Transgender woman 'raped 2,000 times' in all-male prison

'It was hell on earth, it was as if I died and this was my punishment'

Will Worley

A transgender woman has spoken of the "hell on earth" she suffered after being raped and abused more than 2,000 times in an all-male prison.

The woman, known only by her pseudonym, Mary, was imprisoned for four years after stealing a car.

She said the abuse began as soon as she entered Brisbane's notorious Boggo Road Gaol and that her experience was so horrific that she would "rather die than go to prison ever again".

"You are basically set upon with conversations about being protected in return for sex," Mary told *news.com.au*.

"They are either trying to manipulate you or threaten you into some sort of sexual contact and then, once you perform the requested threat of sex, you are then an easy target as others want their share of sex with you, which is more like rape than consensual sex.

"It makes you feel sick but you have no way of defending yourself."

Mary was transferred a number of times, but said Boggo Road was the most violent - and where she suffered the most abuse.

After a failed escape, Mary was designated as 'high-risk', meaning she had to serve her sentence as a maximum security prisoner alongside the most violent inmates.

"I was flogged and bashed to the point where I knew I had to do it in order to survive, but survival was basically for other prisoners' pleasure," she said.

"It was hell on earth, it was as if I died and this was my punishment."

While inside, Mary said she was also forced to endure another type of abuse – the denial of her gender. She said her long hair was cut off by another prisoner and that she was not allowed to take her hormones, so began to grow facial hair.

"It was like my identity was taken away from me," she said.

Mary maintains it was unnecessary and unfair for her to be put in male prisons.

"People must think if you go to a female prison, you're going to rape women and you're not — it doesn't make any sense," Mary said.

"I'd rather die than go to prison ever again in my whole life."

Before her conviction, Mary had undergone the lengthily process of seeing a psychiatrist and been approved hormone therapy. However, she had not had reassignment surgery. If she had undertaken the operation before her sentence, she would have been sent to a female prison.

"I look like a woman and I think if a transgender person is genuine and they are living as the opposite sex, then they should be housed in a female prison, even if you're in a wing on your own.

Amendment VIII

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

KeyCite Yellow Flag - Negative Treatment
Distinguished by Kosilek v. Spencer, 1st Cir.(Mass.), December 16, 2014

645 F.3d 449
United States Court of Appeals,
First Circuit.

Sandy J. BATTISTA, Plaintiff, Appellee,
v.
Harold W. CLARKE, Commissioner of the Massachusetts Department of Correction, and Michael Corsini, Superintendent of Massachusetts Treatment Center, Defendants, Appellants.
Kathleen M. Dennehy; Robert Murphy; Steve Fairly; Susan J. Martin; Gregory J. Hughes; UMass Correctional Health Program; Terre Marshall, Defendants.

No. 10–1965.
|
Heard March 7, 2011.
|
Decided May 20, 2011.

Synopsis

Background: Massachusetts civil detainee, who was anatomically male but suffered from gender identity disorder (GID), brought action against Massachusetts officials, alleging "deliberate indifference" to her medical needs, and seeking an injunction requiring that hormone therapy and female garb and accessories be provided to her. The United States District Court for the District of Massachusetts, Douglas P. Woodlock, J., granted preliminary injunctive relief, and state officials appealed.

[Holding:] The Court of Appeals, Boudin, Circuit Judge, held that record supported district court's conclusion that Massachusetts officials were deliberately indifferent to the medical needs of civil detainee or exercised an unreasonable professional judgment by denying her female hormone therapy.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (2)

[1] **Health** Mental Health

Record supported district court's conclusion that Massachusetts officials were deliberately indifferent to the medical needs of anatomically male civil detainee, who suffered from gender identity disorder (GID) and was severely constrained in a protective custody unit, or exercised an unreasonable professional judgment by denying her female hormone therapy; it had been fifteen years since detainee first asked for treatment, and for ten years, health professionals had been recommending hormone therapy as a necessary part of the treatment, and when, during the delay, detainee sought to castrate herself with a razor blade, state officials could be said to have known that detainee was in "substantial risk of serious harm." U.S.C.A. Const.Amends. 8, 14; 42 U.S.C.A. § 1983; M.G.L.A. c. 12, §§ 11H, 11I.

36 Cases that cite this headnote

[2] **Prisons** Discipline, security, and safety in general

Prisons Health and Medical Care

Any professional judgment that decides an issue involving conditions of confinement must embrace security and administration, and not merely medical judgments; administrators of correctional or mental health facilities are responsible to the state and to the public for making professional judgments of their own, encompassing institutional concerns as well as individual welfare. U.S.C.A. Const.Amends. 8, 14.

10 Cases that cite this headnote

Attorneys and Law Firms

***449** Richard C. McFarland, Legal Division, Department of Correction, with whom Nancy Ankers White, Special Assistant Attorney General, was on brief for appellants.

Neal E. Minahan, with whom Christopher D. Man and McDermott Will & Emery LLP were on brief for appellee.

***450** Before BOUDIN, Circuit Judge, SOUTER,* Associate Justice, and STAHL, Circuit Judge.

Opinion

BOUDIN, Circuit Judge.

In 1983, in state court in Massachusetts, Sandy Battista (born "David Megarry") was convicted of the rape of a child, robbery, and kidnapping. After serving that sentence, Battista was involuntarily committed in 2003 in a civil proceeding, Mass. Gen. Laws ch. 123A, § 14 (2008), to the Massachusetts Treatment Center for Sexually Dangerous Persons ("Treatment Center"). Such persons are held civilly without limit in time until adjudged safe for release. *Id.* §§ 9, 14.

The Treatment Center, for which the Massachusetts Department of Correction ("the Department") is responsible, Mass. Gen. Laws ch. 123A, § 2, is an all-male facility housing three groups: criminals participating in treatment programs, civilly committed residents, and those awaiting adjudication as "sexually dangerous persons." Massachusetts law requires that civil detainees like Battista be separated from criminal ones. *Durfee v. Maloney,* Nos. CIV. A. 98–2523B, CIV. A. 98–3082B, 2001 WL 810385, at *15 (Mass.Super.Ct. July 16, 2001).

Battista is anatomically male but suffers from "gender identity disorder" ("GID"), a psychological condition involving a strong identification with the other gender. GID is a disorder recognized in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.1994). The diagnostic criteria include not only "cross-gender identification" but also "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 537–38.

In 1996, Battista changed her name to Sandy and began to seek treatment from the Department, including administration of female hormones and access to female garb. Her early demands were met with skepticism and resistance.[1] In 1997, a Department consultant diagnosed her GID, but the Department offered no further evaluation or treatment until 2004. Prior to this case, Battista filed two suits seeking GID treatment and accumulated expert opinions confirming the seriousness of her condition and recommending accommodations including hormone therapy.

Battista filed her complaint in the present suit in July 2005 and in October 2005 sought to castrate herself with a razor blade. The suit, against various officials of the Department, charged deliberate indifference to her medical needs in violation of the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983 (2006), as well as state law, including Mass. Gen. Laws ch. 12, §§ 11H–11I. In particular, Battista sought an injunction requiring that hormone therapy and female garb and accessories be provided to her.

In and around 2005 and 2006, the Department fenced with its own healthcare provider, the University of Massachusetts Correctional Health Program, which offered strong support for the GID diagnosis, asserted that harm could easily occur without adequate treatment, and recommended hormone therapy as medically ***451** necessary. The Department instead hired another gender specialist, who then agreed that hormone treatment might be appropriate along with other therapy.

Battista's first request to the district court for a preliminary injunction was denied in March 2006, with a finding that the defendants had not at this stage been shown to be deliberately indifferent to her medical needs. *Battista v. Dennehy,* No. 05–11456–DPW, 2006 WL 1581528, at *9–10, *12 (D.Mass. Mar. 22, 2006). After the further medical assessments continued to recommend hormone therapy, the Department stated that it would not implement treatments until security concerns were further evaluated. This proved to be a drawn-out process.

In August 2008, the first security review by the Department concluded that a feminine appearance would endanger Battista. The core security concern throughout has been that sexual contacts or assaults by other detainees would be made more likely by female clothing and accessories and the enhancement of breasts due to hormone therapy. The

report, however, was fairly cursory, comprising only a few paragraphs, and in December 2008 the district court entered a preliminary injunction requiring psychotherapy, access to women's attire and accessories, monthly reports on Battista's condition, and a recommendation on hormone therapy after a six-month review.

In the six-month report, the doctors again prescribed the hormones. A first dose was administered, but then the Department put another indefinite hold on treatment pending a second security review. The September 2009 review again found the safety risk too high. This new report was more substantial although it more or less duplicated an earlier report prepared for an inmate who also had requested and been denied hormone therapy. Its security evaluation is at the core of the Department's substantive objection to hormone therapy for Battista.

Although hormone therapy had been provided for GID to inmates of some male prisons, the September 2009 report included data gathered under the Prison Rape Elimination Act of 2003 ("PREA") § 4, 42 U.S.C. § 15603, to argue that the risk of sexual assault was higher at the Treatment Center as compared to other facilities of the Department, including prisons. The report noted that Treatment Center residents were sex offenders and that the Treatment Center had an open floor plan. It stressed Battista's past infractions and the inability to move her to another facility because of her civil commitment status.

A bench trial took place in June and August 2010. In the course of the trial, Battista offered an evaluation from psychiatrist George Brown. He testified that Battista was eligible and ready for hormonal treatment, that the past treatment for her GID "falls below any reasonable standard of care," and that with a

> high degree of medical certainty ... when this patient loses hope again regarding access to appropriate care, she will engage in surgical self-treatment by autocastration or will hire someone to do this for her. This could lead to an inadvertent death due to exsanguination.

On August 3, 2010, the court stated that it would enter a modified preliminary injunction order requiring hormone therapy to begin shortly. On August 23, 2010, the district court delivered a detailed oral decision, which recounted the history and made numerous findings in support of its injunction, applying the usual four-part test for preliminary relief, *Iantosca v. Step Plan Svcs., Inc.*, 604 F.3d 24, 29 n. 5 (1st Cir.2010) (likelihood of success, irreparable harm, balance of hardships on the opposing sides, public interest).

***452** **[1]** In its decision, the district court unqualifiedly required hormone therapy.[2] The injunction is styled as preliminary because both sides sought a ruling on implementation issues—specifically, how restricted Battista may be in her confinement—which the district court now has under consideration; but hormone therapy has now been definitively decreed. That directive was stayed by the district court pending appeal, as defendants requested, solely because the district court feared harm to Battista if hormone therapy were begun and later stopped again.

The district court's ultimate finding of "deliberate indifference" rests on several different subordinate findings, which can be recast and summarized under two headings: first, that Battista has an established medical need for hormone therapy, may suffer severe harm without it, and (implicitly) that such therapy is feasible despite safety concerns; and second, that the defendants' reliance on their administrative discretion in invoking and dealing with security concerns has been undercut by a collection of pretexts, delays, and misrepresentations.

The focus of this appeal is narrow. The Department concedes that Battista suffers from GID and needs treatment and that hormone therapy has been recommended as medically necessary; but it says that security concerns reasonably underpin its refusal and contests the finding of deliberate indifference. Because the individual defendants are sued only in their official capacity for injunctive relief and no damages are sought, qualified immunity is not an issue nor need the separate roles of individual defendants be sorted out.[3]

Defendants suggest that review is *de novo;* the plaintiff, that it is essentially for abuse of discretion in the grant of preliminary relief. In truth, the standard of review varies depending on the precise underlying issue in the mosaic of arguments and counter-arguments. Legal issues are open to *de novo* review, factual findings are reviewed

for clear error, and judgment calls by the district judge may get deference depending on the circumstances. *Venegas–Hernandez v. Asociacion De Compositores y Editores de Musica Latinoamericana (ACEMLA),* 424 F.3d 50, 53 (1st Cir.2005).

The *substantive* standard for liability is a more complicated story. In the district court, the parties and the judge focused on the Eighth Amendment test used to assess medical care, or the lack of it, for criminal prisoners, namely, whether the defendants were "deliberately indifferent" to the needs of their charge. *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Estelle v. Gamble,* 429 U.S. 97, 104–05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). This choice of tests was hardly surprising: although protection of civilly committed persons rests on due process concepts rather than the Eighth Amendment, deliberate indifference is the familiar test for medical care.

***453** The Eighth Amendment standard is in part one of subjective intent. *Farmer,* 511 U.S. at 839–40, 114 S.Ct. 1970. The phrasing itself implies at least a callous attitude, but subjective intent is often inferred from behavior and even in the Eighth Amendment context—contrary to the defendants' assertion—a deliberate intent to harm is not required. *Id.* at 835, 114 S.Ct. 1970. Rather, it is enough for the prisoner to show a wanton disregard sufficiently evidenced "by denial, delay, or interference with prescribed health care." *DesRosiers v. Moran,* 949 F.2d 15, 19 (1st Cir.1991).

Because Battista is civilly committed, a different, more plaintiff-friendly standard arguably applies here: whether the defendant failed to exercise a reasonable professional judgment. *Youngberg v. Romeo,* 457 U.S. 307, 321, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).[4] Battista has repeatedly invoked a due process standard and claimed it to be more favorable but does not pinpoint the *Youngberg* formulation. However, fine-tuning is unnecessary. The two standards are not all that far apart and, to the extent that the *Youngberg* phrasing governs and is more helpful to Battista, that only reinforces the outcome reached by the district judge.

Both the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources. This is a regular theme in the Eighth Amendment cases, *Farmer,* 511 U.S. at 844, 114 S.Ct. 1970, and it is equally important under *Youngberg.* There, while stressing that civilly committed persons are entitled to an extra margin of protection, the Court also stated that there can be more than one reasonable judgment, and that the choice in such cases is for the professional. 457 U.S. at 321, 324–25, 102 S.Ct. 2452.

Finally, while an "intent to punish" is not required even under *Farmer,* it could certainly be highly significant under *Farmer* and, *a fortiori,* under *Youngberg.* So it is useful to dispose at the outset of plaintiff's claim that Robert Murphy—the superintendent of the Treatment Center—admitted that whether Battista should "be punished for her lack of good judgment by withholding medical care" was "a consideration" when Murphy wrote the security report rejecting hormone therapy.

This overreads Murphy's testimony. That Battista had regularly evaded Treatment Center restrictions and engaged in sexual contacts with other detainees was fully established, and it enhanced the danger to her in the future if her attractiveness to other detainees was increased. So that fact was legitimately a "consideration" that could affect whether hormone treatment could be safely allowed. The term "punish" was not Murphy's own but was inserted into the question itself by Battista's counsel during the deposition:

> Q: Should Battista be punished for her lack of good judgment by withholding medical care?
>
> A: That's a consideration, yes.

***454** However, even without an evil motive, the district court could reasonably find that there had been "denial," "delay" and "interference" under Eighth Amendment precedent and that a reasonable professional judgment had not been exercised under *Youngberg.* It has been fifteen years since Battista first asked for treatment, and for ten years, health professionals have been recommending hormone therapy as a necessary part of the treatment. When during the delay Battista sought to mutilate herself, the Department

could be said to have known that Battista was in "substantial risk of serious harm." *Farmer,* 511 U.S. at 847, 114 S.Ct. 1970.

But the question remains whether the withholding of hormone therapy was "wanton" or outside the bounds of "reasonable professional judgement." Medical "need" in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands. The known risk of harm is not conclusive: so long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not "deliberate indifference," *Farmer,* 511 U.S. at 844–45, 114 S.Ct. 1970, or beyond "reasonable professional" limits, *Youngberg,* 457 U.S. at 321, 324–25, 102 S.Ct. 2452.

Here, despite much early resistance, *Brugliera v. Comm'r of Mass. Dep't of Corr.,* No. 07–40323–JLT (D.Mass. Dec. 18, 2009); *Kosilek v. Maloney,* 221 F.Supp.2d 156, 159–60 (D.Mass.2002), hormone therapy for GID is now provided in some cases in Massachusetts prisons. The defendants point to this to establish their good faith; Battista, to show that providing her the therapy would be consistent with security needs. Both positions are overstated. Hormone therapy has not been welcomed by the Department, but both the Treatment Center's internal environment and Battista herself arguably presented added risks.

The Treatment Center is the one facility where Battista can be housed as a civil inmate and, while the Department could establish a branch elsewhere, Mass. Gen. Laws ch. 123A, § 2, this would pose administrative difficulties and be isolating for Battista. The civil-side residents of the Treatment Center contain a disproportionate number of male sex offenders who might threaten one who presents herself as female. And Battista has a record of infractions and sexual contacts and risk-taking that colorably place her at greater risk from invited or uninvited sexual contact.

Nor is Battista's willingness to take risks for herself decisive. The defendants have an obligation to take reasonable measures to protect inmates, *Farmer,* 511 U.S. at 833, 114 S.Ct. 1970 (quoting *Cortes–Quinones v. Jimenez–Nettleship,* 842 F.2d 556, 558 (1st Cir.), *cert. denied,* 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988)), and Battista is quite likely to sue if preventable harm occurs. Battista will bear some of the risk of the hormone therapy, but not all of it. And, while she could be kept in protective custody available at the Treatment Center, this custody—as currently structured—involves confinement for most of the day and other disadvantages that Battista is unwilling to tolerate.

[2] The legal labels applied to facts are reviewed on appeal more closely than a district court fact-finding, but often with some deference to the district judge. *United States v. Quinones–Medina,* 553 F.3d 19, 22 (1st Cir.2009). Yet this would be a much harder case if defendants had proffered a persuasive and untainted professional judgment that—while hormone therapy would help Battista—the dangers, security costs and other impediments made it infeasible. For the problem is not ***455** one of callous guards or inept medical care but of conflicting considerations. As we said in an earlier case involving the Treatment Center:

> Any professional judgment that *decides* an issue involving conditions of confinement must embrace security and administration, and not merely medical judgments.... The administrators are responsible to the state and to the public for making professional judgments of their own, encompassing institutional concerns as well as individual welfare. Nothing in the Constitution mechanically gives controlling weight to one set of professional judgments.

Cameron v. Tomes, 990 F.2d 14, 20 (1st Cir.1993).

Yet in this instance, as the record now stands, the defendants have forfeited the advantage of deference. Initially, the district judge was far from anxious to grant the relief sought. It was only after what the judge perceived to be a pattern of delays, new objections substituted for old ones, misinformation and other negatives that he finally concluded that he could not trust the defendants in this instance. The details are laid out in his oral opinion and the record contains support for his conclusion. Several examples stand out.

First, for some time, the Department refused to take the GID diagnosis and request for hormone therapy seriously. Its representatives resisted it in other cases, and when their own medical advisers supported the request for Battista, the defendants went back and forth apparently looking for an out. It may take some education to comprehend that GID is a disorder that can be extremely dangerous. But the education seems to have taken an unduly long time in this instance, especially in light of the self-mutilation attempt.

Second, once the medical prescription was clear, several years passed before the defendants produced a substantial security justification; and this, it turns out, depended in part on inaccurate data in paragraphs largely written by Department counsel and inserted at counsel's request *after* Murphy had made his decision and submitted his initial draft. Murphy admitted in his trial affidavit that he had miscounted the PREA incidents in 2007 and 2008; there were really 41, not 68, reported incidents at the Treatment Center.

Third, for some time, the defendants portrayed the choice facing the court as one between keeping Battista in a severely constraining protective custody unit and denying her hormone therapy. Defendants now show some signs of retreating from this all or nothing choice, [5] but not far: this is consistent with a pattern of slow retreats to the next redoubt. The district court may well be right that a detailed solution will be developed only when the choice is forced on defendants.

In the end, there is enough in this record to support the district court's conclusion that "deliberate indifference" has been established—or an unreasonable professional judgment exercised—even though it does not rest on any established sinister motive or "purpose" to do harm. Rather, the Department's action is undercut by a composite of delays, poor explanations, missteps, changes in position and rigidities —common enough in bureaucratic regimes but here taken to an extreme. This, at least, is how the district court saw it, and it had a reasonable basis for that judgment.

***456** There are a few loose ends to address. One is that the defendants say that the harm faced by Battista is neither immediate nor irreparable—common requisites for preliminary relief—but, as already noted, the injunction is not preliminary as to her entitlement to hormone therapy. And while the risk of self-mutilation is unpredictable, it grows as the litigation drags on. They also say that the risk of physical assault will be increased by therapy, which may be so but is not decisive: medical treatment often poses risks and invites trade-offs.

Another set of defendant arguments is contained only in the reply brief. These include a claim that the decision is inconsistent with the court's earlier denial of relief. This claim, perhaps imprudently, draws attention to the experience with the Department gained by the district court after that denial. Anyway, claims first raised only in reply briefs are forfeit, *Rivera–Muriente v. Agosto–Alicea,* 959 F.2d 349, 354 (1st Cir.1992), and we note only that none of them appear promising even if they had been preserved.

Affirmed.

All Citations

645 F.3d 449

Footnotes

* The Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

1 In response to Battista's initial requests, a Department psychiatric consultant stated in 1997 that the name change and desired treatments were "bizarre at best, and psychotic at worst" and recommended various medical and psychological testing, as well as therapy. The consultant also considered Battista's requests to be "elective procedures" equivalent to "tummy tucks and liposuctions."

2 The modified preliminary injunction now on appeal was issued on August 23, 2010, and requires "[w]ithin seven (7) business days of the entry of this Order, the DOC shall provide hormone therapy to Battista in accordance with the recommendation of Dr. Levine, Dr. Zakai, and Ruth Khowais, Psy.D. on June 19, 2009, and the prescription by endocrinologist Dr. Mohammed Saad dated August 4, 2009 and August 14, 2009."

3 In the district court, Battista asserted but then abandoned earlier damage claims and focused her suit on forward-looking injunctive relief. Had this appeal involved individual liability for damages and qualified immunity, a different outcome could easily have been possible as to such claims.

4 The decisions are not uniform. *Compare* *Ketchum v. Marshall,* No. 90–F–1627, 963 F.2d 382, 1992 WL 111209, at *2 (10th Cir.1992) (unpublished table decision) (using deliberate indifference test for medical care for the civilly committed without mentioning *Youngberg*), *with* *Patten v. Nichols,* 274 F.3d 829, 833–42 (4th Cir.2001) (applying professional judgment test, not deliberate indifference), *with* *Sain v. Wood,* 512 F.3d 886, 894–95 (7th Cir.2008) (treating both standards as equivalent to deliberate indifference), *and* *Ambrose v. Puckett,* 198 Fed.Appx. 537, 539–40 (7th Cir.2006) (treating both standards as equivalent to professional judgment).

5 Finally faced with a decision by the district court to require therapy, defendants now say they have offered to create a modified protective custody arrangement that would provide Battista and others with both protection from other residents and "access to treatment, work, educational programs, and recreation." This may on investigation be less than the quotation suggests but that is another matter.

990 F.2d 14
United States Court of Appeals,
First Circuit.

Robert E. CAMERON, Plaintiff, Appellee,
v.
Henry TOMES, et al., Defendants, Appellants.

No. 92–1343.
|
Heard Oct. 8, 1992.
|
Decided March 31, 1993.

Synopsis

Convicted sex offender confined indefinitely in state treatment center for the sexually dangerous filed action challenging conditions of his confinement. The United States District Court for the District of Massachusetts, Robert E. Keeton, J., granted injunctive relief, and state appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) prior class action in judgment regarding conditions of confinement was not res judicata as to plaintiff's claims, and (2) offender was entitled to injunctive relief requiring reappraisal of his personal dangerousness and of general conditions of his confinement.

Affirmed as modified.

West Headnotes (8)

[1] **Judgment** Persons represented by parties

Class action judgment bound class members as to matters actually litigated in action challenging conditions of confinement in treatment center for sexually dangerous person, but was not res judicata as to claims based on individual circumstances not addressed in the class action, that is, inmate's claim that his physical disability affected his need for outside medical visits, freer movement within the center, and separate bunking arrangement adapted to his handicap, and that his mental condition made ordinary physical searches, disciplinary arrangements and other constraints unsuitable or psychologically dangerous for him.

17 Cases that cite this headnote

[2] **Judgment** Persons represented by parties

In theory, claim preclusion is possible where earlier class action claim is essentially the same as later action for individual relief, and issue preclusion is possible where fact resolved in class action proves important in the later action.

10 Cases that cite this headnote

[3] **Constitutional Law** Medical care and treatment

Mental Health Treatment

Challenges to conditions of confinement by convicted sex offender, who was confined indefinitely in state treatment center for the sexually dangerous, were most appropriately analyzed under the due process clause, requiring conditions that did not fall below minimum standards of civilized decency; although offender's prison sentence would expire in approximately nine years, his confinement in treatment center was indefinite and he could argue that state's ordinary procedures and constraints were affirmatively and needlessly worsening his mental condition, such that he might well be confined long after his sentence had expired. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[4] **Mental Health** Treatment

In treatment center for sexually dangerous offenders, as in ordinary prison, security and administrative concerns may clash with welfare and comfort of individuals, and any "professional judgment" that decides an issue involving conditions of confinement must embrace security and administrative concerns, not merely medical judgments.

13 Cases that cite this headnote

[5] **Prisons** Care, Custody, Confinement, and Control

Professional judgment as to issues involving conditions of confinement creates only "presumption" of correctness; final responsibility belongs to the courts.

3 Cases that cite this headnote

[6] **Injunction** Prisons and Prisoners

District court acted within its authority in entering injunctive relief provision directing general reappraisal of convicted sex offender's personal dangerousness and of general conditions of his confinement in state treatment center for the sexually dangerous.

[7] **Mental Health** Treatment

Evidence supported district court's order requiring that administrators of state treatment center for the sexually dangerous consider request by convicted sex offender for treatment outside treatment center, that ten-minute movement restriction and oral-cavity searches be suspended as to offender unless and until qualified decision maker concluded they were appropriate for him, and that "extraction team" searches of offender be barred unless there was prior consultation with treatment center clinician.

1 Cases that cite this headnote

[8] **Mental Health** Treatment

In action by convicted sex offender challenging conditions of confinement in state treatment center for the sexually dangerous, district court improperly ordered that armed guard and shackles no longer be used when transporting offender outside facility unless and until qualified decision maker determines that to be necessary; treatment center should not have been obliged to suspend its specific security measures for outside visits while offender's case was being reexamined.

1 Cases that cite this headnote

Attorneys and Law Firms

***15** Elisabeth J. Medvedow, Asst. Atty. Gen., Com. of MA, with whom Scott Harshbarger, Atty. Gen., Com. of MA, was on brief, for defendants, appellants.

David M. Rocchio with whom Robert D. Keefe, Mark G. Matuschak, and Hale and Dorr were on brief, for plaintiff, appellee.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and BOUDIN, Circuit Judge.

Opinion

BOUDIN, Circuit Judge.

This case was brought by Robert Cameron, who is currently detained in the Massachusetts Treatment Center for the Sexually Dangerous ("the Treatment Center"). The defendants, whom we refer to as "the state," are officials who are responsible for the Treatment Center. In substance, Cameron complains that his conditions of confinement violate the Due Process Clause of the Fourteenth Amendment and his asserted constitutional "right to treatment."

After a bench trial the district court granted injunctive relief and the state appealed. We modify the injunction in accordance with this opinion and, with certain clarifications, otherwise affirm most of the relief ordered by the district court. Our decision is based upon the district court's findings but rests upon somewhat different legal grounds.

I. THE FACTS AND PRIOR PROCEEDINGS

On December 13, 1978, Cameron was convicted in Vermont of aggravated assault with a deadly weapon and sexual assault —apparently attempted rape—and sentenced to a term of six to twenty years. He was then extradited to Massachusetts and convicted on September 12, 1979, for assault with intent to rape, kidnapping, and other crimes, and sentenced to a term of ten to twenty years, commencing after the Vermont sentence. On being paroled by Vermont on July 12, 1982, Cameron

began serving his Massachusetts sentence, which ***16** at the time of trial was set to expire in the year 2002. [1]

After serving several years in a Massachusetts prison, Cameron on November 14, 1985, was adjudged by the Massachusetts Superior Court to be a sexually dangerous person under M.G.L.A. c. 123A, and committed to the Treatment Center for a period of one day to life. The occasion for the commitment is not described. The Treatment Center, one of several facilities located at MCI Bridgewater, has a checkered history, much of it embroiled in litigation, *e.g.,* *Langton v. Johnston,* 928 F.2d 1206 (1st Cir.1991), and M.G.L.A. c. 123A itself has an uncertain future. [2] Most of the Treatment Center's inhabitants have underlying criminal convictions, and it is administered jointly by the Departments of Mental Health and Corrections to address both the medical and security aims of the Center. Cameron's stay at the Treatment Center appears to have been even more unhappy than normal.

Although the parties agree on little else, it appears that Cameron who is 50 years old and a Vietnam veteran suffers from severe psychological disorders. In the words of the district court, "Cameron suffers from a borderline or mixed personality disorder and post-traumatic stress disorder. There is also no dispute that as a result ... he may often act in a paranoid and confrontational manner." *Cameron v. Tomes,* 783 F.Supp. 1511, 1517 (D.Mass.1992). Psychological treatment is available at the Treatment Center—indeed, its availability is provided for under a consent judgment entered many years ago [3] —but Cameron found what was offered unsuitable until 1989 when he established a working relationship with a therapist.

In the meantime, Cameron brought the present suit in 1986 challenging his conditions of confinement. Counsel was assigned, his claims evolved, and in December 1991 and January 1992, the district court conducted a six-day bench trial in the case. In his opinion issued on February 14, 1992, the district judge declared that Cameron had a "constitutional right to minimally adequate treatment [for his mental disorders] based upon the exercise of professional judgment." 783 F.Supp. at 1516. The court rejected a motion to dismiss by the state, which had argued that no such constitutional right existed. *Id.* It also rejected the state's *res judicata* defense, *id.* at 1516–17, based on the *Langton* case where a different district judge had found that the Treatment Center was in general compliance with the consent decree. *See* *Langton,* 928 F.2d at 1208–16.

The district court then ruled that, on a number of issues, those in charge of the Treatment Center had made judgments about Cameron and enforced policies against him without, or contrary to, the advice of the medical professionals involved in his treatment. 783 F.Supp. at 1518–25. The district court made specific findings relating to Cameron's access to outside medical care, the use of shackles and an armed guard in transporting him, his housing in the facility, physical searches of him, and similar matters. The court then granted injunctive relief on ten different matters. *Id.* at 1526–27.

First, and most broadly, the court ordered the pertinent administrative board within the Treatment Center to conduct an immediate review of his current sexual dangerousness, appropriate treatment and conditions, and his request to participate in ***17** what is called the community access program. 783 F.Supp. at 1526. This injunctive provision ended by stating: "All final decisions on Cameron's long-term treatment, including his participation in the community access program, must be made by a qualified professional, or with due respect and regard for the judgment of a qualified professional." *Id.*

Several other decree provisions are similarly qualified. The court suspended the use of shackles and an armed guard in transporting Cameron for outside medical care unless and until "a qualified decision maker determines through the exercise of professional judgment that such restraints are professionally acceptable, based on a weighing of [the state's] needs along with Cameron's treatment needs." 783 F.Supp. at 1526. Prohibited, under a similar condition, were subjecting Cameron to a restrictive internal movement policy, to an intrusive search procedure previously used and so-called "oral cavity searches," and to the "current disciplinary system" of the Treatment Center. *Id.* at 1526–27.

Finally, without any qualification as to professional judgment, the court ordered that Cameron be allowed medical treatment at Veterans Administration facilities for specific medical conditions, that he be allowed housing in the maximum privilege unit of the Treatment Center without consenting to share a room, and that a handicapped accessible room be immediately made available to him. 783 F.Supp. at 1526.

This last direction, as well as several of the others, was related to physical disabilities suffered by Cameron, including the amputation of a leg due to infection while Cameron was in the care of the state.

II. DISCUSSION

Res Judicata. The state's threshold objection to the suit is that Cameron's claims are encompassed by prior litigation and are therefore barred as *res judicata.* Emphasizing the "claim preclusion" branch of *res judicata,* the state's brief says that one of the consolidated district court cases embraced by *Langton—Bruder v. Johnston*—was a class action suit concerning the right to treatment for all persons confined at the Treatment Center as of 1987. Cameron, says the state, was a member of the class and the state prevailed in that case on the ground that treatment was adequately provided.

[1] We agree with the district court that the state has made no showing that Cameron's claim is barred by *res judicata.* Cases on *res judicata,* ample in many areas, are fairly sparse where preclusion of distinctive individual claims is urged based upon an earlier class action judgment. But in *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 880, 104 S.Ct. 2794, 2801–02, 81 L.Ed.2d 718 (1984), the Supreme Court confirmed what common sense would suggest: a class action judgment—there, in a discrimination case—binds the class members as to matters actually litigated but does not resolve any claim based on individual circumstances that was not addressed in the class action. *Id.* at 880–82, 104 S.Ct. at 2801–02.

Under *Cooper,* we think that *res judicata* plainly does not apply in this instance. The several law suits and years of proceedings embraced by *Langton* require pages to describe, but the suits were concerned with fairly general issues (*e.g.,* physical plant, sequestration, equality of treatment) and with specific claims of individuals other than Cameron.[4] The closest that that litigation came to this case was (1) endorsement of a general requirement of treatment set forth in state regulations, (2) rejection of a charge that the authorized absence program was underutilized, and (3) rejection of a general attack on the "double bunking" requirement. These claims dealt with the general condition of inhabitants of the Treatment Center. If *Langton* has anything else in common with this case, the state has not mentioned it.

***18** This case, by contrast, rests primarily on Cameron's claims that his unusual situation requires special accommodations: specifically, that his physical disability affects his need for outside medical visits, freer movement within the Treatment Center, and separate bunking arrangements adapted to his handicap, and that his mental condition (what lay people would probably call paranoia) makes ordinary physical searches, disciplinary arrangements and other constraints unsuitable, indeed psychologically dangerous, for him. There is no suggestion by the state that these issues peculiar to Cameron were actually litigated in the *Langton* case.

