitioner claims to have continued hormonal treatment while incarcerated by using drugs smuggled into prison, and apparently wears clothing in a feminine manner, as by displaying a shirt "off one shoulder," App. 112. The parties agree that petitioner "projects feminine characteristics." Id., at 51, 74.

The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex, see Farmer v. Haas, supra, at 320, and over time authorities housed petitioner in several federal facilities, sometimes

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in the general male prison population but more often in segregation. While there is no dispute that petitioner was segregated at least several times because of violations of prison rules, neither is it disputed that in at least one penitentiary petitioner was segregated because of safety concerns. See Farmer v. Carlson, 685 F. Supp. 1335, 1342 (MD Pa. 1988).

On March 9, 1989, petitioner was transferred for disciplinary reasons from the Federal Correctional Institute in Oxford, Wisconsin (FCI-Oxford), to the United States Penitentiary in Terre Haute, Indiana (USP-Terre Haute). Though the record before us is unclear about the security designations of the two prisons in 1989, penitentiaries are typically higher security facilities that house more troublesome prisoners than federal correctional institutes. See generally Federal Bureau of Prisons, Facilities 1990. After an initial stay in administrative segregation, petitioner was placed in the USP-Terre Haute general population. Petitioner voiced no objection to any prison official about the transfer to the penitentiary or to placement in its general population. Within two weeks, according to petitioner's allegations, petitioner was beaten and raped by another inmate in petitioner's cell. Several days later, after petitioner claims to have reported the incident, officials returned petitioner to segregation to await, according to respondents, a hearing about petitioner's HIV-positive status.

Acting without counsel, petitioner then filed a Bivens complaint, alleging a violation of the Eighth Amendment. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971); Carlson v. Green, 446 U. S. 14 (1980). As defendants, petitioner named respondents: the warden of USP-Terre Haute and the Director of the Bureau of Prisons (sued only in their official capacities); the warden of FCI-Oxford and a case manager there; and the Director of the Bureau of Prisons North Central Region Office and an official in that office (sued in their official and personal capacities). As later amended, the complaint alleged that respondents either

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transferred petitioner to USP-Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who "projects feminine characteristics," would be particularly vulnerable to sexual attack by some USPTerre Haute inmates. This allegedly amounted to a deliberately indifferent failure to protect petitioner's safety, and thus to a violation of petitioner's Eighth Amendment rights. Petitioner sought compensatory and punitive damages, and an injunction barring future confinement in any penitentiary, including USP-Terre Haute.1

Respondents filed a motion for summary judgment supported by several affidavits, to which petitioner responded with an opposing affidavit and a cross-motion for summary judgment; petitioner also invoked Federal Rule of Civil Procedure 56(f), asking the court to delay its ruling until respondents had complied with petitioner's pending request for production of documents. Respondents then moved for a protective order staying discovery until resolution of the issue of qualified immunity, raised in respondents' summary judgment motion.

Without ruling on respondents' request to stay discovery, the District Court denied petitioner's Rule 56(f) motion and granted summary judgment to respondents, concluding that there had been no deliberate indifference to petitioner's safety. The failure of prison officials to prevent inmate assaults violates the Eighth Amendment, the court stated, only if prison officials were "reckless in a criminal sense," meaning that they had "actual knowledge" of a potential danger. App. 124. Respondents, however, lacked the requisite

1 Petitioner also sought an order requiring the Bureau of Prisons to place petitioner in a "co-correctional facility" (i. e., one separately housing male and female prisoners but allowing coeducational programming). Petitioner tells us, however, that the Bureau no longer operates such facilities, and petitioner apparently no longer seeks this relief.

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knowledge, the court found. "[Petitioner] never expressed any concern for his safety to any of [respondents]. Since [respondents] had no knowledge of any potential danger to [petitioner], they were not deliberately indifferent to his safety." Ibid.

The United States Court of Appeals for the Seventh Circuit summarily affirmed without opinion. We granted certiorari, 510 U. S. 811 (1993), because Courts of Appeals had adopted inconsistent tests for "deliberate indifference." Compare, for example, McGill v. Duckworth, 944 F.2d 344, 348 (CA7 1991) (holding that "deliberate indifference" requires a "subjective standard of recklessness"), cert. denied, 503 U. S. 907 (1992), with Young v. Quinlan, 960 F.2d 351, 360-361 (CA3 1992) ("[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate").

II A

The Constitution "does not mandate comfortable prisons," Rhodes v. Chapman, 452 U. S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment," Helling, 509 U. S., at 31. In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. See Hudson v. McMillian, 503 U. S. 1 (1992). The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates," Hudson v. Palmer, 468 U. S. 517, 526-527 (1984). See Helling, supra,

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at 31-32; Washington v. Harper, 494 U. S. 210, 225 (1990); Estelle, 429 U. S., at 103. Cf. DeShaney v. Winnebago County Dept. of Social Servs., 489 U. S. 189, 198-199 (1989).

In particular, as the lower courts have uniformly held, and as we have assumed, "prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners." Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (CA1) (internal quotation marks and citation omitted), cert. denied, 488 U. S. 823 (1988); 2 see also Wilson v. Seiter, 501 U. S., at 303 (describing "the protection [an inmate] is afforded against other inmates" as a "conditio[n] of confinement" subject to the strictures of the Eighth Amendment). Having incarcerated "persons [with] demonstrated pro clivit[ies] for antisocial criminal, and often violent, conduct," Hudson v. Palmer, supra, at 526, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Cf. DeShaney, supra, at 199-200; Estelle, supra, at 103-104. Prison conditions may be "restrictive and even harsh," Rhodes, supra, at 347, but gratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," Hudson v. Palmer, supra, at 548 (STEVENS, J., concurring in part and dissenting in part), any more than it squares with "'evolving standards of decency,'" Estelle,

2 Other Court of Appeals decisions to the same effect include Villante v. Department of Corrections, 786 F.2d 516, 519 (CA2 1986); Young v. Quinlan, 960 F.2d 351, 361-362 (CA3 1992); Pressly v. Hutto, 816 F.2d 977, 979 (CA4 1987); Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (CA5 1986); Roland v. Johnson, 856 F.2d 764, 769 (CA6 1988); Goka v. Bobbitt, 862 F.2d 646, 649-650 (CA7 1988); Martin v. White, 742 F.2d 469, 474 (CA8 1984); Berg v. Kincheloe, 794 F.2d 457, 459 (CA9 1986); Ramos v. Lamm, 639 F.2d 559, 572 (CAW 1980); LaMarca v. Turner, 995 F.2d 1526, 1535 (CAll 1993); and Morgan v. District of Columbia, 824 F.2d 1049, 1057 (CADC 1987).

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supra, at 102 (quoting Trop v. Dulles, 356 U. S. 86, 101 (1958) (plurality opinion)). Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society." Rhodes, supra, at 347.

It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious," Wilson, supra, at 298; see also Hudson v. McMillian, supra, at 5; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," Rhodes, supra, at 347. For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. See Helling, supra, at 35.3

The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." Wilson, 501 U. S., at 297 (internal quotation marks, emphasis, and citations omitted). To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind." Ibid.; see also id., at 302-303; Hudson v. McMillian, supra, at 8. In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety, Wilson, supra, at 302-303; see also Helling, supra, at 34-35; Hudson v. McMillian, supra, at 5; Estelle, supra, at 106, a standard the parties agree governs the claim in this case. The parties disagree, however, on the proper test for deliberate indifference, which we must therefore undertake to define.

3 At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.

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B 1

Although we have never paused to explain the meaning of the term "deliberate indifference," the case law is instructive. The term first appeared in the United States Reports in Estelle v. Gamble, 429 U. S., at 104, and its use there shows that deliberate indifference describes a state of mind more blameworthy than negligence. In considering the inmate's claim in Estelle that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished "deliberate indifference to serious medical needs of prisoners," ibid., from "negligen[ce] in diagnosing or treating a medical condition," *id.,* at 106, holding that only the former violates the Clause. We have since read Estelle for the proposition that Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." Whitley v. Albers, 475 U. S. 312, 319 (1986).

While Estelle establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. That point underlies the ruling that "application of the deliberate indifference standard is inappropriate" in one class of prison cases: when "officials stand accused of using excessive physical force." Hudson v. McMillian, 503 U. S., at 6-7; see also Whitley, supra, at 320. In such situations, where the decisions of prison officials are typically made " 'in haste, under pressure, and frequently without the luxury of a second chance,'" Hudson v. McMillian, supra, at 6 (quoting Whitley, supra, at 320), an Eighth Amendment claimant must show more than "indifference," deliberate or otherwise. The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm," 503 U. S., at 6 (internal quotation marks and citations omitted), or, as the Court also

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put it, that officials used force with "a knowing willingness that [harm] occur," *id.,* at 7 (internal quotation marks and citation omitted). This standard of purposeful or knowing conduct is not, however, necessary to satisfy the mens rea requirement of deliberate indifference for claims challenging conditions of confinement; "the very high state of mind prescribed by Whitley does not apply to prison conditions cases." Wilson, supra, at 302-303.

With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.4 See, e. g., LaMarca v. Turner, 995 F.2d 1526, 1535 (CA111993); Manarite v. Springfield, 957 F.2d 953, 957 (CA1 1992); Redman v. County of San Diego, 942 F.2d 1435, 1443 (CA9 1991); McGill v. Duckworth, 944 F. 2d, at 347; Miltier v. Beorn, 896 F.2d 848, 851-852 (CA4 1990); Martin v. White, 742 F.2d 469, 474 (CA8 1984); see also Springfield v. Kibbe, 480 U. S. 257, 269 (1987) (O'CONNOR, J., dissenting). It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.

That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails, for the term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. See Prosser and Keeton § 34, pp. 213-214; Restatement (Second) of Torts § 500 (1965). The criminal

4 Between the poles lies "gross negligence" too, but the term is a "nebulous" one, in practice typically meaning little different from recklessness as generally understood in the civil law (which we discuss later in the text). See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984) (hereinafter Prosser and Keeton).

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law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware. See R. Perkins & R. Boyce, Criminal Law 850-851 (3d ed. 1982); J. Hall, General Principles of Criminal Law 115-116, 120, 128 (2d ed. 1960) (hereinafter Hall); American Law Institute, Model Penal Code § 2.02(2)(c), and Comment 3 (1985); but see Commonwealth v. Pierce, 138 Mass. 165, 175-178 (1884) (Holmes, J.) (adopting an objective approach to criminal recklessness). The standards proposed by the parties in this case track the two approaches (though the parties do not put it that way): petitioner asks us to define deliberate indifference as what we have called civil-law recklessness,5 and respondents urge us to adopt an approach consistent with recklessness in the criminal law. 6

We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to dis-

5 See Reply Brief for Petitioner 5 (suggesting that a prison official is deliberately indifferent if he "knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law"); see also Brief for Petitioner 20-21.

6 See Brief for Respondents 16 (asserting that deliberate indifference requires that a prison "official must know of the risk of harm to which an inmate is exposed").

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courage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. See Prosser and Keeton §§ 2, 34, pp. 6, 213-214; see also Federal Tort Claims Act, 28 U. S. C. §§ 2671-2680; United States v. Muniz, 374 U. S. 150 (1963). But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

In Wilson v. Seiter, we rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions. See 501 U. S., at 299-302. As we explained there, our "cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." Id., at 299. Although "state of mind," like "intent," is an ambiguous term that can encompass objectively defined levels of blameworthiness, see 1 W. LaFave & A. Scott, Substantive Criminal Law §§ 3.4, 3.5, pp. 296-300, 313-314 (1986) (hereinafter LaFave & Scott); United States v. Bailey, 444 U. S. 394, 404 (1980), it was no accident that we said in Wilson and repeated in later cases that Eighth Amendment suits against prison officials must satisfy a "subjective" requirement. See Wilson, supra, at 298; see also Helling, 509 U. S., at 35; Hudson v. McMillian, 503 U. S., at 8. It is true, as petitioner points out, that Wilson cited with approval Court of Appeals decisions applying an objective test for deliberate indifference to claims based on prison officials' failure to prevent inmate assaults. See 501 U. S., at 303 (citing CortesQuinones v. Jimenez-Nettleship, 842 F. 2d, at 560; and Morgan v. District of Columbia, 824 F.2d 1049, 1057-1058 (CADC 1987)). But Wilson cited those cases for the proposition that the deliberate indifference standard applies to all prison-conditions claims, not to undo its holding that the

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Eighth Amendment has a "subjective component." 501 U. S., at 298. Petitioner's purely objective test for deliberate indifference is simply incompatible with Wilson's holding.

To be sure, the reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted. But the result is the same: to act recklessly in either setting a person must "consciously disregar[d]" a substantial risk of serious harm. Model Penal Code § 2.02(2)(c).

At oral argument, the Deputy Solicitor General advised against frank adoption of a criminal-law mens rea requirement, contending that it could encourage triers of fact to find Eighth Amendment liability only if they concluded that prison officials acted like criminals. See Tr. of Oral Arg. 3940. We think this concern is misdirected. Bivens actions against federal prison officials (and their 42 U. S. C. § 1983 counterparts against state officials) are civil in character, and a court should no more allude to the criminal law when enforcing the Cruel and Unusual Punishments Clause than when applying the Free Speech and Press Clauses, where we have also adopted a subjective approach to recklessness. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U. S. 657, 688 (1989) (holding that the standard for "reckless disregard" for the truth in a defamation action by a public figure "is a subjective one," requiring that "the defendant in fact entertained serious doubts as to the truth of his publication," or that "the defendant actually had a high degree of awareness of ... probable falsity") (internal quotation marks and citations omitted).7 That said, subjective recklessness as used in the criminal law is a familiar and workable stand-

7 Appropriate allusions to the criminal law would, of course, be proper during criminal prosecutions under, for example, 18 U. S. C. § 242, which sets criminal penalties for deprivations of rights under color of law.

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ard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for "deliberate indifference" under the Eighth Amendment.

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Our decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase "deliberate indifference." And we do not reject petitioner's arguments for a thoroughly objective approach to deliberate indifference without recognizing that on the crucial point (whether a prison official must know of a risk, or whether it suffices that he should know) the term does not speak with certainty. Use of "deliberate," for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental. Cf. Estelle, 429 U. S., at 105 (distinguishing "deliberate indifference" from "accident" or "inadverten[ce]"). And even if "deliberate" is better read as implying knowledge of a risk, the concept of constructive knowledge is familiar enough that the term "deliberate indifference" would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness.

Because "deliberate indifference" is a judicial gloss, appearing neither in the Constitution nor in a statute, we could not accept petitioner's argument that the test for "deliberate indifference" described in Canton v. Harris, 489 U. S. 378 (1989), must necessarily govern here. In Canton, interpreting Rev. Stat. § 1979, 42 U. S. C. § 1983, we held that a municipality can be liable for failure to train its employees when the municipality's failure shows "a deliberate indifference to the rights of its inhabitants." 489 U. S., at 389 (internal quotation marks omitted). In speaking to the meaning of the term, we said that "it may happen that in light of the duties assigned to specific officers or employees the need for

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more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id., at 390; see also *id.,* at 390, n. 10 (elaborating). JUSTICE O'CONNOR'S separate opinion for three Justices agreed with the Court's "obvious[ness]" test and observed that liability is appropriate when policymakers are "on actual or constructive notice" of the need to train, *id.,* at 396 (opinion concurring in part and dissenting in part). It would be hard to describe the Canton understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.

Canton's objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases. Section 1983, which merely provides a cause of action, "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." Daniels v. Williams, 474 U. S. 327, 330 (1986). And while deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability, see Wilson, 501 U. S., at 299-300, the "term was used in the Canton case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents," Collins v. Harker Heights, 503 U. S. 115, 124 (1992), a purpose the Canton Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs. Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official. For these reasons, we cannot accept petitioner's argument that Canton compels the conclu-

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sion here that a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed it.

We are no more persuaded by petitioner's argument that, without an objective test for deliberate indifference, prison officials will be free to ignore obvious dangers to inmates. Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. Cf. 1 C. Torcia, Wharton's Criminal Law § 27, p. 141 (14th ed. 1978); Hall 115. We doubt that a subjective approach will present prison officials with any serious motivation "to take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'" Brief for Petitioner 27. Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, cf. Hall 118 (cautioning against "confusing a mental state with the proof of its existence"), and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. Cf. LaFave & Scott § 3.7, p. 335 ("[I]f the risk is obvious, so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it; but the inference cannot be conclusive, for we know that people are not always conscious of what reasonable people would be conscious of"). For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of

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fact to find that the defendant-official had actual knowledge of the risk." Brief for Respondents 22.8

Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," Helling, 509 U. S., at 35, and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk. See Brief for Respondents 15 (stating that a prisoner can establish exposure to a sufficiently serious risk of harm "by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates"). If, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead ... would leave

8 While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him, see infra, at 844, he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease). When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.

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their beds and spend the night clinging to the bars nearest the guards' station," Hutto v. Finney, 437 U. S. 678, 681-682, n. 3 (1978), it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom. Cf. Helling, supra, at 33 (observing that the Eighth Amendment requires a remedy for exposure of inmates to "infectious maladies" such as hepatitis and venereal disease "even though the possible infection might not affect all of those exposed"); Commonwealth v. Welansky, 316 Mass. 383, 55 N. E. 2d 902 (1944) (affirming conviction for manslaughter under a law requiring reckless or wanton conduct of a nightclub owner who failed to protect patrons from a fire, even though the owner did not know in advance who would light the match that ignited the fire or which patrons would lose their lives); State v. Julius, 185 W. Va. 422, 431432, 408 S. E. 2d 1, 10-11 (1991) (holding that a defendant may be held criminally liable for injury to an unanticipated victim).

Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "'reasonable safety,'" Helling, supra, at 33; see also Washington v. Har-

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per, 494 U. S., at 225; Hudson v. Palmer, 468 U. S., at 526527, a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions," Spain v. Procunier, 600 F.2d 189, 193 (CA9 1979) (Kennedy, J.); see also Bell v. Wolfish, 441 U. S. 520, 547-548, 562 (1979). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

We address, finally, petitioner's argument that a subjective deliberate indifference test will unjustly require prisoners to suffer physical injury before obtaining court-ordered correction of objectively inhumane prison conditions. "It would," indeed, "be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." Helling, supra, at 33. But nothing in the test we adopt today clashes with that common sense. Petitioner's argument is flawed for the simple reason that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." Pennsylvania v. West Virginia, 262 U. S. 553, 593 (1923). Consistently with this principle, a subjective approach to deliberate indifference does not require a prisoner seeking "a remedy for unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief." Helling, supra, at 33-34.

In a suit such as petitioner's, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct," Helling, supra, at 36: their attitudes and conduct at the time suit is brought and persisting thereafter. An inmate seeking an injunction on the ground that there is "a contemporary violation of a nature likely to continue," United States v. Oregon State Medical Soc., 343 U. S. 326, 333 (1952), must adequately

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653 F.3d 550 (2011)

Andrea FIELDS, et al., Plaintiffs-Appellees, Cross-Appellants,
v.
Judy P. SMITH, et al., Defendants-Appellants, Cross-Appellees.

Nos. 10-2339, 10-2466.

United States Court of Appeals, Seventh Circuit.

Argued February 7, 2011.
Decided August 5, 2011.

552 *552 John A. Knight (argued), Attorney, Roger Baldwin Foundation of ACLU, Inc., Chicago, IL, for Plaintiffs-Appellees.

Abigail C.S. Potts (argued), J.B. Van Hollen, Attorneys, Office of the Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellants.

Before ROVNER and WOOD, Circuit Judges, and GOTTSCHALL, District Judge.[*]

GOTTSCHALL, District Judge.

In this appeal, we are asked to review the decision of the district court invalidating a Wisconsin state statute which prohibits the Wisconsin Department of Corrections ("DOC") from providing transgender inmates with certain medical treatments.[1] The Inmate Sex Change Prevention Act ("Act 105") provides in relevant part:

> (a) In this subsection:
>
> 1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender.
>
> 2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.
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> 553 *553 (b) The [Wisconsin Department of Corrections] may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery....

2005 Wis. Act 105, codified at Wis. Stat. § 302.386(5m) (2010). The district court concluded that this provision violates the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's Equal Protection Clause. Defendants, various DOC officials, now appeal.

I

A number of DOC inmates filed this lawsuit as a putative class action in the Eastern District of Wisconsin on behalf of all current and future DOC inmates with "strong, persistent cross-gender identification." The district court denied plaintiffs' motion for class certification, but permitted the case to proceed to trial on the individual claims of three plaintiffs.

The three plaintiffs—Andrea Fields, Matthew Davison (also known as Jessica Davison), and Vankemah Moaton—are male-to-female transsexuals. According to stipulated facts, each has been diagnosed with Gender Identity Disorder ("GID"). GID is classified as a psychiatric disorder in the DSM-IV-TR, the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Individuals with GID identify strongly with a gender that does not match their physical sex characteristics. The condition is associated with severe psychological distress. Prior to the passage of Act 105, each of the plaintiffs had been diagnosed by DOC physicians with GID and had been prescribed hormones.

After a trial in which both sides presented expert testimony about GID, its treatment, and its potential effects on prison security, the district court ruled in favor of plaintiffs. The court ruled that Act 105 was unconstitutional, both as applied and on its face, under the Eighth and Fourteenth Amendments. The district court ultimately issued an injunction barring defendants from enforcing Act 105. We need not recount all the evidence presented at trial—the district court's 40-page opinion thoroughly describes the trial testimony, *see* *Fields v. Smith,* 712 F.Supp.2d 830 (E.D.Wis.2010)—but a brief review of the district court's critical factual findings is warranted.

The district court credited much of the testimony from plaintiffs' witnesses, including three experts in the treatment of GID. Plaintiffs' experts testified that, collectively, they had treated thousands of patients with GID and published numerous peer-reviewed articles and books on the subject. One expert had specifically studied transsexuals in the correctional setting. These experts explained that GID can cause an acute sense that a person's body does not match his or her gender identity. Even before seeking treatment and from an early age, patients will experience this dysphoria and may attempt to conform their appearance and behavior to the gender with which they identify.

The feelings of dysphoria can vary in intensity. Some patients are able to manage the discomfort, while others become unable to function without taking steps to correct the disorder. A person with GID often experiences severe anxiety, depression, and other psychological disorders. Those with GID may attempt to commit suicide or to mutilate their own genitals.

The accepted standards of care dictate a gradual approach to treatment beginning with psychotherapy and real life experience 554 *554 living as the opposite gender. For some number of patients, this treatment will be effective in controlling feelings of dysphoria. When the condition is more severe, a doctor can prescribe hormones, which have the effect of relieving the psychological distress. Hormones also have physical effects on the body. For example, males may experience breast development, relocation of body fat, and softening of the skin. In the most severe cases, sexual reassignment surgery may be appropriate. But often the use of hormones will be sufficient to control the disorder.

When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form. In addition, there may be severe physical effects such as muscle wasting, high blood pressure, and neurological complications. All three plaintiffs in this case experienced some of these effects when DOC doctors discontinued their treatment following the passage of Act 105.[2]

Plaintiffs also called Dr. David Burnett, the DOC's Medical Director, and Dr. Kevin Kallas, the DOC Mental Health Director, to testify at trial. These officials explained that, prior to the enactment of Act 105, hormone therapy had been prescribed to some DOC inmates, including plaintiffs. DOC policies did not permit inmates to receive sex reassignment surgery. Drs. Kallas and Burnett served on a committee of DOC officials that evaluated whether hormone therapy was medically necessary for any particular inmate. Inmates are not permitted to seek any medical treatment outside the prison, regardless of their ability to pay. The doctors testified that they could think of no other state law or policy, besides Act 105, that prohibits prison doctors from providing inmates with medically necessary treatment.

II

We evaluate both the district court's grant of injunctive relief and the scope of that relief for abuse of discretion. *Knapp v. Nw. Univ.,* 101 F.3d 473, 478 (7th Cir.1996); *see* *Brown v. Plata,* ___ U.S. ____, 131 S.Ct. 1910, 1957, 179 L.Ed.2d 969 (2011) (Scalia, J., dissenting) (noting that under the Prison Litigation Reform Act ("PLRA"), "when a district court enters a new decree with new benchmarks, the selection of those benchmarks is ... reviewed under a deferential, abuse-of-discretion standard of review"); *Russian Media Group, LLC v. Cable Am., Inc.,* 598 F.3d 302, 307 (7th Cir.2010) ("[T]he appropriate scope of the injunction is left to the district court's sound discretion."); *Thomas v. Bryant,* 614 F.3d 1288, 1321 (11th Cir.2010) (applying abuse of discretion standard to evaluate scope of injunction in conformity with PLRA); *Crawford v. Clarke,* 578 F.3d 39, 43 (1st Cir.2009) (holding that district court did not abuse its discretion in awarding system-wide relief under the PLRA). The court's factual findings are reviewed for clear error, and any legal determinations are reviewed de novo. *Knapp,* 101 F.3d at 478.

"Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display `deliberate indifference to serious medical needs of prisoners.'" *Greeno v. Daley,* 414 F.3d 645, 652-53 (7th Cir.2005) (quoting 555 *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). *555 In this case, the district court held that plaintiffs suffered from a serious medical need, namely GID, and that defendants acted with deliberate indifference in that defendants knew of the serious medical need but refused to provide hormone therapy because of Act 105. Defendants do not challenge the district court's holding that GID is a serious medical condition. They contend that Act 105 is constitutional because the state legislature has the power to prohibit certain medical treatments when other treatment options are available. And defendants argue that Act 105 is justified by a legitimate need to ensure security in state prisons.

Defendants rely primarily on two Seventh Circuit decisions which addressed constitutional challenges to refusals to provide treatment for gender dysphoria or transsexualism. Over twenty-four years ago, in *Meriwether v. Faulkner,* 821 F.2d 408 (7th Cir.1987), this court reversed the dismissal of a complaint which alleged that the plaintiff, who had previously been taking hormones, was denied all treatment for her gender dysphoria upon entering prison. The court held that the plaintiff stated a claim that transsexualism was a serious medical need and that prison officials acted with deliberate indifference in refusing all treatment. The court noted in dicta that "[i]t is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy which appears to be the focus of her complaint." *Id.* at 413.

Ten years later, in *Maggert v. Hanks,* 131 F.3d 670 (7th Cir.1997), this court, in two brief paragraphs, upheld a decision granting summary judgment on a similar deliberate indifference claim where the plaintiff did not come forward with any evidence to rebut defendants' expert witness, who testified that plaintiff did not suffer from gender dysphoria. The court's opinion proceeded to address "a broader issue, having to do with the significance of gender dysphoria in prisoners' civil rights litigation." *Id.* at 671. The court commented, again in dicta, that the Eighth Amendment does not require the provision of "esoteric" treatments like hormone therapy and sexual reassignment surgery which are "protracted and expensive" and not generally available to those who are not affluent. *Id.* at 671-72. A prison would be required to provide some treatment for gender dysphoria, but not necessarily "curative" treatment because the Eighth Amendment requires only minimum health care for prison inmates. *Id.* at 672.

The court's discussion of hormone therapy and sex reassignment surgery in these two cases was based on certain empirical assumptions—that the cost of these treatments is high and that adequate alternatives exist. More than a decade after this court's decision in *Maggert,* the district court in this case held a trial in which these empirical assumptions were put to the test. At trial, defendants stipulated that the cost of providing hormone therapy is between $300 and $1,000 per inmate per year. The district court compared this cost to the cost of a common antipsychotic drug used to treat many DOC inmates. In 2004, DOC paid a total of $2,300 for hormones for two inmates. That same year, DOC paid $2.5 million to provide inmates with quetiapine, an antipsychotic drug which costs more than $2,500 per inmate per year. Sex reassignment surgery is significantly more expensive, costing approximately $20,000. However, other significant surgeries may be more expensive. In 2005, DOC paid $37,244 for one coronary bypass surgery and $32,897 for one kidney transplant surgery. The district court concluded that DOC might actually incur greater costs by refusing to provide hormones, since inmates with GID might require other expensive treatments or 556 enhanced *556 monitoring by prison security.[3] *Fields,* 712 F.Supp.2d at 863. In fact, at oral argument before this court, counsel for defendants disclaimed any argument that Act 105 is justified by cost savings. *See* Oral Argument at 15:18, *Field v. Smith,* Nos. 10-2339 and 10-2466, *available at* http://www.ca7.uscourts.gov/fdocs/ docs.fwx?dname=arg.

More importantly here, defendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. Plaintiffs' witnesses repeatedly made the point that, for certain patients with GID, hormone therapy is the only treatment that reduces dysphoria and can prevent the severe emotional and physical harms associated with it. Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder. Defendants called their own expert to speak about GID: Dr. Daniel Claiborn, a Ph.D. in psychology who estimated he has treated only about fifty clients with GID over a period of twenty years in his private practice. Dr. Claiborn provided no testimony about the appropriate treatment for plaintiffs. He offered his opinion that GID is not properly characterized as a psychological disorder because a person with GID does not typically suffer from an impairment in psychological functions. However, defendants have now conceded that GID is a serious medical condition. Dr. Claiborn's testimony does not support the assertion that plaintiffs can be effectively treated without hormones.

It is well established that the Constitution's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners. The Supreme Court articulated this principle in *Estelle v. Gamble:*

> 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. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

429 U.S. at 103-04, 97 S.Ct. 285 (citations omitted). Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture. *Id.; see also* *Roe v. Elyea,* 631 F.3d 843, 861-63 (7th Cir.2011) (upholding verdict for plaintiff that prison policy on treatment of Hepatitis C was deliberately indifferent); *Kelley v. McGinnis,* 899 F.2d 612, 616 (7th Cir.1990) (reversing dismissal of complaint alleging that prison provided inadequate treatment for inmate's chronic foot problems). Although Act 105 permits DOC to provide plaintiffs with *some* treatment, the evidence at trial indicated that plaintiffs could not be effectively treated without hormones.

557 Defendants point to the Supreme Court's decision in *Gonzales v. Carhart,* *557 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), for the proposition that a legislature may constitutionally limit the discretion of physicians by outlawing a particular medical procedure. In *Carhart,* the Court upheld the constitutionality of the Partial-Birth Abortion Ban Act of 2003 which outlawed a particular procedure used to perform late-term abortions. The Court noted the existence of "medical uncertainty" regarding whether the banned procedure was more dangerous than alternative procedures. *Id.* at 163-64, 127 S.Ct. 1610. Because safe abortion alternatives to the prohibited procedure appeared to exist, the court turned away the facial challenge to the law. *Id.* at 164, 127 S.Ct. 1610.

Carhart is not helpful to defendants in this case because they did not present any medical evidence that alternative treatments for GID are effective. As defendants point out, some medical uncertainty remains as to the causes of GID, but there was no evidence of uncertainty about the efficacy of hormone therapy as a treatment. Just as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID.

Defendants argue that even if application of Act 105 to plaintiffs violates the Eighth Amendment, the district court erred in sustaining a facial challenge to the law. Act 105 bans treatment to all prisoners, even those for whom hormones and surgery are not medically necessary. A facial challenge to the constitutionality of a law can succeed only where plaintiffs can "`establish that no set of circumstances exists under which the Act would be valid.'" *Doe v. Heck,* 327 F.3d 492, 528 (7th Cir.2003) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Nonetheless, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 894, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The district court, in this case, found that DOC doctors prescribe hormones only when the treatment is medically necessary. *Fields,* 712 F.Supp.2d at 866. Thus, the court correctly concluded that Act 105 is irrelevant to inmates who are not diagnosed with severe GID and in medical need of hormones, and any application of Act 105 would necessarily violate the Eighth Amendment.

Defendants have also argued that Act 105 is justified by the state's interest in preserving prison security. Defendants' security expert, Eugene Atherton, testified that more feminine male inmates become targets for sexual assault in prisons. Because hormone therapy alters a person's secondary sex characteristics such as breast size and body hair, defendants argue that hormones feminize inmates and make them more susceptible to inciting prison violence. But the district court rejected this argument, noting that the evidence showed transgender inmates may be targets for violence even without hormones. Atherton himself, in his deposition, testified that it would be "an incredible stretch" to conclude that banning the use of hormones could prevent sexual assaults. *Id.* at 868. In the Colorado Department of Corrections, where Atherton worked for many years, the state had a policy of providing necessary hormones to inmates with GID. Atherton testified that this policy was reasonable and had been implemented effectively in Colorado.

Defendants cite *Whitley v. Albers* for the proposition that "`[p]rison administrators... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional 558 *558 security.'" 475 U.S. 312, 321-22, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (quoting *Bell v. Wolfish,* 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). But deference does not extend to "actions taken in bad faith and for no legitimate purpose." *Id.* at 322, 106 S.Ct. 1078. The district court did not abuse its discretion in concluding that defendants' evidence failed to establish any security benefits associated with a ban on hormone therapy. The legislators who approved Act 105 may have honestly believed they were improving prison security, but courts "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Carhart,* 550 U.S. at 165, 127 S.Ct. 1610.

Finally, defendants contend that the district court's injunction violates the PLRA, 18 U.S.C. § 3626(a), because it enjoins Act 105 in its entirety.[4] They argue that plaintiffs have never demonstrated a need for sex reassignment surgery, which the law also prohibits. For their part, plaintiffs argue that defendants waived this argument by failing to raise it before the district court. In fact, the record establishes an admission, not a waiver. On June 9, 2010 plaintiffs requested that the district court supplement its findings relating to the PLRA's so-called "need-narrowness-intrusiveness" standard. At a subsequent status conference, the court asked defendants' counsel not once, but twice, "whether or not the Defense believes the order as tendered ... is as narrow as is required"; counsel replied that it was. (*See* Pls.' App. 19.) As a practical matter, then, defendants are precluded from making this argument now.

Regardless, the district court's orders establish that the court evaluated the record as a whole and identified evidence that fully supports the scope of the injunctive relief granted. *See* *Armstrong v. Schwarzenegger,* 622 F.3d 1058, 1070 (9th Cir.2010) ("[T]he language of the PLRA does not suggest that Congress intended a provision-by-provision explanation of a district court's findings.... [T]he statutory language [means] that the courts must do what they have always done when determining the appropriateness of the relief ordered: consider the order as a whole."); *Gomez v. Vernon,* 255 F.3d 1118, 1129 (9th Cir.2001) (the PLRA "has not substantially changed the threshold findings and standards required to justify an injunction"); *Smith v. Ark. Dep't of Corr.,* 103 F.3d 637, 647 (8th Cir.1996) (same); *Williams v. Edwards,* 87 F.3d 126, 133 n. 21 (5th Cir. 1996) (same). In the district court's May 13, 2010 memorandum order, the court expressly addressed both hormone therapy and sex reassignment surgery. There, the court stated that:

> The defendants acknowledge that Act 105 removes even the consideration of hormones or surgery for inmates with gender issues and that the DOC halted evaluations of inmates with GID for possible administration of hormone therapy because of the Act. However, in determining whether a facial challenge to Act 105 may succeed here, the defendants submit that the court must take into 559 *559 account all inmates in DOC custody for whom hormone therapy or sexual reassignment surgery would be considered as treatment for gender issues. If that is done, they maintain that there are circumstances where Act 105 may be applied without violating the Constitution, and that, as a result, the plaintiffs' facial challenge to the law must fail. Unfortunately, the defendants do not support this point.
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> . . . .
>
> In certain cases, as with the plaintiffs in this case, the effect of Act 105 is to withdraw an ongoing course of treatment, the result of which has negative medical consequences. In other cases, the effect of Act 105 is to prevent DOC medical personnel from evaluating inmates for treatment because such evaluation would be futile in light of Act 105's ban on the treatment they may determine to be medically necessary for the health of the inmate.
>
> . . . .
>
> In this case, Act 105 bars the use of hormones "to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender," as well as sexual reassignment surgery "to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a). The statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment if at the outset of treatment, it is possible that the inmate will develop the sexual characteristics of the opposite gender. The reach of this statute is sweeping inasmuch as it is applicable to any inmate who is now in the custody of the DOC or may at any time be in the custody of the DOC, as well as any medical professional who may consider hormone therapy or gender reassignment as necessary treatment for an inmate.

Fields, 712 F.Supp.2d at 865-67. The district court's June 22, 2010 "additional findings" further support its conclusion that the statute is facially invalid. There, the court found that the injunction was "narrowly tailored in that enjoining the enforcement of [Act 105] prohibits only unconstitutional applications of the statute[,] which this court has found to be unconstitutional any time it is applied," and the injunction extended no further than necessary to correct the Eighth Amendment violation because "enjoining all applications of [Act 105] is necessary to prevent constitutional violations." The district court also specifically referenced its prior finding that the constitutional violation stemmed from "removing `even the consideration of hormones or surgery.'" (*See* App. 174-75.) We agree. Evaluating the record as a whole, the district court did not abuse its discretion in enjoining the entirety of Act 105.

Having determined that the district court properly held that Act 105 violates the Eighth Amendment, both on its face and as applied to plaintiffs, we need not address the district court's alternate holding that the law violates the Equal Protection Clause. Plaintiffs have asserted a conditional cross-appeal of the district court's denial of class certification. But because we have upheld the district court's injunction, we also do not address the cross-appeal.

III

The judgment of the district court is affirmed.

[*] The Honorable Joan B. Gottschall, United States District Judge for the Northern District of Illinois, sitting by designation.

[1] A group of medical and mental health professionals sought leave from the court to submit a brief as *amici curiae.* The motion is granted.

[2] Defendants began reducing plaintiffs' hormone levels on January 12, 2006; on January 27, 2006, the district court granted a preliminary injunction barring defendants from continuing to withdraw plaintiffs' hormone therapy and ordering defendants to return plaintiffs to their previous hormone levels.

[3] Plaintiff Moaton, for example, experienced suicidal ideation after DOC officials began withdrawing hormone treatments. *Fields,* 712 F.Supp.2d at 835.

[4] The PLRA provides, in part:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

612 F.2d 754 (1979)

INMATES OF the ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Harry Smith, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated, Appellants, v. Robert PIERCE, Chairman, Allegheny County Board of Prison Inspectors and all other members of the Board; James Jennings, Warden of Allegheny County Jail; and James Flaherty, Robert Pierce and Thomas Foerster, Commissioners for Allegheny County; John P. Lynch, Controller for Allegheny County; Eugene Coon, Sheriff for Allegheny County; The Honorable Henry Ellenbogen, The Honorable John W. O'Brien, The Honorable Samuel Strauss, and The Honorable Patrick R. Tamila, Judges of the Court of Common Pleas of Allegheny County; Peter Flaherty, Mayor of the City of Pittsburgh.

No. 78-2621.

United States Court of Appeals, Third Circuit.

Argued September 4, 1979.
Decided December 28, 1979.

756 *755 *756 Jere Krakoff (argued), Mark B. Greenblatt, Jon Pushinsky, Neighborhood Legal Services Association, Pittsburgh, Pa., for appellants.

Alexander J. Jaffurs, County Sol., Dennis R. Biondo (argued), Asst. County Sol., Pittsburgh, Pa., for appellees.

Before ALDISERT, ROSENN and GARTH, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

We are faced on this appeal with a challenge to certain conditions of confinement for pretrial detainees incarcerated in the Allegheny County Jail. On June 2, 1976, 757 *757 inmates of the jail ("Inmates") filed a class action against the Allegheny County Board of Prison Inspectors ("Board") and other county officials under 42 U.S.C. § 1983 seeking a declaratory judgment that the conditions violate the constitutional rights of the inmates.

On January 4, 1978, the district court issued the first of its two opinions. *Owens-El v. Robinson,* 442 F.Supp. 1368 (W.D.Pa. 1978). Although it found that many of the challenged conditions did violate the constitutional rights of the inmates, it held against them on the issues of contact visits, methadone treatment, and psychiatric care. These findings were incorporated in the court's final opinion and order of October 11, 1978. 457 F.Supp. 984. The Inmates appealed. We affirm on the issues of contact visits and drug detoxification, and remand on the issue of psychiatric care.

I.

The Allegheny County Jail is used primarily as a detention facility for persons awaiting trial. In addition to pretrial detainees, other inmates are also housed at the jail. These include: inmates who have been convicted but are awaiting sentencing; inmates who have been committed to the jail for misdemeanors for relatively short sentences; inmates on a work-release program; federal prisoners awaiting trial or sentencing; and state and federal prisoners from other institutions held in the jail while testifying in pending state and federal cases. The average daily population is approximately 430 inmates with an average length of confinement of about three weeks. Many inmates, however, are confined for substantially longer periods of time.

The Inmates' action against the Board sought broad scale relief from allegedly unconstitutional conditions at the jail. The district court found that many of the challenged conditions did indeed fall below the constitutional minimum and granted substantial relief.

Although not dispositive of the appeal before us, it is instructive to briefly summarize the conditions found to exist by the district court. Living facilities were unhealthy and unsafe. The plumbing system was antiquated and in disrepair. As a result, leaks and overflows frequently occurred in the cells. The cells lacked adequate lighting; the efforts of inmate-electricians seeking to remedy that defect caused exposed electrical wires which presented fire and shock hazards. Prisoners were required to sleep on canvas cots, many of which were discolored by blood, vomit, feces, and urine. Vermin abounded. Cell temperatures fluctuated between extreme cold in the winter and extreme heat in the summer. The shortage of guards reduced supervision of the inmates and permitted hoarding and vandalism of necessary supplies. This in turn contributed significantly to chronic shortages of necessary items such as blankets and bath towels.

Inmates with a wide spectrum of emotional and mental problems, ranging from simple "acting-out" behavior to drug withdrawal, delirium tremens, epileptic seizures, and mental instability, were confined in the "restraint room." Clothed in hospital gowns or left naked, there they were bound to canvas cots with a hole cut in the middle. A tub was placed underneath the hole to collect the body wastes of the occupant.

Some inmates were placed in solitary confinement for up to fourteen days without a mattress, toilet articles, or a change of clothing. Other inmates were confined in the nude in the isolation cell, an unfurnished, darkened, windowless room for up to fourteen consecutive hours, without any blankets or sheets.

In short, conditions in the jail were shockingly substandard and, the district court found, well below the minimum required by the Constitution. Accordingly, the court entered an order providing relief. The Board does not challenge these findings or the terms of the district court's order. In addition, however, the district court denied the Inmates relief in three specific areas. These denials form the basis of the Inmates' appeal presently before us.

758 *758 Currently, jail policy precludes inmates and their visitors from physical contact, restricting them instead to booths in which the inmate and visitor are separated by a pane of glass and communication is by telephone.[1] The district court upheld this practice as a legitimate restriction in light of the security interests of the jail.

The Inmates also challenge the method of drug detoxification at the jail. Currently, any inmate who has been receiving methadone treatment from an authorized treatment center in Allegheny County prior to his incarceration is allowed to receive such treatment for six days following the date of confinement, after which the treatment is terminated. The district court upheld this practice as within the sound discretion of prison medical authorities.

Finally, the Inmates challenge the system of psychiatric care at the jail alleging it to be constitutionally inadequate because of insufficient staffing. Although the court ordered psychiatric training for all nurses at the jail and prohibited the further use of restraint cots, it expressed no opinion as to the constitutional sufficiency of the general level of psychiatric care.

II.

The Inmates' first contention on appeal is that the district court erred in ruling that the prohibition of contact visits does not deprive the Inmates of their due process rights under the fourteenth amendment. They argue that, under *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the denial of contact visits represents an "exaggerated response" to an asserted security interest and therefore constitutes a denial of due process. We disagree.

In *Bell v. Wolfish,* the Supreme Court considered the standard to be applied in evaluating conditions of pretrial detention. The Court held that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law we think the proper inquiry is whether those conditions amount to punishment of the detainee." *Bell v. Wolfish, supra,* 441 U.S. at 535, 99 S.Ct. at 1872.

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." . . . Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment". . . . Conversely if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 538-539, 99 S.Ct. at 1874. The Court admonished lower courts that the government's interest in maintaining security and order and operating the institutions in a manageable fashion is "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." 441 U.S. at 540, 99 S.Ct. at 1875 n. 23.

The Inmates argue that there is very little likelihood that additional contraband will find its way into the jail if contact visits are allowed and that contraband will be introduced into the jail in any case. They urge that a plan recommended by the 759 court adviser[2] which would have allowed *759 contact visits in certain instances, is a reasonable alternative to the absolute prohibition presently imposed and would provide adequate protection for security interests at the jail. Under that plan inmates would not be eligible for contact visits until after having spent 45 days in confinement. The Inmates argue that this plan would protect security interests in a number of ways. First, it would limit the number of contact visits to a manageable level and thus eliminate the need to make major structural changes in the jail. Second, the waiting period would give the jail administration sufficient time to observe the various inmates and identify which of them would pose security risks if permitted to have contact visits. It also would afford the institution sufficient time to set up a visitor list for eligible inmates and determine which visitors might pose security problems.

The Inmates' arguments, however, are unpersuasive. Even though the chances of additional contraband being introduced into the jail by virtue of contact visits may well be small, prohibition of such visits is, nevertheless, not unreasonable. In *Bell v. Wolfish* the Court upheld body cavity inspection of inmates conducted after contact visits. The Court noted that, although

> there has been only one instance where an . . . inmate was discovered attempting to smuggle contraband into the institution on his person [this], may be more a testament to the effectiveness of . . . [the body cavity search] as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell v. Wolfish, supra, 441 U.S. at 559, 99 S.Ct. at 1884-1885.

The rationale applied in *Wolfish* is applicable here, particularly because the procedure the Court upheld was directed at detecting contraband that the prisoners might attempt to smuggle in after contact visits. Testimony in this case, by both the present and past wardens of the jail indicates that preventing the introduction of contraband into the jail is the primary reason for the ban on contact visits. The district court chose to credit that testimony and we cannot say that its decision was clearly erroneous. The court found that "[a]llowing contact visits would present a security problem at the jail." Thus, even though the chance of additional contraband reaching the jail as a result of contact visits may be remote, jail officials may reasonably act to remove even that remote possibility.

Similarly, the existence of other less restrictive alternatives is also not dispositive. As the Court indicated in *Wolfish,* unless the decision of prison authorities has a punitive purpose or is unreasonable or exaggerated in relation to an otherwise legitimate purpose, it is entitled to deference.

There is no indication in the record that the prohibition was adopted for purposes of punishment. The Inmates, however, further argue that the prohibition of contact visits encroaches upon a fundamental zone of privacy, the family relationship, and therefore, is deserving of heightened scrutiny even under *Bell v. Wolfish.* However, assuming a fundamental right is implicated by the prohibition of contact visits, we believe that prohibition to be a permissible restriction in the context of this case.

As the Court noted in *Wolfish,* "even when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish, supra,* 441 U.S. at 547, 99 S.Ct. at 1878. *See* *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). As we noted above, the prohibition of contact visits is a reasonable response to legitimate concerns of prison security. An inmate is not precluded from visiting with members of his family and others, but only from physical contact with 760 those individuals.[3] *760 Thus the restriction is specifically tailored to meet the perceived security problem. Further, the district court noted that, were contact visits to be allowed, other costly and extensive security measures would be required to prevent the entry of contraband. Where contact visits are allowed such measures include: installation of metal detectors, fluoroscopes, strip search rooms, and the testing of urine samples for drugs. The court found that requiring these in the antiquated facilities of the Allegheny County jail "would place an undue burden on the administration." In such circumstances, a ban on contact visits represents a reasonable choice by prison officials between alternative methods of protecting the legitimate security interests of the jail.[4] Thus, we affirm the holding of the court permitting the jail officials to prohibit contact visits.

III.

The Inmates' next claim is that the district court erred in its finding that the system of methadone treatment at the jail does not constitute a denial of due process. Inmates of the jail who have been receiving methadone treatment prior to incarceration from an approved clinic in Allegheny County[5] are given methadone treatment through their sixth day of confinement, after which treatment is terminated.[6]

The testimony of the medical experts conflicted; one testified that seven days of methadone treatment would be sufficient and another advocated administering decreasing methadone dosages over a twenty-one day period. Both the prior and present jail physicians approved of the jail's program of treatment. The district court concluded that the appropriate form of treatment involved a "discrete medical judgment" and it found no abuse of discretion of the jail physicians regarding the choice of treatment. On this record, we perceive no "deliberate indifference" to the inmates' serious medical needs in disregard of the standard enunciated in *Estelle v. Gamble,* 429 U.S. 97, 105-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

The Inmates, however, argue that our opinion in *Norris v. Frame,* 585 F.2d 1183 (3d Cir. 1978), requires that we vacate the district court's holding and remand for further fact finding. In *Norris,* we held that because Pennsylvania has by regulation provided specific procedures for termination of methadone treatment, *id.* at 1189 n.17, a pretrial detainee who has been receiving such treatment in an approved program prior to incarceration, has a due process liberty interest in the continuation of such treatment. We held that when prison officials seek to terminate that treatment other than in accordance with the procedures required by that regulation they must "demonstrate . . . a legitimate security concern, or a genuine fear of substantial administrative disruption." Id. at 1185.

Our opinion in *Norris,* however, must be read in light of the Supreme Court's opinion in *Bell v. Wolfish, supra.* There the Supreme Court set forth the standard to be used in evaluating the constitutionality of conditions of pretrial confinement. The 761 *761 governing inquiry, as we noted above, is whether the particular condition or restriction has a punitive purpose. "Absent a showing of an expressed intent to punish on the part of detention facility officials," we must determine "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish, supra,* 441 U.S. at 538, 99 S.Ct. at 1873-1874.

In this case, there is nothing in either the district court's opinion or the record of the testimony presented at trial which indicates a punitive purpose on the part of jail authorities. The district court itself held that, given the circumstances, the methadone treatment provided at the jail constituted a reasonable medical decision. We believe the record supports the court's conclusion.

There also appears to be a permissible purpose in curtailing the methadone treatment. Jail authorities may reasonably act so as to exclude contraband from the jail environment. *See* *Bell v. Wolfish, supra.* Thus, they may prohibit contact visits, regulate the material received by inmates from outside the jail, or institute strip searches of inmates after contact visits with non-inmates. Such measures have been held to be reasonably related to the legitimate concerns of institutional security. This type of concern is also evinced in the testimony of the jail wardens. It appears to us that such a legitimate security interest is also present in the jail's restriction of methadone treatment. Drug use in jails or prison facilities is certainly of the utmost concern to jail and prison authorities. That is true whether the drug is heroin, marijuana, or methadone. The potential for jail or prison disruption caused by the presence of drugs is well-known. Thus, jail authorities have a legitimate security concern in limiting exposure of inmates to drugs, even those administered on a controlled basis, to as short a period of time as is medically reasonable. We therefore perceive no error in the district court's approval of the methadone detoxification program.

IV.

The Inmates' final contention is that the relief granted by the district court, fails to raise the level of psychiatric care at the jail to the constitutionally required minimum.

Expert testimony at trial indicated that, of an average daily population at the jail of approximately 430 inmates, between 60 and 80 could reasonably be expected to have "easily identifiable and fairly serious mental health problems." Notwithstanding, there are no psychiatric care professionals on the staff of the jail. The medical staff consists of one part-time physician and five registered nurses. Although the doctor is on call twenty-four hours a day he spends approximately two hours a day at the jail. Of this, generally less than fifteen minutes per day is spent in the jail hospital—which includes the restraint ward. Testimony indicated that the doctor spends approximately 35 seconds with each patient in restraint in reaching his decision as to the need for continued restraint. No nurses are stationed in the jail hospital. A nurse will visit the hospital twice every shift for fifteen or twenty minutes in order to dispense medication.

Some assistance is provided to the jail physician by the psychiatrists of the Allegheny County Behavior Clinic. The Clinic is under the jurisdiction of the Allegheny County Court of Common Pleas and is responsible for evaluating all persons charged with homicide, sex offenses, and certain other crimes regardless of whether they are incarcerated. The Clinic, however, has no formal responsibility for psychiatric diagnosis and treatment of inmates of the jail. Nevertheless, when requested by the jail physician, a Behavior Clinic psychiatrist will see patients at the jail and recommend medication. The decision whether to actually prescribe and administer the medicine remains with the jail physician, however. This is because the Clinic is primarily diagnostic and is not involved in treatment. Even then, testimony indicates the psychiatrist will generally see a patient only one time, 762 although where deemed necessary *762 more visits will be made. From the record it appears that the diagnosis offered by the Clinic is conclusory and without the sort of full explanation that would normally be offered if the case had been referred by another physician. The record also indicates that restraint and administration of psychotropic medication remain the primary methods of treatment for psychiatric disturbances at the jail. Expert testimony indicates that without the close supervision that is lacking at the jail, administration of such drugs is likely to be either ineffective or dangerous.

The district court's order does provide some relief: the court forbade the further use of restraint cots, limited the use of restraints in general, and ordered that all nurses at the jail receive psychiatric training. The court, however, expressed no finding as to the adequacy of psychiatric care at the jail.

Although negligence in the administration of medical treatment to prisoners is not itself actionable under the Constitution, failure to provide adequate treatment is a violation of the eighth amendment when it results from "deliberate indifference to a prisoner's serious illness or injury." *Estelle v. Gamble,* 429 U.S. 97, 105, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). Because the case before us involves pretrial detainees, rather than convicted prisoners, our analysis must proceed under the Due Process Clause of the fourteenth amendment rather than the eighth amendment. *See* *Bell v. Wolfish, supra,* 441 U.S. at 535, 99 S.Ct. 1861. Nevertheless, "[i]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted." *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1079-80 (3d Cir. 1976). Thus, at a minimum the "deliberate indifference" standard of *Estelle v. Gamble,* must be met. As we noted in *West v. Keve,* 571 F.2d 158 (3d Cir. 1978), the *Estelle* test is two-pronged. "It requires deliberate indifference on the part of prison officials and it requires the prisoner's medical needs to be serious." *Id.* at 161.

Appropriately, this test affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients. Courts will "disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment." *Bowring v. Godwin,* 551 F.2d 44, 48 (4th Cir. 1977). Implicit in this deference to prison medical authorities is the assumption that such an informed judgment has, in fact, been made. When, however, prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment, the constitutional standard of *Estelle* has been violated. *West v. Keve, supra,* 571 F.2d at 162.

Systemic deficiencies in staffing which effectively deny inmates access to qualified medical personnel for diagnosis and treatment of serious health problems have been held to violate constitutional requirements. In *Gates v. Collier,* 349 F.Supp. 881 (N.D. Miss.1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974), for instance, the court found that "[t]he medical staff and available facilities [at the Mississippi State Penitentiary] fail to provide adequate medical [treatment] for the inmate population." 349 F.Supp. at 888. As a result the court ordered the hiring of additional medical staff, both physicians and nurses, to bring the level of medical care up to the constitutional minimum.

In *Newman v. Alabama,* 349 F.Supp. 278 (M.D.Ala.1972), *aff'd,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), the court found that "gross understaffing" of medical facilities in the Alabama prison system constituted a constitutional violation. As the Second Circuit noted in *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir. 1977), "[w]hen systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers." *See* *Bishop v. Stoneman,* 508 F.2d 1224 (2d 763 Cir. *763 1974). Thus, where the size of the medical staff at a prison in relation to the number of inmates having serious health problems constitutes an effective denial of access to diagnosis and treatment by qualified health care professionals, the "deliberate indifference" standard of *Estelle v. Gamble* has been violated. In such circumstances, the exercise of informed professional judgment as to the serious medical problems of individual inmates is precluded by the patently inadequate size of the staff.

Although most challenges to prison medical treatment have focused on the alleged deficiencies of medical treatment for physical ills, we perceive no reason why psychological or psychiatric care should not be held to the same standard. The leading case in this respect is *Bowring v. Godwin, supra.* There, in holding that a convicted prisoner is entitled to psychological or psychiatric care for serious mental or emotional illness, the court noted that it saw "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Bowring v. Godwin, supra,* 551 F.2d at 47. See *Laaman v. Helgemoe,* 437 F.Supp. 269 (D.N.H.1977). Further, expert testimony received at trial in the instant case indicated that the failure to provide necessary psychological or psychiatric treatment to inmates with serious mental or emotional disturbances will result in the infliction of pain and suffering just as real as would result from the failure to treat serious physical ailments. Thus, the "deliberate indifference" standard of *Estelle v. Gamble* is applicable in evaluating the constitutional adequacy of psychological or psychiatric care provided at a jail or prison. The key factor in determining whether a system for psychological or psychiatric care in a jail or prison is constitutionally adequate[7] is whether inmates with serious mental or emotional illnesses or disturbances are provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances. We hold that, when inmates with serious mental ills are effectively prevented from being diagnosed and treated by qualified professionals, the system of care does not meet the constitutional requirements set forth by *Estelle v. Gamble, supra,* and thus violates the Due Process Clause.

The record before us indicates there are substantial deficiencies in the system of psychiatric care at the Allegheny County Jail. Nevertheless, we are not confident that the record accurately reflects existing conditions at the jail. As indicated at oral argument, it does not contain the two reports of the advisor appointed by the district court nor does it reflect the change in conditions caused by the district court's order.[8] Furthermore, the district court did not make a specific finding as to the adequacy of the system for psychiatric care at the jail. We, therefore, remand to the district court for its determination whether the level of psychiatric care meets the constitutional minimum in light of the standards which we have articulated.[9] Should the district court determine that the constitutional requirements have not been satisfied, it will then, of course, order such relief as it finds is required.

V.

The judgment of the district court accordingly will be affirmed on the issue of contact visitation and drug detoxification. The district court's judgment on the issue of psychiatric care will be vacated and the 764 *764 case remanded for further proceedings not inconsistent with this opinion.

Each side to bear its own costs.

ALDISERT, Circuit Judge, concurring and dissenting.

Because I find no error in the disposition by the trial court of the three basic constitutional issues presented by this appeal— contact visits, methadone treatment, and psychiatric care—I would affirm the judgment of the district court in full. Accordingly, I join parts II and III of Judge Rosenn's opinion affirming those portions of the district court's judgment which determine that the county jail rules prohibiting contact visitations and administering methadone treatment do not offend the fourteenth amendment. For the reasons that follow, however, I dissent from the majority's reversal of that part of the judgment relating to psychiatric care.

I.

In *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the prisoner-plaintiff suffered a back injury during a prison work assignment when a bale of cotton fell on him. He was initially examined and returned to work but then was re-examined, prescribed a painkiller, and permitted to remain in his cell. During a three month period he was seen by medical personnel on seventeen occasions but, allegedly, was treated inadequately for his back injury, high blood pressure, and heart problems. Presented with the opportunity for deciding when faulty medical treatment of an inmate amounts to a constitutional deprivation, the Court determined that the government has an obligation to provide medical care for those it is punishing by incarceration, that *denial* of medical care causes pain and suffering inconsistent with contemporary standards of decency, and then concluded that deliberate indifference to serious medical needs of prisoners constitutes a violation of the eighth amendment:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once proscribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

429 U.S. at 104-05, 97 S.Ct. at 291 (citations and footnotes omitted). The deliberate indifference standard, however, was clarified by the Court to include only "wanton infliction of unnecessary pain" and not circumstances caused by an accident or by inadvertent failure:

> Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 106, 97 S.Ct. at 292. Subsequently, in *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Court specifically instructed that the proper constitutional inquiry is whether conditions of pretrial detention amount to punishment of the detainee.

It is against the standards announced in *Estelle* and *Wolfish* that we must evaluate the claims that the psychiatric procedures offend the eighth and fourteenth amendments. In my view, the legal precepts that control require us to decide whether appellants met their burden of proof before the district court by satisfying (1) the test of *Estelle*: whether there was "deliberate indifference to serious 765 medical needs" constituting "unnecessary and wanton infliction *765 of pain," and (2) the test of *Wolfish*: whether conditions or medical treatment were designed "for the purpose of punishment," or if not expressly so designed, were "not reasonably related to a legitimate goal," or were "arbitrary or purposeless." 441 U.S. at 539, 99 S.Ct. at 1874.

II.

Applying these legal precepts to the facts adduced at trial on the adequacy of psychiatric treatment, I concur in the result reached by the district court. I agree with the majority that the district court made no findings *ipsissimis verbis* as to the adequacy of psychiatric care at the jail, but after examining a voluminous record and a comprehensive opinion dealing with many phases of jail conditions, supplemented by decrees which ordered sweeping reforms, I find no fault in the district court's final resolution of the constitutional issues relating to psychiatric care. By ordering special training for the nurses, the district court implicitly considered it unnecessary to require the jail to install additional professional staff or procedures in order to meet minimum constitutional standards. Judge Cohill ordered:

> 14. A sufficient number of nurses who qualify as psychiatric nurses shall be employed so that there will be at least one psychiatric nurse on duty at the jail at all times.

Appendix for Appellants at 76a.

> 25. The defendants shall, by January 1, 1979, arrange for a training program for present and future jail nurses in the area of psychiatric nursing. All present jail nurses must enroll in the program as soon as it is established. All nurses employed by the jail in the future shall, within six months of their date of employment, complete said training course.

Id. at 96a-97a.

The testimony concerning adequate psychiatric care was conflicting. Appellants presented expert witnesses supporting the necessity for expanded services. Appellees presented expert testimony to the contrary. Dr. Alphonse J. Cipriani described how the jail physicians referred appropriate cases to a psychiatric setting if the symptoms warranted:

> Q. But in the case of men who have psychiatric disorders, specifically, [the nurses] are not trained?
>
> A. No. As I indicated before, we are into a philosophical question, I would repeat for the Court, this is a County Jail with a medical infirmary, a medical hospital, a medical restraining room. We are a County Jail.
>
> I am not, and we are not a psychiatric hospital. We are not a psychiatric unit. The patients, as I said before, get adequate care until final disposition is made.
>
> Now if final disposition means within 24 hours I should have this patient in a general hospital, that's where he or she goes. If it means that this patient should be in a psychiatric setting immediately even before the psychiatric consultation agrees, I told you, that is the way that patient would be handled, the disposition.
>
> But in terms of being a County Jail, they are getting good, adequate psychiatric and general medical care for that period of time that they are there until the Court decides the final disposition.
>
> It is my opinion. That's what I have observed in three months.

Appendix for Appellees at 6b.

Testimony was also adduced that a jail physician is on call twenty-four hours a day and is actually on the premises approximately two and one-half hours a day, and that the services of the Allegheny County Behavior Clinic, an arm of the court of common pleas, are available to the inmates. Five psychiatrists and two psychologists from the clinic "have direct involvement in the Allegheny County Jail." Appendix for Appellants at 369a. The director of the clinic testified that the clinic acts as "psychiatric consultant to Dr. Smith, the jail physician." *Id.* at 372a. Upon request of the jail physician, an inmate will be examined by a Behavior Clinic psychiatrist, a diagnosis will be made, and medication or other treatment will be 766 recommended to the jail physician. *Id.* at 374a. These psychiatrists *766 are available five days a week. *Id.* at 385a.