[2] Thus, the state's claim reduces itself to the argument that Cameron *had* to litigate those issues in the earlier cases or forever hold his peace. To describe this claim is to refute it: class action institutional litigation often addresses general circumstances, not the distinctive plight of someone claiming special needs or status. To the extent individual concerns were addressed in *Langton,* Cameron is not even mentioned in the district court decision. Nor could earlier cases deal with *later* occurring events that are a part of Cameron's present case. In theory, claim preclusion is possible where an earlier class action claim is essentially the same as a later action for individual relief, and issue preclusion is possible where a fact resolved in the class action proves important in the later action. *See Cooper,* 467 U.S. at 880–82, 104 S.Ct. at 2800–02. No such overlap has been shown here.

The Merits. The district court in this case premised its decision on what it deemed to be two established constitutional rights possessed by those at the Treatment Center: "a constitutional right to minimally adequate treatment [for mental disorders] based upon the exercise of professional judgment," 783 F.Supp. at 1516, and a right to be free from "[b]odily restraints" except "when and to the extent professional judgment deems this necessary...." *Id.* at 1520. It is not entirely clear whose professional judgment—medical or administrative—the district court had in mind; but the implication of its discussion is that the administrators of the facility are bound to listen to the judgment of the medical professionals and to heed it unless they offer good reason for refusing to do so. *Id.* at 1519–20.

Both sides on this appeal seek a decision on the constitutional "right to treatment," the state urging that none exists and Cameron supporting the district court. In our view, a decision on the abstract issue of "a right to treatment" is not necessary

for a disposition of this case; and the concept has only a remote connection to the actual relief sought. We address this point briefly, against the background of prior "right to treatment" law, before considering Cameron's own situation and the proper touchstone for appraising his claims.

It is settled that those who are confined by the state, for whatever reason, are entitled under the Constitution to food, clothing, medical care, and reasonable efforts to secure physical safety. Beyond such obvious essentials, however, guidance from the Supreme Court is largely confined to one cautiously phrased decision. In *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), a mother, unable to care for her retarded child, placed him in a state institution. Then, discovering that he was sometimes physically restrained by "soft" shackles and taught little in "basic self-care skills," she sued. The Supreme Court held that under those circumstances the child was constitutionally entitled to be free from any but necessary restraints and had a right to basic self-care training to secure safety and mobility. As for deciding when and how much, the Court said that judges should not dictate the choice among acceptable alternatives and that a "presumption" of correctness must be attached to "professional judgment." *Id.* at 321–23, 102 S.Ct. at 2461–62.

Youngberg left in limbo a prior line of lower court cases and academic literature that had sought to shape a broad constitutional "right to treatment," including treatment of the psychological ills of confined ***19** persons. [5] Since *Youngberg,* a few circuits have ventured into this constitutional territory, returning with different answers. [6] We ourselves may have seemed to send mixed signals. In *Doe v. Gaughan,* 808 F.2d 871 (1st Cir.1986), this court, under the caption "constitutional right to treatment," agreed that *Youngberg* extended beyond the retarded to protect similar interests of those mentally ill persons civilly committed to a different Bridgewater facility. *Id.* at 884. In *Langton,* four years later, this court explicitly refused to decide whether there was a "constitutional right to treatment" at the Treatment Center, remarking that "the trial judge's skirting of the constitutional thicket was appropriate" as such issues should be decided only when necessary. 928 F.2d at 1217. One reason why it was unnecessary in *Langton* was that the consent decree "set a higher standard than the Constitution" in affording treatment for those in the Treatment Center. *Id.* [7]

Although the parties seek to litigate the abstract issue of a right to treatment, we prefer to plow a furrow no wider than the case demands. Cameron's claims for the most part are not really "right to treatment" claims at all: he is receiving substantial psychological treatment for his condition, and most of the arguments he is making concern housing, mobility, transportation, and security. Further, under existing state law, there is already a regulation-based right to treatment at the Treatment Center that equals or exceeds anything that the Supreme Court would likely impose under the Due Process Clause. *See* *Langton,* 928 F.2d at 1217. It is also unclear whether, if the Supreme Court did provide a general "right to treatment" for civilly committed persons, it would apply that right to those held as well under criminal sentence. *Youngberg,* 457 U.S. at 321–22, 102 S.Ct. at 2461. [8] At the very least, the Court's approach in *Youngberg* suggests hewing to the case-by-case approach.

[3] Taking that approach here, we think the touchstone for Cameron's claims is the Due Process Clause of the Fourteenth Amendment, requiring conditions that do not fall below the minimum standards of civilized decency. *See generally* *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Under this rubric, context works in Cameron's favor. While his prison sentence will expire in 2002 or even earlier, his confinement in the Treatment Center is from one day to life and will never end unless his condition improves and he is found to be no longer sexually dangerous. Thus, Cameron's best argument is that the state's ordinary procedures and constraints are affirmatively and needlessly *worsening* his mental condition, so that he may well be confined long after his sentence has expired. This is a claim with some bite, no matter how much latitude ***20** states ordinarily have to run their institutions.

Further, the findings of the district court, which control unless clearly erroneous, Fed.R.Civ.P. 52(a); *Doe v. Gaughan,* 808 F.2d at 877, lend support to Cameron's argument. The findings amount to a determination by the district court that procedures that might ordinarily be applied—such as certain of the searches and the internal movement controls—worsen Cameron's condition *and* may well be unnecessary in this case. *See* 783 F.Supp. at 1523–25. [9] On both points, effect and necessity, the district court says that this is the judgment of the medical professionals and that no adequate response has been obtained from the administrators. *Id.*

The state broadly disputes this version of events, pointing to other evidence showing how much it has helped Cameron and tried to accommodate his special needs. It does not, however, make much effort in its brief to rebut specific findings as to specific episodes. We think there is some conflict in the evidence but also that the district judge's findings are not clearly erroneous. It is true that these findings were made in the framework of a legal analysis that we do not adopt, but the findings fit well enough into a due process framework and this court may affirm on any grounds supported by evidence. *See* *Doe v. Anrig,* 728 F.2d 30, 32 (1st Cir.1984).

Relief Ordered by the District Court. The immediate relief ordered by the district court is, with one or two exceptions, fairly modest, primarily requiring further consideration of Cameron's case and some interim measures. Importantly, the court has ordered a general reappraisal of Cameron's treatment and conditions, with decisions to be made by the administrators "with due respect and regard for the judgment of a qualified professional." 783 F.Supp. at 1526. But given the district court's use in several contexts of the "professional judgment" standard, a word is in order for the guidance of the parties and for any future litigation that may ensue.

[4] In an institution like the Treatment Center, as in an ordinary prison, security and administrative concerns may clash with the welfare and comfort of individuals, as the district court recognized. This was so in the facility at issue in *Youngberg,* 457 U.S. at 320, 102 S.Ct. at 2460, and it is surely so in the Treatment Center where most if not all those detained have been convicted of crimes and many may be dangerous. Any professional judgment that *decides* an issue involving conditions of confinement must embrace security and administration, and not merely medical judgments.

[5] Thus when it comes to appraising the judgments of the administrators, it does not follow that they are bound to do what the doctors say is best for Cameron even if the doctors are unanimous. The administrators are responsible to the state and to the public for making professional judgments of their own, encompassing institutional concerns as well as individual welfare. Nothing in the Constitution mechanically gives controlling weight to one set of professional judgments. Indeed, when it comes to constitutional rights, none of the professionals has the last word. Professional judgment, as the Supreme Court has explained, creates only a "presumption" of correctness; welcome or not, the final responsibility belongs to the courts. *See* *Youngberg,* 457 U.S. at 323, 102 S.Ct. at 2462.

[6] With this clarification as to the role of "professional judgment," we sustain the first injunctive relief provision ordered by the district court directing the general reappraisal ***21** of Cameron's personal dangerousness and of his general conditions of confinement. Para. 1 (783 F.Supp. at 1526). The findings noted above and the evidence portrayed in the district court's decision support this fairly modest directive. In framing equitable relief, a district court has substantial latitude, and we think its "remand" to the Treatment Center administration is well within its authority.

[7] We also conclude that, on the same basis and with the same clarification as to the role of professional judgment, the district court's findings, *see* 783 F.Supp. at 1522–24, support several other conditioned decree provisions: that administrators consider requests by Cameron for treatment outside the Treatment Center, para. 4 (*id.* at 1526); that the ten-minute movement restriction and oral-cavity searches be suspended as to Cameron unless and until a qualified decision-maker concludes that they are appropriate for Cameron; and that the "Extraction Team" searches of Cameron be barred unless there is prior consultation with a Treatment Center clinician. Paras. 5, 6 and 8 (*id.* at 1526).

[8] On two other decree provisions, we believe modifications are required. First, the district court ordered that an armed guard and shackles no longer be used when transporting Cameron outside the facility unless and until a qualified decision-maker determines this to be necessary. Para. 3 (783 F.Supp. at 1526). In matters of security, as opposed to administrative convenience, the administrators' discretion is at its zenith and Cameron is still under criminal sentence. [10] An armed guard and shackles may seem needless precautions for an amputee, but we think that the Treatment Center should not be obliged to suspend its specific security measures for outside visits while Cameron's case is being reexamined. If the district court wishes to require this armed-guard-and-shackles requirement to be re-examined on an expedited basis, that is within its province.

Second, we similarly modify the district court's general injunction preventing the Treatment Center "from enforcing the current disciplinary system, run by Department of

Correction personnel, against Cameron" until a new system suitable to his needs is constructed. Para. 7 (783 F.Supp. at 1526). We have no problem with the decree's requirements that the administrators consider whether changes are warranted in the current system as applied to Cameron and that medical judgments be weighed in this process. But we think that a generally phrased suspension of "the current disciplinary system" in the meantime cuts too broadly and may raise security issues as well.

Finally, we sustain three unqualified decree provisions made by the district court: that Cameron be allowed to continue, as apparently he is at present, visits to Veterans Administration facilities related to his amputation, circulatory problems, and possible cancer; that the "consent" to double bunking be waived as to Cameron, the "consent" being largely symbolic; and that a handicapped accessible room, including a hospital bed if necessary, be made available to him. Paras. 2, 9, 10 (783 F.Supp. at 1526–27). These specifics of relief lie largely within the judgment of the district court, and the state's brief makes no targeted showing that these provisions are improper.

III. CONCLUSION

No one who reviews this record can dispute that Cameron has done harm in the past, nor doubt that he has been afflicted with serious mental illness. The findings of the district court suggest that, without special attention to his peculiar circumstances, further damage will be done to his mental condition. We conclude that the state does have a Due Process Clause obligation, to be balanced by it with competing ***22** demands and interests, to seek to limit the extent to which it worsens Cameron's condition and thereby extends his detention indefinitely. Needless to say, there can be no precision in such a Due Process Clause "standard" nor any way to avoid further dispute about its application, if the parties are bent on dispute.

The district judge, we think, had the right idea in directing the Treatment Center to undertake a good faith reappraisal of its policies as applied to Cameron. The more swiftly the matter is returned to that forum, with that perspective, the better off Cameron will be. As for the state, it may regard the district judge's strictures on its attitude as unfair and heedless of its past efforts for Cameron. But the injunction, at least as we have adjusted it and delimited its future effect, is not unduly burdensome. Like Cameron, the state has an evident interest in a resolution that avoids further litigation.

The district court's injunction is *modified* as set forth above and is otherwise *affirmed,* with the clarifications and upon the grounds stated in this opinion. No costs or attorneys' fees shall be awarded in connection with this appeal.

It is so ordered.

All Citations

990 F.2d 14

Footnotes

1 The district court opinion recites that the Massachusetts sentence ended in February 1992; but the parties advise us that Cameron's release date at the time of trial was 2002. Cameron's brief says that this period may be shortened by good time credits and possible parole.

2 The statute is one of the so-called sexual psychopath laws enacted in the 1940s in a number of states. *See* C. Tenney, *Sex, Sanity and Stupidity in Massachusetts,* 42 B.U.L.Rev. 1 (1962). In 1990, the Massachusetts legislature curtailed new admissions into the Treatment Center. *See* *Langton,* 928 F.2d at 1209.

3 Regulations adopted pursuant to the decree provide that "[e]very patient shall be offered treatment to effect his early return to public society. Such treatment shall consist of medical, psychiatric [and other services] ... Such treatment shall be administered ... in the least restrictive conditions which are consistent with [the patient's] security needs." *Langton,* 928 F.2d at 1211.

4 A detailed history of the litigation and the issues decided is contained in the thorough, 171–page, unpublished decision of Judge Mazzone, which this court in *Langton* affirmed on all issues apart from attorney's fees.

5 *See* Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard,* 102 Yale L.J. 639, 686–90 (1992). Treatment, in any curative sense, was not even an issue in *Youngberg* since the retardation was not curable. The Court expressly declined to devise any general rights to ameliorative programs beyond basic self-help training to assure safety and mobility, saying "we need go no further in this case." 457 U.S. at 319, 102 S.Ct. at 2460.

6 *Compare, e.g., Ohlinger v. Watson,* 652 F.2d 775 (1980), *with Bailey v. Gardebring,* 940 F.2d 1150 (8th Cir.1991), *cert. denied,* 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992). *See generally, Woe v. Cuomo,* 729 F.2d 96, 105 (2d Cir.1984) ("The Supreme Court has not directly addressed the question whether a constitutional right to treatment exists....").

7 In *Cortes–Quinones v. Jimenez–Nettleship,* 842 F.2d 556 (1st Cir.), *cert. denied,* 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988), and *Torraco v. Maloney,* 923 F.2d 231 (1st Cir.1991), this court addressed claims that authorities had not taken the precaution against suicide of individual prisoners. While both decisions spoke of the state's obligation to provide for medical needs, the context was very far removed from any generalized right to treatment for psychological conditions.

8 Whatever other significance it may have, we think that Cameron's criminal sentence does refute any claim that he is entitled under the Constitution to minimum physical restraint based on the judgment of his doctors. Quite unlike the child in *Youngberg,* Cameron is under criminal sentence of imprisonment for serious and violent crimes. To that extent, he lacks the same "liberty" interest as the child in *Youngberg.*

9 For example, the court invoked the testimony of Cameron's therapist that the shackling was "harmful to Cameron's mental health" and the court found it unnecessary based on "uncontroverted evidence." 783 F.Supp. at 1520. The court determined that the Treatment Center's internal movement policy, allowing free movement for only 10 minutes each hour, was unworkable for Cameron as an amputee, creating "undue pressure [that] ... compromises his treatment." *Id.* at 1522. A forcible search of Cameron while handcuffed, which the court found may well have been unnecessary, drove Cameron into moods of "helplessness, anger, despair and hopelessness...." *Id.* at 1523.

10 M.G.L.A. c. 123A, § 6A, provides that, subject to exceptions entrusted to an administrative board, "any person committed as a sexually dangerous person ... shall be held in secure custody." Discharge from the Treatment Center does not "terminate ... any ... unexpired sentence." *Id.* § 9.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by McLean v. U.S., 4th Cir.(Va.), May 21, 2009

330 F.3d 630
United States Court of Appeals,
Fourth Circuit.

Ophelia Azriel DE'LONTA, a/k/
a M. Stokes, Plaintiff–Appellant,
v.
Ronald J. ANGELONE; M.V. Smith; R.
Hulbert, Dr.; Colin C.J. Angliker, Dr.;
Doctor Wray, Defendants–Appellees,
and
Donald Swetter, M.D., Defendant.

No. 01–8020.
|
Argued: April 3, 2003.
|
Decided: May 27, 2003.

Synopsis
Inmate brought civil rights suit, alleging that prison officials and doctors had denied her adequate medical treatment for her gender identity disorder (GID) in violation of Eighth Amendment. The United States District Court for the Western District of Virginia, James C. Turk, Senior District Judge, dismissed suit for failure to state claim. Inmate appealed. The Court of Appeals, Wilkins, Chief Judge, held that: (1) inmate's need for protection against continued self-mutilation was serious medical need to which prison officials could not be deliberately indifferent, and (2) inmate stated claim by alleging inadequate medical treatment to prevent self-mutilation upon withdrawal of hormone therapy for GID.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (9)

[1] **Federal Courts** Pleading

Order dismissing complaint without prejudice, although ordinarily not appealable, was final appealable order where order clearly indicated that no amendment in complaint could cure defects in plaintiff's case.

18 Cases that cite this headnote

[2] **Federal Courts** Indigent Parties; Proceedings in Forma Pauperis

Standards for reviewing dismissal under in forma pauperis statute of inmate's complaint for failure to state claim are same as those for reviewing dismissal under civil rules. 28 U.S.C.A. § 1915(e)(2)(B)(ii); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

143 Cases that cite this headnote

[3] **Federal Civil Procedure** Pro Se or Lay Pleadings

Allegations in pro se complaints should be liberally construed. 28 U.S.C.A. § 1915.

585 Cases that cite this headnote

[4] **Sentencing and Punishment** Necessity of criminal conviction

Scrutiny under the Eighth Amendment is not limited to those punishments authorized by statute and imposed by a criminal judgment. U.S.C.A. Const.Amend. 8.

426 Cases that cite this headnote

[5] **Sentencing and Punishment** Conditions of Confinement

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. U.S.C.A. Const.Amend. 8.

33 Cases that cite this headnote

[6] **Sentencing and Punishment** Conditions of Confinement

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 acted with a sufficiently culpable state of mind. U.S.C.A. Const.Amend. 8.

310 Cases that cite this headnote

[7] **Sentencing and Punishment** Conditions of Confinement

Only extreme deprivations are adequate to satisfy objective component of an Eighth Amendment claim regarding conditions of confinement; prisoner must allege serious or significant physical or emotional injury resulting from challenged conditions or demonstrate substantial risk of such serious harm resulting from prisoner's exposure to challenged conditions. U.S.C.A. Const.Amend. 8.

482 Cases that cite this headnote

[8] **Prisons** Self-harm in general

Sentencing and Punishment Medical care and treatment

Inmate's need for protection against continued self-mutilation was serious medical need to which prison officials could not be deliberately indifferent. U.S.C.A. Const.Amend. 8.

291 Cases that cite this headnote

[9] **Prisons** Self-harm in general

Prisons Transsexuals; sex-change operations

Sentencing and Punishment Medical care and treatment

Inmate who was at risk for self-mutilation or other serious harm following cessation, under prison policy, of her hormone therapy for gender identity disorder (GID) stated Eighth Amendment claim by alleging that she had not received constitutionally adequate treatment to protect her from compulsive mutilation. U.S.C.A. Const.Amend. 8.

49 Cases that cite this headnote

Attorneys and Law Firms

***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.

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]

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 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.

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 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.

[1] 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.

II.

[2] **[3]** 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] 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).

[5] **[6]** **[7]** 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." ***634** *Hudson v. McMillian,* 503 U.S. 1, 5, 112 S.Ct. 995, 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).

[8] 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.

[9] 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 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 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.

All Citations

330 F.3d 630, 26 NDLR P 45

Footnotes

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)).

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

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).

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.

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.

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Billings v. Gates, Or.App., February 22, 1995

97 S.Ct. 285
Supreme Court of the United States

W. J. ESTELLE, Jr., Director, Texas Department of Corrections, et al., Petitioners,
v.
J. W. GAMBLE.

No. 75-929.
|
Argued Oct. 5, 1976.
|
Decided Nov. 30, 1976.
|
Rehearing Denied Jan. 17, 1977.
See 429 U.S. 1066, 97 S.Ct. 798.

Synopsis

State prisoner filed a pro se complaint against various prison officials under civil rights statute for failure to provide adequate medical care. The United States District Court for the Southern District of Texas, at Houston, dismissed the cause and the prisoner appealed. The United States Court of Appeals for the Fifth Circuit, 516 F.2d 937, reversed and remanded, and denied rehearing en banc, 521 F.2d 815. Certiorari was granted. The Supreme Court, Mr. Justice Marshall, J., held, inter alia, that while deliberate indifference to prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of Eighth Amendment, prisoner's pro se complaint showing that he had been seen and treated by medical personnel on 17 occasions within three-month period was insufficient to state a cause of action against physician both in his capacity as treating physician and as medical director of the corrections department, but case would be remanded to consider whether a cause of action was stated against other prison officials.

Reversed and remanded.

Mr. Justice Blackmun concurred in the judgment.

Mr. Justice Stevens filed a dissenting opinion.

West Headnotes (14)

[1] **Federal Courts** Scope and Extent of Review

Since prisoner's civil rights complaint was dismissed for failure to state a claim, Supreme Court must take as true its handwritten, pro se allegations. 42 U.S.C.A. § 1983.

3682 Cases that cite this headnote

[2] **Sentencing and Punishment** Purpose of prohibition

Primary concern of drafter of constitutional prohibition against cruel and unusual punishment was to proscribe torture and other barbarous methods of punishment; amendment proscribes more than physically barbarous punishments and embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency against which court must evaluate penal measures. U.S.C.A.Const. Amend. 8.

1192 Cases that cite this headnote

[3] **Sentencing and Punishment** Scope of Prohibition

Punishments which are incompatible with evolving standards of decency that mark progress of maturing society or which involve unnecessary or wanton infliction of pain are repugnant to Eighth Amendment. U.S.C.A.Const. Amend. 8.

3699 Cases that cite this headnote

[4] **Sentencing and Punishment** Proportionality

Eighth Amendment proscribes punishments which are grossly disproportionate to the severity of crime. U.S.C.A.Const. Amend. 8.

158 Cases that cite this headnote

[5] **Sentencing and Punishment** Declaring Act Criminal

Eighth Amendment imposes substantive limits on what can be made criminal and punished. U.S.C.A.Const. Amend. 8.

25 Cases that cite this headnote

[6] **Prisons** Health and Medical Care

Government has obligation to provide medical care for those whom it is punishing by incarceration. U.S.C.A.Const. Amend. 8.

1103 Cases that cite this headnote

[7] **Sentencing and Punishment** Medical care and treatment

Infliction of unnecessary suffering on prisoner by failure to treat his medical needs is inconsistent with contemporary standards of decency and violates the Eighth Amendment. U.S.C.A.Const. Amend. 8.

8016 Cases that cite this headnote

[8] **Civil Rights** Medical care and treatment

Sentencing and Punishment Medical care and treatment

Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by Eighth Amendment whether the indifference is manifested by prison doctors in response to prison needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed; regardless of how evidenced deliberate indifference to prisoner's serious illness or injuries states cause of action under civil rights statute. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

34504 Cases that cite this headnote

[9] **Civil Rights** Prisons

Accident even though it may produce added anguish is not on that basis alone to be characterized as wanton infliction of unnecessary pain on prisoner as the basis for a cause of action under civil rights statute. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

660 Cases that cite this headnote

[10] **Civil Rights** Medical care and treatment

Inadvertent failure to provide adequate medical care to prisoner cannot be said to constitute a wanton infliction of unnecessary pain on prisoner or to be repugnant to conscience of mankind for purpose of providing cause of action under civil rights statute. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

6176 Cases that cite this headnote

[11] **Civil Rights** Prisons and jails; probation and parole

Sentencing and Punishment Medical care and treatment

Complaint that physician has been negligent in diagnosing or treating medical condition of prisoner does not state a valid claim of medical mistreatment under the Eighth Amendment; medical malpractice does not become a constitutional violation merely because victim is a prisoner. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

11295 Cases that cite this headnote

[12] **Civil Rights** Medical care and treatment

Sentencing and Punishment Medical care and treatment

In order to state a cognizable claim under civil rights statute because of inadequate medical care, prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

25343 Cases that cite this headnote

[13] **Federal Civil Procedure** Prisoners' pleadings

Federal Civil Procedure Civil Rights Actions

Handwritten pro se civil rights complaint of prisoner was to be liberally construed and must be held to less stringent standards than formal pleadings by lawyer, and complaint could be dismissed for failure to state a claim only if it appeared beyond doubt that plaintiff could prove no set of facts in support of claim which would entitle him to relief.

13693 Cases that cite this headnote

[14] **Civil Rights** Prisons and jails; probation and parole

Complaint of prisoner alleging inadequate medical care but showing that he was seen by medical personnel on 17 occasions in a three-month period during which he was treated for his back injury, high blood pressure and heart problem and merely contending that more should have been done by the way of diagnosis and treatment failed to state cause of action against physician in his capacity either as treating physician or as medical director of corrections department, although case was remanded to determine whether cause of action had been stated against other prison officials. U.S.C.A.Const. Amend. 8; 42 U.S.C.A. § 1983.

1267 Cases that cite this headnote

****287** *Syllabus* *

***97** Respondent state inmate brought this civil rights action under 42 U.S.C. s 1983 against petitioners, the state corrections department medical director (Gray) and two correctional officials, claiming that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury assertedly sustained while he was engaged in prison work. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals held that the alleged insufficiency of the medical treatment required reinstatement of the complaint. Held: Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment. Here, however, respondent's claims against Gray do not suggest such indifference, the allegations revealing that Gray and other medical personnel saw respondent on 17 occasions during a 3-month span and treated his injury and other problems. The failure to perform an X-ray or to use additional diagnostic techniques does not constitute cruel and unusual punishment but is at most medical malpractice cognizable in the state courts. The question whether respondent has stated a constitutional claim against the other petitioners, the Director of the Department of Corrections and the ****288** warden of the prison, was not separately evaluated by the Court of Appeals and should be considered on remand. Pp. 289-293.

516 F.2d 937, reversed and remanded.

Attorneys and Law Firms

Bert W. Pluymen, Austin, Tex., for petitioners, pro hac vice, by special leave of Court.

***98** Daniel K. Hedges, Houston, Tex., for respondent, pro hac vice, by special leave of Court.

Opinion

Mr. Justice MARSHALL delivered the opinion of the Court.

Respondent J. W. Gamble, an inmate of the Texas Department of Corrections, was injured on November 9, 1973, while performing a prison work assignment. On February 11, 1974, he instituted this civil rights action under 42 U.S.C. s 1983, [1] complaining of the treatment he received after the injury. Named as defendants were the petitioners, W. J. Estelle, Jr., Director of the Department of Corrections, H. H. Husbands, warden of the prison, and Dr. Ralph Gray, medical director of the Department and chief medical officer of the prison hospital. The District Court, sua sponte dismissed the complaint for failure to state a claim upon which relief could be granted. [2] The Court of Appeals reversed and remanded

with instructions to reinstate the complaint. 516 F.2d 937 (C.A.5 1975). We granted certiorari, 424 U.S. 907, 96 S.Ct. 1101, 47 L.Ed.2d 311 (1976).

***99** I

[1] Because the complaint was dismissed for failure to state a claim, we must take as true its handwritten, pro se allegations. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). According to the complaint, Gamble was injured on November 9, 1973, when a bale of cotton[3] fell on him while he was unloading a truck. He continued to work but after four hours he became stiff and was granted a pass to the unit hospital. At the hospital a medical assistant, "Captain" Blunt, checked him for a hernia and sent him back to his cell. Within two hours the pain became so intense that Gamble returned to the hospital where he was given pain pills by an inmate nurse and then was examined by a doctor. The following day, Gamble saw a Dr. Astone who diagnosed the injury as a lower back strain, prescribed Zactirin (a pain reliever) and Robaxin (a muscle relaxant),[4] and placed respondent on "cell-pass, cell-feed" status for two days, allowing him to remain in his cell at all times except for showers. On November 12, Gamble again saw Dr. Astone who continued the medication and cell-pass, cell-feed for another seven days. He also ordered that respondent be moved from an upper to a lower bunk for one week, but the prison authorities did not comply with that directive. The following week, Gamble returned to Dr. Astone. The doctor continued the muscle relaxant but prescribed a new pain reliever, Febridyne, and placed respondent on cell-pass for seven days, permitting him to remain in his cell except for meals and showers. On November 26, respondent ****289** again saw Dr. Astone, who put respondent back on the original pain reliever for five days and continued the cell-pass for another week.

***100** On December 3, despite Gamble's statement that his back hurt as much as it had the first day, Dr. Astone took him off cell-pass, thereby certifying him to be capable of light work. At the same time, Dr. Astone prescribed Febridyne for seven days. Gamble then went to a Major Muddox and told him that he was in too much pain to work. Muddox had respondent moved to "administrative segregation."[5] On December 5, Gamble was taken before the prison disciplinary committee, apparently because of his refusal to work. When the committee heard his complaint of back pain and high blood pressure, it directed that he be seen by another doctor.

On December 6, respondent saw petitioner Gray, who performed a urinalysis, blood test, and blood pressure measurement. Dr. Gray prescribed the drug Ser-Ap-Es for the high blood pressure and more Febridyne for the back pain. The following week respondent again saw Dr. Gray, who continued the Ser-Ap-Es for an additional 30 days. The prescription was not filled for four days, however, because the staff lost it. Respondent went to the unit hospital twice more in December; both times he was seen by Captain Blunt, who prescribed Tiognolos (described as a muscle relaxant). For all of December, respondent remained in administrative segregation.

In early January, Gamble was told on two occasions that he would be sent to the "farm" if he did not return to work. He refused, nonetheless, claiming to be in too much pain. On January 7, 1974, he requested to go on sick call for his back pain and migraine headaches. After an initial refusal, he saw Captain Blunt who prescribed sodium salicylate (a ***101** pain reliever) for seven days and Ser-Ap-Es for 30 days. Respondent returned to Captain Blunt on January 17 and January 25, and received renewals of the pain reliever prescription both times. Throughout the month, respondent was kept in administrative segregation.

On January 31, Gamble was brought before the prison disciplinary committee for his refusal to work in early January. He told the committee that he could not work because of his severe back pain and his high blood pressure. Captain Blunt testified that Gamble was in "first class" medical condition. The committee, with no further medical examination or testimony, placed respondent in solitary confinement.

Four days later, on February 4, at 8 a. m., respondent asked to see a doctor for chest pains and "blank outs." It was not until 7:30 that night that a medical assistant examined him and ordered him hospitalized. The following day a Dr. Heaton performed an electrocardiogram; one day later respondent was placed on Quinidine for treatment of irregular cardiac rhythm and moved to administrative segregation. On February 7, respondent again experienced pain in his chest, left arm, and back and asked to see a doctor. The guards refused. He asked again the next day. The guards again refused. Finally, on February 9, he was allowed to see Dr. Heaton, who ordered the Quinidine continued for three more days. On February 11, he swore out his complaint.

II

The gravamen of respondent's s 1983 complaint is that petitioners have subjected him to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth.[6] ****290** See ***102** Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). We therefore base our evaluation of respondent's complaint on those Amendments and our decisions interpreting them.

[2] **[3]** The 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. See, e. g., Gregg v. Georgia, 428 U.S. 153, 169-173, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ. (hereinafter joint opinion)); see also Granucci, Nor Cruel and Unusual Punishment Inflicted: The Original Meaning, 57 Calif.L.Rev. 839 (1969). It suffices to note that the primary concern of the drafters was to proscribe "torture(s)" and other "barbar(ous)" methods of punishment. Id., at 842. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment. See 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 that amendment . . ."); In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed. 519 (1890) ("Punishments are cruel when they involve torture or a lingering death . . .").

[4] **[5]** Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. See, e. g., Gregg v. Georgia, supra, at 171, 96 S.Ct. at 2924 (joint opinion); Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 597, 598, 2 L.Ed.2d 630 (1958); Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910). The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ," Jackson v. Bishop, 404 F.2d 571, 579 (C.A.8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, at 101, 78 S.Ct. at 598; see also Gregg v. Georgia, supra, at 172-173, 96 S.Ct. at 2925 (joint opinion); ***103** Weems v. United States, supra, 217 U.S. at 378, 30 S.Ct. at 553, or which "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 173, 96 S.Ct. at 2925 (joint opinion); see also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947); Wilkerson v. Utah, supra, 99 U.S. at 136.[7]

[6] **[7]** These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. 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," In re Kemmler, supra, 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. Cf. Gregg v. Georgia, supra, at 173, 96 S.Ct. at 2924-25 (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation[8] codifying the com ****291** mon-law ***104** view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[9]

[8] We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 173, 96 S.Ct. at 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs[10] or by prison guards in intentionally denying or delaying access to medical ***105** care[11] or intentionally interfering with the treatment once prescribed.[12] Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under s 1983.

[9] This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical

treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), for example, the Court concluded that it was not unconstitutional to force a prisoner to undergo a second effort to electrocute him after a mechanical malfunction had thwarted the first attempt. Writing for the plurality, ****292** Mr. Justice Reed reasoned that the second execution would not violate the Eighth Amendment because the first attempt was an "unforeseeable accident." Id., at 464, 67 S.Ct. 376. Mr. Justice Frankfurter's concurrence, based solely on the Due Process Clause of the Fourteenth Amendment, concluded that since the first attempt had failed because of "an innocent misadventure," id., at 470, 67 S.Ct. at 379, the second would not be " 'repugnant to the conscience of mankind,' " id., at 471, 67 S.Ct. at 380, quoting Palko v. Connecticut, 302 U.S. 319, 323, 58 S.Ct. 149, 150, 82 L.Ed. 288 (1937). [13]

[10] **[11]** **[12]** Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be ***106** "repugnant to the conscience of mankind." 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. [14]

III

[13] Against this backdrop, we now consider whether respondent's complaint states a cognizable s 1983 claim. The handwritten pro se document is to be liberally construed. As the Court unanimously held in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id., at 520-521, 92 S.Ct. at 596, quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[14] ***107** Even applying these liberal standards, however, Gamble's claims against Dr. Gray, both in his capacity as treating physician and as medical director of the Corrections Department, are not cognizable under s 1983. Gamble was seen by medical personnel on 17 occasions spanning a 3-month period: by Dr. Astone five times; by Dr. Gray twice; by Dr. Heaton three times; by an unidentified doctor and inmate nurse on the day of the injury; and by medical assistant Blunt six times. They treated his back injury, high blood pressure, and heart problems. Gamble has disclaimed any objection to the treatment provided for his high blood pressure and his heart problem; his complaint is "based solely on the lack of diagnosis and inadequate treatment of his back injury." Response to Pet. for Cert. 4; see also Brief for Respondent at 19. The doctors diagnosed his injury as a lower back strain and treated it with bed rest, muscle relaxants and pain relievers. Respondent contends that more should have been done by way of diagnosis and treatment, and ****293** suggests a number of options that were not pursued. Id., at 17, 19. The Court of Appeals agreed, stating: "Certainly an x-ray of (Gamble's) lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing." 516 F.2d, at 941. But the question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act. [15] The Court of Appeals was in error in holding that the alleged insufficiency of the ***108** medical treatment required reversal and remand. That portion of the judgment of the District Court should have been affirmed. [16]

The Court of Appeals focused primarily on the alleged actions of the doctors, and did not separately consider whether the allegations against the Director of the Department of Corrections, Estelle, and the warden of the prison, Husbands,

stated a cause of action. Although we reverse the judgment as to the medical director, we remand the case to the Court of Appeals to allow it an opportunity to consider, in conformity with this opinion, whether a cause of action has been stated against the other prison officials.

It is so ordered.

Mr. Justice BLACKMUN concurs in the judgment of the Court.

Mr. Justice STEVENS, dissenting.

Most of what is said in the Court's opinion is entirely consistent with the way the lower federal courts have been processing claims that the medical treatment of prison inmates is so inadequate as to constitute the cruel and unusual punishment prohibited by the Eighth Amendment. I have no serious disagreement with the way this area of the law has developed thus far, or with the probable impact of this opinion. Nevertheless, there are three reasons why I am unable to join it. First, insofar as the opinion orders the dismissal of the complaint against the chief medical ***109** officer of the prison, it is not faithful to the rule normally applied in construing the allegations in a pleading prepared by an uncounseled inmate. Second, it does not adequately explain why the Court granted certiorari in this case. Third, it describes the State's duty to provide adequate medical care to prisoners in ambiguous terms which incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution.

I

The complaint represents a crude attempt to challenge the system of administering medical care in the prison where Gamble is confined. Fairly construed, the complaint alleges that he received a serious disabling back injury in November 1973, that the responsible prison authorities were indifferent to his medical needs, and that as a result of that indifference he has been mistreated and his condition has worsened.

The indifference is allegedly manifested, not merely by the failure or refusal to diagnose and treat his injury properly, but also by the conduct of the prison staff. Gamble was placed in solitary confinement for prolonged periods as punishment for ****294** refusing to perform assigned work which he was physically unable to perform.[1] The only medical evidence presented to the disciplinary committee was the statement of a medical assistant that he was in first-class condition, when in fact he was suffering not only from the back sprain but from high blood pressure. Prison guards refused ***110** to permit him to sleep in the bunk that a doctor had assigned. On at least one occasion a medical prescription was not filled for four days because it was lost by staff personnel. When he suffered chest pains and blackouts while in solitary, he was forced to wait 12 hours to see a doctor because clearance had to be obtained from the warden. His complaint also draws into question the character of the attention he received from the doctors and the inmate nurse in response to his 17 attempts to obtain proper diagnosis and treatment for his condition. However, apart from the medical director who saw him twice, he has not sued any of the individuals who saw him on these occasions. In short, he complains that the system as a whole is inadequate.

On the basis of Gamble's handwritten complaint it is impossible to assess the quality of the medical attention he received. As the Court points out, even if what he alleges is true, the doctors may be guilty of nothing more than negligence or malpractice. On the other hand, it is surely not inconceivable that an overworked, undermanned medical staff in a crowded prison[2] is following the expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would disclose an obvious need for remedial treatment.[3] Three fine judges ***111** sitting on the United States Court of Appeals for the Fifth Circuit[4] thought that enough had ****295** been alleged to require some inquiry into the actual facts. If this Court meant what it said in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652, these judges were clearly right.[5]

***112** The Haines test is not whether the facts alleged in the complaint would entitle the plaintiff to relief. Rather, it is whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, no set of facts could be proved that would entitle the plaintiff to relief.[6] The reasons for the Haines test are manifest. A pro se complaint provides an unsatisfactory foundation for deciding the merits of important questions because typically it is inartfully drawn, unclear, and equivocal, and because thorough pleadings, affidavits, and possibly an evidentiary hearing will usually bring out facts which simplify or make unnecessary the decision of questions presented by the naked complaint.[7]

***113** Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this "is another instance of judicial haste which in the long run makes waste," Dioguardi v. Durning, 139 F.2d 774, 775 (C.A.2 1944) (Clark, J.), cited with approval in Haines v. Kerner, supra, 404 U.S., at 521, 92 S.Ct., at 596. In the instant case, if the District Court had resisted the temptation of premature dismissal, ****296** the case might long since have ended with the filing of medical records or affidavits demonstrating adequate treatment. Likewise, if the decision of the Fifth Circuit reinstating the complaint had been allowed to stand and the case had run its normal course, the litigation probably would have come to an end without the need for review by this Court. Even if the Fifth Circuit had wrongly decided the pleading issue, no great harm would have been done by requiring the State to produce its medical records and move for summary judgment. Instead, the case has been prolonged by two stages of appellate review, and is still not over: The case against two of the defendants may still proceed, and even the ***114** claims against the prison doctors have not been disposed of with finality. [8]

The principal beneficiaries of today's decision will not be federal judges, very little of whose time will be saved, but rather the "writ-writers" within the prison walls, whose semiprofessional services will be in greater demand. I have no doubt about the ability of such a semiprofessional to embellish this pleading with conclusory allegations which could be made in all good faith and which would foreclose a dismissal without any response from the State. It is unfortunate that today's decision will increase prisoners' dependence on those writ-writers. See Cruz v. Beto, 405 U.S. 319, 327 n. 7, 92 S.Ct. 1079, 1084, 31 L.Ed.2d 263 (Rehnquist, J., dissenting).

II

Like the District Court's decision to dismiss the complaint, this Court's decision to hear this case, in violation of its normal practice of denying interlocutory review, see ***115** R. Stern & E. Gressman, Supreme Court Practice 180 (4th ed. 1969), ill serves the interest of judicial economy.

Frankly, I was, and still am, puzzled by the Court's decision to grant certiorari. [9] If the Court merely thought the Fifth Circuit misapplied Haines v. Kerner by reading the complaint too liberally, the grant of certiorari is inexplicable. On the other hand, if the Court thought that instead of a pleading question, the case presented an important constitutional question about the State's duty to provide medical care to prisoners, the crude allegations of this complaint do not provide the kind of factual basis [10] the Court normally requires as a predicate for the adjudication of a novel and serious constitutional issue, see, e. g., ****297** Rescue Army v. Municipal Court, 331 U.S. 549, 568-575, 67 S.Ct. 1409, 1419-1423, 91 L.Ed. 1666; Ellis v. Dixon, 349 U.S. 458, 464, 75 S.Ct. 850, 854, 99 L.Ed. 1231; Wainwright v. City of New Orleans, 392 U.S. 598, 88 S.Ct. 2243, 20 L.Ed.2d 1322 (Harlan, J., concurring). [11] Moreover, as the Court notes, all the Courts of Appeals to consider the question have reached substantially the same conclusion that the Court adopts. Ante, at 292 n. 14. Since the Court seldom takes a case merely to reaffirm settled law, I fail to understand why it has chosen to make this case an exception to its normal practice.

***116** III

By its reference to the accidental character of the first unsuccessful attempt to electrocute the prisoner in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422, see ante, at 291, and by its repeated references to "deliberate indifference" and the "intentional" denial of adequate medical care, I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. [12] Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, 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. [13] Whether the conditions in Andersonville were the ***117** product of design, negligence, or mere poverty, they were cruel and inhuman.

In sum, I remain convinced that the petition for certiorari should have been denied. It having been granted, I would affirm the judgment of the Court of Appeals.

All Citations

429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251

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 Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

1 Title 42 U.S.C. s 1983 provides:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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."

2 It appears that the petitioner-defendants were not even aware of the suit until it reached the Court of Appeals. Tr. of Oral Arg. 7, 13-15. This probably resulted because the District Court dismissed the complaint simultaneously with granting leave to file it in forma pauperis.

3 His complaint states that the bale weighed "6.00 pound." The Court of Appeals interpreted this to mean 600 pounds. 516 F.2d 937, 938 (CA5 1975).

4 The names and descriptions of the drugs administered to respondent are taken from his complaint, App. A-5 A-11, and his brief, at 19-20.

5 There are a number of terms in the complaint whose meaning is unclear and, with no answer from the State, must remain so. For example, "administrative segregation" is never defined. The Court of Appeals deemed it the equivalent of solitary confinement. 516 F.2d, at 939. We note, however, that Gamble stated he was in "administrative segregation" when he was in the "32A-7 five building" and "32A20 five building," but when he was in "solitary confinement," he was in "3102 five building."

6 The Eighth Amendment provides:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
At oral argument, counsel for respondent agreed that his only claim was based on the Eighth Amendment. Tr. of Oral Arg. 42-43.

7 The Amendment also proscribes punishments grossly disproportionate to the severity of the crime, Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. at 2925 (1976) (joint opinion); Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 549 (1910), and it imposes substantive limits on what can be made criminal and punished, Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Neither of these principles is involved here.

8 See, e. g., Ala.Code Tit. 45, s 125 (1958); Alaska Stat. s 33.30.050 (1975); Ariz.Rev.Stat.Ann. s 31-201.01 (Supp.1975); Conn.Gen.Stat.Ann. s 18-7 (1975); Ga.Code Ann. s 77-309(e) (1973); Idaho Code s 20-209 (Supp.1976); Ill.Ann.Stat. c. 38, s 103-2 (1970); Ind.Ann.Stat. s 11-1-1.1-30.5 (1973); Kan.Stat.Ann. s 75-4249 (Supp.1975); Md.Ann.Code Art. 27 s 698 (1976); Mass.Ann.Laws, c. 127, s 90A (1974); Mich.Stat.Ann. s 14.84 (1969); Miss.Code Ann. s 47-1-57 (1972); Mo.Ann.Stat. s 221.120 (1962); Neb.Rev.Stat. s 83-181 (1971); N.H.Rev.Stat.Ann. s 619.9 (1974); N.M.Stat.Ann. s 42-2-4 (1972); Tenn.Code Ann. ss 41-318, 41-1115, 41-1226 (1975); Utah Code Ann. ss 64-9-13, 64-9-19, 64-9-20, 64-9-53 (1968); Va.Code Ann. ss 32-81, 32-82 (1973); W.Va.Code Ann. s 25-1-16 (Supp.1976); Wyo.Stat.Ann. s 18-299 (1959).
Many States have also adopted regulations which specify, in varying degrees of detail, the standards of medical care to be provided to prisoners. See Comment, The Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pretrial Detainees, 42 U.Chi.L.Rev. 705, 708-709 (1975).

Model correctional legislation and proposed minimum standards are all in accord. See American Law Institute, Model Penal Code ss 303.4, 304.5 (1962); National Advisory Commission on Criminal Justice Standards and Goals, Standards on Rights of Offenders, Standard 2.6 (1973); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, s 1(b) (1972); National Sheriffs' Association, Standards for Inmates' Legal Rights, Right No. 3 (1974); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, Rules 22-26 (1955). The foregoing may all be found in U.S. Dept. of Justice Law Enforcement Assistance Administration Compendium of Model Correctional Legislation and Standards (2d ed. 1975).

9 Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

10 See, e. g., Williams v. Vincent, 508 F.2d 541 (C.A.2 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment"); Thomas v. Pate, 493 F.2d 151, 158 (C.A.7), cert. denied sub nom. Thomas v. Cannon, 419 U.S. 879, 95 S.Ct. 143, 42 L.Ed.2d 119 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); Jones v. Lockhart, 484 F.2d 1192 (C.A.8 1973) (refusal of paramedic to provide treatment); Martinez v. Mancusi, 443 F.2d 921 (C.A.2 1970), cert. denied, 401 U.S. 983, 91 S.Ct. 1202, 28 L.Ed.2d 335 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon).

11 See, e. g., Westlake v. Lucas, 537 F.2d 857 (C.A.6 1976); Thomas v. Pate, supra, 493 F.2d 151, at 158-159; Fitzke v. Shappell, 468 F.2d 1072 (C.A.6 1972); Hutchens v. Alabama, 466 F.2d 507 (C.A.5 1972); Riley v. Rhay, 407 F.2d 496 (C.A.9 1969); Edwards v. Duncan, 355 F.2d 993 (C.A.4 1966); Hughes v. Noble, 295 F.2d 495 (C.A.5 1961).

12 See, e. g., Wilbron v. Hutto, 509 F.2d 621, 622 (C.A.8 1975); Campbell v. Beto, 460 F.2d 765 (C.A.5 1972); Martinez v. Mancusi, supra ; Tolbert v. Eyman, 434 F.2d 625 (C.A.9 1970); Edwards v. Duncan, supra.

13 He noted, however, that "a series of abortive attempts" or "a single, cruelly willful attempt" would present a different case. 329 U.S., at 471, 67 S.Ct., at 380.

14 The Courts of Appeals are in essential agreement with this standard. All agree that mere allegations of malpractice do not state a claim, and, while their terminology regarding what is sufficient varies, their results are not inconsistent with the standard of deliberate indifference. See Page v. Sharpe, 487 F.2d 567, 569 (C.A.1 1973); Williams v. Vincent, supra, 508 F.2d 541, at 544 (uses the phrase "deliberate indifference"); Gittlemacker v. Prasse, 428 F.2d 1, 6 (C.A.3 1970); Russell v. Sheffer, 528 F.2d 318 (C.A.4 1975); Newman v. Alabama, 503 F.2d 1320, 1330 n. 14 (C.A.5 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975) ("callous indifference"); Westlake v. Lucas, supra, 537 F.2d, at 860 ("deliberate indifference"); Thomas v. Pate, supra, 493 F.2d, at 158; Wilbron v. Hutto, supra, 509 F.2d, at 622 ("deliberate indifference"); Tolbert v. Eyman, supra, 434 F.2d, at 626; Dewell v. Lawson, 489 F.2d 877, 881-882 (C.A.10 1974).

15 Tex.Rev.Civ.Stat., Art. 6252-19, s 3 (Supp.1976). Petitioners assured the Court at argument that this statute can be used by prisoners to assert malpractice claims. Tr. of Oral Arg.

16 Contrary to Mr. Justice STEVENS' assertion in dissent, this case signals no retreat from Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). In contrast to the general allegations in Haines, Gamble's complaint provides a detailed factual accounting of the treatment he received. By his exhaustive description

he renders speculation unnecessary. It is apparent from his complaint that he received extensive medical care and that the doctors were not indifferent to his needs.

1 In his complaint, Gamble alleged that he had been placed in administrative segregation and remained there through December and January. At the end of January he was placed in solitary confinement. In an affidavit filed in the Court of Appeals the following December, see n. 8, infra, Gamble alleged that with the exception of one day in which he was taken out of solitary to be brought before the disciplinary committee he had remained in solitary up to the date of the affidavit.

2 According to a state legislative report quoted by the Court of Appeals, the Texas Department of Corrections has had at various times one to three doctors to care for 17,000 inmates with occasional part-time help. 516 F.2d 937, 940-941, n. 1 (1975).

3 This poorly drafted complaint attempts to describe conditions which resemble those reported in other prison systems. For instance, a study of the Pennsylvania prison system reported:

"When ill, the prisoner's point of contact with a prison's health care program is the sick-call line. Access may be barred by a guard, who refuses to give the convict a hospital pass out of whimsy or prejudice, or in light of a history of undiagnosed complaints. At sick call the convict commonly first sees a civilian paraprofessional or a nurse, who may treat the case with a placebo without actual examination, history-taking or recorded diagnosis. Even seeing the doctor at some prisons produces no more than aspirin for symptoms, such as dizziness and fainting, which have persisted for years." Health Law Project, University of Pennsylvania, Health Care and Conditions in Pennsylvania's State Prisons, in American Bar Association Commission on Correctional Facilities and Services, Medical and Health Care in Jails, Prisons, and Other Correctional Facilities: A Compilation of Standards and Materials, 71, 81-82 (Aug. 1974).

A legislative report on California prisons found:

"By far, the area with the greatest problem at the hospital (at one major prison), and perhaps at all the hospitals, was that of the abusive doctor-patient relationship. Although the indifference of M.T.A.s (medical technical assistants) toward medical complaints by inmates is not unique at Folsom, and has been reported continuously elsewhere, the calloused and frequently hostile attitude exhibited by the doctors is uniquely reprehensible. . . .

"Typical complaints against (one doctor) were that he would . . . not adequately diagnose or treat a patient who was a disciplinary problem at the prison . . . ." Assembly Select Committee on Prison Reform and Rehabilitation, An Examination of California's Prison Hospitals, 60-61 (1972).

These statements by responsible observers demonstrate that it is far from fanciful to read a prisoner's complaint as alleging that only pro forma treatment was provided.

4 The panel included Mr. Justice Clark, a retired member of this Court, sitting by designation, and Circuit Judges Goldberg and Ainsworth.

5 In Haines a unanimous Supreme Court admonished the federal judiciary to be especially solicitous of the problems of the uneducated inmate seeking to litigate on his own behalf. The Court said:

"Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). See Dioguardi v. Durning, 139 F.2d 774 (C.A.2 1944)." 404 U.S., at 520-521, 92 S.Ct., at 595-596.

Under that test the complaint should not have been dismissed without, at the very minimum, requiring some response from the defendants. It appears from the record that although the complaint was filed in February, instead of causing it to be served on the defendants as required by Fed.Rule Civ.Proc. 4, the Clerk of the District Court referred it to a magistrate who decided in June that the case should be dismissed before any of the normal procedures were even commenced. At least one Circuit has held that dismissal without service on

the defendants is improper, Nichols v. Schubert, 499 F.2d 946 (C.A.7 1974). The Court's disposition of this case should not be taken as an endorsement of this practice since the question was not raised by the parties.

6 This is the test actually applied in Haines, for although the Court ordered the complaint reinstated, it expressly "intimate(d) no view whatever on the merits of petitioner's allegations," 404 U.S., at 521, 92 S.Ct., at 596. It is significant that the Court took this approach despite being pressed by the State to decide the merits. As in this case, the State argued forcefully that the facts alleged in the complaint did not amount to a constitutional violation. (Only in one footnote in its 51-page brief did the State discuss the pleading question, Brief for Respondents 22-23, n. 20, in No. 70-5025, O.T. 1971.) Yet, this Court devoted not a single word of its opinion to answering the argument that no constitutional violation was alleged.

7 Thus, Haines teaches that the decision on the merits of the complaint should normally be postponed until the facts have been ascertained. The same approach was taken in Polk Co. v. Glover, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6, in which the Court reversed the dismissal of a complaint, without intimating any view of the constitutional issues, on "(t)he salutary principle that the essential facts should be determined before passing upon grave constitutional questions . . . ." Id., at 10, 59 S.Ct. at 17. See also Borden's Co. v. Baldwin, 293 U.S. 194, 213, 55 S.Ct. 187, 193, 79 L.Ed. 281 (Cardozo and Stone, JJ., concurring in result). This approach potentially avoids the necessity of ever deciding the constitutional issue since the facts as proved may remove any constitutional question. Alternatively, a more concrete record will be available on which to decide the constitutional issues. See generally Rescue Army v. Municipal Court, 331 U.S. 549, 574-575, 67 S.Ct. 1409, 1422, 1423, 19 L.Ed. 1666. Even when constitutional principles are not involved, it is important that "the conceptual legal theories be explored and assayed in the light of actual facts, not as a pleader's supposition," so that courts may avoid "elucidating legal responsibilities as to facts which may never be." Shull v. Pilot Life Ins. Co., 313 F.2d 445, 447 (C.A.5 1963).

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.

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, 189, 93 S.Ct. 1455, 1460, 36 L.Ed.2d 142 (Stewart, J., dissenting).

10 As this Court notes, ante, at 289 n. 5, even the meaning of some of the terms used in the complaint is unclear.

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.

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 477, 67 S.Ct., at 382 (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ.).

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 291. 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.

114 S.Ct. 1970
Supreme Court of the United States

Dee FARMER, Petitioner
v.
Edward BRENNAN, Warden, et al.

No. 92–7247.
|
Argued Jan. 12, 1994.
|
Decided June 6, 1994.

Synopsis

Prisoner who was transsexual brought *Bivens* suit against prison officials, claiming that officials showed "deliberate indifference" by placing prisoner in general prison population, thus failing to keep him from harm allegedly inflicted by other inmates. The United States District Court for the Western District of Wisconsin, Shabaz, J., entered judgment for officials and appeal was taken. The Court of Appeals, Seventh Circuit, 11 F.3d 668, affirmed. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) prison officials may be held liable under Eighth Amendment for denying humane conditions of confinement only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it, and (2) remand would be required to determine whether prison officials would have liability, under above standards, for not preventing harm allegedly occurring in present case.

Vacated and remanded.

Justice Blackmun concurred and filed opinion.

Justice Stevens concurred and filed statement.

Justice Thomas concurred in judgment and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (24)

[1] **Sentencing and Punishment** Deliberate indifference in general

Prison officials' "deliberate indifference" to substantial risk of serious harm to an inmate violates Eighth Amendment. U.S.C.A. Const.Amend. 8.

24112 Cases that cite this headnote

[2] **Sentencing and Punishment** Conditions of Confinement

Treatment prisoner receives in prison and conditions under which he is confined are subject to scrutiny under Eighth Amendment. U.S.C.A. Const.Amend. 8.

1296 Cases that cite this headnote

[3] **Sentencing and Punishment** Conditions of Confinement

Sentencing and Punishment Use of force

Under Eighth Amendment, prison officials may not use excessive physical force against prisoners and are required to provide humane conditions of confinement, ensuring that inmates receive adequate food, clothing, shelter and medical care, and must take reasonable measures to guarantee safety of inmates. U.S.C.A. Const.Amend. 8.

5412 Cases that cite this headnote

[4] **Prisons** Protection from violence, assault, or abuse

Prison officials have duty to protect prisoners from violence at hands of other prisoners. U.S.C.A. Const.Amend. 8.

1935 Cases that cite this headnote

[5] **Sentencing and Punishment** Conditions of Confinement

In cases involving failure to prevent harm, Eighth Amendment is violated only when inmate shows he is incarcerated under conditions posing substantial risk of serious harm, and that officials displayed "deliberate indifference" to inmate health or safety. U.S.C.A. Const.Amend. 8.

11956 Cases that cite this headnote

[6] **Sentencing and Punishment** Deliberate indifference in general

"Deliberate indifference" on part of prison officials, required to be shown in order to establish Eighth Amendment violation arising out of failure to prevent harm, requires more than ordinary lack of due care for prisoner's interests or safety. U.S.C.A. Const.Amend. 8.

1383 Cases that cite this headnote

[7] **Sentencing and Punishment** Deliberate indifference in general

Requirement that prison officials show "deliberate indifference" to prisoners, in order to be liable for failure to prevent harm, is satisfied by something less than acts or omissions for very purpose of causing harm or with knowledge that harm will result. U.S.C.A. Const.Amend. 8.

2004 Cases that cite this headnote

[8] **Sentencing and Punishment** Deliberate indifference in general

Prison official cannot be found liable under Eighth Amendment, for denying an inmate humane conditions of confinement, unless official knows of and disregards an excessive risk to inmate health and safety; official must both be aware of facts from which inference could be drawn that substantial risk of serious harm exists, and official must also draw that inference. U.S.C.A. Const.Amend. 8.

27972 Cases that cite this headnote

[9] **Sentencing and Punishment** Deliberate indifference in general

Prison official's failure to alleviate significant risk that he should have perceived but did not, while no cause for commendation, does not constitute infliction of punishment, for Eighth Amendment purposes. U.S.C.A. Const.Amend. 8.

1355 Cases that cite this headnote

[10] **Sentencing and Punishment** Deliberate indifference in general

"Subjective recklessness" standard, as used in criminal law, is test for whether prison authorities have acted with "deliberate indifference" toward prisoners, in violation of their Eighth Amendment rights. U.S.C.A. Const.Amend. 8.

1683 Cases that cite this headnote

[11] **Sentencing and Punishment** Deliberate indifference in general

Prisoner claiming that prison officials violated Eighth Amendment duty to protect him against harm need not show that official acted or failed to act believing that harm actually would befall an inmate; it is sufficient that official acted or failed to act despite his knowledge of substantial risk of serious harm. U.S.C.A. Const.Amend. 8.

4144 Cases that cite this headnote

[12] **Prisons** Care, Custody, Confinement, and Control

Sentencing and Punishment Deliberate indifference in general

United States Trial and judgment

Whether prison official had requisite knowledge of substantial risk, so as to have duty to protect prisoner from harm, is question of fact subject to demonstration in usual ways, including inference from circumstantial evidence, and fact finder may conclude that prison official knew of substantial risk from very fact that risk was obvious. U.S.C.A. Const.Amend. 8.

2394 Cases that cite this headnote

[13] **Prisons** Care, Custody, Confinement, and Control

Sentencing and Punishment Deliberate indifference in general

While obviousness of risk of harm is not conclusive, in establishing that prison official owed duty to protect prisoner against such harm, and prison official may show that the obvious escaped him, official would not escape liability if evidence showed 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. U.S.C.A. Const.Amend. 8.

675 Cases that cite this headnote

[14] **Prisons** Protection from violence, assault, or abuse

Sentencing and Punishment Protection from violence

Prison official may not escape liability for showing "deliberate indifference" to prisoners, in failing to protect them against harm, by showing that while he was aware of an obvious substantial risk to inmate safety, he did not know that complainant was especially likely to be assaulted by specific prisoner who eventually committed assault. U.S.C.A. Const.Amend. 8.

5074 Cases that cite this headnote

[15] **Sentencing and Punishment** Deliberate indifference in general

Because prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to officials charged with having shown deliberate indifference to prisoners by failing to protect them from harm, that they were unaware even of an obvious risk to inmate health or safety. U.S.C.A. Const.Amend. 8.

741 Cases that cite this headnote

[16] **Sentencing and Punishment** Deliberate indifference in general

Prison officials who actually knew of substantial risk to inmate health or safety may be found free from Eighth Amendment liability, for failure to protect inmates from harm, if officials responded reasonably to risk, even if harm ultimately was not averted. U.S.C.A. Const.Amend. 8.

8821 Cases that cite this headnote

[17] **Injunction** Prisons and Prisoners

Prisoner who believes that he is being subjected to substantial risk of serious injury, due to officials' failure to protect him from harm, is not required to wait for "tragic event" such as an actual assault before obtaining relief, but may bring an action seeking an injunction based on claim that officials are knowingly and unreasonably disregarding objectively intolerable risk of harm and will continue to do so. U.S.C.A. Const.Amend. 8.

422 Cases that cite this headnote

[18] **Injunction** Prisons and Prisoners

In seeking an injunction, in connection with an alleged failure of prison officials to prevent harm from being inflicted upon prisoner, prisoner may rely on developments that postdate pleadings and pretrial motions, and officials may rely on such developments to establish that inmate is not entitled to injunction. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

40 Cases that cite this headnote

[19] **Injunction** Prisons and Prisoners

Prison officials who had subjectively culpable state of mind, when sued for failing to protect prisoner against harm, could prevent issuance of an injunction requiring such protection by proving, during litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of litigation. U.S.C.A. Const.Amend. 8.

370 Cases that cite this headnote

[20] **Federal Courts** Equity jurisdiction in general

Appeal to equity jurisdiction conferred on federal district courts is an appeal to sound discretion which guides determinations of courts of equity.

9 Cases that cite this headnote

[21] **Injunction** Prisons and Prisoners

When prison inmate seeks injunctive relief, court need not ignore inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them. Civil Rights of Institutionalized Persons Act, § 7, 42 U.S.C.A. § 1997e.

46 Cases that cite this headnote

[22] **Sentencing and Punishment** Deliberate indifference in general

Prison official may be held liable under Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. U.S.C.A. Const.Amend. 8.

18805 Cases that cite this headnote

[23] **Federal Courts** Particular cases

Remand would be required of prisoner's *Bivens* action, alleging violation of prison authorities' Eighth Amendment duty to protect prisoner from harm; trial court may have placed undue emphasis upon failure of prisoner, who was transsexual, to notify authorities that he feared harm if placed in general prison population. U.S.C.A. Const.Amend. 8.

99 Cases that cite this headnote

[24] **Federal Civil Procedure** Civil rights cases in general

Prison officials who were involved in transferring transsexual prisoner to maximum security facility in which he was allegedly raped and assaulted by prisoners were not entitled to summary judgment in their favor on claims that officials had shown deliberate indifference to prisoner, in violation of his Eighth Amendment rights, even though officials claimed that they had no knowledge of conditions in prison to which prisoner was transferred and lacked power to influence ultimate decision that prisoner would be placed in general prison population rather than being segregated; there was evidence indicating that officials had both knowledge and power. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

123 Cases that cite this headnote

**1972 *Syllabus* *

***825** 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 ****1973** 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, 91 S.Ct. 1999, 29 L.Ed.2d 619, 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. 1976–1986.

(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," ***826** *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 2324, 115 L.Ed.2d 271, and the official has acted with "deliberate indifference" to inmate health or safety. Pp. 1976–1977.

(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. 1977–1979.

(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, 111 S.Ct., at 2324, and it is no accident that the Court has repeatedly said that the Eighth Amendment has a "subjective component." Pp. 1979–1980.

(d) The subjective test does not permit liability to be premised on obviousness or constructive notice. *Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412, 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 ****1974** 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. 1980–1983.

(e) Use of a subjective test will not foreclose prospective injunctive relief, nor require a prisoner to suffer physical injury before obtaining ***827** 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, 43 S.Ct. 658, 67 L.Ed. 1117. 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, 113 S.Ct. 2475, 2482, 125 L.Ed.2d 22, 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. 1983–1984.

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. 1984–1986.

11 F.3d 668 (CA7 1992), 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. 1986, and STEVENS, J., *post,* p. 1989, filed concurring opinions. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 1990.

Attorneys and Law Firms

Elizabeth Alexander, for petitioner.

Paul Bender, for respondent.

Opinion

***828** Justice SOUTER delivered the opinion of the Court.

[1] 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, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); ***829** *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (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 ****1975** 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 ***830** 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, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Carlson v. Green,* 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (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 ***831** 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 USP–Terre 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 ****1976** 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 ***832** 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, 114 S.Ct. 56, 126 L.Ed.2d 26 (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, 112 S.Ct. 1265, 117 L.Ed.2d 493 (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

[2] **[3]** The Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman,* 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (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, 113 S.Ct., at 2480. 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, 112 S.Ct. 995, 117 L.Ed.2d 156 (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, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). See ***833** *Helling, supra,* 509 U.S., at 31–32, 113 S.Ct., at 2480; *Washington v. Harper,* 494 U.S. 210, 225, 110 S.Ct. 1028, 1038–1039, 108 L.Ed.2d 178 (1990); *Estelle,* 429 U.S., at 103, 97 S.Ct., at 290. Cf. *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 198–199, 109 S.Ct. 998, 1004–1005, 103 L.Ed.2d 249 (1989).

[4] 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) ****1977** (internal quotation marks and citation omitted), cert. denied, 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988);[2] see also *Wilson v. Seiter,* 501 U.S., at 303, 111 S.Ct., at 2326–2327 (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 proclivit[ies] for antisocial criminal, and often violent, conduct," *Hudson v. Palmer, supra,* 468 U.S., at 526, 104 S.Ct., at 3200, 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,* 489 U.S., at 199–200, 109 S.Ct., at 3021–3022; *Estelle, supra,* 429 U.S., at 103–104, 97 S.Ct., at 290–291. Prison conditions may be "restrictive and even harsh," *Rhodes, supra,* 452 U.S., at 347, 101 S.Ct., at 2399, but gratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," *Hudson v. Palmer, supra,* 468 U.S., at 548, 104 S.Ct., at 3211 (STEVENS, J., concurring in part and dissenting in part), any more than it squares with " 'evolving standards of decency,' " *Estelle,* ***834** *supra,* 429 U.S., at 102, 97 S.Ct., at 290 (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (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,* 452 U.S., at 347, 101 S.Ct., at 2399.

[5] 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,* 501 U.S., at 298, 111 S.Ct., at 2324; see also *Hudson v. McMillian, supra,* 503 U.S., at 5, 112 S.Ct., at 998; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," *Rhodes, supra,* 452 U.S., at 347, 101 S.Ct., at 2399. 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,* 509 U.S., at 35, 113 S.Ct., at 2481.[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, 111 S.Ct., at 2323 (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, 111 S.Ct., at 2326 *Hudson v. McMillian, supra,* 503 U.S., at 8, 112 S.Ct., at 2480. In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety, *Wilson, supra,* 501 U.S., at 302–303, 111 S.Ct., at 2326 see also *Helling, supra,* 509 U.S., at 34–35, 113 S.Ct., at 2481; *Hudson v. McMillian, supra,* 503 U.S., at 5, 112 S.Ct., at 998; *Estelle, supra,* 429 U.S., at 106, 97 S.Ct., at 292, 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.

***835** B

1

[6] Although we have never paused to explain the meaning of the term "deliberate ****1978** indifference," the case law is instructive. The term first appeared in the United States Reports in *Estelle v. Gamble,* 429 U.S., at 104, 97 S.Ct., at 291, 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, 97 S.Ct., at 292, 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, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986).