On this record I cannot conclude that appellants met either their burden under *Estelle* of proving "deliberate indifference to serious medical needs" or the test of *Wolfish,* that the professional psychiatric care was "[designed] for the purpose of punishment," or if not expressly so designed, was "arbitrary or purposeless." For their part, the majority conclude that they "are not confident that the record accurately reflects existing conditions at the jail." Maj. Op., at 763. The function of an appellate court in the Anglo-American tradition, however, is to review the judgment of the district court based on the record before it. Having reviewed that record I would affirm the judgment of the district court in all respects.

[1] Inmates are allowed to have visitors three times per week for one hour.

[2] Arnold Pontesso was appointed by the district court as its advisor in this case. He previously served as Director of Corrections for the State of Oklahoma as well as Warden of the Federal Reformatory in El Reno, Oklahoma.

[3] We note that the restriction at issue here does not prevent visits from non-inmates but only prohibits contact visits. *See* *Valentine v. Englehart,* 474 F.Supp. 294 (D.N.J., 1979) (court holds ban on visits by children unconstitutional under *Bell v. Wolfish.*)

[4] Although the issue was not before it in *Wolfish,* the Court implied that prohibition of contact visits is a reasonable alternative to body cavity searches in preventing contraband from entering a jail or prison. *Bell v. Wolfish,* 441 U.S. at 559-60, 99 S.Ct. 1861 n. 40.

[5] Currently, inmates who have been receiving methadone treatment from clinics located outside Allegheny County receive no methadone treatment after incarceration. The district court found this "uneven treatment" to constitute a violation of the Equal Protection Clause. Nevertheless, the court apparently ordered no relief in this regard and the parties do not raise the issue on appeal.

[6] The district court, however, found that the inmate can request other medication to help ease the effects of his methadone or heroin withdrawal. Those dispensed at the jail included the tranquilizer Sparine and such medicine as Tylenol, Maalox, and Benadryl.

[7] We caution, however, that even though the *system* of care may itself be constitutionally sufficient the refusal to make that system of care available to a particular inmate may itself be unconstitutional. *See* *Bowring v. Godwin, supra.* We are not faced with that issue here, however, and express no opinion as to the relevant standards to be applied in making that determination.

[8] The Board, for instance, alleged at oral argument that the improved recordkeeping required by the district court's order indicates that psychiatrists from the Behavior Clinic now spend a substantial amount of time at the jail.

[9] The district court may receive whatever additional evidence it deems relevant in making that determination.

840 F.2d 359 (1988)

Roy E. JONES, Plaintiff-Appellant, v. Tony A. DUNCAN, R.L. Byrd; Michael R. Gunter, James T. Jones, William Marlowe, Wayne Russell, Jerry L. Jones, Fred Copeland, Larry C. Duncan, Tommy Kilby, Billy R. Kreis, James Adams, Samuel D. Williams, and Morgan County Commission also known as Morgan County Quarterly Court, Defendants-Appellees.

No. 87-5172.

United States Court of Appeals, Sixth Circuit.

Argued December 15, 1987.
Decided March 7, 1988.

David H. Dunaway, Dunaway, Harrell and Van Hook, Lisa M. Countiss (argued), LaFollette, Tenn., for plaintiff-appellant.

Joe R. Judkins, Wartburg, Tenn., Robert H. Watson, Jr. (argued), Knoxville, Tenn., for defendants-appellees.

Before MARTIN and GUY, Circuit Judges, and JOHNSTONE, District Judge.[*]

360 *360 RALPH B. GUY, Jr., Circuit Judge.

Plaintiff, Roy E. Jones, filed suit in federal court pursuant to 42 U.S.C. §§ 1983 and 1985 against the Morgan County Commission and the individual commissioners in their official capacities. Plaintiff alleged that members of the Commission had filed suit in state court seeking his removal from the office of Superintendent of Morgan County Schools. Plaintiff's federal civil rights claims are essentially based on allegations of malicious prosecution. The federal district court granted defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6), finding that the defendants had acted in their unofficial capacities as private citizens; hence, defendants' actions were not taken under color of state law as is required in suits brought under section 1983. Because we find that the requisite element of state action has been alleged, the order of dismissal is reversed.

I.

In June of 1983, Tony Duncan, the Morgan County Executive and Chairman of the County Commission, was informed by the county trustee that expenditures by the county school system had exceeded the amount allocated for that purpose by the Commission. Duncan authorized the payment of $20,000 from the county's general fund to cover the initial overdrafts, but instructed the bank not to honor any additional claims. Thereafter, Duncan contacted the state comptroller's office and requested an audit of the school system's financial status. The audit revealed that the system had spent approximately $300,000 more than what was allowed under the county school budget.

In response to the audit, the Morgan County Commission formed an investigative committee to determine the cause of the deficit in the school system's budget. The committee conducted hearings and interviewed several people involved in purchasing for the school system. The committee concluded that numerous items had been purchased with school funds that had not been used for educational purposes and that the county board of education had approved these expenditures. Some of the evidence before the committee showed that Jones had specifically recommended against making at least some of these expenditures. Superintendent Jones refused to appear before the committee and the committee had no subpoena powers with which to compel his appearance. At the conclusion of the investigation, the Commission unanimously passed a resolution which called for Jones' resignation. The resolution also instructed the county executive to take the necessary steps to institute ouster proceedings against Jones if he did not resign. The Commission rejected a proposal to adopt a similar measure which would have been directed against the entire school board. At the time this action was taken, Jones already had an action pending against the Commission for refusing to supply counsel to him in connection with a civil rights action in which he was a defendant. Some of the commissioners talked about "counter-suing" Jones, and it is clear that, at best, they had no hard evidence against Jones but wanted to clear the air and adopted a "let the chips fall where they may" approach to the proposed litigation.

Jones refused to resign and the Morgan County attorney advised the Commission that he would not file a statutory ouster proceeding against Jones. Members of the Commission, using county funds, hired a private attorney to act as a "special prosecutor" to pursue this matter. The attorney advised the defendants that the Commission itself could not institute proceedings under the Tennessee statutory ouster provisions. The statute, however, provided that an ouster proceeding could be brought by ten or more citizens or freeholders of Morgan County. Accordingly, twelve commissioners voluntarily filed an ouster proceeding as individual citizens of Morgan County. The state court granted Jones' motion for a directed verdict in the ouster proceeding following the presentation of plaintiff's proofs. The state court ruled that the Commission members who were acting as "relators" in the ouster proceedings had failed to establish a *prima facie* case. The Commission
361 members did not *361 appeal the dismissal of their state court action.

Jones was subsequently defeated in an attempt to gain reelection as superintendent of the county school system. He thereafter brought suit in federal court against the county commissioners who had previously instituted the unsuccessful ouster proceedings against him in state court. In his complaint, Jones brought claims under 42 U.S.C. §§ 1983 and 1985 alleging that defendants had "maliciously prosecuted" the plaintiff "with an intent to deprive the plaintiff of his rights and privileges guaranteed by the Constitution and the laws of the United States." The complaint did not specify exactly which federal statutory or constitutional rights had been violated.

As previously noted, the district court granted the defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6), finding that plaintiff had failed to allege the state action element necessary to state a claim under section 1983. Specifically, the court found that the defendants were being sued for instituting the ouster proceedings against Jones and that, according to Tennessee law, such proceedings could only be brought by certain select government officials or by ten citizens of the county.[1] Since the county attorney had refused the commissioners' request to bring the proceedings, the commissioners had to act as individual citizens in order to gain standing to proceed with the suit. Thus, the district court reasoned that commissioners could not have been acting in their official capacities when they instituted the ouster proceedings against Jones. Accordingly, the court concluded that Jones had failed to show that the defendants' actions were taken "under color of law" as is required under section 1983. Therefore, the district court dismissed the plaintiff's suit.[2]

II.

In *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir.1982), *cert. denied sub nom. Wyllie v. Dunn*, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983), this court reiterated the standard used for reviewing the sufficiency of the allegations in a complaint for an action under section 1983:

> Dismissals of complaints under the civil rights statutes are scrutinized with special care. A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires `a short and plain statement of the claim showing that the pleader is entitled to relief....' Fed.R.Civ.P. 8(a)(2). All a complaint need do is afford the defendant `fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [cites omitted]. A motion to dismiss under Rule 12(b)(6) should not be granted `unless *it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*' [cites omitted]. [emphasis added].

Dunn, 697 F.2d at 125 (quoting *Westlake v. Lucas*, 537 F.2d 857, 858-59 (6th Cir.1976)).

In order to state a claim under section 1983, a plaintiff must allege two elements: (1) the plaintiff must show a deprivation of rights secured by the "Constitution and
362 *362 laws" of the United States, and (2) plaintiff must show that the defendant deprived him of this federal right "under color of law."[3] *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

Given the facts alleged in this case, we find that the district court erred in ruling that the plaintiff had failed to properly allege that the defendants acted under color of law. In reaching this conclusion, the court focused solely on the fact that, under Tennessee law, the ouster suit could only be brought by the defendants acting as individual citizens and not in their official capacity as commissioners. The district court, however, ignored all of the predicate actions taken by the defendants in their official roles which led to the unsuccessful ouster proceedings and could serve as the basis for a malicious prosecution suit. Thus, the use of defendants' names as relators in the ouster proceeding against Jones was merely the culmination of a whole series of earlier actions taken by the defendants in their official capacities as commissioners with the intent of removing plaintiff from his office. Lending their names to the suit as plaintiffs was actually the least of the actions involved in this scenario. The commissioners could have as easily had their spouses be the named plaintiffs. It was the exercise of their official power to set the wheels in motion to bring the suit and their financing of the suit that qualifies as "state action."

The defendants rely heavily on our decision in *Crowder v. Conlan*, 740 F.2d 447 (6th Cir.1984). In *Crowder*, a physician brought a section 1983 action against a hospital alleging that the denial of his staff privileges violated his civil rights. In order to show state action, the plaintiff alleged the existence of several factors including: (1) a large percentage of the hospital's revenues were derived from government sources, including Medicare and Medicaid; (2) extensive state regulation of the hospital; (3) the hospital board of trustees included two local officials; and (4) the hospital facilities were owned by the county and leased back to a private organization.

In analyzing the sufficiency of these allegations, this court relied on the general test established by the Supreme Court, i.e., "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly attributed to the State itself." 740 F.2d at 450 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974)). *See also Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982). Applying this standard, the *Crowder* court found that the receipt of government payment for the treatment of welfare patients was not sufficiently related to the revocation of plaintiff's staff privileges. Likewise, the state regulation of the hospital was not enough to convert the challenged activities into state action. The Court also noted that only two of the Hospital Board's thirteen members were public officials and that this did not establish the requisite showing that the State had exercised "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Crowder*, 740 F.2d at 452
363 *363 (quoting *Blum*, 457 U.S. at 1004, 102 S.Ct. at 2786). In sum, the court found that "the connections between the State and the ... Hospital are insufficiently linked to the challenged actions of the defendants to warrant a finding of state action in the hospital's decision to restrict Dr. Crowder's staff privileges." 740 F.2d at 453.

The facts in the instant case stand in stark contrast to those presented in *Crowder*. First, the group of defendants which brought the ouster proceedings against the plaintiff contained not just one or two public officials, but was made up entirely of county commissioners. Cf. *Downs v. Sawtelle*, 574 F.2d 1, 8 (1st Cir.), *cert. denied sub nom. Hagan v. Downs*, 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 255 (1978) ("[T]he appointment by the state of a majority of an institution's board is either determinative of state action or an important factor in establishing state action."). Even more importantly, the expenditure of public funds involved in this case was made for the express purpose of financing the challenged activity of the defendants, i.e., the legal costs associated with the filing of the ouster proceedings. Thus, unlike the facts in *Crowder*, there is a direct nexus between the membership and actions of the Commission and the identity and allegedly illegal actions of the defendants.

We emphasize that none of the individual factors considered above necessarily compel a finding that the defendants had acted under color of law. We merely hold that when considered in combination, these allegations are adequate to withstand a motion for dismissal made pursuant to Fed.R.Civ.P. 12(b)(6). Our reversal of the dismissal will also require the district court to now consider any other defenses, such as qualified immunity, which may have been advanced but not resolved, as well as other theories of liability advanced by the plaintiff.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

[*] Honorable Edward H. Johnstone, United States District Court, Western District of Kentucky, sitting by designation.

[1] Tenn.Code Ann. § 8-47-110 provides:

The petition or complaint shall be in the name of the state and may be filed upon the relation of the attorney general of the state, or the district attorney general for the state, or the county attorney in the case of county officers, and of the city attorney, or the district attorney general, in the case of municipal officers; and in all cases it may be filed, without the concurrence of any of said officers, upon the relation of ten (10) or more citizens and freeholders of the state, county, or city, as the case may be, upon their giving the usual security for costs.

[2] The district court issued an order dismissing the entire action including Jones' section 1985 claims. The order is part of a memorandum opinion which is devoted exclusively to the issue of state action under section 1983. Neither the order nor the opinion contain any reference to plaintiff's section 1985 claims. Moreover, neither of the parties addressed the section 1985 claim on appeal. Under these circumstances, we find it appropriate to refrain from expressing an opinion on the merits of the plaintiff's section 1985 claims. Rather, we instruct the district court to consider this issue separately on remand in addition to the plaintiff's section 1983 claims.

[3] 42 U.S.C. § 1983 provides:

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

The decision of the district court was based entirely on the court's finding that the plaintiff had failed to allege facts which could support a finding that the defendants had acted under "color of law." The district court did not rule on the sufficiency of the plaintiff's allegations with respect to the other element of his section 1983 claim, i.e., the violation of a federally protected right. This issue was not fully considered by the court below and we decline the defendants' invitation to address it for the first time on appeal.

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503 U.S. 1

112 S.Ct. 995

117 L.Ed.2d 156

Keith J. HUDSON, Petitioner,
v.
Jack McMILLIAN et al.

No. 90-6531.

Argued Nov. 13, 1991.

Decided Feb. 25, 1992.

Syllabus

Petitioner Hudson, a Louisiana prison inmate, testified that minor bruises, facial swelling, loosened teeth, and a cracked dental plate he had suffered resulted from a beating by respondent prison guards McMillian and Woods while he was handcuffed and shackled following an argument with McMillian, and that respondent Mezo, a supervisor on duty, watched the beating but merely told the officers "not to have too much fun." The Magistrate trying Hudson's District Court suit under 42 U.S.C. § 1983 found that the officers used force when there was no need to do so and that Mezo expressly condoned their actions, ruled that respondents had violated the Eighth Amendment's prohibition on cruel and unusual punishments, and awarded Hudson damages. The Court of Appeals reversed, holding, *inter alia,* that inmates alleging use of excessive force in violation of the Amendment must prove "significant injury" and that Hudson could not prevail because his injuries were "minor" and required no medical attention.

Held: The use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. Pp. 5-12 .

(a) Whenever prison officials stand accused of using excessive physical force constituting "the unnecessary and wanton infliction of pain" violative of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley v. Albers,* 475 U.S. 312, 320-321, 106 S.Ct. 1078, 1084-1085, 89 L.Ed.2d 251: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Extending *Whitley* § application of the "unnecessary and wanton infliction of pain" standard to all allegations of force, whether the prison disturbance is a riot or a lesser disruption, works no innovation. See, *e.g., Johnson v. Glick,* 481 F.2d 1028, cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324. Pp. 5-7.

(b) Since, under the *Whitley* approach, the extent of injury suffered by an inmate is one of the factors to be considered in determining whether the use of force is wanton and unnecessary, 475 U.S., at 321, 106 S.Ct., at 1085, the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. There is no merit to respondents' assertion that a significant injury requirement is mandated by what this Court termed, in *Wilson v. Seiter,* 501 U.S. ----, ---- -, 111 S.Ct. 2321, 2326, 115 L.Ed.2d 271, the "objective component" of Eighth Amendment analysis: whether the alleged wrongdoing is objectively "harmful enough" to establish a constitutional violation, *id.,* at ----, ----, 111 S.Ct., at 2326, 2329. That component is contextual and responsive to "contemporary standards of decency." *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251. In the excessive force context, such standards always are violated when prison officials maliciously and sadistically use force to cause harm, see *Whitley,* 475 U.S., at 327, 106 S.Ct., at 1088, whether or not significant injury is evident. Moreover, although the Amendment does not reach *de minimis* uses of physical force, provided that such use is not of a sort repugnant to the conscience of mankind, *ibid.,* the blows directed at Hudson are not *de minimis,* and the extent of his injuries thus provides no basis for dismissal of his § 1983 claim. Pp. 7-10.

(c) The dissent's theory that *Wilson* requires an inmate who alleges excessive force to show significant injury *in addition to* the unnecessary and wanton infliction of pain misapplies *Wilson* and ignores the body of this Court's Eighth Amendment jurisprudence. *Wilson* did not involve an allegation of excessive force and, with respect to the "objective component" of an Eighth Amendment claim, suggested no departure from *Estelle* and its progeny. The dissent's argument that excessive force claims and conditions of confinement claims are no different in kind is likewise unfounded. To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment. See *Estelle, supra,* 429 U.S., at 102, 97 S.Ct., at 290. P. 10-11.

(d) This Court takes no position on respondents' legal argument that their conduct was isolated, unauthorized, and against prison policy and therefore beyond the scope of "punishment" prohibited by the Eighth Amendment. That argument is inapposite on the record, since the Court of Appeals left intact the Magistrate's determination that the violence at issue was not an isolated assault, and ignores the Magistrate's finding that supervisor Mezo expressly condoned the use of force. Moreover, to the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Court of Appeals, not presented by the question on which this Court granted certiorari, and, accordingly, not before this Court. Pp. 11-12.

929 F.2d 1014 (CA 5 1990), reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, KENNEDY, and SOUTER, JJ., joined, and in which STEVENS, J., joined as to Parts I, II-A, II-B, and II-C. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

Alvin J. Bronstein, for petitioner.

John G. Roberts, Jr., as amicus curiae, supporting the petitioner.

Harry McCall, Jr., for respondent.

Justice O'CONNOR delivered the opinion of the Court.

1
This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. We answer that question in the affirmative.

2
* At the time of the incident that is the subject of this suit, petitioner Keith Hudson was an inmate at the state penitentiary in Angola, Louisiana. Respondents Jack McMillian, Marvin Woods, and Arthur Mezo served as corrections security officers at the Angola facility. During the early morning hours of October 30, 1983, Hudson and McMillian argued. Assisted by Woods, McMillian then placed Hudson in handcuffs and shackles, took the prisoner out of his cell, and walked him toward the penitentiary's "administrative lockdown" area. Hudson testified that, on the way there, McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind. He further testified that Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun." App. 23. As a result of this episode, Hudson suffered minor bruises and swelling of his face, mouth, and lip. The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.

3
Hudson sued the three corrections officers in Federal District Court under 42 U.S.C. § 1983, alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishments and seeking compensatory damages. The parties consented to disposition of the case before a Magistrate, who found that McMillian and Woods used force when there was no need to do so and that Mezo expressly condoned their actions. App. 26. The Magistrate awarded Hudson damages of $800. *Id.,* at 29.

4
The Court of Appeals for the Fifth Circuit reversed. 929 F.2d 1014 (1990). It held that inmates alleging use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury; (2) resulting "directly and only from the use of force that was clearly excessive to the need"; (3) the excessiveness of which was objectively unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain. 929 F.2d, at 1015. The court determined that respondents' use of force was objectively unreasonable because no force was required. Furthermore, "[t]he conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." *Ibid.* However, Hudson could not prevail on his Eighth Amendment claim because his injuries were "minor" and required no medical attention. *Ibid.*

5
We granted certiorari, 499 U.S. ----, 111 S.Ct. 1679, 114 L.Ed.2d 75 (1991), to determine whether the "significant injury" requirement applied by the Court of Appeals accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted.

II

6
In *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the principal question before us was what legal standard should govern the Eighth Amendment claim of an inmate shot by a guard during a prison riot. We based our answer on the settled rule that " 'the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Id.,* at 319, 106 S.Ct., at 1084 (quoting *Ingraham v. Wright,* 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed.2d 711 (1977)) (internal quotation omitted).

7
What is necessary to establish an "unnecessary and wanton infliction of pain," we said, varies according to the nature of the alleged constitutional violation. 475 U.S., at 320, 106 S.Ct., at 1085. For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited "deliberate indifference." See *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). This standard is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Whitley, supra,* 475 U.S., at 320, 106 S.Ct., at 1084-1085.

8
By contrast, officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S., at 320, 106 S.Ct., at 1084. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.,* at 320-321, 106 S.Ct., at 1085 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (CA2), cert. denied *sub nom. John v. Johnson,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)).

9
Many of the concerns underlying our holding in *Whitley* arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that " '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " 475 U.S., at 321-322, 106 S.Ct., at 1085 (quoting *Bell v. Wolfish,* 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979)). In recognition of these similarities, we hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

10
Extending *Whitley* § application of the "unnecessary and wanton infliction of pain" standard to all allegations of excessive force works no innovation. This Court derived the *Whitley* test from one articulated by Judge Friendly in *Johnson v. Glick, supra,* a case arising out of a prisoner's claim to have been beaten and harassed by a guard. Moreover, many Courts of Appeals already apply the *Whitley* standard to allegations of excessive force outside of the riot situation. See *Corselli v. Coughlin,* 842 F.2d 23, 26 (CA2 1988); *Miller v. Leathers,* 913 F.2d 1085, 1087 (CA4 1990) (en banc), cert. denied, 498 U.S. ----, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991); *Haynes v. Marshall,* 887 F.2d 700, 703 (CA6 1989); *Stenzel v. Ellis,* 916 F.2d 423, 427 (CA8 1990); *Brown v. Smith,* 813 F.2d 1187, 1188 (CA11 1987). But see *Unwin v. Campbell,* 863 F.2d 124, 130 (CA1 1988) (rejecting application of *Whitley* standard absent "an actual disturbance").

A.

11
Under the *Whitley* approach, the extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley,* 475 U.S., at 321, 106 S.Ct. at 1085. In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response." *Ibid.* The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

12
Respondents nonetheless assert that a significant injury requirement of the sort imposed by the Fifth Circuit is mandated by what we have termed the "objective component" of Eighth Amendment analysis. See *Wilson v. Seiter,* 501 U.S. ----, ----, 111 S.Ct. 2321, 2326, 115 L.Ed.2d 271 (1991). *Wilson* extended the deliberate indifference standard applied to Eighth Amendment claims involving medical care to claims about conditions of confinement. In taking this step, we suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim. Thus, courts considering a prisoner's claim must ask both if "the officials act[ed] with a sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. *Id.,* at ----, ----, 111 S.Ct., at 2326, 2329.

13
With respect to the objective component of an Eighth Amendment violation, *Wilson* announced no new rule. Instead, that decision suggested a relationship between the requirements applicable to different types of Eighth Amendment claims. What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons. First, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should . . . be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley, supra,* 475 U.S., at 320, 106 S.Ct., at 1084. Second, the Eighth Amendment's prohibition of cruel and unusual punishments " 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' " and so admits of few absolute limitations. *Rhodes v. Chapman,* 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981) (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion)).

14
The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." *Estelle,* 429 U.S., at 103, 97 S.Ct., at 290. For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," *Rhodes, supra,* 452 U.S., at 347, 101 S.Ct., at 2399, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson, supra,* 501 U.S., at ----, 111 S.Ct., at 2324 (quoting *Rhodes, supra,* 452 U.S., at 347, 101 S.Ct., at 2399) (internal citation omitted). A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." See *Estelle v. Gamble, supra,* 429 U.S., at 103-104, 97 S.Ct., at 290-291.

15
In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See *Whitley, supra,* 475 U.S., at 327, 106 S.Ct., at 1088. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See *Estelle, supra,* 429 U.S., at 102, 97 S.Ct., at 290 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment); *Wilkerson v. Utah,* 99 U.S. 130, 136, 25 L.Ed. 345 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]").

16
That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. See *Johnson v. Glick,* 481 F.2d, at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). The Eighth Amendment's prohibition of "cruel and unusual" punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort " 'repugnant to the conscience of mankind.' " *Whitley, supra,* 475 U.S., at 327, 106 S.Ct., at 1088 (quoting *Estelle, supra,* 429 U.S., at 106, 97 S.Ct., at 292) (internal quotation marks omitted).

17
In this case, the Fifth Circuit found Hudson's claim untenable because his injuries were "minor." 929 F.2d, at 1015. Yet the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim.

B

18
The dissent's theory that *Wilson* requires an inmate who alleges excessive use of force to show serious injury *in addition to* the unnecessary and wanton infliction of pain misapplies *Wilson* and ignores the body of our Eighth Amendment jurisprudence. As we have already suggested, the question before the Court in *Wilson* was "[w]hether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials and, if so, what state of mind is required." *Wilson, supra,* 501 U.S., at ----, 111 S.Ct., at 2322. *Wilson* presented neither an allegation of excessive force nor any issue relating to what was dubbed the "objective component" of an Eighth Amendment claim.

19
Wilson did touch on these matters in the course of summarizing our prior holdings, beginning with *Estelle v. Gamble, supra. Estelle,* we noted, first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of the prisoner's sentence. *Wilson,* 501 U.S., at ----, 111 S.Ct., at ----. As might be expected from this primacy, *Estelle* stated the principle underlying the cases discussed in *Wilson:* punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" or "involv[ing] the unnecessary and wanton infliction of pain" are "repugnant to the Eighth Amendment." *Estelle, supra,* 429 U.S. at 102-103, 97 S.Ct., at 290 (internal quotations omitted). This is the same rule the dissent would reject. With respect to the objective component of an Eighth Amendment claim, however, *Wilson* suggested no departure from *Estelle* and its progeny.

20
The dissent's argument that claims based on excessive force and claims based on conditions of confinement are no different in kind, *post,* at 24-25, and n. 4, is likewise unfounded. Far from rejecting *Whitley*'s insight that the unnecessary and wanton infliction of pain standard must be applied with regard for the nature of the alleged Eighth Amendment violation, the *Wilson* Court adopted it. See *Wilson, supra,* 501 U.S., at ----, 111 S.Ct., at ----. How could it be otherwise when the constitutional touchstone is whether punishment is cruel and unusual? To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the " 'concepts of dignity, civilized standards, humanity, and decency' " that animate the Eighth Amendment. *Estelle, supra,* 429 U.S., at 102, 97 S.Ct., at 290 (quoting *Jackson v. Bishop,* 404 F.2d 571, 579 (CA8 1968)).

C

21
Respondents argue that, aside from the significant injury test applied by the Fifth Circuit, their conduct cannot constitute an Eighth Amendment violation because it was "isolated and unauthorized." Brief for Respondents 28. The beating of Hudson, they contend, arose from "a personal dispute between correctional security officers and a prisoner," and was against prison policy. *Ibid.* Respondents invoke the reasoning of courts that have held the use of force by prison officers under such circumstances beyond the scope of "punishment" prohibited by the Eighth Amendment. See *Johnson v. Glick, supra,* at 1032 ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment' "); *George v. Evans,* 633 F.2d 413, 416 (CA5 1980) ("[A] single, unauthorized assault by a guard does not constitute cruel and unusual punishment . . ."). But see *Duckworth v. Franzen,* 780 F.2d 645, 652 (CA7 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . ."), cert. denied, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

22
We take no position on respondents' legal argument because we find it inapposite on this record. The Court of Appeals left intact the Magistrate's determination that the violence at issue in this case was "not an isolated assault." App. 27, n. 1. Indeed, there was testimony that McMillian and Woods beat another prisoner shortly after they finished with Hudson. *Ibid.* To the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Fifth Circuit, not presented by the question on which we granted certiorari, and, accordingly, not before this Court. Moreover, respondents ignore the Magistrate's finding that Lieutenant Mezo, acting as a supervisor, "expressly condoned the use of force in this instance." App. 26.

The judgment of the Court of Appeals is

23
Reversed.

24
Justice STEVENS, concurring in part and concurring in the judgment.

25
In *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the Court held that injuries to prisoners do not constitute cruel and unusual punishment when they are inflicted during a prison disturbance "that indisputably poses significant risks to the safety of inmates and prison staff" unless force was applied " 'maliciously and sadistically for the very purpose of causing harm.' " *Id.,* at 320-321, 106 S.Ct., at 1085 (citation omitted). The Court's opinion explained that the justification for that particularly high standard of proof was required by the exigencies present during a serious prison disturbance. "When the 'ever-present potential for violent confrontation and conflagration' ripens into *actual* unrest and conflict," *id.,* at 321, 106 S.Ct., at 1085 (citation omitted), then prison officials must be permitted to "take into account the very real threats the unrest presents to inmates and prison officials alike." *Id.,* at 320, 106 S.Ct., at 1084.

26
Absent such special circumstances, however, the less demanding standard of " 'unnecessary and wanton infliction of pain' " should be applied. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) (quoting *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, STEVENS, JJ.)); see *Unwin v. Campbell,* 863 F.2d 124, 135 (CA1 1988) (opinion of Campbell, C.J.) ("where institutional security is not at stake, the officials' license to use force is more limited; to succeed, a plaintiff need not prove malicious and sadistic intent"); see also *Wyatt v. Delaney,* 818 F.2d 21, 23 (CA8 1987). This approach is consistent with the Court's admonition in *Whitley* that the standard to be used is one that gives "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S., at 320, 106 S.Ct., at 1084. In this case, because there was no prison disturbance and "no need to use any force since the plaintiff was already in restraints," App. 27, the prison guards' attack upon petitioner resulted in the infliction of unnecessary and wanton pain. *Id.,* at 28.

27
Although I think that the Court's reliance on the malicious and sadistic standard is misplaced, I agree with the Court that even this more demanding standard was met here. Accordingly, I concur in Parts I, II(A), II(B), and II(C) of the Court's opinion and in its judgment.

28
Justice BLACKMUN, concurring in the judgment.

29
The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with "significant injury," *e.g.,* injury that requires medical attention or leaves permanent marks. Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a telltale "significant injury"—entirely beyond the pale of the Constitution. In other words, the constitutional prohibition of "cruel and unusual punishments" then might not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation's borders, are hardly unknown within this Nation's prisons. See, *e.g., Campbell v. Grammer,* 889 F.2d 797, 802 (CA8 1989) (use of high-powered fire hoses); *Jackson v. Bishop,* 404 F.2d 571, 574-575 (CA8 1968) (use of the "Tucker Telephone," a hand-cranked device that generated electric shocks to sensitive body parts, and flogging with leather strap). See also *Hutto v. Finney,* 437 U.S. 678, 682, n. 5, 98 S.Ct. 2565, 2569, n. 5, 57 L.Ed.2d 522 (1978).

30
Because I was in the dissent in *Whitley v. Albers,* 475 U.S. 312, 328, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986), I do not join the Court's extension of *Whitley* § malicious-and-sadistic standard to all allegations of excessive force, even outside the context of a prison riot. Nevertheless, I otherwise join the Court's solid opinion and judgment that the Eighth Amendment does not require a showing of "significant injury" in the excessive-force context. I write separately to highlight two concerns not addressed by the Court in its opinion.

31
* Citing rising caseloads, respondents, represented by the Attorney General of Louisiana, and joined by the States of Texas, Hawaii, Nevada, Wyoming, and Florida as *amici curiae,* suggest that a "significant injury" requirement is necessary to curb the number of court filings by prison inmates. We are informed that the "significant injury requirement has been very effective in the Fifth Circuit in helping to control its system-wide docket management problems." Brief for Texas, Hawaii, Nevada, Wyoming, and Florida as *Amici Curiae* 15.

32
This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred upon certain plaintiffs. See, *e.g., Associated General Contractors of California, Inc. v. Carpenters,* 459 U.S. 519, 529-546, 103 S.Ct. 897, 904-912, 74 L.Ed.2d 723 (1983) (identifying "judge-made rules" circumscribing persons entitled to sue under § 4 of the Clayton Act); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 737-749, 95 S.Ct. 1917, 1926-1932, 44 L.Ed.2d 539 (1975) (identifying judicial "policy" considerations limiting standing under § 10(b) of the Securities Exchange Act of 1934). But this inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.

33
Since the burden on the courts is presumably worth bearing when a prisoner's suit has merit, the States' "concern" is more aptly termed a "conclusion" that such suits are simply without merit. One's experience on the federal bench teaches the contrary. Moreover, were particular classes of cases to be nominated for exclusion from the federal courthouse, we might look first to cases in which federal law is not sensitively at issue rather than to those in which fundamental constitutional rights are at stake. The right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable. Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886), as his most "fundamental political right, because preservative of all rights."

34
Today's ruling, in any event, does not open the floodgates for filings by prison inmates. By statute, prisoners—alone among all other § 1983 claimants—are required to exhaust administrative remedies. See 94 Stat. 352, 42 U.S.C. § 1997e(a); *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 507-512, 102 S.Ct. 2557, 2563-2565, 73 L.Ed.2d 172 (1982). Moreover, prison officials are entitled to a determination before trial whether they acted in an objectively reasonable manner, thereby entitling them to a qualified immunity defense. *Procunier v. Navarette,* 434 U.S. 555, 561-562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978); see also *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2737-2738, 73 L.Ed.2d 396 (1982) (unsubstantiated allegations of malice are insufficient to overcome pretrial qualified immunity). Additionally, a federal district court is authorized to dismiss a prisoner's complaint *in forma pauperis* "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). These measures should be adequate to control any docket-management problems that might result from meritless prisoner claims.

II

35
I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment. See, *e.g., Wisniewski v. Kennard,* 901 F.2d 1276, 1277 (CA5) (guard placing a revolver in inmate's mouth and threatening to blow prisoner's head off), cert. denied, --- U.S. ----, 111 S.Ct. 309, 112 L.Ed.2d 262 (1990). The issue was not presented here, because Hudson did not allege that he feared that the beating incident would be repeated or that it had caused him anxiety and depression. See App. 29.

36
As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." *Ante,* at 5. "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary. See *Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972) (recognizing Article III standing for "aesthetic" injury); *Brown v. Board of Education,* 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) (identifying school children's feelings of psychological inferiority from segregation in the public schools).

37
To be sure, as the Court's opinion intimates, *ante,* at 9, *de minimis* or nonmeasurable pain is not actionable under the Eighth Amendment. But psychological pain can be more than *de minimis.* Psychological pain often may be clinically diagnosed and quantified through well established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded. I have no doubt that to read a "physical pain" or "physical injury" requirement into the Eighth Amendment would be no less pernicious and without foundation than the "significant injury" requirement we reject today.

38
Justice THOMAS, with whom Justice SCALIA joins, dissenting.

39
We granted certiorari in this case "limited to the following question," which we formulated for the parties:

40
" 'Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishment Clause were not violated as a result of a single incident of force by respondents which did not cause a significant injury?' " 500 U.S. ----, ----, 111 S.Ct. 1679, 1680, 114 L.Ed.2d 75 (1991).

41
Guided by what it considers "the evolving standards of decency that mark the progress of a maturing society," *ante,* at 8 (internal quotations omitted), the Court today answers that question in the negative. I would answer it in the affirmative, and would therefore affirm the judgment of the Fifth Circuit. I respectfully dissent.

42
* The magistrate who found the facts in this case emphasized that petitioner's injuries were "minor." App. 26, 28. The three judges of the Fifth Circuit who heard the case on appeal did not disturb that assessment, and it has not been challenged here. The sole issue in this case, as it comes to us, is a legal one: must a prisoner who claims to have been subjected to "cruel and unusual punishment" establish at a minimum that he has suffered a significant injury? The Court today not only responds in the negative, but broadly asserts that *any* "unnecessary and wanton" use of physical force against a prisoner *automatically* amounts to "cruel and unusual punishment," whenever more than *de minimis* force is involved. Even a *de minimis* use of force, the Court goes on to declare, inflicts cruel and unusual punishment where it is "repugnant to the conscience of mankind." *Ante,* at 10 (internal quotations omitted).[1] The extent to which a prisoner is *injured* by the force—indeed, whether he is injured at all—is in the Court's view irrelevant.

43
In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not "cruel and unusual punishment." In concluding to the contrary, the Court today goes far beyond our precedents.

A.

44
Until recent years, the Cruel and Unusual Punishment Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration. In *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the Court extensively chronicled the background of the amendment, discussing its English antecedents, its adoption by Congress, its construction by this Court, and the interpretation of analogous provisions by state courts. Nowhere does *Weems* even hint that the Clause might regulate not just criminal sentences but the treatment of prisoners. Scholarly commentary also viewed the Clause as governing punishments that were part of the sentence. See T. Cooley, Constitutional Limitations *329 ("It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment *declared by statute* for an offence which was punishable in the same way at the common law, could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the *common law* for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual") (emphasis added). See also 3 J. Story, Commentaries on the Constitution of the United States 750-751 (1833).

45
Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life. "[I]t is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *Stroud v. Swope,* 187 F.2d 850, 851-852 (CA9), cert. denied, 342 U.S. 829, 72 S.Ct. 53, 96 L.Ed. 627 (1951). See also *Sutton v. Settle,* 302 F.2d 286, 288 (CA8 1962) (*per curiam*), cert. denied, 372 U.S. 930, 83 S.Ct. 876, 9 L.Ed.2d 734 (1963); *United States ex rel. Atterbury v. Ragen,* 237 F.2d 953, 954-956 (CA7 1956), cert. denied, 353 U.S. 964, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Banning v. Looney,* 213 F.2d 771, 771 (CA10 1954) (*per curiam*); *Sarshik v. Sanford,* 142 F.2d 676 (CA5 1944). It was not until 1976—185 years after the Eighth Amendment was adopted—that this Court first applied it to a prisoner's complaint about a deprivation suffered in prison. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

B

46
We made clear in *Estelle* that the Eighth Amendment plays a very limited role in regulating prison administration. The case involved a claim that prison doctors had inadequately attended an inmate's medical needs. We rejected the claim because the inmate failed to allege "acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs." *Id.,* at 106, 97 S.Ct., at 292 (emphasis added). From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving "serious" injury inflicted by prison officials acting with a culpable state of mind. We have since described these twin elements as the "objective" and "subjective" components of an Eighth Amendment prison claim. See *Wilson v. Seiter,* 501 U.S. ----, ----, 111 S.Ct. 2321, 2324, 115 L.Ed.2d 271 (1991).

47
We have never found a violation of the Eighth Amendment in the prison context when an inmate has failed to establish either of these elements. In *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), for instance, we upheld a practice of placing two inmates in a single cell on the ground that the injury alleged was insufficiently serious. Only where prison conditions deny an inmate "the minimal civilized measure of life's necessities," *id.,* at 347, 101 S.Ct, at 2399, we said, could they be considered "cruel and unusual punishment." Similarly, in *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), we held that a guard did not violate the Eighth Amendment when he shot an inmate during a prison riot because he had not acted with a sufficiently culpable state of mind. When an official uses force to quell a riot, we said, he does not violate the Eighth Amendment unless he acts " 'maliciously and sadistically for the very purpose of causing harm.' " *Id.,* at 320-321, 106 S.Ct., at 1085 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (CA2) (Friendly, J.), cert. denied *sub nom. John v. Johnson,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)).

48
We synthesized our Eighth Amendment prison jurisprudence last Term in *Wilson, supra.* There the inmate alleged that the poor conditions of his confinement *per se* amounted to cruel and unusual punishment, and argued that he should not be required in addition to establish that officials acted culpably. We rejected that argument, emphasizing that an inmate seeking to establish that a prison deprivation amounts to cruel and unusual punishment always must satisfy *both* the "objective component . . . (was the deprivation sufficiently serious?)" *and* the "subjective component (did the officials act with a sufficiently culpable state of mind?)" of the Eighth Amendment. *Id.,* 501 U.S., at ---- - ----, 111 S.Ct., at 2324. Both are necessary components; neither suffices by itself.

49
These subjective and objective components, of course, are implicit in the traditional Eighth Amendment jurisprudence, which focuses on penalties meted out by statutes or sentencing judges. Thus, if a State were to pass a statute ordering that convicted felons be broken at the wheel, we would not separately inquire whether the legislature had acted with "deliberate indifference," since a statute, as an intentional act, necessarily satisfies an even higher state-of-mind threshold. Likewise, the inquiry whether the deprivation is objectively serious would be encompassed within our determination whether it was "cruel and unusual."

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50
When we cut the Eighth Amendment loose from its historical moorings and applied it to a broad range of prison deprivations, we found it appropriate to make explicit the limitations described in *Estelle*, *Whitley*, and *Wilson*. "If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify," *Wilson,* 501 U.S., at ----, 111 S.Ct., at 2325 (emphasis in original)—thus, the subjective component. Similarly, because deprivations of all sorts are the very essence of imprisonment, we made explicit the *serious* deprivation requirement to ensure that the Eighth Amendment did not transfer wholesale the regulation of prison life from executive officials to judges. That is why, in *Wilson,* we described the inquiry mandated by the objective component as: "[W]as the deprivation *sufficiently serious?*" *Id.*, at ----, 111 S.Ct., at 2324 (emphasis added). That formulation plainly reveals our prior assumption that a serious deprivation is *always* required. Under that analysis, a court's task in any given case was to determine whether the challenged deprivation was "sufficiently" serious. It was not, as the Court's interpretation today would have it, to determine whether a "serious" deprivation *is required at all.*[2]

C

51
Given *Estelle, Rhodes, Whitley,* and *Wilson,* one might have assumed that the Court would have little difficulty answering the question presented in this case by upholding the Fifth Circuit's "significant injury" requirement.[3] Instead, the Court announces that "[t]he objective component of an Eighth Amendment claim is . . . contextual and responsive to contemporary standards of decency." *Ante,* at 8 (internal quotation omitted). In the context of claims alleging the excessive use of physical force, the Court then asserts, the serious deprivation requirement is satisfied by no serious deprivation at all. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Ibid.* Ascertaining prison officials' state of mind, in other words, is the *only* relevant inquiry in deciding whether such cases involve "cruel and unusual punishment." In my view, this approach is an unwarranted and unfortunate break with our Eighth Amendment prison jurisprudence.

52
The Court purports to derive the answer to this case from *Whitley*. The sum and substance of an Eighth Amendment violation, the Court asserts, is " ' "the unnecessary and wanton infliction of pain." ' " *Ante,* at 9 (quoting *Whitley,* 475 U.S., at 319, 106 S.Ct., at 1084). This formulation has the advantage, from the Court's perspective, of eliminating the objective component. As noted above, however, the only dispute in *Whitley* concerned the subjective component; the prisoner, who had been shot, had self-evidently been subjected to an objectively serious injury. *Whitley* did not say, as the Court does today, that the *objective* component is contextual, and that an Eighth Amendment claim may succeed where a prisoner is not seriously injured. Rather, *Whitley* stands for the proposition that, assuming the existence of an objectively serious deprivation, the culpability of an official's state of mind depends on the context in which he acts. "*Whitley* teaches that, *assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim*, see *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), whether it can be characterized as 'wanton' depends upon the constraints facing the official." *Wilson, supra,* 501 U.S., at ----, 111 S.Ct., at 2326 (emphasis modified). Whether officials subject a prisoner to the "unnecessary and wanton infliction of pain" is simply one way to describe the state of *mind inquiry* that was at issue in *Whitley* itself. As *Wilson* made clear, that inquiry is *necessary* but not *sufficient* when a prisoner seeks to show that he has been subjected to cruel and unusual punishment.

53
Perhaps to compensate for its elimination of the *objective* component in excessive force cases, the Court simultaneously makes it harder for prisoners to establish the *subjective* component. As we explained in *Wilson,* "deliberate indifference" is the baseline mental state required to establish an Eighth Amendment violation. 501 U.S., at ----, 111 S.Ct., at 2326-2327. Departure from this baseline is justified where, as in *Whitley,* prison officials act in response to an emergency; in such situations their conduct cannot be characterized as "wanton" unless it is taken "maliciously and sadistically for the very purpose of causing harm." 475 U.S., at 320-321, 106 S.Ct., at 1085 (internal quotation omitted). The Court today extends the heightened mental state applied in *Whitley* to *all* excessive force cases, even where no competing institutional concerns are present. The Court simply asserts that "[m]any of the concerns underlying our holding in *Whitley* arise *whenever* guards use force to keep order." *Ante,* at 6 (emphasis added). I do not agree. Many excessive force cases do not arise from guards' attempts to "keep order." (In this very case, the basis for petitioner's Eighth Amendment claim is that the guards hit him when there was no need for them to use any force at all.) The use of excessive physical force is by no means invariably (in fact, perhaps not even predominantly) accompanied by a "malicious and sadistic" state of mind. I see no justification for applying the extraordinary *Whitley* standard to *all* excessive force cases, without regard to the constraints facing prison officials. The Court's unwarranted extension of *Whitley,* I can only suppose, is driven by the implausibility of saying that minor injuries imposed upon prisoners with anything less than a "malicious and sadistic" state of mind can amount to "cruel and unusual punishment."

D

54
The Court's attempts to distinguish the cases expressly resting upon the objective component are equally unconvincing. As noted above, we have required an extreme deprivation in cases challenging conditions of confinement, *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Why should such an objectively serious deprivation be required there and not here? The Court's explanation is that "routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.' " *Ante,* at 9 (quoting *Rhodes, supra,* at 347, 101 S.Ct., at 2399). But there is quite a gap between "routine discomfort" and the denial of "the minimal civilized measure of life's necessities" required to establish an Eighth Amendment violation. In the Court's view, then, our society's standards of decency are not violated by anything short of uncivilized conditions of confinement (no matter how malicious the mental state of the officials involved), but are automatically violated by any malicious use of force, regardless of whether it even causes an injury. This is puzzling. I see no reason why our society's standards of decency should be more readily offended when officials, with a culpable state of mind, subject a prisoner to a deprivation on one discrete occasion than when they subject him to continuous deprivations over time. If anything, I would think that a deprivation inflicted continuously over a long period would be of greater concern to society than a deprivation inflicted on one particular occasion.[4]

55
The Court's attempted distinction of *Estelle* is also unpersuasive: "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " *Ante,* at 9. In my view, our society similarly has no expectation that prisoners will have "unqualified" freedom from force, since forcibly keeping prisoners in detention is what prisons are all about. Why should the seriousness of injury matter when doctors maliciously decide not to treat an inmate, but not when guards maliciously decide to strike him?

56
At bottom, of course, there is no conclusive way to refute the Court's assertions about our society's "contemporary notions of decency." That is precisely why this Court has long insisted that determinations of whether punishment is cruel and unusual "should be informed by objective factors to the maximum possible extent," *Rhodes, supra,* 452 U.S., at 346, 101 S.Ct., at 2399 (internal quotations omitted).

57
The Court attempts to justify its departure from precedent by saying that if a showing of serious injury were required, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Ante,* at 9. That statement, in my view, reveals a central flaw in the Court's reasoning. "[D]iabolic or inhuman" punishments *by definition* inflict serious injury. That is not to say that the injury must be, or always will be, *physical.* "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999' may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks." *Williams v. Boles,* 841 F.2d 181, 183 (CA7 1988). Surely a prisoner who alleges that prison officials tortured him with a device like the notorious "Tucker Telephone" described by Justice BLACKMUN, *ante,* at 14, has alleged a serious injury. But petitioner has not alleged a deprivation of this type; the injuries he has alleged are entirely physical and were found below to be "minor." Furthermore, to characterize the serious injury requirement as "arbitrary" is not to explain why it should be eliminated in this particular context while it remains applicable to all other prison deprivations. To be sure, it will not always be obvious which injuries are "serious." But similarly, it will not always be obvious which medical needs are "serious," or which conditions of confinement deny "the minimal civilized measure of life's necessities." These determinations are, however, required by the Eighth Amendment, which prohibits *only* those punishments that are "cruel and unusual." As explained above, I think our precedents clearly establish that a prisoner seeking to prove that he has been subjected to "cruel and unusual" punishment must always show that he has suffered a serious deprivation.

58
If the Court is to be taken at its word that "the unnecessary and wanton infliction of pain" upon a prisoner *per se* amounts to "cruel and unusual punishment," the implications of today's opinion are sweeping. For this formulation replaces the objective component described in our prior cases with a "necessity" component. Many prison deprivations, however, are not "necessary," at least under any meaningful definition of that word. Thus, under today's analysis, *Rhodes* was wrongly decided. Surely the "double celling" of inmates was not "necessary" to fulfill the State's penal mission; in fact, the prison in that case had been designed for individual cells, but was simply overcrowded. 452 U.S., at 343, 101 S.Ct., at 2397. We rejected the prisoners' claim in *Rhodes* not because we determined that double-celling was "necessary," but because the deprivations alleged were not sufficiently serious to state a claim of cruel and unusual punishment. After today, the "necessity" of a deprivation is apparently the only relevant inquiry beyond the wantonness of official conduct. This approach, in my view, extends the Eighth Amendment beyond all reasonable limits.

II

59
Today's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation. To reject the notion that the infliction of concededly "minor" injuries can be considered either "cruel" or "unusual" "punishment" (much less cruel *and* unusual punishment) is not to say that it amounts to acceptable conduct. Rather, it is to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various States.

60
Petitioner apparently could have, but did not, seek redress for his injuries under state law.[5] Respondents concede that if available state remedies were not constitutionally adequate, petitioner would have a claim under the Due Process Clause of the Fourteenth Amendment. Cf. *Davidson v. Cannon,* 474 U.S. 344, 348, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986); *Hudson v. Palmer,* 468 U.S. 517, 532-534, 104 S.Ct. 3194, 3203-3204, 82 L.Ed.2d 393 (1984); *Parratt v. Taylor,* 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981). I agree with respondents that this is the appropriate, and appropriately limited, federal constitutional inquiry in this case.

61
Because I conclude that, under our precedents, a prisoner seeking to establish that he has been subjected to "cruel and unusual punishment" must always show that he has suffered a serious injury, I would affirm the judgment of the Fifth Circuit.

1
This point is pure dictum, because the force here was surely not *de minimis*.

2
While granting petitioner relief on his Eighth Amendment claim, the Court leaves open the issue whether isolated and unauthorized acts are "punishment" at all. This will, of course, be the critical question in future cases of this type. If we ultimately decide that isolated and unauthorized acts are not "punishment," then today's decision is a dead letter. That anomaly simply highlights the artificiality of applying the Eighth Amendment to prisoner grievances, whether caused by the random misdeeds of prison officials or by official policy.

3
I do not believe that there is any substantive difference between the "serious deprivation" requirement found in our precedents and the Fifth Circuit's "significant injury" requirement.

4
Moreover, by distinguishing this case from "conditions" cases, the Court resurrects a distinction that we have repudiated as "not only unsupportable in principle but unworkable in practice." *Wilson v. Seiter,* 501 U.S. ---- - ----, and n. 1, 111 S.Ct. 2321, 2324, and n. 1, 115 L.Ed.2d 271 (1991). When officials use force against a prisoner, whether once or every day, that is a "condition" of his confinement. It is unwise, in my view, to make the very existence of the serious deprivation requirement depend on whether a particular claim is characterized as one challenging a "condition" or one challenging a "specific act." Cf. *McCarthy v. Bronson,* 500 U.S. - ---, ----, 111 S.Ct. 1737, 1742, 114 L.Ed.2d 194 (1991) ("conditions of confinement" under 28 U.S.C. § 636(b)(1)(B) includes not only challenges to ongoing prison conditions but also challenges to "isolated incidents" of excessive force, in part because "the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify").

5
According to respondents:

"Louisiana state courts are open to prisoners for the purpose of suing prison officials who have caused them unjustified wrongs. For example, see *Parker v. State,* 282 So.2d 483, 486-87 (La.1973), *cert. denied,* 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); *Anderson v. Phelps,* 451 So.2d 1284, 1285 (La.Ct.App. 1st Cir.1984); *McGee v. State,* 417 So.2d 416, 418 (La.Ct.App. 1st Cir.), *writ denied,* 420 So.2d 871 [981] (La.1982); *Neathery v. State,* 395 So.2d 407, 410 (La.Ct.App.3d Cir.1981); *Shields v. State Through Dep't of Corrections,* 380 So.2d 123 (La.Ct.App. 1st Cir.1979), *writ denied,* 382 So.2d 164 [(La.1980)]; *Craft v. State,* 308 So.2d 290, 295 (La.Ct.App. 1st Cir.), *writ denied,* 319 So.2d 441 (La.1975), *cert. denied,* 423 U.S. 1075, 96 S.Ct. 859, 47 L.Ed.2d 84 (1975); *Lewis v. Listi,* 377 So.2d 551, 553 (La.Ct.App.3d Cir.1979); *Bastida v. State,* 269 So.2d 544, 545 (La.Ct.App. 1st Cir.1972); *Adams v. State,* 247 So.2d 149, 151 (La.Ct.App. 1st Cir.1971); *St. Julian v. State,* 98 So.2d 284 (La.Ct.App. 1st Cir.1957); *Nedd v. State,* 281 So.2d 131, 132 (La.1973), *cert. denied,* 415 U.S. 957, 94 S.Ct. 1484, 39 L.Ed.2d 572 (1974); *Mack v. State,* 529 So.2d 446, 448 (La.Ct.App. 1st Cir.1988), *writ denied,* 533 So.2d 959 (La.1988); *Walden v. State,* 430 So.2d 1224 (La.Ct.App. 1st Cir.1983), *writ denied,* 435 So.2d 430 (La.1983); *White v. Phelps,* 387 So.2d 1188 (La.Ct.App. 1st Cir.1980); *Hansen v. State,* 361 So.2d 257, 258 (La.Ct.App. 1st Cir.1978); *Davis v. State,* 356 So.2d 452, 454 (La.Ct.App. 1st Cir.1977); *Betsch v. State,* 353 So.2d [358], 359 (La.Ct.App. 1st Cir.1977), *writ refused,* 354 So.2d 1389 [1380] (La.1978); *Williams v. State,* 351 So.2d 1273 (La.Ct.App. 1st Cir.1977); *Jones v. State,* 346 So.2d 807, 808 (La.Ct.App. 1st Cir.), *writ refused,* 350 So.2d 671 (La.1977); *Walker v. State,* 346 So.2d 794, 796 (La.Ct.App. 1st Cir.), *writ denied,* 349 So.2d 879 (La.1977); *Raney v. State,* 322 So.2d 890 (La.Ct.App. 1st Cir.1975); and *Bay v. Maggio,* 417 So.2d 1386 (La.Ct.App. 1st Cir.1982)." Brief for Respondents 42-43, n. 38.

Petitioner has not disputed the existence or adequacy of state-law remedies for his injuries.

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Matsushita v. Zenith Radio Corp., 475 U.S. 574 (1986)

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U.S. Supreme Court

Matsushita v. Zenith Radio Corp., 475 U.S. 574 (1986)

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.

No. 83-2004

Argued December 11, 1985

Decided March 26, 1986

475 U.S. 574

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

Syllabus

Petitioners and 21 Japanese corporations or Japanese controlled American corporations that manufacture and/or sell consumer electronics product (CEPs) primarily television sets. Respondents are American manufacturers of CEPs and their parent corporations. In 1974, respondents filed a complaint against the Japanese CEP manufacturers, alleged that they, petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a predatory scheme to sell below antitrust-illegal prices for export, while charging supracompetitive prices in Japan, so as to recoup the losses from the export sales. Respondents sought to prove, inter alia, that the Japanese CEP manufacturers formed the various schemes alleged, inter alia, 90 Stat.1 of the Sherman Act, § 2 (of the Sherman Act) and 15 U.S.C. § 1 (of the Sherman Act) and 15 U.S.C. § 15 (of the Clayton Act). Petitioners moved for summary judgment on the ground that the evidence they had produced in discovery showed that the parties to the conspiracy lacking the requisite motive to engage in the conduct respondents had alleged, and that, in the absence of such motive, respondents could not raise a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. The District Court granted the motion, concluding that respondents had failed to show, in economic terms, respondents had not shown that petitioners had engaged in any conduct that would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking to recover treble damages must show that the conduct of the defendants was illegal, and that the injury suffered by the alleged conspiracy was caused by the defendants' illegal conduct. Respondents failed to show that petitioners had engaged in any conduct that would be part of a conspiracy to drive the American CEP manufacturers out of the American market. The Court of Appeals reversed. The Court of Appeals stated that, determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals concluded that the District Court had improperly granted petitioners' motion for summary judgment. The Court of Appeals also concluded that, in granting petitioners' motion for summary judgment, the District Court had concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to recoup the losses from the export sales, and that the District Court had improperly resolved the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. 475 U.S. 574, 575.

(a) The "direct evidence" on which the Court of Appeals relied — petitioners' alleged supracompetitive pricing in Japan — [Footer 1]

Page 475 U.S. 575

cast "by which such Japanese producer was permitted to sell only to the American distributors, and the American distributors were permitted to sell only to American consumers, the profits from the Japanese market being used to offset the losses from the American market." Respondents argued that petitioners had engaged in a predatory scheme against petitioners by selling at a loss in the American market, and that petitioners had engaged in a conspiracy to drive American firms from the American market. The Court of Appeals stated that petitioners had shown that it was a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury

[Section 1]

In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent or sixty-five percent, for the entire period of the conspiracy, and that petitioners knew that they were selling at prices which were contrary to the economic interests of the export trade." 571 F.2d 959.

[Section 2]

The Ninth Circuit also found conduct outside our *Sanitary Milk* case, but only when the conduct has an effect on American commerce. *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 n. 15 (1962). If a conspiracy is monopolistic or restrictive the domestic or foreign commerce of the United States is not outside the reach of the *Sherman Act* just because part of the conduct complained of occurs in foreign countries. The *Continental Ore* *decision* applies only to the antitrust violations proscribed by Section 1 of the United States.

Petitioners' alleged conspiration of the Japanese market could not have caused the effect over a period of years here described. Once petitioners decided, as complained of in the complaint, to sell in Japan at the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. Petitioners, in fact, did sell more goods in other markets. Petitioners' contention that it was more profitable due to the Japanese tariffs does not flow from the combination of the Japanese market. On the contrary, were the Japanese market perfectly competitive, petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on the relative profitability of the sales. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

[Section 3]

Petitioners also argue that the direct prices, the free-competitive ones, and the price-fixing ones in Japan and elsewhere are not properly comparable because monopolization of the foreign market destroys pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy – whether the price-cutting conspiracy or never – respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 (1982); *Illinois Brick* v. *Illinois*, 431 U.S. 720, 729 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 13 (1972); *Conn. Light & Power Co.* v. *Westinghouse Elec. Corp.*, 255 F.Supp. 1000, 1009 (D. Conn. 1966). The plaintiff seeks damages in turn on proof that petitioners conspired to price predatorily in the United States market, or that the other conduct involved in the alleged conspiracy cannot have caused such an injury.

[Section 4]

Respondents argue that the direct prices, the free-competitive ones, and the price-fixing ones in Japan and elsewhere are not properly comparable because of the foreign monopoly pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy – whether the price-cutting conspiracy or never – respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 (1982); *Illinois Brick* v. *Illinois*, 431 U.S. 720, 729 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 13 (1972); *Conn. Light & Power Co.* v. *Westinghouse Elec. Corp.*, 255 F.Supp. 1000, 1009 (D. Conn. 1966). The plaintiff seeks damages in turn on proof that petitioners conspired to price predatorily in the United States market, or that the other conduct involved in the alleged conspiracy cannot have caused such an injury.

[Section 5]

Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[Section 12]

See n 15, supra.

[Section 13]

NoS's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1955. NoS Complaint ¶ 32; Zenith Complaint ¶ 29.

[Section 14]

During the same period, the number of American firms manufacturing consumer electronics fell from 15 to 5. Kaiser, Brief for Respondent in No. 81-2331 (CA), p 7&n.6. This decline continued a trend that began in 1948 when 90 consumer radio sets in the United States market were negligible. But See Zenith Complaint ¶ ¶ 35, 37.

[Section 15]

Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet, without barriers to entry, it would presumably be impossible to maintain supra-competitive prices for an extended time. Judge Easterbrook, commenting on this case in a law-review article, offers the following explanation:

"The plaintiffs (or, more accurately, their lawyers) hope that the low-priced imports or other American manufacturers have sold 10% or less than cost in order to drive United States firms out of business. Such predatory pricing is said to be a tactic of the Japanese conspiracy. Predation may be a tactic some United States firms sue of business; they could not recoup. Fifteen years of losses could be made up only by charging supra-competitive prices after the competition has been eliminated. But the Japanese firms compared interests of shareholders should try to raise prices to such a level. Any attempt would invite competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. Firms could enter the market, sell for a few years, and then exit if the Japanese firms raised their prices. Anticipation of this strategy would deter the predation. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels are not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and sell more than its share. Predation is implausible because it would be profitable only if it would be followed by a period in which the victim's rivals charged supra-competitive prices. Yet the victim's rivals would have been put engaged in hard competition."

Easterbrook, The Limits of Antitrust, 63 Texas L. 1,26-27 (1984) (footnotes omitted).

[Section 16]

The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price-fixing after they have succeeded in driving competitors from the market. Such pricing, however, has an independent violation of § 1 of the *Sherman Act*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

[Section 17]

The predatory losses must actually increase as the conspiracy nears its objective: the greater the predators' market share, the more productive the predators will but since every sale brings with a loss, an increase in market share also means an increase in predatory losses.

[Section 18]

The same is true of any supposed excess profits conspiracy that petitioners may have processed. The conspiracy would have to last long enough to recoup the losses sustained during the period of low prices; although about 4 dec no. however, provision for recoupment of price-cutting losses over the years. Petitioners' claim does it explain why petitioners would be willing to sustain losses in the United States market when it is reasonable prospect of recouping their investments?

[Section 19]

Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it contains of expert opinion based on a mathematical construction that, in turn, rests on many assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both unsupported and implausible. Petitioners' Appendix to Pet. for Cert. in No. 83-2004, pp 42-47, App. to Pet. for Cert. in No. 83-2171, p 5. Judge Lord of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not discuss the District Court's analysis of the factors that underlies its conclusion that the assumptions on which the study rests are "speculative." 723 F.2d 238, 253 (CA3 1983). Petitioners' brief in this Court does not even mention the District Court's finding. Such profitable sales presumably would be made in the Japanese market if the Japanese firms could raise prices to the competitive level. Petitioners' contention that such conduct is irrational.

[Section 20]

The Court of Appeals correctly reasoned that the free-company rule might tend to insulate petitioners from competition with each other. 723 F.2d at 306. But this effect is irrelevant to a conspiracy to price predatorily in the United States market, or to any other conduct that could cause injury to respondents. Indeed, they could sell their goods. The fact that it is not possible inference from a customer alleged agreement such as the free-company rule is that petitioners were competing to raise prices, by limiting their ability to take sales from each other. Respondents – petitioners' competitors – suffer injury when the price-fixing conspiracy raises prices. Supra at 475 U.S. 582-583. Moreover, it seems very unlikely that the free-company rule had any effect on the price-fixing conspiracy. Petitioners have argued that the free-company rule is not illegal per se and did not limit the contribution to which the subsidiaries could. Logan, and 7-136.