[7] 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, 112 S.Ct., at 999; see also *Whitley, supra,* 475 U.S., at 320, 106 S.Ct., at 1084–1085. 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,* 503 U.S., at 6, 112 S.Ct., at 998 (quoting *Whitley, supra,* 475 U.S., at 320, 106 S.Ct., at 1084–1085), 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, 112 S.Ct., at 998 (internal quotation marks and citations omitted), or, as the Court also ***836** put it, that officials used force with "a knowing willingness that [harm] occur," *id.*, at 7, 112 S.Ct., at 999 (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,* 501 U.S., at 302–303, 111 S.Ct., at 2326.

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 (CA11 1993); *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, 107 S.Ct. 1114, 1120–1121, 94 L.Ed.2d 293 (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 ***837** law, however, generally permits a finding of recklessness only when a person ****1979** 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]

[8] **[9]** 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 discourage, ***838** 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, 83 S.Ct. 1850, 10 L.Ed.2d 805 (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.

[10] 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, 111 S.Ct., at 2324–2326. 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, 111 S.Ct., at 2324. 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, 100 S.Ct. 624, 631–632, 62 L.Ed.2d 575 (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,* 501 U.S., at 298, 111 S.Ct., at 2324; see also *Helling,* 509 U.S., at 35, 113 S.Ct., at 2481; *Hudson v. McMillian,* 503 U.S., at 8, 112 S.Ct., at 2327. 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, 111 S.Ct., at 2327 (citing *Cortes–Quinones 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 ****1980** standard applies to all prison-conditions claims, not to undo its holding that the ***839** Eighth Amendment has a "subjective component." 501 U.S., at 298, 111 S.Ct., at 2324. 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. 39–40. 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, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (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 standard ***840** 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.

2

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, 97 S.Ct., at 291–292 (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, 109 S.Ct. 1197, 103 L.Ed.2d 412 (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, 109 S.Ct., at 1205 (internal quotation marks omitted). ****1981** 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 ***841** 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, 109 S.Ct., at 1205; see also *id.,* at 390, n. 10, 109 S.Ct., at 1205, 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, 109 S.Ct., at 1208 (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, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (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, 111 S.Ct., at 2325, 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, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (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 conclusion ***842** 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.

[11] **[12]** **[13]** 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 **1982 could be sufficient to permit a trier of *843 fact to find that the defendant-official had actual knowledge of the risk." Brief for Respondents 22. [8]

[14] 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, 113 S.Ct., at 2481, 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 *844 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, 98 S.Ct. 2565, 2569, n. 3, 57 L.Ed.2d 522, 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,* 509 U.S., at 33, 113 S.Ct., at 2480 (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, 431–432, 408 S.E.2d 1, 10–11 (1991) (holding that a defendant may be held criminally liable for injury to an unanticipated victim).

[15] 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.

[16] 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 **1983 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, 113 S.Ct., at 2481; see also *845 *Washington v. Harper,* 494 U.S., at 225, 110 S.Ct., at 1038–1039; *Hudson v. Palmer,* 468 U.S., at 526–527, 104 S.Ct., at 3200–3201, 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, 99 S.Ct. 1861, 1878–1879, 1886, 60 L.Ed.2d 447 (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.

[17] **[18]** **[19]** 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,* 509 U.S., at 33, 113 S.Ct., at 2481. 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, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (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, 113 S.Ct., at 2481.

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, 113 S.Ct., at 2482: 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, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952), must adequately ***846** plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. In so doing, the inmate may rely, in the district court's discretion, on developments that postdate the pleadings and pretrial motions, as the defendants may rely on such developments to establish that the inmate is not entitled to an injunction.[9] See Fed.Rule Civ.Proc. 15(d); 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 1504–1510, pp. 177–211 (2d ed. 1990). If the court finds the Eighth Amendment's subjective and objective requirements satisfied, it may grant ****1984** appropriate injunctive relief. See *Hutto v. Finney,* 437 U.S., at 685–688, and n. 9, 98 S.Ct., at 2570–2572, and n. 9 (upholding order designed to halt "an ongoing violation" in prison conditions that included extreme overcrowding, rampant violence, insufficient food, and unsanitary conditions). Of course, a district court should approach issuance of injunctive orders with the usual ***847** caution, see *Bell v. Wolfish, supra,* 441 U.S., at 562, 99 S.Ct., at 1886 (warning courts against becoming "enmeshed in the minutiae of prison operations"), and may, for example, exercise its discretion if appropriate by giving prison officials time to rectify the situation before issuing an injunction.

[20] **[21]** That prison officials' "current attitudes and conduct," *Helling,* 509 U.S., at 36, 113 S.Ct., at 2482, must be assessed in an action for injunctive relief does not mean, of course, that inmates are free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity," *Meredith v. Winter Haven,* 320 U.S. 228, 235, 64 S.Ct. 7, 11, 88 L.Ed. 9 (1943), and any litigant making such an appeal must show that the intervention of equity is required. When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them. Cf. 42 U.S.C. § 1997e (authorizing district courts in § 1983 actions to require inmates to exhaust "such plain, speedy, and effective administrative remedies as are available"). Even apart from the demands of equity, an inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances. When those procedures produce results, they will typically do so faster than judicial processes can. And even when they do not bring constitutionally required changes, the inmate's task in court will obviously be much easier.

[22] Accordingly, we reject petitioner's arguments and hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement 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.

***848** III

A

[23] Against this backdrop, we consider whether the District Court's disposition of petitioner's complaint, summarily affirmed without briefing by the Court of Appeals for the Seventh Circuit, comports with Eighth Amendment principles. We conclude that the appropriate course is to remand.

In granting summary judgment to respondents on the ground that petitioner had failed to satisfy the Eighth Amendment's subjective requirement, the District Court may have placed decisive weight on petitioner's failure to notify respondents of a risk of harm. That petitioner "never expressed any concern for his safety to any of [respondents]," App. 124, was the only evidence the District Court cited for its conclusion that there was no genuine dispute about respondents' assertion that they "had no knowledge of any potential danger to [petitioner]," *ibid.* But with respect to each of petitioner's claims, for damages and for injunctive relief, the failure to give advance notice is not dispositive. Petitioner may establish respondents' awareness by reliance on any relevant evidence. See *supra,* at 1981.

The summary judgment record does not so clearly establish respondents' entitlement to judgment as a matter of law on the issue of subjective knowledge that we can simply assume the absence of error below. For example, in papers filed in opposition to respondents' summary-judgment motion, petitioner pointed to respondents' admission that petitioner is a "non-violent" transsexual who, because of petitioner's "youth and feminine appearance" is "likely to experience a great deal of sexual pressure" in prison. App. 50–51, 73–74. And petitioner recounted a statement ****1985** by one of the respondents, then warden of the penitentiary in Lewisburg, Pennsylvania, who told petitioner that there was "a high probability that [petitioner] could not safely function at USP–Lewisburg," *id.,* at 109, an incident confirmed in a ***849** published District Court opinion. See *Farmer v. Carlson,* 685 F.Supp., at 1342; see also *ibid.* ("Clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at [USP–]Lewisburg, a [high-]security institution, could pose a significant threat to internal security in general and to plaintiff in particular").

We cannot, moreover, be certain that additional evidence is unavailable to petitioner because in denying petitioner's Rule 56(f) motion for additional discovery the District Court may have acted on a mistaken belief that petitioner's failure to notify was dispositive. Petitioner asserted in papers accompanying the Rule 56(f) motion that the requested documents would show that "each defendant had knowledge that USP–Terre Haute was and is, a violent institution with a history of sexual assault, stabbings, etc., [and that] each defendant showed reckless disregard for my safety by designating me to said institution knowing that I would be sexually assaulted." App. 105–106. But in denying the Rule 56(f) motion, the District Court stated that the requested documents were "not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment," *id.,* at 121, a statement consistent with the erroneous view that failure to notify was fatal to petitioner's complaint.

Because the District Court may have mistakenly thought that advance notification was a necessary element of an Eighth Amendment failure-to-protect claim, we think it proper to remand for reconsideration of petitioner's Rule 56(f) motion and, whether additional discovery is permitted or not, for application of the Eighth Amendment principles explained above. [10]

***850** B

Respondents urge us to affirm for reasons not relied on below, but neither of their contentions is so clearly correct as to justify affirmance.

[24] With respect to petitioner's damages claim, respondents argue that the officials sued in their individual capacities (officials at FCI–Oxford and the Bureau of Prisons North Central Region office) were alleged to be liable only for their transfer of petitioner from FCI–Oxford to USP–Terre Haute, whereas petitioner "nowhere alleges any reason for believing that these officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates." Brief for Respondents 27–28. But petitioner's Rule 56(f) motion alleged just that. Though respondents suggest here that petitioner offered no factual basis for that assertion, that is not a ground on which they chose to oppose petitioner's Rule 56(f) motion below and, in any event, is a matter for the exercise of the District Court's judgment, not ours. Finally, to the extent respondents seek affirmance here on the ground that officials at FCI–Oxford and the Bureau of Prisons regional office had no power to control prisoner placement at Terre Haute, the

record gives at least a suggestion to the contrary; the affidavit of one respondent, the warden of USP–Terre Haute, states that after having been at USP–Terre Haute for about a month petitioner was placed in administrative segregation "pursuant to directive from the North Central Regional Office" and a "request ... by staff at FCI–Oxford." App. 94–95. Accordingly, though we do not reject respondents' arguments about petitioner's claim for damages, the record ****1986** does not permit us to accept them as a basis for affirmance when they were not relied upon below. Respondents are free to develop this line of argument on remand.

With respect to petitioner's claim for injunctive relief, respondents argued in their merits brief that the claim was ***851** "foreclosed by [petitioner's] assignment to administrative detention status because of his high-risk HIV-positive condition, ... as well as by the absence of any allegation ... that administrative detention status poses any continuing threat of physical injury to him." Brief for Respondents 28–29. At oral argument, however, the Deputy Solicitor General informed us that petitioner was no longer in administrative detention, having been placed in the general prison population of a medium-security prison. Tr. of Oral Arg. 25–26. He suggested that affirmance was nevertheless proper because "there is no present threat" that petitioner will be placed in a setting where he would face a "continuing threat of physical injury," *id.,* at 26, but this argument turns on facts about the likelihood of a transfer that the District Court is far better placed to evaluate than we are. We leave it to respondents to present this point on remand.

IV

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice BLACKMUN, concurring.

I agree with Justice STEVENS that inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind. This Court's holding in *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), to the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with our precedents interpreting the Cruel and Unusual Punishments Clause. Whether the Constitution has been violated "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." ***852** *Estelle v. Gamble,* 429 U.S. 97, 116, 97 S.Ct. 285, 297, 50 L.Ed.2d 251 1976) (STEVENS, J., dissenting). *Wilson v. Seiter* should be overruled.

Although I do not go along with the Court's reliance on *Wilson* in defining the "deliberate indifference" standard, I join the Court's opinion, because it creates no new obstacles for prison inmates to overcome, and it sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly. Under the Court's decision today, prison officials may be held liable for failure to remedy a risk so obvious and substantial that the officials must have known about it, see *ante,* at 1982, and prisoners need not " 'await a tragic event [such as an] actua[l] assaul[t] before obtaining relief,' " *ante,* at 1983.

I

Petitioner is a transsexual who is currently serving a 20–year sentence in an all-male federal prison for credit-card fraud. Although a biological male, petitioner has undergone treatment for silicone breast implants and unsuccessful surgery to have his testicles removed. Despite his overtly feminine characteristics, and his previous segregation at a different federal prison because of safety concerns, see *Farmer v. Carlson,* 685 F.Supp. 1335, 1342 (MD Pa.1988), prison officials at the United States Penitentiary in Terre Haute, Indiana, housed him in the general population of that maximum-security prison. Less than two weeks later, petitioner was brutally beaten and raped by another inmate in petitioner's cell.

Homosexual rape or other violence among prison inmates serves absolutely no penological purpose. See *Rhodes v. Chapman,* 452 U.S. 337, 345–346, 101 S.Ct. 2392, 2398–2399, 69 L.Ed.2d 59 (1981), citing ****1987** *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929–2930, 49 L.Ed.2d 859 (1976) (joint opinion) (the Eighth Amendment prohibits all punishment, physical and mental, which is "totally without penological justification"). "Such

brutality is the equivalent of torture, and is offensive to any modern standard of human dignity." ***853** *United States v. Bailey,* 444 U.S. 394, 423, 100 S.Ct. 624, 641, 62 L.Ed.2d 575 (1980) (BLACKMUN, J., dissenting). The horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure. See Note, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of *Wilson v. Seiter,* 44 Stan.L.Rev. 1541, 1545 (1992). Unable to fend for himself without the protection of prison officials, the victim finds himself at the mercy of larger, stronger, and ruthless inmates. Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit card fraud or tax evasion, degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials. *

The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But our Constitution sets minimal standards governing the administration of punishment in this country, see *Rhodes,* 452 U.S., at 347, 101 S.Ct., at 2399–2400, and thus it is no answer to the complaints of the brutalized inmate that the resources ***854** are unavailable to protect him from what, in reality, is nothing less than torture. I stated in dissent in *United States v. Bailey:*

> "It is society's responsibility to protect the life and health of its prisoners. '[W]hen a sheriff or a marshall *[sic]* takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act. We* have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not' (emphasis in original). Address by THE CHIEF JUSTICE, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.)." 444 U.S., at 423, 100 S.Ct., at 641.

The Court in *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), held that any pain and suffering endured by a prisoner that is not formally a part of his sentence —no matter how severe or unnecessary—will not be held violative of the Cruel and Unusual Punishments Clause unless the prisoner establishes that some prison official intended the harm. The Court justified this remarkable conclusion by asserting that only pain that is intended by a state actor to be punishment is punishment. See *id.,* at 300, 111 S.Ct., at 2325 ("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 ****1988** must be attributed to the inflicting officer before it can qualify") (emphasis in original).

The Court's analysis is fundamentally misguided; indeed it defies common sense. "Punishment" does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers "severe, rough, or disastrous treatment," see, *e.g.,* Webster's Third New International Dictionary 1843 (1961), ***855** regardless of whether a state actor intended the cruel treatment to chastise or deter. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as "[a]ny pain, suffering, or loss inflicted on *or suffered by* a person because of a crime or evil-doing") (emphasis added); cf. *Wilson,* 501 U.S., at 300, 111 S.Ct., at 2325, citing *Duckworth v. Franzen,* 780 F.2d 645, 652 (CA7 1985) (" 'The infliction of punishment is a deliberate act intended to chastise or deter' "), cert. denied, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

The Court's unduly narrow definition of punishment blinds it to the reality of prison life. Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. 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 punishment for the two convicts.

Wilson's myopic focus on the intentions of *prison officials* is also mistaken. Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because

no prison official acted culpably. *Wilson* failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level." The Supreme Court—Leading Cases, 105 Harv.L.Rev. 177, 243 (1991). The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature. Yet, regardless of what state actor or institution caused the harm ***856** and with what intent, the experience of the inmate is the same. 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. *But 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 (CA9 1993) (concurring opinion) (citations omitted) (emphasis added).

Before *Wilson,* it was assumed, if not established, that the conditions of confinement are themselves part of the punishment, even if not specifically "meted out" by a statute or judge. See *Wilson,* 501 U.S., 306–309, 111 S.Ct. at 2328–2330 (White, J., concurring in judgment), citing *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). We examined only the objective severity of the conditions of confinement in the pre-*Wilson* cases, not the subjective intent of government officials, as we found that "[a]n express intent to ****1989** inflict unnecessary pain is not required, ... *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.' " *Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986), quoting *Rhodes,* 452 U.S., at 347, 101 S.Ct., at 2399 (emphasis added). This initial approach, which employed an objective standard to chart the boundaries of the Eighth Amendment, reflected the practical reality ***857** that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system," *Wilson,* 501 U.S., at 310, 111 S.Ct., at 2330 (White, J., concurring in judgment). It also, however, demonstrated a commitment to the principles underlying the Eighth Amendment. The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measures will be taken to ensure his safety. Where a prisoner can prove that no such reasonable steps were taken and, as a result, he experienced severe pain or suffering without any penological justification, the Eighth Amendment is violated regardless of whether there is an easily identifiable wrongdoer with poor intentions.

II

Though I believe *Wilson v. Seiter* should be overruled, and disagree with the Court's reliance upon that case in defining the "deliberate indifference" standard, I nonetheless join the Court's opinion. Petitioner never challenged this Court's holding in *Wilson* or sought reconsideration of the theory upon which that decision is based. More importantly, the Court's opinion does not extend *Wilson* beyond its ill-conceived boundaries or erect any new obstacles for prison inmates to overcome in seeking to remedy cruel and unusual conditions of confinement. The Court specifically recognizes that "[h]aving incarcerated 'persons [with] demonstrated proclivities for criminally antisocial and, in many cases, violent conduct,' [and] 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." *Ante,* at 1977. The Court further acknowledges that prison rape is not constitutionally tolerable ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society' "), and it ***858** clearly states that prisoners can obtain relief before being victimized, see *ante,* at 1983 ("[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' "). Finally, under the Court's holding, prison officials may be held liable for failure to remedy a risk of harm so obvious and substantial that the prison officials must have known about it, see *ante,* at 1981–1982. The opinion's clear message is that prison officials

must fulfill their affirmative duty under the Constitution to prevent inmate assault, including prison rape, or otherwise face a serious risk of being held liable for damages, see *ante,* at 1981–1982, or being required by a court to rectify the hazardous conditions, see *ante,* at 1983–1984. As much as is possible within the constraints of *Wilson v. Seiter,* the Court seeks to ensure that the conditions in our Nation's prisons in fact comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 198–200, 109 S.Ct. 998, 1004–1006, 103 L.Ed.2d 249 (1989). Short of overruling *Wilson v. Seiter,* the Court could do no better.

Justice STEVENS, concurring.

While I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation, see *Estelle v. Gamble,* 429 U.S. 97, 116–117, 97 S.Ct. 285, 297, 50 L.Ed.2d 251 (1976) (dissenting opinion); *Wilson v. Seiter,* 501 U.S. 294, 306–307, 111 S.Ct. 2321, 2328–2329, 115 L.Ed.2d 271 (1991) (White, J., concurring ****1990** in judgment), I join Justice SOUTER's thoughtful opinion because it is faithful to our precedents.

Justice THOMAS, concurring in the judgment.

Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no ***859** matter what the guards do ... unless all prisoners are locked in their cells 24 hours a day and sedated." *McGill v. Duckworth,* 944 F.2d 344, 348 (CA7 1991). Today, in an attempt to rectify such unfortunate conditions, the Court further refines the "National Code of Prison Regulation," otherwise known as the Cruel and Unusual Punishments Clause. *Hudson v. McMillian,* 503 U.S. 1, 28, 112 S.Ct. 995, 1010, 117 L.Ed.2d 156 (1992) (THOMAS, J., dissenting).

I adhere to my belief, expressed in *Hudson* and *Helling v. McKinney,* 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (THOMAS, J., dissenting), that "judges or juries—but not jailers—impose 'punishment.' " *Id.,* at 40, 113 S.Ct., at 2484. "[P]unishment," from the time of the Founding through the present day, "has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.' " *Id.,* at 38, 113 S.Ct., at 2483 (quoting Black's Law Dictionary 1234 (6th ed. 1990)). See also 2 T. Sheridan, A General Dictionary of the English Language (1780) (defining "punishment" as "[a]ny infliction imposed in vengeance of a crime"). Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence. See *Helling, supra,* at 42, 113 S.Ct., at 2485 (THOMAS, J., dissenting). As an original matter, therefore, this case would be an easy one for me: Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute "punishment" under the Eighth Amendment.

When approaching this case, however, we do not write on a clean slate. Beginning with *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court's prison condition jurisprudence has been guided, not by the text of the Constitution, but rather by "evolving standards of decency that mark the progress of a maturing society." *Id.,* at 102, 97 S.Ct., at 290 (internal quotation marks omitted). See also *ante,* at 1977; *Helling, supra; Hudson, supra.* I continue to doubt the legitimacy of that mode of constitutional decisionmaking, the logical result of which, ***860** in this context, is to transform federal judges into superintendents of prison conditions nationwide. See *Helling, supra,* 509 U.S., at 40–41, 113 S.Ct., at 2484–2485 (THOMAS, J., dissenting). Although *Estelle* loosed the Eighth Amendment from its historical moorings, the Court is now unwilling to accept the full consequences of its decision and therefore resorts to the "subjective" (state of mind) component of post-*Estelle* Eighth Amendment analysis in an attempt to contain what might otherwise be unbounded liability for prison officials under the Cruel and Unusual Punishments Clause. Cf. *McGill, supra,* at 348.

Although I disagree with the constitutional predicate of the Court's analysis, I share the Court's view that petitioner's theory of liability—that a prison official can be held liable for risks to prisoner safety of which he was ignorant but should have known—fails under even "a straightforward application of *Estelle.*" *Helling, supra,* 509 U.S., at 42, 113 S.Ct., at 2485 (THOMAS, J., dissenting). In adopting the "deliberate indifference" standard for challenges to prison conditions, *Estelle* held that mere "inadverten[ce]" or "negligen[ce]"

does not violate the Eighth Amendment. 429 U.S., at 105–106, 97 S.Ct., at 291–292. "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." ****1991** *Hudson, supra,* 503 U.S., at 20, 112 S.Ct., at 1006 (THOMAS, J., dissenting).

We reiterated this understanding in *Wilson v. Seiter,* 501 U.S. 294, 305, 111 S.Ct. 2321, 2328, 115 L.Ed.2d 271 (1991), holding that "mere negligence" does not constitute deliberate indifference under *Estelle.* See also, *e.g., Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). Petitioner's suggested "should have known" standard is nothing but a negligence standard, as the Court's discussion implicitly assumes. *Ante,* at 1979–1980. Thus, even under *Estelle,* petitioner's theory of liability necessarily fails.

The question remains, however, what state of mind *is* sufficient to constitute deliberate indifference under *Estelle.* ***861** Given my serious doubts concerning the correctness of *Estelle* in extending the Eighth Amendment to cover challenges to conditions of confinement, I believe the scope of the *Estelle* "right" should be confined as narrowly as possible. Cf. *Helling, supra,* 509 U.S., at 42, 113 S.Ct., at 2485 (THOMAS, J., dissenting). In *Wilson,* the Court has already held that the highest subjective standard known to our Eighth Amendment jurisprudence—"maliciou[s] and sadisti[c]" action "for the very purpose of causing harm," *Whitley, supra,* 475 U.S., at 320–321, 106 S.Ct., at 1084–1085 (internal quotation marks omitted)—"does not apply to prison conditions cases." *Wilson, supra,* 501 U.S., at 303, 111 S.Ct., at 2326. The Court today adopts the next highest level of subjective intent, actual knowledge of the type sufficient to constitute recklessness in the criminal law, *ante,* at 1979, 1980, noting that "due regard" is appropriate "for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.' "[1] *Ante,* at 1983 (quoting *Spain v. Procunier,* 600 F.2d 189, 193 (CA9 1979) (Kennedy, J.)).

Even though the Court takes a step in the right direction by adopting a restrictive definition of deliberate indifference, I cannot join the Court's opinion. For the reasons expressed more fully in my dissenting opinions in *Hudson* and *Helling,* I remain unwilling to subscribe to the view, adopted by *ipse dixit* in *Estelle,* that the Eighth Amendment regulates prison conditions not imposed as part of a sentence. Indeed, "[w]ere the issue squarely presented, ... I might vote to overrule *Estelle."* *Helling,* 509 U.S., at 42, 113 S.Ct., at 2485 (THOMAS, J., dissenting). Nonetheless, the issue is not squarely presented ***862** in this case. Respondents have not asked us to revisit *Estelle,* and no one has briefed or argued the question. In addition to these prudential concerns, *stare decisis* counsels hesitation in overruling dubious precedents. See 509 U.S., at 42, 113 S.Ct., at 2485. For these reasons, I concur in the Court's judgment.[2] In doing so, however, I remain hopeful that in a proper case the Court will reconsider *Estelle* in light of the constitutional text and history.

All Citations

511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811, 62 USLW 4446

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 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.

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 (CA10 1980); *LaMarca v. Turner,* 995 F.2d 1526, 1535 (CA11 1993); and *Morgan v. District of Columbia,* 824 F.2d 1049, 1057 (CADC 1987).

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.

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).

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").

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.

8 While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him, see *infra,* at 1982, 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.

9 If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment, and in deciding whether an inmate has established a continuing constitutional violation a district court may take such developments into account. At the same time, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.

10 The District Court's opinion is open to the reading that it required not only advance notification of a substantial risk of assault, but also advance notification of a substantial risk of assault posed by a particular fellow prisoner. See App. 124 (referring to "a specific threat to [a prisoner's] safety"). The Eighth Amendment, however, imposes no such requirement. See *supra,* at 1982–1983.

* Numerous court opinions document the pervasive violence among inmates in our state and federal prisons. See, *e.g.,* *United States v. Bailey,* 444 U.S. 394, 421, 100 S.Ct. 624, 640, 62 L.Ed.2d 575 (1980)

(BLACKMUN, J., dissenting); *McGill v. Duckworth,* 944 F.2d 344, 348 (CA7 1991), cert. denied, 503 U.S. 907, 112 S.Ct. 1265, 117 L.Ed.2d 493 (1992); *Redman v. County of San Diego,* 942 F.2d 1435 (CA9 1991) (en banc), cert. denied, 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992); *Hassine v. Jeffes,* 846 F.2d 169, 172 (CA3 1988); *Alberti v. Klevenhagen,* 790 F.2d 1220, 1222 (CA5), clarified, 799 F.2d 992 (CA5 1986); *Jones v. Diamond,* 636 F.2d 1364, 1372 (CA5 1981), overruled on other grounds, 790 F.2d 1174 (CA5 1986); *Withers v. Levine,* 615 F.2d 158, 161 (CA4), cert. denied, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980); *Little v. Walker,* 552 F.2d 193, 194 (CA7 1977), cert. denied, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 530 (1978); *Holt v. Sarver,* 442 F.2d 304, 308 (CA8 1971), later proceeding *sub nom.* *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

1 The facts of this case demonstrate how difficult that task can be. When petitioner was taken out of general prison population for security reasons at United States Penitentiary–Lewisburg, he asserted that he "d [id] not need extra security precautions" and filed suit alleging that placing him in solitary confinement was unconstitutional. See *Farmer v. Carlson,* 685 F.Supp. 1335, 1342 (MD Pa.1988). Petitioner's present claim, oddly enough, is essentially that *leaving him* in general prison population was unconstitutional because it subjected him to a risk of sexual assault.

2 I do not read the remand portion of the Court's opinion to intimate that the courts below reached the wrong result, especially because the Seventh Circuit has long followed the rule of law the Court lays down today. See *McGill v. Duckworth,* 944 F.2d 344 (CA7 1991); *Duckworth v. Franzen,* 780 F.2d 645 (CA7 1985). Rather, I regard it as a cautionary measure undertaken merely to give the Court of Appeals an opportunity to decide in the first instance whether the District Court erroneously gave dispositive weight to petitioner's failure to complain to prison officials that he believed himself at risk of sexual assault in the general prison population. *Ante,* at 1985. If, on remand, the Seventh Circuit concludes that the District Court did not, nothing in the Court's opinion precludes the Seventh Circuit from summarily affirming the entry of summary judgment in respondents' favor.

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Hormone Replacement Therapy Cost

How Much Does Hormone Replacement Therapy Cost?

Low: Insurance Copays $5-$30 a month

High: Without Insurance Coverage $10-$85 a month

Post **Comments (37)**

Hormone replacement therapy (HRT), also called hormone therapy, sometimes is used to counter side effects, such as hot flashes, mood swings and vaginal dryness, that can result from a decrease in female hormones during menopause.

Typical costs:

- For patients not covered by health insurance, the average monthly cost of hormone replacement therapy can range from about **$10** to **$85,** depending on the drug used. Generic estrogen-only or progesterone-only pills fall at the lower end of the cost range, while brand name estrogen-plus-progesterone pills or patches such as Prempro the CombiPatch, fall in the middle and some bioidentical estrogen vaginal creams, such as Estrace Cream, can fall on the high end. ConsumerReports.com[1] offers a comparison chart of the monthly costs of various hormone replacement therapy pills, creams and patches.
- Hormone replacement therapy is covered by most health insurance plans, but some do not cover it because they consider hormone-level decline a normal part of aging. For example, several women on WebMD's menopause support forum[2] stated that their Kaiser plans did not cover HRT.
- For patients covered by insurance, prescription drug copays range from **$5** to **$30** per month.

Related articles: Bone Density Test

What should be included:

- Hormone replacement therapy typically contains synthetic versions of the hormones estrogen and progestin or a combination of the two. Recently, there has been more interest in bioidentical hormones, which mimic those produced by a woman's body. Harvard Health[3] provides an overview of bioidentical hormones, and cautions that there is no solid scientific evidence these are safer or more effective than non-bioidentical hormones.
- Hormone replacement therapy generally is available in the form of a pill, a patch, a gel, a vaginal cream or a slow-releasing vaginal ring. Most pills are taken daily, and most creams are applied daily, while patches are usually applied once or twice a week. The North American Menopause Society[4] has an overview of HRT.

Additional costs:

- An initial doctor visit is required, and that can cost between **$75** and **$200** without insurance.
- Before prescribing HRT, the doctor probably will order a blood test to check hormone levels, and it can cost about **$1,000** without insurance.
- Periodic follow-up doctor visits, and possibly follow-up blood testing, will be required.

Discounts:

- Walmart[5] offers several generic HRT drugs for **$4** for a monthly supply.

Shopping for hormone replacement therapy:

- Hormone replacement therapy was much more commonly prescribed before a 2002 study exposed some risks, such as an increased risk of heart disease, blood clots, strokes and breast cancer. Now, long-term hormone replacement therapy generally is not recommended, but short-term therapy may, in addition to symptom relief, provide other health benefits, such as protection against osteoporosis and colorectal cancer. The Mayo Clinic[6] provides an overview of benefits and risks, and the American Cancer Society[7] offers a detailed FAQ on HRT and risk for different types of cancer.
- Talk to your regular gynecologist about whether you are a candidate for HRT. Or, the American College of Obstetricians and Gynecologists[8] offers a doctor finder by state.
- However, even short-term hormone replacement therapy is not recommended for women with heart disease, breast cancer or history of strokes. The National Institutes of Health[9] provides an overview of research on complementary and alternative therapies.
- Side effects of hormone replacement therapy can include symptoms such as headaches, stomache cramps, fluid retention, breast tenderness and changes in sex drive.

Material on this page is for informational purposes only and should not be construed as medical advice. Always consult your physician or pharmacist regarding medications or medical procedures.

Post **Comments (37)**

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Estradiol Patch - progesterone Pill - estradiol cream
Amount: $185.00
Posted by: Just started hormones in Clearwater, FL. **Posted:** October 8th, 2020 05:10PM
Insurance:: Cigna high deductible health plan

I just picked up prescription for estradiol patch $ 96 . Progesterone pills $50. And Low dose estradiol vaginal cream. $40. Total $185 per one month. It may be covered but I have a 5000 deductible (high deductible health insurance) so I had to pay out of pocket until my deductible is reached. Blood tests were partially covered but $450. Was the Estimated out of pocket. Also had to get mammogram free. Doctor says another choice for HRT is an insert slow release estradiol-projesterone that is inserted under skin for $350 That lasts 3 months. That works out to 117/ mo. She said it would not be covered by insurance.
Was this post helpful to you? yes no Report prohibited or spam

Estrogen pills (30)
Amount: $0.00
Posted by: Addison in Charlottesville, VA. **Posted:** April 18th, 2020 11:04AM
Insurance:: Aetna
The retail price for me is 15$ but with my insurance I didn't pay anything out of pocket
Was this post helpful to you? yes no Report prohibited or spam

Compound HRT
Amount: $84.00
Posted by: paracelsus in Lincoln, NE. **Posted:** November 12th, 2018 10:11AM
Insurance:: CVS Caremark
Will not cover compounded HRT. "Insufficient clinical evidence exists for safety or effectiveness of compounded HRT." According to them, you can just live with the symptoms as they eventually fade after a few years (or 20). Or if you feel that lifestyle changes don't help, they will pay for the blood pressure pills, the insulin, sleep pills, xanax, drugs for bone density, and a hundred other expensive things, but not compounded HRT.
Was this post helpful to you? yes no Report prohibited or spam

The cost of hormone replacement therapy
Amount: $0.00
Posted by: I will be Reese in Margate, FL. **Posted:** October 15th, 2018 04:10PM
Insurance:: Only recently
Transitioning from male to female typically progesterone will not be prescribed as it is still not considered a required or proven case for necessity of it. Mostly estradiol is the only thing typically provided with alpha blockers such as Spirolactone
If your insurance does not cover it there are other ways to get it it may be less or more than you are used to paying I won't go into how to do it but I have been providing my own hormones up until this last year through my own way of getting them
Was this post helpful to you? yes no Report prohibited or spam

HRT transgender FTM hormone blocking
Amount: $20.00
Posted by: Eli James in Oneonta, NY. **Posted:** July 7th, 2018 06:07PM
Insurance:: MVP and Fidelis
On progesterone shots to block estrogen production. Fidelis (my insurance) won't cover hormones/birth control for me since I'm under 18 years of age, hence the copay, but MVP(my family's insurance) covered it, no questions asked.
Was this post helpful to you? yes no Report prohibited or spam

Prempro
Amount: $123.00
Posted by: a user in Augusta, GA. **Posted:** November 30th, 2017 01:11PM
Insurance:: UHS Care Mart

When I had insurance I paid $123 for a 3 month supply. I had a lapse in insurance and the quote was over $500. Why is birth control free w/ most insurance and at the health department but not HRT. Same hormones.
Was this post helpful to you? yes no Report prohibited or spam

Prempro
Amount: $250.00
Posted by: DJD in Columbia, MD. **Posted:** November 24th, 2017 04:11AM
Insurance:: Bcbs
Phizer does have a patient program to cover them free but my salary went over their limit.
Was this post helpful to you? yes no Report prohibited or spam

HRT for transgender (MTF) and natal women
Amount: $8.00
Posted by: Gillian 2017 in Atlanta, GA. **Posted:** November 16th, 2017 01:11AM
Insurance:: none
Walmart sells generic estradiol 2mg per pill for $4.00 for a one month supply (for women). Transgender dosage is typically double that (4 mg per day). A three month (for women) supply is $10.00. They also sell generic progesterone for the same price.
Was this post helpful to you? yes no Report prohibited or spam

Prempro
Amount: $95.00
Posted by: Renee deason in Austin, TX. **Posted:** September 26th, 2017 04:09AM
Insurance:: BCBS
Without insurance $265... insurance covered it at a cost of $95 / mo. Why are there no generics for it? The main reason I went to the doctor is because I had rapid weight gain In one year .... but all the reviews mention weight gain as a side effect . My doctor advised the weight gain was because this was the year I went into full
Menopause
Was this post helpful to you? yes no Report prohibited or spam

BHRT
Amount: $350.00
Posted by: StuckFootingtheBill in Norman, OK. **Posted:** June 7th, 2017 12:06AM
Insurance:: None
Bio identical hormone replacement therapy. There is no insurance that covers the pellets for women, only men. Because menopause is a normal part of life. The cause of my menopause is NOT due to natural aging, I am only 31!
Was this post helpful to you? yes no Report prohibited or spam

Hormone Therapy
Amount: $938.00
Posted by: Ripped off in Phoenix in Phoenix, AZ. **Posted:** May 5th, 2017 02:05PM
Insurance:: Cigna Home Pharamacy
I think that from what I can see on costs they ripped me off big time for a Estrogen/Progest. Cream to be that expensive is just crazy! The worst part about it is that I asked my dr to check the coverage and cost before ordering it neither were done. I have a auto alert on my HSA was the only reason I knew that the money was withdrawn from my account. I am fuming mad that they did not call me when I asked Cigna just said only if it is over $1000 REALLY!!!
Was this post helpful to you? yes no Report prohibited or spam

HRT REPLACEMENT
Amount: $25,000.00
Posted by: Lorita F Howard in Louisville, KY. **Posted:** April 24th, 2017 11:04AM
Insurance:: BCBS
Was this post helpful to you? yes no Report prohibited or spam

Estrace cream
Amount: $264.00
Posted by: kansas Granny in paola, KS. **Posted:** March 8th, 2017 07:03AM
Insurance:: Walmart/humana plan
Full cost $333.00. My price 264.00 3/1/2017
Was this post helpful to you? yes no Report prohibited or spam

Prempro
Amount: $550.00
Posted by: Kas5900 in Hayden, ID. **Posted:** February 16th, 2017 08:02PM
Insurance:: Bluecross
I went to get my prempro prescription at Walmart and was told my share would be $550.00 after insurance. I guess I really don't need to take it. Can't/won't pay that much.
Was this post helpful to you? yes no Report prohibited or spam

Prempro
Amount: $179.00
Posted by: LiterallyHot in Chicago, IL. **Posted:** January 11th, 2017 07:01AM
Insurance:: BCBS
$10-$85? Where do I find HRT that cheap? My prescription costs $179. The price is re-dick-ulous when it is something necessary for normal life for women. Prick pharmaceutical companies, get your heads out of your asses! You have enough money to last for your entire lifetime, you don't need to steal money from the rest of us to line your pockets further.
Was this post helpful to you? yes no Report prohibited or spam

Transgender seeking hormone replacement therapy
Amount: $0.00
Posted by: vanilla beaner 37 in Linton, IN. **Posted:** July 27th, 2016 03:07PM
Insurance:: Mdwise
I am male going to female I want to know if the hormone replacement therapy will be covered MDwise said the appointment is covered but that the Dr will need to do a prior authorization to see if the hormone replacement therapy will be covered. Plz help
Was this post helpful to you? yes no Report prohibited or spam

Eight years on Wiley Protocol
Amount: $23,200.00
Posted by: TheBiz in Albuquerque, NM. **Posted:** June 8th, 2016 06:06PM
Insurance:: Quit covering hormones.
Pay this for about 5-6 week supply for estrogen, progesterone, and testosterone. Insurance only covers blood testing. With co-pays, used to be $90/month. Now, insurance will only pay for pharma HRT, which I cannot sub for the Wiley Protocol. I pay my CNP out of pocket because I don't want to switch. I can afford it, but it's not right at the major university I work for in the southwest, I'm surrounded by diabetics who won't change their horrid diet, taking expensive diabetic drugs, plus antidepressants, and more, and they whine all the time about their aches and pains, doctor visits constantly, and I'm older than they are often. I have to pay via rising insurance costs for their bad habits, while I only want my BHRT, and apparently good health is my responsibility. If I could figure out how to buy lower-cost insurance for just emergencies

and high-cost expenses, which I can't under the ACA rules, I'd do it in a heart beat. I'd rather pay for my integrative health care on my own.
Was this post helpful to you? yes no Report prohibited or spam

Prempro tabs
Amount: $150.00
Posted by: Kare in Anthem, AZ. **Posted:** May 27th, 2016 09:05AM
Insurance:: UHC
This is my first time on hormones. I have been going through hot flashes and night sweats for 4 years and finally decided to get some help. My doctor put me on a fairly new treatment called prempro, made from the urine of pregnant mares.
I was shocked at the price and not sure if I want to spend $150 every month. Plus I just got my menstrual period after not having it for 3 years. I'm a newbie and will be doing more research but at this particular moment, I'll take the hotflashes and night sweats.
Was this post helpful to you? yes no Report prohibited or spam

Angeliq 1mg/1mg
Amount: $38.00
Posted by: meri in Ormond Beach, FL. **Posted:** May 7th, 2016 07:05AM
Insurance:: no
Angeliq if purchased out of the USA (Panama or Canada) without insurance is only $38.00 per month plus shipping. U need an RX to buy in Canada and may need your doctor to RX a dose not available in USA. With insurance coverage it cost $80-$110 in USA.I find that it relieves all my post menopausal symptoms
Was this post helpful to you? yes no Report prohibited or spam

estrace
Amount: $240.00
Posted by: TtNh in Brandon, FL. **Posted:** April 29th, 2016 01:04PM
Insurance:: medicare bc/bs
How is it so cheap outside of Medicare... Isn't something way,way,way wrong here or am I missing something??
Was this post helpful to you? yes no Report prohibited or spam

Hormones
Amount: $120.00
Posted by: Justarose123@gmail.com in Cranston, RI. **Posted:** April 15th, 2016 10:04AM
Insurance:: Doesn't cover
I needed estrogen/progestion and testesterone replacement because all low. -and armour thyroid. Vitamin D shots
Even though this is pretty low I had to stop after a year of paying because I'm on Ssdi and just couldn't afford them.
Was this post helpful to you? yes no Report prohibited or spam

Estratest
Amount: $284.00
Posted by: HPNC in Greensboro, NC. **Posted:** March 20th, 2016 03:03PM
Insurance:: Out of Pocket
Hormone replacement with testosterone is not covered by Medicare, only estrogen. Functional ovaries make estrogen and testosterone.
Three month supply purchased at Costco; membership is not required for pharmacy purchases.
Was this post helpful to you? yes no Report prohibited or spam

Estrace cream 1 1/2 oz
Amount: $240.00
Posted by: Nessa in venice, FL. **Posted:** February 25th, 2016 09:02AM
Insurance:: after 200 ded/40% after
started this 2 yrs ago for atrophy. cost was 139.
I called the company to complain about price gouging basically was told too bad. This is suppose to be better because it is applied directly to site with out going thru bloodstream.
half a gram 3x a week. 3 tubes a yr.
Was this post helpful to you? yes no Report prohibited or spam

612 F.2d 754
United States Court of Appeals,
Third Circuit.

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.
|
Argued Sept. 4, 1979.
|
Decided Dec. 28, 1979.

Synopsis

Inmates of county jail brought civil rights action seeking declaratory judgment that conditions of confinement for pretrial detainees incarcerated in jail violated their constitutional rights. The United States District Court for the Western District of Pennsylvania, Maurice B. Cohill, Jr., J., 457 F.Supp. 984, found that many of the challenged conditions violated constitutional rights of the inmates but held against them on the issues of contact visits, methadone treatment, and psychiatric care, and inmates appealed. The Court of Appeals, Rosenn, Circuit Judge, held that: (1) denial of contact visits did not violate inmates' constitutional rights; (2) district court did not err in finding that system of methadone treatment at jail did not constitute denial of due process; and (3) remand was required for determination whether level of psychiatric care at jail met constitutional requirement that inmates with serious mental or emotional illnesses or disturbances be provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances.

Affirmed in part and remanded in part.

Aldisert, Circuit Judge, concurred and dissented and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Constitutional Law** Conditions of confinement in general

Denial of contact visits for county jail inmates did not constitute denial of due process, where evidence indicated that allowing contact visits would present security problem at jail and where there was no indication that prohibition was adopted for purposes of punishment, even though chance of additional contraband reaching jail as a result of contact visits might have been remote. U.S.C.A.Const. Amend. 14.

17 Cases that cite this headnote

[2] **Prisons** Contact and conjugal visits

Denial of contact visits at county jail was a permissible restriction of inmates' right to privacy, where prohibition of contact visits was reasonable response to legitimate concerns of prison security and where restriction prohibiting physical contact was specifically tailored to meet perceived security problem.

36 Cases that cite this headnote

[3] **Constitutional Law** Medical care and treatment

Where inmates of county jail who had been receiving methadone treatment prior to incarceration from an approved clinic in the county were given methadone treatment through

their sixth day of confinement, after which treatment was terminated, system of methadone treatment at jail would not constitute denial of due process, where there was medical testimony to the effect that system was adequate and where record did not establish any deliberate indifference to inmates' serious medical needs. U.S.C.A.Const. Amend. 14.

8 Cases that cite this headnote

[4] **Prisons** Personal property and effects; contraband

Prisons Strip searches

Prisons Contact and conjugal visits

Jail authorities may reasonably act so as to exclude contraband from jail environment, and thus they may prohibit contact visits, regulate material received by inmates from outside jail, or institute strip searches of inmates after contact visits with noninmates.

11 Cases that cite this headnote

[5] **Prisons** Particular Conditions and Treatments

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.

4 Cases that cite this headnote

[6] **Sentencing and Punishment** Medical care and treatment

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. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8.

171 Cases that cite this headnote

[7] **Constitutional Law** Medical treatment

Prisons Health and Medical Care

Analysis of whether county jail provided adequate medical treatment to pretrial detainees, as opposed to convicted prisoners, had to proceed under due process clause of Fourteenth Amendment rather than Eighth Amendment, but because it would be anomalous to afford pretrial detainee less constitutional protection than a convicted one, county jail had to meet, at a minimum, "deliberate indifference" standard prohibiting jail from failing to provide adequate medical treatment as a result of deliberate indifference to prisoner's serious illness or injury. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

121 Cases that cite this headnote

[8] **Sentencing and Punishment** Medical care and treatment

"Deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate is two-pronged: it requires deliberate indifference on the part of prison officials and it requires prisoner's medical needs to be serious. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

561 Cases that cite this headnote

[9] **Sentencing and Punishment** Medical care and treatment

"Deliberate indifference" standard for determining whether medical care afforded prisoners is constitutionally adequate affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients, but where prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating need for such treatment, constitutional standard has been violated. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

690 Cases that cite this headnote

[10] **Prisons** Particular Conditions and Treatments

Where size of prison medical staff in relation to number of inmates having serious health problems constitutes an effective denial of access to diagnosis and treatment by qualified health care professionals, "deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate has been violated, for, in such circumstances, exercise of informed professional judgment as to serious medical problems of individual inmates is precluded by patently inadequate size of the staff.

351 Cases that cite this headnote

[11] **Sentencing and Punishment** Psychological and psychiatric treatment

"Deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate is applicable in evaluating constitutional adequacy of psychological or psychiatric care provided at a jail or prison; key factor in determining whether system for psychological or psychiatric care in a jail or prison is constitutionally adequate 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. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

100 Cases that cite this headnote

[12] **Prisons** Health and Medical Care

Even though system of medical care at a jail or prison may itself be constitutionally sufficient, refusal to make that system of care available to a particular inmate may itself be unconstitutional. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[13] **Federal Courts** All or part of issues or parties, new trial on

In view of fact that record indicated that there were substantial deficiencies in system of psychiatric care at county jail, in view of factors indicating that record did not accurately reflect existing conditions at jail, and in view of lack of any specific finding as to adequacy of system for psychiatric care at jail, case would be remanded for determination as to whether level of psychiatric care at jail met constitutional minimum prohibiting prison officials from being deliberately indifferent to serious medical needs of inmates. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

16 Cases that cite this headnote

Attorneys and Law Firms

***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** 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. s 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-FI 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** 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.

[1] 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 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.

[2] 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 those individuals. ***760** [3] 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.

[3] 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** 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.

[4] **[5]** 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, 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.

[6] **[7]** **[8]** 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.

[9] 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.

[10] 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 ***763** Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 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.

[11] **[12]** 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.

[13] 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** 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 s 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 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 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.

All Citations

612 F.2d 754

Footnotes

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.

774 F.3d 63
United States Court of Appeals,
First Circuit.

Michelle KOSILEK, Plaintiff, Appellee,
v.
Luis S. SPENCER, Commissioner of the Massachusetts Department of Correction, Defendant, Appellant.

No. 12–2194.
|
Dec. 16, 2014.

Synopsis

Background: State inmate brought action against Massachusetts Department of Corrections (DOC), alleging that DOC's refusal to provide male-to-female sex reassignment surgery (SRS) to treat inmate's gender identity disorder (GID) constituted inadequate medical care and deliberate indifference to inmate's serious medical needs, in violation of Eighth Amendment. The United States District Court for the District of Massachusetts, Mark L. Wolf, J., 889 F.Supp.2d 190, granted injunction requiring DOC to provide SRS, and DOC appealed.

Holdings: On rehearing en banc, the Court of Appeals, Torruella, Circuit Judge, held that:

[1] DOC's decision not to provide SRS to treat inmate's GID was not sufficiently harmful to inmate so as to violate Eighth Amendment, and

[2] DOC was not deliberately indifferent in refusing to provide SRS.

Reversed.

Thompson and Kayatta, Circuit Judges, dissented and filed opinions.

Procedural Posture(s): On Appeal.

West Headnotes (38)

[1] **Sentencing and Punishment** Conditions of Confinement

In Eighth Amendment context, where society takes from prisoners the means to provide for their own needs, the failure to provide such care may actually produce physical torture or a lingering death. U.S.C.A. Const.Amend. 8.

[2] **Sentencing and Punishment** Cruelty and unnecessary infliction of pain

Undue suffering, unrelated to any legitimate penological purpose, is considered a form of punishment proscribed by the Eighth Amendment. U.S.C.A. Const.Amend. 8.

28 Cases that cite this headnote

[3] **Sentencing and Punishment** Cruelty and unnecessary infliction of pain

Eighth Amendment is meant to prohibit unnecessary and wanton infliction of pain, which is repugnant to the conscience of mankind. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

[4] **Sentencing and Punishment** Medical care and treatment

Eighth Amendment's focus on punishment means that not all shortages or failures in medical care exhibit the intent and harmfulness required to fall within its ambit. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[5] **Sentencing and Punishment** Medical care and treatment

To prove an Eighth Amendment violation based on inadequate medical care, a prisoner must satisfy both of two prongs: (1) an objective prong that requires proof of a serious medical need, and

(2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need. U.S.C.A. Const.Amend. 8.

57 Cases that cite this headnote

[6] **Sentencing and Punishment** Medical care and treatment

Objective prong of Eighth Amendment claim based on inadequate medical care requires that medical need be one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. U.S.C.A. Const.Amend. 8.

33 Cases that cite this headnote

[7] **Sentencing and Punishment** Medical care and treatment

Objective prong of Eighth Amendment claim based on inadequate medical care does not impose upon prison administrators a duty to provide care that is ideal, or of the prisoner's choosing; rather, Eighth Amendment proscribes care that is so inadequate as to shock the conscience. U.S.C.A. Const.Amend. 8.

25 Cases that cite this headnote

[8] **Sentencing and Punishment** Medical care and treatment

Even if medical care is so inadequate as to satisfy the objective prong of Eighth Amendment claim, the Eighth Amendment is not violated unless prison administrators also exhibit deliberate indifference to the prisoner's needs. U.S.C.A. Const.Amend. 8.

62 Cases that cite this headnote

[9] **Sentencing and Punishment** Medical care and treatment

For purposes of subjective prong of Eighth Amendment claim based on inadequate medical care, "deliberate indifference" defines a narrow band of conduct, and requires evidence that the failure in treatment was purposeful. U.S.C.A. Const.Amend. 8.

23 Cases that cite this headnote

[10] **Sentencing and Punishment** Medical care and treatment

Obvious case of deliberate indifference to an inmate's serious medical need, for Eighth Amendment purposes, would be a denial of needed medical treatment in order to punish the inmate. U.S.C.A. Const.Amend. 8.

33 Cases that cite this headnote

[11] **Sentencing and Punishment** Medical care and treatment

While deliberate indifference, as element of Eighth Amendment claim based on inadequate medical care, may be exhibited by a "wanton disregard" to a prisoner's needs, such disregard must be akin to criminal recklessness, requiring consciousness of impending harm, easily preventable. U.S.C.A. Const.Amend. 8.

13 Cases that cite this headnote

[12] **Sentencing and Punishment** Medical care and treatment

When evaluating medical care and deliberate indifference under Eighth Amendment, security considerations inherent in the functioning of a penological institution must be given significant weight. U.S.C.A. Const.Amend. 8.

13 Cases that cite this headnote

[13] **Sentencing and Punishment** Medical care and treatment

In context of Eighth Amendment claim based on inadequate medical care, wide-ranging deference is accorded to prison administrators in the adoption and execution of policies and practices that in their judgment are needed to maintain institutional security. U.S.C.A. Const.Amend. 8.

2 Cases that cite this headnote

[14] **Sentencing and Punishment** Medical care and treatment

Even a denial of medical care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security. U.S.C.A. Const.Amend. 8.

4 Cases that cite this headnote

[15] **Sentencing and Punishment** Medical care and treatment

In context of Eighth Amendment claim based on inadequate medical care, prison administrators need only have responded reasonably to the risk. U.S.C.A. Const.Amend. 8.

6 Cases that cite this headnote

[16] **Sentencing and Punishment** Medical care and treatment

Test for establishing an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal. U.S.C.A. Const.Amend. 8.

[17] **Federal Courts** Mixed questions of law and fact in general

Appellate court's review of "mixed questions" is of a variable exactitude; the more law-based a question, the less deferentially appellate court assesses the district court's conclusion.

1 Cases that cite this headnote

[18] **Federal Courts** Imprisonment and incidents thereof

Ultimate legal conclusion of whether prison administrators have violated Eighth Amendment is reviewed by appellate court de novo. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[19] **Federal Courts** Imprisonment and incidents thereof

On appellate review of Eighth Amendment claim of inadequate medical care, subsidiary legal questions, such as whether an actor's conduct amounted to deliberate indifference for purposes of the Eighth Amendment, are reviewed de novo. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[20] **Federal Courts** Imprisonment and incidents thereof

On appellate review of Eighth Amendment claim of inadequate medical care, appellate court awards deference to the district court's resolution of questions of pure fact and issues of credibility, and will reverse the district court's findings on such factual questions only for clear error. U.S.C.A. Const.Amend. 8.

[21] **Federal Courts** Imprisonment and incidents thereof

In reviewing Eighth Amendment claim of inadequate medical care, appellate court may find clear error when the district court commits an error of law that affects its fact-finding analysis. U.S.C.A. Const.Amend. 8.

[22] **Federal Courts** Imprisonment and incidents thereof

Standard of review for Eighth Amendment claims of inadequate medical care tracks the Supreme Court's framework for appellate review of claims of excessive punishment or fines under the Eighth Amendment. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[23] **Sentencing and Punishment** Medical care and treatment

In context of Eighth Amendment claim based on inadequate medical care, medical "need" in real life is an elastic term that takes its

substantive content from the particular context in which the standards are being assessed. U.S.C.A. Const.Amend. 8.

5 Cases that cite this headnote

[24] **Federal Courts** Imprisonment and incidents thereof

Because "legal rules" for what constitutes medical care in violation of the Eighth Amendment acquire content only through application, this fact favors de novo appellate review to maintain control of, and to clarify, the legal principles. U.S.C.A. Const.Amend. 8.

[25] **Sentencing and Punishment** Medical care and treatment

Significant risk of future harm that prison administrators fail to mitigate may suffice under the objective prong of Eighth Amendment claim based on inadequate medical care. U.S.C.A. Const.Amend. 8.

4 Cases that cite this headnote

[26] **Prisons** Transsexuals; sex-change operations

Sentencing and Punishment Medical care and treatment

Decision of Massachusetts Department of Corrections (DOC) not to provide male-to-female sex reassignment surgery (SRS) to treat inmate's gender identity disorder (GID), in light of continued provision of all ameliorative measures afforded inmate, and in addition to antidepressants and psychotherapy, was not sufficiently harmful to inmate so as to violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

5 Cases that cite this headnote

[27] **Sentencing and Punishment** Medical care and treatment

In context of Eighth Amendment claim based on inadequate medical treatment, where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of court to second guess medical judgments or to require that prison administrators adopt the more compassionate of two adequate options. U.S.C.A. Const.Amend. 8.

15 Cases that cite this headnote

[28] **Prisons** Transsexuals; sex-change operations

Sentencing and Punishment Medical care and treatment

Massachusetts Department of Corrections (DOC) was not deliberately indifferent to inmate's gender identity disorder (GID), as would violate inmate's Eighth Amendment rights, in refusing to provide inmate with male-to-female sex reassignment surgery (SRS), in light of continued provision of all ameliorative measures afforded inmate, and in addition to antidepressants and psychotherapy; DOC solicited opinion of multiple medical professionals, and DOC's concerns about safety and security, including provision of safe housing options for inmate after SRS, were reasonable. U.S.C.A. Const.Amend. 8.

6 Cases that cite this headnote

[29] **Sentencing and Punishment** Medical care and treatment

Subjective element of Eighth Amendment medical claim for injunctive relief requires not only that inmate show that the treatment she received was constitutionally inadequate, but also that the correctional entity was, and continues to be, deliberately indifferent to her serious risk of harm. U.S.C.A. Const.Amend. 8.

11 Cases that cite this headnote

[30] **Sentencing and Punishment** Medical care and treatment

In analyzing subjective prong of Eighth Amendment claim based on inadequate medical treatment, it is not the district court's own belief about medical necessity that controls, but what

was known and understood by prison officials in crafting their policy. U.S.C.A. Const.Amend. 8.

[31] **Sentencing and Punishment** Medical care and treatment

In context of subjective prong of Eighth Amendment claim based on inadequate medical treatment, choice of a medical option that, although disfavored by some in the field, is presented by competent professionals does not exhibit a level of inattention or callousness to a prisoner's needs rising to a constitutional violation. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

[32] **Sentencing and Punishment** Medical care and treatment

Later court decision, ruling that prison administrators were wrong in their estimation of medical treatment's reasonableness, does not somehow convert that choice into one exhibiting the sort of obstinacy and disregard required to find deliberate indifference, as element of Eighth Amendment claim based on inadequate medical treatment. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[33] **Sentencing and Punishment** Medical care and treatment

Subjective prong of Eighth Amendment claim based on inadequate medical treatment recognizes that, in issues of security, prison 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. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[34] **Sentencing and Punishment** Medical care and treatment

In context of subjective prong of Eighth Amendment claim based on inadequate medical treatment, although court cannot abdicate its responsibility to ensure that the limits imposed by the Constitution are not ignored, court does not sit to substitute its own judgment for that of prison administrators. U.S.C.A. Const.Amend. 8.

[35] **Sentencing and Punishment** Medical care and treatment

As long as prison administrators make judgments balancing security and health concerns that are within the realm of reason and made in good faith, their decisions do not amount to a violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[36] **Prisons** Transsexuals; sex-change operations

Sentencing and Punishment Medical care and treatment

Fact that Massachusetts Department of Corrections (DOC) commissioner was motivated in part by concerns unrelated to prison security in denying inmate's request for male-to-female sex reassignment surgery (SRS) to treat inmate's gender identity disorder (GID) did not render security concerns articulated by DOC irrelevant for purposes of analyzing subjective prong of inmate's Eighth Amendment claim based on inadequate medical treatment. U.S.C.A. Const.Amend. 8.

6 Cases that cite this headnote

[37] **Sentencing and Punishment** Medical care and treatment

When determining the appropriateness of injunctive relief with respect to Eighth Amendment claim based on inadequate medical treatment, court's focus must include current attitudes and conduct. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[38] **Sentencing and Punishment** Medical care and treatment

Eighth Amendment proscribes only medical care so unconscionable as to fall below society's minimum standards of decency. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

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Before LYNCH, Chief Judge, TORRUELLA, HOWARD, THOMPSON and KAYATTA, Circuit Judges.

Opinion En Banc

TORRUELLA, Circuit Judge.

This case involves important issues that arise under the Eighth Amendment to the U.S. Constitution. We are asked to determine whether the district court erred in concluding that the Massachusetts Department of Correction ("DOC") has violated the Cruel and Unusual Punishment Clause of the Eighth Amendment by providing allegedly inadequate medical care to prisoner Michelle Kosilek ("Kosilek"). More precisely, we are faced with the question whether the DOC's choice of a particular medical treatment is constitutionally inadequate, such that the district court acts within its power to issue an injunction requiring provision of an alternative treatment—a treatment which would give rise to new concerns related to safety and prison security.

After carefully considering the community standard of medical care, the adequacy of the provided treatment, and the valid security concerns articulated by the DOC, we conclude that the district court erred and that the care provided to Kosilek by the DOC does not violate the Eighth Amendment. We therefore reverse the district court's grant of injunctive relief, and we remand with instructions to dismiss the case.

I. *Background*

This litigation has now spanned more than twenty years and produced several opinions of significant length. *See* *Kosilek v. Spencer,* 889 F.Supp.2d 190 (D.Mass.2012) ("*Kosilek II* "); *Kosilek v. Maloney,* 221 F.Supp.2d 156 (D.Mass.2002) ("*Kosilek I* "). In light of the expansive record, we recite here only the facts necessary to clarify the issues on appeal.

A. Michelle Kosilek

Michelle Kosilek—born in 1949 as Robert Kosilek—is an anatomically male prisoner in her mid-sixties who suffers from gender identity disorder ("GID") [1] and self-identifies as a female. In 1992 Kosilek was convicted of first-degree murder and sentenced to a term of life imprisonment ***69** without parole for the 1990 strangulation of her then-wife, Cheryl McCaul, whose body was found abandoned in the backseat of a vehicle at a local shopping mall. *See*

Commonwealth v. Kosilek, 423 Mass. 449, 668 N.E.2d 808 (1996). While awaiting trial for McCaul's murder, Kosilek twice attempted to commit suicide. She also once tied a string around her testicles in an attempt at self-castration, but removed the string when it became painful. Since 1994, Kosilek has been housed at MCI–Norfolk, a medium security male prison in Massachusetts. Throughout the twenty-year duration of her incarceration at MCI–Norfolk, Kosilek has not attempted to harm herself.

B. Kosilek I

Kosilek first sued the DOC in 1992, alleging that its failure to provide direct treatment for her GID was a violation of the Eighth Amendment. At that time, Kosilek was receiving only "supportive therapy" to cope with the distress caused by her GID. Kosilek initially sought both damages and injunctive relief requiring the DOC to provide her with sex reassignment surgery ("SRS"), although only her claim for injunctive relief survived to trial.

The district court issued a decision in 2002, in which it concluded that Kosilek had proven the existence of a serious medical need and had shown that her then-current treatment plan was inadequate. The court concluded, however, that the DOC was unaware that a failure to provide additional treatment to Kosilek might result in serious harm. Moreover, it held that the DOC's failure to provide treatment was rooted, at least in part, in "sincere security concerns." As a result, the court ruled that the DOC was not in violation of the Eighth Amendment.

Despite finding for the DOC, the district court's opinion made clear that Kosilek required additional treatment for her GID, and that the DOC would need to develop and implement an improved treatment plan. The court warned that a failure to provide treatment in the future, now that the DOC was on notice of the potential for harm if only "supportive therapy" was provided, could amount to an Eighth Amendment violation.

C. The DOC offers treatment

The DOC responded to *Kosilek I* by revamping its policy for GID treatment. In the past, the DOC had adopted a policy of "freezing" a prisoner's treatment at whatever level that prisoner had attained prior to incarceration. Hormonal treatment, for example, would be available only to prisoners who had been prescribed hormones prior to incarceration. In place of this "freeze-frame" policy, after *Kosilek I* the DOC adopted a plan that allowed prisoners to receive additional treatment beyond the level of that received before entering prison, when such care was medically required. Under this new plan, medical recommendations would be made by the University of Massachusetts Correctional Health Program ("UMass"), a health-services provider contracted by the DOC. The DOC Commissioner and the DOC Director of Health Services were responsible for assessing whether any change in treatment would create increased security concerns.

Kosilek was evaluated by Dr. David Seil, a gender-identity specialist, who prescribed a course of treatment to alleviate the mental distress—often referred to as "dysphoria"—associated with her GID. In line with Dr. Seil's recommendations, in 2003 the DOC began providing Kosilek with significant ameliorative treatment aimed at directly addressing the mental distress caused by GID. In addition to continued mental health treatment, she ***70** was provided female, gender-appropriate clothing and personal effects, and electrolysis was performed to permanently remove her facial hair.[2] Kosilek also began a course of hormonal treatments recommended by an endocrinologist. These treatments resulted in "breast development and shrinkage of her testicles." All of the treatments described continue to be offered to Kosilek to the present day.

D. Consideration of SRS

In line with the Harry Benjamin Standards of Care (the "Standards of Care" or "the Standards"),[3] Dr. Seil recommended that Kosilek be considered for SRS after one year of hormonal treatment.[4] Accordingly, in 2004 the DOC began the process of finding an appropriate professional to evaluate Kosilek's eligibility for, and the necessity of, SRS. At the DOC's Executive Staff Meetings there was some debate regarding who should be hired to conduct this evaluation. The UMass Mental Health Program Director, Dr. Kenneth Appelbaum, suggested that the DOC consult with the Fenway Community Health Center (the "Fenway Center"). The Fenway Center is a Boston-based facility focused on serving the lesbian, gay, bisexual, and transgender community. In contrast, the DOC's Director of Mental Health and Substance Abuse Services, Gregory Hughes ("Hughes"), suggested consulting with Cynthia Osborne ("Osborne"), a gender identity specialist employed at the Johns Hopkins School of Medicine who had experience working with other departments of correction regarding GID treatment.

Hughes expressed concern with using the Fenway Center because of "the perception that their approach was to come out with recommendations that globally endorsed a full panoply of treatments." It was thought that Osborne, in contrast, "may do more objective evaluations." Dr. Appelbaum noted, however, that the Fenway Center's approach was, to his knowledge, probably "more the norm than the exception." The DOC also recognized that having a Boston-based treatment provider might more easily facilitate the process of Kosilek's evaluation.

The Fenway Center was retained by the DOC, and Kosilek was evaluated by Kevin ***71** Kapila, M.D., and Randi Kaufman, Psy.D., in a ninety-minute interview. Drs. Kapila and Kaufman also reviewed Kosilek's medical records. On February 24, 2005, they issued a report recommending that Kosilek receive SRS (the "Fenway Report"). The Fenway Report acknowledged Kosilek's positive response to the treatment provided by the DOC.

> Her joy around being feminized through hormone therapy, facial and body hair removal, and her ability to have access, and to dress in, feminine attire and make-up is palpable. These responses further suggest that being able to express herself as female has been helpful in alleviating her gender dysphoria.... [I]t is clear that her increasingly feminine presentation has been beneficial to her psychologically.

Nonetheless, it also emphasized that Kosilek remained significantly distressed by "having male genitalia, as well as not having female genitalia." In light of this continuing distress, the Fenway Center doctors stated that "it is quite likely that Michelle will attempt suicide again if she is not able to change her anatomy." The report also concluded that Kosilek had fully progressed through the Standards of Care's triadic sequence, and that she "appear[ed] to be ready" for SRS. SRS, the doctors believed, would most likely "allow Michelle to have full relief from the symptoms of gender dysphoria" and would quite possibly "increase her chance for survival" by greatly decreasing the potential for future suicidal ideation.

The Fenway Report was received by the DOC and reviewed by Dr. Appelbaum and his UMass colleague, Dr. Arthur Brewer. The UMass doctors informed the DOC that they found no clear contraindications to SRS, but noted that they were "unaware of any other case in which an inmate has undergone sex reassignment surgery while incarcerated."

After considering the information from UMass, the DOC decided to have Osborne conduct a peer review of the Fenway Report. In a letter to Osborne, the DOC stated that it was requesting her services because "[t]he treatment of Gender Identity Disorder within a correctional environment is a complicated issue and one that the Department takes very seriously. We are aware of the substantial expertise you possess in this area and hope that you can provide us with assistance in determining appropriate treatment."[5] On April 12, 2005, the DOC sent Osborne copies of all previous medical evaluations of Kosilek.