[Section 21]

We find that any of petitioners had had a plausible reason to compete, antitrust conduct could suffice to create a treable issue of conspiracy. Our decision in *Monsanto* co. v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), established that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.* at 465 U. S. 764. See supra at 475 U.S. 588.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed conceivable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including this Court's *Sanitary Milk* case, *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 705 n. 15 (1962), and it took firmly in mind the principle that proof of conspiracy is not to be fragmented, *see Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 370 U. S. 699 (1962). After surveying the massive record, it concluded that

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sufficient evidence of the District Court erroneously had excluded, the Court of Appeals concluded that the evidence, taken as a whole, creates a genuine issue of fact whether petitioners engaged in a conspiracy to price predatorily in the United States market. The Court of Appeals *affirmed* the District Court, *id.*, the Court of Appeals' opinion now before us accordingly supports this judgment.

The Court's opinion today, far from identifying reversible error, only mutates the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court fails to heed the Third Circuit's admonition, and, remands the case although it is plain that respondents' evidence cannot genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that,

"[where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"

Id. at 475 U. S. 587 (quoting Cities Service, supra, at 391 U. S. 289). I also agree that,

"[p]ti nonmoving party has the burden to show that there is indeed this underlying fact, . . . must be viewed in the light most favorable to the party opposing the motion."

Id. at 475 U. S. 587 (quoting United States v. Diebold, Inc., 369 U. S. 654, 369 U. S. 655 (1962). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following view of the Third Circuit's opinion:

"[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive foreign competitors out of business and then to raise prices to monopoly levels. . . . The Court of Appeals reasoned that petitioners did not consider whether it was as plausible to contribute

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that petitioners' price-cutting behavior was independent, and not conspiratorial."

Ante at 475 U. S. 581.

In a similar vein, the Court summarizes *Monsanto* Co. v. *Spray-Rite Service Corp.*, supra, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . ." *Ante* at 475 U. S. 587. The Court then concludes that the Court of Appeals improperly "[ignored] the possibility that the respondents could be exploited the traditional summary judgment standard, and that it improperly "[ignored] the weight of the evidence favors the plaintiff. Cities Service and *Monsanto* do not stand for any such proposition. Each *of* these cases simply held that a particular piece of evidence, standing alone, was insufficiently probative to justify sending a case to the jury. [Footnote 21] These holdings in no way undermine the

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proposition that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overruling settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions that invade the province of the factfinder. The Court makes very little discussion the evidence, instead, it relies on the *Sherman* Act only if they prove that

"petitioners conspired to drive respondents out of the relevant markets by (1) pricing below the level necessary to sell their products, in (2) pricing below appropriate measures of cost."

Ante at 475 U. S. 585. A. This statement is premised on the assumption that

"[p]n agreement without these features would either have respondents in the same position as would market forces or would actually benefit respondents by making market prices

Id. In making this assumption, the Court ignores the company concessions of respondents' expert Dethelsen, whose opinion was based on the assumption that the Japanese firms sold at a loss.

The Dethelsen Report, on which the Court of Appeals relied along with other material, indicates that petitioners' sales in Japan at the "fair market value" would be competitive with the prices charged in Japan. Indeed, "the Asian necessary to sell their products, . . . come appropriate measures of cost." Id. 369 F. First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods than would have been the case if the Japanese market goods in this country, than would have occurred had prices in Japan been at the competitive level. Increasing

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exports to this country resulted in depressed prices here, which harmed respondents. [Footnote 21] Petitioners' contention that the Japanese tariffs and other trade barriers prevented the importation and entrenched the oligopolists such as the free-company rule with the goal of avoiding the competition of the United States market. The Report explains that petitioners' restrictions on retrogrow competition would respondents to lose business that they would not have lost had petitioners competed with one another. [Footnote 22]

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The Dethelsen Report states creates a genuine factual issue regarding the harm to respondents caused by petitioners' conduct. Petitioners' contention that the Japanese tariffs and other trade barriers prevented the Court of Appeals from ever reaches the Dethelsen Report. Id. 369 F. But it is not a reason to deny the factfinder an opportunity to consider Dr. Dethelsen's views on how petitioners' alleged collusion harmed respondents. [Footnote 23]

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The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over goods. See, e.g., *ante* at 475 U. S. 595. In light of the evidence that petitioners had had goods to be disposed of, this assumption is at best a strong presumption. See *Fed. R. Civ. P.* 56(e). I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reviewing the Third Circuit's judgment, the Court identifies two alleged errors.

"[i] [The District endorsed] on which the [Court of Appeals] relied had little, if any, relevance to the alleged conspiracy. [ii] [The District] erred in the court failed to consider the absence of a plausible motive to engage in predatory pricing."

Ante at 475 U. S. 599. The Court's position is without substance.

A

The first claim of error is that the Third Circuit inaved evidence regarding price-fixing in Japan and the so-called free-company rule and sheds prices as "*direct evidence* of a conspiracy that injured respondents." *Ante* at 475 U. S. 599. The Court *distinguishes* *Monsanto* Products Antitrust Litigation, 723 F.2d 238, 265 (CA3 1983), the precedent from the Third

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Circuit's opinion in which the Court locates this alleged error makes what I consider to be a plain simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases in that there is direct evidence of price-setting agreements. But the Third Circuit did not, as the Court implies, jump unthoughtfully from this observation to the conclusion that evidence regarding the free-company rule and sheds prices in Japan is irrelevant to the conspiracy. Id. 723 F. The Court of Appeals correctly noted that the traditional summary judgment analysis does not permit a factfinder to weigh the strength of the evidence favors the plaintiff. Cities Service and *Monsanto* do not stand for any such proposition. Each of these cases simply held that a particular piece of evidence, standing alone, was insufficiently probative to justify sending a case to the jury. [Footnote 21] These holdings in no way undermine the

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proposition that all evidence must be construed in the light most favorable to the party opposing summary judgment.

B

The Court's opinion also *ignores* the Court of Appeals's relevant finding that petitioners had had a plausible motive to engage in predatory pricing. The Court of Appeals reasoned that

"petitioners conspired to drive respondents out of the relevant markets by (1) pricing below the level necessary to sell their products, in (2) pricing below appropriate measures of cost."

Ante at 475 U. S. 585. A. This statement is premised on the assumption that

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IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm the judgment below and remand the case for

[Section 25]

The Court adequately summarizes the quite fact-specific holding in *Cities Service.* *Ante* at 475 U. S. 587.

In *Monsanto*, the Court held that a manufacturer's termination of a price-setting distributor after receiving a complaint from another distributor is not, standing alone, sufficient to create a jury question. 465 U. S. 465 U. S. 763-764. The underscored this holding: it is important to realize that, unlike United States v. Colgate & Co., 250 U. S. 300 (1919), *Monsanto* does not stand for the proposition that a manufacturer may terminate those who fail to comply with its wishes. 465 U. S. 465 U. S. 764. Rather, *Monsanto* *Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will resell the goods. *Id.* 465 U. S. 465 U. S. 761. *Monsanto* *Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984). Respondents cite Colgate for the proposition that a manufacturer is permitted to cut off a distributor understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. Brief for Respondents, 16. Colgate, to establish liability under 1 of the *Sherman* Act, requires evidence of behavior that is consistent with a distributor's exercise of its prerogatives under Colgate. This

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Colgate must be explained before it is considered relevant to the instant case. Colgate *Co.* v. United States, 250 U. S. 250 U. S. 300 (1919).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Clark v. LeBlanc, M.D.La., September 22, 2017

731 F.Supp. 792
United States District Court, W.D. Michigan, Southern Division.

Marty PHILLIPS, Plaintiff,
v.
MICHIGAN DEPARTMENT OF CORRECTIONS, Robert Brown, Jr., Director, Darryl Opicka, D.O., R.C.F., Craig Hutchinson, M.D., Medical Director, R.C.F., Lynn A. Green, M.D., Deputy Medical Director, M.D.O.C., Defendants.

No. G88–693 CA1.
|
Jan. 26, 1990.

Synopsis

Alleged transsexual inmate brought action against Department of Corrections and prison officials under § 1983, seeking opportunity to continue estrogen treatment. On inmate's motion for preliminary injunction, the District Court, Enslen, J., held that: (1) inmate suffered from "serious medical need," within meaning of Eighth Amendment prohibition against cruel and unusual punishment, whether proper diagnosis of inmate's condition was transsexualism or gender identity disorder of adolescence or adulthood, nontranssexual type, and (2) inmate was entitled to preliminary injunction ordering correctional officials to provide her with estrogen therapy.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Headnotes (9)

[1] **Injunction** Balancing or weighing factors; sliding scale

Injunction Serious or substantial question on merits

Injunction Balancing or weighing hardship or injury

Court can enter preliminary injunction if it finds that plaintiff at least shows serious questions going to merits and irreparable harm which decidedly outweighs any potential harm to defendant if injunction is issued; as strength of showing as to irreparable harm increases, necessity to show likelihood of success on merits decreases.

4 Cases that cite this headnote

[2] **Sentencing and Punishment** Barbarous and inhumane punishment

Eighth Amendment prohibits punishment that is physically barbarous or involves unnecessary and wanton infliction of pain. U.S.C.A. Const.Amend. 8.

[3] **Sentencing and Punishment** Necessity of criminal conviction

Constitutional proscription against cruel and unusual punishment applies only after criminal conviction. U.S.C.A. Const.Amend. 8.

[4] **Sentencing and Punishment** Intentional conduct

There need be no conscious purpose or intent to inflict suffering for defendant's conduct to violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

[5] **Sentencing and Punishment** Medical care and treatment

Deliberate indifference by prison officials to prisoner's serious medical needs constitutes cruel and unusual punishment in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8.

14 Cases that cite this headnote

[6] **Civil Rights** Medical care and treatment

Denial of medical care that results in unnecessary suffering in prison is inconsistent with contemporary standards of decency and

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gives rise to cause of action under § 1983. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[7] **Sentencing and Punishment** Psychological and psychiatric treatment

Psychological disorders of prison inmates may constitute "serious medical need" within meaning of Eighth Amendment prohibition against cruel and unusual punishment; thus, general principles and standards of Eighth Amendment apply to provision of mental health care. U.S.C.A. Const.Amend. 8.

12 Cases that cite this headnote

[8] **Prisons** Transsexuals; sex-change operations

Sentencing and Punishment Medical care and treatment

Inmate suffered from "serious medical need," within meaning of Eighth Amendment prohibition against cruel and unusual punishment, whether proper diagnosis of inmate's condition was transsexualism or gender identity disorder of adolescence of adulthood, nontranssexual type. U.S.C.A. Const.Amend. 8.

20 Cases that cite this headnote

[9] **Civil Rights** Criminal law enforcement; prisons

Alleged transsexual inmate was entitled to preliminary injunction ordering correctional officials to provide her with estrogen therapy; institution had denied inmate medical care through intentional conduct and deliberate indifference, inmate had been subject of ridicule and offensive remarks at the hands of prison physician, and conduct of prison officials actually reversed therapeutic effects of previous treatment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

16 Cases that cite this headnote

Attorneys and Law Firms

***793** James H. Geary, Howard & Howard, Kalamazoo, Mich., for plaintiff.

A. Peter Govorchin, Asst. Atty. Gen., Frank J. Kelley, Atty. Gen., Corrections Div., Lansing, Mich., for defendants.

OPINION

ENSLEN, District Judge.

This case is currently before the Court on plaintiff Marty Phillips' Motion for a Preliminary Injunction. Plaintiff is a prisoner at the Riverside Correctional Facility in Ionia, Michigan. Plaintiff filed a complaint in September 1988 pursuant to 42 U.S.C. § 1983 alleging that defendant Michigan Department of Corrections ("MDOC") has been deliberately indifferent to plaintiff's serious medical needs. The Court heard testimony in this case at a hearing which took place on December 11 and 12, 1989. Plaintiff stressed that she is asking this Court only for the opportunity to continue her estrogen treatment, at her own expense, if necessary. Plaintiff is not seeking sex reassignment treatment, nor is she complaining of special housing needs, bathroom or showering privileges. [1]

BACKGROUND

Life History

Plaintiff is an inmate at Riverside Correctional Facility, an all-male facility. The medical experts testifying in this case describe plaintiff as gender dysphoric, that is, plaintiff was born with male genitalia, yet anguishes over being a man. Indeed plaintiff asserts that she is a woman, a transsexual. [2] Plaintiff testified that although she was born with male physical characteristics, she is psychologically a female.

Before plaintiff's incarceration, she appeared and lived as a woman. Plaintiff adopted the name Lindsey Patricia Wofford, and lived with a man, Gradie Wofford, in a heterosexual relationship. Born Albert Hart, plaintiff has cross-dressed since she was fourteen years old, and lived ***794** as a woman since she was seventeen. [3] Now thirty four, plaintiff has had

a number of surgeries and other procedures to enhance her appearance as a female, including electrolysis, a brow lift, dermabrasions, a chemical face peel, jaw reduction, a chin implant, and breast implant surgery. In addition, since the age of seventeen or eighteen, plaintiff has taken estrogen treatment to slow hair growth, soften skin, develop the breast implants, and further develop female characteristics. [4] Plaintiff retains male genitalia, and testified that she has not yet had castration surgery, because of the expense and because, in plaintiff's words, "before I had my last surgery, I wanted everything to be perfect."

After being arrested for the charge which led to her imprisonment, plaintiff used the name Marty Phillips. Plaintiff explained that she did this to save her family the embarrassment associated with a criminal trial. Plaintiff was charged with aiding and abetting an arson in which an individual died. At trial, plaintiff was convicted of first degree murder. That conviction was recently overturned by the Michigan Court of Appeals, and it is not yet clear whether the Michigan Supreme Court will hear the appeal. Thus it is possible that plaintiff will be released from prison in a few months.

When plaintiff was first incarcerated, plaintiff was placed in an all-male jail, and the Department of Corrections provided her estrogen treatment. Yet, after plaintiff was transferred to the correctional facility in Ionia, the hormonal treatments were stopped after plaintiff was examined by a MDOC physician, Dr. Opika. Plaintiff was also denied her requests for brassieres until recently when Dr. Opika's superior intervened. According to plaintiff, at the time Dr. Opika first examined her, he abruptly said that plaintiff was born a male and would stay a male as far as the MDOC was concerned.

One of the prison's policy directives affords prisoners limited access to health services outside the facility, at their own expense. Plaintiff has offered to pay for the estrogen therapy herself, and agreed to release the MDOC from claims arising from adverse complications of the estrogen treatment. Defendant MDOC has continued to deny plaintiff access to the treatment. As a result, plaintiff testified that she has suffered significant discomfort due to a reduction of tissue around her breasts which caused bruising. The lack of estrogen has also reversed many of the female characteristics previously attained through treatment and has caused periods of vomiting and depression.

Medical Testimony

During the two day hearing, the Court heard medical testimony from three physicians. Also, one medical expert was deposed and the transcript was provided to the Court. The following is a summary of the highlights of this medical and psychiatric evidence.

Dr. Darryl Opika, a general practitioner, originally examined plaintiff at Riverside Correctional Facility. He testified that he had no special expertise in diagnosis or treatment of transsexuals or gender dysphoric individuals. After Dr. Opika discovered that plaintiff still had testicles, he decided that there was no medical indication for estrogen. He also admitted that he denied plaintiff's request for a brassiere, stating that he did not "buy bras." Referring to plaintiff using masculine pronouns, Dr. Opika stated that plaintiff Phillips would not have his testicles removed while in the MDOC, and while in the Department of Corrections, he would remain in a male prison and "would be a male." Dr. Opika also testified that he had "no way of knowing whether plaintiff is or isn't a transsexual."

***795** Dr. Robert Dickey, defendant's medical expert, is a staff psychiatrist at the Clarke Institute of Psychiatry in Toronto, Canada. Dr. Dickey is the psychiatrist in charge of the Gender Identity Clinic at the Clarke Institute, and has seen hundreds of patients through his work at the clinic in the past seven or eight years. Dr. Dickey examined plaintiff in one session recently at Ionia Correctional Facility.

According to Dr. Dickey, transsexualism is one of several types of gender dysphoria. *See* Defendant's Exhibit 3 (Diagnostic and Statistical Manual of Mental Disorders) at 71–78. Gender dysphoria, a disturbance in gender identity, is a psychiatric condition demonstrating no impairment of reality. *Id.* at 71. According to the Diagnostic and Statistical Manual of Mental Disorders ("DSM–III–R"), published by the American Psychiatric Association, the crux of the gender identity disorders is as follows:

> The essential feature of the [gender identity] disorders is an incongruence between assigned sex (*i.e.,* the sex that is recorded on the birth certificate) and gender identity. Gender identity is the sense of knowing to which sex one belongs, that is, the awareness

> that 'I am a male,' or 'I am a female.' Gender identity is the private experience of gender role, and gender role is the public expression of gender identity. Gender role can be defined as everything that one says and does to indicate to others or to oneself the degree to which one is male or female.

Transsexualism, one of the gender identity disorders, is a severe disturbance. [5] The DSM–III–R, used by Dr. Dickey in his testimony, states as follows:

> Some forms of gender identity disturbance are on a continuum, whereas others may be discrete. When gender identity disturbance is mild, the person is aware that he is a male or female, but discomfort and a sense of inappropriateness about the assigned sex are experienced. When severe, *as in transsexualism,* the person not only is uncomfortable with the assigned sex but has the sense of belonging to the opposite sex.

Id. at 71. Dr. Dickey discussed transsexualism and another less severe gender identity disorder—known as gender identity disorder of adolescence or adulthood, non-transsexual type ("GIDAANT")—concluding that plaintiff Marty Phillips is properly diagnosed as having a GIDAANT. *See also* DSM–III–R § 302.85, at 76. Dr. Dickey decided that plaintiff is not a transsexual, because he questions plaintiff's conviction about acquiring new primary and secondary sex characteristics. According to Dr. Dickey's testimony, his clinic, consistent with the DSM–III–R diagnosis criteria, considers a transsexual as one who is unhappy with his or her anatomical sex and has had a persistent desire for two or more years for a change of primary and secondary ***796** sex characteristics. The DSM–III–R defines transsexualism as follows:

> The essential features of [transsexualism] are a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty. In addition, there is persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex. Therefore the diagnosis is not made if the disturbance is limited to brief periods of stress. Invariably there is the wish to live as a member of the other sex.... People with this disorder usually claim that they are uncomfortable wearing clothes of their assigned sex and therefore dress in clothes of the other sex. Often they engage in activities that in our culture tend to be associated with the other sex. These people often find their genitals repugnant, which may lead to persistent requests for sex reassignment by hormonal or surgical means. To various degrees, the behavior, dress, and mannerisms become those of the other sex.

Id. at 74. A transsexual demonstrates a consistent desire to change primary and secondary sex characteristics over a period of time and with an intensity Dr. Dickey feels plaintiff lacks.

On the other hand, Dr. Dickey stated that plaintiff falls into another gender dysphoric group, the GIDAANT class, which the DSM–III–R defines as follows:

> The essential features of this disorder are a persistent or recurrent discomfort and sense of inappropriateness about one's assigned sex, and persistent or recurrent cross-dressing in the role of the other sex, either in fantasy or in actuality, in a person who has reached puberty. This disorder differs from ... transsexualism in that there is no persistent preoccupation (for at least two years) with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.

Id. at 76.

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Dr. Dickey also told the Court that at the Clarke Institute, the doctors do not treat a patient who desires a male to female sex change with estrogen or sexual reassignment surgery unless the individual has lived, worked, and otherwise existed as a woman for at least one year. For this determination, Dr. Dickey stated that he looks at formal name change to an unambiguously female name; work at an unambiguously female profession or one that is not associated with males or females; and other "real life" evidence of a desire to change sex. [6] Although this may seem harsh, said Dr. Dickey, the clinic has a real concern for performing treatment on an individual who may later have a change of heart about sexual identity.

This expert witness also testified on another relevant matter here—the medical risks of hormonal treatment. Dr. Dickey was of the opinion that the risks associated with estrogen treatment in a case as this one, especially with an individual with functioning testes, were significant, consisting of hypertension, stroke, and other negative side effects.

Dr. Alan Neal Wilson was deposed on November 1, 1989 and the Court was provided with a transcript of that proceeding. Dr. Wilson is a professor of surgery at Wayne State University's School of Medicine, specializing in plastic surgery. Dr. Wilson also has a private practice in the Detroit area. Dr. Wilson testified at length about his twenty years of experience with transsexual patients, and his work in surgical methods of treatment. According to Dr. Wilson, he has evaluated approximately 150 "male to female" transsexuals. The testimony revealed that Dr. ***797** Wilson uses the DSM–III–R diagnosis for transsexualism as a starting point, supplementing that criteria with what he called the Armstrong four-factor test. Dr. Wilson described that test in the following way:

> Sex is a very complex subject, and [C.H. Armstrong's] four criteria [for establishing transsexualism] are, one, chromosomal sex, that is the males have 46 chromosomes and an X and Y and a female has 46 and an X and X. The second criteria is gonadal sex. That is, whether the individual has testes or ovaries. The third criteria is apparent sex or the sex of appearance, genitalia and body form; and the fourth is psychological sex, and that's the way people behave. Normally they're all in congruence. If there's any difference, then the case is gender dysphoria, gender conflict or [in Armstrong's terminology] gender intersex.
>
> [Armstrong] goes on to say that he considers a transsexual to be an individual who from usually five to seven years of age is convinced that he or she has the wrong physical body, and in such a person nothing has been found to dispel this conviction. And [Armstrong] quite rightly says that psychotherapy always fails.

Deposition of Wilson, at 14–15 (Nov. 1, 1989).

Dr. Wilson, after examining plaintiff, made a diagnosis of transsexualism. According to Dr. Wilson, gender transformation "depends on how much psychological conflict there is and how severe [the compulsion is]." *Id.* at 54. He described the transformation as "rather like stripping away years of social gender coding", a sort of "maturing process." *Id.* at 54–55. Dr. Wilson stressed plaintiff's need for hormone therapy, regardless of plans to do sex reassignment surgery. *Id.* at 29, 37, 60. Dr. Wilson discussed the results of estrogen deprivation at this point in time, stating that it would have adverse effects, including psychological devastation, androgynization, and diminishing self-respect. [7]

This witness also gave testimony that conflicted with Dr. Dickey's conclusions about the risks of estrogen treatment in gender dysphoric individuals. According to Dr. Wilson, the treatment has few, if any, side effects especially in plaintiff's age group. [8]

The forth medical expert in this matter was Dr. Craig Hutchinson, the Director of the Bureau of Health Care for the MDOC. Since Dr. Hutchinson supervises a staff of physicians, including Dr. Opika, he had occasion to review plaintiff's case when a grievance was filed. Dr. Hutchinson has apparently been instrumental in making special accommodations for plaintiff, including bathroom and shower access and allowing her a brassiere. Dr. Hutchinson expressed a concern for both "a man who looks like a woman in a male prison", and, in a female prison, having an inmate who could "be the cause of a pregnancy." Dr. Hutchinson also confirmed that during plaintiff's initial incarceration—at Jackson—she received estrogen treatment. Although the MDOC has housed other transsexuals, including those who have taken medication, Dr. Hutchinson says that plaintiff's case is the first where the incarceration may be for life. Dr. Hutchinson revealed that the MDOC is concerned about the side effects of estrogen therapy, especially because plaintiff is also a smoker, and says that realistically, even if plaintiff signs a waiver for health complications, if plaintiff has a serious,

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debilitating reaction to the estrogen, the MDOC will in fact bear the financial burden.

***798** DISCUSSION

Preliminary Injunction Standard

In deciding whether to grant or deny a preliminary injunction, the Court must balance four well-known factors. These factors are:

1. Whether the plaintiff has shown a strong or substantial likelihood of success on the merits;

2. Whether the plaintiff has shown irreparable injury;

3. Whether the issuance of a preliminary injunction would cause substantial harm to others; and

4. Whether the public interest would be served by issuing a preliminary injunction.

Forry, Inc. v. Neundorfer, Inc., 837 F.2d 259, 262 (6th Cir.1988); *Mason County Medical Association v. Knebel,* 563 F.2d 256, 261 (6th Cir.1977).

The purpose of the preliminary injunction is to preserve the status quo pending final determination of the lawsuit. *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Preliminary injunctions are addressed to the discretion of the district court. *Synanon Foundation, Inc. v. California,* 444 U.S. 1307, 100 S.Ct. 496, 62 L.Ed.2d 454 (1979). This type of relief is an extraordinary remedy best used sparingly. *Roghan v. Block,* 590 F.Supp. 150 (W.D.Mich.1984).

[1] The Sixth Circuit has cautioned courts that they should not view these factors as prerequisites to relief, but rather as factors to be balanced. *In re DeLorean Motor Co.,* 755 F.2d 1223 (6th Cir.1985). Thus, a court can enter a preliminary injunction if it finds that the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Friendship Materials, Inc. v. Michigan Brick, Inc.,* 679 F.2d 100, 105 (6th Cir.1982). "Where the burden of the injunction would weigh as heavily on the defendant as on the plaintiff [, however], the plaintiff must make a showing of at least a 'strong probability of success on the merits' before a trial court would be justified in issuing the order." *Frisch's Restaurant, Inc. v. Shoney's, Inc.,* 759 F.2d 1261, 1270 (6th Cir.1985). Also, as the strength of showing as to irreparable harm increases, the necessity to show likelihood of success on the merits decreases. *Ardis v. Mansour,* 627 F.Supp. 641, 644 (W.D.Mich.1986). Yet in spite of the overall flexibility of the test for preliminary injunctive relief, the Sixth Circuit has stated that irreparable harm element is to be analyzed carefully. In *Friendship Materials, Inc. v. Michigan Brick, Inc.,* the court said:

> Despite the overall flexibility of the test for preliminary injunctive relief, and the discretion vested in the district court, equity has traditionally required [a showing of] irreparable harm before an interlocutory injunction may be issued.

679 F.2d 100, 103 (6th Cir.1982).

Section 1983 Action

[2] **[3]** **[4]** The Eighth Amendment prohibits punishment that is physically barbarous or involves unnecessary and wanton infliction of pain. *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). The constitutional proscription against cruel and unusual punishment applies only after a criminal conviction. *Gilmore v. City of Atlanta,* 737 F.2d 894 (11th Cir.1984). Drafters of the Eighth Amendment were primarily concerned with preventing tortures and other barbarous methods of punishment, yet the Amendment has been used to halt punishment beyond the eighteenth century tortures. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Amendment has continually been interpreted in a flexible and dynamic manner, drawing its meaning from the evolving standards of decency which mark the progress of a maturing society. *Id.;* *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Thus no static test can exist by which courts can routinely determine whether conditions of confinement are cruel and unusual. *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Of course, there need be no conscious purpose or intent to inflict suffering for defendants' conduct to violate ***799** the Eighth Amendment. *U.S.*

ex rel. Schuster v. Vincent, 524 F.2d 153 (2d Cir.1975). The role of a federal court is to enforce the Eighth Amendment protection without assuming the role of jail administrator; this policy of minimal intrusion is of especial interest when a state prison system is involved. *Wilkerson v. Maggio,* 703 F.2d 909 (5th Cir.1983).

[5] **[6]** Deliberate indifference by prison officials to a prisoner's serious medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Estelle,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251. The denial of such medical care—whether intentional or through deliberate indifference—in the worst case can result in physical torture, and even in less serious cases can result in pain without a penological purpose. *Id.* at 103, 97 S.Ct. at 290. Denial of medical care that results in unnecessary suffering in prison is inconsistent with contemporary standards of decency and gives rise to a cause of action under 42 U.S.C. § 1983. *Id.;* *White v. Farrier,* 849 F.2d 322 (8th Cir.1988). The Supreme Court has said that mere negligence in diagnosing or treating a medical condition does not rise to the level of an Eighth Amendment violation. *Estelle,* 429 U.S. at 106, 97 S.Ct. at 292.

[7] Psychological disorders may constitute a serious medical need. *White v. Farrier,* 849 F.2d 322 (8th Cir.1988); *Meriwether v. Faulkner,* 821 F.2d 408 (7th Cir.), *cert. denied,* 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 269 (1987). Thus the general principles and standards of the Eighth Amendment apply to the provision of mental health care. *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir.1982).

More specifically, transsexualism is not voluntarily assumed and is not merely a matter of sexual preference. *Sommers v. Budget Marketing, Inc.,* 667 F.2d 748 (8th Cir.1982). The Seventh and Eighth Circuits have concluded that transsexualism is a serious medical and psychological problem which constitutes a serious medical need. *White,* 849 F.2d at 325; *Meriwether,* 821 F.2d at 413. Several courts have held that transsexual inmates have a constitutional right to some type of medical treatment. *Supre v. Ricketts,* 792 F.2d 958 (10th Cir.1986); *Meriwether,* 821 F.2d at 413; *Lamb v. Maschner,* 633 F.Supp. 351 (D.Kansas 1986). In *White,* the Eighth Circuit declared that there was a material issue of fact about whether the inmate in question was a transsexual and whether any treatment was required. 849 F.2d at 328.

In *Meriwether,* prison officials denied hormone therapy to an inmate who had been chemically castrated through nine years of estrogen therapy prior to incarceration. The Seventh Circuit recognized transsexualism as a serious medical need and held that a transsexual inmate was entitled to some type of medical treatment. The court held that a prisoner has no constitutional right to one particular type of treatment where another form of treatment is made available. 821 F.2d at 413. In *Meriwether,* the Seventh Circuit expressly stated that some form of treatment must be provided:

> [D]efendants have failed to provide the plaintiff with *any* type of medical treatment, not merely hormone therapy, for her gender dysphoria.... The Courts in *Supre* and *Lamb* both emphasized that a different result would be required in a case where there had been a total failure to provide any kind of medical attention at all.

821 F.2d at 414 (Emphasis supplied).

Similarly, in *Supre,* plaintiff attempted to mutilate his/her own sexual organs and requested estrogen therapy. Prison officials denied the request for estrogen because of the medical risks involved, but provided the inmate with psychological counseling. 792 F.2d 958. The district court in *Lamb* held that plaintiff had no right to be transferred to a female prison or to cosmetics, female clothing, preoperative hormone therapy, or sex reassignment surgery. None of the psychiatrists who had examined the plaintiff in *Lamb* recommended hormones or surgery. After deciding that plaintiff was receiving psychological treatment, the court granted defendant's motion for summary judgment. 633 F.Supp. at 353–54.

***800** CONCLUSION

[8] **[9]** For the purposes of this preliminary injunction motion, I believe that plaintiff has shown a strong likelihood of success on the merits. Under the facts before me on this motion, I find first that plaintiff suffers from a serious medical need, being deprived of treatment, whether the diagnosis is transsexualism or the gender identity disorder of adolescence or adulthood, non-transsexual type. The medical experts on gender agreed that Marty Phillips is gender dysphoric, and Dr. Dickey testified that transsexualism and GIDAANT were closely related disorders. The essence of both disorders result in a human who experiences distress about one of the most striking parts of our identity—whether we are male or female. The medical testimony was clear that transsexualism and GIDAANT are serious psychiatric disorders with profound emotional and physical effects. Moreover, one does not need to be a physician to see the effects of this disorder on Marty Phillips. [9]

Furthermore, read broadly, the case law supports the proposition that GIDAANT—as a form of gender dysphoria—may present a serious medical need under the *Estelle* formulation. The *Meriwether* court, for example, reasoned that, in general, a psychiatric or psychological condition may present a serious medical need. *See* 821 F.2d at 413 (citing *Partridge v. Two Unknown Police Officers of Houston,* 791 F.2d 1182, 1187 (5th Cir.1986); *Wellman v. Faulkner,* 715 F.2d 269, 273 (7th Cir.), *cert. denied,* 468 U.S. 1217, 104 S.Ct. 3587, 82 L.Ed.2d 885 (1983); *Ramos v. Lamm,* 639 F.2d 559, 574 (10th Cir.), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1980); *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754, 763 (3d Cir.1979); *Bowring v. Godwin,* 551 F.2d 44, 47 (4th Cir.1977). Likewise, the cases make general and specific references to defendants failing to treat "gender dysphoria" and "transsexualism".

As to the second prong of this analysis, I find that defendant MDOC has denied Marty Phillips medical care through—at various times—both intentional conduct and deliberate indifference. [10] The denial of medical care in this case stems from at least three sources—which in concert violate plaintiff's right under the constitution to be free from cruel and unusual punishment. [11] A result decried in *Meriwether* and in dicta by the *Supre* and *Lamb* courts is present here: defendant has failed to provide plaintiff with treatment of any kind. And, as was the plaintiff in *Meriwether,* plaintiff has been the subject of ridicule and offensive remarks at the hands of Dr. Opika. Third, this Court characterizes defendant's conduct in this case as conduct which actually reversed the therapeutic effects of previous treatment. It is one thing to fail to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery or to operate on a long-endured cyst. Taking measures which actually reverse the effects of years of healing medical treatment, as I observe here, is measurably worse, making the cruel and unusual determination much easier.

The irreparable harm element is clear. Prior to trial, the effects of the lack of estrogen will wreak havoc on plaintiff's physical and emotional state. Such harm is neither compensable nor speculative. ***801** Moreover, when an alleged deprivation of a constitutional right is involved, no further showing of irreparable harm is necessary. *See, e.g.,* *Mitchell v. Cuomo,* 748 F.2d 804 (2d Cir.1984) (Eighth Amendment).

Finally, a preliminary injunction is unlikely to result in harm to others and I believe the public interest will be served by safeguarding Eighth Amendment rights in the prisons in Michigan. As defendant acknowledged in oral argument, this Court is bound by law to keep a balance between efficient prison management and keeping prisons a humane place: in this case, there is a glaring need for the latter goal. Therefore, for all the aforementioned reasons, I will grant plaintiff's motion for a preliminary injunction and I will order defendant MDOC, prior to the time of trial, to provide plaintiff with the same standard of care she was receiving prior to incarceration and at the time she was housed at Jackson Prison—2.5 mg per day of Premarin.

All Citations

731 F.Supp. 792

Footnotes

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1 Plaintiff states that she has been treated well on the whole in the male facility. She states that the male inmates are used to her and no longer stare or make her uncomfortable. She is also able to use the bathroom and shower privately.

2 One issue in this matter is whether plaintiff is indeed a transsexual. Plaintiff's and defendant's experts agree that plaintiff is gender dysphoric, which is a fairly broad psychiatric term describing discomfort and rejection of one's gender based on physical characteristics and sex assigned at birth. Within the classification of gender dysphoria, plaintiff's expert concludes that she is a transsexual while defendant's expert makes a related diagnosis, that of gender identity disorder of adulthood. The medical testimony and diagnoses will be discussed throughout this opinion. The Court, out of respect for plaintiff, will use female pronouns, as most parties in this proceeding have done.

3 Over the past seventeen years, plaintiff has worked—among other things—as a cocktail waitress, a female impersonator, and a professional dancer.

4 According to plaintiff's testimony, eleven or twelve physicians in different locales have administered or prescribed estrogen for her during this time period. Estrogen, in plaintiff's case, also reduces the male genitalia significantly.

5 A transsexual should be distinguished from homosexuals, who are sexually attracted to persons of the same sex, and from transvestites, who are most likely male heterosexuals who cross-dress for sexual arousal rather than comfort with gender identity. Both homosexuals and transvestites are "content with the sex into which they were born." *Meriwether v. Faulkner,* 821 F.2d 408, 412 n. 6 (7th Cir.1987); *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1083 n. 3 (7th Cir.1984); American Psychiatric Association, DSM–III–R § 302.50, at 74 (1987); Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry,* 6 J. Sex & Marital Therapy 116–120 (1980). A transsexual is also to be distinguished from a hermaphrodite, where an individual has both genital and sexual characteristics of both sexes. *Proof of Facts 3d: Tabor's Cyclopedic Medical Dictionary,* at 758 (15th ed. 1988).

In addition, the Court observes that:

> A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity. Most are men who consider themselves to have feminine gender identity and regard their genitalia and masculine features with repugnance. Their primary objective in seeking psychiatric help is not to obtain psychologic treatment but to secure surgery that will give them as close an approximation as possible to a female body.

Merck Manual of Diagnosis and Therapy 1437 (14th ed. 1982). *See generally* Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 Conn.L.Rev. 288, 288 n. 1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law,* 56 Cornell L.Rev. 963, 963 n. 1 (1971).

6 Dr. Dickey testified that he did not consider plaintiff to have passed the "real life" test, because she used an ambiguous (male-female) name; because there had been no formal name change; and because some of the work she did was in a male profession, *e.g.,* she worked as a female impersonator. Dr. Dickey also stated at one point that he could not say that "beyond a reasonable doubt", plaintiff's conviction about changing her sex was consistent with transsexualism. The Court observed at that time, and at the present, that such a standard need not be met for his diagnosis in this proceeding.

7 This, of course, conflicts with defendant's witness' testimony that the result of estrogen withdrawal would have few psychological ramifications. Dr. Dickey did testify, however, that there would be a loss of a number of the feminine characteristics plaintiff had developed over the years, including lack of body hair, body fat distribution, breast tissue, and so forth. Plaintiff could also experience an increase in the size of the male genitalia and the frequency of erections, which both diminish with the estrogen treatments. Dr. Dickey did not think there would be a shift in voice pitch.

8 According to Dr. Wilson, older patients may have increased risk of heart disease or stroke. Dr. Wilson testified that he has only seen one patient in twenty years in which these side effects might be attributed to estrogen.

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9 I must admit, it is good for my concept of humanity to believe that all those who share this earth, if nothing more, would have empathy for Marty Phillips' attempt to heal herself. From the testimony, however, at least one medical professional had no such empathy.

10 I find that the conduct of Dr. Opika was to intentionally deny plaintiff the medical care she had received over a period of years prior to incarceration for her gender dysphoria. Others in the MDOC have been indifferent to the serious medical needs present in Marty Phillips' case.

11 As the Supreme Court has warned, the denial of medical care can result in physical torture or pain without a penological purpose. *Estelle v. Gamble,* 429 U.S. at 103, 97 S.Ct. at 290. Plaintiff here has suffered the effects of depression, vomiting and fainting spells, and pain as the tissue around her breasts has contracted and was bruised. More important, plaintiff has been made to experience the emotional pain she described when parts of her body reverted to looking and feeling characteristically male when plaintiff experiences life as a female.

End of Document

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487 U.S. 552 (1988)

PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT v. UNDERWOOD ET AL.

No. 86-1512.

Supreme Court of United States.

Argued December 1, 1987
Decided June 27, 1988

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

*554 *Deputy Solicitor General Merrill* argued the cause for petitioner. On the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Lauber, Charles A. Rothfeld, William Kanter, John S. Koppel,* and *Gershon M. Ratner.*

Mary S. Burdick argued the cause for respondents. With her on the brief was *Richard A. Rothschild.*[*]

JUSTICE SCALIA delivered the opinion of the Court.

Respondents settled their lawsuit against one of petitioner's predecessors as Secretary of Housing and Urban Development, *555 and were awarded attorney's fees after the court found that the position taken by the Secretary was not "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d). The court also determined that "special factors" justified calculating the attorney's fees at a rate in excess of the $75-per-hour cap imposed by the statute. We granted certiorari, 481 U. S. 1047 (1987), to resolve a conflict in the Courts of Appeals over important questions concerning the interpretation of the EAJA. Compare Dubose v. Pierce, 761 F. 2d 913 (CA2 1985), cert. pending, No. 85-516, with 761 F. 2d 1342 (CA9 1985) *(per curiam),* as amended, 802 F. 2d 1107 (1986) (case below).

I

This dispute arose out of a decision by one of petitioner's predecessors as Secretary not to implement an "operating subsidy" program authorized by § 236 as amended by § 212 of the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633, formerly codified at 12 U. S. C. §§ 1715z-1(f)(3) and (g) (1970 ed., Supp. IV). The program provided payments to owners of Government-subsidized apartment buildings to offset rising utility expenses and property taxes. Various plaintiffs successfully challenged the Secretary's decision in lawsuits filed in nine Federal District Courts. See Underwood v. Pierce, 547 F. Supp. 256, 257, n. 1 (CD Cal. 1982) (citing cases). While the Secretary was appealing these adverse decisions, respondents, members of a nationwide class of tenants residing in Government-subsidized housing, brought the present action challenging the Secretary's decision in the United States District Court for the District of Columbia. That court also decided the issue against the Secretary, granted summary judgment in favor of respondents, and entered a permanent injunction and writ of mandamus requiring the Secretary to disburse the accumulated operating-subsidy fund. See Underwood v. Hills, 414 F. Supp. 526, 532 (1976). We stayed the District *556 Court's judgment pending appeal. *Sub nom. Hills* v. *Cooperative Services, Inc.,* 429 U. S. 892 (1976). The Court of Appeals for the Second Circuit similarly stayed, pending appeal, one of the eight other District Court judgments against the Secretary. See Dubose v. Harris, 82 F. R. D. 582, 584 (Conn. 1979). Two of those other judgments were affirmed by Courts of Appeals, see Ross v. Community Services, Inc., 544 F. 2d 514 (CA4 1976), and Abrams v. Hills, 547 F. 2d 1062 (CA9 1976), vacated *sub nom. Pierce* v. *Ross,* 455 U. S. 1010 (1982), and we consolidated the cases and granted the Secretary's petitions for writs of certiorari to review those decisions, Harris v. Ross, 431 U. S. 928 (1977). Before any other Court of Appeals reached a decision on the issue, and before we could review the merits, a newly appointed Secretary settled with the plaintiffs in most of the cases. The Secretary agreed to pay into a settlement fund $60 million for distribution to owners of subsidized housing or to tenants whose rents had been increased because subsidies had not been paid. The present case was then transferred to the Central District of California for administration of the settlement.

In 1980, while the settlement was being administered, Congress passed the EAJA, 28 U. S. C. § 2412(d), which as relevant provides:

> "(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . , incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> .....
>
> "(2) For the purposes of this subsection —
>
> "(A) `fees and other expense' includes . . . reasonable attorney fees (The amount of fees awarded under this *557 subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)."

The District Court granted respondents' motion for an award of attorney's fees under this statute, concluding that the Secretary's decision not to implement the operating-subsidy program had not been "substantially justified." The court determined that respondents' attorneys had provided 3,304 hours of service and that "special factors" justified applying hourly rates ranging from $80 for work performed in 1976 to $120 for work performed in 1982. This produced a base or "lodestar" figure of $322,700 which the court multiplied by three-and-one-half (again because of the "special factors"), resulting in a total award of $1,129,450.

On appeal, the Court of Appeals for the Ninth Circuit held that the District Court had not abused its discretion in concluding that the Secretary's position was not substantially justified. 761 F. 2d, at 1346. The Court of Appeals also held that the special factors relied on by the District Court justified increasing the hourly rates of the attorneys, but did not justify applying a multiplier to the lodestar amount. It therefore reduced the award to $322.700. *Id.,* at 1347-1348; see 802 F. 2d, at 1107.

We granted the Secretary's petition for certiorari on the questions whether the Government's position was "substantially justified" and whether the courts below properly identified "special factors" justifying an award in excess of the statute's $75-per-hour cap on attorney's fees.

II

We first consider whether the Court of Appeals applied the correct standard when reviewing the District Court's determination *558 that the Secretary's position was not substantially justified. For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion"). The Ninth Circuit treated the issue of substantial justification as involving the last of these; other Courts of Appeals have treated it as involving the first. See Battles Farm Co. v. Pierce, 257 U. S. App. D. C. 6, 11-12, 806 F. 2d 1098, 1103-1104 (1986), cert. pending, No. 86-1661; Dubose v. Pierce, 761 F. 2d, at 917.

For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. See, *e. g.,* 42 U. S. C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"). For most others, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer.[1] See Rosenberg, *559 Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 638 (1971) (hereinafter Rosenberg). No more today than in the past shall we attempt to discern or to create a comprehensive test; but we are persuaded that significant relevant factors call for an "abuse of discretion" standard in the present case.

We turn first to the language and structure of the governing statute. It provides that attorney's fees shall be awarded "unless *the court finds* that the position of the United States was substantially justified." 28 U. S. C. § 2412(d)(1)(A) (emphasis added). This formulation, as opposed to simply "unless the position of the United States was substantially justified," emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal. That inference is not compelled, but certainly available. Moreover, a related provision of the EAJA requires an administrative agency to award attorney's fees to a litigant prevailing in an agency adjudication if the Government's position is not "substantially justified," 5 U. S. C. § 504(a)(1), and specifies that the agency's decision may be reversed only if a reviewing court "finds that the failure to make an award . . . was unsupported by substantial evidence." § 504(c)(2). We doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court. Again, however, the inference of deference is assuredly not compelled.

We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of justice, *560 one judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, 474 U. S. 104, 114 (1985). We think that consideration relevant in the present context as well, and it argues in favor of deferential, abuse-of-discretion review. To begin with, some of the elements that bear upon whether the Government's position "*was* substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

In some cases, such as the present one, the attorney's fee determination will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation. It cannot be assumed, however, that *de novo* review of this will not require the appellate court to invest substantial additional time, since it will in any case have to grapple with the same legal issue on the merits. To the contrary, one would expect that where the Government's case is so feeble as to provide grounds for an EAJA award, there will often be (as there was here) a settlement below, or a failure to appeal from the adverse judgment. Moreover, even if there is a merits appeal, and even if it occurs simultaneously with (or goes to the same panel that entertains) the appeal from the *561 attorney's fee award, the latter legal question will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been. In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. The former result will obtain when (because of intervening legal decisions by this Court or by the relevant circuit itself) the law of the circuit is, at the time of the EAJA appeal, quite clear, so that the question of what the Government was substantially justified in believing it to have been is of entirely historical interest. Where, on the other hand, the law of the circuit remains unsettled at the time of the EAJA appeal, a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion. Moreover, the possibility of the latter occurrence would encourage needless merits appeals by the Government, since it would know that if it does not appeal, but the victorious plaintiff appeals the denial of attorney's fees, its district-court loss on the merits can be converted into a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits. All these untoward consequences can be substantially reduced or entirely avoided by adopting an abuse-of-discretion standard of review.

Another factor that we find significant has been described as follows by Professor Rosenberg:

> "One of the `good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, *562 special, narrow facts that utterly resist generalization — at least, for the time being.
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> .....
>
> "The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate. . . . A useful analogue is the course of development under Rule 39(b) of the Federal Rules of Civil Procedure, providing that in spite of a litigant's tardiness (under Rule 38 which specifies a ten-day-from-last-pleading deadline) the trial court `in its discretion' may order a trial by jury of any or all issues. Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late-demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary. Time and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge." Rosenberg 662-663.

We think that the question whether the Government's litigating position has been "substantially justified" is precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop. There applies here what we said in connection with our review of Rule 54(b) discretionary certification by district courts: "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." Curtiss-Wright Corp. v. General Electric Co., 446 U. S. 1, 10-11 (1980). Application of an abuse-of-discretion standard to the present question will permit that needed flexibility.

*563 It must be acknowledged that militating against the use of that standard in the present case is the substantial amount of the liability produced by the District Judge's decision. If this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively. In that regard, however, the present case is not characteristic of EAJA attorney's fee cases. The median award has been less than $3,000. See Annual Report of the Director of the Administrative Office of the U. S. Courts, Fees and Expenses Awarded Under the Equal Access to Justice Act, pp. 99-100, Table 29 (1987) (351 of 387 EAJA awards in fiscal year 1986-1987 were against the Department of Health and Human Services and averaged $2,379). We think the generality rather than the exception must form the basis for our rule.

In sum, although as we acknowledged at the outset our resolution of this issue is not rigorously scientific, we are satisfied that the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA. In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U. S. 424, 437 (1983).

III

Before proceeding to consider whether the trial court abused its discretion in this case, we have one more abstract legal issue to resolve: the meaning of the phrase "substantially justified" in 28 U. S. C. § 2412(d)(1)(A). The Court of Appeals, following Ninth Circuit precedent, held that the Government's position was "substantially justified" if it "had a reasonable basis both in law and in fact." 761 F. 2d, at 1346. The source of that formulation is a Committee Report prepared at the time of the original enactment of the EAJA, which commented that "[t]he test of whether the Government *564 position is substantially justified is essentially one of reasonableness in law and fact." H. R. Conf. Rep. No. 96-1434, p. 22 (1980). In this petition, the Government urges us to hold that "substantially justified" means that its litigating position must have had "some substance and a fair possibility of success." Brief for Petitioner 16. Respondents, on the other hand, contend that the phrase imports something more than "a simple reasonableness standard," Brief for Respondents 24 — though they are somewhat vague as to precisely *what* more, other than "a high standard," and "a strong showing," *id.,* at 28.

In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it — whether that be "reasonable basis in both law and fact" or anything else. "Substantially justified" is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word "substantial" can have two quite different — indeed, almost contrary — connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2514 (2d ed. 1945) — as, for example, in the statement. "He won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," *ibid.* — as, for example, in the statement, "What he said was substantially true." Depending upon which connotation one selects, "substantially justified" is susceptible of interpretations ranging from the Government's to the respondents'.

We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act, 5 U. S. C. § 706(2)(E). That phrase *565 does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197, 229 (1938). In an area related to the present case in another way, the test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was "substantially justified," Fed. Rules Civ. Proc. 37(a)(4) and (b)(2)(E). To our knowledge, that has never been described as meaning "justified to a high degree," but rather has been said to be satisfied if there is a "genuine dispute," Advisory Committee's Notes on 1970 Amendments to Fed. Rule Civ. Proc. 37(a)(4), 28 U. S. C. App., p. 601; see, *e. g.,* *Quaker Chair Corp.* v. *Litton Business Systems, Inc.,* 71 F. R. D. 527, 535 (SDNY 1976), or "if reasonable people could differ as to [the appropriateness of the contested action]," *Reygo Pacific Corp.* v. *Johnston Pump Co.,* 680 F. 2d 647, 649 (CA9 1982); see 8 C. Wright & A. Miller, Federal Practice and Procedure § 2288, p. 790 (1970); *SEC* v. *Musella,* [1984] CCH Fed. Sec. L. Rep. ¶ 91,647, p. 99,282 (SDNY 1984); *Smith* v. *Montgomery County,* 573 F. Supp. 604, 614 (Md. 1983).

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" — that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. See *United States* v. *Yoffe,* 775 F. 2d 447, 449-450 (CA1 1985); *Dubose* v. *Pierce,* 761 F. 2d, at 917-918; *Citizens Council of Delaware County* v. *Brinegar,* 741 F. 2d 584, 593 (CA3 1984); *Anderson* v. *Heckler,* 756 F. 2d 1011, 1013 (CA4 1985); *Hanover Building Materials, Inc.* v. *Guiffrida,* 748 F. 2d 1011, 1015 (CA5 1984); *Trident Marine Construction, Inc.* v. *District* *566 *Engineer,* 766 F. 2d 974, 980 (CA6 1985); *Ramos* v. *Haig,* 716 F. 2d 471, 473 (CA7 1983); *Foster* v. *Tourtellotte,* 704 F. 2d 1109, 1112 (CA9 1983) *(per curiam); United States* v. *2,116 Boxes of Boned Beef,* 726 F. 2d 1481, 1486-1487 (CA10), cert. denied *sub nom. Jarboe-Lackey Feedlots, Inc.* v. *United States,* 469 U. S. 825 (1984); *Ashburn* v. *United States,* 740 F. 2d 843, 850 (CA11 1984). To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.[2]

Respondents press upon us an excerpt from the House Committee Report pertaining to the 1985 reenactment of the EAJA, which read as follows:

> "Several courts have held correctly that `substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of `reasonably justified' in favor of `substantially justified,' the test must be more than mere reasonableness." H. R. Rep. No. 99-120, p. 9 (1985) (footnote omitted).

If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter — because it is not an explanation *567 of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested. Such a reenactment, of course, generally includes the settled judicial interpretation. *Lorillard* v. *Pons,* 434 U. S. 575, 580-581 (1978). Here, to the contrary, the almost uniform appellate interpretation (12 Circuits out of 13) *contradicted* the interpretation endorsed in the Committee Report. See *supra,* at 565-566 (citing cases); see also *Foley Construction Co.* v. *United States Army Corps of Engineers,* 716 F. 2d 1202, 1204 (CA8 1983), cert. denied, 466 U. S. 936 (1984); *Broad Avenue Laundry and Tailoring* v. *United States,* 693 F. 2d 1387, 1391 (CA Fed. 1982). Only the District of Columbia Circuit had adopted the position that the Government had to show something "slightly more" than reasonableness. *Spencer* v. *NLRB,* 229 U. S. App. D. C. 225, 244, 712 F. 2d 539, 558 (1983), cert. denied, 466 U. S. 936 (1984). We might add that in addition to being out of accord with the vast body of existing appellate precedent, the 1985 House Report also contradicted, without explanation, the 1980 House Report ("reasonableness in law and fact") from which, as we have noted, the Ninth Circuit drew its formulation in the present case.

Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only *568 the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage, and so unadministerable, as "more than mere reasonableness." Between the test of reasonableness, and a test such as "clearly and convincingly justified" — which no one, not even respondents, suggests is applicable — there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior.

IV

We reach, at last, the merits of whether the District Court abused its discretion in finding that the Government's position was not "substantially justified." Both parties argue that for purposes of this inquiry courts should rely on "objective indicia" such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits. This, they suggest, can avoid the time-consuming and possibly inexact process of assessing the strength of the Government's position. While we do not disagree that objective indicia can be relevant, we do not think they provide a conclusive answer, in either direction, for the present case.

Respondents contend that the lack of substantial justification for the Government's position was demonstrated by its willingness to settle the litigation on unfavorable terms. Other factors, however, might explain the settlement equally well — for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements.

Respondents further contend that the weakness of the Government's position is established by the objective fact that the merits were decided at the pleadings stage. We disagree. At least where, as here, the dispute centers upon *569 questions of law rather than fact, summary disposition proves only that the district judge was efficient.

Both parties rely upon the objective indicia consisting of the views expressed by other courts on the merits of the Government's position. Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose. Nevertheless, a string of losses can be indicative; and even more so a string of successes. Once again, however, we cannot say that this category of objective indicia is enough to decide the present case. Respondents emphasize that every court to hear the merits (nine District Courts and two Courts of Appeals) rejected the Government's position. The Secretary responds that the stays issued by the Court of Appeals for the Second Circuit and by this Court reflect a view on the merits and objectively establish substantial justification; and that it is "unlikely that [this] Court would have granted the government's petitions [for certiorari in two cases to review this issue] had the Secretary's argument" not been substantial. Brief for Petitioner 25. Respondents reply that neither the stays nor the grants of certiorari are reliable indications of substantial merit. We will not parse these arguments further. Respondents' side of the case has at least sufficient force that we cannot possibly state, on the basis of these objective indications alone, that the District Court abused its discretion in finding no substantial justification.

We turn, then, to the actual merits of the Government's litigating position. The Government had argued that the operating-subsidy program was established in permissive rather than mandatory language: the Secretary is "*authorized* to make, and contract to make" operating-subsidy payments. 12 U. S. C. § 1715z-1(f)(3) (1970 ed., Supp. IV) (emphasis added). This contrasts with the mandatory language Congress used when creating a related housing subsidy *570 program: the Secretary "*shall* make, and contract to make." § 1715z-1(f)(2) (emphasis added). Moreover, the Government argued that its position was supported by the decision in Pennsylvania v. Lynn, 163 U. S. App. D. C. 288, 501 F. 2d 848 (1974), which held that a program authorized through permissive statutory language could be suspended by the Secretary when he concluded that its implementation would interfere with other housing goals. Finally, the Government contended that because Congress had not authorized sufficient funds to conduct the operating-subsidy program as well as two related subsidy programs, the Secretary had discretion to suspend the operating-subsidy program.

Respondents argued in rebuttal that other statutory language made clear that the operating-subsidy program was mandatory: "[T]here shall be established an initial operating expense level . . . [which] shall be established by the Secretary not later than 180 days after August 22, 1974." 12 U. S. C. §§ 1715z-1(f)(3), 1715z-1(g) (1970 ed., Supp. IV). The "project owner shall . . . pay to the Secretary all rental charges collected in excess of the basic rental charges [and] excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments." § 1715z-1(g). Furthermore, respondents argued that *Lynn* did not support the Government's position because the Secretary did not contend here, as was the case there, that the operating-subsidy program was inconsistent with national housing policy. They also pointed out that the most direct precedents at the time the Government took its position in the present case were the nine adverse District Court decisions. Finally, respondents argued that the Secretary did not need an additional authorization because the reserve fund from excess rental charges had accumulated tens of millions of dollars which could be used only for operating-subsidy payments.

We cannot say that this description commands the conclusion that the Government's position was substantially justified. *571 Accordingly, we affirm the Ninth Circuit's holding that the District Judge did not abuse his discretion when he found it was not.

V

The final issue before us is whether the amount of the attorney's fees award was proper. Here it is well established that the abuse-of-discretion standard applies. See *Hensley* v. *Eckerhart,* 461 U. S., at 437 (42 U. S. C. § 1988); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air,* 478 U. S. 546, 560-561 (1986) (42 U. S. C. § 7604(d)); *id.,* at 568 (BLACKMUN, J., concurring in part and dissenting in part).

The EAJA provides that attorney's fees "shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U. S. C. § 2412(d)(2)(A)(ii). In allowing fees at a rate in excess of the $75 cap (adjusted for inflation), the District Court relied upon some circumstances that arguably come within the single example of a "special factor" described in the statute, "the limited availability of qualified attorneys for the proceedings involved." We turn first to the meaning of that provision.

If "the limited availability of qualified attorneys for the proceedings involved" meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap — since the "prevailing market rates for the kind and quality of the services furnished" are obviously *determined* by the relative supply of that kind and quality of services.[3] "Limited availability" so *572 interpreted would not be a "special factor," but a factor virtually always present when services with a market rate of more than $75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city — or even in the entire country — come to exceed $75 per hour (adjusted for inflation), then that market-minimum rate will govern instead of the statutory cap. To the contrary, the "special factor" formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question — as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.

*573 For the same reason of the need to preserve the intended effectiveness of the $75 cap, we think the other "special factors" envisioned by the exception must be such as are not of broad and general application. We need not specify what they might be, but they include nothing relied upon by the District Court in this case. The "novelty and difficulty of issues," "the undesirability of the case," the "work and ability of counsel," and "the results obtained," App. to Pet. for Cert. 16a-17a, are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are. The factor of "customary fees and awards in other cases," *id.,* at 17a, is even worse; it is not even a routine reason for market rates, but rather a description of market rates. It was an abuse of discretion for the District Court to rely on these factors.

The final factor considered by the District Court, "the contingent nature of the fee," is also too generally applicable to be regarded as a "special" reason for exceeding the statutory cap. This issue is quite different from the question of contingent-fee enhancement that we faced last Term, in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air,* 483 U. S. 711 (1987) *(Delaware Valley II).* The EAJA differs from the sort of statutory scheme at issue there, not only because it contains this "special factor" requirement, but more fundamentally because it is not designed to reimburse reasonable fees without limit. Once the $75 cap is exceeded, neither the client paying a reasonable hourly fee nor the client paying a reasonable contingent fee is fully compensated. Moreover, it is impossible to regard, or to use, the EAJA as a means of fostering contingent-fee practice for nonmonetary claims (or small-dollar claims) in a certain favored category of cases. Unlike the statutes discussed in *Delaware Valley II,* the EAJA subsidy is not directed to a category of litigation that can be identified in advance by the contingent-fee attorney. While it may be possible to base an economically viable contingent-fee practice *574A upon the acceptance of nonmonetary civil-rights cases (42 U. S. C. § 1988) or Clean Air Act cases (42 U. S. C. § 7604(d)) in which there is fair prospect of victory, it is quite impossible to base such a practice upon the acceptance of nonmonetary cases in which there is fair prospect that the Government's position will not be "substantially justified." Even if a lawyer can assess the strength of the Government's case at the time of initial discussions with the prospective client, the lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable as to produce an EAJA award. To be sure, allowing contingency as a "special factor" might cause the EAJA to foster contingent-fee practice in the broad category of all litigation against the Federal Government. But besides the fact that such an effect would be so diluted as to be insignificant, we do not think it was Congress' purpose, in providing for reimbursement in a very small category of cases, to subsidize all contingent-fee litigation with the United States.

We conclude, therefore, that none of the reasons relied upon by the District Court to increase the rate of reimbursement above the statutory was a "special factor."

* * *

We affirm the award of attorney's fees, but as to the amount of the award we vacate the judgment and remand for proceedings consistent with our opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

*574B JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I agree that an award of attorney's fees under the Equal Access to Justice Act (EAJA) was appropriate in this case, *575 and I agree that the courts below did not adhere to the statutory hourly cap on fees. Therefore, I concur in the Court's judgment affirming the decision to award fees and remanding for a new determination as to the amount. I disagree, however, with some of the Court's reasoning. While I agree that appellate courts should review district court EAJA fee awards for abuse of discretion, in my view the Government may not prove that its position was "substantially justified" by showing that it was merely "reasonable." Therefore, although I join Parts I, II, and IV of the Court's opinion, I do not join Part III.[1] Further, because I believe that the Court's interpretation of the predicate showing for a party to obtain a fee award exceeding the statutory cap — that there existed "a special factor, such as the limited availability of qualified attorneys for the proceedings involved" — is stingier than Congress intended, I do not join Part V of the Court's opinion.

I

Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation, Congress enacted the EAJA, waiving the United States' sovereign and general statutory immunity to fee awards and creating a limited exception to the "American Rule" against awarding attorneys fees to prevailing parties. S. Rep. No. 96-253, pp. 1-6 (1979) (S. Rep.). Consequently, when a qualified party (as defined in the Act) prevails against the United States in an adversarial proceeding not sounding in tort, the EAJA prescribes that "a court shall award . . . fees and other expenses. . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U. S. C. § 2412(d)(1)(A). *576 In this, our first EAJA case, we are called upon to consider the phrase "substantially justified."

The Court begins, as is proper, with the plain meaning of the statutory language. The Court points out that "substantially" is not a word of precise and singular definition. Indeed, the word bears two arguably different relevant definitions: " `considerable in amount, value, or the like; large' "; and " `in substance or in the main.' " *Ante,* at 564. See also Webster's Third New International Dictionary 2280 (1976) ("considerable in amount, value, or worth"; and "having a solid or firm foundation . . . being that specified to a large degree or in the main"). The Court concludes, and I agree, that, to the extent they are different, Congress intended the latter meaning.

Unfortunately, the Court feels duty bound to go beyond the words enacted by Congress and to fashion its own substitute phrase using what it perceives to be a more legally precise term. The test upon which the Court alights is initially the " `reasonable basis both in law and fact' " standard, adopted by the courts below. *Ante,* at 565. While this phrase is often mentioned in the legislative history as the explication of "substantially justified," this alternative phraseology is inherently no more precise than the statutory language. In fact, it may be less so, for the Court equates it with "the test of reasonableness," *ante,* at 568, a standard rejected by Congress and significantly more forgiving than the one actually adopted.

The Senate Judiciary Committee considered and rejected an amendment substituting the phrase "reasonably justified" for "substantially justified." S. Rep., at 8. Clearly, then, the Committee did not equate "reasonable" and "substantial"; on the contrary, it understood the two terms to embrace different burdens. "Reasonable" has a variety of connotations, but may be defined as "not absurd" or "not ridiculous." Webster's New Third International Dictionary 1892 (1976). Even at its strongest, the term implies a position *577 of some, but not necessarily much, merit. However, as we have seen, "substantial" has a very different definition: "in substance or in the main." Thus, the word connotes a solid position, or a position with a firm foundation. While it is true "reasonable" and "substantial" overlap somewhat (substantial at its weakest and reasonable at its strongest) an overlap is not an identity. Therefore, although Congress may well have intended to use "substantial" in its weaker sense, there is no reason to believe, and substantial reason to disbelieve (as I will discuss below), that Congress intended the word to mean "reasonable" in *its* weaker sense.

The underlying problem with the Court's methodology is that it uses words or terms with similar, but not identical, meanings as a substitute standard, rather than as an aid in choosing among the assertedly different meanings of the statutory language. Thus, instead of relying on the legislative history and other tools of interpretation to help resolve the ambiguity in the word "substantial," the Court uses those tools essentially to jettison the phrase crafted by Congress. This point is well illustrated by the Government's position in this case. Not content with the term "substantially

justified," the Government asks us to hold that it may avoid fees if its position was "reasonable." Not satisfied even with that substitution, we are asked to hold that a position is "reasonable" if "it has some substance and a fair possibility of success." Brief for Petitioner 13. While each of the Government's successive definitions may not stray too far from the one before, the end product is significantly removed from "substantially justified." I believe that Congress intended the EAJA to do more than award fees where the Government's position was one having no substance, or only a slight possibility of success; I would hope that the Government rarely engages in litigation fitting that definition, and surely not often enough to warrant the $100 million in attorney's fees Congress expected to spend over the original EAJA's 5-year life.

578 *578 My view that "substantially justified" means more than merely reasonable, aside from conforming to the words Congress actually chose, is bolstered by the EAJA's legislative history. The phrase "substantially justified" was a congressional attempt to fashion a "middle ground" between an earlier, unsuccessful proposal to award fees in all cases in which the Government did not prevail, and the Department of Justice's proposal to award fees only when the Government's position was "arbitrary, frivolous, unreasonable, or groundless." S. Rep., at 2-3. Far from occupying the middle ground, "the test of reasonableness" is firmly encamped near the position espoused by the Justice Department. Moreover, the 1985 House Committee Report pertaining to the EAJA's reenactment expressly states that "substantially justified" means more than "mere reasonableness." H. R. Rep. No. 99-120, p. 9 (1985). Although I agree with the Court that this Report is not dispositive, the Committee's unequivocal rejection of a pure "reasonableness" standard in the course of considering the bill reenacting the EAJA is deserving of some weight.

Finally, however lopsided the weight of authority in the lower courts over the meaning of "substantially justified" might once have been, lower court opinions are no longer nearly unanimous. The District of Columbia, Third, Eighth, and Federal Circuits have all adopted a standard higher than mere reasonableness, and the Sixth Circuit is considering the question en banc. See *Riddle* v. *Secretary of Health and Human Services,* 817 F. 2d 1238 (CA6) (adopting a higher standard), vacated for rehearing en banc, 823 F. 2d 164 (1987); *Lee* v. *Johnson,* 799 F. 2d 31 (CA3 1986); *United States* v. *1,378.65 Acres of Land,* 794 F. 2d 1313 (CA8 1986); *Gavette* v. *OPM,* 785 F. 2d 1568 (CA Fed. 1986) (en banc); *Spencer* v. *NLRB,* 229 U. S. App. D. C. 225, 712 F. 2d 539 (1983).

In sum, the Court's journey from "substantially justified" to "reasonable basis both
579 in law and fact" to "the test of *579 reasonableness" does not crystallize the law, nor is it true to Congress' intent. Instead, it allows the Government to creep the standard towards "having some substance and a fair possibility of success," a position I believe Congress intentionally avoided. In my view, we should hold that the Government can avoid fees only where it makes a clear showing that its position had a solid basis (as opposed to a marginal basis or a not unreasonable basis) in both law and fact. That it may be less "anchored" than "the test of reasonableness," a debatable proposition, is no excuse to abandon the test Congress enacted.[2]

II

I also disagree with the Court's discussion of the circumstances supporting a fee enhancement beyond the $75-per-hour (adjusted for inflation) cap set by Congress, although I do agree that the lower courts' judgment in this regard cannot stand. The statute states that courts may not award fees in excess of this cap unless "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies the higher fee." 28 U. S. C. § 2412(d)(2)(A)(ii). The District Court found that there was a limited availability of qualified attorneys here, and also that there were additional special factors warranting an increase. In so deciding, however, the District Court's and Court of Appeals' analyses erroneously mirrored the analysis under 42 U. S. C. § 1988, a fee-shifting statute without an hourly rate limitation. Congress clearly meant to contain the potential costs of the EAJA by limiting the hourly rate of attorneys where fees are awarded. Consequently, a consideration of factors like counsel's customary rate, while perfectly appropriate under § 1988, cannot justify exceeding the EAJA cap. To hold
580 otherwise would render the cap nothing more than *580 advisory despite Congress' expressed intent to permit higher awards only in rare cases.

That said, our job is to decide the meaning of the term: "a special factor, such as the limited availability of qualified attorneys." The Court begins with the single expressed special factor, the "limited availability of qualified attorneys." It holds that this phrase refers to an attorney with a required, articulable specialization, and does not refer to the limited availability of attorneys experienced or skilled enough to handle the proceedings involved. The Court reasons that allowing an enhancement for extraordinary skill or experience, even if required, would render the cap nugatory, since those factors merely set the market rate. This tidy analysis is too simplistic.

The most striking aspect of the Court's holding in this regard is its willingness to ignore the plain meaning and language of the exception. After all, in the rare EAJA case where highly experienced attorneys are truly required, a neophyte lawyer is no more "qualified . . . for the proceedings involved" than a nonpatent lawyer is to handle a patent case. The Court's interpretation might nonetheless be appropriate if the cap would otherwise be actually rendered meaningless, but that is not the case here. First, we must keep in mind the nature of the cases Congress envisioned would result in a fee award: those in which the Government's position was not "substantially justified." This observation takes much of the force from the Court's reasoning, as it will be a rare case in which an attorney of exceptional skill is necessary *and* where the Government's position was weak enough to warrant an EAJA award.

Second, the phrase "limited availability of qualified attorneys," read in conjunction with "special factor," reflects a congressional judgment that if the price of lawyers generally exceeds the cap, that trend alone will not justify an increase. Therefore,
581 awarding an enhancement in cases where extraordinary *581 experience or skill is required does not write the cap out of the statute.

Third, the Court's economic analysis assumes that the market price for services rendered will always be precisely known, an assumption I cannot share, and one that there is no reason to believe Congress shared. A "reasonable" hourly rate cannot be determined with exactitude according to some preset formulation accounting for the nature and complexity of every type of case. Therefore, courts often assume that an attorney's normal hourly rate is reasonable, or, in the case of public interest counsel, a reasonable rate is generally the rate charged by an attorney of like "skill, experience, and reputation." *Blum* v. *Stenson,* 465 U. S. 886, 895, n. 11 (1984). Certainly adjustments up or down are appropriate where the fee charged is out of line with the nature of the services rendered. However, such adjustments are often difficult to make given that the "prevailing market rate" is determined by reference to the particular attorney involved rather than to a minimally qualified hypothetical lawyer, *ibid.,* and that the fee determination should not become a "second major litigation." *Hensley* v. *Eckerhart,* 461 U. S. 424, 437 (1983). Moreover, to some extent, even in a simple case higher hourly rates may be offset by fewer hours billed due to counsel's greater efficiency. Absent the statutory cap, these factors would be used in an EAJA analysis as extensively as they are used in a § 1988 analysis. However, a showing that the particular attorney retained normally charges more than the statutory cap will, by itself, avail a fee applicant nothing under EAJA, although it may, by itself, be dispositive under § 1988.

Therefore, the Court is simply wrong when it asserts that if we allow a showing of extraordinary skill or experience (in the rare case where it is required) to justify an enhanced award, then the cap will be rendered meaningless. Far from it. The same logic supporting a "patent lawyer" exception — that when only a fraction of
582 the bar is qualified to handle a *582 case, those attorneys may charge a premium for their services — supports an enhancement for skill or experience.

Equally troubling is the Court's requirement that a "special factor" must not be "of broad and general application." *Ante,* at 573. We are given no explanation of or for this limitation, beyond the declaration that it is necessary to preserve the efficacy of the cap. Further, while the Court is willing to say what is *not* a special factor — everything relied upon below — we are given no example of anything that *is* a special factor other than the subject-matter specialization already considered as falling within the "limited availability of qualified attorneys for the proceedings involved" example. Having rejected the lower courts' list of factors in its entirety, it seems as if the Court leaves nothing remaining.

Such a strained interpretation, apparently reading the words "such as" out of the Act, is unnecessary. See *Vibra-Tech Engineers, Inc.* v. *United States,* 787 F. 2d 1416 (CA10 1986); *Action on Smoking and Health* v. *CAB,* 233 U. S. App. D. C. 79, 724 F. 2d 211 (1984). Cf. *Kungys* v. *United States,* 485 U. S. 759, 778 (1988) ("[N]o provision [of a statute] should be construed to be entirely redundant"). A "special factor" may be readily analogized to the factors we identified in *Blum* to enhance the lodestar figure under § 1988. In *Blum,* we held that the lodestar amount (the reasonable hourly rate multiplied by the number of hours billed) is "presumably" the reasonable fee. However, we also held that an upward adjustment may be appropriate "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional." 465 U. S., at 899 (internal quotations omitted).[3]
583 Analogizing to the EAJA *583 context, the lodestar would be calculated by multiplying the reasonable rate (as capped) by the number of hours billed. That amount would presumably be the proper award. However, where a factor exists that would justify an enhancement of the lodestar amount under § 1988, an enhancement of the EAJA award might also be appropriate. Unlike the lower courts' approach, this rule would not read the cap out of the statute, for as we predicted in *Blum,* a lodestar enhancement would be appropriate only in "the rare case."

Although the *Blum* enhancers constitute more than the situation where there is a limited availability of qualified counsel, the statute expressly allows more to be considered. The Court's miserly refusal to accede to this statutory command is unjustified and unwarranted. I therefore concur only in the judgment as to the fee calculation.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I agree with the majority's interpretation of the term "substantially justified" as used in the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d). However, because I believe that a district court's assessment of whether the Government's legal position was substantially justified should be reviewed *de novo* and that the attorney's fees award in this case could not be sustained under that standard of review, I dissent from Parts II and IV of the majority's opinion.

I

The majority acknowledges that neither the language nor the structure of the EAJA "compel[s]" deferential review of a district court's determination of whether the Government's position was substantially justified. *Ante,* at 559. In fact, the statute
584 is wholly silent as to the standard under which *584 such determinations are to be reviewed.[1] This congressional silence in the face of both the general rule of *de novo* review of legal issues and the EAJA's special purpose of encouraging meritorious suits against the Government suggests a different result than that reached by the majority.

The Congress that adopted the EAJA certainly was aware of the general rule that issues of law are reviewed *de novo* while issues of fact are reviewed only for clear error. See Fed. Rule Civ. Proc. 52(a); *Pullman-Standard* v. *Swint,* 456 U. S. 273, 287 (1982). Congress would have known that whether or not a particular legal position was substantially justified is a question of law rather than of fact. The historical facts having been established, the question is to be resolved by the legal analysis of the relevant statutory and decisional authorities that appellate courts are expected to perform. As the District of Columbia Circuit has observed, "the special expertise and experience of appellate courts in assessing the relative force of competing interpretations and applications of legal norms makes the case for *de novo* review of judgments [of whether the Government's legal position was substantially justified] even stronger than the case for such review of paradigmatic conclusions of law." *Spencer* v. *NLRB,* 229 U. S. App. D. C. 225, 249, 712 F. 2d 539, 563 (1983), cert. denied, 466 U. S. 936 (1984). It is thus most likely that Congress expected that the courts of appeals would apply the same *de novo*
585 standard of review to a district *585 court's assessment of whether the Government's interpretation of the law was substantially justified for purposes of the EAJA as they would apply to a district court's assessment of whether the Government's interpretation of the law was correct in the underlying litigation.

De novo appellate review of whether the Government's legal position was substantially justified would also foster consistency and predictability in EAJA litigation. A court of appeals may be required under the majority's "abuse of discretion" standard to affirm one district court's holding that the Government's legal position was substantially justified and another district court's holding that the same position was not substantially justified. As long as the district court's opinion about the substantiality of the Government case rests on some defensible construction and application of the statute, the Court's view would command the court of appeals to defer even though that court's own view on the legal issue is quite different. The availability of attorney's fees would not only be difficult to predict but would vary from circuit to circuit or even within a particular circuit. Such uncertainty over the potential availability of attorney's fees would, in my view, undermine the EAJA's purpose of encouraging challenges to unreasonable governmental action. See *Spencer, supra,* at 249-250, 712 F. 2d, at 563-564.[2]

586 *586 Finally, the Federal Courts of Appeals have concluded with near unanimity that "close scrutiny," or *de novo* review, should be applied to district courts' assessments of whether the Government's legal position was substantially justified. See, *e. g., Brinker* v. *Guiffrida,* 798 F. 2d 661, 664 (CA3 1986); *United States* v. *Estridge,* 797 F. 2d 1454, 1457 (CA8 1986); *Haitian Refugee Center* v. *Meese,* 791 F. 2d 1489, 1496 (CA11 1986); *United States* v. *Yoffe,* 775 F. 2d 447, 451 (CA1 1985); *Russell* v. *National Mediation Bd.,* 775 F. 2d 1284, 1289 (CA5 1985); *Essex Electro Engineers, Inc.* v. *United States,* 757 F. 2d 247, 252-253 (CA Fed. 1985); *Hicks* v. *Heckler,* 756 F. 2d 1022, 1024-1025 (CA4 1985); *Sigmon Fuel Co.* v. *TVA,* 754 F. 2d 162, 167 (CA6 1985); *Boudin* v. *Thomas,* 732 F. 2d 1107, 1117 (CA2 1984); *United States* v. *2,116 Boxes of Boned Beef,* 726 F. 2d 1481, 1486 (CA10), cert. denied *sub nom. Jarboe-Lackey Feedlots, Inc.* v. *United States,* 469 U. S. 825 (1984); *Spencer, supra,* at 251, 712 F. 2d, at 565. This weight of appellate authority reinforces my view that whether or not the Government's interpretation of the law was substantially justified is an appropriate question for *de novo* review.

II

I do not believe that the District Court's conclusion that the Government's position in this litigation was not substantially justified could withstand appellate scrutiny under a *de novo* standard of review.

The housing statute at issue in this case provided for three subsidy programs: a "deep-subsidy" program, an "interest-reduction" program, and an "operating-
587 subsidy" program. *587 It was the Secretary's failure to implement the last of these programs that was challenged by respondents.

The statute provided that the Secretary was "*authorized* to make, and contract to make" operating-subsidy and interest-reduction payments. 12 U. S. C. §§ 1715z-1(f)(3), 1715z-1(a) (1970 ed., Supp. IV) (emphasis added). In contrast, the statute stated that the Secretary "*shall* make, and contract to make" deep-subsidy payments. § 1715z-1(f)(2) (emphasis added). In 1974, after concluding that Congress had not authorized her to commit funds sufficient to operate all three subsidy programs, Secretary Hills decided to devote the available funds to the more clearly mandatory deep-subsidy program (and to certain pre-existing commitments under the interest-reduction program) rather than to spread the funds among all three programs.

Whether or not the courts might differ with Secretary Hills on the scope of her discretion to decline to implement the operating-subsidy program, see *ante,* at 569, given the statutory language and the existing case law, her conclusion was not without substantial justification. The statutory provisions instructing the Secretary to make deep-subsidy payments, but merely "authorizing" her to make operating-subsidy payments, could reasonably be construed as vesting the Secretary with some discretion over the implementation of the operating-subsidy program. If Congress had intended to give the Secretary no choice in the matter, it is defensible to believe that Congress would have directed that the Secretary "*shall* make, and contract to make" operating-subsidy payments.

Moreover, the then-recent decision in *Pennsylvania* v. *Lynn,* 163 U. S. App. D. C. 288, 501 F. 2d 848 (1974), offered further support for the Secretary's position. The Court of Appeals held in that case that the Secretary had not abused his discretion in suspending the interest-reduction program — under which the Secretary was likewise "authorized to make, and contract to make" payments — after he had
588 concluded *588 that the program was not serving national housing goals. The *Lynn* case is not, of course, on all fours with this one. However, because *Lynn* suggests that the Secretary has a degree of discretion over whether to implement housing programs that are not couched in clearly mandatory statutory language, that decision would have given Secretary Hills reason to believe that such discretion could properly be exercised with regard to the operating-subsidy program.[3]

Because I would conclude upon *de novo* review that the Secretary's refusal to implement the operating-subsidy program was substantially justified, I would reverse the award of attorney's fees under the EAJA.[4]

[*] Briefs of *amici curiae* urging affirmance were filed for Battles Farm Co. et al. by *Gerald Goldman* and *Thomas D. Goldberg;* for the National Organization of Social Security Claimants' Representatives by *Robert E. Rains* and *Nancy G. Shor;* for the San Francisco Lawyers' Committee for Urban Affairs et al. by *Marilyn Kaplan;* for the Small Business Foundation of America, Inc., et al. by *David Overlock Stewart;* and for Vernice Dubose et al. by *Dennis J. O'Brien* and *William H. Clendenen, Jr.*

[1] JUSTICE WHITE suggests, *post,* at 583-585, that since the "substantial justification" question does not involve the establishment of "historical facts," Congress would have expected it to be reviewed *de novo.* We disagree. From the given that the issue is not one of fact, one can confidently conclude that Congress would *not* have expected, on the basis of the case law, that a clearly-erroneous standard of review would be applied, but not that it would have expected review *de novo* rather than review for abuse of discretion. See, *e. g., Piper Aircraft Co.* v. *Reyno,* 454 U. S. 235, 257 (1981) (abuse-of-discretion standard applied to dismissal on *forum non conveniens* grounds); *Gulf Oil Co.* v. *Bernard,* 452 U. S. 89, 103 (1981) (order under Fed. Rule Civ. Proc. 23(d)); *Curtiss-Wright Corp.* v. *General Electric Co.,* 446 U. S. 1, 10-11 (1980) (certification under Fed. Rule Civ. Proc. 54(b)). It is especially common for issues involving what can broadly be labeled "supervision of litigation," which is the sort of issue presented here, to be given abuse-of-discretion review. See, *e. g., Hensley* v. *Eckerhart,* 461 U. S. 424, 437 (1983) (attorney's fees); *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U. S. 639, 642 (1976) (discovery sanctions); see generally 1 S. Childress & M. Davis, Standards of Review §§ 4.1-4.20, pp. 228-286 (1986).

[2] Contrary to JUSTICE BRENNAN's suggestion, *post,* at 576-577, our analysis does not convert the statutory term "substantially justified" into "reasonably justified." JUSTICE BRENNAN's arguments would have some force if the statutory criterion were "substantially *correct*" rather than "substantially *justified.*" But a position can be justified even though it is not correct, and we believe it can be substantially (*i. e.,* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

[3] It is perhaps possible to argue that Congress intended to create a dichotomy between the phrase "the kind and quality of services *furnished*" in the first part of § 2412(d)(2)(A), and the later reference to attorneys "qualified. . . *for the proceedings involved*" — meaning the former to refer to the legal services provided (which may have been quite *de luxe*) and the latter to refer to the legal services really needed for the case (which may have been quite run-of-the-mine). Only those *de luxe* services really needed (the argument would run) could be reimbursed at a rate above the $75 cap. The problem with this is that both the provisions define and limit the statutory term "reasonable attorney's fees" in § 2412(d)(2)(A). See *supra,* at 556-557. Since that primary term assuredly embraces the notion that the fees must relate to services of a kind and quality needed for the case, the phrase "prevailing market rates for the kind and quality of services furnished" must in fact refer to the kind and quality of services both furnished and needed. The other reading, besides distorting the text, produces the peculiar result that attorney's fees for services of a needlessly high quality would be reimbursable up to $75 per hour, but not beyond.

[1] Because I view the term "substantially justified" as imposing a higher burden on the Government than does the Court, the Court's reasoning in Part IV of its opinion applies perforce to my view of the case.

[2] Because the purposes of the EAJA are different from those of Federal Rule of Civil Procedure 37 and from those served by the "substantial evidence" test used to review agency determinations, I believe the meanings given the term "substantial" in those contexts do not govern here.

[3] We left open whether the contingent nature of the fee could also justify an enhancement. However, much for the reasons stated by the Court, that question is not pertinent to an EAJA case. It is one thing to say that a contingent-fee enhancement is necessary to compensate an attorney when *victory* is uncertain, it is another thing entirely to say that such an enhancement is necessary to compensate an attorney when the lack of *substantial justification* is uncertain.

[1] That Congress remained silent as to the standard of review to be applied to district court's determinations of whether an attorney's fee award is appropriate, yet explicitly directed that an "abuse of discretion" standard be applied to similar determinations by governmental agencies, see 5 U. S. C. § 504(c)(2), would seem to militate against rather than in favor of the rule adopted by the majority. See *ante,* at 559. The more reasonable inference to be drawn from this difference in the statutory provisions governing court-awarded and agency-awarded attorney's fees is that Congress knew how to specify an "abuse of discretion" standard when it chose to do so and that Congress did not choose to do so with regard to attorney's fee awards by the district courts.

[2] The majority suggests that an "abuse of discretion" standard is desirable in order to limit the amount of "appellate energy" expended on cases that are unlikely to yield "law-clarifying benefits." *Ante,* at 561. I would have thought that decisions concerning the allocation of appellate resources are better left to Congress than to this Court. If the courts of appeals are to concentrate their efforts on clarifying the law, at the expense of correcting district court errors that may affect only the parties to a particular case, then Congress ought to make that policy choice. In any event, if the law of the circuit is indeed "quite clear" at the time of the EAJA appeal, *ibid.,* the appellate court may often have to expend relatively little energy in ascertaining whether the law was also reasonably clear at some earlier date. Of course, in those cases in which the law of the circuit remains unsettled at the time of the EAJA appeal, the appellate court may provide needed guidance both to the Government and to any individuals with similar legal claims. The majority's concern that *de novo* review will force the Government to take "needless merits appeals," *ibid.,* does not appear to be shared by the Government itself, which has argued throughout this litigation that the question whether a legal position was substantially justified ought to be reviewed under a *de novo* standard rather than an "abuse of discretion" standard.

[3] In *Dubose* v. *Pierce,* 761 F. 2d 913 (CA2 1985), cert. pending, No. 85-516, the Court of Appeals held that the Secretary's refusal to implement the operating-subsidy program was substantially justified for purposes of the EAJA. The court relied heavily on *Pennsylvania* v. *Lynn* in concluding that "[t]he governing law, to the extent that it existed, did not mandate HUD's surrender early in the litigation" and did not "bec[o]me so one-sided as to render HUD's position clearly unjustifiable" even after several lower courts had ruled against the Secretary on the operating-subsidy program. 761 F. 2d, at 918.

[4] The Court concludes that the amount of the award must be reconsidered. I agree in this respect and hence join Part V of the Court's opinion.

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Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

Anthony Q. ROWE, Plaintiff,
v.
CORRECTIONAL MEDICAL
SERVICES, INC., et al., Defendants.

No. 1:08–cv–827.
|
Aug. 18, 2010.

Attorneys and Law Firms

Anthony Q. Rowe, Jackson, MI, pro se.

Julia R. Bell, MI Dept. Attorney General, Lansing, MI, for Defendants.

REPORT AND RECOMMENDATION

HUGH W. BRENNEMAN, JR., United States Magistrate Judge.

***1** This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. This matter is before the court on a motion for summary judgment filed by defendants Haresh Pandya, M.D., Ms. Julie Van Setters, and George Pramstaller, D.O. (docket no. 55).

I. Introduction

Plaintiff filed this action against five defendants: Dr. Joseph Savage, a Regional Medical Officer at the Michigan Department of Corrections (MDOC); Julie Van Setters, the MDOC's Director of Nursing for Region II; Dr. George Pramstaller, a former Chief Medical Officer for the MDOC; Dr. Haresh Pandya, a Regional Medical Officer for the MDOC [1]; and Dr. William Neslon, a physician at the MDOC's Ionia Maximum Correctional Facility. Neither Dr. Savage nor Dr. Nelson have been served with a summons and complaint in this matter.

Plaintiff sets forth the following allegations. Plaintiff is a transsexual. Amended Compl. at ¶ 14. Prior to his incarceration in 2007, he received treatment from a private physician, Alla Sakharova, M.D., for transsexual and gender identity disorders. [2] *Id.* The private physician prescribed plaintiff the following medications: Premetrium 200 mg daily; Aldactone 100 mg daily; and Estradial 2 mg twice daily. *Id.* During plaintiff's initial MDOC evaluation on August 3, 2007, the examining physician, V.S. Thyagargian, M.D., ordered three medications for plaintiff, identified as a transsexual male: Premarin 1.25 mg daily; Estradiol 2 mg daily; [3] and Prometrium 200 mg daily. *Id.* at ¶ 16. The order for these three medications was apparently deferred pending approval by the Regional Medical Officer, Dr. Joseph Savage. *Id.* at ¶ 18. On August 6, 2007, Dr. Thyagargian entered a progress note indicating that Dr. Savage denied administration of the three medications. *Id.* at ¶ 21. A fourth medication, Aldactone, was ordered and administered to plaintiff. *Id.* at ¶ 20.

Plaintiff alleged that Dr. Pramstaller, Dr. Savage and the MDOC denied hormone treatment for his transexualism for reasons other than "sound medical decisions to treat transsexualism based upon an individual assessment of the plaintiff patient's need." *Id.* at ¶ 27. Rather, plaintiff alleged that their decision to discontinue hormone treatment or not to treat plaintiff with hormones for breast development and to inhibit androgen secretion "was based upon administrative and cost considerations" pursuant to a written or unwritten policy or practice of the State of Michigan and/or the MDOC "to save the State and/or Department of Corrections money." *Id.*

Plaintiff filed a grievance on January 6, 2008, relying on the federal court case of *Phillips v. MDOC,* 731 F.Supp. 792 (W.D.Mich.1990), claiming that deprivation of treatment for transsexualism presents a serious medical need for purposes of deliberate indifference under the Eighth Amendment as set forth in *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). *Id.* at ¶ 36. Among other things, plaintiff's grievance sought "immediate provision of hormones." *Id.* The MDOC did not provide a Step I response to the grievance, and Ms. Van Setters provided a "false statement" in rejecting the Step II appeal as untimely filed. *Id* . at ¶¶ 37–47.

***2** In July 2008, defendant Dr. William Nelson discontinued plaintiff's Aldactone (a testosterone blocker). *Id.* at ¶ 31. Due to the discontinuation of the Aldactone, plaintiff suffered irreversible hardening of silicone, which is apparently located

in various parts of his body. *Id.* at ¶¶ 14 and 32.[4] In addition, Dr. Pandya hrefused to issue plaintiff a bra, even though Dr. Nelson ordered one as a special accommodation. *Id.* at ¶ 34.

Plaintiff sets forth the following causes of action against "any one or all" of defendants Dr. Savage, Dr. Pramstaller, Dr. Nelson, Dr. Pandya and Ms. Van Setters. *Id.* at ¶ 55. First, a violation of the Eighth Amendment by denying plaintiff treatment for a serious medical need. *Id.* Second, violating plaintiff's right to equal protection under the law as secured under the Fourteenth Amendment "by refusing to treat plaintiff with hormones while treating other similarly situated prisoners with serious medical needs, plaintiff being a *class of one,* and/or a class of prisoners diagnosed as GID/transsexuals." *Id.* (emphasis in original). Third, that Ms. Van Setters violated plaintiff's "right to petition the government for redress of grievances and/or right to access the court" under the First and Fourteenth Amendments by "interfering with plaintiff's ability to exhaust administrative remedies through the MDOC grievance procedure," "attempting to conceal the underlying constitutional violation," "making false statements regarding time limits," and "otherwise impeding plaintiff['s] access to the court." *Id.*

Plaintiff seeks injunctive, declaratory and monetary relief. Plaintiff seeks an injunction requiring defendants: to provide him with an outside evaluation "by a physician experienced with treating transsexualism;" to provide him with the three medications prescribed by Dr. Thyagargian; and to allow him "to possess and wear a bra as required." *Id.* at ¶¶ 58 and 61. Plaintiff also seeks a declaratory judgment that defendants violated his constitutional rights. *Id.* at ¶ 59. Finally, plaintiff seeks an award of punitive damages against defendants in the amount of $100,000.00 to punish them for their misconduct. *Id.* at ¶ 60.

II. Legal Standard

Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, which confers a private federal right of action against any person who, acting under color of state law, deprives an individual of any right, privilege or immunity secured by the Constitution or federal laws. *Burnett v. Grattan,* 468 U.S. 42, 45 n. 2, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Stack v. Killian,* 96 F.3d 159, 161 (6th Cir.1996). To state a § 1983 claim, a plaintiff must allege two elements: (1) a deprivation of rights secured by the Constitution and laws of the United States, and (2) that the defendant deprived him of this federal right under color of law. *Jones v. Duncan,* 840 F.2d 359, 360–61 (6th Cir.1988); 42 U.S.C. § 1983.

***3** Defendants Pandya, Van Setters and Pramstaller have moved for summary judgment on plaintiff's amended complaint. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In *Copeland v. Machulis,* 57 F.3d 476 (6th Cir.1995), the court set forth the standard for deciding a motion for summary judgment:

> The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. The mere existence of a scintilla of evidence to support plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Copeland, 57 F.3d at 478–79 (citations omitted). "In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.,* 224 F.3d 797, 800 (6th Cir.2000). However, the court is not bound to blindly adopt a non-moving party's version of the facts. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

III. Discussion

A. Plaintiff's claims against Ms. Van Setters

Plaintiff alleged that Ms. Van Setters' improper denial of a Step II appeal of a grievance resulted in violations of his First, Eighth and Fourteenth Amendment rights. The court disagrees. A prison official whose only role involved the denial of an administrative grievance cannot be liable under § 1983. *Shehee v. Luttrell,* 199 F.3d 295, 300 (6th Cir.1999). "The mere denial of a prisoner's grievance states no claim of constitutional dimension." *Alder v. Correctional Medical Services,* 73 Fed. Appx. 839, 841 (6th Cir.2003). *See Martin v. Harvey,* 14 Fed. Appx. 307, 309 (6th Cir.2001) (observing that the denial of an appeal of a grievance complaining of inadequate medical care is not the same as the actual denial of a request to receive medical care). Plaintiff has failed to state a federal constitutional claim against Ms. Van Setters. Ms. Van Setters motion for summary judgment should be granted.

B. Plaintiff's Eighth Amendment claim

1. Legal standard

Plaintiff claims that Drs. Pandya and Pramstaller denied him medical care because they failed to provide him with hormones and a brassiere for his transsexual and gender identity disorder. It is well established that an inmate has a cause of action under § l983 against prison officials for "deliberate indifference" to his serious medical needs, since the same constitutes cruel and unusual punishment proscribed by the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (l976). A viable Eighth Amendment claim consists of an objective and a subjective component. *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). A court considering a prisoner's Eighth Amendment claim must ask both if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation and if the officials acted with a sufficiently culpable state of mind. *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

***4** The objective component requires the infliction of serious pain or failure to treat a serious medical condition. *Hudson,* 503 U.S. at 8–9. With respect to the infliction of serious pain, courts recognize that "[b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* at 8 (internal citations and quotation marks omitted). Similarly, "[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " *Id.* at 9.

The subjective component requires that the defendant act with deliberate indifference to an inmate's health or safety. *See Wilson v. Seiter,* 501 U.S. 294, 302–03, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). To establish the subjective component, the plaintiff must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause." *Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

2. The MDOC's policy directive on Gender Identity

When Dr. Thyagargian examined plaintiff in 2007, the MDOC's policy regarding transsexual prisoners was set forth in Policy Directive 04.06.184 (Eff. April 19, 1993) "Gender Identity Disorders in Prisoners." The MDOC summarized its policy as follows:

> A. A person with a gender identity disorder is unhappy with his/her biological sex, and desires to be considered a member of the opposite sex. In the extreme gender identity disorder called transsexualism, the individual also has a longstanding desire to replace his or her own physical sexual characteristics (genitals, breasts, voice quality, hair distribution, body shape, etc.) with those of the opposite sex. Gender identity disorders including transsexualism differ from homosexuality, which is sexual attraction to persons of the same sex, and transvestism, which is the wearing of clothing of the opposite sex for sexual gratification.
>
> B. While imprisonment provides special difficulties in the diagnosis and management of persons with gender identity disorders and transsexualism, these conditions represent serious medical needs which may not be ignored. The best

foundation for appropriate management and for avoiding inappropriate interventions is a prompt and thorough initial medical and mental health evaluation, followed by implementation of an individual management plan by both custody and health care staff.

***5** Policy Directive 04.06.184 ¶¶ A and B.

In this case, plaintiff disputes the decision to defer medication, specifically hormones. The Policy Directive addresses the issue of "Hormonal Sex Reassignment Treatment" in some detail. *See* Policy Directive 04.06.184 ¶¶ K and L. The Policy Directive states that Hormonal treatment of a prisoner with a GID may be undertaken only if one or more of the following apply:

1. The prisoner was, immediately prior to incarceration, scheduled for sex reassignment surgery at a recognized university affiliated gender identity disorder clinic (as documented by receipt of definitive records) and was receiving hormonal treatment under that clinic's supervision;

2. the prisoner has been surgically castrated (confirmed anatomically, or in biological females, by receipt of definitive records);

3. the prisoner (typically a biological male) has had years of hormonal treatment, and there is laboratory verification, after two or more months of hormonal treatment, of testosterone or estrogen deficiency with elevated FSH and LH;

4. other circumstances if approved by the Chief Medical Officer, BHCS [i.e., Bureau of Health Care Services].

Id. at ¶ K.

The Policy Directive further provides that in each case:

1. The decision to provide hormonal treatment is to be made by a Department physician;

2. written informed consent is to be obtained after detailed discussion of side effects and dangers;

3. only the medically appropriate dose of hormone (e.g., ethinyl estradiol 0.05 mg/day for biological male transsexuals or methyltestosterone 10–20 mg./d for biological female transsexuals) should be used. There is no accepted role for high dose estrogen or high dose progestin or for cycle or parenteral administration in biological male transsexuals.

Id. at ¶ L.

3. Claims against Dr. Pramstaller and Dr. Pandya

Dr. Pramstaller served as the MDOC's Chief Medical Officer from February 2002 through March 2008. Pramstaller Aff. at ¶ 1 (docket no. 56–5). In his affidavit, Dr. Pramstaller stated that his only involvement in this matter was to approve plaintiff's individual management plan on September 19, 2007. *Id.* at ¶ 4. The plan was formulated by Regional Medical Director Pandya on September 17, 2007. *Id.* This particular plan did not include medications. *Id.* In his affidavit, Dr. Pramstaller also denied that he is against transsexual treatment due to cost. *Id.* at ¶ 5.

In his affidavit, Dr. Pandya stated that he is employed by the MDOC as a Regional Medical Officer for BHCS, Region II, in Ionia, Michigan. Pandya Aff. at ¶ 1 (docket no. 56–4). Effective August 28, 2007, he became acting Regional Medical Officer for BHCS, Region III, when defendant Dr. Joseph Savage was promoted to Assistant Chief Medical Officer. *Id.* at ¶¶ 1–3. As acting Regional Medical Officer, Dr. Pandya provided clinical oversight for the 12 correctional facilities in the region, including the Charles Egeler Reception and Guidance Center. *Id.* at ¶ 4. His responsibilities included formulating Individual Management Plans for prisoners with GID, rendering decisions concerning off-formulary medication requests after a review of the medical care received and acting as a resource person/consulting physician for the on-site physicians. *Id.* On September 17, 2007, Dr. Pandya formulated an Individual Management Plan for plaintiff, based upon the August 3, 2007 physical examination performed by Dr. Thyagargian and the August 21, 2007 psychological evaluation performed by Diana M. Gartland, Psy. D. *Id.* at ¶ 5. This plan did not include any hormone therapy, because plaintiff was awaiting laboratory testing as advised by former Regional Medical Officer Dr. Savage on August 6, 2007, pursuant to Policy Directive 04.06.184. *Id.* When the laboratory testing was completed and plaintiff was re-evaluated, the hormone therapy was approved by Dr. Jeffrey Stieve on October 8, 2008, the then-acting Regional Medical Officer for Region II. *Id.* at ¶ 6. On October 31, 2008, Dr. Pandya submitted an updated Individual Medical Management Plan, which included hormone therapy, to the Chief Medical Officer, who approved the updated plan in November 5, 2008. *Id.* at ¶ 7. Finally, Dr. Pandya stated that due to the hormone therapy, other medication therapy and

weight gain, plaintiff's breasts became larger, so he requested a bra. *Id.* at ¶ 8. "After appropriate exam and confirmation for need for a bra, that too was approved under an updated Individual Management Plan on April 9, 2009." *Id.*

***6** Based on this record, the court concludes that neither Dr. Pramstaller nor Dr. Pandya violated plaintiff's Eighth Amendment rights. A threshhold question for the court is whether transsexualism and GID are serious medical needs for purposes of the Eighth Amendment. This court has held that transsexualism is a serious medical need for purposes of the Eighth Amendment. *Phillips v. Michigan Department of Corrections,* 731 F.Supp. 792, 800 (W.D.Mich.1990), *affirmed,* 932 F.2d 969 (6th Cir.1991). "Since transsexualism is a recognized medical disorder, and transsexuals often have a serious medical need for some sort of treatment, a complete refusal by prison officials to provide a transsexual with any treatment at all would state an Eighth Amendment claim for deliberate indifference to medical needs." *Murray v. United States Bureau of Prisons,* No. 95–5204, 1997 WL 34677 at *3 (6th Cir. Jan.28, 1997). However, where the prisoner is receiving treatment, the dosage levels of which are based on the considered professional judgment of a physician, courts are reluctant to second-guess the physician's judgment. *Id.*

In *Praylor v. Texas Department of Criminal Justice,* 430 F.3d 1208 (5th Cir.2005), the court concluded that the failure to provide hormones to a transsexual inmate is not, in and of itself, an Eighth Amendment violation. In *Praylor,* the court assumed, without deciding, that transsexualism presented a serious medical need, and held that "on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference." *Praylor,* 430 F.3d at 1209. In reaching this determination, the court observed that while it had not addressed the issue of providing hormone treatment to transsexual inmates:

> Other circuits that have considered the issue have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need. *See, e.g.,* *White v. Farrier,* 849 F.2d 322 (8th Cir.1988) (acknowledging that transsexualism is a serious medical condition, but holding that declining to provide hormone therapy did not constitute deliberate indifference to that medical need); *Meriwether v. Faulkner,* 821 F.2d 408, 413 (7th Cir.1987) (holding transsexual prisoner has no constitutional right to "any particular type of treatment, such as estrogen therapy"); *Supre v. Ricketts,* 792 F.2d 958, 963 (10th Cir.1986) (concluding that declining to provide hormone therapy did not constitute deliberate indifference when prison officials offered alternate treatment).

Id.

Here, the record reflects that plaintiff was receiving psychological services and medical treatment related to his transsexualism/GID while the hormone therapy request was pending. *See, e.g,* Defendants' Exh. A (excerpts of plaintiff's medical records) at pp. 31–33, 63, 67–69, 73, 80–85, 87, 91–95 (docket nos. 56–3 and 63). In addition, the delay in authorizing hormone therapy treatment was based on the sound exercise of medical judgment, as set forth in the Policy Directive. The record reflects that when Dr. Savaged reviewed Dr. Thyagargian's recommendations in August 2007, he deferred ordering the Premarin, Estradiol and Prometrium, citing the Policy Directive:

> ***7** Pursuant to MDOC policy 04.06.184 and conversation with Dr. Sahkarovam [plaintiff's private physician] on 08/06/07; patient was not scheduled for surgery for gender re-assignment, patient was not surgically castrated, patient does not have a verified testosterone or estrogen deficiency with elevated FSH and LH. Please consider testosterone, estrogen, FSH and LH tests in 8 weeks. Please submit GID physical exam form and mental health services GID evaluation form.

See Defendants' Exh. A at p. 23.

In opposing this motion [5], plaintiff points to a letter to the MDOC from his private physician dated September 19, 2007, which stated: that plaintiff was diagnosed with GID "three years ago"; that plaintiff has been under the physician's care for a transsexual disorder and prescribed hormone therapy for three years; that the physician "feels strongly" that

plaintiff needs to continue the medications; and that "[a]brupt discontinuation of this therapy can lead to significant physical and mental complications." Dr. Sakharova letter (Sept. 19, 2007) (docket no. 67–3). Plaintiff also suggests that the MDOC did not address his medical concerns, because it did not request plaintiff's medical records from Dr. Sakharova until May 2008. *See* Request for payment and/or authorization (May 28, 2008) (docket no. 67–2).

Viewing the evidence in the light most favorable to plaintiff, the court concludes that defendants Dr. Pandya and Dr. Pramstaller are entitled to summary judgment on this claim. The record reflects that the MDOC physicians undertook testing and examinations before authorizing the hormone therapy consistent with the requirements of Policy Directive 04.06.184. The record reflects that plaintiff did not receive hormone treatment for approximately fifteen months (i.e., from August 2007 through November 2008). Under the circumstances of this case, and given the unique circumstances of the prison setting and the requirements of the Policy Directive, the actions of the Drs. Pramstaller and Pandya cannot be considered a deliberate indifference. Assuming that plaintiff's transsexual condition is a serious medical need, he has no federal constitutional right to receive hormone therapy. *See* *Praylor,* 430 F.3d at 1209. Furthermore, where the prisoner is receiving treatment with the dosage levels based on the considered professional judgment of a physician, this court is reluctant to second-guess that judgment. *Murray,* 1997 WL 34677 at *3. In this regard, the record reflects that plaintiff received psychological and medical treatment while he was at the correctional facility. Accordingly, Drs. Pramstaller and Pandya are entitled to summary judgment on plaintiff's Eighth Amendment claim.

C. Plaintiff's equal protection claim

Plaintiff alleged that defendants' violated his right to equal protection of the law as secured under the Fourteenth Amendment to the United States Constitution "by refusing to treat plaintiff with hormones while treating other similarly situated prisoners with serious medical needs, plaintiff being a *class of one,* and/or a class of prisoners diagnosed as GID/transexuals [sic]." Amend. Compl. at ¶ 55 (emphasis in original).

***8** In order to maintain a Fourteenth Amendment Equal Protection claim, plaintiff must prove that he is a member in a protected class and that a state actor purposefully discriminated against him because of his class membership. *See* *Herron v. Harrison,* 203 F.3d 410, 417 (6th Cir.2000). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

Prisoners are not considered a suspect class for purposes of equal protection litigation. *Jackson v. Jamrog,* 411 F.3d 615, 619 (6th Cir.2005). However, the Sixth Circuit has determined that a transsexual is a protected class under the Equal Protection Clause. *See* *Barnes v. City of Cincinnati,* 401 F.3d 729, 739 (6th Cir.2005) ("[t]he City's claim that [the plaintiff] did not have standing to bring an equal protection claim based on his status as a transsexual also fails, as [the plaintiff] is a member of a protected class-whether as a man or a woman"), citing *Smith v. City of Salem,* Ohio, 378 F.3d 566, 575 (6th Cir.2004) ("[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity"); *Glenn v. Brumby,* 632 F.Supp.2d 1308, 1315–1316 (N.D.Ga.2009) ("while 'transsexuals' are not members of a protected class based on sex, those who do not conform to gender stereotypes are members of a protected class based on sex").

Equal protection analysis requires strict scrutiny of a state classification only when that classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). *See* *Greene v. Livingston,* No. 2:08–cv–101, 2009 WL 1788419 at *3 (W.D.Mich. June 19, 2009) ("[u]nder the Equal Protection Clause, a state practice generally will not require strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals"). Since the Sixth Circuit recognizes transsexuals as a protected class, defendants actions with respect to plaintiff would be subject to "strict scrutiny" as opposed to "rational basis" test. *See* *Jamrog,* 411 F.3d at 619 (where challenged legislation

involved neither a suspect class nor a fundamental right, the district court properly reviewed the legislation under the "rational-basis standard of review").

While the Sixth Circuit has determined that transsexuals are a suspect class for purposes of the Equal Protection Clause, this requires strict scrutiny only where a state classification or practice interferes with a fundamental right or discriminates against a suspect class. Plaintiff has neither alleged or shown either to be the case here. His status as a transsexual is not being denied, nor is he being discriminated against because of it. Rather, his status is being accommodated and he is receiving the necessary medical procedures. Of course, plaintiff's status as a transsexual does not, and as a practical matter, constitutionalize the daily medical decisions made on his behalf. The Sixth Circuit has never required the trial court to substitute its judgment for that of the medical providers who treat the transsexuals on a day-to-day basis, assuming that medical care os being provided. As a general rule, "[w]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Westlake v. Lucas,* 537 F.2d 857, 860 n. 5 (6th Cir.1976). *See Owens v. Hutchinson,* 79 Fed. Appx. 159, 161 (6th Cir.2003) ("[a] patient's disagreement with his physicians over the proper medical treatment alleges no more than a medical malpractice claim, which is a tort actionable in state court, but is not cognizable as a federal constitutional claim"). The fact that transsexuals are a protected class does not alter this basic principle. Not only does the court not have the expertise to substitute its judgment, the pace at which medical decisions have to routinely be made does not lend itself to judicial determinations.

***9** As Policy Directive 04.06.184 makes clear, the treatment of a transsexual prisoner requires a number of medical decisions (e.g., whether the prisoner was scheduled for sex reassignment surgery, whether the prisoner has been surgically castrated, the extent of a prisoner's hormonal treatment, laboratory verification of the hormonal treatment, whether the prisoner has a testosterone or estrogen deficiency, whether the prisoner understands the side effects and dangers of hormonal treatment, and, of course, the type and dosage of hormones that are appropriate for that particular person). Plaintiff should not confuse the medical process required to maintain a prisoner's identity as a transsexual (from which an Eighth Amendment claim could arise for failing to treat a serious medical need) with the question of his status as a transsexual within the prison system (from which a Fourteenth Amendment Equal Protection claim could arise for sex stereotyping based on gender). Here, plaintiff disagrees with the prescribed course of treatment as a transsexual, a medical condition which, like any other medical condition, will be constantly evolving based upon the unique functioning of his body. This court does not substitute its medical judgment for that of plaintiff's medical providers. *See Westlake,* 537 F.2d at 860 n. 5; *Owens,* 79 Fed. Appx. at 16.

Based upon this record, plaintiff has raised an Eighth Amendment claim alleging failure to treat a serious medical need (see discussion in § III.B., *supra*), as opposed to a Fourteenth Amendment claim alleging an Equal Protection violation based on gender. Accordingly, plaintiff's Equal Protection claim should be dismissed.

D. Injunctive relief

Defendants also seek summary judgment with respect to plaintiff's official capacity claim seeking injunctive relief. Here, plaintiff seeks a permanent injunction: to provide him with an outside evaluation of a physician experienced in treating transexualism; to possess and wear a bra; and to require defendants to provide him with the three medications prescribed by Dr. Thyagargian August 3, 2007: Premarin 1.25 mg daily; Estradiol 2 mg daily; and Prometrium 200 mg daily. Amend. Compl. at ¶¶ 58 and 61. As previously discussed, plaintiff has no cause of action under the Eighth Amendment to require a specific treatment, such as the requested hormone therapy or a bra. [6] Accordingly, plaintiff's request for injunctive relief should be denied.

IV. Conclusion

Accordingly, I respectfully recommend that the motion for summary judgment filed by Dr. Pandya, Dr. Pramstaller and Ms. Van Setters (docket no. 55) be **GRANTED.**

All Citations

Not Reported in F.Supp.2d, 2010 WL 3779561

Footnotes

1 Plaintiff's amended complaint identifies Dr. Haresh Pandya as “Steive Pandya.” *See* docket no. 46. This error was noted on Dr. Pandya's acknowledgment of service. *See* docket no. 48.

2 The term “gender identity disorder” is sometimes abbreviated as “GID.”

3 Plaintiff refers to Estradiol as “Estrdiol.”

4 Plaintiff alleged that he has “loose silicone” in the hip, cheek and breasts, and that his physical characteristics are maintained by the silicone rather than implants. *Id.* at ¶¶ 14, 32.

5 The court notes that plaintiff filed a “Declaration in opposition to defendants motion for summary judgment [sic].” *See* docket no. 67. The declaration (which is unsigned) was attached to a document entitled “Plaintiff's verified motion in opposition to defendants motion for summary judgment [sic].” *Id.* Plaintiff's “motion” and “declaration” are essentially a response to defendants' motion and docketed as such by the Clerk's Office. Although the response was untimely filed, the court has considered the matters raised therein in resolving defendants' motion.

6 The court notes that plaintiff's request for a bra is moot, because that was approved on April 9, 2009. Dr. Pandya Aff. at ¶ 18.

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Rule 56. Summary Judgment(c)

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

95 F.3d 586 (1996)

Leon SNIPES, Plaintiff-Appellant,
v.
George DETELLA, Doctor Ehrhardt, John L. Russian, et al., Defendants-Appellees.

No. 94-2313.

United States Court of Appeals, Seventh Circuit.

Argued May 21, 1996.
Decided September 9, 1996.

588 *587 *588 Robert J. Palmer, May, Oberfell & Lorber, Anthony Hartmann (argued), and Luka S. Misetic, Law Student (argued), South Bend, IN, for Plaintiff-Appellant.

Jennifer M. Link, Barbara E. Pitts (argued), Office of the Attorney General, Chicago, IL, for Defendants-Appellees.

Before CUMMINGS, MANION, and ROVNER, Circuit Judges.

MANION, Circuit Judge.

Leon Snipes stubbed his left big toe on a drawer in his prison cell, damaging his toenail. The prison physician treated him promptly, but not to his liking, and while his toenail was healing he may have had to shower in an inch or two of water due to an allegedly faulty drain, making him concerned about infections. Snipes brought suit against the prison warden, the doctor, the chief engineer, and the plumber for violation of the Eighth Amendment. The district court granted summary judgment for defendants. We affirm.

I.

On January 29, 1993, while still incarcerated at the Danville Correctional Center in Illinois, Leon Snipes filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 alleging that prison warden George DeTella, prison doctor Marvin Ehrhardt, Rayland Jackson, chief engineer at Danville, and John L. Russian, the prison plumber, had violated his Eighth Amendment rights and committed medical malpractice. Snipes' factual allegations, in their (unedited) entirety, were as follows:

> On October 9, 1992, I had ripped my big toe nail, on my left foot, partially off, on the sharp metal latch for the drawers that is attached to the bed. My foot was bleeding bad and I was in a lot of pain. I immediately reported this to the wing officers, Officer Snokes and Officer Rosdial and then to Lt. Guy, and I was admitted to the Health Care Unit. I saw the nurse and she then cleaned the wound then I saw the doctor. Doctor Ehrhardt. He decided he wouldn't take the nail completely off at that time. He took a gauze and tape to wrap the wound. (This was on Friday and I was to see him again on Monday October 12, 1992.) He also gave me additional gauzes for the weekend and pain pills (Fenoprofen 600 mg.) and a institutional lay-in for four days, but no ointment or tape to wrap the wound. I had suffered with my foot all weekend long. On Monday October 12, 1992, I again saw Doctor Ehrhardt, he examined my toe and said he would take the nail completely off. He was in the process of doing so when I asked him if he could give me something to deaden the area first. He said "no," and because of the pain I had already suffered, I had asked him again, and again, after that time the doctor said "Forget it I know what I'm doing go back to your unit." Consequently, from that date to this date, October 30, 1992, I have not had any medical attention given to me concerning my foot, leaving my foot vulnerable to any infection, especially in the Receiving unit showers where the drain ring
> 589 is protrude *589 one inch above the shower's floor, leaving filthy water standing after each shower. I had filed a institutional grievance on or about October 30, 1992, and to this date November 20, 1992, I have not had any response to the grievance or any medical treatment for my foot. I also spoke with Warden DeTella in hope to have something done consequently I still haven't had medical treatment concerning the aforestated. The cause of action is deliberated indifference and medical malpractice.

For this Snipes requested $600,000 in damages and an investigation into defendants' conduct.

Snipes moved for appointment of counsel on August 26, 1993, but noting that the merits of his complaint were "highly doubtful," the court denied the request. On March 8, 1994, defendants moved for summary judgment. In their statement of undisputed facts they confirmed many of Snipes' allegations but added that Snipes' toe had since healed and that there had never been any problems with infections. Defendants attached a copy of Snipes' medical records indicating that Snipes had missed a third, follow-up appointment with the doctor. Also attached was a photograph purporting to show that the drain in the shower Snipes used was flush with the floor and an affidavit from the chief assistant engineer at the prison stating that the drain had always been flush with the floor, implying there had never been a standing water problem in that shower. Defendants submitted the required cautionary instruction to Snipes in compliance with *Lewis v. Faulkner,* 689 F.2d 100 (7th Cir.1982), informing him of the time limit for filing a response to the motion and that the district court would accept the assertions in defendants' affidavits as true unless he submitted his own contradictory affidavits or documentary evidence.

Snipes did not file a timely response. On April 26, 1994, the district court granted the motion for summary judgment and entered judgment for defendants. On May 9, 1994, Snipes filed a motion to reinstate his complaint and a response to the motion for summary judgment. He attributed his late response to his sister's failure to mail the documents and noted that the court had granted defendants leave to file their motion for summary judgment after the established deadline. Snipes' response alleged that, contrary to defendants' assertion, no third appointment had ever been scheduled, for if it had he would have been compelled to attend, and that Warden DeTella should have intervened in his medical care. He also said he had sought medical treatment while on parole and had discovered his toe was afflicted with something called "onyx" in which "the nail grew back with a deformed crusty skin between the toe and the nail which elevates the nail 3/8 inch above the toe," making "it hard and painful to wear shoes or stand for any length of time." He claimed an infection caused by inadequate medical treatment had caused the condition. Finally, Snipes alleged that the showers were made flush with the floor only about two weeks before he was paroled. No affidavits or exhibits were attached to his response.

On May 10, 1994, the district court denied the motion to reinstate. The court stated it had considered Snipes' untimely response to the motion for summary judgment but remained "persuaded that the defendants are entitled to judgment as a matter of law." Snipes appeals with the assistance of appointed counsel, raising two issues. First, he contends the court erred in granting summary judgment because "numerous" questions of material fact remain as to whether defendants were deliberately indifferent to his serious medical needs and to harmful prison conditions. Second, he argues the district court improperly denied his request for appointed counsel.

II.

Snipes' Eighth Amendment contentions are at best a questionable claim for medical malpractice and negligence. Snipes thinks the prison doctor improperly treated his toenail and that prison officials should have provided faster-draining showers. These are not constitutional injuries.

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A.

"[T]he primary concern of the drafters [of the Eighth Amendment's prohibition on `cruel and unusual punishments'] was to proscribe `torture[s] and other barbar[ous]' methods of punishment." *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) (quoting Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning,* 57 Calif.L.Rev. 839, 842 (1969)). Nevertheless, recent Supreme Court decisions have held that the Eighth Amendment proscribes more than just "physically barbarous punishments." *Estelle,* 429 U.S. at 102, 97 S.Ct. at 290. "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, ___, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994) (internal citations and quotation marks omitted). Such "treatment" and "conditions" include a prisoner's medical care, for the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle,* 429 U.S. at 103, 97 S.Ct. at 290.

"[A] prison official violates the Eighth Amendment only when two requirements are met. First the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Farmer,* 511 U.S. at ___, 114 S.Ct. at 1977 (internal citations and quotation marks omitted). "The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. In prison-conditions cases that state of mind is one of `deliberate indifference' to inmate health or safety." *Id.* (internal citations and quotation marks omitted). Thus, "the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* [to] that narrow class of deprivations involving `serious' injury inflicted by prison officials acting with a culpable state of mind." *Hudson v. McMillian,* 503 U.S. 1, 19, 112 S.Ct. 995, 1006, 117 L.Ed.2d 156 (1992) (Thomas, J., dissenting).

"[D]eliberate indifference to [the] serious medical needs of prisoners" violates the Eighth Amendment. *Estelle,* 429 U.S. at 104, 97 S.Ct. at 291. The test to determine whether a prison official acted with "deliberate indifference" is a subjective one: "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.... [A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment [and thus falls outside the Eighth Amendment]." *Farmer,* 511 U.S. at ___, 114 S.Ct. at 1979 (internal citations and quotation marks omitted). To raise an Eighth Amendment issue, "[t]he infliction [of punishment] must be deliberate or otherwise reckless in the criminal law sense, which means that the defendant must have committed an act so dangerous that his knowledge of the risk can be inferred or that the defendant actually knew of an impending harm easily preventable." *Antonelli v. Sheahan,* 81 F.3d 1422, 1427 (7th Cir.1996). Mere negligence or even gross negligence does not constitute deliberate indifference. *Wilson v. Seiter,* 501 U.S. 294, 305, 111 S.Ct. 2321, 2327-28, 115 L.Ed.2d 271 (1991); *Farmer,* 511 U.S. at ___, 114 S.Ct. at 1991 (Thomas, J., concurring); *Duckworth v. Franzen,* 780 F.2d 645, 652-53 (7th Cir.1985).

Therefore, the Eighth Amendment is not a vehicle for bringing claims for medical malpractice. *See* *Estelle,* 429 U.S. at 105, 97 S.Ct. at 291; *Bryant v. Madigan,* 84 F.3d 246, 249 (7th Cir.1996) ("[T]he courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punishments clause
591 into a medical *591 malpractice statute for prisoners."); *Oliver v. Deen,* 77 F.3d 156, 159 (7th Cir.1996) ("Medical malpractice ... is not a violation of the [Eighth] Amendment."). Medical decisions that may be characterized as "classic example[s] of matter[s] for medical judgment," *Estelle,* 429 U.S. at 107, 97 S.Ct. at 292-93, such as whether one course of treatment is preferable to another, are beyond the Amendment's purview. Such matters are questions of tort, not constitutional law.

B.

Assuming Snipes' tardiness in responding to summary judgment should be excused, and even assuming all Snipes alleged in his complaint is true, his assertion that Dr. Ehrhardt or the Warden was deliberately indifferent to a serious medical need (or that there is a genuine factual dispute about this) does not go far. Snipes has not contested the diagnosis or the chosen treatment. His principal challenge is to the doctor's decision not to administer a local anesthetic before removing his toenail.[1] The argument raises an interesting question: To what extent can one portion or procedure of a "medical treatment" be separated out and subjected to deliberate indifference scrutiny? In other words, is it proper to parse Dr. Ehrhardt's treatment into two discrete actions, (1) the refusal to give anesthetic and (2) the removal of the toenail, or must the entire treatment be viewed as a whole? We think in this case the latter is the correct approach. In Dr. Ehrhardt's medical judgment (and Snipes agrees), the toenail had to be removed. So there is no issue of withholding a needed treatment. Removing a toenail (the treatment) involves a number of minor medical decisions, including whether the procedure merits a local anesthetic. Such decisions are "classic example[s] of matter[s] for medical judgment," *Estelle,* 429 U.S. at 107, 97 S.Ct. at 292-93, and thus are questions of tort, not constitutional law. What we have here is not deliberate indifference to a serious medical need, but a deliberate decision by a doctor to treat a medical need in a particular manner. Snipes disagrees with the way that treatment was administered, "but a `mere disagreement with the course of [the inmate's] medical treatment [does not constitute] an Eighth Amendment claim of deliberate indifference.'" *Warren v. Fanning,* 950 F.2d 1370, 1373 (8th Cir.1991) (quoting *Smith v. Marcantonio,* 910 F.2d 500, 502 (8th Cir.1990)).

Even if Snipes' desire for a local anesthetic could be considered a separable medical need under the Eighth Amendment (which it cannot), the denial of that need was not, "objectively, sufficiently serious" to constitute the "denial of the minimal civilized measure of life's necessities," whatever the doctor's motive might have been. *Farmer,* 511 U.S. at ___, 114 S.Ct. at 1977. A doctor's decision not to anesthetize a toe before removing a partially torn-off toenail — like the decision to remove a big splinter or stitch a cut without anesthetic — is not the type of barbaric treatment the Eighth Amendment was intended to prevent. To the extent such a decision is medically erroneous, it cannot be characterized as disregard for "an *excessive* risk to inmate health or safety." *Farmer,* 511 U.S. at ___, 114 S.Ct. at 1979 (emphasis added). Snipes' health was not put at excessive risk by the extra pain he may have endured. Further, there is no presumption, as Snipes seems to think, in favor of deadening limbs before treating minor injuries. The administration of pain killers requires medical expertise and judgment. Using them entails risks that doctors must consider in light of the benefits. Injecting an anesthetic may involve the risk of nerve damage or some other side effect (*e.g.,* an allergic reaction). Obviously major surgery cannot be performed without appropriate anesthetic. But this was hardly major surgery. It is even possible that an injection
592 of anesthetic would have *592 hurt more than quickly removing the nail. Nothing Snipes has alleged remotely strikes us as inhumane or a denial of the minimal necessities of a civilized society.

Snipes disagrees, arguing the matter is an issue of fact for the jury. Quoting language from *Davis v. Jones,* 936 F.2d 971, 972 (7th Cir.1991), he claims a medical condition is serious if it "pose[s] a risk of needless pain." We are not sure what exactly "a risk of needless pain" is, or even if such a notion applies to Eighth Amendment deliberate indifference claims — *Davis* was a due process case. Arguably, all pain beyond what is necessary to keep the mind cognizant of an untreated ailment is "needless." It would be nice if after appropriate medical attention pain would immediately cease, its purpose fulfilled; but life is not so accommodating. Those recovering from even the best treatment can experience pain. To say the Eighth Amendment requires prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment would be absurd. It would also be absurd to say (as Snipes appears to) that the Constitution requires prison doctors to administer the least painful treatment. That may be preferable, but the Constitution is not a medical code that mandates specific medical treatment. *Davis* did not find deliberate indifference to "needless pain," even though the authorities knew plaintiff was injured but did nothing. The issue there was delay in treatment, not the constitutional threshold of when pain is "needless."