On April 28, 2005, the DOC Director of Health Services, Susan Martin ("Martin"), wrote UMass, stating her concern that UMass had not "address[ed] the lack of detail, clarity and specific recommendations in the evaluation done by the Fenway Clinic," and had failed to provide an independent recommendation as to the appropriateness of surgery. She also asked for specific logistical information, including a list of doctors who might provide the surgery, what procedures would be performed, and what recovery time could be expected.

***72** On May 10, 2005, Drs. Appelbaum and Brewer replied, indicating that they deferred to the Fenway Center's recommendation of surgery, as they were not experts in the area of SRS—a medical procedure specifically excluded from their contract to provide services to the DOC. They provided a preliminary list of surgeons to consider, none of whom were licensed to practice medicine in Massachusetts.

On May 20, 2005, Osborne finished her peer review of the Fenway Report. She began by making clear that her review was limited to reading and evaluating the reports of others. As a result, she could not independently diagnose Kosilek, but she agreed with the conclusion that Kosilek suffered from GID. Still, she disagreed with what she believed to be a lack of comprehensiveness in the report and an inclination to minimize the possibility of comorbid conditions. Namely, Osborne highlighted that Kosilek had previously been diagnosed with Antisocial Personality Disorder, a diagnosis neither confirmed nor denied by the Fenway Report, and

that the report included no indication that Kosilek had been assessed for other pathologies likely to lead to self-harming behavior. Osborne expressed belief that threats of self-harm or suicide should serve as a contraindication to surgery, and that such threats were not a valid or clinically acceptable justification for surgery. In consequence, she disagreed with the Fenway Center's statements that surgery was medically necessary as a means to diminish the likelihood that Kosilek would attempt suicide in the future.

Osborne's report also highlighted that the Standards of Care admit of flexible application, and noted that the Standards state that "the diagnosis of GID invites the consideration of a variety of therapeutic options, only one of which is the complete therapeutic triad." She emphasized that "[t]here is currently no universal professional consensus regarding what constitutes medical necessity in GID."

In reference to the Standards of Care's application in a penological setting, Osborne noted that the Standards of Care include a criterion that candidates for SRS exhibit "satisfactory control of problems such as sociopathy, substance abuse, psychosis and suicidality." She believed that this requirement was inherently in conflict with the Standard's application to incarcerated persons, as she felt incarceration indicated a lack of mastery over such antisocial leanings. Moreover, Osborne noted that non-incarcerated individuals often face external constraints in their choice of treatments or determine, as a result of their "real life experience," that other, non-invasive treatments are personally preferable to SRS. In consequence, she felt that it was unrealistic for inmates to expect "that prison life [would] provide *no* constraints or obstacles to cross gender preferences" and that it was "outside[ ] the bounds of good clinical practice" for care providers to try to meet this expectation. Given the isolation attendant to incarceration, Osborne also emphasized that prisoners might often lack awareness of the frequency with which individuals choose alternative treatments over SRS.

After considering Osborne's peer review, Martin again reached out to the doctors at UMass. On May 25, 2005, she expressed continuing concern with the Fenway Report, highlighting that Osborne's peer review had raised at least three questions regarding the report's thoroughness: (1) why the report omitted consideration of potential comorbidities; (2) why the report did not rely on formal psychological testing, but only an in-person interview; and (3) why Kosilek's claims that she would likely seek to end her life if not provided with SRS were seen to justify, rather than ***73** serve as a contraindication to, surgery. Martin also expressed dissatisfaction that "the February 24, 2005 evaluation by the Fenway Clinic does not indicate whether sex reassignment surgery is a medical necessity for Michele [sic] Kosilek" and "fails to adequately address the issue of whether the current treatment provided to Kosilek provides sufficient relief of the symptoms of gender dysphoria."

A response from Drs. Appelbaum and Brewer came on June 14, 2005. The doctors made clear that they were not experts in the treatment of GID, and that they deferred to the Fenway Center's treatment recommendation. Referring to the differences between the preferred treatment plans of the Fenway Center and Osborne, the doctors reminded Martin that Osborne's report had emphasized the "dearth of empirical research upon which to base treatment decisions" for GID and had highlighted the lack of "professional consensus" regarding the "medical necessity" of SRS.

The Fenway Center issued a follow-up report aimed at answering Osborne's critique of its initial recommendation. In this report, Drs. Kapila and Kaufmann noted that suicidal ideation was common among individuals suffering from GID, and that it often decreased with the provision of care. Therefore, the likelihood that Kosilek would become suicidal if denied surgery was, to the doctors, not a contraindication to her eligibility, but instead was a symptom that could be alleviated by provision of SRS. The doctors also disagreed with Osborne's belief that incarceration was a significant contraindication to surgery, noting that the Standards of Care specifically state that "[p]ersons who are receiving treatment for [GID] should continue to receive appropriate treatment ... after incarceration. For example, those who are receiving psychotherapy and/or cross-sex hormonal treatments should be allowed to continue this medically necessary treatment...."

The Fenway Center doctors further discussed their belief that a key step of the triadic sequence, the "real-life experience," could occur in prison. This treatment prerequisite requires that an individual live full-time in their preferred cross-gender role for at least one year prior to being deemed eligible for SRS. The purpose of this requirement is ensure that GID patients have an opportunity to experience a full measure of life in a cross-gender role, including the social scrutiny that may arise among professional counterparts and peers. Prison, the Fenway Center's doctors surmised, might be considered a "more stringent" real-life experience, because a prisoner's gender presentation would be subject to full-time monitoring by prison personnel and other inmates. The report concluded

by reiterating the Fenway Center's recommendation that Kosilek receive SRS. The doctors recognized that performing "such a procedure would ... bring up issues of housing and safety," but emphasized that "hormone therapy and [SRS] are the only clinical treatments found to be effective for GID."

E. The DOC's Security Report

On April 25, 2005, the district court issued an order requiring that the DOC conduct a review of any potential safety and security concerns arising from the provision of SRS. In the next month, the DOC worked to formalize its security concerns into a report, which it eventually submitted to the court on June 10, 2005. As made clear by the minutes of the DOC's staff meetings, however, these security issues were a topic of discussion prior to the court's order. Previously, on January 5, 2005, the meeting attendees had discussed how and if Kosilek's prior violent ***74** acts against her wife should impact their evaluation and treatment plan. On April 20, 2005, the parties discussed potential security concerns that would arise should Kosilek be housed, post-surgery, in MCI–Framingham, Massachusetts' only female prison. During that meeting, DOC personnel noted that they were prepared to provide an evaluation of general climate and security concerns implicated by the provision of surgery.

On May 19, 2005, DOC Commissioner Kathleen Dennehy ("Dennehy") convened a meeting with the Superintendent of MCI–Norfolk, Luis Spencer ("Spencer"), and the Superintendent of MCI–Framingham, Lynne Bissonnette ("Bissonnette"), as well as the DOC's legal counsel. The purpose of this meeting was to formally discuss the security concerns previously expressed by both superintendents in phone conversations with Dennehy. It was also an opportunity to begin preparation of the report requested by the district court.

The report focused mainly on issues of safety and security surrounding Kosilek's post-operative housing. Dennehy conveyed concern regarding housing Kosilek at MCI–Norfolk, noting that approximately twenty-five percent of male offenders in the Massachusetts prison system are classified as sex offenders and concluding that "Kosilek would clearly be a target for assault and victimization in a male prison." The report also expressed concerns with housing Kosilek at MCI–Framingham, including the absence of single-bed cells, such that all inmates had to share cells, and the possibility that Kosilek's presence might exacerbate mental distress among the significant portion of MCI–Framingham's population that had previously experienced domestic abuse and trauma at the hands of male partners.

Given the stated infeasibility of housing Kosilek in the general population of either MCI–Framingham or MCI–Norfolk, the report considered segregated housing in a protected ward. It expressed concern, however, about the possible deleterious impact on Kosilek's mental health caused by any housing solution that required long-term isolation. The report also noted that it was not within the DOC's ability to create a special ward for prisoners with GID, given that these prisoners present a significant range of criminal histories, security ratings, and treatment needs that are antithetical to co-housing.

On June 10, 2005, citing both its internal review of safety and security and Osborne's reported concerns regarding the appropriateness of SRS, the DOC informed the district court that it had chosen to continue Kosilek's current ameliorative treatment, but not to provide her with SRS.

F. *Kosilek II*

Trial commenced on May 30, 2006, with what would be the first of three rounds of testimony. For the sake of clarity and concision, we summarize this testimony topically, rather than temporally. We begin with evidence regarding the standard of care for treatment of GID.

1. Testimony related to medical necessity

a. Initial testimony

First to testify in 2006 was an expert witness for Kosilek, Dr. George Brown, who had previously evaluated Kosilek in 2001 and was an author of the Standards of Care. Prior to testifying, Dr. Brown issued a written report assessing Kosilek's readiness for surgery and evaluating her current mental and physical presentation, as compared with 2001. Dr. Brown noted that Kosilek consistently presented as female ***75** and that "[a]ccess to makeup and female undergarments, laser hair removal, along with hormonal treatments ... have all seemed to significantly reinforce and consolidate the outward expression of [Kosilek's] gender identity as female." Other positive effects of treatment were also described:

> Hormonal treatments have resulted in obvious breast growth since my last assessment, decrease in upper body strength, increase in hip size, changes in amount and texture of body hair, skin texture changes, testicular volume decrease, and a large reduction in spontaneous erections.... Psychologically, the effects of these combined treatments have [included] ... resolution of depression, resolution of suicidality and suicide gestures and attempts, improved mood with reduction in irritability, anxiety, and depression....

Based on his observations, Dr. Brown concluded that Kosilek was eligible for SRS, having met all of the readiness criteria.

Before the court, Dr. Brown's testimony emphasized that the provision of female clothing and effects, hair removal, and hormones had resulted in a lessening of "the severity of [Kosilek's] dysphoria." According to Dr. Brown "[s]he was clearly less depressed, less anxious, less irritable.... She was not suicidal...." Despite these significant improvements, Dr. Brown testified that he believed SRS to be an appropriate and "medical[ly] necessary component" of Kosilek's treatment. He related instances in which incarcerated persons who could not complete the triadic sequence [6] exhibited an increase in negative symptoms, including a resurgence of self-harming behavior.

Dr. Brown further testified that, if not granted surgery, he believed Kosilek's feelings of "hopelessness will intensify," and that she would likely attempt suicide. In reaching this conclusion, Dr. Brown emphasized that "other parts of the treatment plan [*e.g.,* hormones, hair removal, and the provision of female clothing] ... all contribute in their own way to a level of improvement." Nonetheless, he felt that, if Kosilek lost hope of receiving SRS, her current treatment plan would not stop a deterioration of her mental state and the possible reemergence of suicidal ideation.

Dr. Kaufman from the Fenway Center also testified, reiterating that the Fenway Center believed SRS to be an appropriate and medically necessary step in Kosilek's treatment. She further stated her belief that, if not given surgery, Kosilek would present a significant risk of suicide: "if she's not able to have surgery, I think that she'll be hopeless and feel helpless and at that point really will have nothing else to live for."

Next to testify was Mark Burrows ("Burrows"), who had been Kosilek's treating psychiatrist for approximately five years. Burrows testified to Kosilek's strong desire for SRS, and to her feelings of hope associated with completing the formalization of her gender presentation. Burrows also stated that denying surgery would likely have a negative impact on Kosilek's mental health. He believed that it was "slightly" "more probable than not" that a denial of the surgery would result in Kosilek attempting to commit suicide. Burrows also spoke about his belief that, if given SRS, Kosilek should not continue to reside at MCI–Norfolk, as "the risks involved in her possibly being assaulted are obvious."

***76** Dr. Appelbaum of UMass was also called as a witness for Kosilek. He testified as to UMass's trust in the Fenway Center's recommendations, and to his belief that the DOC need not have sought out a peer review of the Fenway Report, given the Fenway Center's expertise in the treatment of GID.

Kosilek testified next. She expressed the depth of her desire for SRS, and she stated that she would continue to experience mental anguish regarding her gender identity so long as she had male genitalia. If not provided with SRS, Kosilek said that she "would not want to continue existing [as an anatomical male]" and might instead attempt to commit suicide. She disagreed with the suggestion that treatment short of SRS could adequately relieve her mental distress, stating that "[t]he problem is my genitals. That's what needs to be fixed." Kosilek also testified as to feeling discomfort in the all-male environment of MCI–Norfolk and having a strong desire to be transferred to MCI–Framingham. She felt that the inmates at MCI–Framingham would be more accepting and welcoming of her than those at MCI–Norfolk.

The DOC offered testimony from Dr. Chester Schmidt, a licensed psychiatrist and Associate Director of the Johns Hopkins School of Medicine. Dr. Schmidt expressed his belief that Kosilek had undergone an "excellent adaptation" through treatment with hormones, hair removal, psychotherapy, and the provision of female garb. These treatments had alleviated the severity of her mental distress and allowed Kosilek to significantly consolidate her gender identity. Dr. Schmidt acknowledged that, if not provided SRS,

Kosilek's level of mental distress would likely increase, with depression or attempts at self-harm possible. On the whole, however, he believed that her positive adaptation and the consolidation of her gender identity indicated that the current course of treatment provided by the DOC was medically adequate. Dr. Schmidt explained that the severity of dysphoria associated with GID may "wax and wane," with patients feeling depressed or hopeless at times, but generally being able to alleviate these depressive symptoms with appropriate psychotherapy and medical interventions. He felt that these measures, in combination with Kosilek's current course of treatment, would allow her to live safely and maintain a level of contentment.

On cross-examination, Dr. Schmidt was questioned regarding his alleged rejection of the Standards of Care. Dr. Schmidt responded that he found the Standards of Care "very useful for patients" and that he commonly requested that patients familiarize themselves with these Standards when they began to seek care for SRS. Asked if he had stricter requirements for SRS eligibility than those in the Standards of Care, Dr. Schmidt emphasized that he neither "advocate[s] for nor ... speak[s] against the decisions for the cross-gender hormones or eventually for surgery." Rather, he believes such decisions are best made by the patient, based on their personal needs and desires. In line with this belief, Dr. Schmidt stated that he does not specifically recommend SRS, but at a patient's request he will release medical files and send a letter indicating that a patient is ready for surgery to their chosen SRS provider.

Dr. Schmidt further testified that he viewed the Standards of Care as "guidelines." He explained, however, that "[t]here are many people in the country who disagree with those standards who are involved in the [GID] field." Because of this disagreement, Dr. Schmidt expressed hesitation to refer to the Standards of Care, or the recommendation for SRS, as medically necessary. He emphasized the ***77** existence of alternative methods and treatment plans accepted within the medical community. He also questioned whether the Standards of Care's requirement of a real-life experience could occur in prison, opining that the real-life experience required a range of social and vocational experiences unavailable within a penological setting.

Osborne testified next, reiterating her agreement with Kosilek's GID diagnosis, but disagreeing that SRS was a medically necessary treatment. In reference to the Standards of Care, Osborne testified that she fully agreed that SRS was an effective and appropriate treatment for GID. She emphasized, however, that she did not view SRS as medically necessary in light of "the whole continuum from noninvasive to invasive" treatment options available to individuals with GID. Regarding Kosilek personally, Osborne indicated that she believed Kosilek's current treatment plan had been highly effective in allowing Kosilek to feel "hopeful, euphoric, and not depressed" about her gender identity. Osborne, like Dr. Schmidt before her, again expressed skepticism as to whether a real-life experience could occur in jail, given that a single-sex environment necessarily limited the sorts of social and human interactions available. Osborne agreed that not providing Kosilek with SRS might give rise to possible suicidal ideation, but noted that the DOC had significant expertise in treating prisoners exhibiting self-harming behavior. She felt that Kosilek's current treatment plan, in conjunction with protective measures aimed at ensuring her personal safety, was an appropriate and medically acceptable response to Kosilek's GID.

b. The UMass report

Following the close of initial testimony, the district court ordered UMass to review the testimony of all medical experts and to issue a report regarding whether the treatment proposed by Dr. Schmidt was an adequate method of treating Kosilek's GID. In this report—submitted to the court on September 18, 2006—Drs. Appelbaum and Brewer made clear that they "worked with and relied upon Dr. Kapila and Dr. Kaufman" who "assist[ed] to prepare this response." The report stated that the UMass doctors "have been informed by Dr. Kaufman and Dr. Kapila that ... trial testimony ... confirms their opinion that Michelle Kosilek has a 'serious medical need' because there is a 'substantial risk of serious harm if it is not adequately treated.' " In conclusion, the report reiterated that the Fenway Center believed Dr. Schmidt's proposed treatment plan would not provide adequate care, and UMass endorsed that conclusion.

c. The court-appointed expert

At the conclusion of the first round of testimony, the district court decided to appoint an independent expert to assist in determining what constituted the medical standard of treatment for GID. On October 31, 2006, with the parties' input, the district court selected Dr. Stephen Levine, a practitioner at the Center for Marital and Sexual Health in Ohio and a clinical professor of psychiatry at Case

Western Reserve University School of Medicine. Dr. Levine had helped to author the fifth version of the Standards of Care, and served as Chairman of the Harry Benjamin International Gender Dysphoria Association's Standards of Care Committee.

A month after his appointment, Dr. Levine issued a written report. The report began by explaining the dual roles that WPATH—formerly the Harry Benjamin Association and the organization that wrote the Standards of Care-plays in its provision of care to individuals with GID:

> ***78** WPATH is supportive to those who want sex reassignment surgery (SRS).... Skepticism and strong alternate views are not well tolerated. Such views have been known to be greeted with antipathy from the large numbers of nonprofessional adults who attend each [of] the organization's biennial meetings....
>
> The [Standards of Care are] the product of an enormous effort to be balanced, but it is not a politically neutral document. WPATH aspires to be both a scientific organization and an advocacy group for the transgendered. These aspirations sometimes conflict. The limitations of the [Standards of Care], however, are not primarily political. They are caused by the lack of rigorous research in the field.

Dr. Levine further emphasized that "large gaps" exist in the medical community's knowledge regarding the long-term effects of SRS and other GID treatments in relation to its positive or negative correlation to suicidal ideation.

Dr. Levine next discussed the possibility of Kosilek having a real-life experience in prison. He explained that the Fenway Center, in stating that a real-life experience could be had in prison, "failed to offer a mild caveat that the real life test was designed to test the patients' capacity to function as a female in the community by mastering the demands of ... family, social relationships, educational accomplishment, [and] vocational performance." Such experiences and relationships, Dr. Levine noted, are not a part of Kosilek's daily life in prison. Dr. Levine's final conclusion was that:

> Dr. Schmidt's view, however unpopular and uncompassionate in the eyes of some experts in GID, is within prudent professional community standards. Treatment stopping short of SRS would be considered adequate by many psychiatrists, gender team members, and gender patients themselves, if Kosilek were a citizen in the community.... [T]here are a number of acceptable community standards which derive from differing assumptions about disorders, their causes, and the possible effective interventions.

He recognized that the different treatment plans advocated by Dr. Schmidt and the Fenway Center "each ... [had] merit," as well as limitations. Dr. Levine further wrote that doctors generally "do *not* recommend treatment to GID patients.... The decision is [the patient's], when and if they still want it."

Dr. Levine testified on December 16, 2006. He first reiterated his belief that Dr. Schmidt's view, although not preferred by some GID specialists, was within "prudent professional standards." He noted that Kosilek had received significant relief on her current treatment plan, and that many patients with GID live comfortably without completing the triadic sequence. He believed that Kosilek had already successfully consolidated her gender identity, such that the removal of her male genitalia might relieve dysphoria, but it was not necessary to complete that consolidation. He also indicated variability and difficulty in forecasting depressive symptoms and self-harming behavior in GID patients. He explained that he believed Kosilek would certainly express deep disappointment if denied SRS—described as the sole current focus of her life—but that coping mechanisms might well change her outlook in months and years to come, allowing her to live happily without the provision of SRS.

The district court then asked Dr. Levine to narrow the lens of his inquiry by presuming that there were absolutely no external contraindications to surgery and ***79** that Kosilek had indeed had a real-life experience in prison. Given these presumptions, the court asked Dr. Levine to testify as to whether it would still be prudent to not provide Kosilek with SRS. Dr. Levine acknowledged his belief that prudent professionals would generally not deny surgery to a fully eligible individual. Still, he hesitated to declare Dr. Schmidt's approach medically unacceptable. He answered that the provision of SRS would surely be a prudent course of treatment, but then stated that "I also believe it's prudent not to give her Sex Reassignment Surgery for lots of reasons."

He again emphasized for the court that the treatment of GID was an evolving field, in which practitioners could reasonably differ in their preferred treatment methods. Dr. Levine explained that in many instances patients cannot or do not want to receive SRS, and prudent physicians commonly employ a range of treatments to ameliorate these patients' dysphoria.

d. Additional rounds of testimony

Several witnesses were recalled for additional testimony. Drs. Kapila and Kaufman appeared again on behalf of Kosilek. Both reiterated their belief that Kosilek had a serious medical need and that, given Kosilek's high risk of suicide if denied the surgery, SRS was the only adequate treatment plan. Dr. Appelbaum also testified again, as did the UMass Medical Director. Both UMass doctors reaffirmed their endorsement of the Fenway Center's treatment recommendations.

Kosilek also presented additional witness testimony from Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, who had previously evaluated Kosilek during *Kosilek I*. Dr. Forstein issued a written report, in which he noted that "the question of the most prudent form of treatment is complicated by the diagnosis of GID being on the margins of typical medical practice." Despite this recognition, he testified that he believed SRS was necessary for Kosilek. He felt that, if she was not given SRS, there was a significant risk that Kosilek would attempt suicide or self-mutilation. Although Dr. Forstein believed that psychotherapy might "help with frustration, with harassment, and with depression," he was uncertain whether Kosilek could ever fully "reconcile with being incompletely transitioned."

2. Testimony regarding safety and security concerns

a. Initial testimony

In line with the June 10, 2005, security report prepared by Commissioner Dennehy, multiple DOC officials testified regarding the safety and security concerns that were likely to arise if Kosilek was provided SRS.

First to testify was Spencer, who at that time served as Superintendent of MCI–Norfolk. Spencer began by explaining the general layout and security measures at MCI–Norfolk. He also explained that the prison had, so far, successfully been able to accommodate Kosilek's receipt of care without incident. Spencer was unaware of any issues or incidents of harassment related to Kosilek's breast growth and increasingly feminine appearance. He stated, however, that he would have significant concerns housing an anatomically female prisoner in MCI–Norfolk, an all-male prison. Despite the lack of historical incidents specific to Kosilek, he emphasized that "inmates do get assaulted, inmates have been raped ... [a]nd putting a female in a correctional environment like MCI–Norfolk would be of high concern to me." If Kosilek remained at MCI–Norfolk, Spencer testified that he believed she would only be safe if housed in the Special Management ***80** Unit, a highly restricted secure building separated from the general population.

Bissonnette, Superintendent of MCI–Framingham, also testified about the security concerns she believed would arise if Kosilek was transferred to the all-female prison after receiving SRS. She explained that MCI–Framingham does not have private cells, save for the segregation and medical units. All women in the general population are required to cohabitate, and that prison would be unable to provide a single-occupancy cell for Kosilek. She also explained that Kosilek's presence could create significant disruption in MCI–Framingham's population, given that Kosilek had been convicted for violently murdering her wife, and that a significant portion of women at MCI–Framingham were victims of domestic abuse.

Bissonnette acknowledged that there were procedures in place designed to help women cope with exposure to upsetting or traumatic experiences with other prisoners, but maintained that these security concerns would require that Kosilek, if transferred to MCI–Framingham, be housed in the segregated Close Custody unit. Bissonnette explained that she had significant hesitation about incarcerating anyone long-term in the Close Custody unit, given the potential negative effects of such long-term segregation.

Commissioner Dennehy also testified. She described the security concerns arising from cross-gender housing as "obvious" to any experienced corrections officer. In line with her belief that the safety and security concerns about post-operative housing were clear, Dennehy stated that she would not feel comfortable allowing SRS—even if mandated by the court—if she could not identify an adequate method of safely housing Kosilek after her operation. Dennehy reiterated Spencer's and Bissonnette's concerns, stating that she deeply trusted both Superintendents' professional

judgments regarding the security of housing Kosilek at their respective facilities. Dennehy also explained why reliance on an interstate compact to transfer Kosilek would be problematic. She emphasized that other states take prisoners on a fully voluntary basis, and that no state may be willing or able to accommodate a transfer request for Kosilek.

Commissioner Dennehy was also questioned about negative press surrounding the DOC's possible provision of SRS to Kosilek. Specifically, she was asked about her professional relationship with a state senator who had vocally opposed surgery and sponsored legislation to deny its provision. She was also asked about any contact with the then-lieutenant governor, who was another strong opponent of providing SRS to prisoners. Dennehy stated that she was aware of negative press reports and political opposition surrounding Kosilek's request, but that her decision not to provide SRS was based only on security concerns and had not been influenced by this public pressure.

The district court recalled Dennehy on October 18, 2006, to ask additional questions regarding a growing amount of press coverage surrounding the case. Dennehy acknowledged that she was aware of significant news coverage of Kosilek's case, but denied personally following the story in the media. She explained that there were staff members within the DOC trained to deal with press inquiries and that she generally received only summaries of news coverage from her staff. Again, Dennehy strongly denied forming any opinion about correctional safety procedures based on media reports or public opinion.

***81 b. Commissioner Clarke**

Dennehy ended her tenure as DOC Commissioner on April 30, 2007, and in November 2007 the position was filled by Harold Clarke. After Clarke took over, the district court requested that he familiarize himself with a selected number of trial transcripts. Clarke was ordered to file a report, on the basis of those transcripts, indicating whether he believed that the DOC had legitimate reasons to refuse Kosilek's request for SRS.

Clarke's report, filed approximately a month after the district court's order, stated that his conclusions were based on more than three decades of correctional experience and were not influenced by political or media pressure. He expressed concern regarding threats of suicide being used as a means for prisoners to receive wanted benefits or concessions from staff. Finding it to be bad practice for prison administrators to give in to demands accompanied by the threat of suicide, Clarke stated that he believed the Massachusetts prison system had taken significant measures to ensure it was prepared to deal with suicidal ideation among its prison population. In addition to considering the issue of suicide, Clarke's report reemphasized the significant post-operative security concerns expressed by his predecessor. He stated that housing Kosilek at MCI–Norfolk created clear security concerns related to mixed-gender prison populations, while housing Kosilek at MCI–Framingham would pose a significant risk of destabilizing that environment, given the number of women prisoners who were victims of domestic violence. Clarke also stated his belief that a separate unit to house GID prisoners was not feasible, given that prisoners with GID might have a wide range of security classifications and security needs, making cohabitation unsafe. In reference to the possibility of an interstate transfer, Clarke reiterated the concern that any interstate transfer would be completely voluntary and that a receiving state might later decide to return Kosilek, at which time the housing concerns would reemerge.

Testifying before the court, Clarke acknowledged that he had received several letters from outraged state politicians claiming that provision of the surgery would be an “affront to the taxpayers” and citing state budget concerns as a reason to deny Kosilek surgery. The letters argued that a strained state budget should not be used to accommodate what the legislators believed to be an “elective” procedure and that the DOC would be “unwise” to provide it. Clarke, however, explained that he had not answered these letters, as he believed providing an answer would be inappropriate given his role as DOC Commissioner. He also denied being in any way influenced by cost concerns in reaching his conclusion regarding safety and security concerns. Clarke similarly testified that he was aware of media coverage regarding Kosilek's request, but he had not personally viewed the news or heard the radio stories.

G. *Kosilek II*

The district court issued an extensive opinion on September 4, 2012. This opinion concluded that Kosilek had a serious medical need and that-based on the court's belief that Dr. Schmidt was not a prudent professional-the only adequate way to treat this need was through SRS. Moreover, the court determined that the DOC's stated security concerns were merely pretextual and concluded that the DOC had in fact made its decision based on public and political pressure.

This, the court concluded, amounted to deliberate indifference under the Eighth Amendment. Stating its belief that the DOC would continue to ***82** deny Kosilek adequate treatment in the future, the district court granted an injunction requiring that the DOC provide Kosilek with SRS.

II. *Discussion*

A. The Eighth Amendment and Medical Care in Prison

[1] **[2]** **[3]** "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. From this brief amendment, courts have derived the principles that govern the permissible conditions under which prisoners are held and that establish the medical treatment those prisoners must be afforded. *See* *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Where "society takes from prisoners the means to provide for their own needs," the failure to provide such care "may actually produce physical torture or a lingering death." *Brown v. Plata,* —— U.S. ——, 131 S.Ct. 1910, 1928, 179 L.Ed.2d 969 (2011) (internal quotation marks omitted). Undue suffering, unrelated to any legitimate penological purpose, is considered a form of punishment proscribed by the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The Eighth Amendment is meant to prohibit "unnecessary and wanton infliction of pain," which is "repugnant to the conscience of mankind." *Id.* at 105–06, 97 S.Ct. 285 (internal quotation marks omitted).

[4] **[5]** The Amendment's focus on punishment means that not all shortages or failures in care exhibit the intent and harmfulness required to fall within its ambit. *See* *Farmer,* 511 U.S. at 837, 114 S.Ct. 1970 (reasoning that the Eighth Amendment's prohibition of punishment implies an act done with intentionality). Therefore, to prove an Eighth Amendment violation, a prisoner must satisfy both of two prongs: (1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need. *See* *Estelle,* 429 U.S. at 106, 97 S.Ct. 285 (holding that inadequate treatment must be "sufficiently harmful to evidence deliberate indifference to serious medical needs"); *Sires v. Berman,* 834 F.2d 9, 12 (1st Cir.1987) ("A plaintiff must satisfy two elements to present a viable [Eighth Amendment] claim: he must show a serious medical need, and he must prove the defendant's purposeful indifference thereto.").

[6] **[7]** First, a medical need must be "serious." *Id.* This objective prong requires that the need be "one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Gaudreault v. Municipality of Salem, Mass.,* 923 F.2d 203, 208 (1st Cir.1990). This prong does not impose upon prison administrators a duty to provide care that is ideal, or of the prisoner's choosing. *See United States v. Derbes,* 369 F.3d 579, 583 (1st Cir.2004) (stating that prison administrators are "by no means required to tailor a perfect plan for every inmate; while [they are] constitutionally obligated to provide medical services to inmates, these services need only be on a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards" (internal quotation marks and citations omitted)); *United States v. DeCologero,* 821 F.2d 39, 43 (1st Cir.1987) (same); *Ferranti v. Moran,* 618 F.2d 888, 891 (1st Cir.1980) ("[A]llegations [that] simply reflect a disagreement on the appropriate course of treatment ... fall[ ] short of alleging a constitutional violation." ***83**). Rather, the Constitution proscribes care that is " 'so inadequate as to shock the conscience.' " *Torraco v. Maloney,* 923 F.2d 231, 235 (1st Cir.1991) (quoting *Sires,* 834 F.2d at 13). [7]

[8] **[9]** **[10]** **[11]** Second, even if medical care is so inadequate as to satisfy the objective prong, the Eighth Amendment is not violated unless prison administrators also exhibit deliberate indifference to the prisoner's needs. *Estelle,* 429 U.S. at 105–06, 97 S.Ct. 285. For purposes of this subjective prong, deliberate indifference "defines a narrow band of conduct," *Feeney v. Corr. Med. Servs. Inc.,* 464 F.3d 158, 162 (1st Cir.2006), and requires evidence that the failure in treatment was purposeful. *See* *Estelle,* 429 U.S. at 105, 97 S.Ct. 285 (holding that "an inadvertent failure to provide adequate medical care" is not a constitutional violation); [8] *id.* at 106, 97 S.Ct. 285 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Watson v. Caton,* 984 F.2d 537, 540 (1st Cir.1993) ("The courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice

rises to the level of cruel and unusual punishment."). "The obvious case would be a denial of needed medical treatment in order to punish the inmate." *Watson,* 984 F.2d at 540. While deliberate indifference may also be exhibited by a "wanton disregard" to a prisoner's needs, *Battista v. Clarke,* 645 F.3d 449, 453 (1st Cir.2011), such disregard must be akin to criminal recklessness, requiring consciousness of " 'impending harm, easily preventable.' " *Watson,* 984 F.2d at 540.

[12] **[13]** **[14]** **[15]** When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight. *Battista,* 645 F.3d at 454 ("[S]ecurity considerations also matter at prisons ... and administrators have to balance conflicting demands."). "[W]ide-ranging deference" is accorded to prison administrators "in the adoption and execution of policies and practices that in their judgement are needed to ... maintain institutional security." *Whitley v. Albers,* 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)) (internal quotation marks omitted). In consequence, even a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security. *Cameron v. Tomes,* 990 F.2d 14, 20 (1st Cir.1993) (requiring courts to "embrace security and administration, ... not merely medical judgments" in assessing claims of deliberate indifference); *Sires,* 834 F.2d at 13 ("[S]afety factors are properly ***84** included in the evaluation of the medical needs of an inmate."). Importantly, prison administrators need only have " 'responded reasonably to the risk.' " *Giroux v. Somerset Cnty.,* 178 F.3d 28, 33 (1st Cir.1999) (quoting *Farmer,* 511 U.S. at 844, 114 S.Ct. 1970).

B. Standard of Review

[16] **[17]** The test for establishing an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal. Review of such "mixed questions" is of a variable exactitude; the more law-based a question, the less deferentially we assess the district court's conclusion. *In Re Extradition of Howard,* 996 F.2d 1320, 1328 (1st Cir.1993) ("The standard of review applicable to mixed questions usually depends upon where they fall along the degree-of-deference continuum....").