Whether and how pain associated with medical treatment should be mitigated is for doctors to decide free from judicial interference, except in the most extreme situations. A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." *Thomas v. Pate,* 493 F.2d 151, 158 (7th Cir.1974), *vacated and remanded on other grounds sub nom.* *Cannon v. Thomas,* 419 U.S. 813, 95 S.Ct. 288, 42 L.Ed.2d 39 (1974). The pain Snipes experienced when his toenail was removed was not constitutionally serious and there is no evidence the failure to administer an anesthetic aggravated his condition. Snipes' deliberate indifference claim against Dr. Ehrhardt, and thus against Warden DeTella, who had no involvement in the treatment, is without merit.

C.

Snipes also claims prison authorities were deliberately indifferent to a prison condition posing a substantial risk of serious harm, namely, an inch or two of standing water in the shower. Snipes believes the fear and emotional distress he suffered from contemplating the risk of contracting AIDS or some other communicable disease constitutes a cruel and unusual punishment for which even the prison plumber should pay. Snipes does not claim he contracted any such disease and has produced no evidence (and barely asserts) that the dirty shower water caused his onyx condition.

Defendants provided an affidavit stating the shower never had a standing water problem. Snipes says the prison fixed the problem shortly before he was paroled (though he submits no affidavit to that effect). The dispute is unimportant, however. Assuming Snipes' story is true, the fact remains that an inch or two of water in the shower, even where one has a sore toe, is not "an excessive risk to inmate health or safety," *Farmer,* 511 U.S at ___, 114 S.Ct. at 1979, nor the "denial of the minimal civilized measure of life's necessities." *Id.* at ___, 114 S.Ct. at 1977. The shower condition he describes may require extra care on his part to keep the toe clean, but such needed precautions do not ignite a constitutional claim.

D.

Finally, Snipes submits the district court abused its discretion when it denied him appointed counsel. It did not. The presence of counsel would not have made a difference in the outcome of this case. Snipes' claim that he was subjected to cruel and unusual punishment by prison officials is a simple claim with little merit. From
593 the beginning this was at best a suit for medical *593 malpractice and negligence, not a plausible action for violation of constitutional rights. The district court was not unreasonable in denying Snipes appointed counsel. *See* *Farmer v. Haas,* 990 F.2d 319, 322 (7th Cir.1993) ("We ask not whether [the judge] was right [in denying appointment of counsel], but whether he was reasonable.").

III.

The decision of the district court is AFFIRMED.

ILANA DIAMOND ROVNER, Circuit Judge, concurring.

Snipes did not reply to defendants' summary judgment motion and, even in his late filing, offered no evidence regarding Dr. Ehrhardt's decision to treat Snipes' toenail without administering anesthetic. Snipes therefore failed to raise a factual question as to either Dr. Ehrhardt's mental state or the propriety of his treatment method. I would leave the matter there and refrain from our own evaluation of medical procedures about which we are without evidence or expertise.

[1] We say "principal" because Snipes also seems to suggest that the lack of follow-up visits could be the basis for a deliberate indifference claim. The parties disagree about whether a follow-up visit was scheduled, but the dispute is not significant. The district court found that Snipes' injury was not sufficiently serious to support a deliberate indifference claim. Whether or not that was true before he was treated, it was certainly true after — once the toenail was removed Snipes' injury could no longer be characterized as constitutionally significant. The mere lack of a follow-up visit where the injury was so minor to begin with cannot support a deliberate indifference claim.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Clark v. LeBlanc, M.D.La., September 22, 2017

211 F.3d 1275
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

Torey Tuesday SOUTH, Plaintiff-Appellee,
v.
James H. GOMEZ, Director, individually and as Director of California Dept of Corrections, Sacramento, Defendant,
and
STEVIG; Benson; Weaver; Battalino; Duncan, Defendants-Appellants.

No. 99-15976.
|
DC No. CV-95-01070-DFL.
|
Argued and Submitted Dec. 7, 1999.
|
Decided Feb. 25, 2000.

Appeal from the United States District Court for the Eastern District of California, David F. Levi, District Judge, Presiding.

Before ALDISERT,[**] O'SCANNLAIN, and HAWKINS, Circuit Judges.

MEMORANDUM[*]

***1** Five California state corrections officials (collectively, "Battalino") appeal the denial of their qualified immunity defense in a damages action brought by Torey Tuesday South, a former California state prisoner, under 42 U.S.C. § 1983. The district court denied Battalino qualified immunity after finding that Battalino, by abruptly and peremptorily terminating South's cycle of female hormone therapy, acted with deliberate indifference to her serious medical need.

On appeal, Battalino argues that he is entitled to qualified immunity because any right of South that he allegedly violated was not clearly established under existing law. The facts and prior proceedings are known to the parties; they are not restated herein except as necessary.

I

Before proceeding to the merits, a brief discussion of our jurisdiction is appropriate. Although the district court's denial of qualified immunity to Battalino was accompanied by a grant of summary judgment in favor of South on the issue of liability, the district court's order is not final within the meaning of 28 U.S.C. § 1291 because South's damages remain to be determined at trial. *See, e.g.,* *In re Frontier Properties, Inc.,* 979 F.2d 1358, 1362 (9th Cir.1992); *Hain Pure Food Co. Inc. v. Sona Food Prods. Co.,* 618 F.2d 521 (9th Cir.1980). Appeal from the district court's order is thus permissible only on an interlocutory basis.

The interlocutory nature of this appeal places strict limits upon our jurisdiction. A denial of qualified immunity is an appealable "final decision" under 28 U.S.C. § 1291 "to the extent that it turns on an issue of law." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). We therefore have jurisdiction to decide the legal questions of (1) whether the district court correctly defined the right allegedly violated by Battalino and (2) whether this right was clearly established under existing law. *See* *id.* at 528. Under *Johnson v. Jones,* 515 U.S. 304 (1995), however, we lack jurisdiction to review factual findings by the district court, even findings made in the qualified immunity context. To the extent that Battalino disputes the district court's factual findings with respect to Battalino's deliberate indifference to South's serious medical need, we lack jurisdiction over his claims.

II

Battalino claims that he is entitled to qualified immunity because inmates suffering from gender dysphoria (more commonly known as transsexualism), such as South, have no clearly established right to female hormone therapy. Battalino attempts to define the right at issue too narrowly. Our precedents make clear that with respect to prisoner medical claims, the right at issue should be defined as a

prisoner's Eighth Amendment right "to officials who are not 'deliberately indifferent to serious medical needs." ' *Kelley v. Borg,* 60 F.3d 664, 667 (9th Cir.1995) (quoting *Estelle v. Gamble,* 429 U.S. 97, 106 (1976)). We have repeatedly rejected attempts by defendants to define the right allegedly violated with greater specificity. *See* *Jackson v. McIntosh,* 90 F.3d 330, 332 (9th Cir.1996) (rejecting an attempt by prison doctors to define the issue as whether established law required them to provide a kidney transplant to a prisoner on dialysis); *Carnell v. Grimm,* 74 F.3d 977, 979-80 (9th Cir.1996); *Kelley,* 60 F.3d at 667 ("To hold that the magistrate judge should have defined the right at issue more narrowly ... would be to allow Appellants, and future defendants, to define away all potential claims."). Thus, our cases make clear that (1) the right allegedly violated by Battalino was South's Eighth Amendment right not to have prison officials be deliberately indifferent to her serious medical needs, and (2) this right was clearly established at the time of the challenged actions by Battalino.

***2** Battalino attempts to extricate his case from the unbroken line of precedents set forth above by citing cases in which other circuits found no Eighth Amendment violation when prison officials denied transsexual inmates long-term female hormone therapy. As the district court correctly recognized, however, the case at bar differs in several important respects from the cases relied upon by Battalino:

> The question in this case ... is far narrower [than in the cases cited by Battalino]. The critical element here is that plaintiff *was already receiving female hormones* when she was transferred from [one prison to a second prison]. .... Upon her transfer [to the second prison], the hormones were abruptly cut off, but not because of any considered medical judgment. Thus, the question becomes whether Eighth Amendment standards [can be] violated when a course of hormone treatment is abruptly terminated. All of the doctors and experts in this case are of one opinion that once hormone therapy is begun it should only be terminated by gradually tapering it, and not by halting it peremptorily.

In light of the particular facts of this case, as set forth above by the district court, the decisions relied upon by Battalino are inapposite. In sum, the district court correctly identified the right of South that was allegedly violated and concluded that it was clearly established at the time of the challenged actions by Battalino.

III

For the foregoing reasons, the district court's denial of qualified immunity to Battalino was proper.

AFFIRMED.

All Citations

211 F.3d 1275, 2000 WL 222611 (Table)

Footnotes

** Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

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The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version

February, 2001

Committee Members: Walter Meyer III M.D. (Chairperson), Walter O. Bockting Ph.D., Peggy Cohen-Kettenis Ph.D., Eli Coleman Ph.D., Domenico DiCeglie M.D., Holly Devor Ph.D., Louis Gooren M.D., Ph.D., J. Joris Hage M.D., Sheila Kirk M.D., Bram Kuiper Ph.D., Donald Laub M.D., Anne Lawrence M.D., Yvon Menard M.D., Stan Monstrey M.D., Jude Patton PA-C, Leah Schaefer Ed.D., Alice Webb D.H.S., Connie Christine Wheeler Ph.D.

This is the sixth version of the Standards of Care since the original 1979 document.
Previous revisions were in 1980, 1981, 1990, and 1998.

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I. Introductory Concepts

The Purpose of the Standards of Care. The major purpose of the Standards of Care (SOC) is to articulate this international organization's professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders. Professionals may use this document to understand the parameters within which they may offer assistance to those with these conditions. Persons with gender identity disorders, their families, and social institutions may use the SOC to understand the current thinking of professionals. All readers should be aware of the limitations of knowledge in this area and of the hope that some of the clinical uncertainties will be resolved in the future through scientific investigation.

The Overarching Treatment Goal. The general goal of psychotherapeutic, endocrine, or surgical therapy for persons with gender identity disorders is lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment.

The Standards of Care Are Clinical Guidelines. The SOC are intended to provide flexible directions for the treatment of persons with gender identity disorders. When eligibility

requirements are stated they are meant to be minimum requirements. Individual professionals and organized programs may modify them. Clinical departures from these guidelines may come about because of a patient's unique anatomic, social, or psychological situation, an experienced professional's evolving method of handling a common situation, or a research protocol. These departures should be recognized as such, explained to the patient, and documented both for legal protection and so that the short and long term results can be retrieved to help the field to evolve.

The Clinical Threshold. A clinical threshold is passed when concerns, uncertainties, and questions about gender identity persist during a person's development, become so intense as to seem to be the most important aspect of a person's life, or prevent the establishment of a relatively unconflicted gender identity. The person's struggles are then variously informally referred to as a gender identity problem, gender dysphoria, a gender problem, a gender concern, gender distress, gender conflict, or transsexualism. Such struggles are known to occur from the preschool years to old age and have many alternate forms. These reflect various degrees of personal dissatisfaction with sexual identity, sex and gender demarcating body characteristics, gender roles, gender identity, and the perceptions of others. When dissatisfied individuals meet specified criteria in one of two official nomenclatures--the International Classification of Diseases-10 (ICD-10) or the Diagnostic and Statistical Manual of Mental Disorders--Fourth Edition (DSM-IV)--they are formally designated as suffering from a gender identity disorder (GID). Some persons with GID exceed another threshold--they persistently possess a wish for surgical transformation of their bodies.

Two Primary Populations with GID Exist -- Biological Males and Biological Females. The sex of a patient always is a significant factor in the management of GID. Clinicians need to separately consider the biologic, social, psychological, and economic dilemmas of each sex. All patients, however, should follow the SOC.

II. Epidemiological Considerations

Prevalence. When the gender identity disorders first came to professional attention, clinical perspectives were largely focused on how to identify candidates for sex reassignment surgery. As the field matured, professionals recognized that some persons with bona fide gender identity disorders neither desired nor were candidates for sex reassignment surgery. The earliest estimates of prevalence for transsexualism in adults were 1 in 37,000 males and 1 in 107,000 females. The most recent prevalence information from the Netherlands for the transsexual end of the gender identity disorder spectrum is 1 in 11,900 males and 1 in 30,400 females. Four observations, not yet firmly supported by systematic study, increase the likelihood of an even higher prevalence: 1) unrecognized gender problems are occasionally diagnosed when patients are seen with anxiety, depression, bipolar disorder, conduct disorder, substance abuse, dissociative identity disorders, borderline personality disorder, other sexual disorders and intersexed conditions; 2) some nonpatient male transvestites, female impersonators, transgender people, and male and female homosexuals may have a form of gender identity disorder; 3) the intensity of some persons' gender identity disorders fluctuates below and above a clinical threshold; 4) gender variance among female-bodied individuals tends to be relatively invisible to the culture, particularly to mental health professionals and scientists.

Natural History of Gender Identity Disorders. Ideally, prospective data about the natural history of gender identity struggles would inform all treatment decisions. These are lacking, except for the demonstration that, without therapy, most boys and girls with gender identity disorders outgrow their wish to change sex and gender. After the diagnosis of GID is made the therapeutic approach usually includes three elements or phases (sometimes labeled triadic therapy): a real-life experience in the desired role, hormones of the desired gender, and surgery to change the genitalia and other sex characteristics. Five less firmly scientifically established observations prevent clinicians from prescribing the triadic therapy based on diagnosis alone: 1) some carefully diagnosed persons spontaneously change their aspirations; 2) others make more comfortable accommodations to their gender identities without medical interventions; 3) others give up their wish to follow the triadic sequence during psychotherapy; 4) some gender identity clinics have an unexplained high drop out rate; and 5) the percentage of persons who are not benefited from the triadic therapy varies significantly from study to study. Many persons with GID will desire all three elements of triadic therapy. Typically, triadic therapy takes place in the order of hormones = = > real-life experience = = > surgery, or sometimes: real-life experience = = > hormones = = > surgery. For some biologic females, the preferred sequence may be hormones = = > breast surgery = = > real-life experience. However, the diagnosis of GID invites the consideration of a variety of therapeutic options, only one of which is the complete therapeutic triad. Clinicians have increasingly become aware that not all persons with gender identity disorders need or want all three elements of triadic therapy.

Cultural Differences in Gender Identity Variance throughout the World. Even if epidemiological studies established that a similar base rate of gender identity disorders existed all over the world, it is likely that cultural differences from one country to another would alter the behavioral expressions of these conditions. Moreover, access to treatment, cost of treatment, the therapies offered and the social attitudes towards gender variant people and the professionals who deliver care differ broadly from place to place. While in most countries, crossing gender boundaries usually generates moral censure rather than compassion, there are striking examples in certain cultures of cross-gendered behaviors (e.g., in spiritual leaders) that are not stigmatized.

III. Diagnostic Nomenclature

The Five Elements of Clinical Work. Professional involvement with patients with gender identity disorders involves any of the following: diagnostic assessment, psychotherapy, real-life experience, hormone therapy, and surgical therapy. This section provides a background on diagnostic assessment.

The Development of a Nomenclature. The term *transexxual* emerged into professional and public usage in the 1950s as a means of designating a person who aspired to or actually lived in the anatomically contrary gender role, whether or not hormones had been administered or surgery had been performed. During the 1960s and 1970s, clinicians used the term *true transsexual*. The true transsexual was thought to be a person with a characteristic path of atypical gender identity development that predicted an improved life from a treatment sequence that culminated in genital surgery. True transsexuals were thought to have: 1) cross-gender identifications that were consistently expressed behaviorally in childhood, adolescence, and

adulthood; 2) minimal or no sexual arousal to cross-dressing; and 3) no heterosexual interest, relative to their anatomic sex. True transsexuals could be of either sex. True transsexual males were distinguished from males who arrived at the desire to change sex and gender via a reasonably masculine behavioral developmental pathway. Belief in the true transsexual concept for males dissipated when it was realized that such patients were rarely encountered, and thatsome of the original true transsexuals had falsified their histories to make their stories match the earliest theories about the disorder. The concept of true transsexual females never created diagnostic uncertainties, largely because patient histories were relatively consistent and gender variant behaviors such as female cross-dressing remained unseen by clinicians. The term "gender dysphoria syndrome" was later adopted to designate the presence of a gender problem in either sex until psychiatry developed an official nomenclature.

The diagnosis of Transsexualism was introduced in the DSM-III in 1980 for gender dysphoric individuals who demonstrated at least two years of continuous interest in transforming the sex of their bodies and their social gender status. Others with gender dysphoria could be diagnosed as Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type; or Gender Identity Disorder Not Otherwise Specified (GIDNOS). These diagnostic terms were usually ignored by the media, which used the term transsexual for any person who wanted to change his/her sex and gender.

The DSM-IV. In 1994, the DSM-IV committee replaced the diagnosis of Transsexualism with Gender Identity Disorder. Depending on their age, those with a strong and persistent cross-gender identification and a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex were to be diagnosed as Gender Identity Disorder of Childhood (302.6), Adolescence, or Adulthood (302.85). For persons who did not meet these criteria, Gender Identity Disorder Not Otherwise Specified (GIDNOS)(302.6) was to be used. This category included a variety of individuals, including those who desired only castration or penectomy without a desire to develop breasts, those who wished hormone therapy and mastectomy without genital reconstruction, those with a congenital intersex condition, those with transient stress-related cross-dressing, and those with considerable ambivalence about giving up their gender status. Patients diagnosed with GID and GIDNOS were to be subclassified according to the sexual orientation: attracted to males; attracted to females; attracted to both; or attracted to neither. This subclassification was intended to assist in determining, over time, whether individuals of one sexual orientation or another experienced better outcomes using particular therapeutic approaches; it was **not** intended to guide treatment decisions.

Between the publication of DSM-III and DSM-IV, the term "transgender" began to be used in various ways. Some employed it to refer to those with unusual gender identities in a value-free manner -- that is, without a connotation of psychopathology. Some people informally used the term to refer to any person with any type of gender identity issues. Transgender is not a formal diagnosis, but many professionals and members of the public found it easier to use informally than GIDNOS, which is a formal diagnosis.

The ICD-10. The ICD-10 now provides five diagnoses for the gender identity disorders (F64):

Transsexualism (F64.0) has three criteria:

1. The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment;
2. The transsexual identity has been present persistently for at least two years;
3. The disorder is not a symptom of another mental disorder or a chromosomal abnormality.

Dual-role Transvestism (F64.1) has three criteria:
1. The individual wears clothes of the opposite sex in order to experience temporary membership in the opposite sex;
2. There is no sexual motivation for the cross-dressing;
3. The individual has no desire for a permanent change to the opposite sex.

Gender Identity Disorder of Childhood (64.2) has separate criteria for girls and for boys.
For girls:

1. The individual shows persistent and intense distress about being a girl, and has a stated desire to be a boy (not merely a desire for any perceived cultural advantages to being a boy) or insists that she is a boy;
2. Either of the following must be present:
    a. Persistent marked aversion to normative feminine clothing and insistence on wearing stereotypical masculine clothing;
    b. Persistent repudiation of female anatomical structures, as evidenced by at least one of the following:
        1. An assertion that she has, or will grow, a penis;
        2. Rejection of urination in a sitting position;
        3. Assertion that she does not want to grow breasts or menstruate.
3. The girl has not yet reached puberty;
4. The disorder must have been present for at least 6 months.

For boys:

1. The individual shows persistent and intense distress about being a boy, and has a desire to be a girl, or, more rarely, insists that he is a girl.
2. Either of the following must be present:
    a. Preoccupation with stereotypic female activities, as shown by a preference for either cross-dressing or simulating female attire, or by an intense desire to participate in the games and pastimes of girls and rejection of stereotypical male toys, games, and activities;
    b. Persistent repudiation of male anatomical structures, as evidenced by at least one of the following repeated assertions:
        1. That he will grow up to become a woman (not merely in the role);
        2. That his penis or testes are disgusting or will disappear;
        3. That it would be better not to have a penis or testes.
3. The boy has not yet reached puberty;
4. The disorder must have been present for at least 6 months.

Other Gender Identity Disorders (F64.8) has no specific criteria.

Gender Identity Disorder, Unspecified has no specific criteria.

Either of the previous two diagnoses could be used for those with an intersexed condition.

The purpose of the DSM-IV and ICD-10 is to guide treatment and research. Different professional groups created these nomenclatures through consensus processes at different times. There is an expectation that the differences between the systems will be eliminated in the future. At this point, the specific diagnoses are based more on clinical reasoning than on scientific investigation.

Are Gender Identity Disorders Mental Disorders? To qualify as a mental disorder, a behavioral pattern must result in a significant adaptive disadvantage to the person or cause personal mental suffering. The DSM-IV and ICD-10 have defined hundreds of mental disorders which vary in onset, duration, pathogenesis, functional disability, and treatability. The designation of gender identity disorders as mental disorders is not a license for stigmatization, or for the deprivation of gender patients' civil rights. The use of a formal diagnosis is often important in offering relief, providing health insurance coverage, and guiding research to provide more effective future treatments.

IV. The Mental Health Professional

The Ten Tasks of the Mental Health Professional. Mental health professionals (MHPs) who work with individuals with gender identity disorders may be regularly called upon to carry out many of these responsibilities:

1. To accurately diagnose the individual's gender disorder;
2. To accurately diagnose any co-morbid psychiatric conditions and see to their appropriate treatment;
3. To counsel the individual about the range of treatment options and their implications;
4. To engage in psychotherapy;
5. To ascertain eligibility and readiness for hormone and surgical therapy;
6. To make formal recommendations to medical and surgical colleagues;
7. To document their patient's relevant history in a letter of recommendation;
8. To be a colleague on a team of professionals with an interest in the gender identity disorders;
9. To educate family members, employers, and institutions about gender identity disorders;
10. To be available for follow-up of previously seen gender patients.

The Adult-Specialist. The education of the mental health professional who specializes in adult gender identity disorders rests upon basic general clinical competence in diagnosis and treatment of mental or emotional disorders. Clinical training may occur within any formally credentialing discipline -- for example, psychology, psychiatry, social work, counseling, or nursing. The following are the recommended minimal credentials for special competence with the gender identity disorders:

1. A master's degree or its equivalent in a clinical behavioral science field. This or a more advanced degree should be granted by an institution accredited by a recognized national

or regional accrediting board. The mental health professional should have documented credentials from a proper training facility and a licensing board.
2. Specialized training and competence in the assessment of the DSM-IV/ICD-10 Sexual Disorders (not simply gender identity disorders).
3. Documented supervised training and competence in psychotherapy.
4. Continuing education in the treatment of gender identity disorders, which may include attendance at professional meetings, workshops, or seminars or participating in research related to gender identity issues.

The Child-Specialist. The professional who evaluates and offers therapy for a child or early adolescent with GID should have been trained in childhood and adolescent developmental psychopathology. The professional should be competent in diagnosing and treating the ordinary problems of children and adolescents. These requirements are in addition to the adult-specialist requirement.

The Differences between Eligibility and Readiness. The SOC provide recommendations for eligibility requirements for hormones and surgery. Without first meeting these recommended eligibility requirements, the patient and the therapist should not request hormones or surgery. An example of an eligibility requirement is: a person must live full time in the preferred gender for twelve months prior to genital surgery. To meet this criterion, the professional needs to document that the real-life experience has occurred for this duration. Meeting readiness criteria -- further consolidation of the evolving gender identity or improving mental health in the new or confirmed gender role -- is more complicated, because it rests upon the clinician's and the patient's judgment.

The Mental Health Professional's Relationship to the Prescribing Physician and Surgeon. Mental health professionals who recommend hormonal and surgical therapy share the legal and ethical responsibility for that decision with the physician who undertakes the treatment. Hormonal treatment can often alleviate anxiety and depression in people without the use of additional psychotropic medications. Some individuals, however, need psychotropic medication prior to, or concurrent with, taking hormones or having surgery. The mental health professional is expected to make this assessment, and see that the appropriate psychotropic medications are offered to the patient. The presence of psychiatric co-morbidities does not necessarily preclude hormonal or surgical treatment, but some diagnoses pose difficult treatment dilemmas and may delay or preclude the use of either treatment.

The Mental Health Professional's Documentation Letter for Hormone Therapy or Surgery Should Succinctly Specify:

1. The patient's general identifying characteristics;
2. The initial and evolving gender, sexual, and other psychiatric diagnoses;
3. The duration of their professional relationship including the type of psychotherapy or evaluation that the patient underwent;
4. The eligibility criteria that have been met and the mental health professional's rationale for hormone therapy or surgery;
5. The degree to which the patient has followed the Standards of Care to date and the likelihood of future compliance;
6. Whether the author of the report is part of a gender team;

7. That the sender welcomes a phone call to verify the fact that the mental health professional actually wrote the letter as described in this document.

The organization and completeness of these letters provide the hormone-prescribing physician and the surgeon an important degree of assurance that mental health professional is knowledgeable and competent concerning gender identity disorders.

One Letter is Required for Instituting Hormone Therapy, or for Breast Surgery. One letter from a mental health professional, including the above seven points, written to the physician who will be responsible for the patient's medical treatment, is sufficient for instituting hormone therapy or for a referral for breast surgery (e.g., mastectomy, chest reconstruction, or augmentation mammoplasty).

Two Letters are Generally Required for Genital Surgery. Genital surgery for biologic males may include orchiectomy, penectomy, clitoroplasty, labiaplasty or creation of a neovagina; for biologic females it may include hysterectomy, salpingo-oophorectomy, vaginectomy, metoidioplasty, scrotoplasty, urethroplasty, placement of testicular prostheses, or creation of a neophallus.

It is ideal if mental health professionals conduct their tasks and periodically report on these processes as part of a team of other mental health professionals and nonpsychiatric physicians. One letter to the physician performing genital surgery will generally suffice as long as two mental health professionals sign it.

More commonly, however, letters of recommendation are from mental health professionals who work alone without colleagues experienced with gender identity disorders. Because professionals working independently may not have the benefit of ongoing professional consultation on gender cases, two letters of recommendation are required prior to initiating genital surgery. If the first letter is from a person with a master's degree, the second letter should be from a psychiatrist or a Ph.D. clinical psychologist, who can be expected to adequately evaluate co-morbid psychiatric conditions. If the first letter is from the patient's psychotherapist, the second letter should be from a person who has only played an evaluative role for the patient. Each letter, however, is expected to cover the same topics. At least one of the letters should be an extensive report. The second letter writer, having read the first letter, may choose to offer a briefer summary and an agreement with the recommendation.

V. Assessment and Treatment of Children and Adolescents

Phenomenology. Gender identity disorders in children and adolescents are different from those seen in adults, in that a rapid and dramatic developmental process (physical, psychological and sexual) is involved. Gender identity disorders in children and adolescents are complex conditions. The young person may experience his or her phenotype sex as inconsistent with his or her own sense of gender identity. Intense distress is often experienced, particularly in adolescence, and there are frequently associated emotional and behavioral difficulties. There is greater fluidity and variability in outcomes, especially in pre-pubertal children. Only a few

gender variant youths become transsexual, although many eventually develop a homosexual orientation.

Commonly seen features of gender identity conflicts in children and adolescents include a stated desire to be the other sex; cross dressing; play with games and toys usually associated with the gender with which the child identifies; avoidance of the clothing, demeanor and play normally associated with the child's sex and gender of assignment; preference for playmates or friends of the sex and gender with which the child identifies; and dislike of bodily sex characteristics and functions. Gender identity disorders are more often diagnosed in boys.

Phenomenologically, there is a qualitative difference between the way children and adolescents present their sex and gender predicaments, and the presentation of delusions or other psychotic symptoms. Delusional beliefs about their body or gender can occur in psychotic conditions but they can be distinguished from the phenomenon of a gender identity disorder. Gender identity disorders in childhood are not equivalent to those in adulthood and the former do not inevitably lead to the latter. The younger the child the less certain and perhaps more malleable the outcome.

Psychological and Social Interventions. The task of the child-specialist mental health professional is to provide assessment and treatment that broadly conforms to the following guidelines:

1. The professional should recognize and accept the gender identity problem. Acceptance and removal of secrecy can bring considerable relief.
2. The assessment should explore the nature and characteristics of the child's or adolescent's gender identity. A complete psychodiagnostic and psychiatric assessment should be performed. A complete assessment should include a family evaluation, because other emotional and behavioral problems are very common, and unresolved issues in the child's environment are often present.
3. Therapy should focus on ameliorating any comorbid problems in the child's life, and on reducing distress the child experiences from his or her gender identity problem and other difficulties. The child and family should be supported in making difficult decisions regarding the extent to which to allow the child to assume a gender role consistent with his or her gender identity. This includes issues of whether to inform others of the child's situation, and how others in the child's life should respond; for example, whether the child should attend school using a name and clothing opposite to his or her sex of assignment. They should also be supported in tolerating uncertainty and anxiety in relation to the child's gender expression and how best to manage it. Professional network meetings can be very useful in finding appropriate solutions to these problems.

Physical Interventions. Before any physical intervention is considered, extensive exploration of psychological, family and social issues should be undertaken. Physical interventions should be addressed in the context of adolescent development. Adolescents' gender identity development can rapidly and unexpectedly evolve. An adolescent shift toward gender conformity can occur primarily to please the family, and may not persist or reflect a permanent change in gender identity. Identity beliefs in adolescents may become firmly held and strongly expressed, giving a false impression of irreversibility; more fluidity may return at a later stage. For these reasons, irreversible physical interventions should be delayed as long as is clinically appropriate. Pressure for physical interventions because of an adolescent's level of distress can be great and in such

circumstances a referral to a child and adolescent multi-disciplinary specialty service should be considered, in locations where these exist.

Physical interventions fall into three categories or stages:

1. Fully reversible interventions. These involve the use of LHRH agonists or medroxyprogesterone to suppress estrogen or testosterone production, and consequently to delay the physical changes of puberty.
2. Partially reversible interventions. These include hormonal interventions that masculinize or feminize the body, such as administration of testosterone to biologic females and estrogen to biologic males. Reversal may involve surgical intervention.
3. Irreversible interventions. These are surgical procedures.

A staged process is recommended to keep options open through the first two stages. Moving from one state to another should not occur until there has been adequate time for the young person and his/her family to assimilate fully the effects of earlier interventions.

Fully Reversible Interventions. Adolescents may be eligible for puberty-delaying hormones as soon as pubertal changes have begun. In order for the adolescent and his or her parents to make an informed decision about pubertal delay, it is recommended that the adolescent experience the onset of puberty in his or her biologic sex, at least to Tanner Stage Two. If for clinical reasons it is thought to be in the patient's interest to intervene earlier, this must be managed with pediatric endocrinological advice and more than one psychiatric opinion.

Two goals justify this intervention: a) to gain time to further explore the gender identity and other developmental issues in psychotherapy; and b) to make passing easier if the adolescent continues to pursue sex and gender change. In order to provide puberty delaying hormones to an adolescent, the following criteria must be met:

1. throughout childhood the adolescent has demonstrated an intense pattern of cross-sex and cross-gender identity and aversion to expected gender role behaviors;
2. sex and gender discomfort has significantly increased with the onset of puberty;
3. the family consents and participates in the therapy.

Biologic males should be treated with LHRH agonists (which stop LH secretion and therefore testosterone secretion), or with progestins or antiandrogens (which block testosterone secretion or neutralize testosterone action). Biologic females should be treated with LHRH agonists or with sufficient progestins (which stop the production of estrogens and progesterone) to stop menstruation.

Partially Reversible Interventions. Adolescents may be eligible to begin masculinizing or feminizing hormone therapy as early as age 16, preferably with parental consent. In many countries 16-year olds are legal adults for medical decision making, and do not require parental consent.

Mental health professional involvement is an eligibility requirement for triadic therapy during adolescence. For the implementation of the real-life experience or hormone therapy, the mental health professional should be involved with the patient and family for a minimum of six months. While the number of sessions during this six-month period rests upon the clinician's judgment,

the intent is that hormones and the real-life experience be thoughtfully and recurrently considered over time. In those patients who have already begun the real-life experience prior to being seen, the professional should work closely with them and their families with the thoughtful recurrent consideration of what is happening over time.

Irreversible Interventions. Any surgical intervention should not be carried out prior to adulthood, or prior to a real-life experience of at least two years in the gender role of the sex with which the adolescent identifies. The threshold of 18 should be seen as an eligibility criterion and not an indication in itself for active intervention.

VI. Psychotherapy with Adults

A Basic Observation. Many adults with gender identity disorder find comfortable, effective ways of living that do not involve all the components of the triadic treatment sequence. While some individuals manage to do this on their own, psychotherapy can be very helpful in bringing about the discovery and maturational processes that enable self-comfort.

Psychotherapy is Not an Absolute Requirement for Triadic Therapy. Not every adult gender patient requires psychotherapy in order to proceed with hormone therapy, the real-life experience, hormones, or surgery. Individual programs vary to the extent that they perceive a need for psychotherapy. When the mental health professional's initial assessment leads to a recommendation for psychotherapy, the clinician should specify the goals of treatment, and estimate its frequency and duration. There is no required minimum number of psychotherapy sessions prior to hormone therapy, the real-life experience, or surgery, for three reasons: 1) patients differ widely in their abilities to attain similar goals in a specified time; 2) a minimum number of sessions tends to be construed as a hurdle, which discourages the genuine opportunity for personal growth; 3) the mental health professional can be an important support to the patient throughout all phases of gender transition. Individual programs may set eligibility criteria to some minimum number of sessions or months of psychotherapy.

The mental health professional who conducts the initial evaluation need not be the psychotherapist. If members of a gender team do not do psychotherapy, the psychotherapist should be informed that a letter describing the patient's therapy might be requested so the patient can proceed with the next phase of treatment.

Goals of Psychotherapy. Psychotherapy often provides education about a range of options not previously seriously considered by the patient. It emphasizes the need to set realistic life goals for work and relationships, and it seeks to define and alleviate the patient's conflicts that may have undermined a stable lifestyle.

The Therapeutic Relationship. The establishment of a reliable trusting relationship with the patient is the first step toward successful work as a mental health professional. This is usually accomplished by competent nonjudgmental exploration of the gender issues with the patient during the initial diagnostic evaluation. Other issues may be better dealt with later, after the person feels that the clinician is interested in and understands their gender identity concerns.

Ideally, the clinician's work is with the whole of the person's complexity. The goals of therapy are to help the person to live more comfortably within a gender identity and to deal effectively with non-gender issues. The clinician often attempts to facilitate the capacity to work and to establish or maintain supportive relationships. Even when these initial goals are attained, mental health professionals should discuss the likelihood that no educational, psychotherapeutic, medical, or surgical therapy can permanently eradicate all vestiges of the person's original sex assignment and previous gendered experience.

Processes of Psychotherapy. Psychotherapy is a series of interactive communications between a therapist who is knowledgeable about how people suffer emotionally and how this may be alleviated, and a patient who is experiencing distress. Typically, psychotherapy consists of regularly held 50-minutes sessions. The psychotherapy sessions initiate a developmental process. They enable the patient's history to be appreciated**,** current dilemmas to be understood, and unrealistic ideas and maladaptive behaviors to be identified. Psychotherapy is not intended to cure the gender identity disorder. Its usual goal is a long-term stable life style with realistic chances for success in relationships, education, work, and gender identity expression. Gender distress often intensifies relationship, work, and educational dilemmas.

The therapist should make clear that it is the patient's right to choose among many options. The patient can experiment over time with alternative approaches. Ideally, psychotherapy is a collaborative effort. The therapist must be certain that the patient understands the concepts of eligibility and readiness, because the therapist and patient must cooperate in defining the patient's problems, and in assessing progress in dealing with them. Collaboration can prevent a stalemate between a therapist who seems needlessly withholding of a recommendation, and a patient who seems too profoundly distrusting to freely share thoughts, feelings, events, and relationships.

Patients may benefit from psychotherapy at every stage of gender evolution. This includes the post-surgical period, when the anatomic obstacles to gender comfort have been removed, but the person may continue to feel a lack of genuine comfort and skill in living in the new gender role.

Options for Gender Adaptation. The activities and processes that are listed below have, in various combinations, helped people to find more personal comfort. These adaptations may evolve spontaneously and during psychotherapy. Finding new gender adaptations does not mean that the person may not in the future elect to pursue hormone therapy, the real-life experience, or genital surgery.

Activities:

Biological Males:

1. Cross-dressing: unobtrusively with undergarments; unisexually; or in a feminine fashion;
2. Changing the body through: hair removal through electrolysis or body waxing; minor plastic cosmetic surgical procedures;
3. Increasing grooming, wardrobe, and vocal expression skills.

Biological Females:

1. Cross-dressing: unobtrusively with undergarments, unisexually, or in a masculine fashion;
2. Changing the body through breast binding, weight lifting, applying theatrical facial hair;

3. Padding underpants or wearing a penile prosthesis.

Both Genders:

1. Learning about transgender phenomena from: support groups and gender networks, communication with peers via the Internet, studying these Standards of Care, relevant lay and professional literatures about legal rights pertaining to work, relationships, and public cross-dressing;
2. Involvement in recreational activities of the desired gender;
3. Episodic cross-gender living.

Processes:

1. Acceptance of personal homosexual or bisexual fantasies and behaviors (orientation) as distinct from gender identity and gender role aspirations;
2. Acceptance of the need to maintain a job, provide for the emotional needs of children, honor a spousal commitment, or not to distress a family member as currently having a higher priority than the personal wish for constant cross-gender expression;
3. Integration of male and female gender awareness into daily living;
4. Identification of the triggers for increased cross-gender yearnings and effectively attending to them; for instance, developing better self-protective, self-assertive, and vocational skills to advance at work and resolve interpersonal struggles to strengthen key relationships.

VII. Requirements for Hormone Therapy for Adults

Reasons for Hormone Therapy. Cross-sex hormonal treatments play an important role in the anatomical and psychological gender transition process for properly selected adults with gender identity disorders. Hormones are often medically necessary for successful living in the new gender. They improve the quality of life and limit psychiatric co-morbidity, which often accompanies lack of treatment. When physicians administer androgens to biologic females and estrogens, progesterone, and testosterone-blocking agents to biologic males, patients feel and appear more like members of their preferred gender.

Eligibility Criteria. The administration of hormones is not to be lightly undertaken because of their medical and social risks. Three criteria exist.

1. Age 18 years;
2. Demonstrable knowledge of what hormones medically can and cannot do and their social benefits and risks;
3. Either:
   a. A documented real-life experience of at least three months prior to the administration of hormones; or
   b. A period of psychotherapy of a duration specified by the mental health professional after the initial evaluation (usually a minimum of three months).

In selected circumstances, it can be acceptable to provide hormones to patients who have not fulfilled criterion 3 – for example, to facilitate the provision of monitored therapy using hormones of known quality, as an alternative to black-market or unsupervised hormone use.

Readiness Criteria. Three criteria exist:

1. The patient has had further consolidation of gender identity during the real-life experience or psychotherapy;
2. The patient has made some progress in mastering other identified problems leading to improving or continuing stable mental health (this implies satisfactory control of problems such as sociopathy, substance abuse, psychosis and suicidality;
3. The patient is likely to take hormones in a responsible manner.

Can Hormones Be Given To Those Who Do Not Want Surgery or a Real-life Experience? Yes, but after diagnosis and psychotherapy with a qualified mental health professional following minimal standards listed above. Hormone therapy can provide significant comfort to gender patients who do not wish to cross live or undergo surgery, or who are unable to do so. In some patients, hormone therapy alone may provide sufficient symptomatic relief to obviate the need for cross living or surgery.

Hormone Therapy and Medical Care for Incarcerated Persons. Persons who are receiving treatment for gender identity disorders should continue to receive appropriate treatment following these Standards of Care after incarceration. For example, those who are receiving psychotherapy and/or cross-sex hormonal treatments should be allowed to continue this medically necessary treatment to prevent or limit emotional lability, undesired regression of hormonally-induced physical effects and the sense of desperation that may lead to depression, anxiety and suicidality. Prisoners who are subject to rapid withdrawal of cross-sex hormones are particularly at risk for psychiatric symptoms and self-injurious behaviors. Medical monitoring of hormonal treatment as described in these Standards should also be provided. Housing for transgendered prisoners should take into account their transition status and their personal safety.

VIII. Effects of Hormone Therapy in Adults

The maximum physical effects of hormones may not be evident until two years of continuous treatment. Heredity limits the tissue response to hormones and this cannot be overcome by increasing dosage. The degree of effects actually attained varies from patient to patient.

Desired Effects of Hormones. Biologic males treated with estrogens can realistically expect treatment to result in: breast growth, some redistribution of body fat to approximate a female body habitus, decreased upper body strength, softening of skin, decrease in body hair, slowing or stopping the loss of scalp hair, decreased fertility and testicular size, and less frequent, less firm erections. Most of these changes are reversible, although breast enlargement will not completely reverse after discontinuation of treatment.

Biologic females treated with testosterone can expect the following permanent changes: a deepening of the voice, clitoral enlargement, mild breast atrophy, increased facial and body hair and male pattern baldness. Reversible changes include increased upper body strength, weight gain, increased social and sexual interest and arousability, and decreased hip fat.

Potential Negative Medical Side Effects. Patients with medical problems or otherwise at risk for cardiovascular disease may be more likely to experience serious or fatal consequences of cross-sex hormonal treatments. For example, cigarette smoking, obesity, advanced age, heart disease, hypertension, clotting abnormalities, malignancy, and some endocrine abnormalities may increase side effects and risks for hormonal treatment. Therefore, some patients may not be able to tolerate cross-sex hormones. However, hormones can provide health benefits as well as risks. Risk-benefit ratios should be considered collaboratively by the patient and prescribing physician.

Side effects in biologic males treated with estrogens and progestins may include increased propensity to blood clotting (venous thrombosis with a risk of fatal pulmonary embolism), development of benign pituitary prolactinomas, infertility, weight gain, emotional lability, liver disease, gallstone formation, somnolence, hypertension, and diabetes mellitus.

Side effects in biologic females treated with testosterone may include infertility, acne, emotional lability, increases in sexual desire, shift of lipid profiles to male patterns which increase the risk of cardiovascular disease, and the potential to develop benign and malignant liver tumors and hepatic dysfunction.

The Prescribing Physician's Responsibilities. Hormones are to be prescribed by a physician, and should not be administered without adequate psychological and medical assessment before and during treatment. Patients who do not understand the eligibility and readiness requirements and who are unaware of the SOC should be informed of them. This may be a good indication for a referral to a mental health professional experienced with gender identity disorders.
The physician providing hormonal treatment and medical monitoring need not be a specialist in endocrinology, but should become well-versed in the relevant medical and psychological aspects of treating persons with gender identity disorders.

After a thorough medical history, physical examination, and laboratory examination, the physician should again review the likely effects and side effects of hormone treatment, including the potential for serious, life-threatening consequences. The patient must have the capacity to appreciate the risks and benefits of treatment, have his/her questions answered, and agree to medical monitoring of treatment. The medical record must contain a written informed consent document reflecting a discussion of the risks and benefits of hormone therapy.

Physicians have a wide latitude in what hormone preparations they may prescribe and what routes of administration they may select for individual patients. Viable options include oral, injectable, and transdermal delivery systems. The use of transdermal estrogen patches should be considered for males over 40 years of age or those with clotting abnormalities or a history of venous thrombosis. Transdermal testosterone is useful in females who do not want to take injections. In the absence of any other medical, surgical, or psychiatric conditions, basic medical monitoring should include: serial physical examinations relevant to treatment effects and side effects, vital sign measurements before and during treatment, weight measurements, and laboratory assessment. Gender patients, whether on hormones or not, should be screened for pelvic malignancies as are other persons.

For those receiving estrogens, the minimum laboratory assessment should consist of a pretreatment free testosterone level, fasting glucose, liver function tests, and complete blood count with reassessment at 6 and 12 months and annually thereafter. A pretreatment prolactin level should be obtained and repeated at 1, 2, and 3 years. If hyperprolactemia does not occur during this time, no further measurements are necessary. Biologic males undergoing estrogen treatment should be monitored for breast cancer and encouraged to engage in routine self-examination. As they age, they should be monitored for prostatic cancer.

For those receiving androgens, the minimum laboratory assessment should consist of pretreatment liver function tests and complete blood count with reassessment at 6 months, 12 months, and yearly thereafter. Yearly palpation of the liver should be considered. Females who have undergone mastectomies and who have a family history of breast cancer should be monitored for this disease.

Physicians may provide their patients with a brief written statement indicating that the person is under medical supervision, which includes cross-sex hormone therapy. During the early phases of hormone treatment, the patient may be encouraged to carry this statement at all times to help prevent difficulties with the police and other authorities.

Reductions in Hormone Doses After Gonadectomy. Estrogen doses in post-orchiectomy patients can often be reduced by 1/3 to ½ and still maintain feminization. Reductions in testosterone doses post-oophorectomy should be considered, taking into account the risks of osteoporosis. Lifelong maintenance treatment is usually required in all gender patients.

The Misuse of Hormones. Some individuals obtain hormones without prescription from friends, family members, and pharmacies in other countries. Medically unmonitored hormone use can expose the person to greater medical risk. Persons taking medically monitored hormones have been known to take additional doses of illicitly obtained hormones without their physician's knowledge. Mental health professionals and prescribing physicians should make an effort to encourage compliance with recommended dosages, in order to limit morbidity. It is ethical for physicians to discontinue treatment of patients who do not comply with prescribed treatment regimens.

Other Potential Benefits of Hormones. Hormonal treatment, when medically tolerated, should precede any genital surgical interventions. Satisfaction with the hormone's effects consolidates the person's identity as a member of the preferred sex and gender and further adds to the conviction to proceed. Dissatisfaction with hormonal effects may signal ambivalence about proceeding to surgical interventions. In biologic males, hormones alone often generate adequate breast development, precluding the need for augmentation mammaplasty. Some patients who receive hormonal treatment will not desire genital or other surgical interventions.

The Use of Antiandrogens and Sequential Therapy. Antiandrogens can be used as adjunctive treatments in biologic males receiving estrogens, though they are not always necessary to achieve feminization. In some patients, antiandrogens may more profoundly suppress the production of testosterone, enabling a lower dose of estrogen to be used when adverse estrogen side effects are anticipated.

Feminization does not require sequential therapy. Attempts to mimic the menstrual cycle by prescribing interrupted estrogen therapy or substituting progesterone for estrogen during part of the month are not necessary to achieve feminization.

Informed Consent. Hormonal treatment should be provided only to those who are legally able to provide informed consent. This includes persons who have been declared by a court to be emancipated minors and incarcerated persons who are considered competent to participate in their medical decisions. For adolescents, informed consent needs to include the minor patient's assent and the written informed consent of a parent or legal guardian.

Reproductive Options. Informed consent implies that the patient understands that hormone administration limits fertility and that the removal of sexual organs prevents the capacity to reproduce. Cases are known of persons who have received hormone therapy and sex reassignment surgery who later regretted their inability to parent genetically related children. The mental health professional recommending hormone therapy, and the physician prescribing such therapy, should discuss reproductive options with the patient prior to starting hormone therapy. Biologic males, especially those who have not already reproduced, should be informed about sperm preservation options, and encouraged to consider banking sperm prior to hormone therapy. Biologic females do not presently have readily available options for gamete preservation, other than cryopreservation of fertilized embryos. However, they should be informed about reproductive issues, including this option. As other options become available, these should be presented.

IX. The Real-Life Experience

The act of fully adopting a new or evolving gender role or gender presentation in everyday life is known as the real-life experience. The real-life experience is essential to the transition to the gender role that is congruent with the patient’s gender identity. Since changing one's gender presentation has immediate profound personal and social consequences, the decision to do so should be preceded by an awareness of what the familial, vocational, interpersonal, educational, economic, and legal consequences are likely to be. Professionals have a responsibility to discuss these predictable consequences with their patients. Change of gender role and presentation can be an important factor in employment discrimination, divorce, marital problems, and the restriction or loss of visitation rights with children. These represent external reality issues that must be confronted for success in the new gender presentation. These consequences may be quite different from what the patient imagined prior to undertaking the real-life experiences. However, not all changes are negative.

Parameters of the Real-Life Experience. When clinicians assess the quality of a person's real-life experience in the desired gender, the following abilities are reviewed:

1. To maintain full or part-time employment;
2. To function as a student;
3. To function in community-based volunteer activity;
4. To undertake some combination of items 1-3;
5. To acquire a (legal) gender-identity-appropriate first name;

6. To provide documentation that persons other than the therapist know that the patient functions in the desired gender role.

Real-Life Experience versus Real-Life Test. Although professionals may recommend living in the desired gender, the decision as to when and how to begin the real-life experience remains the person's responsibility. Some begin the real-life experience and decide that this often imagined life direction is not in their best interest. Professionals sometimes construe the real-life experience as the real-life test of the ultimate diagnosis. If patients prosper in the preferred gender, they are confirmed as "transsexual," but if they decided against continuing, they "must not have been." This reasoning is a confusion of the forces that enable successful adaptation with the presence of a gender identity disorder. The real-life experience tests the person's resolve, the capacity to function in the preferred gender, and the adequacy of social, economic, and psychological supports. It assists both the patient and the mental health professional in their judgments about how to proceed. Diagnosis, although always open for reconsideration, precedes a recommendation for patients to embark on the real-life experience. When the patient is successful in the real-life experience, both the mental health professional and the patient gain confidence about undertaking further steps.

Removal of Beard and other Unwanted Hair for the Male to Female Patient. Beard density is not significantly slowed by cross-sex hormone administration. Facial hair removal via electrolysis is a generally safe, time-consuming process that often facilitates the real-life experience for biologic males. Side effects include discomfort during and immediately after the procedure and less frequently hypo-or hyper pigmentation, scarring, and folliculitis. Formal medical approval for hair removal is not necessary; electrolysis may be begun whenever the patient deems it prudent. It is usually recommended prior to commencing the real-life experience, because the beard must grow out to visible lengths to be removed. Many patients will require two years of regular treatments to effectively eradicate their facial hair. Hair removal by laser is a new alternative approach, but experience with it is limited.

X. Surgery

Sex Reassignment is Effective and Medically Indicated in Severe GID. In persons diagnosed with transsexualism or profound GID, sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners, is medically indicated and medically necessary. Sex reassignment is not "experimental," "investigational," "elective," "cosmetic," or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID.

How to Deal with Ethical Questions Concerning Sex Reassignment Surgery. Many persons, including some medical professionals, object on ethical grounds to surgery for GID. In ordinary surgical practice, pathological tissues are removed in order to restore disturbed functions, or alterations are made to body features to improve the patient’s self image. Among those who object to sex reassignment surgery, these conditions are not thought to present when surgery is performed for persons with gender identity disorders. It is important that professionals dealing

with patients with gender identity disorders feel comfortable about altering anatomically normal structures. In order to understand how surgery can alleviate the psychological discomfort of patients diagnosed with gender identity disorders, professionals need to listen to these patients discuss their life histories and dilemmas. The resistance against performing surgery on the ethical basis of "above all do no harm" should be respected, discussed, and met with the opportunity to learn from patients themselves about the psychological distress of having profound gender identity disorder.

It is unethical to deny availability or eligibility for sex reassignment surgeries or hormone therapy solely on the basis of blood seropositivity for blood-borne infections such as HIV, or hepatitis B or C, etc.

The Surgeon's Relationship with the Physician Prescribing Hormones and the Mental Health Professional. The surgeon is not merely a technician hired to perform a procedure. The surgeon is part of the team of clinicians participating in a long-term treatment process. The patient often feels an immense positive regard for the surgeon, which ideally will enable long-term follow-up care. Because of his or her responsibility to the patient, the surgeon must understand the diagnosis that has led to the recommendation for genital surgery. Surgeons should have a chance to speak at length with their patients to satisfy themselves that the patient is likely to benefit from the procedures. Ideally, the surgeon should have a close working relationship with the other professionals who have been actively involved in the patient's psychological and medical care. This is best accomplished by belonging to an interdisciplinary team of professionals who specialize in gender identity disorders. Such gender teams do not exist everywhere, however. At the very least, the surgeon needs to be assured that the mental health professional and physician prescribing hormones are reputable professionals with specialized experience with gender identity disorders. This is often reflected in the quality of the documentation letters. Since fictitious and falsified letters have occasionally been presented, surgeons should personally communicate with at least one of the mental health professionals to verify the authenticity of their letters.

Prior to performing any surgical procedures, the surgeon should have all medical conditions appropriately monitored and the effects of the hormonal treatment upon the liver and other organ systems investigated. This can be done alone or in conjunction with medical colleagues. Since pre-existing conditions may complicate genital reconstructive surgeries, surgeons must also be competent in urological diagnosis. The medical record should contain written informed consent for the particular surgery to be performed.

XI. Breast Surgery

Breast augmentation and removal are common operations, easily obtainable by the general public for a variety of indications. Reasons for these operations range from cosmetic indications to cancer. Although breast appearance is definitely important as a secondary sex characteristic, breast size or presence are not involved in the legal definitions of sex and gender and are not important for reproduction. The performance of breast operations should be considered with the

same reservations as beginning hormonal therapy. Both produce relatively irreversible changes to the body.

The approach for male-to-female patients is different than for female-to-male patients. For female-to-male patients, a mastectomy procedure is usually the first surgery performed for success in gender presentation as a man; and for some patients it is the only surgery undertaken. When the amount of breast tissue removed requires skin removal, a scar will result and the patient should be so informed. Female-to-male patients may have surgery at the same time they begin hormones. For male-to-female patients, augmentation mammoplasty may be performed if the physician prescribing hormones and the surgeon have documented that breast enlargement after undergoing hormone treatment for 18 months is not sufficient for comfort in the social gender role.

XII. Genital Surgery

Eligibility Criteria. These minimum eligibility criteria for various genital surgeries equally apply to biologic males and females seeking genital surgery. They are:

1. Legal age of majority in the patient's nation;
2. Usually 12 months of continuous hormonal therapy for those without a medical contraindication (see below, "Can Surgery Be Performed Without Hormones and the Real-life Experience");
3. 12 months of successful continuous full time real-life experience. Periods of returning to the original gender may indicate ambivalence about proceeding and generally should not be used to fulfill this criterion;
4. If required by the mental health professional, regular responsible participation in psychotherapy throughout the real-life experience at a frequency determined jointly by the patient and the mental health professional. Psychotherapy per se is not an absolute eligibility criterion for surgery;
5. Demonstrable knowledge of the cost, required lengths of hospitalizations, likely complications, and post surgical rehabilitation requirements of various surgical approaches;
6. Awareness of different competent surgeons.

Readiness Criteria. The readiness criteria include:

1. Demonstrable progress in consolidating one’s gender identity;
2. Demonstrable progress in dealing with work, family, and interpersonal issues resulting in a significantly better state of mental health; this implies satisfactory control of problems such as sociopathy, substance abuse, psychosis, suicidality, for instance).

Can Surgery Be Provided Without Hormones and the Real-life Experience? Individuals cannot receive genital surgery without meeting the eligibility criteria. Genital surgery is a treatment for a diagnosed gender identity disorder, and should undertaken only after careful evaluation. Genital surgery is not a right that must be granted upon request. The SOC provide for an individual approach for every patient; but this does not mean that the general guidelines, which specify treatment consisting of diagnostic evaluation, possible psychotherapy, hormones,

and real-life experience, can be ignored. However, if a person has lived convincingly as a member of the preferred gender for a long period of time and is assessed to be a psychologically healthy after a requisite period of psychotherapy, there is no inherent reason that he or she must take hormones prior to genital surgery.

Conditions under which Surgery May Occur. Genital surgical treatments for persons with a diagnosis of gender identity disorder are not merely another set of elective procedures. Typical elective procedures only involve a private mutually consenting contract between a patient and a surgeon. Genital surgeries for individuals diagnosed as having GID are to be undertaken only after a comprehensive evaluation by a qualified mental health professional. Genital surgery may be performed once written documentation that a comprehensive evaluation has occurred and that the person has met the eligibility and readiness criteria. By following this procedure, the mental health professional, the surgeon and the patient share responsibility of the decision to make irreversible changes to the body.

Requirements for the Surgeon Performing Genital Reconstruction. The surgeon should be a urologist, gynecologist, plastic surgeon or general surgeon, and Board-Certified as such by a nationally known and reputable association. The surgeon should have specialized competence in genital reconstructive techniques as indicated by documented supervised training with a more experienced surgeon. Even experienced surgeons in this field must be willing to have their therapeutic skills reviewed by their peers. Surgeons should attend professional meetings where new techniques are presented.

Ideally, the surgeon should be knowledgeable about more than one of the surgical techniques for genital reconstruction so that he or she, in consultation with the patient, will be able to choose the ideal technique for the individual patient. When surgeons are skilled in a single technique, they should so inform their patients and refer those who do not want or are unsuitable for this procedure to another surgeon.

Genital Surgery for the Male-to-Female Patient. Genital surgical procedures may include orchiectomy, penectomy, vaginoplasty, clitoroplasty, and labiaplasty. These procedures require skilled surgery and postoperative care. Techniques include penile skin inversion, pedicled rectosigmoid transplant, or free skin graft to line the neovagina. Sexual sensation is an important objective in vaginoplasty, along with creation of a functional vagina and acceptable cosmesis.

Other Surgery for the Male-to-Female Patient. Other surgeries that may be performed to assist feminization include reduction thyroid chondroplasty, suction-assisted lipoplasty of the waist, rhinoplasty, facial bone reduction, face-lift, and blepharoplasty. These do not require letters of recommendation from mental health professionals.
There are concerns about the safety and effectiveness of voice modification surgery and more follow-up research should be done prior to widespread use of this procedure. In order to protect their vocal cords, patients who elect this procedure should do so after all other surgeries requiring general anesthesia with intubation are completed.

Genital Surgery for the Female-to-Male Patient. Genital surgical procedures may include hysterectomy, salpingo-oophorectomy, vaginectomy, metoidioplasty, scrotoplasty, urethroplasty, placement of testicular prostheses, and phalloplasty. Current operative techniques for

phalloplasty are varied. The choice of techniques may be restricted by anatomical or surgical considerations. If the objectives of phalloplasty are a neophallus of good appearance, standing micturition, sexual sensation, and/or coital ability, the patient should be clearly informed that there are several separate stages of surgery and frequent technical difficulties which may require additional operations. Even metoidioplasty, which in theory is a one-stage procedure for construction of a microphallus, often requires more than one surgery. The plethora of techniques for penis construction indicates that further technical development is necessary.

Other Surgery for the Female-to-Male Patient. Other surgeries that may be performed to assist masculinization include liposuction to reduce fat in hips, thighs and buttocks.

XIII. Post-Transition Follow-up

Long-term postoperative follow-up is encouraged in that it is one of the factors associated with a good psychosocial outcome. Follow-up is important to the patient's subsequent anatomic and medical health and to the surgeon's knowledge about the benefits and limitations of surgery. Long-term follow-up with the surgeon is recommended in all patients to ensure an optimal surgical outcome. Surgeons who operate on patients who are coming from long distances should include personal follow-up in their care plan and attempt to ensure affordable, local, long-term aftercare in the patient's geographic region. Postoperative patients may also sometimes exclude themselves from follow-up with the physician prescribing hormones, not recognizing that these physicians are best able to prevent, diagnose and treat possible long term medical conditions that are unique to hormonally and surgically treated patients. Postoperative patients should undergo regular medical screening according to recommended guidelines for their age. The need for follow-up extends to the mental health professional, who having spent a longer period of time with the patient than any other professional, is in an excellent position to assist in any post-operative adjustment difficulties.

Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment

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Introduction

As transgender youth[1] are identifying as such at earlier ages, the population of self-identified transgender youth housed in juvenile detention facilities is on the rise nationwide.[2] In many jurisdictions,

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[1] Transgender persons have gender identities that do not correspond with their anatomical sex. "Gender identity is distinct from sexual orientation, and refers to a person's internal, deeply felt sense of being male, female, something other, or in between. . . . [Gender identity] also describes people whose gender expression does not conform to societal norms, although not all gender nonconforming individuals identify as transgender." KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 11 (2009) *available at* http://www.equityproject.org/pdfs/hidden_injustice.pdf. For an insightful resource that answers general questions about what it means to be transgender, *see* APA LESBIAN, GAY, BISEXUAL & TRANSGENDER CONCERNS OFFICE & APA PUB. & MEMBER COMMC'NS, AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY AND GENDER EXPRESSION (2011), *available at* http://www.apa.org/topics/sexuality/transgender.pdf.

[2] Gender identity and sexual orientation are typically established at a young age. As of 2009, research indicated that thirteen percent of youths housed in U.S. juvenile detention facilities identified as lesbian, gay, bisexual or transgender ("LGBT"). MAJD ET AL., *supra* note 1, at 2. As late as 2001, even in New York State for example, "concrete data estimating the precise number of LGBT youth in the juvenile justice system [did] not exist." RANDI FEINSTEIN ET AL., URBAN JUSTICE CTR, JUSTICE FOR ALL? A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 1 (2001) *available at* http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf. Still, there is no doubt that transgender youth are identifying as such at earlier ages, or at the very least, are having their existence acknowledged more than ever. This is evidenced by the many articles appearing in the national press on transgender youth fighting for their rights on their own or with the help of others, such as their parents. For example, in June, 2013, the State of Colorado's civil rights division found that a local school district discriminated against a six-year-old transgender girl in the first grade when it refused to allow her access to the girl's restroom. Dan Frosch, *Rights Unit Finds Bias Against Transgender Student*, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/us/agency-says-district-discriminated-against-transgender-student.html?_r=1&. In fact, when the child, Coy Mathis, was in kindergarten, her parents had informed the school system that "their child identified as a girl and should be treated as one." *Id. See also*, Stephanie Francis Ward, *A Gender Change at a Tender Age*, A.B.A. J., Oct. 1, 2013, *available at* http://www.abajournal.com/magazine/article/a_gender_change_at_a_tender_age (discussing the Coy Mathis case and the experiences of other young transgender children). For a more thorough understanding of transgender issues in general, see Brian Moulton and Liz Seaton, *Transgender Americans: A Handbook for Understanding*, HUMAN RIGHTS CAMPAIGN (2008), http://www.hrc.org/files/assets/resources/hrcTGguide.pdf.

transgender youth are frequently isolated from general populations within these facilities.[3]

Isolation of transgender youth, depending on the reason given to justify the practice,[4] may very well constitute unwarranted punishment that violates the Eighth Amendment's proscription against "cruel and unusual punishment."[5] Isolation inflicts needless and significant physical and emotional distress on transgender youth,[6] youth whose detention is often caused in large part by acceptance issues within their family, schools and communities.[7]

In a recent paper,[8] Professor Marsha Levick and her colleagues advocate for the extension of Eighth Amendment rights to juveniles, primarily through the use of two Supreme Court decisions.[9] This paper, *Unwarranted Punishment*, builds on Professor Levick's advocacy, and further shows why it is important to utilize the Eighth Amendment as a means of protecting transgender youth housed in juvenile detention facilities. Moreover, this paper shows how an Eighth Amendment

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[3] *See* discussion *infra* Part I.B.

[4] Part I.B *infra* lists the reasons typically given by juvenile detention facility staff and administration to justify isolation of transgender youth. Of course, isolation of all youth may be justified in limited cases for very limited periods of time, such as when facility rules and procedures have been found to be routinely violated by a youth, or the youth is consistently found to be the instigator of physical assaults. *See* discussion of Bell v. Wolfish, 441 U.S. 520 (1979) *infra* in Part III.A. The *Bell* Court held that actions taken to "preserve the security" of an institution, if not excessive, would be considered a "legitimate nonpunitive governmental objective". *Id.* at 539 n.20. *See e.g.*, R.G. v. Koller, 415 F. Supp. 2d 1129, 1156 n.12 (D. Haw. 2006) ("The court notes that it is *not* concluding that [a juvenile detention facility] can never isolate a ward for his or her own protection. . . . [A] threatened ward might need to be temporarily segregated while the staff attempts to control the situation. . . . [H]owever, impos[ing] extended periods of isolation and segregation on LGBT wards who experience harassment and abuse rather than addressing the climate of harassment and abuse . . . of LGBT wards . . . is not a constitutionally acceptable response.").

[5] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). *See* Farmer v. Brennan, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring) ("the Eighth Amendment prohibits all punishment, physical and mental, which is 'totally without penological justification'") (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

[6] *See infra* Part I.C.

[7] *See infra* Part I.A.

[8] Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285 (2012).

[9] Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

approach, involving a proposed two-pronged test, could succeed in cases where a Fourteenth Amendment substantive due process approach may fail to protect transgender youth.

Part I.A of this article discusses the many factors that negatively impact the experience of transgender youth in the American juvenile justice system. Part I.A further examines how frequent rejection of transgender youth in the home and at school often leads to their involvement with the juvenile justice system. Part I.B surveys the ideal goal of the juvenile justice system, one that stresses rehabilitation over punishment or detention, and the four reasons why juvenile detention facility staff typically place transgender youth in isolation. Part I.C discusses the harmful effects of being placed in isolation, particularly when a transgender youth is the target of this practice.

Part II then examines *R.G. v. Koller*,[10] a Hawaii District Court case that addressed a complaint filed by three LGBT youth, one transgender, seeking preliminary injunctive relief, in part to prevent future isolation in a juvenile detention facility. The examination of this case involves a description by the court of a transgender youth's account of what she experienced while held in isolation for her own "protection."

Using a Fourteenth Amendment substantive due process analysis, the *R.G.* court effectively found in the plaintiffs' favor.[11] However, in reaching its holding, the *R.G.* court explicitly declined to undertake an Eighth Amendment analysis of the conditions at issue to see if they constituted cruel and unusual punishment.[12]

In order to better understand why the *R.G.* court rejected an Eighth Amendment analysis of the plaintiffs' conditions of confinement in a juvenile detention facility, Part III.A explains how the courts are enforcing the Eighth Amendment rights of detained or sentenced incarcerated adults. Part III.B analyzes how these rights are addressed in conditions of confinement cases.

Next, Part III.C summarizes the Supreme Court's Eighth Amendment analysis in *Farmer v. Brennan*.[13] *Farmer* requires that a two part test be satisfied in order for a court to hold that a condition of confinement violates an inmate's Eighth Amendment rights: the condition

[10] R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006).
[11] *Id.* at 1152-62.
[12] *Id.* at 1152.
[13] Farmer v. Brennan, 511 U.S. 825 (1994).

in question must be "objectively 'sufficiently serious'"[14] and there must be "'deliberate indifference'" to the condition by prison or penitentiary staff.[15] The key part of the *Farmer* opinion was the Court's use of a subjective test to determine deliberate indifference, rather than an objective one.[16] In effect, this subjective test requires both staff knowledge of the condition in question and a failure by staff to address it.[17]

In Part IV.A, this paper argues that the *R.G.* court incorrectly declined to address the Eighth Amendment in reaching its decision. While the Supreme Court has explicitly declined to extend Eighth Amendment protection to adult detainees, the Court has yet to reach the question of whether such protection should be extended to juveniles housed in juvenile detention facilities.[18] This part examines a line of five Supreme Court opinions, culminating with the Court's opinion in *Roper v. Simmons*.[19] These cases, along with the concept of "evolving standards of decency,"[20] will be used to support the assertion that certain inherent characteristics of juveniles dictate that courts extend full Eighth Amendment protection to juveniles detained or adjudicated delinquent and held in juvenile detention facilities.

In Part IV.B, this paper proposes a two-pronged test to determine if isolation of transgender youth in juvenile detention facilities violates the Eighth Amendment's proscription against cruel and unusual punishment. First, as in *Farmer*, the condition in question must be "objectively sufficiently serious." Second, unlike the subjective test in *Farmer,* the deliberate indifference test must be an objective one, requiring that facility staff knew *or should have known* of the condition in question, yet failed to rectify it. In Parts IV.B and IV.C, the proposed two-pronged test is applied to two hypothetical situations involving isolation of transgender youth. The paper thereby shows why an Eighth Amendment analysis may be a more effective approach to preventing isolation of transgender youth than a substantive due process approach.

This paper concludes, in part, by stressing the importance of using several tools in conjunction—an Eighth Amendment analysis, a substantive due process analysis, and adoption of specific policies and

[14] *Id.* at 834. (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991)).
[15] *Id.*
[16] *Id.* at 837, 847.
[17] *Id.* at 837.
[18] *See* Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977).
[19] Roper v. Simmons, 543 U.S. 551 (2005).
[20] Trop v. Dulles, 356 U.S. 86, 101 (1958).

procedures—to prevent the isolation of transgender youth in detention facilities. These policies and procedures would effectively end the practice of isolation of transgender youth in juvenile detention facilities. Finally, this paper advocates for the extension of Eighth Amendment protections to transgender youth as these policies and procedures are implemented, and as a means to enforce these policies and procedures once they have been adopted.

I. Overview: Transgender Youth and the Juvenile Justice System

A. Risk Factors Leading to Detention

There are many factors that negatively affect the experience of transgender youth (and often LGBT youth in general,) in the American juvenile justice system.[21] The juvenile justice system responds poorly to transgender youth largely due to common misconceptions about gender identity and frequent rejection of children who identify as transgender.[22] Being transgender is often wrongly viewed as a choice or even as a mental illness, and hence, as a "condition" that can be changed.[23] As a result, parents, teachers, school administrators, and even some professionals working within the juvenile justice system, often punish transgender youth for expressing their gender identity "through choice of hairstyle, clothing, mannerisms, and name."[24] Such punishment of transgender youth is quite harmful, as many medical experts now agree that it is "critically important for [the] well-being" of transgender youth to allow them to "express their core gender identity."[25]

Family rejection of a transgender youth is particularly hurtful, leading to feelings of isolation and damage to a youth's self-esteem and physical well-being.[26] These issues are further compounded when a

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[21] These factors are explored in detail in HIDDEN INJUSTICE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS, a ground-breaking 2009 co-publication of Legal Services for Children, National Juvenile Defender Center, and National Center for Lesbian Rights. MAJD ET AL., *supra* note 1.

[22] *See generally* MAJD ET AL., *supra* note 1, at 43-59.

[23] *See id.* at 2. Research confirms that gender identity is "established at a very early age, although it may take [transgender] youth some time to understand and become comfortable with their [gender] identity." *Id.* at 45.

[24] *See id.* at 2. Such expression may actually result in a parent seeking to have ungovernability charges filed against a son or daughter. *Id.* at 71.

[25] *Id.* at 2.

[26] *See generally id.* at 70-74; FEINSTEIN ET AL., *supra* note 2, at 13-14.

transgender youth faces harassment at school from classmates.[27] Teachers and administrators then often fail to keep the transgender youth safe or may even single out and punish the youth for "minor misconduct that could more appropriately be handled at school."[28]

In response to these pressures, a transgender youth's grades may suffer or school might be avoided altogether.[29] Fights may occur in the home or the youth may run away from the abusive home.[30] Absconding could eventually lead to homelessness,[31] drug use, shoplifting, prostitution, or other crimes.[32] If arrested, whatever the reason, a

[27] *See generally,* MAJD ET AL., *supra* note 1, at 75-78.

[28] *Id.* at 3-4. *See generally id.* at 75-78.

[29] *See id.* at 76. Once involved in the juvenile justice system, problems at school may then be "counted against" the transgender youth charged. *Id.* at 78. Even if a youth receives probation for an offense, a common condition of such probation is attendance at school, and if the youth skips school out of fear for his or her own safety, "probation is often revoked without concern for the reason [he or she] did not attend school." *Id.* Indeed, "[t]he school system and [the] juvenile justice system have become inextricably linked in ways that undermine the effectiveness of each system." *Id.* at 75. For example, "[s]chools today often rely on the court system to handle minor student misconduct that historically would have been handled informally by the school. These school-referral cases have clogged the juvenile court dockets . . . . Like other youth, LGBT youth are impacted by the tendency to criminalize student [in effect, typical adolescent,] behavior. For them, however, the problem is exacerbated by the harassment and abuse they face in schools." *Id.* at 75.

As a former Juvenile Public Defender, I can state with certainty that "zero tolerance" policies in school systems are regularly taking often needless personal and financial tolls on children, their families and the juvenile justice system. In addition, the prosecution of status offenses (versus delinquent ones,) is up sharply across the country, which is ironic, as the adoption of status offense laws throughout the 1960's was originally "intended to provide preventative measures to keep at-risk youth out of the criminal justice system." *Id.* at 25. It should be noted that status offenses involve conduct that is unlawful only as a result of a child's age, such as ungovernability, absconding, truancy and possession of alcohol by a minor. These are actions that would not be crimes if an adult had committed them. Juvenile delinquent defenders, on the other hand, have committed acts that would be considered crimes if an adult had committed them. Not all states differentiate between these "classes" of offenses, but most do. *See id.*

[30] MAJD ET AL., *supra* note 1, at 71-72.

[31] Ann Cammett, *Queer Lockdown: Coming to Terms with the Ongoing Criminalization of LGBTQ Communities*, 7 S&F ONLINE, no. 3, 12 (Summer 2009), http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1626&context=facpub ("It is estimated that in some cities [in the U.S.,] up to 40 percent of homeless youth are [LGBT]. This condition is a direct result of the hardships associated with coming out" or expressing gender-related identity issues at a young age). *See also* FEINSTEIN ET AL., *supra* note 2, at 17-18.

[32] *See* MAJD ET AL., *supra* note 1, at 72-74; *infra* note 61. *See also* FEINSTEIN ET AL., *supra*, note 2 at 18-19.

transgender youth is then typically detained disproportionately to other youth pending trial.[33] This disproportionate detention results because the family refuses to take the youth back into the home[34] and/or because there are insufficient alternative placement options that can accommodate a transgender youth.[35] Detained transgender youth, as well as transgender youth who are eventually adjudicated delinquent,[36] then "often experience further rejection, harassment, and discrimination at the hands" of other wards, as well as at the hands of the facility staff and administrators.[37]

B. Stated Justifications for Isolation of Transgender Youth

The purpose of the juvenile justice system is to rehabilitate youth, not punish them.[38] Accordingly, all participants in this system – judges, families, prosecutors, defense attorneys, social agencies and detention facility workers – should strive together to improve the quality of life and future of the youth who have contact with the system.[39] Ideally, detention of transgender youth, indeed all youth, should be avoided and appropriate alternative placement options should be considered if the child must be

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[33] *See generally* MAJD ET AL., *supra* note 1, at 93-99.

[34] *Id.* at 95.

[35] *See generally id.* at 83-91; FEINSTEIN ET AL., *supra* note 2, at 28-29.

[36] If a juvenile court judge determines that a youth has violated a criminal law or has engaged in a status offense, the youth is then adjudicated delinquent and is referred to as such, rather than as "guilty." *See* discussion of status offenses *supra* note 29.

[37] Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Systems Safe for All Youth Through Litigation, Advocacy and Education*, 79 TEMP. L. REV. 415, 419 (2006).

[38] "The Juvenile Court is theoretically engaged in determining the needs of the child . . . rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child . . . , not to fix criminal responsibility, guilt and punishment." Kent v. United States, 383 U.S. 541, 554-55 (1966).

[39] There are generally two types of cases handled in juvenile courts: delinquency cases and dependency cases. A delinquency case involves a child who has been accused of a crime or status offense. A dependency case involves situations where allegations have been made that a child has been or is being abused or neglected by the child's parent(s) or guardian(s). *See generally* Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 UNIV. N.H. L. REV. 97, 97-100 (2013). Note that juvenile criminal proceedings in most states are actually civil proceedings, but involve procedures that are more analogous to those used in adult criminal proceedings. As such, juvenile criminal proceedings are often referred to as "quasi-criminal" in nature. *See* discussion of *In re* J.M., 287 S.W.3d 481 (Tex. App. 2009), *infra* note 149.

removed from the home.[40] However, if a judge determines that detention of a transgender youth is warranted, and isolation then ensues, such isolation can often have detrimental effects,[41] effects that may in turn lead to feelings of further rejection and perhaps even to an increased likelihood of future criminal activity.

Detention facility officers and administrators justify isolation of transgender youth on four grounds: (1) the prevention of further or anticipated emotional, physical, and/or sexual abuse of transgender youth at the hands of other wards, often referred to as "involuntary protective custody;"[42] (2) the perceived need to "solve" the "problem" of how to

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[40] When I worked as Juvenile Public Defender, I had a client ("Amber," for purposes of this paper,) who presented as a boy. Amber was not transgender, but self-identified as lesbian. She wore baggy clothes, kept her hair quite short, and wore no makeup.

Amber was charged with an assault on her brother, and was detained when I met her. During my initial interview of Amber, she indicated that her brother had hit her, she responded in kind, and things progressed from there. As usual, she said, her mom had sided with her brother. She relayed that this was because her mom was very unhappy with Amber's appearance and lifestyle "choice;" consequently if there was a problem in the home, Amber was blamed. Of course, her brother had become aware of this, and had begun taking advantage of the family dynamics.

Amber had been detained several times prior to the case at hand, and, I believe, had one or more prior adjudications. At her detention hearing, Amber agreed to allow me to be candid with the judge about her sexual orientation and assessment of the situation at her home. During the hearing, Amber's mom indicated in no uncertain terms that she wanted Amber detained and out of the house as she was causing problems in the home. After approaching the bench and explaining Amber's and my view of the situation to the judge, he ordered the case to remain open pending family counseling and sent Amber into alternative placement. At my suggestion, she was placed with CHRIS Kids, a local organization in Atlanta that has LGBT friendly alternative placement options for children in the Atlanta area. For information about CHRIS Kids see CHRIS KIDS, http://www.chriskids.org/about-chris-kids/history-mission (last updated 2013). The prosecutor was on board for all of these conditions of release.

Amber thrived at CHRIS Kids, the family counseling went well, and the last time I heard from Amber, she was back at home with a more accepting mom, and things had changed all around for the better. The assault charges were dropped.

Amber's case is an example of how the juvenile justice system should ideally work. Unfortunately, not all judges are as enlightened as Amber's is and not all systems have alternative placements available such as those provided by CHRIS Kids. This is especially so in more rural locales, where there are likely to be less placement options for LGBT youth.

[41] *See infra* Part I.C.

[42] *Cf.* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 544-45 (2009).

house transgender youth within the detained juvenile population;[43] (3) to punish transgender youth for expressing their gender identity;[44] and (4) the perception that transgender youth are sexual predators who need to be segregated from the general population.[45]

C. The Harmful Effects of Isolation

Isolation of transgender youth from the general population in detention facilities is "profoundly psychologically damaging."[46] An expert in one case involving a transgender youth declared that "isolation may be perceived [by a youth] as punishment for being LGBT, which evokes feelings of rejection and depression [that] . . . may manifest itself through a variety of physical symptoms ranging from headaches to self-mutilation."[47] Expert testimony in many cases points to the "devastating" and lingering effects of isolation of juveniles in general, leaving youths feeling "angry, depressed, frightened, self-destructive, and violent."[48]

In April, 2012, the American Academy of Child & Adolescent Psychiatry (the "AACAP,") issued a Policy Statement on the harmful effects of placing juvenile offenders in isolation (referred to by the AACAP as "solitary confinement").[49] The AACAP statement references recommendations of other commissions on the topic, noting that isolation

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[43] *Id.* at 545.

[44] *Id.* at 545-46; *cf. id.* at 546 (for example, in adult populations, transgender women might be placed in isolation "for possession of a bra or other items of women's clothing or for using makeup . . . [while transgender men might be placed in isolation] for failing to eliminate their facial hair or for refusing to wear prison uniforms that are tight fitting or that involve skirts").

[45] *See* FEINSTEIN ET AL., *supra* note 2, at 29. *See also id.* at 8 (One "transgender girl was placed in isolation at every facility she attended, since staff believed that she would inappropriately touch the other residents.").

[46] *See* Arkles, *supra* note 42, at 538.

[47] Declaration of Robert J. Bidwell, M.D. at 11, R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). These feelings of "rejection and depression" of course, further compound those experienced through family and school rejection discussed *supra* Part I.A.

[48] *See, e.g.,* Gary H. v. Hegstrom, 831 F.2d 1430, 1434 (9th Cir. 1987) (Ferguson, J., concurring). *See also* Arkles, *supra* note 42, at 537-39 (setting forth the "documented psychological effects of isolation").

[49] Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILDREN AND ADOLESCENT PSYCHIATRY (April 2012), http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx. For more information about the AACAP, a professional medical organization comprised of over eight thousand members, see,

> should only be used for the least amount of time possible for the immediate physical protection of an individual, in situations where less restrictive interventions have proven ineffective . . . [, and it should never be used] "as a means of coercion, discipline, convenience or staff retaliation."[50]

When placed in isolation, youths are cut off from other wards, and their rights and privileges (e.g., phone calls, showers, television, facility programming, recreation,) are also typically restricted.[51] One judge, in assessing the bleak conditions of isolation of a youth in a juvenile detention facility, found that the isolation in question was "so oppressive as to destroy the integrity and the identity of the child" who was ironically supposed to be "the object of our concern."[52]

A problem unique to involuntary protective custody isolation is that it punishes the victim of violence, not the offender.[53] Moreover, if transgender youth are aware that they will automatically be placed in isolation if an attack is reported, the policy deters them from reporting such attacks.[54]

One might think that transgender youth would prefer the perceived "safety" of isolation and protective custody. However, a study of adult transgender prison populations has shown that more transgender

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About Us, AM. ACAD. OF CHILDREN AND ADOLESCENT PSYCHIATRY (2013), http://www.aacap.org/AACAP/About_Us/Home.aspx. The majority of AACAP's members are psychiatrists specializing in the treatment of children and adolescents. *Id.*

[50] Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, *supra* note 49 (citations omitted).

[51] *See* Arkles, *supra* note 42, at 541-42. *See also infra* Part II for a discussion of the conditions of isolation of C.P., a transgender youth held in a juvenile detention facility and a plaintiff in *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006). *R.G.* is discussed in detail *infra* Part II as well.

[52] Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 475-76 (S.D.N.Y. 1970) (statement of Judge Burstein, a Family Court Judge who was not the judge before whom the matter was heard, but who submitted a detailed report on the conditions in question) ("'[Lollis] was kept in a room about 6' x 9' for 24 hours a day. . . . She was completely unoccupied for 24 hours daily. Nevertheless[,] I inquired how she kept herself busy. She replied by saying 'I sleep all day and I cry all night.' She [was denied a request] . . . to see a psychiatrist . . . until she was released from solitary. . . . 'She wore pajamas all day, sat staring at the wall and did absolutely nothing. 'There was a wooden bench * * *. There was a blanket on the bench and this is where the child rested for twenty-four hours.' Although the room contained a window, it was blinded so that it 'absolutely prevented the youngster from looking outside.'").

[53] Arkles, *supra* note 42, at 545.

[54] *Id.* at 544-45.

"prisoners who were in some form of segregation against their will [were] seeking assistance to get out of it than . . . [those] in general population seeking to be placed in protective custody with all of the attendant negative consequences."[55] It is likely that this would be the case with juveniles as well - that they would prefer to find their way in the general population with all its inherent difficulties, rather than be placed in isolation.[56]

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[55] *Id.* at 537. "However, many have wanted some other change to improve their safety, such as . . . access to a private shower, access to a single cell within general population, or the ability to choose the person with whom they would share a cell." *Id.* at 537 n.129.
There are, indeed, other effective alternatives to isolation. The adopted policies and proposed model policies discussed *infra* Part IV.A and Conclusion detail some options. For now, it appears that the best solution is to house transgender girls with other girls, with transgender boys being housed with the girls as well if safety concerns are an issue. *See* MAJD ET AL., *supra* note 1, at 108-109 ("it may be necessary to place . . . transgender boys[,] who face high risk of assault in boys' facilities if the other boys discover they are transgender" with the female population).
On a related note, see Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (examining the KG6 block at the Los Angeles County Jail, a special unit distinct from the general population, dedicated solely to the housing of gay men and transgender women). While strategic segregation may someday be an option in larger juvenile detention facilities in major urban areas with higher LGBT populations, it is unlikely that such distinct housing will ever be a possibility in more rural, or even suburban areas. However, if there is enough population to create a unit such as the KG6 block in a juvenile detention facility, "vulnerable" youth will have "access to both security and community, ensuring that no one has to choose between safety from sexual assault and satisfying his or her basic human need for the company of others." *Id.* at 87-88.

[56] *See* Arkles, *supra* note 42, at 539. Arkles notes "one major flaw in the legal analysis of challenges to segregating placement, [is] that to the extent courts consider issues of safety at all in their analysis[,] they almost always assume that safety would be better served by isolation than by contact with others." *Id.* at 547.
However, this should not be taken to assert that the threat of serious physical and sexual assaults of transgender youth in juvenile detention facilities is not one that needs to be taken seriously. *See generally*, Letter from Masen Davis et al., to Att'y Gen. Eric Holder, Preventing the Sexual Abuse of Lesbian, Gay, Bisexual, Transgender, and Intersex People in Correctional Settings, Comments Submitted in Response to Docket No. OAG-131: AG Order No. 3143-2010, 3-5 (2010), http://www.wcl.american.edu/endsilence/documents/ACLULambdaNCLRNCTETLCCommentsonPREAStandards.pdf. The letter points out that transgender youth are not just subject to sexual abuse at the hands of other wards, but also at the hands of staff as well. *Id.* at 22. *See also* Arkles, *supra* note 42, at 540 (stating that "[s]ome [adult] trans people have reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance").

II. *R.G. v. Koller*[57]: Ignoring the Eighth Amendment

R.G. v. Koller is the seminal case involving the isolation of a transgender youth in a juvenile detention facility.[58] This case provides a good example of how some courts have been handling isolation cases in general.[59] In *R.G.*, three youths who were or had been confined at the Hawaii Youth Correction Facility (the "HYCF,") filed a motion seeking preliminary injunctive relief.[60] The plaintiffs were: (1) J.D., a young man "who was perceived to be gay;" (2) R.G., a self-identified lesbian; and (3) C.P., a transgender girl.[61] The defendants included the Directors of the Hawaii Department of Human Services and the Hawaii Office of Youth Services, the HYCF Youth Facility Administrator (the "YFA"), and several Youth Corrections Supervisors and Officers.[62]

As a caveat, it is important to note that not all transgender youth housed in a general population are necessarily being victimized emotionally and/or physically, or are having extremely negative experiences in general. Clearly though, being housed in a juvenile detention facility is going to be fraught with issues, whether one is transgender or not. After all, it can hardly be expected to be an easy experience to be housed with a large group of youth with "raging" hormones and adolescent angst. Regardless, other open-minded wards are certainly capable of forming friendships and bonds with transgender youth, even to the extent that they may protect the transgender youth from harassment by other wards. *See id.* at 527-31 (Section III, Detention as a Site of Solidarity, Resistance, Love and Mutual Support). "Any concept that the only interactions possible between transgender and non-transgender prisoners are necessarily violent does disservice to the diversity and humanity of the people behind bars and plays into racist stereotypes." *Id.* at 531.

[57] R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006).

[58] *Id.*

[59] *See* discussion *infra* Part IV.A.

[60] *R.G.*, 415 F. Supp. 2d at 1133.

[61] *Id.* at 1134. In her declaration for the *R.G.* court, C.P. detailed the facts surrounding several of her arrests. According to C.P., she was arrested in May 2003 for hitting her sister in the shoulder during a fight over some car keys. Declaration of C.P. at 1, R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). The situation escalated to the point that two neighbors beat C.P. up so badly that she suffered a head trauma and had to be taken to the hospital. *Id.* at 1-2. When the police arrived, C.P.'s mother declined to press charges against the neighbors for physically assaulting C.P., yet charges were filed against C.P. for assault on a family member. *Id.* at 2. C.P.'s experience is a prime example of the consequences of family rejection of transgender youth discussed *supra* Part I.A. C.P. stated that she was also arrested for solicitation in November 2003 and for running away in February 2004. *Id.* at 2-3. This crime (solicitation,) and status offence (running away,) are typical of those committed by transgender youth who are feeling rejected by family. See *supra* Part I.A.

[62] *R.G.*, 415 F. Supp. 2d at 1134.

Among other reasons, the plaintiffs sought injunctive relief "to require defendants to refrain from . . . isolating plaintiffs based on their actual or perceived sexual orientation, gender identity or sex."[63] After examining several factors, the court determined that only J.D. and R.G. had standing to pursue the injunction.[64] The court found that J.D.'s and R.G.'s claims were not moot,[65] but that C.P.'s claims were, as C.P. had aged out of the juvenile justice system when she had turned eighteen in December, 2005.[66] The court nevertheless found that despite C.P.'s lack of standing, testimony and evidence regarding her experience at the HYCF was "relevant to the remaining plaintiffs' claims insofar as it show[ed] the extent and nature of the alleged abuse" at that facility.[67]

During the hearing, the YFA testified under oath that the HYCF's retained experts "told her that it was appropriate to house male-to-female . . . transgender youth with the boys, and that the norm in juvenile corrections is to house wards based on their genitalia."[68] Both experts emphatically denied ever making such a statement, insisting they had actually indicated that housing male-to-female transgender youth with males in a juvenile detention facility would be "unsafe and inappropriate."[69]

In fact, over the objections of her own medical staff, the YFA actually transferred C.P. from the girls' unit to the boys' unit.[70] The court found that

> [a]fter C.P.'s transfer [to the boys' unit], C.P. was subjected to escalating harassment and abuse from other wards, including physical and sexual assaults . . . and threatening commands such as "suck my dick," "put this in your mouth and suck on it," or "give me head," and threats of rape and assault. . . . Some of the male wards touched C.P., pulled her hair, threw things at her . . . or asked permission to rub her legs. Other male wards made comments like, "I want to

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[63] *Id.* at 1133.
[64] *Id.* at 1135-40.
[65] *Id.* at 1138-39.
[66] *Id.* at 1139. To say that a child has "aged out" of the juvenile justice system means, in most jurisdictions, that the child is seventeen years of age or older. Accordingly, any future charges would be handled in the adult criminal court system.
[67] *Id.*
[68] *R.G.*, 415 F. Supp. 2d at 1141.
[69] *Id.*
[70] *Id.* at 1144.

> feel your ass," and "I want to fuck you," or asked her to show her breasts. Other male wards exposed their buttocks to her, pulled out their erect penises and showed them to her, or started masturbating in front of her.[71]

As a result of this verbal, physical and sexual abuse, C.P. sent a letter to the YFA reporting that the boys were giving her a "'hard time'" by teasing her, calling her names and generally by "'making trouble.'"[72] She stated that this conduct hurt her and that it made her feel "'insane and angry.'"[73]

The abuse of C.P. was not solely at the hands of her fellow wards though. The court found that while housed with the girls at the HYCF, C.P. was also verbally abused by staff, who "taunted and harassed" her, threatening to cut off her hair and even to transfer her to the boys' section.[74]

Despite C.P.'s reports of abuse by fellow wards, the YFA and HYCF staff "failed to discipline or stop the wards from calling her names."[75] What the staff did do, however, pursuant to the YFA's policy of isolating certain LGBT wards for their own protection, was to first subject C.P. "to social isolation by physically segregating her from the other wards in the module."[76] Eventually, and for her "protection," C.P. was "held in solitary confinement for six days."[77]

> She was isolated in a holding cell under video surveillance for twenty-three hours a day, with nothing in her cell other than her pillow and a blanket. She was allowed one hour a day to leave the cell for recreation and showering. She was not permitted letters, writing instruments, radio, or

[71] *Id.* at 1144-45 (citation omitted). C.P. alleged that even when she was briefly housed with the girls, she was threatened with being sent "to the boys' side" if she swore or hit the other girls. *Id.* at 1146. C.P. stated that this was the case even when she was simply responding to verbal or physical harassment from other female wards, harassment that the staff was ignoring. Declaration of C.P., *supra* note 61, at 5. To expect a child not to stick up for herself in such a situation, whether or not the taunts related to her gender identity, was clearly going to create an untenable situation for C.P.

[72] *R.G.*, 415 F. Supp. 2d at 1145.

[73] *Id.*

[74] *Id.* at 1143. C.P. alleged that when she wanted to "put up" her hair, the threats to move her were based on staff assertions that C.P. "did not have [the] same privileges as the girls." Declaration of C.P., *supra* note 61, at 6.

[75] *R.G.*, 415 F. Supp. 2d at 1145.

[76] *Id.* at 1148.

[77] *Id.*

> television, nor was she allowed to interact with any other wards. C.P. reported to medical staff that she was "going crazy" in the holding cell.[78]

The court found that J.D. suffered similar physical and sexual abuse at the HYCF at the hands of the wards, and both J.D. and R.G. reported emotional abuse by fellow wards and the HYCF staff.[79] Only J.D., however, was subject to isolation similar to that inflicted upon C.P.[80]

In examining the effects of such isolation on C.P. and J.D., the court reviewed the evidence provided by the experts originally retained by some of the defendants in the case.[81] The experts gave credence to C.P.'s and J.D.'s testimony, stating, "that social isolation is experienced as punishment and that prolonged isolation can cause serious psychological consequences."[82] It was further stated that isolation and segregation should "be used 'sparingly' and only in response to serious behavioral infractions and for short periods of time 'while the ward poses an imminent danger to others,'"[83] and presumably, to his or her self.

Experts testified that it was "the responsibility of the [HYCF] administration to create an environment that is physically and psychologically safe for the wards without violating the wards' rights."[84] The experts agreed that the practice of isolating youth at the HYCF for

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[78] *Id.* (citations omitted). *See* Declaration of C.P., *supra* note 61, at 15-16 (where C.P. relays her experiences in isolation). In addition to what was described by the court, C.P. reported: "I had no privacy . . . because there is a camera right over me 24-7. The camera could see me using the bathroom . . . , just everything. It's very intrusive. When I had to go to the bathroom I would try to hold it and wait for the nurse [so that I could use] their bathroom." *Id.* C.P. stated that when she was housed with the boys and not in physical isolation, she was frequently instructed not to have any interaction whatsoever with the male wards. *Id.* at 11. She "was not supposed to sit with them, not even . . . speak with them [or] look at them." *Id.* She quickly became lonely, but was regardless denied a request to interact with "some of the nicer boys." *Id.* This social isolation was surely almost as harmful as the physical isolation she endured from time to time. Note the reference to "nicer boys," one example of how transgender youth housed in general population are not necessarily being treated poorly by all wards. *See supra* note 56.

[79] *R.G.*, 415 F. Supp. 2d at 1142-44.

[80] *Id.* at 1148.

[81] *Id.* at 1154-55.

[82] *Id.* at 1149 (citations omitted). *See also*, *supra* Part I.C. The text associated with note 47 of Part I.C actually quotes from the court declaration of one of the experts who testified in *R.G.*, Dr. Robert J. Bidwell.

[83] *Id.*

[84] *Id.* at 1150.

their own protection was "'inexcusable,'" "'not an acceptable correctional practice for juveniles,'" and, most importantly, "inherently punitive."[85]

Despite the fact that isolation practices at the HYCF were determined to be "inherently punitive," the court found that the Eighth Amendment's "guarantee against cruel and unusual punishment" was not the correct constitutional standard to apply in deciding the case before it.[86] In making this determination, the court indicated that the Eighth Amendment was not applicable as the youths had simply been detained for alleged crimes and/or adjudicated delinquent for committing crimes.[87] With respect to the latter group, the court held that juveniles "adjudicated delinquent" had not been convicted of crimes under Hawaii statute, so they were not to be treated as sentenced adult inmates.[88]

In reaching its decision, the court applied what it referred to as a "more protective" Fourteenth Amendment substantive due process standard.[89] Based solely on due process grounds, the court determined that the preliminary injunction was warranted to prevent further verbal,

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[85] *R.G.*, 415 F. Supp. 2d at 1148-49 (citations omitted).
[86] *Id.* at 1152.
[87] *See id.* at 1152. *See infra*, Part III.A, where the rights of adult pretrial detainees versus adult convicted prisoners are discussed. The *R.G.* court effectively chose to accord the *R.G.* plaintiff's the same rights accorded to adult pretrial detainees.
[88] *R.G.*, 415 F. Supp. 2d at 1152.
[89] *Id.* (quoting Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987)). For the balance of this paper, "substantive due process" will be referred to as "due process." If a reference to procedural due process is made, it will be referred to as such. "Substantive due process embraces the right of citizens to be free from arbitrary deprivations of life, liberty and property." 16C C.J.S. *Constitutional Law* §1505 (2013). "Procedural due process, on the other hand, concerns the constitutionality of the procedures employed to deny a person's life, liberty or property. . . ." *Id.*
No discussion of juvenile rights in the criminal context would be complete without referencing a line of important cases that extended specific procedural due process rights to juveniles. In *In re Gault*, 387 U.S. 1, 33-34, 41, 47, 57 (1967), the Court found that juveniles were entitled to certain rights in delinquency hearings: timely notice of a hearing, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. These procedural due process rights were further expanded in subsequent cases. In *In re Winship*, 397 U.S. 358, 368 (1970), the Court held that the correct burden of proof in delinquency hearings was for the State to prove its case beyond a reasonable doubt. In *Breed v. Jones*, 421 U.S. 519, 541 (1971), the Court found that juveniles were not to be subject to double jeopardy. Subsequent cases, however, limited procedural due process protections for juveniles. *See* Schall v. Martin, 467 U.S. 253, 265-68 (1984) (holding that "preventive detention" of juveniles was not unconstitutional); McKeiver v. Pensylvania, 403 U.S. 528, 545 (1971) (holding that a jury trial is not constitutionally required in delinquency proceedings).

physical and sexual abuse, and isolation of, LGBT youth.[90] Specifically with respect to isolation, the court found that the customary response to verbal, physical and sexual abuse of LGBT youth housed at the HYCF was to isolate and segregate these wards "rather than [to address] the climate of harassment and abuse."[91] Applying the *Bell v. Wolfish* [92] test, the court held that there was no "legitimate nonpunitive government objective"[93] in "[c]onsistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to separate LGBT wards from their abusers."[94] It also noted that "[t]he likely perception by teenagers that isolation is imposed as punishment for being LGBT only compound[ed] the harm."[95]

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[90] *R.G.*, 415 F. Supp. 2d at 1152-58. However, the court delayed the granting of the injunction to see if certain on-going negotiations between the HYCF and the Hawaii Department of Justice could be completed. *Id.* at 1162.

[91] *Id.* at 1156 n.12.

[92] Bell v. Wolfish, 441 U.S. 520 (1979) is discussed *infra* Part III.A.

[93] *R.G.*, 415 F. Supp. 2d at 1152 (quoting *Bell,* 441 U.S. 520).

[94] *Id.* at 1156. This paper will not discuss in detail issues and holdings relating to violations of Equal Protection rights. It is duly noted, however, that the *R.G.* court did not reach the plaintiffs' Equal Protection claims as it saw no need to address this issue in light of its holding on the Due Process claims. *Id.* at 1159. Some, however, have advocated for an Equal Protection analysis to end isolation of transgender adults. *See e.g.,* Arkles, *supra* note 42, at 557 (stating that the Equal Protection Clause is violated "[w]hen the state imposes the extreme conditions of solitary confinement on people in detention against their will solely because they are transgender . . . or gender nonconforming . . . ."); Estrada & Marksamer, *supra* note 37, at 431-32 (section on "The Constitutional right to Equal Protection."). Estrada and Marksamer also advocate for use of the First Amendment to secure the right of transgender youth in juvenile detention facilities to express their gender identity "through clothing and grooming." *Id.* at 432.

[95] *R.G.*, 415 F. Supp. 2d at 1155. The *R.G.* court was not entirely unassisted in considering the *Bell* due process test's applicability in determining the constitutionality of isolating the plaintiffs for their own protection and in rejecting the potential applicability of the Eighth Amendment. The ACLU filed a Memorandum in Support of Motion (the "ACLU Memorandum,") in the case and the language in that motion in support of this determination was "lifted" by the court almost verbatim from the ACLU Memorandum. *Compare R.G.*, 415 F. Supp. 2d at 1152 *with* ACLU Memorandum in Support of Motion at 13, R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). The ACLU Memorandum persuasively argued that "Defendants may not constitutionally punish the victims of harassment with isolation simply because doing so is cheaper or more convenient than providing adequate staffing, supervision or training." ACLU Memorandum, *supra,* at 24.

The State of Hawaii eventually agreed to a settlement involving a large payment to the to the *R.G.* plaintiffs. *See Hawai'i Youth Correctional Facility to Pay Over Half a Million Dollars for "Relentless Campaign of Harassment" of Gay and Transgender Youth*, AMERICAN CIVIL LIBERTIES UNION (June 15, 2006), https://www.aclu.org/lgbt-

So then, the *R.G.* court rejected an Eighth Amendment analysis. In order to understand why this was done in error, this paper will continue by examining the Eighth Amendment in the adult context.

III. The Eighth Amendment and Conditions of Confinement

A. Eighth Amendment Rights of Adults

The Eighth Amendment[96] states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[97] Adults convicted of crimes are currently afforded direct protection under the Eighth Amendment.[98] Federal inmates making a claim that their Eighth Amendment rights have been violated may do so directly.[99] State inmates making a similar claim currently do so under

rights_hiv-aids/hawaii-youth-correctional-facility-pay-over-half-million-dollars-relentless-cam.

[96] The purpose of this paper is not to delve into the history of the Eighth Amendment, so there will be no lengthy discussion of why this amendment was adopted or how its current language came to be. As the Supreme Court has stated, "[t]he history of the constitutional prohibition of 'cruel and unusual punishments' has been recounted at length in prior opinions of the Court and need not be repeated here." Estelle v. Gamble, 429 U.S. 97, 102 (1975). *See e.g.*, Gregg v. Georgia, 428 U.S. 153, 169-73 (1976); Furman v. Georgia, 408 U.S. 238, 316-33 (1972) (Marshall, J., concurring). *See also Furman* 408 U.S. at 242-44 (Douglas, J., concurring); *Id.* at 258-69 (Brennan, J., concurring).

For an interesting discussion on the text of the amendment, see Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 883-84 (2009) ("[the] normative force [of the amendment] derives chiefly from its use of the word cruel. . . . In its most basic sense, to be cruel is to inflict unjustified suffering . . . . ") (footnotes omitted). For a discussion on the importance of "evolving standards of decency" as it relates to application of the Eighth Amendment, see *infra* Part IV.A.

[97] U.S. CONST. amend. VIII.

[98] Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

[99] A person can bring suit for the violation of a Constitutional right, unless a federal statute specifically excludes such a lawsuit. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395-96 (1971). *Bivens*, in effect, creates a cause of action against the federal government similar to that created against the states by 42 U.S.C. § 1983 (2012). *See infra*, notes 100 and 101.

section 1983 of the Civil Rights Act of 1871.[100] In a section 1983 claim, the Eighth Amendment is applied under the incorporation doctrine.[101]

In *Bell v. Wolfish*, however, the Supreme Court found that the Due Process Clause of the Fourteenth Amendment controls the rights of adult pretrial detainees, not the Eighth Amendment.[102] A detainee asserting cruel and unusual punishment would therefore assert this claim through due process.[103]

The *Bell* Court found that the government can detain a person to ensure his presence at trial in a detention facility so long as the conditions and restrictions at the facility "do not amount to punishment, or otherwise violate the Constitution."[104] However, the Court also held:

> [i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to

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[100] 42 U.S. § 1983 (2012) ("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.").

[101] *See* Wilson v. Seiter, 501 U.S. 294, 296 (1991) (affirming that the Eighth Amendment applies to the States through the due process clause of the Fourteenth Amendment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Fourteenth Amendment incorporated the Eighth Amendment, making the Eighth Amendment enforceable against the States). *See also* Twining v. New Jersey, 211 U.S. 78, 99 (1908) (one of the first cases to explicitly suggest that the Bill of Rights could be applied to the States via the Fourteenth Amendment through what has now become to be known as the Incorporation Doctrine); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 257–73 (1982) (an overview of the origins of the Incorporation Doctrine and its development).

[102] *Bell*, 441 U.S. at 535 n.16 ("Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment. . . . 'Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.'") (citations omitted) (quoting Ingraham v. Wright, 430 U.S. 651, 671 (1977)).

[103] *See id.* at 535 (holding that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law").

[104] *Id.* at 536-37.

> "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.[105]

This *Bell* test is what the *R.G.* court used when examining the plaintiffs' assertions that their due process rights were violated when they were placed in involuntary protective custody. As indicated in Part II, the *R.G.* court found that there was no "legitimate nonpunitive government objective" in subjecting the juvenile plaintiffs to isolation for the asserted purpose of protecting them.[106] The *R.G.* court clarified that even when such an objective was asserted, if the conditions in question were "excessive" or "exaggerated," there was accordingly a violation of Due Process.[107]

With respect to adult detainees though, where does this *Bell* test leave them, with more constitutional rights than someone sentenced to serve time, or less? It appears that the rights are considered to be, at minimum, of the same degree, with the *Bell* Court finding that "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."[108]

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[105] *Id.* at 539 (footnotes omitted) (citations omitted).
[106] *R.G.*, 415 F. Supp. at 1155-56 (D. Haw. 2006).
[107] *Id.* at 1152 (quoting *Bell*, 441 U.S. at 538, 540 n.23).
[108] *Bell*, 441 U.S. at 545. For an interesting and excellent discussion of the Eighth Amendment and the rights of pretrial detainees, see Dolovich, *supra* 96, at 886 n.15 ("[C]ourts routinely regard the Fourteenth Amendment due process rights of plaintiffs challenging the conditions of their confinement in jail as identical to those accorded sentenced offenders under the Eighth Amendment. It is widely acknowledged that pretrial detainees cannot be accorder fewer rights than convicted offenders. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) ('[T]he due process rights of a person [in state custody] are at least as great as the Eighth Amendment protections available to a convicted prisoner.'). But as regards conditions claims, this principle has not translated into anything more than an assurance of parity of treatment."). The author then cites and quotes key language from four federal Courts of Appeals that adopt this approach. *Id.*

B. Confinement of Adults

The Supreme Court has held that the Eight Amendment "does not mandate comfortable prisons."[109] However, the Court has also stated that the Constitution does not allow for inhumane prisons, it being "now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'"[110] The Eighth Amendment then, "imposes a duty" on prison officials to provide basic inmate needs such as "food, clothing, shelter, and medical care."[111]

The Supreme Court first acknowledged that the Eighth Amendment "could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment" in *Estelle v. Gamble*.[112] In *Gamble*, an inmate whose back was injured when a bale of cotton fell on him filed a complaint against various prison officials, including certain doctors.[113] Gamble's main allegation was that he had received poor medical treatment for his injury, leaving him in pain, and that this poor treatment was a violation of his Eighth Amendment rights.[114]

The Court dismissed the claims against the doctors, rejecting Gamble's claim that he had suffered cruel and unusual punishment when the doctors failed to adequately attend to his back pain.[115] The Court found that only the "'unnecessary and wanton infliction of pain'"[116] violates the Eighth Amendment, and that an inmate stating a claim under that amendment needed to at least allege "deliberate indifference" to "serious" medical needs.[117] Finally, the Court held that allegations of "inadvertent

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[109] Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
[110] Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).
[111] *Id.* at 832.
[112] Wilson v. Seiter, 501 U.S. 294, 297 (1991). *See generally* Estelle v. Gamble, 429 U.S. 97, (1976).
[113] *Gamble*, 429 U.S. at 98-99.
[114] *Id.* at 99-101. *Gamble* also alleged, in effect, that the discipline for refusing to work due to this pain was part of this violation of his rights. *Id.* at 101.
[115] *Id.* at 104-08.
[116] *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S 153, 173 (1976)).
[117] *Id.* at 106. *See also id.* at 104-05 ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

failure to provide adequate medical care" and a "negligent" diagnosis failed to establish "deliberate indifference" on the part of the doctors.[118] The Court then noted that these allegations might, however, support a malpractice claim.[119]

However, the *Gamble* opinion did not make clear exactly what constituted "'deliberate indifference.'" The Court hinted that the standard was more of a subjective recklessness standard, as opposed to one of mere negligence,[120] but that was not clarified until the Court's opinion in *Farmer v. Brennan.*[121]

C. Farmer v. Brennan[122] *and the Subjective Deliberate Indifference Test*

Farmer v. Brennan, a key case in Eighth Amendment jurisprudence, involved a lawsuit by Dee Farmer, a transgender woman.[123] In 1986, Farmer was convicted for a non-violent crime and sentenced to prison.[124] At the time, "[t]he practice of federal prison authorities [was] to incarcerate preoperative transsexuals with prisoners of like biological sex . . . ."[125] While Farmer was accordingly housed with the general male prison population, she was also segregated several times for disciplinary reasons, and on at least one occasion, for her own safety.[126]

In 1990, Farmer alleged that after being in a brief "administrative segregation" following a transfer to a higher security penitentiary for disciplinary infractions, she was placed in the general male population, where, within two weeks, she was "beaten and raped" by her cellmate.[127]

Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under [§] 1983.") (footnotes omitted) (citation omitted).

[118] *Gamble*, 429 U.S. at 104-07.

[119] *Id.*

[120] *See id.* at 104-05 (the "indifference" may be evidenced by "prison guards . . . intentionally denying or delaying access to medical care").

[121] Farmer v. Brennan, 511 U.S. 825 (1994).

[122] *Id.*

[123] *Id.* at 829.

[124] *Id.* Prior to her conviction, Farmer "wore women's clothing . . . , underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful 'black market' testicle-removal surgery." *Id.* at 829. Farmer claimed to have continued hormone treatment in prison through the use of smuggled drugs. *Id.* All parties in the lawsuit were in agreement that Farmer projected a feminine appearance while in prison. *Id.*

[125] *Id.*

[126] *Id.* at 829-30.

[127] *Farmer,* 511 U.S. at 830.

She then filed a *pro se Bivens* complaint,[128] in which she alleged that her Eighth Amendment rights had been violated.[129]

The Court found that there was only a violation of Farmer's Eighth Amendment rights if two conditions were satisfied.[130] First, the alleged violation had to be "*objectively*, 'sufficiently serious.'"[131] For cases involving an allegation that prison officials failed to prevent physical harm to one inmate at the hands of the other, the inmate therefore needed to demonstrate that the conditions under which he was incarcerated posed "a substantial risk of serious harm."[132] As for the second condition, the *Farmer* court confirmed that a deliberate indifference test was needed, finding that this requirement flowed

> from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind." In prison-conditions cases, that state of mind is one of "deliberate indifference" to inmate health or safety . . . .[133]

Impliedly, the fact that Farmer was raped satisfied the requirement that the violation in question be "objectively sufficiently serious."[134] Both parties in *Farmer* agreed that the deliberate indifference standard governed the inquiry into the second prong of the test, but they disagreed as to whether or not the proper inquiry for determining the presence of deliberate indifference on the part of prison officials should be an

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[128] *See supra* note 99.

[129] *Farmer,* 511 U.S. at 830-31. Farmer also "sought compensatory and punitive damages, and an injunction barring future confinement in any penitentiary . . . ." *Id.* at 831.

[130] *Id.* at 834.

[131] *Id.* (emphasis added) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

[132] *Id.* at 834.

[133] *Id.* (citations omitted) (quoting *Wilson*, 501 U.S. at 297, 302-03).

[134] *See id.* at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'") (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). In discussing whether or not the alleged deprivation was "objectively sufficiently serious," the Court indicated that "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Rhodes*, 452 U.S. at 347 (1981)). Clearly, being free from rape would satisfy that inquiry. Still, the Court went on to note as follows: "At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it." *Id.* at 834 n.3.

objective or subjective one.[135] This was, in effect, the central issue in *Farmer.*[136]

Ultimately, the Court found that the subjective deliberate indifference test advocated for by respondents, one that implied a degree of recklessness analogous to a criminal standard of recklessness, was the proper test to adopt in determining the presence of deliberate indifference.[137] The Court held that

> a prison official may be held liable under the Eighth Amendment for denying [inmates] humane conditions of confinement only if he knows that [the] inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.[138]

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[135] *Farmer,* 511 U.S. at 834. The objective test considered by the *Farmer* Court is discussed *infra* Part IV.B.

[136] *Id.* at 832. Indeed, the Court noted that it had granted certiorari in the case "because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'" *Id.* "Compare, for example, *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (holding that 'deliberate indifference' requires a 'subjective standard of recklessness'), cert. denied, 503 U.S. 907, 1112 S. Ct. 1265, 117 L.Ed.2d 493 (1992), with *Young v. Quinlan*, 960 F.2d 351, 360-361 (3d Cir. 1992), ('[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate')." *Id.*

[137] *Farmer*, 511 U.S. at 836-37.

[138] *Id.* at 847. This holding relied, in large part, on the Court's pronouncement in *Wilson*, 501 U.S. at 296 and later cases, "that Eighth Amendment suits against prison officials must satisfy a "'subjective" requirement.'" *Farmer*, 511 U.S. at 838. *See* Dolovich, *supra* note 96, at 881 (in which the author nicely sums up the second prong of the *Farmer* test as being "that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not 'punishment' within the meaning of the Eight Amendment.").

In *Wilson*, an inmate alleged conditions of confinement that violated the Eighth Amendment, such as "overcrowding, excessive noise" and "improper ventilation." *Wilson*, 501 U.S. at 296. In its holding vacating summary judgment and remanding to ensure the proper test was applied, the Court stated: "[A]ssuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, see *Rhodes v. Chapman*, 452 U.S. 337 . . . (1981), whether it can be characterized as 'wanton' depends upon the constraints facing the *official.* From that standpoint, we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. . . . 'Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard

The Supreme Court reversed the District Court's summary judgment for the respondents, affirmed by the Court of Appeals, on each of Farmer's claims.[139] In the reversed opinion, the District Court had, in fact, applied a subjective deliberate indifference test, granting summary judgment largely on the basis that Farmer had not filed any type of grievance with prison officials expressing "concern for [her] safety."[140] Accordingly, the District Court found that the prison officials could not have been aware of the potential problem.[141] The Supreme Court found that the reliance on this sole factor, the lack of a filed grievance, was improper and that other evidence would need to be considered in determining if the prison officials acted with deliberate indifference in housing Farmer with the general male population.[142]

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articulated in [*Gamble*.]'" *Id.* at 303, 305-06 (quoting LaFaut v. Smith, 834 F.2d. 389, 391-92 (4th Cir. 1987)).

[139] *Farmer*, 511 U.S. at 848.

[140] *Id.* (citation omitted).

[141] *Id.*

[142] *Id.* at 848-49 (holding that the record below "does not so clearly establish respondents' entitlement to judgment as a matter of law on the issue of subjective knowledge."). Many of the Eighth Amendment cases involving transgender inmates that have been heard since the turn of the century involve the application of the *Farmer* subjective deliberate indifference test to the alleged lack or insufficiency of medical treatment relating to gender identity. *See, e.g.*, Fields v. Smith, 653 F.3d 550, 556, 559 (7th Cir. 2011) (holding that a Wisconsin Act prohibiting the Department of Corrections from using state funds for any hormone therapy violated the Eighth Amendment, stating in part that "[r]efusing to provide effective treatment for a serious medical condition [gender identity disorder ('GID,') when the inmate was receiving hormone treatment for GID prior to incarceration,] serves no valid penological purpose and amounts to torture."); Brooks v. Berg, 270 F. Supp. 2d 302,10 (N.D.N.Y. 2003), *vacated in part by* 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (reversing summary judgment for defendants in finding that there was evidence that prison officials acted with deliberate indifference in denying plaintiff's "numerous requests for treatment" for GID). *See also*, Travis Wright Colopy, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 27 (2012).

Farmer was not Dee Farmer's first lawsuit involving prison officials. In 1988, she filed a suit alleging in part that her Eighth Amendment rights had been violated when she was placed in administrative segregation for her own safety. Farmer v. Carlson, 685 F. Supp. 1335, 1342 (D. Pa. 1988). Unfortunately, the *Farmer v. Carlson* court held that the curtailment of rights in question "were a necessary part of prison security and . . . [did] not amount to an infliction of cruel and unusual punishment." *Id.* at 1343 (quoting Loe v. Wilkinson, 604 F. Supp. 130, 135-36 (M.D. Penn. 1984)).

In his *Farmer v. Brennan* concurrence, Justice Thomas makes light of the relief sought by Farmer in *Farmer v. Carlson* by pointing out that in *Farmer v. Brennan*, she was asserting "that leaving him [*sic*] in general prison population was unconstitutional because it subjected him [*sic*] to a risk of sexual assault," while in *Farmer v. Carlson*, she

IV. Extending Eighth Amendment Rights to Juveniles

A. Evolving Standards of Decency: Protecting Juvenile Detainees and Juveniles Adjudicated Delinquent

It is clear from the discussion in Part III.A that adults convicted of crimes can bring Eighth Amendment claims. Under *Bell* and its progeny, adults detained[143] for the alleged commission of a crime who allege cruel and unusual punishment must do so through a due process claim. Courts in several jurisdictions, including the *R.G.* court, have found that claims relating to isolation and other conditions of confinement at juvenile detention facilities should be dealt with by applying due process to both

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alleged that her conditions of confinement after having been removed from general population were unconstitutional. Farmer v. Brennan, 511 U.S. 825, 861 n.1 (1994) (Thomas, J., concurring). What Thomas clearly failed to understand, however, was that the curtailment of rights and privileges evidently experienced by Farmer while in administrative detention (e.g., "lack of educational programs, . . . limited use of the telephone[,]" etc., *Farmer v. Carlson*, 685 F. Supp. at 1343 (quoting *Loe v. Wilkinson,* 604 F. Supp. at 135-36)), was not the only means available to prison administrators to ensure that she remained free from the threat of rape. *See* Arkles, *supra* note 42, at 553. ("It is extremely problematic that our courts could consider a desire to be free from sexual assault to be incompatible with a desire to be free from solitary confinement . . .").

[143] As the years went by in my close to twenty year career as a public defender with DeKalb County, Georgia, it seemed as if more and more persons awaited case resolution at the DeKalb County Jail as opposed to out on bond. (The DeKalb County Jail is one of the largest jails in the Southeastern United States, generally housing those charged with crimes until they are released on bond, set free, or sentenced. Those sentenced on felony charges to a year or more in jail are typically transferred to a State prison after sentencing.) "Most of the people incarcerated in jails have not been convicted, but are pre-trial detainees too poor to pay bail." Arkles, *supra* note 42, at 519. Several factors seemed to contribute to this surge in detainee population: (1) an increase in the number of people charged with crimes; (2) the increase in fees associated with posting a bond; (3) a decline in staffing and curtailed budget at a pre-trial release program that assisted those having trouble making bail secure lower or On Their Own Recognizance ("OR,") bonds; (4) often slow indictment of cases; and (5) an increase in the trial calendar back log in some court divisions. While I am basing these observations on my own personal experiences, as well as discussions with other attorneys involved in criminal defense in other jurisdictions, it appears that these issues are not unique to DeKalb County. Perhaps in this age of seemingly limitless detention for many inmates awaiting case resolution, the Supreme Court should revisit the issue of extending strong Eighth Amendment rights to adult detainees in addition to juvenile detainees and those adjudicated delinquent as argued for in this paper. The *Farmer* subjective deliberate indifference test (discussed *supra* Part III.C) is too difficult a standard for convicted prisoners to satisfy, and a "relaxing" of this standard must be reexamined for all seeking the protection of the Eighth Amendment.

juvenile detainees and juveniles who have been adjudicated delinquent.[144] The logic in applying a due process test in such cases is typically that expressed by the *R.G.* court, that juvenile detainees should be treated similar to adult detainees, and that, as juveniles adjudicated delinquent have not been actually convicted of a crime, they should be treated similar to adult detainees as well .[145]

However, this due process approach to conditions of confinement claims brought by juveniles housed in juvenile detention facilities is not mandated by the United States Supreme Court. In fact, in the 1977 case of *Ingraham v. Wright*, the Supreme Court stated:

> [s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. *We have no occasion in this case, for example, to consider whether or under what circumstances*

[144] *See* Alexander S. v. Boyd, 113 F.3d 1373, 1377 n.3 (4th Cir. 1997) (involving an award of attorney's fees to plaintiffs in which the court noted that "[t]he district court joined the First, Ninth, Tenth, and Eleventh Circuits in reviewing the conditions at state juvenile facilities under the standards of the Due Process Clause of the Fourteenth Amendment") *abrogation on other grounds recognized by* Montcalm Pub. Corp. v. Virginia, 199 F.3d 168 (4th Cir. 1999). Gary H. v. Hegstrom, 831 F.2d 1430, 1431-32 (9th Cir. 1987) (involving "disciplinary segregation" (isolation) issues in an Oregon juvenile facility); Milonas v. Williams, 691 F.2d 931, 939-43 (10th Cir. 1982) (involving isolation and other conditions of confinement issues at a Utah private school for youth with behavior problems found to be "acting under color of state law" as some youths were "placed at the school involuntarily by juvenile courts."); Hewett *ex rel.* H.C. v. Jarrard, 786 F.2d 1080, 1085-87 (11th Cir. 1986) (a pre-*Farmer* case following *Gamble*'s "deliberate indifference" standard, involving a Florida juvenile detainee who sustained serious injuries after being slammed into a wall and a metal cot by a guard as the juvenile was being placed in isolation, but who was nevertheless left in isolation and denied medical treatment for three days). *But see* Stevens v. Harper, 213 F.R.D. 358, 374 (E.D. Ca. 2002) ("Because two of the named plaintiffs . . . have been convicted of a crime as adults and sentenced to the CYA [California Youth Authority], their claims must be analyzed under the Eighth Amendment.").
For an exhaustive 1998 survey of cases involving conditions in juvenile detention facilities, see Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1999). This article includes unreported opinions and consent decrees. I respectfully disagree with the author's assertion, however, that, post-*Bell*, the Due Process Clause would have to be the means to holding a condition was unconstitutional, rather than the Eighth Amendment. *Id.* at 683-84. *See infra* following paragraph in this Part IV.A.

[145] *See R.G.*, 415 F. Supp. 2d at 1152.

> *persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.*[146]

To date, this issue has not been considered by the Supreme Court, neither with respect to juveniles arrested and detained pending an adjudication hearing, nor with respect to juveniles adjudicated delinquent.

In fact, several jurisdictions responding to claims of cruel and unusual punishment by juveniles held in juvenile detention facilities have analyzed these claims under the Eighth Amendment. They have done so with analyses that addressed both Eighth Amendment and Due Process concerns,[147] or by looking solely to the Eighth Amendment.[148] Several

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[146] Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977) (emphasis added) (citation omitted).

[147] *See* Nelson v. Heyne, 355 F. Supp. 451, 454-57 (N.D. Ind. 1972), *aff'd* 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.D. 976 (1974) (finding that use of corporal punishment, tranquilizing drugs and solitary confinement at a medium security correctional institution for boys violated, the plaintiffs' Eighth Amendment rights, "8th and 14th Amendment rights," and Eighth Amendment and "procedural due process rights," respectively). The *Nelson* court noted that "[t]he use of solitary confinement does not of itself constitute cruel and unusual punishment. . . . [but that t]he quality of confinement [the length of time held in confinement and conditions therein], however, is subject to limitations imposed by the 8th Amendment." *Id.* at 456. *See also* Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983) (assessing both Eighth Amendment and due process concerns in determining the constitutionality of the use of isolation at a detention facility); Inmates of the Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972) ("I hold that isolation of children under the circumstances as described in my findings of fact for the solitary confinement rooms of Annex B to be cruel and unusual punishment . . ."). In *Inmates of the Boys' Training Sch.*, several juveniles were disciplined by sending them to an adult facility, where they were housed "in the resuscitated relic of a former women's prison, in dim and cold steel cellblocks . . ." *Id.* at 1357. Some of the rooms contained just a toilet and a mattress on the floor and had no artificial lighting, and in one of the rooms with no artificial lighting, the windows were boarded over. *Id.* at 1359. The court also found that the use of these cells was "a violation of equal protection and due process of law." *Id.* at 1367.

[148] *See* Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 482 (S.D.N.Y. 1970) ("[A] two week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment."). *See also* Morales v. Turman, 364 F. Supp. 166, 173 (E.D. Tex. 1973) (following *Lollis* and stating that Eighth Amendment protection applied "not only to convicted persons[,] but also to non-convicted persons held in custody [so that j]uveniles held in state institutions are protected by the eighth amendment"). In *Morales*, the court found that placing juveniles in isolation (referred to by the court as "solitary confinement"), "in the absence of any . . . administrative limitation on the duration and intensity of the confinement and subject only to the

courts using the Eighth Amendment have done so by utilizing *Farmer*'s subjective deliberate indifference test.[149]

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unfettered discretion of correctional officers, constitutes cruel and unusual punishment in violation of the eighth amendment." *Id.* at 174.

See also Santiago v. City of Phila., 435 F. Supp. 136, 149 (E.D. Pa. 1977) *abrogated on other grounds by* Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982) ("We find that the eighth amendment applies to the confinement of juveniles . . . ."). The Santiago court found that a factual hearing was required in order "to determine whether or to what extent the conditions [of confinement] . . ." at a juvenile detention facility "violate[d] the eighth amendment." *Id.* at 149. The use of solitary confinement was one of the conditions alleged to do so. *Id.* at 142.