[18] **[19]** The ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed *de novo. See, e.g., Thomas v. Bryant,* 614 F.3d 1288, 1307 (11th Cir.2010) ("Whether the record demonstrates that [the prisoner] was sprayed with chemical agents ... and that he suffered psychological injuries from such sprayings are questions of fact. Whether these deprivations are objectively 'sufficiently serious' to satisfy the objective prong, is a question of law...." (internal citations omitted)); *Hallett v. Morgan,* 296 F.3d 732, 744 (9th Cir.2002) ("The district court's factual findings regarding conditions at the Prison are reviewed for clear error. However, its conclusion that the facts do not demonstrate an Eighth Amendment violation is a question of law that we review de novo." (citing *Campbell v. Wood,* 18 F.3d 662, 681 (9th Cir.1994) (en banc))); *Hickey v. Reeder,* 12 F.3d 754, 756 (8th Cir.1993) ("Whether conduct, if done with the required culpability, is sufficiently harmful to establish an Eighth Amendment violation is an objective or legal determination which we decide *de novo.*"); *Alberti v. Klevenhagen,* 790 F.2d 1220, 1225 (5th Cir.1986) ("[O]nce the facts are established, the issue of whether these facts constitute a violation of constitutional rights is a question of law that may be assayed anew upon appeal."). Subsidiary legal questions, such as whether an actor's conduct amounted to deliberate indifference for purposes of the Eighth Amendment, are likewise reviewed *de novo. Cf. Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (holding that, for Fourth Amendment purposes, reasonable suspicion and probable cause determinations should receive *de novo* appellate review); *United States v. Camacho,* 661 F.3d 718, 724 (1st Cir.2011) (we review *de novo* a district court's subsidiary reasonable suspicion and probable cause determinations in evaluating a motion to suppress); *United States v. Bucci,* 582 F.3d 108, 115–17 (1st Cir.2009).

[20] **[21]** Our court awards deference to the district court's resolution of questions of pure fact and issues of credibility. *See, e.g., DesRosiers v. Moran,* 949 F.2d 15, 19 (1st Cir.1991) (reviewing factual findings regarding the adequacy of care deferentially); *Torraco,* 923 F.2d at 234 (finding

that issues of culpability in a deliberate indifference inquiry are usually questions for a jury). We will reverse the district court's findings on such factual questions only for clear error. *DesRosiers,* 949 F.2d at 19 ("[W]e assay findings of fact in a bench trial only for clear error."). We find clear error when we are left with " 'a strong, unyielding belief, based on the whole of the record,' that the judge made a mistake." *In re O'Donnell,* 728 F.3d 41, 45 (1st Cir.2013) (quoting *Islamic Inv. Co. of the Gulf (Bah.) Ltd. v. Harper (In re* ***85** *Grand Jury Investigation),* 545 F.3d 21, 24 (1st Cir.2008)). We may also find clear error when the district court commits an error of law that affects its fact-finding analysis. *See Uno v. City of Holyoke,* 72 F.3d 973, 978 (1st Cir.1995) ("[T]he jurisprudence of clear error 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " (quoting *Thornburg v. Gingles,* 478 U.S. 30, 106, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986))).

[22] This standard of review tracks the Supreme Court's framework for appellate review of claims of excessive punishment or fines under the Eighth Amendment. *United States v. Bajakajian,* 524 U.S. 321, 336–37 & n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). In *Bajakajian,* the Supreme Court concluded that the excessiveness of a fine was a question properly considered *de novo* by appellate courts, applying "the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents." *Id.* at 336, 118 S.Ct. 2028. "[T]he application of a constitutional standard to the facts of a particular case," the Supreme Court reasoned, may appropriately require *de novo* appellate review to ensure consistency in the law's development. *Id.* at 336 n. 10, 118 S.Ct. 2028; *see also Cooper Indus. v. Leatherman Tool Grp., Inc.,* 532 U.S. 424, 435–36, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (extending *de novo* review of the excessiveness inquiry associated with the Excessive Fines Clause of the Eighth Amendment to punitive damages awards); *Ornelas,* 517 U.S. at 699, 116 S.Ct. 1657 (holding that "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal").

[23] **[24]** The considerations set forth in *Ornelas,* and applied in *Bajakajian* and *Leatherman Tool,* are equally relevant here. "Medical 'need' in real life is an elastic term," *Battista,* 645 F.3d at 454, "that take[s its] substantive content from the particular context[ ] in which the standards are being assessed." *Ornelas,* 517 U.S. at 696, 116 S.Ct. 1657. Similarly, the "legal rules" for what constitutes care in violation of the Eighth Amendment "acquire content only through application"-a fact which favors *de novo* appellate review "to maintain control of, and to clarify, the legal principles." *See id.* at 697, 116 S.Ct. 1657.

C. The Objective Prong: Serious Medical Need

[25] To sustain a claim under the objective prong of the Eighth Amendment, Kosilek must show that she has a serious medical need for which she has received inadequate treatment. *See Estelle,* 429 U.S. at 106, 97 S.Ct. 285; *Sires,* 834 F.2d at 13 (finding no Eighth Amendment violation where the prisoner failed to "present[ ] any evidence of a serious medical need that has gone unmet"); *see also Derbes,* 369 F.3d at 583 (a prison's constitutional obligation to provide medical services does not require "a perfect plan for every inmate"); *DeCologero,* 821 F.2d at 42 ("[T]hough it is plain that an inmate deserves *adequate* medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy."). A significant risk of future harm that prison administrators fail to mitigate may suffice under the objective prong. *Helling v. McKinney,* 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *see also Baze v. Rees,* 553 U.S. 35, 50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) ("[S]ubjecting individuals to a risk of future harm ... can qualify as cruel and unusual punishment." ***86**); *Roe v. Elyea,* 631 F.3d 843, 858 (7th Cir.2011) ("[T]he Eighth Amendment 'protects [an inmate] not only from deliberate indifference to his or her *current* serious health problems, but also from deliberate indifference to conditions posing an unreasonable risk of serious damage to *future* health.' " (quoting *Board v. Farnham,* 394 F.3d 469, 479 (7th Cir.2005))).

[26] That GID is a serious medical need, and one which mandates treatment, is not in dispute in this case. The parties do not spar over the fact that Kosilek requires medical care aimed at alleviating the harms associated with GID—to the contrary, the DOC has provided such care since 2003. Rather, the parties disagree over whether SRS is a medically necessary component of Kosilek's care,

such that any course of treatment not including surgery is constitutionally inadequate. The parties' disparate positions on this issue are fit for succinct summary.

Kosilek argues that the *only* constitutionally sufficient treatment regimen is to adhere to the Standards of Care's triadic sequence in full, including the provision of SRS. Kosilek emphasizes that doctors at both UMass and Fenway Clinic—doctors hired by the DOC—confirmed at trial that SRS was "medically necessary." The failure to provide treatment, these doctors testified, would almost certainly lead to a deterioration in Kosilek's mental state and a high likelihood of self-harming behaviors. In light of this risk, and given that they believed Kosilek had successfully met all eligibility criteria for SRS, these doctors believed that any course of treatment excluding SRS is insufficient to treat Kosilek's GID.

In contrast, the DOC argues that full progression through the Standards of Care's triadic sequence is not the only adequate treatment option, as Kosilek's GID may be appropriately managed with treatment short of SRS. The DOC maintains that the evidence does not meet the standards for negligent treatment of a medical condition, much less the higher Eighth Amendment standard. *See* *Estelle,* 429 U.S. at 106, 97 S.Ct. 285 ("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."); *Watson,* 984 F.2d at 540 (stating that "simple medical malpractice" does not "rise[ ] to the level of cruel and unusual punishment").

Relying on the advice of accredited medical professionals, the DOC argues that its alternative course of treatment—which provides Kosilek such alleviative measures as psychotherapy, hormones, electrolysis, and the provision of female garb and accessories—is sufficient to treat Kosilek's GID and far exceeds a level of care that would be "so inadequate as to shock the conscience." *See* *Torraco,* 923 F.2d at 235 (quoting *Sires,* 834 F.2d at 13). Moreover, this course of treatment has, in practice, greatly diminished Kosilek's mental distress and allowed her a fair measure of contentment. Should suicidal ideation arise in the future, the DOC contends that—based on the advice of its medical experts and its own penological experience—it would be able to address that future risk appropriately through psychotherapy and antidepressants.

We begin by discussing the district court's conclusions regarding the objective prong. We then examine *de novo* the question whether the treatment offered was constitutionally adequate.

1. The district court's medical prudence determination

The district court ruled that SRS was a medically necessary treatment, and that ***87** Dr. Schmidt's alternative belief was outside the bounds of medical prudence.[9] However, the court's finding that Dr. Schmidt's views were medically imprudent was based on several erroneous determinations.

First, the court ruled that, unlike prudent medical professionals, Dr. Schmidt did not "follow" the Standards of Care in his treatment of GID. This finding ignored critical nuance in Dr. Schmidt's testimony and based its conclusion on a severely strained reading of Dr. Levine's expert testimony.

As an initial matter, the Standards of Care themselves admit of significant flexibility in their interpretation and application. They state, for example, that "[t]he Standards of Care [a]re Clinical *Guidelines* " and are "intended to provide *flexible directions* " to medical professionals in crafting treatment plans. Standards of Care at 1 (emphases added). The Standards of Care also specifically warn that "[a]ll readers should be aware of the limitations of knowledge in this area." Standards of Care at 1. "Individual professionals and organized programs," the Standards of Care continue on, "may modify [the standards]" as appropriate. *Id.* at 2. Dr. Levine's testimony acknowledged this flexibility:

> [DR. LEVINE]: [T]he "Standards of Care" was a consensus document from people from seven different countries or something, you know, who come from different systems, and it was a political process that forged together a set of standards.... So "prudent" is a wonderful word, but it's not like it has one simple definition.
>
> ...
>
> THE COURT: But is this an area in which you think prudent professionals can reasonably differ as to what is at least minimally adequate treatment for this condition?
>
> [DR. LEVINE]: Yes, and do.

Moreover, the district court put great weight on the fact that the Standards of Care require that patients receive two letters of recommendation prior to SRS. The court concluded,

therefore, that "prudent professionals who treat individuals suffering from severe gender identity disorders write such letters of recommendation," and it faulted Dr. Schmidt as imprudent for his failure to engage in this practice. In so doing, the court relied on Dr. Levine's testimony, which it believed stated that a prudent professional would not "[refuse] to write letters of recommendation."

Dr. Schmidt's testimony, however, makes clear that although he does not advocate or recommend surgery to his patients, if a patient chooses to seek SRS, he releases all of their medical files to a surgeon and writes that surgeon a letter confirming that the patient is eligible for surgery. Insofar as Dr. Schmidt had not advocated for the surgery, this neutrality aligns with what Dr. Levine describes as the accepted practice for doctors in the treatment of GID: "[i]f the patient meets eligibility requirements ... we then write a letter of support ... I understand how others may perceive this as a recommendation ... [but] we tell ourselves we are opening a gate to their decision." Therefore, ***88** whatever the semantic force of the district court's distinction, we see no material difference between the letters written by Dr. Schmidt confirming a patient's readiness for surgery and what the Standards of Care refers to as a letter of recommendation.

The district court next concluded that Dr. Schmidt was imprudent because antidepressants and psychotherapy alone are inadequate to treat GID. Again, the court claimed that it relied on the testimony of Dr. Levine, but misconstrued his testimony in support of its conclusion. Dr. Levine did in fact state that "gender dysphoria is not significantly ameliorated ... by treating [patients] with a prozac-like drug alone." He continued on, however, to explain that he did not believe this was the treatment plan advocated by Dr. Schmidt or the DOC. To the contrary, he understood that Kosilek would continue to receive ameliorative treatment for her GID and, if she entered a depressive or suicidal state based on her inability to receive SRS, antidepressants and psychotherapy would be used to help stabilize her mental state so as to alleviate the risk of suicide while working with her to craft new perspectives and life goals beyond surgery. He felt that the treatment might well be successful in this capacity, when combined with the direct alleviative treatments currently provided.

Finally, the district court found Dr. Schmidt imprudent because he did not believe that a real-life experience could occur in prison, given that it was an isolated, single-sex environment. The district court disagreed, stating that it had concluded a real-life experience could occur in prison, as Kosilek would remain incarcerated for her entire life. In reaching this determination, the court made a significantly flawed inferential leap: it relied on its own—non-medical—judgment about what constitutes a real-life experience to conclude that Dr. Schmidt's differing viewpoint was illegitimate or imprudent. Prudent medical professionals, however, do reasonably differ in their opinions regarding the requirements of a real-life experience-and this reasonable difference in medical opinions is sufficient to defeat Kosilek's argument. *Cf.* *Bismark v. Fisher,* 213 Fed.Appx. 892, 897 (11th Cir.2007) ("Nothing in our case law would derive a constitutional deprivation from a prison physician's failure to subordinate his own professional judgment to that of another doctor...."); *Estate of Cole by Pardue v. Fromm,* 94 F.3d 254, 261 (7th Cir.1996); *Bowring v. Godwin,* 551 F.2d 44, 48 (4th Cir.1977).

In fact, Dr. Levine noted that an incarcerative environment might well be insufficient to expose Kosilek to the variety of societal, familial, and vocational pressures foreseen by a real-life experience. This viewpoint aligned with that of Dr. Schmidt and Osborne. And, although Dr. Forstein's written report appears to presume Kosilek had completed a real-life experience, it echoed this same point: "being in prison has helped [Kosilek] consolidate her desire ... simplifying the issues, without the stressors and choices that she would have had to make out in the outside real world." We find no support for the district court's conclusion that no reasonable medical expert could opine that Kosilek lacked real-life experience, particularly in light of the contrary testimony from medical experts concerning the range of social, environmental, and professional considerations that are necessary to constitute a real-life experience under the Standards of Care. The district court thus erred by substituting its own beliefs for those of ***89** multiple medical experts. [10]

The district court's finding of medical imprudence relied heavily on inferences we do not believe can rightly be drawn from Dr. Levine's testimony; this finding also ignored significant contrary evidence regarding the breadth and variety of acceptable treatments for GID within the medical community. [11] Its conclusion that the Fenway Center's recommendation constituted the sole acceptable treatment plan is, thus, contradicted by the record.

2. Adequacy of the DOC's treatment plan

Regarding the medical adequacy of Kosilek's treatment, the district court held that psychotherapy and antidepressants alone would not adequately treat Kosilek's GID. This finding mischaracterizes the issues on appeal and unduly minimizes the nature of the DOC's preferred treatment plan. The DOC does not claim that treating Kosilek's GID merely with therapy and antidepressants alone would constitute adequate care. *Cf.* *Fields v. Smith,* 653 F.3d 550, 556 (7th Cir.2011) (accepting, in the absence of contrary evidence, expert testimony that "psychotherapy as well as antipsychotics and antidepressants ... do nothing to treat the underlying disorder [of GID]"). In fact, since *Kosilek I* the DOC has acknowledged the need to directly treat Kosilek's GID. Beginning in 2003, it has provided hormones, electrolysis, feminine clothing and accessories, and mental health services aimed at alleviating her distress. The parties agree that this care has led to a real and marked improvement in Kosilek's mental state. There is also no dispute that this care would continue, whether or not SRS is provided.

The question before our court, therefore, is not whether antidepressants and psychotherapy alone are sufficient to treat GID, or whether GID constitutes a serious medical need. Rather, the question is whether the decision not to provide SRS-in light of the continued provision of all ameliorative measures currently afforded Kosilek and in addition to antidepressants and psychotherapy—is sufficiently harmful to Kosilek so as to violate the Eighth Amendment. It is not. *See* *Smith v. Carpenter,* 316 F.3d 178, 186 (2d Cir.2003) ("[I]t's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes."); *see also* *Estelle,* 429 U.S. at 106, 97 S.Ct. 285 (requiring proof of "acts or omissions sufficiently harmful" as to illustrate deliberate indifference ***90** to a serious medical need); *Estate of Bearden ex rel. Bearden v. Anglin,* 543 Fed.Appx. 918, 921 (11th Cir.2013); *Leavitt,* 645 F.3d at 497.

Kosilek admits that the DOC's current treatment regimen has led to a significant stabilization in her mental state. Kosilek's doctors testified to the same, highlighting her "joy around being feminized." This claim is also borne out by the passage of significant time since she exhibited symptoms of suicidal ideation or attempted to self-castrate. In addition to alleviating her depressive state, this treatment has also resulted in significant physical changes and an increasingly feminine appearance.

The significance of a future risk of suicidality is not one that this court takes lightly, and Kosilek is right to note that a clear risk of future harm may suffice to sustain an Eighth Amendment claim. *See* *Helling,* 509 U.S. at 35, 113 S.Ct. 2475 (determining that an "unreasonable risk" of future harm may amount to an Eighth Amendment violation); *Baze,* 553 U.S. at 49, 128 S.Ct. 1520; *Roe,* 631 F.3d at 858. Nonetheless, the risk of suicidal ideation is born from Kosilek's GID-related mental distress. Therefore an assessment of the gravity of that risk, and its appropriate treatment, must encompass the entirety of the DOC's treatment plan, not merely the potential addition of psychotherapy and antidepressants.

Kosilek is provided hormones, facial hair removal, feminine clothing and accessories, and access to regular mental health treatment. The DOC also stands ready to protect Kosilek from the potential for self-harm by employing its standard and accepted methods of treating any prisoner exhibiting suicidal ideation. Trial testimony established that this plan offers real and direct treatment for Kosilek's GID. It employs methods proven to alleviate Kosilek's mental distress while crafting a plan to minimize the risk of future harm. *See* *Carpenter,* 316 F.3d at 186. It does not wantonly disregard Kosilek's needs, but accounts for them. *See* *Torraco,* 923 F.2d at 235.

[27] The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to "second guess medical judgments" or to require that the DOC adopt the more compassionate of two adequate options. *Layne v. Vinzant,* 657 F.2d 468, 474 (1st Cir.1981) (quoting *Westlake v. Lucas,* 537 F.2d 857, 860 n. 5 (6th Cir.1976)); *Bismark,* 213 Fed.Appx. at 897; *Medrano v. Smith,* 161 Fed.Appx. 596, 599 (7th Cir.2006); *Sanchez v. Vild,* 891 F.2d 240, 242 (9th Cir.1989); *Bowring,* 551 F.2d at 48.

That the DOC has chosen one of two alternatives-both of which are reasonably commensurate with the medical standards of prudent professionals, and both of which provide

Kosilek with a significant measure of relief—is a decision that does not violate the Eighth Amendment. [12]

Kosilek warns, however, that upholding the adequacy of the DOC's course of treatment in this case—despite her medical history ***91** and record of good behavior—will create a de facto ban against SRS as a medical treatment for any incarcerated individual. We do not agree. For one, the DOC has specifically disclaimed any attempt to create a blanket policy regarding SRS. We are confident that the DOC will abide by this assurance, as any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs. *See, e.g.,* *Roe,* 631 F.3d at 862–63 (holding that the failure to conduct an individualized assessment of a prisoner's needs may violate the Eighth Amendment).

For another, this case presents unique circumstances; we are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking SRS in the future. Certain facts in this particular record —including the medical providers' non-uniform opinions regarding the necessity of SRS, Kosilek's criminal history, and the feasibility of postoperative housing—were important factors impacting the decision.

D. The Subjective Prong: Deliberate Indifference

1. The DOC's reliance on medical experts

[28] **[29]** **[30]** The subjective element of an Eighth Amendment claim for injunctive relief requires not only that Kosilek show that the treatment she received was constitutionally inadequate, but also that the DOC was—and continues to be—deliberately indifferent to her serious risk of harm. *See* *Farmer,* 511 U.S. at 844–45, 114 S.Ct. 1970. [13] On the record presented, this is a burden Kosilek cannot meet. Even if the district court had been correct in its erroneous determination that SRS was the only medically adequate treatment for Kosilek's GID, the next relevant inquiry would be whether the DOC also knew or should have known this fact, but nonetheless failed to respond in an appropriate manner. *See* *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). In answering this question, it is not the district court's own belief about medical necessity that controls, but what was known and understood by prison officials in crafting their policy. *Id.* at 300, 111 S.Ct. 2321 (requiring a showing of purposefulness or intent on the part of prison administrators).

[31] **[32]** In this case, the DOC solicited the opinion of multiple medical professionals and was ultimately presented with two alternative treatment plans, which were each developed by different medical experts to mitigate the severity of Kosilek's mental distress. The choice of a medical ***92** option that, although disfavored by some in the field, is presented by competent professionals does not exhibit a level of inattention or callousness to a prisoner's needs rising to a constitutional violation. [14] *Cf.* *Torraco,* 923 F.2d at 234 ("[T]his court has hesitated to find deliberate indifference to a serious need '[w]here the dispute concerns not the absence of help, but the choice of a certain course of treatment,' [but] deliberate indifference may be found where the attention received is 'so clearly inadequate as to amount to a refusal to provide essential care.' " (internal citations omitted)). Moreover, a later court decision—ruling that the prison administrators were wrong in their estimation of the treatment's reasonableness—does not somehow convert that choice into one exhibiting the sort of obstinacy and disregard required to find deliberate indifference. *Cf.* *Nadeau v. Helgemoe,* 561 F.2d 411, 417 (1st Cir.1977) (refusing to "substitute the values and judgment of a court for the values and judgment of the ... prison administration").

2. The DOC's security concerns

[33] **[34]** **[35]** The subjective prong also recognizes that, in issues of security, "[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." *Bell,* 441 U.S. at 547, 99 S.Ct. 1861. Although we cannot "abdicate our responsibility to ensure that the limits imposed by the Constitution are not ignored," *Blackburn v. Snow,* 771 F.2d 556, 562 (1st Cir.1985), we do not sit to substitute our own judgment for that of prison administrators, *see* *Nadeau,* 561 F.2d at 417. As long as prison administrators make judgments balancing security and health concerns that are "within the realm of reason and made in good faith," their decisions do not amount to a violation of the Eighth Amendment. *Battista,* 645 F.3d at 454.

The DOC officials explained that they believed SRS would create new security issues, the most significant being the

provision of safe housing options for Kosilek after her surgery. They further explained the importance of keeping other inmates from believing that they could use threats of suicide to extract concessions from the prison administration. Nonetheless, rather than deferring to the expertise of prison administrators, the district court ignored the DOC's stated security concerns, reasoning ***93** both that Kosilek could be housed safely and that the DOC had not acted out of a legitimate concern for Kosilek's safety and the security of the DOC's facilities. As explained below, this was in error.

a. The DOC's concerns about safety and security were reasonable

Recognizing that reasonable concerns would arise regarding a post-operative, male-to-female transsexual being housed with male prisoners takes no great stretch of the imagination. *See* *Farmer,* 511 U.S. at 848–49, 114 S.Ct. 1970 (summarizing evidence that a prison's refusal to provide segregated housing to a pre-operative male-to-female transsexual could pose significant security concerns). At the same time, as particularly relevant in Kosilek's case, the DOC's security report reflected that significant concerns would also arise from housing a formerly male inmate—with a criminal history of extreme violence against a female domestic partner—within a female prison population containing high numbers of domestic violence survivors. Nonetheless, in dismissing the DOC's concerns, the district court relied heavily on the fact that security issues have not yet arisen within MCI–Norfolk's general population. Rejecting the testimony of multiple individuals with decades of penological experience—all of whom acknowledged the risk of housing a female prisoner at MCI–Norfolk—the district court reasoned that Kosilek's *past* safety was indicative of a likelihood that she could reside safely at the prison after her operation.

This reasoning wrongly circumvents the deference owed to prison administrators: the appropriate inquiry was not whether the court believed that Kosilek could be housed safely, but whether the DOC has a reasoned basis for its stated concerns. Indeed, that Kosilek had so far been safe within MCI–Norfolk's prison population does not negate the DOC's well-reasoned belief that safety concerns would arise in the future after SRS. *Cf.* *Jones v. N.C. Prisoners' Labor Union,* 433 U.S. 119, 132–33 & n. 9, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (holding, in the First Amendment context, that the rights of prisoners may be abridged based on a reasonable belief that future harm or disruption may occur); *cf.* *Hudson v. Palmer,* 468 U.S. 517, 526–27, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (requiring prison administrators to implement prophylactic solutions to foreseeable security issues reasonably within the scope of their expertise). Moreover, the fact that, preoperatively, Kosilek has not been subject to assault or threats does not vitiate the concern that she would be victimized after receiving SRS. [15]

The district court also reasoned that "the DOC [could] reasonably assure the safety of Kosilek and others after sex reassignment surgery by housing Kosilek in a segregated protective custody unit." It then noted, however, that there existed a strong argument that such isolation would amount to "a form of extrajudicial punishment that is prohibited by the Eighth Amendment." This warning echoes the very concerns highlighted by the DOC, which expressed disagreement with the use of long-term isolation as a housing solution for Kosilek, based on its potential negative effects on her mental health. *See also* *Battista,* 645 F.3d at 454 (explaining that creating a segregated treatment center to house a GID prisoner would "pose administrative difficulties and be isolating" ***94**). The deference awarded to prison administrators cannot be defeated by such circular reasoning, which dismisses the DOC's concern in one breath only to recognize its validity in the next.

The prison administrators in this case have decades of combined experience in the management of penological institutions, and it is they, not the court, who are best situated to determine what security concerns will arise. *See* *Bell,* 441 U.S. at 548, 99 S.Ct. 1861 ("[J]udicial deference is accorded [in part] because the administrator ordinarily will ... have a better grasp of his domain than the reviewing judge...."). The DOC's judgment regarding post-operative housing is without doubt "within the realm of reason," *Battista,* 645 F.3d at 454, and the district court's alternative belief as to the possibility of safely housing Kosilek does not suffice to undermine this reasonableness.

The DOC officials also expressed concern that providing Kosilek SRS would incentivize the use of suicide threats by prisoners as a means of receiving desired benefits. Although the district court determined that, in this case, Kosilek's risk for suicidal ideation was very real, this finding does not invalidate the DOC's reasonable belief that providing

SRS might lead to proliferation of false threats among other prisoners.

The DOC's concern—regarding the unacceptable precedent that would be established in dealing with future threats of suicide by inmates to force the prison authorities to comply with the prisoners' particular demands—cannot be discounted as a minor or invalid claim. Such threats are not uncommon in prison settings and require firm rejection by the authorities, who must be given ample discretion in dealing with such situations. Given the circumstances presented here, we cannot say that the DOC lacks reasonable security concerns.

b. Deference to the DOC's reasonable concerns about safety and security

The district court ultimately dismissed the DOC's concerns as pretextual, reasoning that DOC was in fact acting in response to "public and political criticism." The primary evidence on record tending to support this theory includes a press interview by Commissioner Dennehy, Dennehy's relationships with a state senator and the lieutenant governor, and the acknowledgment that the DOC was aware of negative news coverage regarding Kosilek's request for surgery.

In her testimony, Dennehy denied being influenced by such media and political pressures, and stated that the decision not to provide SRS was founded in bona fide security concerns alone. The district court, however, found this testimony non-credible, and this credibility finding is the sort of determination to which our court gives deference. *See* Fed.R.Civ.P. 52(a)(6). Even accepting that Dennehy's motivations were colored by political and media pressure, however, does not take Kosilek's claim as far as it needs to go.

[36] As an initial matter, the fact that Dennehy was motivated in part by concerns unrelated to prison security does not mean that the security concerns articulated by the DOC were irrelevant, wholly pretextual, or—most importantly—invalid on the merits. In *Battista,* our court held that deference to the decisions of prison administrators could be overcome where those administrators admittedly relied on inflated data, identified a security concern only several years after refusing to provide treatment for an acknowledged medical need, and engaged in a pattern of changing positions and arguments before ***95** the court. *Battista,* 645 F.3d at 455. Such gross delays and misstatements were not present here. [16] Rather, the DOC testified consistently that it believed the postoperative security concerns surrounding Kosilek's treatment were significant and problematic. [17] Even if not entitled to deference, *see id.,* those concerns still matter insofar as they are reasonable and valid, and Kosilek did not put on any evidence showing that they wholly lacked merit. [18]

[37] Second, when determining the appropriateness of injunctive relief, our focus must include "current attitudes and conduct." *Farmer,* 511 U.S. at 845, 114 S.Ct. 1970 (" '[D]eliberate indifference[ ] should be determined in light of the prison authorities' current attitudes and conduct': their attitudes and conduct at the time suit is brought and persisting thereafter." (quoting *Helling,* 509 U.S. at 36, 113 S.Ct. 2475)). Dennehy has not served as DOC Commissioner since 2007. Given the age of this litigation and the changes in DOC leadership that have occurred since the suit was filed, the district court's assumption that Dennehy's attitudes necessarily carried over to her successors and governed their actions is unsupported by the record. Although consideration of Dennehy's motivation is surely relevant, it is insufficient to show that the DOC continued to be motivated by public pressure even after her departure, or that this is what motivates the DOC presently.

Indeed, it was Commissioner Clarke—and not Dennehy—who made the decision here. And the only evidence tending to show that Commissioner Clarke may have considered public and political criticism were two letters *received* by Clarke—who did not respond—from Massachusetts legislators. These letters, however, relate almost in their entirety to concerns about the cost of SRS, and the district court soundly rejected any argument that the DOC, or Clarke specifically, had adopted its safety and security measures as a pretextual means of addressing the cost concerns raised by state legislators. Moreover, Clarke was never found by the court to be noncredible. [19]

***96** The district court improperly imputed its belief that Commissioner Dennehy had acted out of concern for public and political pressure to its assessment of the motivations of future DOC Commissioners. This error ignores the requirement, in cases of injunctive relief, that a court consider the attitudes and beliefs of prison administrators at the time of its decision. *Id.* at 845–46, 114 S.Ct. 1970. The effect of this error is particularly clear given that Clarke has now been replaced by Commissioner Spencer, so that Dennehy is now

several administrations and more than seven years removed from the decisionmaking process. Without proof that the DOC remains motivated by pretextual or improper concerns with public pressure, even if it was assumed that Dennehy was improperly motivated, the district court's finding that injunctive relief was required is unsupportable.

III. *Conclusion*

[38] We are not tasked today with deciding whether the refusal to provide SRS is uncompassionate or less than ideal. Neither finding would support Kosilek's claims of a constitutional violation. The Eighth Amendment, after all, proscribes only medical care so unconscionable as to fall below society's minimum standards of decency. *See* *Estelle,* 429 U.S. at 102–05, 97 S.Ct. 285. In this case, the DOC has chosen to provide a form of care that offers direct treatment for Kosilek's GID. *Cf.* *Leavitt,* 645 F.3d at 498 (acknowledging that the effects of treatment decisions may be relevant to consideration of the subjective component of the Eighth Amendment). Moreover, it has done so in light of the fact that provision of SRS would create new and additional security concerns—concerns that do not presently arise from its current treatment regimen.

Given the positive effects of Kosilek's current regimen of care, and the DOC's plan to treat suicidal ideation should it arise, the DOC's decision not to provide SRS does not illustrate severe obstinacy or disregard of Kosilek's medical needs. *DesRosiers,* 949 F.2d at 19 ("[T]he complainant must prove that the defendants had a culpable state of mind and intended wantonly to inflict pain."). Rather, it is a measured response to the valid security concerns identified by the DOC. *Battista,* 645 F.3d at 454 ("Medical 'need' in real life is an elastic term: security considerations also matter at prisons...."); *Cameron,* 990 F.2d at 20 ("Nothing in the Constitution mechanically gives controlling weight to one set of professional judgments."). Having reviewed the record before us, we conclude that Kosilek has failed, on these facts, to demonstrate an Eighth Amendment violation. Accordingly, we reverse the district court's order of injunctive relief and remand this case to the district court with instructions to dismiss the case.

Reversed and Remanded.

THOMPSON, Circuit Judge, dissenting.

The majority turns a blind eye to binding precedent, opting instead to cobble together law from other circuits and non-Eighth Amendment jurisprudence to formulate a standard of review that, though articulated as one of variable exactitude, amounts to sweeping de novo review. Armed with the ability to take a fresh look at findings that clearly warranted deference, the majority easily steps into the trial judge's shoes —the inarguable superiority ***97** of the judge's ability to marshal facts, assess motive, and gauge credibility all but forgotten. The parameters set by the majority foretold the result. It concludes that the Massachusetts Department of Correction did not violate Michelle Kosilek's constitutional rights. That conclusion is erroneous, the majority's analytical path to it is misguided, and the fact that this case is even subject to en banc scrutiny in the first place is wrong. And so I dissent.

I. En Banc Grant

The criteria for en banc relief are clear: it is not a favored form of relief, and ordinarily should not be ordered unless "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R.App. P. 35(a). My colleagues' reasons for granting en banc review are not articulated, but it seems clear that the maintenance of uniformity piece is not in play. Therefore I can only assume they perceive an issue of exceptional importance. This justification is problematic.

As my colleague has explained in a series of thoughtful dissents, in this circuit there has been what some might see "as the recurring unprincipled denial and granting of petitions for rehearing en banc, without any attempt to define and apply a set of objective criteria to determine when a case is of exceptional importance." *Kolbe v. BAC Home Loans Servicing, LP,* 738 F.3d 432, 474 (1st Cir.2013) (Torruella, J., dissenting); *see also* *Igartúa v. United States,* 654 F.3d 99, 105 (1st Cir.2011) (Torruella, J., filing opinion concerning denial of en banc consideration); *United States v. Vega–Santiago,* 519 F.3d 1, 7 (1st Cir.2008) (Torruella, J., dissenting). I am at a loss to see what objective criteria warranted review in this case.

While the relief ordered by the district court, and affirmed by a majority of the original panel, was unprecedented, Kosilek's case is not a legally complicated one. Rather it is a fact-intensive dispute, which required the original panel to determine whether the district court's take on the significant amount of evidence, and its ultimate holding as to the existence of an Eighth Amendment violation, was erroneous. I fail to see what in this framework made this case worthy of en banc review.