[149] In *Beers-Capitol v. Whetzel*, 256 F.3d 120, 144 (3d Cir. 2001), the Third Circuit Court of Appeals affirmed in part and reversed in part the lower court's denial of summary judgment in favor of juvenile detention facility staff. The two plaintiffs in *Beers-Capitol* alleged "violations of their Eighth Amendment rights" as they had been sexually assaulted by a staff member while housed at the facility. *Id.* at 125. Originally, the case had also included allegations that due process rights had been violated, but the *Beers-Capitol* court agreed with the District Court's holding that "an Eighth Amendment analysis was the proper one to use for claims arising from incarceration in a facility for juvenile offenders." *Id.* at 130 n.5. As the Fourteenth Amendment claim was not pressed in the appeal, it was not addressed. *Id.* The court then went on to apply *Farmer*'s two-pronged test to determine that summary judgment was proper with respect to all defendants but one, a staff member who admitted that she "'kind of knew'" that the alleged perpetrator was "'messing'" around with wards. *Id.* at 141, 144. *Cf.* Paige v. Hines, 2006 WL 2252703, 5 n.16 (N.D. Ill. 2006) (another case where female juveniles housed in a detention facility alleged that they were subjected to sexual assaults by staff where the court used the *Farmer* test, holding that "[i]t need not be decided whether plaintiffs' claims are Eighth amendment cruel and unusual punishment claims or Fourteenth Amendment due process claims because, for failure to protect claims, "there is 'little practical difference between the two standards.'") (quoting Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005)); *but see* A.M. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 584-85 (3d Cir. 2004) (applying the *Farmer* test in a conditions of confinement case after stating, "[w]e do not dispute that A.M.'s claims are appropriately analyzed under the Fourteenth Amendment since he was a detainee [arrested for indecent exposure and awaiting an adjudication hearing,] and not a convicted prisoner. However, the contours of a state's due process obligations to detainees with respect to medical care have not been defined by the Supreme Court. Yet, it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment.") (citations omitted). Still, the Third Circuit has now held that allegations concerning conditions of confinement made by juveniles adjudicated delinquent "fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment." Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 261 (3d Cir. 2010). *Betts* was followed by *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 771-72 (D.N.J. 2011). In *Troy*, the *Farmer* test was applied to a case where the plaintiffs, both adjudicated delinquent, made allegations concerning conditions of confinement, including "excessive room isolation." *Id.* at 762.

See also In re J.M., 287 S.W.3d 481, 492 (Tex. Ct. App. 2009). J.M. complained of, among other things, being threatened by other wards, pressured by other wards to join a

The Supreme Court has several options when it reaches the question of whether or not those confined in "juvenile institutions can claim the protection of the Eighth Amendment."[150] The Court could follow the logic of the *R.G.* court discussed in Part II, as well as the line of cases discussed in this Part IV.A (specifically corresponding to note 144,) that look exclusively to Due Process when determining claims relating to conditions of confinement in juvenile detention facilities. Alternatively, the Court could look to the line of cases discussed in this Part IV.A (specifically corresponding to notes 147 - 149,) in which similar claims were examined under the Eighth Amendment, either alone or in conjunction with a Due Process analysis. However, as will be shown in the balance of Parts IV.A, IV.B and IV.C, an Eighth Amendment analysis may offer more comprehensive protection to such youths than that afforded by a Due Process analysis alone. The Eighth Amendment analysis must be specifically tailored to take into account the levels of maturity and culpability of juveniles being housed in juvenile detention facilities, in addition to their high susceptibility to psychological distress in comparison to incarcerated adults.[151] To begin to understand why the

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gang and poor staff supervision. *Id.* at 492 (quoting *In re* H.V., 252 S.W.3d 319, 323 (Tex. 2008)), the *In re J.M.* court first found that "'[j]uvenile cases, though classified as civil proceedings, are quasi-criminal in nature and frequently concern constitutional rights and procedures normally found only in criminal law.'" *Id.* "Due to this similarity, we examine cases involving claims of cruel and unusual punishment in the context of confinement for criminal offenses for guidance here. Confinement in a state prison facility is a form of punishment subject to scrutiny under the Eighth Amendment." *Id.* (citations omitted). No Eighth Amendment violation was found, however. *Id.* at 495. The court found that the staff had largely responded to the grievances that they were made aware of. *Id.* at 494. Accordingly, there was no evidence that the staff "acted in reckless disregard of the threats posed to J.M." *Id.* at 495.

[150] *Ingraham*, 430 U.S. at 669 n.37.

[151] *See* discussion *infra* Part IV.A. These considerations have also been addressed to a degree in the procedural and substantive due process context. In Fare v. Michael C., 442 U.S. 707, 725 (1979), the Supreme Court found that a totality of the circumstances approach was ideal to determine the validity of a juvenile's waiver of his Fifth Amendment rights. The Court held that "[t]he totality approach . . . mandates inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* (citations omitted). However, while "[t]heoretically, this test allows judges the discretion to weigh the age of the child more heavily and thereby extend greater protections to juveniles. . . . judges generally do not grant these protections." Benjamin E. Freidman, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In re Gault, 58 UCLA L. REV. DISCOURSE 165, 174 (2011). With regards to substantive due process, in a case not directly related to

Eighth Amendment could be the guiding principle in these cases, a discussion of the concept of "evolving standards of human decency" must first be undertaken.

The Eighth Amendment, according to the Supreme Court, "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .' against which we must evaluate penal measures."[152] These standards, however, are not fixed in time. The Supreme Court has recognized that these standards evolve and that these "evolving standards of decency . . . mark the progress of a maturing society."[153]

The concept of "evolving standards of decency" is demonstrated in an important line of death penalty cases involving the mentally ill and juveniles. In these five cases, the distinct characteristics of these two classes were taken into account in ultimately banning the execution of the mentally ill[154] and youth under the age of eighteen.[155] The rationales expressed in these decisions ultimately supports the extension of Eighth Amendment protections to both detained juveniles and those adjudicated delinquent.

The first of the three cases involving juveniles was *Thompson v. Oklahoma*.[156] In *Thompson*, a plurality of the Court found that evolving standards of decency precluded the execution of juveniles who were under the age of sixteen when the crime in question was committed.[157] It based this determination in part on

> [t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense[, which] is consistent with

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juveniles, the Seventh Circuit has acknowledged that "an investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements . . . ." Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998).

[152] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

[153] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[154] Atkins v. Virginia, 536 U.S. 304 (2002); Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

[155] Roper v. Simmons, 543 U.S. 551, 563 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Thompson v. Oklahoma, 487 U.S. 815 (1988).

[156] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[157] *Id.* at 821-23.

> the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[158]

However, in *Stanford v. Kentucky*, the Supreme Court, referring to "evolving standards of decency," declined to extend its ruling in *Thompson* to prevent the execution of juveniles sixteen years of age or older, but under the age of eighteen.[159] The *Stanford* plurality looked solely to what it referred to as objective indicia in reaching its decision, finding that only a minority of the States who permitted capital punishment limited that sentence to those eighteen years of age or older.[160]

In the sixteen intervening years between *Stanford* and the next major case involving juveniles and the death penalty, the Supreme Court heard two major cases involving this punishment as applied to the mentally ill. The first of these two cases was *Penry v. Lynaugh*.[161]

In *Penry*, the Supreme Court held that although, "mental retardation" was a mitigating factor in determining whether or not the death penalty should be imposed in a capital case, it could not "conclude . . . that the Eighth Amendment preclude[d] the execution of any mentally retarded person . . . by virtue of his or her mental retardation alone."[162] The plaintiff argued in part that there was "objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.'"[163] The Court rejected the plaintiff's argument, finding that only two states to date had actually banned the execution of the mentally ill.[164]

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[158] *Id.* at 830.
[159] *Stanford*, 492 U.S. at 369, 378-80.
[160] *Id.* at 369-71. The court noted that "our job is to . . . determine, not what they [the evolving standards of decency,] *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. . . . [and we] reject petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment' regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds." *Id.* at 378 (citations omitted).
[161] Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). The *Penry* and *Stanford* opinions were both delivered on June 26, 1989.
[162] *Id.* at 340.
[163] *Id.* at 333-34 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
[164] *Id.* at 334.

Thirteen years later, in *Atkins v. Virginia*, the Supreme Court overruled *Penry*, finding that in the years since *Penry* had been decided, a national consensus had emerged that executing the mentally ill was cruel and unusual punishment in violation of the Eighth Amendment.[165] By 2002, out of the thirty-one states that allowed the death penalty to be imposed, twenty-one, in addition to the federal government, did not allow the mentally ill to be executed.[166] In *Atkins*, unlike in *Penry*, the Court found that there was an emerging national consensus on the issue that reflected "evolving standards of decency."[167]

The *Atkins* Court did not just look at objective indicia in reaching its decision. It also used its own independent judgment to find that the "relationship between mental retardation and the penological purposes served by the death penalty" led to the conclusion that the Eighth Amendment forbade the execution of the mentally ill.[168] By using this more subjective approach, the Court impliedly rejected the holding in *Stanford* that "the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment."[169]

These four cases, *Thompson*, *Stanford*, *Penry* and *Atkins*, set the stage for the Supreme Court's decision in *Roper v. Simmons*.[170] In *Simmons*, the Court overruled *Stanford*, finding that the execution of juveniles who were under the age of eighteen at the time of their crimes was prohibited by the Eighth Amendment's proscription against cruel and unusual punishment.[171] Referencing "'evolving standards of decency that mark the progress of a maturing society' to determine which punishments

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[165] Atkins v. Virginia, 536 U.S. 304, 315-16 (2002).
[166] *Id.* at 313-16.
[167] *Id.* at 316, 321. It was effectively left to the States, however, to determine what constituted mental illness. *See id.* at 317.
[168] *Id.* at 317.
[169] Roper v. Simmons, 543 U.S. 551, 563 (2005). The *Atkins* Court also held that the "imposition of the death penalty" on the mentally ill did not contribute to any sense of retribution [due to diminished capacity,] or deterrence [the same capacity making it less likely that the penalty meted out to others would be considered by one who is mentally ill], so amounted to "nothing more than the purposeless and needless imposition of pain and suffering, and hence [was] an unconstitutional punishment." *Atkins*, 536 U.S. at 319 (internal quotation marks omitted) (citations omitted).
[170] *Simmons*, 543 U.S. at 569.
[171] *Id.* at 578-79. The Court noted in reversing *Stanford* that it was reconsidering the issue in that case, just as the Court had reconsidered the issue in *Penry* in deciding *Atkins*. *Id.* at 564.

are so disproportionate as to be cruel and unusual,"[172] the Court examined both objective and subjective indicia.[173]

With respect to objective indicia, after examining the laws of the various States at that time, the Court concluded that a majority no longer allowed juveniles under the age of eighteen to be sentenced to death.[174] Turning to subjective indicia, the Court made several notable observations in ultimately recognizing that "[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty [retribution and deterrence,] apply to them with less force than to adults."[175] Most importantly, the court stated that "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."[176] Noting that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood[,]" the Court held that this was "the age at which the line for death eligibility ought to rest."[177]

Therefore, the Supreme Court has provided a rationale that could extend Eighth Amendment protections to juveniles housed in juvenile detention facilities, whether detained or adjudicated delinquent: evolving standards of decency. The Court has explicitly acknowledged the "diminished culpability"[178] of juveniles and the "comparative immaturity"[179] to adults of youth under the age of eighteen.[180] This

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[172] *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
[173] *Id.* at 564-74.
[174] *Id.* at 568.
[175] *Id.* at 571.
[176] *Simmons*, 543 U.S. at 569.
[177] *Id.* at 574. *See also id.* at 587 (Stevens, J., concurring) (holding that "[i]f the meaning of . . . [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.") (citation omitted).
[178] *Id.* at 571.
[179] *Id.* at 569.
[180] In Levick et al., *supra* note 8, at 299-306, the authors point to *Graham v. Florida*, 560 U.S. 48 (2010), a post-*Roper* case, to show how the Supreme Court continues to examine adolescent development and the ways in which one's status as a juvenile "is central to" an Eighth Amendment "constitutional analysis." Levick et al., *supra* note 8, at 300. The *Graham* Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 130 S. Ct. at 2034.

acknowledgement justifies the extension of these heightened protections to juveniles.

The Court has also recognized that being young "is more than a chronological fact."[181] Being young, the Court has observed, "is a time and condition of life when a person may be most susceptible to . . . psychological damage."[182] As has been shown in Part I.C, the practice of isolating transgender youths is fraught with the potential to cause such damage. Other courts have recognized the inherent frailty of adolescents, stating that "there is a legal distinction in the nature of treatment appropriate to a convicted felon, and that accorded one adjudged a juvenile delinquent."[183]

More specific to the problem of isolation of transgender youth in juvenile detentions facilities, cities are promulgating new policies and procedures meant to protect transgender youth, as discussed further in this Part IV.A. These policies recognize the inherent differences between adults and juveniles. The New Orleans policies, for example, state that "[t]he [New Orleans] detention center recognizes that LGBT youth are in the midst of adolescent development and have complex needs that require the sensitivity and awareness of well-trained staff. . . ."[184]

In light of these differences, the holding in *Simmons*, and the concept of the "evolving standards of decency that mark the progress of a maturing society,"[185] subjective indicia dictate that youths housed in juvenile detention facilities, especially transgender youth who are particularly at risk as discussed in Part I.A, should be treated differently

[181] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
[182] *Id.*
[183] Nelson v. Heyne, 355 F. Supp. 451, 457 (N.D. Ind. 1972) (citation omitted), *aff'd* 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.D. 976 (1974). *See also* Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983) ("It would not be unreasonable to assume that society's conscience might be shocked by the conditions of confinement imposed on a juvenile in an isolation cell, when it would be unwilling to label the same treatment, given to an adult, cruel and unusual.").
[184] LOUISIANA DEP'T OF HUMAN SERVS. & THE NEW ORLEANS JUVENILE DET. CTR., POLICY 12.3: NON-DISCRIMINATORY DEVELOPMENTALLY-SOUND TREATMENT OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) YOUTH 1 (2011), *available at* http://www.youthbreakout.org/sites/breakout.drupalgardens.com/files/YSC%20LGBT%20Policy%202011.pdf.
[185] Trop v. Dulles, 356 U.S. 86, 101 (1958).

than their adult counterparts in jails, prisons and penitentiaries. In fact, juveniles should be subject to far less harsh conditions than adults.[186]

As for objective indicia, there is admittedly not an overwhelming trend toward adoption of policies and procedures that advocate for and protect transgender youth (and LGBT youth in general,) in custody, but there is an emerging trend nonetheless. For example, the New York State Office of Children and Family Services ("NYOCFS,") has adopted specific and comprehensive guidelines relating to treatment of LGBT youth "in [the] residential and after-care programs it operates."[187] The policy specifically states that it "protects from discrimination . . . youth who self-identify as . . . transgender."[188]

In 2011, the Department of Human Services and the New Orleans Juvenile Detention Center adopted policies and procedures which emphasize that "[i]t is the policy [of this jurisdiction] to establish operational guidelines and training to respond to the gender identity and sexual orientation of the youth in our care."[189] With respect to isolation, the policy is clear: "LGBT youth will not be placed in isolation as a means of keeping them safe from discrimination, harassment or abuse. Staff will actively intervene in behaviors by other youth that make the youth feel unsafe or disrespected."[190]

Accordingly, following the logic of *Simmons*, objective and subjective indicia of evolving standards of decency dictate the extension

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[186] Levick et al., *supra* note 8, at 286. ("As the [Supreme] Court increasingly relies upon the principle that youth are different to inform its decisions involving children's constitutional rights . . . the conditions under which juvenile offenders are incarcerated . . . will face greater scrutiny.").

[187] N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS. POLICY AND PROCEDURES MANUAL 3442.00 LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH, (March 17, 2008), *available at* http://www.equityproject.org/pdfs/LGBTQ_Youth_Policy_PPM_3442_00.pdf

[188] *Id.* at 1.

[189] LOUISIANA DEP'T OF HUMAN SERVS., *supra* note 184, at 1.

[190] *Id.* at 3. Washington, D.C. has adopted the "General Prohibitions of Gender Identity or Expression Discrimination" Act. Compliance Rules and Regulations Regarding Gender Identity or Expression, 4 DCMR § 801 (2006). While this act does not specify that it applies to juvenile detention facilities, that it does so is certainly implied in its text, which covers all "housing" and "educational institutions." (Of course, educational instruction takes place in juvenile detention facilities, "housing.") California has adopted a "Youth Bill of Rights" for "youth confined in a juvenile facility" that includes sections effectively banning isolation of all youth and "discrimination or harassment on the basis of actual or perceived . . . gender identity. . . ." CAL. WELF. & INST. CODE §§ 224.74(i), (m) (2008).

of Eighth Amendment protection to conditions of confinement of transgender youth. Just as the Eighth Amendment protects those under the age of eighteen from being put to death, it should also protect transgender youth held in juvenile detention facilities—whether detained or adjudicated delinquent—from being subjected to conditions that amount to cruel and unusual punishment.

For adults, the conditions under which a sentence is served, not just the sentence itself, are clearly part of that punishment.[191] In Part III.B, it was shown that the Supreme Court has found that conditions of confinement for sentenced adult prisoners are subject to Eighth Amendment scrutiny. In fact, the Supreme Court has specifically held that isolation "is a form of punishment subject to scrutiny under Eighth Amendment standards."[192] A youth who is detained or adjudicated delinquent should be provided *more* Eighth Amendment protections than an adult who has been sentenced to prison, not less.[193]

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[191] *See* Dolovich, *supra* note 96, at 907. *See also id.* at 910 (asking "when [do] prison conditions cross the line from mere unpleasantness into cruelty[?]").

[192] Hutto v. Finney, 437 U.S. 678, 685 (1978). In *Finney*, the Court found that conditions in the isolation cells in question constituted cruel and unusual punishment and upheld a lower court's ruling limiting the time spent in such isolation cells. *Id.* at 687.

[193] *See* Lollis v. N.Y. State Dep't of Soc. Serv., 322 F. Supp 473, 481 (S.D.N.Y. 1970) (With respect to the negative effects of isolation, "'[w]hat is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressures than mature adults . . . [and] isolation is a condition of extraordinary severe psychic stress . . . .'") (quoting the sworn affidavit of expert Joseph D. Noshpitz, M.D. filed with the court on November 6, 1970). *See also* Swansey v. Elrod, 386 F. Supp. 1138, 1140, 1143, 1145 (N.D. Ill. 1975) (a case where juveniles between the ages of thirteen and seventeen facing charges as adults filed a successful lawsuit seeking a preliminary injunction to prevent their further incarceration in an adult facility, and where the court held as follows: "[u]nder the Eighth Amendment[,] children who remain unconvicted of any crime may not be subjected to devastating psychological and reprehensible physical conditions, and while other juvenile law cases are not strictly on point, they recognize that juveniles are different and should be treated differently. Thus, the evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees. Plaintiffs therefore have demonstrated that there is a likelihood of success on their Eighth Amendment claim."). *Cf.* United States *ex. rel.* Wolfish v. United States, 428 F. Supp. 333, 339 (S.D.N.Y. 1977), *aff'd*, Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'd*, Bell v. Wolfish, 441 U.S. 520 (1979) ("To have an inferior minority of persons housed in ways found unconstitutional for the rest would . . . fairly . . . be condemned as cruel and unusual for those affected."). *Id.* at 528. In making this statement, the court was pointing out the inherent unfairness of adult detainees being double bunked in rooms originally intended to house one person, while those sentenced to crimes and incarcerated in the

It is axiomatic that transgender youth (indeed, all youths,) housed in juvenile detention facilities should be free from cruel and unusual punishment. This right should accrue directly in federal court cases, and through the incorporation doctrine, rather than through Due Process, in state court cases. Indeed, an Eighth Amendment analysis, undertaken as described in Parts IV.B and IV.C, will result in a court holding that it is a violation of the Eighth Amendment to place a transgender youth in isolation as punishment for, effectively, identifying as transgender.

B. The Need for an Objective Deliberate Indifference Test

Accordingly, conditions of confinement in juvenile detention facilities should be subject to Eighth Amendment scrutiny. It will now be shown why the practice of isolating transgender youth in such facilities, if based on one of the four grounds set forth in Part I.B, constitutes cruel and unusual punishment. To begin, a brief review of the *Farmer*[194] decision discussed in Part III.C is required.

In order to determine if a condition of confinement in a juvenile detention facility constitutes cruel and unusual punishment, the Supreme Court's opinion in *Farmer* would theoretically require the application of a two-pronged test.[195] First, an inquiry examining the totality of the circumstances surrounding the condition and youth in question must be made in order to determine whether or not the alleged violation is "*objectively*, 'sufficiently serious.'"[196] This inquiry assesses whether or not the actions or omissions of the facility staff resulted "in the denial of 'the minimal civilized measure of life's necessities.'"[197] The second prong involves the subjective deliberate indifference test, requiring "that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not 'punishment' for Eighth Amendment purposes."[198]

The typical conditions of isolation and the effect of isolation on transgender youth in juvenile detention facilities has been documented in Part I.C ("The Harmful Effects of Isolation,") and in Part II (discussing the

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same facility were being housed in comparative luxury in rooms similar to those found in "college dormitories." *Id.* at 336-39.

[194] Farmer v. Brennan, 511 U.S. 825 (1994).

[195] *Id.* at 834.

[196] *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)) (emphasis added).

[197] *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

[198] Dolovich, *supra* note 96, at 881.

isolation of LGBT youth during an analysis of the decision of *R.G. v. Koller*).[199] Experts and judges consistently state that isolation of transgender youth (indeed, all youth,) in juvenile detention facilities is a particularly harmful and psychologically devastating practice.[200] To place a transgender youth in isolation, effectively as punishment for identifying as transgender, and to leave the youth in isolation for an extended period of time, is "objectively, 'sufficiently serious.'"[201] The objective seriousness of this practice satisfies the first prong of the *Farmer* test.[202]

Next, troubling language in *Farmer* must be examined in an analysis of the second prong of the test used to determine if deliberate indifference is present. The Court held that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[203] This language was used in part by the *Farmer* Court to justify its decision to adopt a subjective deliberate indifference test, as opposed to an objective one. However, the position of the Court is fatally flawed. The correct approach would be to view the conditions of imprisonment as being part of the punishment.

When someone is sentenced to a term in jail, persuasive critiques have been made that one cannot argue that the conditions of confinement have no relation to the sentence itself.[204] "In a society where incarceration

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[199] R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006).

[200] Arkles, *supra* note 42, at 538. Marsha Levick et al. argue that "[as] juveniles are both more vulnerable to pressures and more malleable than adults[,] . . . the effects of a harmful condition may take a unique toll on a juvenile, even when the same punishment is constitutional for an adult." Levick et al., *supra* note 8, at 312. "For example, . . . isolation . . . may inflict heightened trauma on youth." *Id.*

[201] *Farmer*, 511 U.S. at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

[202] It is possible that the length of period in isolation and/or the conditions therein may have some bearing on the outcome reached in applying the objective test, as well as the reasons given for the isolation. *See* discussion of Nelson v. Heyne, 355 F. Supp. 451, 454-57 (N.D. Ind. 1972), *supra* note 147.

[203] *Farmer*, 511 U.S. at 837. *See* Dolovich, *supra* note 96, at 890 (stating that this holding reflects that the *Farmer* Court "was motivated by consideration[s]" of when prison conditions are punishment, and not by when they are cruel).

[204] In his concurring opinion in *Farmer*, Justice Blackmun makes several observations. *Farmer*, 511 U.S. at 851-58 (Blackmun, J., concurring). First, he compares the prison sentence of inmates classified differently, with one being sent to a minimum security prison to serve out his sentence ("well-managed . . . , complete with tennis courts and cable television"), while another is sent to a maximum security prison ("characterized by rampant violence and terror"). *Id.* at 855. He then observes, "it matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing

is the most common penalty for criminal acts," if the Eighth Amendment's prohibition on cruel and unusual punishment is to mean anything, limits must be placed on "what the state can do to prisoners over the course of their incarceration."[205]

Indeed, Professor Sharon Dolovich[206] argues that

> the state . . . has an affirmative obligation to protect [adult] prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners' basic human needs, may be understood as *the state's carceral burden*. When the state, indifferent to its obligation, violates this burden and thereby causes serious harm to prisoners, prison conditions may be said to be cruel. . . . [As] the state's carceral burden is ongoing, those prison officials charged with fulfilling its terms are obliged to be proactive. . . . [Prison officials should at the very least be held] liable for failures to recognize substantial risks of serious harm that a reasonable prison official, appropriately attentive to prisoners' basic needs, would have recognized.[207]

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punishment for the two convicts." *Id.* Second, Blackmun states: "[a] punishment is simply no less cruel or unusual because its harm is unintended. In view of this obvious fact, there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally. As Judge Noonan has observed: 'The Framers were familiar from their wartime experience of British prisons with the kind of cruel punishment administered by a warden with the mentality of a Captain Bligh, *[b]ut they were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement*. The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care.' Jordan v. Gardner, 986 F.2d 1521, 1544 (9th Cir.1993) (citations omitted) (emphasis added)." *Id.* at 856.

Certainly, one should consider as well that it is not just the impact of prison official "action" that should be of concern, but inaction as well. *Contra id.* at 859 (Thomas, J., concurring) (holding that "[b]ecause the attack . . . [on Farmer] was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment").

[205] Dolovich, *supra* note 96, at 885.

[206] Sharon Dolovich is a Professor of Law at UCLA School of Law and a scholar of Eighth Amendment jurisprudence.

[207] Dolovich, *supra* note 96, at 891-92 (footnotes omitted). Professor Dolovich's discussion here relates primarily to the responsibilities of a state toward its inmates, but of course, this would apply as well to the responsibilities of the federal government toward its inmates. *See supra* notes 99-101. *See also* DeShaney v. Winnebago County

Accordingly the *Farmer* Court erred in adopting a subjective, as opposed to objective, deliberate indifference test when formulating the second prong of the two part test to be used to determine if a condition of confinement constituted cruel and unusual punishment. *Farmer*, of course, involved the assertion by a convicted and sentenced adult inmate that a condition of confinement violated her Eighth Amendment rights. The same factors discussed in Part IV.A that require an extension of Eighth Amendment protection to youth detained or adjudicated delinquent and held in juvenile detention facilities also require that an objective deliberate indifference test be applied in considering allegations by such youth that being subject to certain conditions of confinement violates Eighth Amendment rights. In other words, just as the Court has found that juveniles under the age of eighteen should not be subject to the death penalty[208] or life without parole in a case that does not involve a homicide,[209] so too should the Court find that where juveniles are involved, an objective deliberate indifference test is more appropriate than a subjective one.

A proper objective deliberate indifference test for juveniles in conditions of confinement cases should be as follows: a juvenile detention facility officer or administrator is deliberately indifferent "when he *knows or should have known* of a sufficiently serious" condition affecting a

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Dept. of Social Services, 489 U.S. 189, 199-200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.,* food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.") (citations and footnotes omitted); Estelle v. Gamble, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting) (stating that "[i]f a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy.").

Professor Dolovich also notes that agents of the state delegate authority (or, as she notes, the state's "carceral burden,") to prison administrators, who in turn delegate authority to lower prison officials and ultimately the correctional officers who come into contact with inmates on a daily basis. Dolovich *supra* note 96, at 905, 929. In a challenge that a prison condition violates the Eighth Amendment, "there will [therefore] be some identifiable state official responsible for the challenged condition and thus the basis for a § 1983 action." *Id.* at 937. This logic assists in overcoming any Eleventh Amendment concerns. *Id.* at 937.

[208] *See* discussion of *Simmons*, *supra* Part IV.A.

[209] *See* discussion of *Graham*, *supra* note 180.

ward,[210] yet fails "to take reasonable measures to abate it."[211] Once it is confirmed that isolation of a transgender youth is "objectively sufficiently serious," as discussed *supra* this Part IV.B, this proposed objective deliberate indifference test would then be applied.

The application of this proposed objective deliberate indifference test would lead to a positive outcome for a transgender youth asserting that the period of isolation in question was cruel and unusual punishment in violation of the Eighth Amendment. For example, suppose that facility staff observes a male ward inappropriately fondling a transgender female ward, "Child A," who has been housed with the males. Rather than discipline the male ward, the staff places Child A in isolation for her own "protection." The conditions of the isolation are similar to those that C.P. endured in isolation in the Hawaiian Youth Correction Facility.[212]

After two days in isolation, Child A files a grievance in which she states that the isolation is causing extreme anxiety and depression. The staff would then have notice of— *would know of*— the sufficiently serious condition. If Child A was left in isolation, then the objective deliberate indifference test is satisfied (as would, most likely, a subjective test), and a lawyer filing for a preliminary injunction to stop further isolation would accordingly be successful.

Suppose Child A does not file a grievance after two days in isolation, but is seen by staff crying in her room for hours on end. On the third day, a staff member notices that Child A's arm is bleeding. Child A is sent to the nurse, who cleans and bandages the cut. Child A had in fact, purposefully scratched herself with a plastic fork that she managed to keep from her lunch that day. Neither the nurse nor any other facility staff ask Child A how she was cut, yet she is returned to isolation. In this case, the staff *should have known* of the sufficiently serious condition, and the objective deliberate indifference test would once again be satisfied. Under

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[210] This portion of the proposed objective deliberate indifference test is based on and partially quotes language from, Young v. Quinlan, 960 F.2d 351, 361 (3d Cir. 1992), *superseded by statute on other grounds*, Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), *as recognized in* Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (emphasis added). As discussed *supra* note 136, *Young* was cited in *Farmer* as a Court of Appeal's opinion that had formulated an objective deliberate indifference test. *Farmer*, 511 U.S. at 832.

[211] This portion of the proposed objective deliberate indifference test partially quotes language from the *Farmer* Court's mandated subjective deliberate indifference test. *Farmer*, 511 U.S. at 847.

[212] *See supra* Part II, discussion of R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006).

this scenario as well, if a lawyer filed for a preliminary injunction to stop further isolation, the deciding court would have grounds to grant it.

In his wryly observant dissent in *Gamble*, Justice Stevens stated a definitive rationale detailing why the deliberate indifference test adopted by the majority (that was later clarified in *Farmer* to be a subjective test,) does not provide adequate Eighth Amendment protections.[213] Justice Stevens first noted that "[s]ubjective motivation" may in fact be relevant in determining what remedy, if any, "is appropriate against a particular defendant."[214] However, Stevens then correctly pointed out that "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville[215] were the product of design, negligence, or mere poverty, they were cruel and inhuman."[216] Justice Stevens' rationale identifies exactly why the subjective deliberate indifference test must be discarded in favor of an objective test.

C. Getting It Right – Using the Eighth Amendment to Prevent Isolation of Transgender Youth in Juvenile Detention Facilities

One might argue that there is no need to advocate for applying the Eighth Amendment to cases involving isolation of transgender youth. If a court chooses to apply the *Bell* due process analysis, as the *R.G.* court

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[213] *Gamble,* 429 U.S. at 116 (Stevens, J., dissenting). *See also* Dolovich, *supra* note 96, at 899 ("Prison officials who create the conditions under which a prisoner will live are by their actions administering a state punishment whatever their mental state regarding the conditions they create . . . [and f]or this reason, all the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny.").

[214] *Id.* at 116 (Stevens, J., dissenting).

[215] Andersonville (also known as Camp Sumter,) was a Confederate prison for captured Union soldiers during the United States Civil War. The conditions in the camp were notoriously poor, with overcrowding, starvation and disease common. *See, e.g., Camp Sumpter/Andersonville Prison*, NATIONAL PARK SERVICE , http://www.nps.gov/ande/historyculture/camp_sumter.htm (November 17, 2013). Of the 45,000 prisoners housed at the camp during the war, 13,000 died there. *Id.*

[216] *Gamble,* 429 U.S. at 116-17 (Stevens, J., dissenting). *See also* Dolovich *supra* note 96 at 882. ("The problem with a recklessness standard is that it holds officers liable only for those risks they happen to notice – and thereby creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse."). The subjective deliberate indifference test then is bad enough where adults are involved, nevertheless youths.

did,[217] and this results in a successful outcome for juvenile plaintiffs, why drag the Eighth Amendment into the equation?

After all, as shown in Part II, in reaching its decision for the minor plaintiffs, the *R.G.* court declined to conduct an Eighth Amendment based inquiry. Instead, the *R.G.* court granted relief to the plaintiffs on due process grounds,[218] finding that there was no "legitimate nonpunitive government objective" in "[c]onsistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to separate LGBT wards from their abusers."[219]

Despite the current jurisdictional split (discussed in Part IV.A,) over how to approach conditions of confinement cases involving juveniles, courts need not have to choose between a *Bell* due process analysis and an Eighth Amendment inquiry. These two approaches are not mutually exclusive and both can serve as avenues to secure complete remedies. However, there are circumstances where the due process analysis may not result in a positive outcome for transgender youth, while an Eighth Amendment inquiry would. Suppose that a District Court gave deference to juvenile detention facility administrators while applying the *Bell* test and found that there was a "legitimate non-punitive government objective" in isolating a transgender youth? Where would this holding leave the youth if an Eighth Amendment claim had not also been filed?

Consider the following example. Child B is a male to female sixteen-year-old transgender youth. She is arrested for burglary, and the judge hearing her case adjudicates her delinquent. It is Child B's third adjudication. Her first adjudication had her under court supervision for a year. During that year, she was adjudicated on a second offense and sent to an alternative placement group home. While in the group home, she was arrested on the burglary offense. Due to her history, upon adjudication, the judge sentences Child B to a juvenile detention facility for one year.[220]

Child B is assigned to housing in the general male population when she arrives at the facility. She is immediately subjected to verbal

[217] *See supra* Part II.
[218] *R.G.*, 415 F. Supp. 2d at 1152.
[219] *Id.* at 1156. As the *R.G.* court pointed out, other jurisdictions that had previously considered the issue before it had "likewise concluded that the use of isolation for juveniles, except in extreme circumstances, [was] a violation of Due Process." *Id.* at 1155 (citing decisions of three different Circuit Courts of Appeals [1st, 10th and 11th] and two District Courts [Southern District of New York and Oregon]).
[220] Note that the same analysis would be involved if Child B was simply detained pending her adjudication hearing on the burglary allegation.

abuse from other wards and even facility administrators. A few of the other wards begin trying to trip Child B whenever she walks by or they purposefully bump into her. Child B files several grievances with the facility administration, two verbal, and one written. These grievances are left unaddressed and Child B is unable to make contact with her attorney. In the fourth grievance, written and filed three months after her arrival, Child B threatens to harm herself if her grievances remain unresolved.[221] In response to this threat, Child B is placed in isolation and on suicide watch.

In isolation and on suicide watch, Child B is stripped of all but her undergarments, left to sleep on a bare mattress, subject to round the clock "eyeball" supervision and given only thirty minutes of solo outdoor recreation. There is no television in the cell and no contact with other wards. After two days in isolation, Child B makes verbal grievances to two separate staff members that if she is left in isolation, she will "go crazy." Eighteen hours later and in response to intense depression and anxiety resulting from her continued isolation, Child B bangs her head three times against a cinder block wall. This action causes bleeding to her forehead and results in a severe concussion that leaves her with possibly permanent nerve damage in her left arm. While she is in the hospital, a cause of action is filed seeking to enjoin her return to the facility, as well as compensatory and punitive damages under section 1983.

At the preliminary injunction hearing, the evidence shows that the acknowledged policy at the facility and others in the State is to isolate any youth who threatens self-harm and to place said youth on suicide watch. Applying the *Bell* test, the court finds that the effects of isolation were "but an incident of a legitimate non-punitive governmental objective,"[222]

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[221] C.P., the transgender youth/plaintiff in *R.G.*, relayed at one point that she was "having trouble adjusting to HYCF" [no doubt considering the physical and emotional taunts she was enduring there,] and that she was going to try to kill herself. Declaration of C.P., *supra* note 61, at 6. This resulted in her being placed in isolation. *Id.* The underlying causes went unaddressed. *See supra* Part II. *See also* Nelson v. Heyne, 355 F. Supp. 451, 455-56 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974), *cert denied*, 417 U.S. 976 (1974) (plaintiff mutilated himself three times during eight weeks of solitary confinement, and then was apparently punished for the self-mutilation with further isolation, without having received "recommended psychiatric treatment").

[222] *R.G.*, 415 F. Supp. 2d at 1152, 1155. The language "legitimate non-punitive governmental objective" in the context of a due process analysis should not be read to preclude enforcement of Eighth Amendment rights. The due process inquiry focuses on the potential justifications for putting Child B in isolation. The Eighth Amendment

to prevent Child B from harming herself after she threatened to do so in her fourth grievance. The preliminary injunction is denied and summary judgment is granted to the defendants on the damages claims.

Applying the Eighth Amendment analysis described in Part IV.B, an entirely different outcome would be reached, one that would properly afford protection to Child B. First, the conditions of isolation would be found to be "objectively sufficiently serious." Second, the objective deliberate indifference test would be satisfied as a result of the two verbal grievances made by Child B after she was placed in isolation and the lack of staff response to these complaints. Under these circumstances— where even a subjective deliberate indifference test would arguably be satisfied—an Eighth Amendment analysis would likely be successful, while a due process analysis would likely fail. This illustration accordingly shows why it is important to extend Eighth Amendment protection to transgender youth in juvenile detention facilities.

Conclusion

Ideally, recourse to the Eighth Amendment should not be necessary in order to prevent isolation of transgender youths housed in juvenile detention facilities. The goal of preventing isolation can easily be attained through common sense approaches. The states, counties and cities in which juvenile detention facilities are located should adopt policies and procedures that guarantee that all transgender youths in the juvenile justice system, whether or not detained or adjudicated and subsequently housed in juvenile detention facilities, are treated fairly and with respect.[223] Above

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inquiry focuses on the act itself, that is, whether, under the totality of circumstances, putting Child B in isolation is punishment, whether or not intended as such.

[223] As noted *supra* in Part IV.A, jurisdictions are already adopting such policies and procedures. Model proposed policies have also been suggested. In 2007, Dr. Marty Beyer put forth a "Sample Policy for Facilities, Non-discriminatory, Developmentally-Sound Treatment of Lesbian, Gay, Bisexual and Transgender (LGBT) Youth." MARTY BEYER, THE EQUITY PROJECT, SAMPLE PROPOSED POLICY: NON-DISCRIMINATORY, DEVELOPMENTALLY-SOUND TREATMENT OF LESBIAN GAY, BISEXUAL AND TRANSGENDER (LGBT) YOUTH (July 8, 2013), *available at* http://www.equityproject.org/pdfs/Beyer_%20proposed%20LGBT%20policy.pdf. The New Orleans Policy 12.3 referred to *supra* note 184 is largely based on Dr. Beyer's model with some language lifted verbatim from that model. *See also*, MAJD ET AL., *supra* note 1, at 159-65. ("Appendix E: Model Non-Discriminatory Services Policy, Model Policy & Practice Guidelines for Providing Non-Discriminatory Services to Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in Juvenile Justice Facilities"). Part D, concerning Youth Placement, contains isolation banning language identical to that in the New Orleans Policy 12.3.

all, these policies and procedures need to ensure that these youths' constitutional rights are not being violated.[224]

Juvenile detention facility administrators and staff must be trained to enforce these policies and procedures, with on-going training as needed. Adequate training should emphasize the protection of transgender (and other at risk) youth and include sensitivity training with respect to gender identity (and other LGBT-related) issues. Beyond training, effective grievance systems need to be adopted, with grievance channels that are well established, easy for youths to understand, and promptly responsive to grievances. Finally, there needs to be adequate staffing of juvenile detention facilities with sufficient numbers of supervisors in place to supervise both wards and staff.[225]

The practical approaches explained here would effectively eradicate the need to place transgender youth in isolation, whether as a means to resolve housing and protection issues, as punishment for expressing gender identity, or due to a perception that transgender youth are likely to be sexual predators. If facilities nevertheless place a transgender youth in isolation, the youth should be able to prevail in a claim that his or her Eighth Amendment rights were violated.

However, whether or not these common sense approaches are adopted, attorneys should diligently represent their juvenile transgender clients both in and outside the courtroom. Contact with an at-risk transgender client should be maintained after the youth is detained or adjudicated delinquent and sent to a juvenile detention facility. If policies are in place that curtail the use of isolation of transgender youth, attorneys must make sure that these policies are being enforced by following up on any client grievances with juvenile detention facility staff and presiding judges. Regardless, if working with these parties fails to end the practice

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Several other sources also contain comprehensive recommendations meant to improve the treatment of LGBT youth in juvenile justice systems. *See e.g.,* MAJD ET AL., *supra* note 1, at 137-43; FEINSTEIN ET AL., *supra* note 2, at 43-53. Finally, see Letter from Masen Davis et al., *supra* note 56, at 6-24, for a comprehensive outline of proposed "specific standards" that would help lessen the risk of sexual assault of transgender adults and youth in incarceration settings.

[224] *See R.G.*, 415 F. Supp. 2d at 1149-52.

[225] The *R.G.* court points out several factors which could have prevented the substantiated abuse of the plaintiffs at the HYCF: adequate training to prevent abuse and harassment of LGBT youth, staffing numbers that would ensure proper supervision of all wards, a working grievance system in which complaints quickly reached the appropriate staff members and were quickly investigated, and "a classification system to protect vulnerable youth." *Id.* at 1157.

of isolating a transgender client, the attorney must seek injunctive relief to prevent further isolation, and if appropriate, compensatory and punitive damages.[226]

Finally, family and friends of transgender youth must advocate for transgender rights, motivating their local governments and legislatures to adopt these policies and procedures.[227] The LGBT community must become more engaged in this effort as well.[228] In the interim, expanding Eighth Amendment protections to transgender juveniles will result in positive outcomes in the courts. These positive outcomes will in turn give further incentive to state and local governments to adopt meaningful policies and procedures to prevent further violation of Eighth Amendment rights.

Attorneys can and should use the Eighth Amendment to effectively prevent isolation of transgender youth in juvenile detention facilities, whether detained or adjudicated delinquent. The rationales set forth in this paper can also be used to secure Eighth Amendment protection for all juveniles being housed in juvenile detention facilities. Enforcing the rights of juveniles housed in such facilities will lead to an abatement of conditions of confinement that violate the Eight Amendment's proscription against cruel and unusual punishment.

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[226] *See generally* MAJD ET AL., *supra* note 1, at 117-135. In *R.G.*, the court noted that J.D.'s public defender filed a petition for writ of habeas corpus demanding that J.D. be released from the HYCF out of concern for J.D.'s "emotional and physical well-being and safety." *R.G.*, 415 F. Supp. 2d at 1146.

[227] *See* Dolovich, *supra* note 96, at 974-76. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) ("Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of . . . prisons.").

[228] In her 2009 article "Queer Lockdown", Ann Cammett points to the focus of LGBT communities in recent years to secure gay marriage rights and hate crimes legislation. Cammett, *supra* note 31, at 10. Cammett argues that more attention is also needed to address "the challenges flowing from [LGBT] involvement in the criminal justice system" *Id.* at 11.

715 F.2d 269 (1983)

Bruce D. WELLMAN, et al., Plaintiffs-Appellants, Cross-Appellees, v. Gordon H. FAULKNER, et al., Defendants-Appellees, Cross-Appellants.

Nos. 81-3060, 81-3061.

United States Court of Appeals, Seventh Circuit.

Argued September 13, 1982.
Decided August 9, 1983.

271 *270 *271 William E. Marsh, Legal Services Org. of Ind., Indianapolis, Ind., for plaintiffs-appellants, cross-appellees.

David A. Arthur, Deputy Atty. Gen., Indianapolis, Ind., Martha Schatz Volk, Newby, Lewis, Kaminski & Jones, La Porte, Ind., for defendants-appellees, cross-appellants.

Before BAUER and CUDAHY, Circuit Judges, and WEICK, Senior Circuit Judge.[*]

CUDAHY, Circuit Judge.

In these consolidated appeals we consider whether the conditions of imprisonment at the Indiana state prison at Michigan City meet constitutional standards. Plaintiffs challenge the adequacy of Michigan City's medical care, the condition of its physical plant, the level of violence, the amount of time prisoners must spend in their cells and certain prison procedures (or lack thereof) that allegedly heighten the level of tension in the prison. The district court found that the totality of conditions did not violate the eighth amendment but that certain specific constitutional violations were established. *Hendrix v. Faulkner,* 525 F.Supp. 435 (N.D.Ind.1981). We affirm the district court's finding regarding the totality of conditions, its findings of certain specific constitutional violations and the remedies it ordered. We also conclude, however, that plaintiffs have established that the medical care at Michigan City is inadequate by constitutional standards and we therefore reverse and remand for further proceedings to determine further appropriate relief.

The state cross-appeals from the district court's damage award. We vacate the award and remand for consideration of whether the plaintiffs established at trial the requisite personal liability of defendants. We affirm the district court's denial of damages to plaintiffs who did not establish the personal responsibility of defendants.

Medical Care

When a state imposes imprisonment as a punishment for crime, it accepts the obligation to provide persons in its custody with a medical care system that meets minimal standards of adequacy. This obligation is enforceable in federal court, since inadequate medical care for prisoners violates the eighth amendment.[1] *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976); *id.*
272 at 116 n. 13, 97 *272 S.Ct. at 292 n. 13 ("denial of medical care is surely not part of the punishment which civilized nations may impose for crime.") (Stevens, J., dissenting). "When systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers." *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir.1977) (Kaufman, C.J.). Further, the policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Id.* at 54. *Compare Bell v. Wolfish,* 441 U.S. 520, 551 n. 32, 99 S.Ct. 1861, 1880 n. 32, 60 L.Ed.2d 447 (1979) (deferring to prison officials' judgment on means to control smuggling of money, drugs and weapons into prison).

With respect to medical care, plaintiffs can establish an eighth amendment violation only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble,* 429 U.S. at 104, 97 S.Ct. at 291. As a practical matter, "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be demonstrated by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir.1980) (citation omitted), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). *See also Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir.1977).

In the instant case, we think the record contains sufficient evidence of repeated instances of negligent medical treatment together with evidence of general systemic deficiencies to establish that there is deliberate indifference to serious medical needs such that unnecessary suffering is inevitable. For example, two of the three physicians at Michigan City are recent immigrants from Vietnam and, unfortunately, their English language skills are such that they cannot communicate effectively with their patients. A physician's assistant at the prison testified "I've seen [the prisoners] come out storming mad because they do not understand them." Tr. at 662. Even the *defendants'* medical expert testified that he observed a "language barrier between the inmate and the physician on a number of occasions" and acknowledged that this problem could interfere with the quality and effectiveness of medical care. Tr. at 2152-53. An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore unnecessary pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of alleviation, can contribute to unconstitutional deficiencies in medical care.

Nor has the state adequately staffed the psychiatric care component of Michigan City's medical care system. Treatment of the mental disorders of mentally disturbed inmates is a "serious medical need." *Ramos v. Lamm,* 639 F.2d 559, 574 (10th Cir.1980), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); *Inmates v. Pierce,* 612 F.2d 754, 763 (3d Cir.1979); *Bowring v. Godwin,* 551 F.2d 44, 47 (4th Cir.1977); *Finney v. Mabry,* 534 F.Supp. 1026, 1037 (E.D.Ark.1982). At Michigan City, however, the position of staff psychiatrist has been unfilled for over two years, and there seems to be no prospect of filling it. *Defendants'* medical expert saw this as "[t]he most obvious serious deficiency in health care at Indiana State Prison" because "without an on-site psychiatrist there is no one qualified to evaluate and treat psychiatric emergencies such as suicide and homicide candidates, or to follow patients who need to be maintained on long term psychotropic medications." DX HHH at 13. Maintenance on long term psychotropic medications enables patients to avoid the unnecessary suffering of acute episodes of mental illness. Without such care, repeated acute episodes can
273 be predicted.[2] Tr. at 1002-03. As plaintiffs' *273 psychiatric expert explained, a psychiatrist is needed to supervise long term maintenance because "[a] regular physician, that is a non-psychiatric physician is not really in a position to perform the evaluation to make decisions about drug dosage that would require the services of a psychiatrist." Tr. at 1003.[3]

The district court recognized the importance of on-site care, but decided against finding an eighth amendment violation in part because a psychiatric position was authorized for the prison and prison officials had been trying for two years to fill it. We think this circumstance may weigh more heavily against the state than for it, since the position has remained vacant for two years and the authorized salary is, in the district court's words, "woefully inadequate." Despite the apparent good intentions of prison officials, there seems to be no foreseeable cure for this serious systemic deficiency.

In addition, plaintiffs showed many individual instances of medical maltreatment, including several that the district court found constituted eighth amendment violations in and of themselves and for which the district court awarded damages. For example, James Hendrix was denied treatment for a stomach problem for two years, Melon Carroll was denied treatment for a painful abscess for five years and Grady Bobbitt was denied treatment for a dental problem for two years. The district court found that, "[t]hese individuals endured for extended periods of time a systematic failure to receive treatment, even though their ailments were made known." Order of November 25, 1981, Defendants-Appellees' Appendix at 97.

In addition, there was a good deal of evidence about the seemingly inadequate medical care received by James Stubblefield, who died of heart failure at age 47. Mr. Stubblefield first came to the prison infirmary at 3:00 PM on February 9, 1979, and complained of chest pains. His blood pressure and pulse were checked and he was sent back to his cell. By 6:00 PM, Mr. Stubblefield returned to the infirmary again complaining of chest pain. He appeared to be in "severe distress" and had trouble breathing. PX 88. Nevertheless, no physician came to check on Stubblefield. A prison doctor was called by telephone and he prescribed a mild tranquilizer. Stubblefield was then admitted to the prison infirmary. By 7:30 PM, Stubblefield's blood pressure had dropped to 60/40 and his pulse was irregular. Plaintiffs' medical expert and defendants' medical expert agreed that Stubblefield "had suffered some type of cardiovascular catastrophe at that point." "He was in cardiovascular shock." Tr. at 2120, 2121. Still no doctor came to see Stubblefield. At 9:45 PM, Stubblefield's blood pressure was still only 60/40 and his pulse rate was up to 120 beats per minute. The infirmary progress notes state, "request [the doctor] to come in again and again he declined." PX 88. Finally, after four attempts to get [the doctor] to see Stubblefield, the infirmary called a second prison doctor. This doctor prescribed some medication for Stubblefield, though he did not order that Stubblefield be sent to the hospital until midnight, nine hours after Stubblefield had begun alerting the prison personnel to his chest pain.

Plaintiffs' medical expert testified that there "were very serious deficiencies in the care of Mr. Stubblefield." Tr. at 755. Defendants' medical expert did not dispute this
274 conclusion. *See* Tr. at 2119-23. Instead, defendants' medical expert testified *274 that the modern treatment for cardiovascular shock is to place the patient in an intensive care unit. Yet five hours passed from the time Stubblefield was obviously in cardiovascular shock and the time he was finally taken to the hospital. He died the following day.

There also have been very disturbing problems in stocking necessary medical supplies. Tr. 639-40. One of the more distressing instances of this problem is the prison's apparently continuing difficulty in stocking disposable waste-collection bags for inmates who have had a colostomy. These inmates have been forced to wash out and re-use bags that are designed for single-use. A physician's assistant at the prison explained why this practice literally stank: "It's very foul smelling for one, causes problems in the cells next to the inmates. The seals on these are only designed to be used once so they do not seal properly afterwards. They do not drain correctly after being used." Tr. at 640.

Therefore, given the gross deficiencies in staffing, the shocking delays in treatment and the ongoing severe problems in stocking needed supplies, we think plaintiffs have established that there is a deliberate indifference to serious medical needs of prisoners at Michigan City such that a great deal of unnecessary suffering is inevitable. We, of course, recognize that many of these appalling medical deficiencies are closely related to the lack of funds to support these activities. We understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment.

Overcrowding

Defendants appeal from the district court's holding that Michigan City is unconstitutionally overcrowded: "[t]he most serious problem at the prison is simple overcrowding. Given the nature and age of the physical plant it is pervasive and cuts across all other issues here. Given the most generous application of judicial restraint it raises serious Eighth Amendment problems. In the context of the physical plant and the limits on staffing this overcrowding constitutes a violation of the Eighth Amendment of the Constitution of the United States. This Court reaches this conclusion with greatest reluctance but the facts compel the conclusion." *Hendrix,* 525 F.Supp. at 527. Accordingly, the district court ordered a two-stage reduction in population from 1950 inmates at time of trial to 1750 inmates by December 31, 1982 and to 1615 inmates by December 31, 1983.

We think the district court's conclusion is broadly supported by the Record. Michigan City's physical plant is more than one hundred years old. Given its age, it is not surprising that there are problems with plumbing, electrical wiring and rodent and insect infestation. Routine maintenance in the cells, corridors and main food service area is deficient. As discussed above, the medical care system makes unnecessary suffering inevitable, and overcrowding simply heightens this pain. Overcrowding also has resulted in extremely limited time for outside recreation and unreasonable periods of time some prisoners must spend locked in exceedingly cramped cells. For example, prisoners in the A & O Unit have been spending between 22 and 23 1/2 hours per day in their cells, although the cells' floor space *only amounts to 17 square feet.* There was testimony that some inmates have not had outside recreation in five months. There has also been an extreme shortage of prison personnel in recent years. Hence, we agree with the district court that at current population levels Michigan City's physical and personnel resources are so overtaxed that unnecessary suffering is serious and inevitable.

Other Conditions of Confinement

Various prison conditions do not exist in isolation. Rather, challenged conditions must be viewed in the light of other prison conditions that may aggravate or mitigate the effect of the challenged conditions. For example, "the constitutionality
275 of double-celling involves an assessment of many factors, *275 including, *inter alia,* the duration of the confinement, the size of the cells and the opportunities for inmates to leave their cells during the normal prison routine." *Madyun v. Thompson,* 657 F.2d 868, 872 n. 5 (7th Cir.1981). *See Ruiz v. Estelle,* 679 F.2d 1115, 1139-40 (5th Cir.), *modified,* 688 F.2d 266 (5th Cir.1982), *cert. denied,* ___ U.S. ___, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Villanueva v. George,* 659 F.2d 851, 854 (8th Cir.1981) (en banc). *See also Smith v. Fairman,* 690 F.2d 122, 125 (7th Cir.1982). At the same time, "otherwise unquestionably constitutional conditions [do not] become unconstitutional by their aggregation." *Madyun,* 657 F.2d at 874 n. 10. *But see Rhodes v. Chapman,* 452 U.S. 337, 362-63, 101 S.Ct. 2392, 2407-08, 69 L.Ed.2d 59 (Brennan, J., concurring).

With these standards in mind, we have reviewed the evidence respecting plaintiffs' challenges to the prison's physical environment, the level of violence and several prison practices that are alleged to create unnecessary tension in the institution.[4] Based on this review, we cannot say that the district court erred in determining that these conditions of confinement were insufficient to establish further eighth amendment violations.

Damages

Plaintiffs appeal from the district court's denial of damages to the named plaintiffs in 81-3060. Defendants cross-appeal from the district court's award of five hundred dollars each to plaintiffs Hendrix and Bobbitt and one thousand dollars to plaintiff Carroll. Damages were awarded to these plaintiffs in 81-3061 for specific instances of medical maltreatment — these prisoners were denied adequate medical care for several years — and not for the general deficiencies in medical facilities and personnel. Defendants contend that none of the plaintiffs in 81-3060 or in 81-3061 presented at trial any evidence of personal involvement, knowledge or acquiescence in these denials of medical care by any of the named defendants. *See Adams v. Pate,* 445 F.2d 105 (7th Cir.1971). The named defendants are the Warden, the Commissioner and the Director of Classification and Treatment.[5]

To recover damages under 42 U.S.C. § 1983, a plaintiff must establish a defendant's personal responsibility for the claimed deprivation of a constitutional right. *Duncan v. Duckworth,* 644 F.2d 653, 655 (7th Cir.1981). The personal responsibility requirement is satisfied "if the official acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Crowder v. Lash,* 687 F.2d 996, 1005 (7th Cir.1982).

We consider first the plaintiffs' argument for a modification, based on several of our cases, in the procedural requirements for proving defendants' personal responsibility. Thus, several of our cases have held that, under some circumstances, the responsibility of senior prison officials can be assumed at the pleading stage, pending discovery of those who were directly responsible for whatever deprivation may have occurred. *Duncan,* 644 F.2d 653, 655; *Chavis v. Rowe,* 643 F.2d 1281, 1290 n. 9 (7th Cir.), *cert. denied,* 454 U.S. 907, 102 S.Ct. 415, 70 L.Ed.2d 225 (1981). Plaintiffs argue that this rule should be applied and extended in the case before us so that a named defendant's liability may be presumed until the defendant identifies who was directly responsible if the named defendant was not. "If those officials so named or called to testify all remain silent as to the persons responsible for the deprivations and such information is in the
276 hands of defendants but not necessarily discoverable by plaintiffs, *276 then liability should attach to those officials who are in a position to know but, through a conspiracy of silence, do not disclose that information." Plaintiffs-Appellants' Reply Brief at 23.

This argument is similar to one that carried the day for the plaintiff in *Ybarra v. Spangard,* 25 Cal.2d 486, 154 P.2d 687 (1944). Mr. Ybarra suffered an injury of unknown origin to his shoulder between the time he was anesthetized for an appendectomy and the time he awoke in the recovery room. Ybarra argued that res ipsa loquitur should be applied against all of the doctors and hospital employees connected with the operation, though presumably not all of them were responsible. The defendants argued that they were entitled to a dismissal because the plaintiff had not shown which of the defendants was responsible for his injury. The California Supreme Court held that Ybarra could proceed to trial because under the circumstances it was appropriate to place the burden of initial explanation for the injury on the defendants. At the subsequent trial, each of the testifying defendants denied seeing anything occur that could have caused the injury to the plaintiff. The trial court held, however, that this evidence did not overcome the plaintiff's prima facie case and entered judgment against all the defendants. The California appellate court affirmed the judgment. *Ybarra v. Spangard,* 93 Cal.App.2d 43, 208 P.2d 445 (1949) ("*Ybarra* II").

The principal basis for applying res ipsa loquitur in *Ybarra* apparently was the special circumstances of the medical personnel-patient relationship. "The basis of the decision appears quite definitely to have been the special responsibility for the plaintiff's safety undertaken by everyone concerned." W. Prosser, HANDBOOK OF THE LAW OF TORTS 223 (4th ed. 1971). If so, *Ybarra* is analogous to the case before us insofar as prison authorities have a special responsibility to inmates who are totally dependent upon them to receive medical treatment. *Estelle,* 429 U.S. at 103, 97 S.Ct. at 290. *Ybarra* is, however, not analogous to the degree that these plaintiffs, unlike Ybarra, were not unconscious at the time they suffered the alleged injuries.

Considering all relevant factors, we do not think it appropriate in the case before us to extend, in the fashion of *Ybarra* II, the presumption of senior prison official responsibility beyond the pleading stage. *See Duncan,* 644 F.2d 653. Unlike *Ybarra,* the defendants here are not the individuals who were immediately responsible for plaintiffs' care. Also, unlike *Ybarra* in which the standard of liability was mere negligence, in the instant case negligence would not be enough, *Estelle,* 429 U.S. at 106, 97 S.Ct. at 292. We are reluctant under these facts to presume a higher degree of culpability. Finally, although prisoners are to some extent handicapped in identifying who precisely is responsible for their maltreatment, we cannot say that they are so limited in their access to information that the burden of explanation should be shifted to defendants beyond the point indicated in *Duncan,* 644 F.2d 653. We confront the problem here after trial, when through discovery and otherwise, there should have been an opportunity to identify the directly culpable parties. As indicated above different considerations would apply on a motion to dismiss or otherwise early in the proceedings.

We next consider plaintiffs' entitlement to damages under the existing standards. With respect to the plaintiffs in 81-3060, the district court denied them damages because they had not shown that any of the named defendants were responsible for the injuries they suffered. *Hendrix,* 525 F.Supp. at 447, 450, 454, 457, 459 and 463. Having reviewed the evidence and plaintiffs' arguments, we cannot conclude that the district court erred in finding that the personal responsibility requirements of *Adams v. Pate,* 445 F.2d 105, and its progeny were not satisfied. Of course, the same principles governing personal responsibility apply to the medical claims of these plaintiffs as to the claims of Hendrix, Bobbitt and Carroll, explained below, and the district court, if appropriate, may consider this on remand.

277 *277 With respect to those plaintiffs in 81-3061 who were awarded damages (Messrs. Hendrix, Bobbitt and Carroll), we vacate the awards and remand for clarification and appropriate disposition. The district court, in its post-trial Order, stated with respect to Hendrix, Bobbitt and Carroll:

> These individuals endured for extended periods of time a systematic failure to receive treatment, even though their ailments were made known.

Order of November 25, 1981, Defendants-Appellees' Appendix at 97. This statement of the district court can be read as suggesting that some or all of the named defendants knew of and acquiesced in the nontreatment of these plaintiffs so that there may be an "affirmative link" between the defendants and the constitutional violation. *See Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir.1983). After making this statement, however, the district court cited *Duncan v. Duckworth,* 644 F.2d 653 (7th Cir.1981). As we discussed above, exclusive reliance on *Duncan* to establish liability of persons having no "affirmative link" to the constitutional violation would be inappropriate in this case after trial on the merits. On the other hand, there may be a connection through "systematic" conditions for which senior prison officials may have been responsible. Presumably, the latter circumstance would involve problems of proximate cause which we are not now in a position to evaluate. Thus, we vacate the award and remand for clarification of the plaintiffs' entitlement to damages under *Adams v. Pate,* 445 F.2d 105, and its progeny.

Costs

The district court held that each party should bear its own costs. This court follows the general rule about the award of costs, namely, that there is a presumption in favor of awarding costs to the prevailing party. *Popeil Brothers, Inc. v. Schick Electric, Inc.,* 516 F.2d 772, 774-75 (7th Cir.1975). To prevent an award of costs, the losing party must overcome the presumption. *Id.* at 775.

In light of the additional relief we have ordered herein, we vacate the district court's order and remand for a determination by the district court whether costs should not now be awarded to plaintiffs. *See* 6 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE ¶ 54.70 (2d ed. 1982).

The cause is affirmed in part, vacated in part and remanded for further proceedings in accordance with this opinion.

[*] The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

[1] The eighth amendment is applicable to the state through the fourteenth amendment. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[2] Plaintiffs' psychiatric expert testified that, "[g]enerally, the occurrence of repeated episodes during which such an individual becomes floridly psychotic is accompanied by a progressive deterioration in psychological and intellectual functioning which leads to more and more serious impairment of that person's capability of adjustment." Tr. at 1004.

[3] Warden Duckworth testified that hiring a psychiatrist was the single greatest need he saw for the prison. A psychiatrist would not only be beneficial to the mentally ill patients themselves but would also benefit the rest of the inmates because the mentally ill patients make life less bearable for the majority. Tr. at 2340. Warden Duckworth explained that he has been unable to hire a psychiatrist because the authorized salary is too low and he cannot do anything about raising it.

[4] Plaintiffs argue that "unnecessary tension in the institution is created by arbitrary and racially harassing body cavity searches, harassment of visitors, illegal interference with inmate mail, frequent mismanagement of inmates' property coupled with an inadequate grievance system, unsafe work locations and arbitrary and capricious disciplinary procedures." Plaintiffs-Appellants' Brief at 10-11.

[5] The "treatment" referred to in Edward Jones' job title apparently does not mean medical treatment. *See* Tr. at 1953-91.

501 U.S. 294 (1991)

WILSON
v.
SEITER ET AL.

No. 89-7376.

Supreme Court of the United States.

Argued January 7, 1991.
Decided June 17, 1991.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

295 *295 *Elizabeth Alexander* argued the cause for petitioner. With her on the briefs were *Alvin J. Bronstein, Gordon J. Beggs, John A. Powell,* and *Steven A. Shapiro.*

Deputy Solicitor General Bryson argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Starr, Assistant Attorney General Dunne, Deputy Solicitor General Shapiro, Deputy Assistant Attorney General Clegg, Michael R. Dreeben, David K. Flynn,* and *Thomas E. Chandler.*

Rita S. Eppler, Assistant Attorney General of Ohio, argued the cause for respondents. With her on the brief were *Anthony J. Celebrezze, Jr.,* Attorney General, *Nancy J. Miller,* and *Cherry Lynne Poteet* and *Nancy Johnston,* Assistant Attorneys General.[*]

296 *296 JUSTICE SCALIA delivered the opinion of the Court.

This case presents the questions whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required.

Petitioner Pearly L. Wilson is a felon incarcerated at the Hocking Correctional Facility (HCF) in Nelsonville, Ohio. Alleging that a number of the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, he brought this action under 42 U. S. C. § 1983 against respondents Richard P. Seiter, then Director of the Ohio Department of Rehabilitation and Correction, and Carl Humphreys, then warden of HCF. The complaint alleged overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates. Petitioner sought declaratory and injunctive relief, as well as $900,000 in compensatory and punitive damages. App. 2-9, 53-54, 62-63.

The parties filed cross-motions for summary judgment with supporting affidavits. Petitioner's affidavits described the challenged conditions and charged that the authorities, after notification, had failed to take remedial action. Respondents' affidavits denied that some of the alleged conditions existed, and described efforts by prison officials to improve the others.

The District Court granted summary judgment for respondents. The Court of Appeals for the Sixth Circuit affirmed, 893 F. 2d 861 (1990), and we granted certiorari, 498 U. S. 808 (1990).

I

The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, 297 *297 *Robinson* v. *California,* 370 U. S. 660, 666 (1962), prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes. In *Estelle* v. *Gamble,* 429 U. S. 97 (1976), we first acknowledged that the provision could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment. We rejected, however, the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind. Since, we said, only the "`unnecessary *and wanton* infliction of pain'" implicates the Eighth Amendment, *id.,* at 104 (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 173 (1976) (joint opinion) (emphasis added)), a prisoner advancing such a claim must, at a minimum, allege "deliberate indifference" to his "serious" medical needs. 429 U. S., at 106. "It is *only* such indifference" that can violate the Eighth Amendment, *ibid.* (emphasis added); allegations of "inadvertent failure to provide adequate medical care," *id.,* at 105, or of a "negligent. . . diagnos[is]," *id.,* at 106, simply fail to establish the requisite culpable state of mind.

Estelle relied in large measure on an earlier case, *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947), which involved not a prison deprivation but an effort to subject a prisoner to a second electrocution after the first attempt failed by reason of a malfunction in the electric chair. There Justice Reed, writing for a plurality of the Court, emphasized that the Eighth Amendment prohibited "the *wanton* infliction of pain," *id.,* at 463 (emphasis added). Because the first attempt had been thwarted by an "unforeseeable accident," the officials lacked the culpable state of mind necessary for the punishment to be regarded as "cruel," regardless of the actual suffering inflicted. "The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell 298 *298 block." *Id.,* at 464. Justice Frankfurter, concurring solely on the basis of the Due Process Clause of the Fourteenth Amendment, emphasized that the first attempt had failed because of "an innocent misadventure," *id.,* at 470, and suggested that he might reach a different conclusion in "a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt," *id.,* at 471.

After *Estelle,* we next confronted an Eighth Amendment challenge to a prison deprivation in *Rhodes* v. *Chapman,* 452 U. S. 337 (1981). In that case, inmates at the Southern Ohio Correctional Facility contended that the lodging of two inmates in a single cell ("double celling") constituted cruel and unusual punishment. We rejected that contention, concluding that it amounts "[a]t most . . . to a theory that double celling inflicts pain," *id.,* at 348-349, but not that it constitutes the "unnecessary and wanton infliction of pain" that violates the Eighth Amendment, *id.,* at 346. The Constitution, we said, "does not mandate comfortable prisons," *id.,* at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," *id.,* at 347, are sufficiently grave to form the basis of an Eighth Amendment violation.

Our holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?), and we did not consider the subjective component (Did the officials act with a sufficiently culpable state of mind?). That *Rhodes* had not eliminated the subjective component was made clear by our next relevant case, *Whitley* v. *Albers,* 475 U. S. 312 (1986). There an inmate shot by a guard during an attempt to quell a prison disturbance contended that he had been subjected to cruel and unusual punishment. We stated:

> "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not 299 *299 purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is *obduracy and wantonness, not inadvertence or error in good faith,* that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.,* at 319 (emphasis added; citations omitted; internal quotation marks omitted).

These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.[1] See also *Graham* v. *Connor,* 490 U. S. 386, 398 (1989). Petitioner concedes that this is so with respect to *some* claims of cruel and unusual prison conditions. 300 *300 He acknowledges, for instance, that if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm. Reply Brief for Petitioner 12-14. Petitioner, and the United States as *amicus curiae* in support of petitioner, suggests that we should draw a distinction between "short-term" or "one-time" conditions (in which a state-of-mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment.* If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify. As Judge Posner has observed:

> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985." *Duckworth* v. *Franzen,* 780 F. 2d 645, 652 (CA7 1985), cert. denied, 479 U. S. 816 (1986).

See also *Johnson* v. *Glick,* 481 F. 2d 1028, 1032 (CA2) (Friendly, J.), ("The thread common to all [Eighth Amendment prison cases] is that `punishment' has been deliberately administered for a penal or disciplinary purpose"), cert. denied *sub nom. John* v. *Johnson,* 414 U. S. 1033 (1973). Cf. *Block* v. *Rutherford,* 468 U. S. 576, 584 (1984); *Bell* v. *Wolfish,* 441 U. S. 520, 537-539 (1979). The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent, cf. *Canton* v. *Harris,* 489 U. S. 378, 390, n. 10 (1989); but there is no logical reason 301 *301 why it should cause the *requirement* of intent to evaporate. The proposed short-term/long-term distinction also defies rational implementation. Apart from the difficulty of determining the day or hour that divides the two categories (Is it the same for *all* conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing. Cf. *McCarthy* v. *Bronson,* 500 U. S. 136, 143-144 (1991).[2]

The United States suggests that a state-of-mind inquiry might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions. Even if that were so, it is hard to understand how it could control the meaning of "cruel and unusual punishments" in the Eighth Amendment. An intent requirement is either implicit in the word "punishment" or is not; it cannot be alternately 302 *302 required and ignored as policy considerations might dictate. At any rate, the validity of a "cost" defense as negating the requisite intent is not at issue in this case, since respondents have never advanced it. Nor, we might note, is there any indication that other officials have sought to use such a defense to avoid the holding of *Estelle* v. *Gamble,* 429 U. S. 97 (1976).

II

Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind, it remains for us to consider what state of mind applies in cases challenging prison conditions. As described above, our cases say that the offending conduct must be *wanton. Whitley* makes clear, however, that in this context wantonness does not have a fixed meaning but must be determined with "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U. S., at 320. Where (as in *Whitley*) officials act in response to a prison disturbance, their actions are necessarily taken "in haste, under pressure," and balanced against "competing institutional concerns for the safety of prison staff or other inmates." *Ibid.* In such an emergency situation, we found that wantonness consisted of acting "`maliciously and sadistically for the very purpose of causing harm.'" *Id.,* at 320-321 (quoting *Johnson,* 481 F. 2d, at 1033). See also *Dudley* v. *Stubbs,* 489 U. S. 1034, 1037-1038 (1989) (O'CONNOR, J., dissenting from denial of certiorari). In contrast, "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities," *Whitley, supra,* at 320, so that in that context, as *Estelle* held, "deliberate indifference" would constitute wantonness.

The parties agree (and the lower courts have consistently held, see, *e. g., LaFaut* v. *Smith,* 834 F. 2d 389, 391-392 (CA4 1987)), that the very high state of mind prescribed by 303 *303 *Whitley* does not apply to prison conditions cases. Petitioner argues that, to the extent officials' state of mind is relevant at all, there is no justification for a standard more demanding than *Estelle*'s "deliberate indifference." Respondents counter that "deliberate indifference" is appropriate only in "cases involving personal injury of a physical nature," and that a malice standard should be applied in cases such as this, which "do not involve . . . detriment to bodily integrity, pain, injury, or loss of life." Brief for Respondents 28-29.

We do not agree with respondents' suggestion that the "wantonness" of conduct depends upon its effect upon the prisoner. *Whitley* teaches that, assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, see *Rhodes* v. *Chapman,* 452 U. S. 337 (1981), whether it can be characterized as "wanton" depends upon the constraints facing the *official.* From that standpoint, we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions. Thus, as retired Justice Powell has concluded: "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the `deliberate indifference' standard articulated in *Estelle.*" *LaFaut,* 834 F. 2d, at 391-392. See also *Lopez* v. *Robinson,* 914 F. 2d 486, 492 (CA4 1990); *Givens* v. *Jones,* 900 F. 2d 1229, 1234 (CA8 1990); *Cortes-Quinones* v. *Jimenez-Nettleship,* 842 F. 2d 556, 304 *304 558 (CA1), cert. denied, 488 U. S. 823 (1988); *Morgan* v. *District of Columbia,* 263 U. S. App. D. C. 69, 77-78, 824 F. 2d 1049, 1057-1058 (1987).

III

We now consider whether, in light of the foregoing analysis, the Sixth Circuit erred in affirming the District Court's grant of summary judgment in respondents' favor.

As a preliminary matter, we must address petitioner's contention that the Court of Appeals erred in dismissing, before it reached the state-of-mind issue, a number of claims (inadequate cooling, housing with mentally ill inmates, and overcrowding) on the ground that, even if proved, they did not involve the serious deprivation required by *Rhodes.* A court cannot dismiss any challenged condition, petitioner contends, as long as other conditions remain in dispute, for each condition must be "considered as part of the overall conditions challenged," Brief for Petitioner 36. Petitioner bases this contention upon our observation in *Rhodes* that conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. 452 U. S., at 347.

As other courts besides the Court of Appeals here have understood, see *Wellman* v. *Faulkner,* 715 F. 2d 269, 275 (CA7 1983), cert. denied, 468 U. S. 1217 (1984); *Hoptowit* v. *Ray,* 682 F. 2d 1237, 1247 (CA9 1982); *Wright* v. *Rushen,* 642 F. 2d 1129, 1133 (CA9 1981), our statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts. *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise — for example, a low cell temperature at night combined with a failure to issue blankets. Compare *Spain* v. *Procunier,* 600 F. 2d 189, 199 (CA9 1979) (outdoor exercise required when prisoners otherwise confined in small cells almost 24 hours 305 *305 per day), with *Clay* v. *Miller,* 626 F. 2d 345, 347 (CA4 1980) (outdoor exercise not required when prisoners otherwise had access to dayroom 18 hours per day). To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists. While we express no opinion on the relative gravity of the various claims that the Sixth Circuit found to pass and fail the threshold test of serious deprivation, we reject the contention made here that no claim can be found to fail that test in isolation.

After disposing of the three claims on the basis of *Rhodes,* the Court of Appeals proceeded to uphold the District Court's dismissal of petitioner's remaining claims on the ground that his affidavits failed to establish the requisite culpable state of mind. The critical portion of its opinion reads as follows:

> "[T]he *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim." 893 F. 2d, at 867.

It appears from this, and from the consistent reference to "the *Whitley* standard" elsewhere in the opinion, that the court believed that the criterion of liability was whether respondents acted "maliciously and sadistically for the very purpose of causing harm," *Whitley,* 475 U. S., at 320-321. To be sure, mere negligence would satisfy neither that nor the more lenient "deliberate indifference" standard, so that any error on the point may have been harmless. Conceivably, however, the court would have given further thought to 306 *306 its finding of "[a]t best . . . negligence" if it realized that that was not merely an argument *a fortiori,* but a determination almost essential to the judgment. Out of an abundance of caution, we vacate the judgment of the Sixth Circuit and remand the case for reconsideration under the appropriate standard.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

The majority holds that prisoners challenging the conditions of their confinement under the Eighth Amendment must show "deliberate indifference" by the responsible officials. Because that requirement is inconsistent with our prior decisions, I concur only in the judgment.

It is well established, and the majority does not dispute, that pain or other suffering that is part of the punishment imposed on convicted criminals is subject to Eighth Amendment scrutiny without regard to an intent requirement. The linchpin of the majority's analysis therefore is its assertion that "[i]f the pain inflicted is not formally meted out *as punishment by the statute or the sentencing judge,* some mental element must be attributed to the inflicting officer before it can qualify." *Ante,* at 300 (emphasis added). That reasoning disregards our prior decisions that have involved challenges to conditions of confinement, where we have made it clear that the conditions are themselves *part of the punishment,* even though not specifically "meted out" by a statute or judge.

We first considered the relationship between the Eighth Amendment and conditions of confinement in *Hutto* v. *Finney,* 437 U. S. 678 (1978). There, the District Court had entered a series of remedial orders after determining that the conditions in the Arkansas prison system violated the Eighth Amendment. The prison officials, while conceding that the conditions were cruel and unusual, challenged two aspects of 307 *307 the District Court's relief: (1) an order limiting punitive isolation to 30 days; and (2) an award of attorney's fees.

In upholding the District Court's limitation on punitive isolation, we first made it clear that the conditions of confinement are part of the punishment that is subject to Eighth Amendment scrutiny:

> "The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, `proscribe[s] more than physically barbarous punishments.' *Estelle* v. *Gamble,* 429 U. S. 97, 102 [(1976)]. It prohibits penalties that are grossly disproportionate to the offense, *Weems* v. *United States,* 217 U. S. 349, 367 [(1910)], as well as those that transgress today's `"broad and idealistic concepts of dignity, civilized standards, humanity, and decency."' *Estelle* v. *Gamble, supra,* at 102, quoting *Jackson* v. *Bishop,* 404 F. 2d 571, 579 (CA8 1968). *Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.*" *Id.,* at 685 (emphasis added).

Focusing only on the objective conditions of confinement, we then explained that we found "no error in the [District Court's] conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment." *Id.,* at 687.

In *Rhodes* v. *Chapman,* 452 U. S. 337 (1981), we addressed for the first time a *disputed* contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment. See *id.,* at 344-345. There, prisoners challenged the "double celling" of inmates at an Ohio prison. In addressing that claim, we began by reiterating the various bases for an Eighth Amendment challenge:

> "Today the Eighth Amendment prohibits punishments which, although not physically barbarous, `involve the unnecessary and wanton infliction of pain,' *Gregg* v. 308 *308 *Georgia,* [428 U. S. 153,] 173 [(1976)], or are grossly disproportionate to the severity of the crime, *Coker* v. *Georgia,* 433 U. S. 584, 592 (1977) (plurality opinion); *Weems* v. *United States,* 217 U. S. 349 (1910). Among `unnecessary and wanton' inflictions of pain are those that are `totally without penological justification.' *Gregg* v. *Georgia, supra,* at 183; *Estelle* v. *Gamble,* 429 U. S. 97, 103 (1976).
>
> "No static `test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment `must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion)." *Id.,* at 346 (footnote omitted).

We then explained how those principles operate in the context of a challenge to conditions of confinement:

> "*These principles apply when the conditions of confinement compose the punishment at issue.* Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In *Estelle* v. *Gamble, supra,* we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U. S., at 103. In *Hutto* v. *Finney, supra,* the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto,* alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized 309 *309 in *Gamble, supra,* at 103-104." *Id.,* at 347 (emphasis added).

Finally, we applied those principles to the conditions at issue and found that "there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." *Id.,* at 348. *Rhodes* makes it crystal clear, therefore, that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is "formally meted out *as punishment* by the statute or the sentencing judge," *ante,* at 300—we examine only the objective severity, not the subjective intent of government officials.

The majority relies upon our decisions in *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Estelle* v. *Gamble,* 429 U. S. 97 (1976); and *Whitley* v. *Albers,* 475 U. S. 312 (1986), but none of those cases involved a challenge to conditions of confinement. Instead, they involved challenges to specific acts or omissions directed at individual prisoners. In *Gamble,* for example, the challenge was not to a general lack of access to medical care at the prison, but to the allegedly inadequate delivery of that treatment to the plaintiff. Similarly, in *Whitley* the challenge was to the action of a prison guard in shooting the plaintiff during a riot, not to any condition in the prison. The distinction is crucial because "unlike `conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley,* the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie* v. *Crawford,* 833 F. 2d 47, 50 (CA5 1987) *(per curiam),* reinstated in part en banc, 858 F. 2d 1101, 1103 (CA5 1988).

Moreover, *Whitley* expressly supports an objective standard for challenges to conditions of confinement. There, in discussing the Eighth Amendment, we stated:

> "An express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble,* 429 U. S. 97, 104 (1976) (`deliberate 310 *310 indifference' to a prisoner's serious medical needs is cruel and unusual punishment), and harsh *`conditions of confinement' may constitute cruel and unusual punishment* unless such conditions `are part of the penalty that criminal offenders pay for their offenses against society.' *Rhodes* v. *Chapman,* 452 U. S. 337, 347 (1981)." 475 U. S., at 319 (emphasis added).

The majority places great weight on the subsequent dictum in *Whitley* that "`[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.'" *Ibid.* See *ante,* at 298-299. The word "conduct" in that statement, however, is referring to "conduct that does not purport to be punishment at all," 475 U. S., at 319, rather than to the "harsh `conditions of confinement'" referred to earlier in the opinion.

Not only is the majority's intent requirement a departure from precedent, it likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.[1]

311 *311 The majority's approach also is unwise. It leaves open the possibility, for example, that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials. See *ante,* at 301-302.[2] In my view, having chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney* v. *Winnebago Cty. Dept. of Social Services,* 489 U. S. 189, 198-200 (1989). As the United States argues: "[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." Brief for United States as *Amicus Curiae* 19. The ultimate result of today's decision, I fear, is that "serious deprivations of basic human needs," *Rhodes,* 452 U. S., at 347, will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."

[*] *John Boston* filed a brief for the American Public Health Association as *amicus curiae* urging reversal.

A brief of *amici curiae* was filed for the State of Michigan et al. by *Frank J. Kelley,* Attorney General of Michigan, *Gay Secor Hardy,* Solicitor General, and *Thomas C. Nelson,* Assistant Attorney General, joined by the Attorneys General for their respective jurisdictions as follows: *Douglas B. Bailey* of Alaska, *Ron Fields* of Arkansas, *John K. Van de Kamp* of California, *Clarine Nardi Riddle* of Connecticut, *Charles M. Oberly III* of Delaware, *Warren Price III* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Robert T. Stephen* of Kansas, *Frederic J. Cowan* of Kentucky, *William L. Webster* of Missouri, *Robert J. Del Tufo* of New Jersey, *Dave Frohnmayer* of Oregon, *Ernest D. Preate, Jr.,* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *Mary Sue Terry* of Virginia, and *Hector Rivera-Cruz* of Puerto Rico.

[1] The concurrence would distinguish these cases on the ground that they did not involve "conditions of confinement" but rather "specific acts or omissions directed at individual prisoners." *Post,* at 309. It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not—much less that the one constitutes "punishment" and the other does not. The concurrence's imaginative interpretation of *Estelle* v. *Gamble,* 429 U. S. 97 (1976), has not been imagined by the Courts of Appeals—or as far as we are aware even litigants before the Courts of Appeals—which have routinely applied the "deliberate indifference" requirement to claims of prisonwide deprivation of medical treatment. See, *e. g., Toussaint* v. *McCarthy,* 801 F. 2d 1080, 1111-1113 (CA9 1986); *French* v. *Owens,* 777 F. 2d 1250, 1254-1255 (CA7 1985).

Of course the concurrence does not say that the deprivation must be imposed upon *all* prisoners to rise to the level of a "condition of confinement" and of "punishment"—only that it does not suffice if directed at "individual prisoners." One wonders whether depriving all the individual prisoners who are murderers would suffice; or all the individual prisoners in Cellblock B. The concurrence's distinction seems to us not only unsupportable in principle but unworkable in practice.

[2] The concurrence, going beyond what both petitioner and the United States have argued here, takes the position that *all* conditions that exist in prison, even though prison officials neither know nor have reason to know about them, constitute "punishment." For the reasons we have described, there is no basis for that position in principle, and it is contradicted by our cases. The concurrence purports to find support for it in two cases, *Hutto* v. *Finney,* 437 U. S. 678 (1978), and *Rhodes* v. *Chapman,* 452 U. S. 337 (1981). In *Hutto,* as the concurrence's description makes clear, the question whether the conditions remedied by the District Court's order constituted cruel and unusual punishment was not at issue. Indeed, apart from attorney's fees, the only element of the order at issue in *any* respect pertained to "punitive isolation," *post,* at 307. Even if one were to think that we passed upon the "cruel and unusual punishment" point uninvited and *sub silentio,* punitive isolation is self-evidently inflicted with punitive intent. As for *Rhodes,* the concurrence describes that as addressing "for the first time a *disputed* contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment." *Post,* at 307 (emphasis in original). What it does not mention is that the only element disputed (as well as the only element decided, see *supra,* at 298) was whether the conditions were a sufficiently serious deprivation to violate the constitutional standard. When that is borne in mind, it is evident that the lengthy quotation from that case set forth in the concurrence, *post,* at 307-309, provides no support, even by way of dictum, for the concurrence's position.

[1] It is telling that the lower courts often have examined only the objective conditions, and not the subjective intent of government officials, when considering Eighth Amendment challenges to conditions of confinement. See, *e. g., Tillery* v. *Owens,* 907 F. 2d 418, 426-428 (CA3 1990); *Foulds* v. *Corley,* 833 F. 2d 52, 54-55 (CA5 1987); *French* v. *Owens,* 777 F. 2d 1250, 1252-1254 (CA7 1985), cert. denied, 479 U. S. 817 (1986); *Hoptowit* v. *Spellman,* 753 F. 2d 779, 784 (CA9 1985).

[2] Among the lower courts, "[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith* v. *Sullivan,* 611 F. 2d 1039, 1043-1044 (CA5 1980). See also, *e. g., Wellman* v. *Faulkner,* 715 F. 2d 269, 274 (CA7 1983), cert. denied, 468 U. S. 1217 (1984); *Ramos* v. *Lamm,* 639 F. 2d 559, 573, n. 19 (CA10 1980), cert. denied, 450 U. S. 1041 (1981); *Battle* v. *Anderson,* 564 F. 2d 388, 396 (CA10 1977); *Gates* v. *Collier,* 501 F. 2d 1291, 1319 (CA5 1974).

130 F.Supp.2d 648
United States District Court,
E.D. Pennsylvania.

Jessica E. WOLFE,
v.
Martin F. HORN, et al.

No. 97–CV–3114.
|
Jan. 29, 2001.

Synopsis

Pre-operative transsexual inmate brought § 1983 action against prison officials and medical professionals alleging that their failure to permit inmate to continue hormonal treatment violated inmate's constitutional rights. On officials' and professionals' motions for summary judgment, the District Court, Anita B. Brody, J., held that: (1) fact issues remained as to whether officials were deliberately indifferent to inmate's gender identity disorder; (2) officials reasonably relied on medical professionals' opinions as to propriety of withdrawing inmate's hormonal therapy; and (3) officials did not violate inmate's equal protection rights.

Motions granted in part, and denied in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (17)

[1] **Civil Rights** Nature and elements of civil actions

Elements of § 1983 action require showing that: (1) alleged misconduct was committed by person acting under color of state law; and (2) plaintiff was deprived of rights, privileges, or immunities secured by Constitution or laws of United States. 42 U.S.C.A. § 1983.

[2] **Sentencing and Punishment** Medical care and treatment

Negligent medical malpractice by prison officials, standing alone, is not actionable under Eighth Amendment. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** Civil rights cases in general

Genuine issue of material fact as to whether prison officials were deliberately indifferent to treating pre-operative transsexual inmate's gender identity disorder precluded summary judgment in inmate's § 1983 action alleging Eighth Amendment violations. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[4] **Constitutional Law** Prisons and parole

Constitutional Law Prisons and other confinement

Prisons Clothing and grooming; bedding and sleeping conditions

Prison officials did not violate equal protection rights of inmate suffering from gender identity disorder by calling inmate by male commitment name, rather than female name, and by prohibiting inmate from wearing makeup or to cross-dress, absent evidence that officials treated any other inmate differently. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[5] **Prisons** Clothing and grooming; bedding and sleeping conditions

Prison officials did not violate equal protection rights of pre-operative transsexual inmate suffering from gender identity disorder by refusing to permit inmate to grow long hair, even if other inmates were allowed to grow long hair for religious reasons, in light of potential for institutional disruption and violence if inmate were allowed to express feminine gender identity. U.S.C.A. Const.Amend. 14.

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[6] **Civil Rights** Privilege or Immunity; Good Faith and Probable Cause

Private individuals who contract with state to provide prison services are not entitled to qualified immunity under § 1983. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[7] **Civil Rights** Prisons, jails, and their officers; parole and probation officers

Prison official has qualified immunity from liability under § 1983 for failing to intervene in medical decision if official did not possess information that would alert reasonable person in his situation to constitutional violation. 42 U.S.C.A. § 1983.

[8] **Civil Rights** Prisons, jails, and their officers; parole and probation officers

Lay prison administrators were entitled to qualified immunity on pre-operative transsexual inmate's § 1983 damage claims arising from medical professionals' alleged failure to provide proper treatment for inmate's gender identity disorder, where medical professionals claimed to provide treatment for inmate's transsexualism. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[9] **Civil Rights** Time to Sue

Federal Courts Civil rights and discrimination cases

Limitations period applicable to § 1983 action is limitations period for personal injury actions under state law. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[10] **Federal Civil Procedure** Civil rights cases in general

Genuine issue of material fact as to when prison officials made final decision to discontinue hormonal treatment program for pre-operative transsexual inmate precluded summary judgment on limitations grounds in inmate's § 1983 action against prison officials for deliberate indifference to inmate's gender identity disorder. 42 U.S.C.A. § 1983; 42 Pa.C.S.A. § 5524.

4 Cases that cite this headnote

[11] **Judgment** Nature and requisites of former adjudication as ground of estoppel in general

Under federal law, party will be estopped from relitigating an issue when: (1) issue sought to be precluded is same as one involved in prior action; (2) issue was actually litigated; (3) issue was determined by valid and final judgment; and (4) issue was essential to prior judgment.

[12] **Judgment** Judgment on discontinuance, dismissal, or nonsuit

Inmate's prior suit against prison officials did not preclude subsequent action based on same facts, where prior suit was dismissed "without prejudice" after inmate was transferred to another district.

[13] **Judgment** What constitutes diversity of issues

Pre-operative transsexual inmate's action against prison officials and physicians for violating his Eighth Amendment rights due to their deliberate indifference to inmate's gender identity disorder was not precluded by prior judgment that inmate did not have constitutional right to sex change operation or to be housed in state hospital, as opposed to all-male correctional institution. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

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[14] **Civil Rights** Mental suffering, emotional distress, humiliation, or embarrassment

Pre-operative transsexual inmate suffered sufficient "physical injury" to permit inmate to pursue § 1983 claims against prison medical professionals for mental or emotional injury for refusing to approve continuation of inmate's hormonal therapy, where, after hormones were withdrawn, inmate suffered headaches, nausea, vomiting, cramps, hot flashes, hair loss, reduced breast size, increased body hair, and lowered voice pitch, and re-emergence of masculine physical characteristics caused inmate to become depressed and suicidal. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(e), 42 U.S.C.A. § 1997e(e).

7 Cases that cite this headnote

[15] **Civil Rights** Vicarious or respondeat superior liability in general

Respondeat superior is not basis for imposing liability under § 1983. 42 U.S.C.A. § 1983.

[16] **Federal Civil Procedure** Tort cases in general

Genuine issue of material fact as to whether prison medical professionals were deliberately indifferent to treating pre-operative transsexual inmate's gender identity disorder precluded summary judgment in inmate's medical malpractice suit against professionals. 50 P.S. § 7114(a).

2 Cases that cite this headnote

[17] **Health** Standard of practice and departure therefrom

Under Pennsylvania law, medical malpractice plaintiff must introduce expert testimony that disputed treatment fell below applicable standard of care.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

ANITA B. BRODY, District Judge.

In this action pursuant to 42 U.S.C. § 1983 and Pennsylvania law, Jessica E. Wolfe, a state prisoner, alleges: (1) deliberate indifference to her serious medical needs under the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 13 of the Pennsylvania Constitution, (2) violation of the Equal Protection Clause, and (3) medical malpractice. All of the defendants have moved for summary judgment. [1]

I will grant summary judgment in favor of all defendants on the equal protection claim, and dismiss the § 1983 damage claims against Martin F. Horn, Martin L. Dragovich and Kenneth D. Kyler on the basis of qualified immunity. I will deny summary judgment on the deliberate indifference and medical malpractice claims.

I. *FACTUAL BACKGROUND*

Wolfe is a male-to-female pre-operative transsexual. [2] While retaining male genitalia, Wolfe suffers from a gender identity disorder that causes her to identify as a woman. Having experienced this disorder from a young age, Wolfe's medical history reflects depression, alcoholism and suicidal impulses.

In October 1994, Wolfe sought treatment at the Persad Center in Pittsburgh ("Persad"), which specializes in the treatment of transsexuals. In April 1995, Persad accepted Wolfe into a therapeutic program. In February 1996, following extensive psychotherapy, a Persad endocrinologist prescribed "Estrace" and "Lupron" hormones to suppress Wolfe's testosterone

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production and align her body more closely with her gender identity. [3] Prozac was prescribed for Wolfe's depression.

On March 13, 1996, Wolfe was arrested and detained at Allegheny County Jail. Wolfe continued to receive hormonal treatment in Allegheny County Jail. On July 29, 1996, after being sentenced to a minimum term of five years imprisonment, Wolfe was transferred to SCI–Pittsburgh. Wolfe continued to receive hormonal treatment at SCI–Pittsburg.

On August 6, 1996, Wolfe was transferred to SCI–Camp Hill, where she was examined by John Mitchell Hume, M.D. Wolfe explained to Hume that she suffered from transsexualism, that an endocrinologist had prescribed hormones for her, and that she continued to receive such hormones at Allegheny County Jail and at SCI–Pittsburgh. Hume told Wolfe that he would discontinue hormonal treatment. In Wolfe's medical chart, Hume noted that hormones posed risks to Wolfe because she smoked, was forty pounds overweight and had marginally elevated blood pressure. Nevertheless, Hume agreed to refer Wolfe to another psychiatrist for a "second opinion." On September 27, 1996, that psychiatrist promised to reinstate Wolfe's hormonal therapy. However, Hume refused to approve hormonal treatment because there was no indication of such a promise in the files. Hume prescribed psychotherapy, group therapy and Prozac. Hume did not offer to gradually taper-off ***651** the hormones, advise Wolfe that she would endure withdrawal symptoms, or monitor Wolfe's progress through withdrawal.

In late September 1996, after Wolfe had exhausted her last supply of Estrace, she suffered severe withdrawal symptoms, including headaches, nausea, vomiting, cramps, hot flashes, and hair loss. In addition, the hormonal effects on Wolfe's breast size, body hair and voice pitch dissipated. As Wolfe reacquired masculine physical features, she became depressed and suicidal. On October 15, 1996, Hume told Wolfe that she had "survived the withdrawal," and would no longer receive any hormones.

Martin L. Lasky, D.O., Medical Director of SCI–Camp Hill, affirmed Hume's decisions. After personally evaluating Wolfe when she arrived at SCI–Camp Hill, Lasky instructed a Physician's Assistant not to refill Wolfe's Estrace prescription. Subsequently, Wolfe appealed to Kyler, Superintendent of SCI–Camp Hill, and Horn, Secretary of the Pennsylvania Department of Corrections. Kyler and Horn declined to interfere with Hume and Lasky's medical decisions.

On November 19, 1996, Wolfe was transferred to SCI–Mahanoy, where she remains incarcerated to date. At SCI–Mahanoy, she was evaluated by Louis Martin, M.D. and Peter Baddick, D.O. Neither Martin nor Baddick provided hormonal therapy to Wolfe. Initially, Martin provided monthly counseling sessions and prescribed Prozac. On January 6, 1997, Baddick determined that he would prescribe "no treatment at present." In a meeting on April 2, 1997, Baddick reported that hormones would not be prescribed because surgery was unavailable, and hormones might expose Wolfe to risks of cancer and thrombophlebitis. Wolfe appealed to Dragovich, then-Superintendent of Mahanoy, who declined to intervene. [4]

II. *DISCUSSION*

In this litigation, Wolfe does not seek a sex change operation, nor does she necessarily seek hormonal therapy or any particular cure. *See Madera v. Correctional Medical Systems,* 1990 WL 132382 * 3 (E.D.Pa.1990) (no "absolute" right to hormones). Rather, she seeks some form of therapy to alleviate her suffering from transsexualism while in prison. The defendants move for summary judgment on all of Wolfe's claims under 42 U.S.C. § 1983, the Pennsylvania Constitution, and Pennsylvania negligence standards.

[1] Because analysis of the state-law claims may be facilitated by resolution of the Eighth and Fourteenth Amendment claims pursuant to § 1983, I begin with the elements of a § 1983 action: (1) the alleged misconduct was committed by a person acting under color of state law; and (2) the plaintiff was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See West v. Atkins,* 487 U.S. 42, 48–57, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). The defendants do not dispute that they were acting under color of state law. *See id.* However, they seek summary judgment on the Eighth and Fourteenth Amendment claims, and raise a number of defenses to suit under § 1983. [5]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* ***652** 477 U.S. 317,

322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A court must determine "whether the evidence presents a sufficient [factual] disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). At the summary judgment stage, the Court must view the evidence, and draw all reasonable inferences, in the light most favorable to the non-moving party. *See* *Dici v. Com. of Pa.,* 91 F.3d 542, 547 (3d Cir.1996).

A. *"Deliberate Indifference" Claims*

[2] When prison officials are deliberately indifferent to an inmate's serious medical needs, they violate the Eighth Amendment's ban against "cruel and unusual punishments." *See* *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). To establish this violation, two prongs must be met: (1) "deliberate indifference," (2) to a prisoner's "serious" medical needs. *See* *Monmouth County Correctional Institutional Inmates v. Lanzaro,* 834 F.2d 326, 346 (3d Cir.1987); *West v. Keve,* 571 F.2d 158, 161 (3d Cir.1978).[6] Negligent malpractice, standing alone, is not actionable under the Eighth Amendment. *See* *Estelle,* 429 U.S. at 105–06, 97 S.Ct. 285; *Durmer v. O'Carroll,* 991 F.2d 64, 67 (3d Cir.1993); *White v. Napoleon,* 897 F.2d 103, 110 (3d Cir.1990).

Courts have consistently considered transsexualism a "serious medical need" for purposes of the Eighth Amendment. *See* *Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir.2000); *White v. Farrier,* 849 F.2d 322, 325 (8th Cir.1988); *Meriwether v. Faulkner,* 821 F.2d 408, 411–13 (7th Cir.1987). Accordingly, the defendants focus their summary judgment motions on the "deliberate indifference" prong, rather than the "serious medical needs" prong.

When a prisoner has received medical attention and merely questions its adequacy, courts hesitate to second-guess professional judgments under the guise of the Eighth Amendment. *See* *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754, 762 (3d Cir.1979); *United States ex rel. Walker v. Fayette County,* 599 F.2d 573, 575 n. 2 (3d Cir.1979). Prisoners are only entitled to "some" kind of medical attention. *See* *Farrier,* 849 F.2d at 327; *Meriwether,* 821 F.2d at 413. Thus, courts have rejected demands for hormonal therapy by transsexuals who did not take hormones outside of the prison setting. *See* *Maggert v. Hanks,* 131 F.3d 670 (7th Cir.1997); *Long v. Nix,* 86 F.3d 761 (8th Cir.1996); *Brown v. Zavaras,* 63 F.3d 967, 970 & n. 2 (10th Cir.1995); *Supre v. Ricketts,* 792 F.2d 958 (10th Cir.1986); *Farmer v. Carlson,* 685 F.Supp. 1335 (M.D.Pa.1988); *Lamb v. Maschner,* 633 F.Supp. 351 (D.Kan.1986).

The case is different when prison officials terminate medical treatment that was previously recommended and administered by a medical professional. In *Phillips v. Michigan Dep't. of Corrections,* 731 F.Supp. 792 (W.D.Mich.1990), *aff'd,* 932 F.2d 969, 1991 WL 76205 (6th Cir.1991), the plaintiff had taken hormones immediately before incarceration, and her therapy was initially continued in prison. Upon plaintiff's transfer to a different facility, her hormones were withdrawn by a prison doctor. Applying the "deliberate indifference" test, the court ordered prison officials to maintain preexisting hormonal levels, since withdrawal would "wreak havoc on plaintiff's physical and emotional state." *Id.* at 800–01. The court observed that "[t]aking measures which actually reverse the effects of years of healing medical treatment ... is measurably worse [than not providing care in the first place], making ***653** the cruel and unusual determination much easier." *Id.* at 800.

Likewise, in *South v. Gomez,* 211 F.3d 1275, 2000 WL 222611 * 2 (9th Cir.2000), the court distinguished between failing to provide hormonal therapy in the first instance, and abruptly terminating an existing prescription. The court considered the latter context to be critically different and "far narrower." *Id.* The court also affirmed a preliminary injunction requiring the prison to continue plaintiff's hormone therapy, since a prison doctor had halted treatment without contacting the prescribing physician or consulting an expert. *See* *South v. Gomez,* 129 F.3d 127, 1997 WL 683661 (9th Cir.1997); *see also* *Saunders v. Horn,* 959 F.Supp. 689, 694 (E.D.Pa.1996), *adopted,* 960 F.Supp. 893 (E.D.Pa.1997) ("deliberate indifference" claim stated where prison official at SCI–Camp Hill confiscated orthopedic shoes prescribed by outside physician).

Similarly, in this case, Wolfe claims that hormonal therapy prescribed for her by a private endocrinologist, and continued by prison doctors at Allegheny County Jail and SCI–Pittsburg, was abruptly discontinued by prison officials who did not have expertise in transsexualism or consult any specialists. Additionally, Wolfe disputes that she has received any treatment for transsexualism at SCI–Camp Hill or Mahanoy. She claims, for example, that the Prozac prescribed for her depression was not treatment for transsexualism. Furthermore, Wolfe produces expert opinions stating that she received no therapy specifically treating her gender identity disorder. (Plaintiff's Ex. B, at 19). [7]

Accordingly, while Wolfe may have received some medical attention in prison, there is a fact question as to whether Wolfe received any treatment for transsexualism. *See* *Durmer v. O'Carroll,* 991 F.2d 64, 67–69 (3d Cir.1993) (reversing summary judgment for prison doctor who had provided "some treatment," where evidence was both consistent and inconsistent with deliberate indifference to medical condition); *West v. Keve,* 571 F.2d 158, 162 & n. 6 (3d Cir.1978) (finding material fact issue where prison denied recommended post-operative treatment, and opted for "easier and less efficacious treatment" of aspirin); *see also* *Meriwether v. Faulkner,* 821 F.2d 408, 413 (7th Cir.1987) (reversing dismissal of complaint, where prison withdrew hormones from plaintiff who alleged denial of all treatment for transsexualism).

Moreover, abrupt termination of prescribed hormonal treatments by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute "deliberate indifference." *See* *Farmer v. Brennan,* 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) ("deliberate indifference" is fact question which may be demonstrated through circumstantial evidence that risks were obvious); *Young v. Quinlan,* 960 F.2d 351, 359–60 n. 21 (3d Cir.1992) (presence of deliberately indifferent state-of-mind unlikely to be resolved at summary judgment stage). [8]

[3] Viewing the evidence in the light most favorable to Wolfe, there is at least a fact question as to whether each of the defendants was deliberately indifferent to treating Wolfe's gender identity disorder. Accordingly, the Eighth Amendment claim will proceed to trial. [9]

654 B. *"Equal Protection" Claim

The Equal Protection Clause of the Fourteenth Amendment requires all persons "similarly situated" to be treated alike by state actors. *See* *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Therefore, Wolfe must show that she was similarly situated to, and treated differently from, other inmates. *See* *Tillman v. Lebanon County Correctional Facility,* 221 F.3d 410, 424 (3d Cir.2000); *Keenan v. City of Philadelphia,* 983 F.2d 459, 465 (3d Cir.1992); *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478 (3d Cir.1990).

Wolfe bases her equal protection claim on her status as a transsexual. She alleges that the defendants were unwilling to take transsexualism "seriously," and failed to provide even basic treatment. (Plaintiff's Consolidated Memorandum of Law, at 29). Wolfe seems to imply that transsexual inmates at SCI–Camp Hill and Mahanoy do not receive the same medical treatment that other inmates receive. However, Wolfe presents no evidence of other inmates who have been treated differently in like circumstances. She points to no evidence that the medical conditions of other inmates at SCI–Camp Hill or Mahanoy were taken "seriously" or adequately treated. Nor does Wolfe know of other inmates who have received the medical treatment she seeks. (Deposition of Jessica E. Wolfe, at 106). Wolfe simply repeats her "deliberate indifference" allegations under the cloak of equal protection. *See* *Brown v. Borough of Mahaffey,* 35 F.3d 846, 850 (3d Cir.1994) (to assert equal protection violation as an independent constitutional claim, plaintiffs must prove that they received different treatment from other similarly situated persons).

[4] Wolfe also alleges that Kyler, Dragovich and Horn implemented policies that limit treatment options for transsexuals, in that they did not call her "Jessica," or allow her to wear makeup or cross-dress. However, Wolfe fails to establish that other inmates with serious medical needs have received more appropriate treatment. Wolfe also produces no evidence that she received differential treatment insofar as prison officials called her by her commitment name. [10] Wolfe knows of no inmates at the all-male facilities of SCI–Camp Hill or Mahanoy who have been permitted to wear makeup or cross-dress. (Deposition of Jessica E. Wolfe, at 107). These equal protection allegations are simply unsupported. *See*

Brown v. Zavaras, 63 F.3d 967, 970–72 (10th Cir.1995) (even assuming other prisoners received female hormones, plaintiff's equal protection allegations were conclusory and did not state factual basis).

Finally, Wolfe suggests as a basis for her equal protection claim that she was not allowed long hair, even though inmates are allowed long hair for *bona fide* religious reasons. Wolfe contends that long hair would serve a therapeutic purpose for her gender identity disorder. Yet, it is far from clear that such a therapeutic purpose would render Wolfe "similarly situated" to inmates with a sincere religious objection to the hair-length rule. Whether Wolfe ***655** presents sufficiently like circumstances to meet the "similarly situated" threshold is questionable.

Nevertheless, summary judgment remains appropriate if there is a distinction between Wolfe and religious objectors that is "reasonably grounded in legitimate penological concerns." *DeHart v. Horn,* 227 F.3d 47, 61 (3d Cir.2000) (*en banc*) (citing *Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)). In *DeHart,* the Third Circuit considered a Buddhist prisoner's equal protection challenge to the dietary accommodation of Orthodox Jewish inmates. Because neither the defendants nor the district court had explained the penological interest in distinguishing between two religions, nor was a penological distinction "self-evident," the Third Circuit remanded for an explanation. *Id.* at 61.

In this case, there is a penological distinction between gender- and religiously-based requests for long hair that is more "readily apparent" than a dietary distinction between "a sincere orthodox believer" and "a sincere non-orthodox one." *Id.* n. 11. Distinguishing her situation from religious objection to haircuts, Wolfe wants long hair to address "gender issues" and express her "identity" as a woman. (*See* Commonwealth Ex. 6, at 8; attached Exs. S, T). The defendants have each raised security concerns with Wolfe's becoming "feminized" in an all-male prison. (*See, e.g.,* Commonwealth Defendants' Memorandum of Law, at 21–22). Indeed, as Wolfe recognizes in her Second Amended Complaint, there is a legitimate penological interest in protecting inmates from other inmates and maintaining prison order. Specifically, Wolfe notes that "grow[ing] her hair in accordance with Department of Corrections guidelines for female inmates" may not be deemed possible "without threat to her safety or [ ] disruption of control of the remaining inmate population." (Sec. Am. Cmplt. at 18, ¶ 3) (observing potential for "undue disruption to prison procedures").

[5] Unlike the stated purpose and foreseeable effect of Wolfe's request for long hair in a male prison, religious opposition to haircuts is not designed to express a feminine gender identity, and does not invite similar threats to prison security. Wolfe herself recognizes the potential for institutional disruption and violence in allowing her to grow long hair in a male prison. "There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 136, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977).

Summary judgment on the equal protection claims will be granted.

C. *Qualified Immunity*

A number of the defendants assert qualified immunity as a basis for summary judgment on Wolfe's § 1983 claims. Qualified immunity shields government officials from civil damages if their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).[11] For a plaintiff to overcome qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *see also* *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (immunity recognized "if officers ***656** of reasonable competence could disagree").

[6] Under the current state of the law, private individuals who contract with the state to provide prison services do not appear entitled to qualified immunity under § 1983. *See* *Richardson v. McKnight,* 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) (private prison guards not entitled to qualified immunity); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1276 (3d Cir.1994) (citing *Wyatt v. Cole,* 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504

(1992)) (private persons acting under color of law cannot assert qualified immunity); *Pearson v. City of Philadelphia,* 1998 WL 721076 * 3 (E.D.Pa.1998) (qualified immunity for private prison doctor is "questionable"). Since the medical defendants contracted with the state as private individuals, only Kyler, Dragovich and Horn are eligible for qualified immunity.

In undertaking the qualified immunity analysis for Kyler, Dragovich and Horn, I must determine whether these officials knew or should have known that their actions violated clearly established law, given the information they possessed. *See* *Hunter v. Bryant,* 502 U.S. 224, 227–28, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (qualified immunity analysis considers what reasonable officer could have believed in light of clearly established law and information officer possessed); *Gruenke v. Seip,* 225 F.3d 290, 298–300 (3d Cir.2000) (qualified immunity depends, not only on the law, but on what reasonable official would know under like circumstances).

[7] Where a prison official is accused of failing to intervene in a medical decision, summary judgment is appropriate if the official did not possess information that would alert a reasonable person in his situation to a constitutional violation. *See* *Cuoco v. Moritsugu,* 222 F.3d 99, 110–12 (2d Cir.2000) (objectively reasonable for Warden, Health Services Administrator and prison psychologist, each of whom lacked medical degree, to disregard request for hormones in the face of withdrawal symptoms); *Rouse v. Plantier,* 182 F.3d 192, 199–201 (3d Cir.1999) (remanding for consideration of whether lay prison administrator, as opposed to medical professionals, should have discerned Eighth Amendment violation); *Durmer v. O'Carroll,* 991 F.2d 64, 69 (3d Cir.1993) (summary judgment properly granted to prison administrators who ignored medical complaints, as plaintiff "was already being treated by the prison doctor"); *Saunders v. Horn,* 960 F.Supp. 893, 896 (E.D.Pa.1997) ("high-level officials cannot be held liable for Eighth Amendment violations when the officials rely on expertise of professional staff that they themselves lack").

[8] Kyler, Dragovich and Horn are lay prison administrators, not professional medical providers. Although they were required to know that Wolfe was entitled to "some" treatment for transsexualism, these defendants reasonably could have believed that Wolfe was receiving such treatment. It is undisputed that Wolfe discussed her transsexualism with several medical professionals, received psychological counseling, and took prescription drugs. The medical professionals themselves claimed to provide treatment for Wolfe's transsexualism. In these circumstances, it was objectively reasonable for Kyler, Dragovich and Horn to rely on the medical professionals. (*See, e.g.,* Commonwealth Defendants' Motion for Summary Judgment, Ex. 4, at ¶¶ 2–4; Ex. 6, at ¶¶ 4–7 & 9–10). [12] Accordingly, Kyler, Dragovich and Horn are entitled to qualified ***657** immunity on Wolfe's § 1983 damage claims. [13]

D. *Statute of Limitations*

[9] Hume and Lasky alternatively move for summary judgment on the basis of the statute of limitations. The limitations period applicable to a § 1983 action is the limitations period for personal injury actions under state law. *See* *Wilson v. Garcia,* 471 U.S. 261, 276–80, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The statute of limitations for personal injury actions in Pennsylvania is two years. *See* 42 Pa.C.S.A. § 5524; *see also* *Smith v. Holtz,* 87 F.3d 108, 111 & n. 2 (3d Cir.1996); *Centifanti v. Nix,* 865 F.2d 1422, 1432–33 (3d Cir.1989); *Botton v. Marple Tp.,* 689 F.Supp. 477, 480 (E.D.Pa.1988).

A claim arising under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable." *Barnes v. American Tobacco Co.,* 161 F.3d 127, 136, 152 (3d Cir.1998); *Ross v. Johns–Manville Corp.,* 766 F.2d 823, 826 (3d Cir.1985). Accrual is not triggered merely because "causes are set in motion which ultimately produce injury as a consequence." *Mack Trucks, Inc. v. Bendix–Westinghouse Automotive Air Brake Co.,* 372 F.2d 18, 21 (3d Cir.1966) (citation omitted).

[10] There is a fact question as to whether the action against Hume and Lasky is time-barred. Wolfe filed this action on October 15, 1998. Although Wolfe was told, prior to October 15, 1996, that she would not receive hormones, there is evidence that this decision was not final. Among other things, Hume told Wolfe that he needed medical records from Persad to render a final decision about Wolfe's treatment plan. (Plaintiff's Ex. A, ¶ 14). Wolfe had reason to believe her medical records had not arrived by October 15, 1996. (Plaintiff's Ex. A, ¶¶ 15–18, 21; Exs. M, P, R, S). Because there is evidence to suggest that Wolfe did not know, and

should not have known, that a final decision violating her right to medical treatment had occurred by October 15, 1996, summary judgment on statute of limitations grounds will be denied.

E. *Issue Preclusion*

[11] Hume and Martin alternatively move for summary judgment on the basis of issue preclusion. Under federal law, a party will be estopped from relitigating an issue when: (1) the issue sought to be precluded is the same as the one involved in the prior action; (2) the issue was actually litigated; (3) the issue was determined by a valid and final judgment; and (4) the issue was essential to the prior judgment. *See In re Docteroff,* 133 F.3d 210, 214 (3d Cir.1997); *Burlington Northern R. Co. v. Hyundai Merchant Marine Co., Ltd.,* 63 F.3d 1227, 1231–32 (3d Cir.1995); *see also Hawksbill Sea Turtle v. Federal Emergency Management Agency,* 126 F.3d 461, 474–75 (3d Cir.1997).

[12] The first action Hume and Martin seek to employ as a basis for issue preclusion is *James a/k/a Jessica Wolfe v. Zwierzyna, et al.,* Civil No. 3:CV–96–2046 (M.D.Pa.1996) (Kosik, J.). In that *pro se* suit for injunctive relief, the court noted that Wolfe had been transferred to SCI–Mahanoy, which is located within the confines of the United States District Court for the Eastern District of Pennsylvania. Because the case had been filed in the Middle District of Pennsylvania, the court dismissed the complaint "without prejudice," as moot. Clearly, this cannot satisfy the elements of issue preclusion.

The second action Hume and Martin seek to employ as a basis for issue preclusion is *Jessica E. Wolfe v. Commonwealth of Pennsylvania, et al.,* Civil Action No. 98–1132 (W.D.Pa.1998) (Lee, J.; Caiazza, M.J.), *aff'd,* No. 99–3392 (3d Cir.1999). In that *pro se* case, while the complaint mentioned ***658** deliberate indifference to Wolfe's medical needs, the basis for the claim was failure to train employees or adopt policies protecting transsexuals at Allegheny County Jail, and/or to house Wolfe in a state hospital. Among other findings, which are not relevant to this case, the court concluded: (1) Wolfe did not have a constitutional right to a sex change, (2) Wolfe did not have a constitutional right to serve her sentence in a state hospital, as opposed to an all-male correctional institution, and (3) the Constitution does not recognize preoperative transsexuals as a protected class. *See* Def. Hume's Motion for Summary Judgment, Ex. 14, at 16–21 (quoting *Maggert v. Hanks,* 131 F.3d 670 (7th Cir.1997)).

[13] In the present case, Wolfe is not seeking a sex change, nor does she ask to serve her sentence in a state hospital. Because there is no identity of the first and second issues, they cannot serve as a bar here. Given the disposition of Wolfe's equal protection claim, I need not decide whether Wolfe is precluded from arguing that transsexuals are a constitutionally protected class. The motions for summary judgment on the basis of issue preclusion will be denied. [14]

F. *Physical Injury*

Hume, Martin and Baddick alternatively move for summary judgment, claiming that Wolfe has failed to produce evidence of a "physical injury." Under 42 U.S.C. § 1997e(e), no federal civil action may be brought by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury."

[14] However, Wolfe states that after her hormones were withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes, and hair loss. Wolfe also complains of reduced breast size, increased body hair, and lowered voice pitch. With the re-emergence of masculine physical characteristics, Wolfe became depressed and suicidal. Thus, the alleged constitutional violations caused direct physical injuries, with attendant emotional consequences. [15] The motions for summary judgment based on the "physical injury" requirement will be denied.

G. *Respondeat Superior*

[15] Baddick alternatively moves for summary judgment, claiming that Wolfe seeks to hold him liable on a *respondeat superior* theory. It is well settled that *respondeat superior* is not a basis for imposing liability under § 1983. *See Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1294 (3d Cir.1997). However, liability will attach when there is evidence of "personal direction" or "actual knowledge and acquiescence." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478 (3d Cir.1990); *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988).

Baddick was not merely the Medical Director of SCI–Mahanoy, but: (1) personally evaluated Wolfe, (2) determined

what treatment was appropriate, and (3) reported to Wolfe that she would not receive hormonal therapy. This constitutes sufficient participation for § 1983 purposes, and Baddick's motion for summary judgment on this basis will be denied.

659 H. *Good–Faith Defense

Baddick alternatively moves for summary judgment by asserting a "good-faith" defense. In *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1275–78 (3d Cir.1994), the Third Circuit held that private individuals invoking state attachment laws, which are subsequently found to be unconstitutional, could raise an affirmative defense of "good faith." However, assuming the "good-faith" defense applies in this context, the defendants' subjective state of mind cannot be evaluated without weighing the evidence and determining credibility. *See Egervary v. Rooney,* 2000 WL 1160720 * 6 (E.D.Pa.2000) (reserving judgment on "good faith" defense until jury trial); *Pearson v. City of Philadelphia,* 1998 WL 721076 * 2 (E.D.Pa.1998) (doubting applicability of "good faith" defense, but leaving issue for the jury).

Without deciding whether or not a "good faith" defense is applicable to this case, Baddick's motion for summary judgment on this basis will be denied.

I. *Medical Malpractice*

[16] Hume and Martin move for summary judgment on the medical malpractice claim, arguing that there is no material fact question as to whether they could be found liable for "willful misconduct" or "gross negligence." *See* 50 P.S. § 7114(a) (absent "willful misconduct" or "gross negligence," psychiatrists immune from liability for treatment of mentally ill). However, because there is a triable fact issue concerning "deliberate indifference" to serious medical needs, there is also a fact question concerning negligent malpractice under Pennsylvania law. [16]

[17] Lasky and Baddick move for summary judgment on the malpractice count, claiming that Wolfe's experts did not suggest a violation of the applicable standard of care, and did not state their opinions to a "reasonable degree of medical certainty." Under Pennsylvania law, a medical malpractice plaintiff must introduce expert testimony that the disputed treatment fell below the applicable standard of care. *See Brannan v. Lankenau Hospital,* 490 Pa. 588, 595, 417 A.2d 196, 199 (1980); *see also Doby v. DeCrescenzo,* 171 F.3d 858, 876 (3d Cir.1999). Such expert testimony must be rendered within a "reasonable degree of medical certainty." *Mitzelfelt v. Kamrin,* 526 Pa. 54, 62, 584 A.2d 888, 892 (1990). However, experts are not required to use "the magic words," so long as the substance of their testimony, when taken as a whole, meets these requirements. *Id.* at 66–67, 894.

When read as a whole, the expert reports Wolfe submits are competent evidence, sufficient to create a factual question as to whether Lasky and Baddick were negligent. Accordingly, I will deny the motions for summary judgment concerning the medical malpractice claims.

An appropriate order follows.

ORDER

AND NOW, this day of January 2001, it is hereby **ORDERED** that:

(1) The claims for injunctive relief against Dragovich, Martin and Baddick are **DISMISSED AS MOOT**.

(2) The consolidated motion for summary judgment of defendants Martin F. Horn, Martin L. Dragovich, and Kenneth D. Kyler (Docket Entry # 97) is **GRANTED IN PART** and **DENIED IN PART.** The equal protection claim is dismissed on the merits; the "deliberate indifference" claim for damages under the Eighth and Fourteenth Amendments is dismissed on ***660** the basis of qualified immunity. To the extent that the "deliberate indifference" claim seeks injunctive relief against Horn, the motion for summary judgment is denied.

(3) The motions for summary judgment of defendants John Mitchell Hume, M.D. (Docket Entry # 94), Louis Martin, M.D. (filed as Docket Entry # 31 to 98–CV–5474), Martin L. Lasky, D.O. (Docket Entry # 95), and Peter Baddick, D.O. (Docket Entry # 99) are **GRANTED IN PART** and **DENIED IN PART**. The equal protection claims are dismissed on the merits. The motions for summary judgment seeking dismissal of the "deliberate indifference" and medical malpractice claims are denied.

All Citations

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Footnotes

1 The remaining defendants are: (1) Martin F. Horn, (2) Martin L. Dragovich, (3) Kenneth D. Kyler, (4) John Mitchell Hume, M.D., (5) Louis Martin, M.D., (6) Martin L. Lasky, D.O., and (7) Peter Baddick, D.O.

2 On a motion for summary judgment, the facts are stated in the light most favorable to the plaintiff. I will refer to plaintiff using the pronouns "she" and "her."

3 By Decree dated March 5, 1996, Wolfe changed her legal name from "James Elliott Wolfe, Jr." to "Jessica Elaine Wolfe." (Civil Case No. GD 96–000935, Court of Common Pleas, Allegheny County).

4 Throughout her years of incarceration, Wolfe has been identified, housed and treated as a male prisoner. Her commitment name is "James." Accordingly, the defendants did not refer to Wolfe as "Jessica," and she has not been permitted to wear female undergarments, makeup, or long hair.

5 These defenses include: (1) qualified immunity, (2) statute of limitations, (3) issue preclusion, (4) lack of "physical injury," (5) attempt to impose "respondeat superior" liability, and (6) "good faith."

6 "Deliberate indifference" is essentially a subjective standard: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). However, objective factors may inform the viability of a "deliberate indifference" claim.

7 *See also* Def. Hume's Motion for Summary Judgment, Ex. 16, at 42–43 (treatment plan consisted of: (a) obtaining records, (b) continuing Prozac for depression, (c) providing psychotherapy to assist with prison "issues," and (d) recommending group therapy for anger, aggression and substance abuse problems).

8 Although the defendants argue that they acted through informed medical judgment, a jury could consider the medically-based justifications to be "merely a pretext." *Durmer,* 991 F.2d at 68; *Phillips,* 731 F.Supp. at 797–98 (Eighth Amendment claim likely to succeed, even though doctor stated concern about hormonal side effects on smoker).

9 The "deliberate indifference" test of the Eighth Amendment is applicable to claims under Article I, Section 13 of the Pennsylvania Constitution. *See Jochen v. Horn,* 727 A.2d 645, 649 (1999); *Inmates of B–Block v. Jeffes,* 79 Pa.Cmwlth. 275, 278–79, 470 A.2d 176, 178–79 (1983), *aff'd on other grounds,* 504 Pa. 509, 475 A.2d 743 (1984). Therefore, the Pennsylvania Constitutional claim will proceed against the medical defendants. Wolfe has voluntarily dismissed this claim against Horn, Dragovich and Kyler.

10 It is undisputed that prison officials called Wolfe by her commitment name, "James," except under limited circumstances. While this may have hampered the delivery of mail addressed to "Jessica" for a brief interval, no such allegation appears in Wolfe's complaint. In any event, whatever constitutional provisions might apply to such an allegation, "equal protection" cannot be one of them without evidence of differential treatment. *See Saunders v. Horn,* 959 F.Supp. 689, 696 (E.D.Pa.1996), *adopted,* 960 F.Supp. 893 (E.D.Pa.1997).

11 Qualified immunity does not bar injunctive relief. At the motion to dismiss stage, the claims for injunctive relief against Kyler, Lasky and Hume were dismissed as moot. Because Dragovich, Martin and Baddick have left SCI–Mahanoy, the claims for injunctive relief against them will also be dismissed as moot. The claim for injunctive relief against Horn remains.

12 Even if they were mistaken as to whether Wolfe was receiving treatment for transsexualism, Kyler, Dragovich and Horn would be entitled to qualified immunity under these circumstances. *See Hunter,* 502 U.S. at 228–29, 112 S.Ct. 534 (qualified immunity provides "ample room for mistaken judgments"); *Malley,* 475 U.S. at 341, 106 S.Ct. 1092 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

13 In view of this disposition, I need not reach Kyler's claim that Wolfe failed to exhaust her administrative remedies at SCI–Camp Hill.

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14 There may be several additional reasons not to apply the issue preclusion doctrine. For example, the issue of withdrawn hormonal therapy did not arise at Allegheny County Jail and was not actually litigated in the Western District action, but rather arose at SCI–Camp Hill and Mahanoy, within the jurisdictions of the Middle and Eastern Districts of Pennsylvania.

15 *Compare* *McGrath v. Johnson,* 67 F.Supp.2d 499, 508 (E.D.Pa.1999) (constitutional violation caused emotional trauma, which manifested in inflamed preexisting skin condition); *Cain v. Com. of Va.,* 982 F.Supp. 1132, 1135 & n. 3 (E.D.Va.1997) (court disbelieved plaintiff's latest allegations of headaches, vision-loss, numbness and joint pains, "in light of his prior testimony and litigation").

16 Of course, it may very well be that the defendants were neither deliberately indifferent nor negligent. *See Standards of Care: The Hormonal and Surgical Sex Reassignment of Gender Dysphoric Persons,* Harry Benjamin International Gender Dysphoria Association, Inc. 642, 646 (1990) (administration of hormones to males may lead to health-threatening complications, and sex reassignment applicants often underestimate risks). The expert reports submitted by the defendants supply evidence that they were not negligent.

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