I am not implying this case is unimportant. This litigation is significant to Kosilek, the DOC, and many others, and the rights afforded under the Eighth Amendment are crucial. But if those things alone were enough, nearly every case would attract the full court's attention. And a good deal more cases would be heard en banc if disagreeing with the result reached by the original panel, or simply desiring to weigh in, were valid grounds for awarding en banc review. They are not, but unfortunately I suspect they were the grounds that carried the day here. *See, e.g.,* *Kolbe,* 738 F.3d at 474 (Torruella, J., dissenting) ("En banc consideration is not for the purpose of correcting panel decisions.") (citing *Calderón v. Thompson,* 523 U.S. 538, 569, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (Souter, J., dissenting)).

This case does not satisfy the well-settled requirements for a grant of en banc. Lamentably, a majority of this court decided otherwise. Similarly, a majority has decided that the district court got it wrong. That conclusion is fundamentally flawed, starting with the level of scrutiny paid to the lower court's decision.

II. Standard of Review

The issue of what standard of review should be employed is a significant point of divergence for me, and indeed one that permeates the entirety of my discord with ***98** the majority. The majority, undoubtedly aware that it could more handily toss aside the district court's findings if it utilized a non-deferential standard of review, formulates its standard by borrowing liberally from other circuits and non-Eighth Amendment jurisprudence while disregarding on-point case law from this circuit. The end result is a standard that, in theory, afforded minimal deference to the lower court's finding, and in the majority's actual application, afforded essentially none.

Let me start with our common ground. I agree with the majority that different standards of review are in play. When deciding a post-bench-trial appeal, this court takes up questions of law de novo, but reviews findings of fact for clear error only. *Wojciechowicz v. United States,* 582 F.3d 57, 66 (1st Cir.2009). On the latter point, this means we accept the court's factual findings, and the inferences drawn from those facts, unless the evidence compels us to conclude a mistake was made. *Janeiro v. Urological Surgery Prof'l Ass'n,* 457 F.3d 130, 138 (1st Cir.2006). With inquiries that are more of a mixed bag, there is a continuum. *Johnson v. Watts Regulator Co.,* 63 F.3d 1129, 1132 (1st Cir.1995). The more fact-intensive the question, the more deferential our review. *Id.* Conversely, the more law-dominated the query, the more likely our review is de novo. *Id.*

That is where the congruity ends. The majority, undoubtedly with a certain end result in mind, maneuvers the standard of review into its most favorable form. While it correctly acknowledges that factual and legal issues are implicated, the majority utterly favors the de novo end of the spectrum.[20] This approach does not accord with our case law (although to read the majority you would think we had very little on-point jurisprudence in this circuit).

For one, the majority posits that the issue of deliberate indifference is a legal one to be reviewed de novo. It relies on Fourth Amendment jurisprudence, citing criminal cases that, in the context of deciding the validity of searches and seizures, hold that reasonable suspicion and probable cause determinations should receive de novo appellate review. *See* *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *United States v. Camacho,* 661 F.3d 718, 724 (1st Cir.2011). I do not see how these cases are analogous to Kosilek's challenge, nor why we should look to Fourth Amendment cases rather than our Eighth Amendment jurisprudence.

In the context of the Eighth Amendment, we have explained that the existence of deliberate indifference is a "state-of-mind issue" that usually presents a jury question, *Torraco v. Maloney,* 923 F.2d 231, 234 (1st Cir.1991), or in other words, an issue for the finder of fact. This makes sense. Often intertwined in state-of-mind issues are determinations about credibility and motivation; those are classic examples of the judgment calls to which we give deference. *See* Fed.R.Civ.P. 52(a)(6) ("[T]he reviewing court must give due

regard ***99** to the trial court's opportunity to judge the witnesses' credibility."); *Monahan v. Romney,* 625 F.3d 42, 46 (1st Cir.2010). *See also* *Janeiro,* 457 F.3d at 138–39 (explaining that, following a bench trial, "if the trial court's reading of the record [with respect to an actor's motivation] is plausible, appellate review is at an end") (alteration in original).

The majority recognizes *Torraco,* citing it for the narrow proposition that "issues of culpability in a deliberate indifference inquiry are usually questions for a jury," in connection with its discussion about what standard of review findings of fact garner. But this is a mischaracterization of what Torraco held. Rather, the case states that "the existence of deliberate indifference," is a state-of-mind issue, which makes it a typical juror question. *Torraco,* 923 F.2d at 234 (emphasis added). The majority's slight spin on this holding allows it to ignore *Torraco,* and lean on Fourth Amendment jurisprudence instead to support the notion that deliberate indifference gets a fresh look from this court.

Similarly erroneous is the majority's position that we review de novo the district court's ultimate determination as to whether an Eighth Amendment violation occurred. For support it cites to a series of Eighth Amendment cases from other circuit courts. *See, e.g.,* *Thomas v. Bryant,* 614 F.3d 1288, 1307 (11th Cir.2010); *Hallett v. Morgan,* 296 F.3d 732, 744 (9th Cir.2002). At first blush, there is some surface appeal to this position. If nothing else, the existence of a constitutional violation sounds like something that would fall closer to the question-of-law end of the spectrum. The problem though is that the ultimate constitutional question is inextricably tied up with the factual details that emerged at trial, the credibility of the witnesses, and the questions of motivation. This counsels against pure de novo review and our own case law supports this notion.

As explained above, a state-of-mind issue such as the existence of deliberate indifference is typically left to the finder of fact. *Torraco,* 923 F.2d at 234. And when reviewing a trial judge's determination on the adequacy of medical treatment following a bench trial, this court has applied the deferential clearly erroneous standard. *DesRosiers v. Moran,* 949 F.2d 15, 19–20 (1st Cir.1991). On top of this, it is well established that "elusive issues of motive and intent" (relevant here in connection with the Eighth Amendment's subjective prong) are typically fact-bound ones subject to the clearly erroneous rule. *Fed. Refinance Co. v. Klock,* 352 F.3d 16, 27–28 (1st Cir.2003); *see also McIntyre ex rel. Estate of McIntyre v. United States,* 545 F.3d 27, 40 (1st Cir.2008). Thus the major pieces of the puzzle in an Eighth Amendment inquiry—adequacy of medical care, the existence of deliberate indifference, and the parties' motive and intent—are subject to the clearly erroneous standard, making unqualified de novo review a bad fit.

Policy concerns do not counsel otherwise, making the majority's reliance on *Ornelas,* 517 U.S. at 690, 116 S.Ct. 1657, a Fourth Amendment case, not particularly persuasive.[21] *Ornelas,* which characterized ***100** the ultimate reasonable suspicion and probable cause determination as a mixed question of law and fact, decided that de novo review was the best fit for its resolution. *Id.* at 696–97, 116 S.Ct. 1657. The Supreme Court, as the majority points out, emphasized that "[i]ndependent review" by appellate courts can help "to maintain control of, and to clarify, the legal principles" in reasonable suspicion and probable cause cases. *Id.* at 697, 116 S.Ct. 1657. While I do not disagree that as an appellate court we are often required to clarify legal principles and ensure continuity of the law's development, this is not a persuasive justification for employing de novo review here.

As noted by the dissent in *Ornelas,* "[l]aw clarification requires generalization, and some issues lend themselves to generalization much more than others." *Id.* at 703, 116 S.Ct. 1657 (Scalia, J., dissenting). The issues here do not. Cases dealing with the constitutional adequacy of medical care under the Eighth Amendment are incredibly fact-specific, resulting in distinctive issues. The trial judge must, among other things, have a handle on the prisoner's medical condition, the treatment sought, the treatment provided (if any), what treatment medical providers recommended, what the defendant knew and when, and what motivated its decisions. This court cannot hope to match the district judge's expertise in these areas, nor can I fathom why we would want to try. The "extremely fact-bound nature" of these cases means that *"de novo* review [will] have relatively little benefit," *id.* at 700, 116 S.Ct. 1657 (Scalia, J., dissenting), leaving us unmoved by the uniformity-of-the-law considerations raised by the majority.

So where does all this leave us with regard to the standard that attaches to the determination of whether the Eighth Amendment has been violated? It is clear (and the majority agrees) that with questions of varying exactitude, the "standard of review applied depends, in the last analysis, on the extent to which a particular question is fact-dominated or law-dominated." *Turner v. United States,* 699 F.3d 578, 584 (1st Cir.2012) (internal quotation marks omitted); *see also In re IDC Clambakes, Inc.,* 727 F.3d 58, 64 (1st Cir.2013); *Dugas v. Coplan,* 506 F.3d 1, 8 (1st Cir.2007). Drawing the distinction between law-heavy versus fact-heavy questions is sometimes a tricky thing to do, and given that establishing an Eighth Amendment claim involves a mixed question of law and fact, it is a thicket into which we must enter. Luckily, I do not think it is a particularly thorny one in this case.

Here, before reaching its ultimate constitutional conclusion, the trial court heard testimony from no fewer than nineteen witnesses (e.g., medical providers, medical experts, prison officials, and Kosilek) over the course of a trial that ultimately extended two years. The court scrutinized events that had transpired over a twenty-year period, including those relating to what treatment Kosilek had requested, what treatment had been recommended, and what care was ultimately provided. The court considered evidence about the DOC's security review, how it was conducted, and the concerns it raised. It assessed the credibility of Kosilek, DOC officials, and the medical experts. The court reviewed a copious amount of exhibits, such as Kosilek's medical records, Kosilek's prison records, DOC policies, DOC contracts, DOC manuals, reports from Kosilek's medical providers, reports penned by each side's experts, DOC staff meeting notes, security reports, medical literature, ***101** correspondence, and deposition testimony. The end result was pages upon pages of factual findings made by the trial judge. [22]

In other words, the district court "engaged in a careful and close analysis of the trial evidence," *Turner,* 699 F.3d at 584, to make its ultimate determination that the DOC, without any valid penological purpose, refused to provide medically necessary treatment for Kosilek's life-threatening condition. Given the clearly fact-intensive nature of the court's review, our own examination into whether the court was correct that the DOC violated the Eighth Amendment should be deferential, as opposed to the fresh look the majority proposes. [23] *See id.;* *Fed. Refinance Co.,* 352 F.3d at 27 (explaining that the more fact-intensive the question, the more deferential our review). As ably said by the Supreme Court, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned than the appellate court to decide the issue in question, or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell,* 499 U.S. 225, 233, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (internal quotation marks omitted).

The majority's articulation of a standard of review that runs afoul of our case law is not the only problem. There is also its application. While the majority's skewed standard allows minimal aspects of the lower court's decision to garner clear error review, namely factual findings and credibility determinations, in actual application essentially no deference was paid. The only conclusion of the district court that the majority concedes warranted deference was the judge's determination that Commissioner Kathleen Dennehy's testimony was not credible. [24] Given the voluminous record in this case, and the breadth of the lower court's findings, it is simply unfathomable that the majority did not consider a single other fact-drawn inference, credibility finding, or motive determination, all of which warrant deference.

For instance, the district court drew inferences from the various medical providers' testimony to decide what constituted a prudent approach. It also considered what Commissioner Harold Clarke's motivations were for denying sex reassignment surgery. It drew inferences from the DOC's conduct (e.g., the timing of security reviews and the DOC's communications with Kosilek's medical providers) to determine that the DOC had engaged in prevarication and delay. The majority; however, does not appear to adjust its consideration of these issues to reflect any deference to the trial judge. Rather it decides anew what inferences should be drawn from the facts attested to at trial. Even under the majority's standard, this is not proper.

***102** Without doubt, the level of scrutiny applied by a court permeates its analysis and guides the outcome. The impact here is clear. The Eighth Amendment is violated when prison officials fail to provide an inmate with adequate medical care, such that "their 'acts or omissions [are] sufficiently harmful to evidence deliberate indifference to serious medical needs.' " *Leavitt v. Corr. Med. Servs., Inc.,* 645 F.3d 484, 497 (1st Cir.2011) (citing *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). The district court concluded that the evidence established the DOC had committed such a violation. The majority says

otherwise but its analysis is plagued with flaws, starting with its determination as to the objective prong.

III. Eighth Amendment: Objective Prong

Whether the so-called objective component of the Eighth Amendment inquiry is satisfied turns on whether the alleged deprivation is "objectively, sufficiently serious." *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (internal quotation marks omitted); *Leavitt,* 645 F.3d at 497. In this context, a prisoner with a "serious medical need," *Mahan v. Plymouth Cnty. House of Corr.,* 64 F.3d 14, 17–18 (1st Cir.1995), is entitled to adequate medical care, i.e., "services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards." *United States v. DeCologero,* 821 F.2d 39, 43 (1st Cir.1987).

That gender identity disorder is a serious medical need which warrants treatment, is not, as the majority notes, disputed. The disagreement—both between the parties and amongst this en banc court—centers around whether the district court correctly found that the DOC's proffered regimen of care was inadequate, and that sex reassignment surgery is the only appropriate treatment for Kosilek. Based on the record, and when one employs the proper standard of review, that conclusion was generously supported by the evidence.

A. Dr. Schmidt's Prudence

To start, despite the majority's qualms, the district court's conclusion that the DOC's expert, Dr. Chester Schmidt, was not a prudent professional was not clearly erroneous. In his testimony, Dr. Schmidt expressed a good deal of disagreement with the Harry Benjamin Standards of Care, which were widely relied upon by the other medical providers who testified below and which have been generally accepted by courts. *See, e.g., De'lonta v. Johnson,* 708 F.3d 520, 522–23 (4th Cir.2013) (describing the Standards of Care as "the generally accepted protocols for the treatment of GID"); *Soneeya v. Spencer,* 851 F.Supp.2d 228, 231 (D.Mass.2012) (noting that the "course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care' "); *O'Donnabhain v. Comm'r of Internal Revenue,* 134 T.C. 34, 65 (U.S.Tax Ct.2010) (indicating that the Standards are "widely accepted in the psychiatric profession, as evidenced by the recognition of the standards' triadic therapy sequence as the appropriate treatment for GID and transsexualism in numerous psychiatric and medical reference texts").

While, as the majority notes, the Standards of Care have a built-in flexibility, that pliancy appears to stem from the uniqueness of patient needs and the evolution of the gender identity disorder field. [25] ***103** Dr. Schmidt's departure from the Standards appeared more fundamental. For instance, the Standards of Care explained that sex reassignment surgery is not "experimental, investigational, elective, cosmetic, or optional in any meaningful sense." Standards of Care, Version 6, at 18. Dr. Schmidt disagreed. In his expert report, he wrote that sex reassignment surgery was a "voluntary, elective choice[ ] and procedure[ ]," calling the steps towards reassignment "equivalent to a variety of elective cosmetic non-surgical procedures and elective cosmetic surgical procedures." Another example: the Standards of Care provide that, for persons with severe gender identity disorder, sex reassignment surgery is effective, and when paired with hormone therapy and a real-life experience, "medically indicated and medically necessary." Standards of Care, Version 6, at 18. Dr. Schmidt again was not on board. He testified that generally he does not believe that sex reassignment surgery is medically necessary and his practice manifests this philosophy. In the approximately 300 patients he had evaluated, Dr. Schmidt never recalled seeing even one case of gender identity disorder serious enough to warrant surgery. [26]

For Dr. Schmidt, there was an additional wrinkle. In Dr. Schmidt's opinion, a real-life experience living as the opposite gender could not be effectively replicated in prison, and this counseled against surgery for Kosilek. The district court found that this viewpoint was not prudent. The majority claims that in doing so the court "relied on its own—non-medical—judgment about what constitutes a real-life experience." This is not accurate.

The court based its determination, back in *Kosilek I*, on the testimony of Dr. Marshall Forstein and Dr. George Brown, who "convincingly testified [that] Kosilek's 'real life' is prison." *Kosilek v. Maloney,* 221 F.Supp.2d 156, 167 (D.Mass.2002). Then in *Kosilek II*, the court found the "credible evidence in the instant case confirmed the

conclusion in *Kosilek I* that a person can have a 'real life experience' in prison." *Kosilek v. Spencer,* 889 F.Supp.2d 190, 232 (D.Mass.2012). Evidence before the court in *Kosilek II* included an expert report from Dr. Forstein, and testimony from Dr. Randi Kaufman, both of whom indicated that Kosilek had undergone a real-life experience in prison. There was also the February 24, 2005 report from the Fenway doctors, Dr. Kevin Kapila and Dr. Kaufman, which explained that Kosilek had moved successfully through the steps outlined by the Standards of Care. Then, in their October 7, 2005 report, the Fenway doctors explained at length why Cynthia Osborne's review subtly distorted the concept of the real-life experience, and why Kosilek had completed the real-life test-a test made even more stringent by the fact that she was living as a female in an all-male prison. Dr. Brown echoed a similar sentiment. He testified that Kosilek had not only met the minimum real-life experience but had exceeded it. Dr. Brown focused on the significant amount of information ***104** that existed regarding Kosilek's time in prison, a record that his patients in the outside world would never have. [27]

The record is clear. The district court's determination that Dr. Schmidt's viewpoint about the feasibility of a real-life experience in prison was not based on the judge's own lay opinion. It was, as the district court alluded to, grounded in a significant amount of evidence offered by competent medical professionals, all of whom disagreed with Dr. Schmidt. [28]

The same can be said about what course of treatment was appropriate for Kosilek. Dr. Schmidt testified that Kosilek had "made an excellent adaptation" on her current treatment regimen and that surgery would not "confer any additional functional capability." Surgery was not, according to Dr. Schmidt, medically necessary for Kosilek. To minimize the risk of future harm to Kosilek, Dr. Schmidt thought employing psychotherapy and medication to reduce her dysphoria and, if needed, placing Kosilek in a medical facility would be effective. A majority of the testifying medical providers said otherwise though. When asked what they thought about Dr. Schmidt's suggested regimen, Drs. Kapila, Kaufman, Appelbaum, and Forstein all thought it unreasonable. [29] The common thinking was that Dr. Schmidt's approach was not likely to effectively reduce Kosilek's risk of self harm, given that the source of her dysphoria was her male genitalia.

In the Eighth Amendment context, the adequacy of medical care is "measured against 'prudent professional standards.'" *Nunes v. Mass. Dept. of Corr.,* 766 F.3d 136, 142 (1st Cir.2014) (quoting *DeCologero,* 821 F.2d at 43). The district court here concluded that Dr. Schmidt was not a prudent professional. Given the above, I am not convinced that this determination was clearly erroneous. Dr. Schmidt's significant disagreement with widely accepted guidelines and the sharp contrast between his and the other well-credentialed providers' opinions, offer strong support for the court's finding.

B. Adequacy of the DOC's Treatment

In light of the court's determination as to Dr. Schmidt's prudence, the question remains whether the evidence supported its conclusion that the DOC's treatment was not medically adequate. The majority's ***105** consideration of this issue begins with a faulty premise. It states that the "district court held that psychotherapy and antidepressants alone would not adequately treat Koslilek's GID," a finding the majority calls an incorrect characterization of the issues, and a minimization of the DOC's proffered treatment plan. It is the majority who is wrong.

The district court was of course well aware that the DOC was suggesting a more comprehensive treatment plan beyond therapy and medication. Nonetheless, as it repeatedly explained, it found that *all* treatment other than sex reassignment surgery was inadequate for Kosilek. *See, e.g., Kosilek,* 889 F.Supp.2d at 202, 233, 236, 238, 240. This included the DOC's past treatment, as well as its intended treatment going forward. In other words, the court did not minimize the DOC's regimen. Based on the testimony and evidence presented, it simply found the regimen did not, and would not going forward, adequately treat Kosilek's gender identity disorder. This finding was well within the court's purview to make. The fact that the DOC fashioned some treatment, in the form of hormone therapy, electrolysis, and access to feminine items does not insulate it from liability. In *De'lonta v. Johnson,* the Fourth Circuit Court of Appeals found that an inmate, who sought sex reassignment surgery after her gender identity disorder failed to resolve despite receiving hormones, stated a plausible deliberate indifference claim. 708 F.3d at 522, 525. The court concluded that, though the Virginia Department of Corrections had provided the inmate with hormone therapy and psychological counseling consistent with the Standards of Care, "it does not follow that they have necessarily provided

her with *constitutionally adequate* treatment." *Id.* at 522, 526 (emphasis in original).

The majority nonetheless would have us believe the care provided by the DOC can withstand constitutional scrutiny. It endeavors to convince by giving little weight to the attested to shortcomings in Kosilek's treatment plan, and instead focusing heavily on the improvement Kosilek has made since being provided hormones, electrolysis, feminine garb and gear, and mental health treatment. This is not in dispute; Kosilek has indeed progressed. However, despite the short shrift the majority pays it, there was ample evidence supporting the district court's conclusion that this improvement was not sufficient to ease Kosilek's suffering to a point where she was no longer facing a life-threatening risk of harm.

Though the DOC has been treating Kosilek for many years, the district court found that she "continues to suffer intense mental anguish." *Kosilek,* 889 F.Supp.2d at 202. The court chronicled the evidence: Kosilek's own testimony about her continued distress,[30] the Fenway Center report indicating Kosilek's ongoing angst over her male genitalia and the high likelihood of another suicide attempt, and the along-the-same-lines testimony of Kosilek's treating psychologist, Mark Burrowes. *See id.* at 226. There was also Dr. Kaufman's testimony that, even with the treatment the DOC provided, Kosilek still suffered from clinically significant distress and severe dysphoria, a fact she found "quite notable." Dr. Brown testified similarly, explaining that Kosilek's treatment to date, including the hormones, had not obviated her need ***106** for surgery. Further, there was evidence that Kosilek's improvement was tangled up in her continuing hope that sex reassignment surgery would be provided. Dr. Brown testified: "And without that hope, the [DOC's] treatments are —I wouldn't say for naught, but they are not going to continue her level of improvement where she is now."

Thus, even with Kosilek's documented improvement, Drs. Brown, Kaufman, Forstein, Kapila, and Appelbaum all testified unequivocally that sex reassignment surgery was medically necessary and the only appropriate treatment for Kosilek. They further agreed that there was a serious risk of harm, most likely suicide, should Kosilek not receive the surgery, which was a concern the Fenway doctors voiced as early as 2005. As the majority says, this potentiality matters because the Eighth Amendment's protections extend beyond present suffering to future harm. *See Helling v. McKinney,* 509 U.S. 25, 33–34, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Leavitt,* 645 F.3d at 501.

The DOC's assertion that this future risk could be curbed with medication and psychotherapy cannot carry the day. As the district court found, treating the underlying disorder and its symptoms are two very different things, a distinction also drawn by the Seventh Circuit. *See Fields v. Smith,* 653 F.3d 550 (7th Cir.2011). In *Fields,* the court found a Wisconsin statute that prohibited the state's correctional department from providing transgender inmates with hormones and sex reassignment surgery unconstitutional. *Id.* at 552–53, 559. The court, discussing how some patients require hormone therapy, found the department of corrections had not effectively rebutted the evidence that an offering of medication and psychotherapy would "do nothing to treat the underlying disorder." *Id.* at 556. In the instant matter, Drs. Appelbaum and Kapila testified that the preferred approach is to treat the underlying problem—Kosilek's gender identity disorder—as opposed to the symptoms it might produce. As chronicled above, the consensus was that the only way to adequately treat that problem was with sex reassignment surgery.

Lest we forget, the procedural posture of this case bears another mention. The DOC is challenging the district court's grant of injunctive relief following a bench trial, meaning that due regard is paid to the judge's factual findings and credibility determinations. *See Monahan,* 625 F.3d at 46. When the evidence yields competing inferences or two permissible views, we cannot second guess, "even if, had we been sitting as triers of the facts, we might have arrived at a different set of judgments." *N. Ins. Co. of N.Y. v. Point Judith Marina, LLC,* 579 F.3d 61, 67 (1st Cir.2009). Here the judge concluded that the DOC's present treatment regimen, with the added medication and therapy to cushion the post-surgery-denial fallout, would not reduce Kosilek's suffering to the point where she did not have a major medical need. Rather, sex reassignment surgery was the only adequate treatment for Kosilek's life-threatening disorder. As detailed above, these findings were supported by the un-objected to testimony of multiple eminently qualified doctors, by widely accepted, published standards, and by the testimony of Kosilek herself. The factfinder found this evidence convincing; he found the DOC's evidentiary offering less so. It is not for us to re-weigh

the evidence and second-guess this determination, but that is exactly what the majority does.

What's more, by upholding the adequacy of the DOC's course of treatment, the majority in essence creates a de facto ban on sex reassignment surgery for inmates in ***107** this circuit. Its attempt to repudiate this notion is not compelling. For instance, the fact that the DOC has "disclaimed any attempt to create a blanket policy regarding SRS" is a non-starter. The issue is not whether correctional departments will voluntarily provide the surgery, it is whether the precedent set by this court today will preclude inmates from ever being able to mount a successful Eighth Amendment claim for sex reassignment surgery in the courts. Equally unconvincing is the majority's assertion that the "unique circumstances" presented by Kosilek's case will prevent any de facto ban. The first so-called anomaly cited by the majority—the divergence of opinion as to Kosilek's need for surgery—only resulted from the DOC disregarding the advice of Kosilek's treating doctors and bringing in a predictable opponent to sex reassignment surgery. It is no stretch to imagine another department of corrections stealing a page from this play book, i.e., just bring in someone akin to Osborne. It is hardly a matchless scenario. The same goes for Kosilek's criminal history and post-surgical housing options, which the majority also points to. Rare will be the prisoner who does not pose some type of security concern, or harbor some potential for causing climate unrest. So the question remains, if Kosilek—who was time and again diagnosed as suffering from severe gender identity disorder, and who was uniformly thought by qualified medical professionals to require surgery—is not an appropriate candidate for surgery, what inmate is?

In sum, the majority's conclusion that the district court wrongly found that Kosilek satisfied the objective component of the Eighth Amendment inquiry is, in my opinion, flatly incorrect. I am no more convinced by the majority's examination of the subjective component.

IV. Eighth Amendment: Subjective Prong

A satisfied subjective prong means that prison officials had "a sufficiently culpable state of mind" in that they showed deliberate indifference to an inmate's health and safety. *Farmer,* 511 U.S. at 834, 114 S.Ct. 1970; *Leavitt,* 645 F.3d at 497. The officials were both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and they drew that inference. *Ruiz–Rosa v. Rullán,* 485 F.3d 150, 156 (1st Cir.2007). The majority posits that the DOC, because it was faced with conflicting medical opinions about what treatment was appropriate for Kosilek, and because it proffered reasonable security concerns, was not deliberately indifferent to Kosilek's risk for serious harm. Both theories fail to convince.

A. Conflicting Medical Opinions

The idea that incompatible medical opinions serve to insulate the DOC from a deliberate indifference finding is a concept not advanced by the DOC, which rests on several faulty propositions and has very problematic implications.

The majority concedes that the DOC never made this particular argument, but charitably claims it is not waived because "[t]he DOC's contention that the district court erred in deeming SRS medically necessary and in rejecting Dr. Schmidt's approach as imprudent necessarily entails the DOC's subjective belief that SRS was unnecessary."[31] This is a stretch. An ***108** argument advanced on appeal years after surgery was denied is not the equivalent of the DOC's subjective belief that sex reassignment surgery was unnecessary when it denied it. Moreover, the mere existence of contradictory medical opinions does not necessarily mean that the DOC did not deny Kosilek surgery for purely pretextual reasons. It is certainly conceivable that a correctional department could seize on an opinion from a medical provider, whether or not it found it compelling, as a means to justify denying treatment.

Another even more serious flaw in the majority's theory is that it is contradicted by the evidence. Commissioner Dennehy testified multiple times, and submitted a report to the same effect, that it was security concerns that motivated her decision to deny Kosilek surgery. During Dennehy's first round of testimony, when she was still claiming ignorance about whether UMass (the DOC's contracted health-services provider) was recommending surgery, she testified that based "strictly [on] safety and security concerns" she would still veto the surgery even if UMass told her that it was medically necessary. Then, once UMass's position that surgery was medically necessary became pellucid to Dennehy, she submitted a report to the court indicating that she was standing firm in her decision to deny surgery based on "alarming and substantial" safety and security concerns. Her final time on the stand, Dennehy testified that the only thing, in her view, preventing surgery for Kosilek was safety

and security concerns; absent such concerns, Dennehy would have no reason to interfere with any medical order for treatment.

The evidence with regard to Commissioner Clarke's stance on the issue was similar. In his report to the court, Clarke disclaimed any ability to render an opinion on the validity of the medical opinions expressed at trial, and went on to explain his view that "the safety and security concerns presented by the prospect of undertaking sex reassignment surgery for Michelle Kosilek are insurmountable." Clarke then hammered home his security concerns on the stand. Therefore, even though there was contradictory opinions on whether surgery was medically necessary for Kosilek, both Dennehy's and Clarke's decision to deny the procedure was, as they put it, based solely on security concerns.

The majority's presumption that the existence of varying medical opinions should insulate the DOC is not only an unpreserved, unsupported argument but it has very troubling implications. It gives correctional departments serious leeway with the Eighth Amendment. If they do not want to provide a prisoner with care recommended by one or more than one medical provider, they need only find a doctor with a differing mind set (typically not a difficult task). It is no stretch to think that might be what happened here. The DOC had the treatment recommendation of Drs. Kaufman and Kapila, a local psychiatrist and psychologist who had evaluated Kosilek. The doctors themselves were recommended by the DOC's own medical provider, UMass. Yet the DOC took the unusual step of having the Fenway doctors' recommendation peer reviewed by Cynthia Osborne, an out-of-state social worker with a known opinion about sex reassignment surgery. It seems highly unlikely that the DOC was simply looking for a more complete picture of Kosilek's treatment options, and that Osborne's predictable opposition to Kosilek being provided with surgery was a non-factor. The DOC knew that Osborne was working with ***109** the Virginia and Wisconsin departments of corrections to help defend lawsuits filed by transgender prisoners, and internal DOC meeting minutes noted that Osborne "may do more objective evaluations" and was "[m]ore sympathetic to DOC position." Predictably, Osborne was one-hundred percent sympathetic.

B. Security Concerns

There is no dispute that "security considerations ... matter at prisons," leaving "ample room for professional judgment." *Battista v. Clarke,* 645 F.3d 449, 453, 454 (1st Cir.2011). "Any professional judgment that *decides* an issue involving conditions of confinement must embrace security and administration and not merely medical judgments." *Id.* at 455 (quoting *Cameron v. Tomes,* 990 F.2d 14, 20 (1st Cir.1993) (emphasis in original)). But it is also true that at some point a defendant forfeits the advantage of deference, for instance following a "pattern of delays, new objections substituted for old ones, misinformation and other negatives."[32] *Id.* The district court determined that the DOC had done just this, causing undue delay in Kosilek's treatment regimen, manufacturing security concerns, and orchestrating a half-hearted security review. The record amply supported these conclusions, yet the majority too easily discounts them, especially given the deferential look this issue warrants. *See, e.g., Torraco,* 923 F.2d at 234 (explaining that deliberate indifference is usually a jury question); *Monahan,* 625 F.3d at 46 (providing that due regard is given to credibility calls); *Fed. Refinance Co.,* 352 F.3d at 27–28 (noting that a clear error look makes sense when there are questions of motive and intent).

Of course, it has been many years since medical providers began considering the propriety of surgery for Kosilek. Back during *Kosilek I*, Dr. Forstein recommended that Kosilek be allowed to consult with a surgeon who specialized in sex reassignment surgery. Then in 2003, Dr. Seil said Kosilek should be allowed to meet with a specialist after a year on hormones. But right when she started as commissioner, Dennehy made a curious move. She reassessed the care being provided to all inmates suffering from gender identity disorder, despite the DOC's contract with UMass placing that medical care squarely in UMass's purview. Then once the Fenway doctors opined in 2005 that Kosilek should be allowed to have surgery, the DOC frittered away time claiming not to understand that UMass recommended surgery for Kosilek. The majority does not quibble with the court's finding that the DOC prevaricated in this respect because it "does not undercut the consistency with which they identified safety and security concerns." This misses the point. To establish a subjective intent, "it is enough for the prisoner to show a wanton disregard sufficiently evidenced 'by denial, delay, or interference with prescribed health care.' " *Battista,* 645 F.3d at 453 (quoting *DesRosiers,* 949 F.2d at 19); *see also Johnson v. Wright,* 412 F.3d 398, 404 (2d Cir.2005) (A "deliberate indifference

claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's ***110** treating physicians."). That is precisely what the district court found happened here, and the evidentiary support for this determination is in the record.

The same goes for the court's conclusion that the DOC's security reviews were rushed and results-driven. Dennehy told a news outlet that the DOC would deny Kosilek's request for surgery despite only having "generalized discussions" and phone calls with the relevant players; she had not yet received written reports or convened a formal security meeting. When the DOC did meet, there was just a week left before its court-ordered security report was due—a report that was then penned predominantly by trial counsel and reviewed by Dennehy only a day or two before its filing. Once trial was underway, the hurriedness continued. A mere nine days before expert disclosures were due, Dennehy contacted the director of the Federal Bureau of Prisons looking for a security expert. And the experts the DOC ultimately did present at trial seemed ill prepared, failing to take into account important details about Kosilek's medical and disciplinary history.

For the district court, another reason not to esteem the DOC's proffered security concerns was the fact that they were "largely false" and "greatly exaggerated." This finding is not clearly erroneous. Yet the majority easily dismisses it, in part by limiting its focus to what it presumably perceives as the DOC's more valid security concerns—where to house Kosilek postoperatively and the deterrence of false suicide threats by inmates. The majority is conveniently forgetting the throw-it-up-and-see-what-sticks approach taken by the DOC below. It was this approach, in part, that led the court to question whether the DOC could be trusted to give an accurate picture of security concerns consequent to surgery.

For instance, the DOC repeatedly claimed that transporting Kosilek to surgery out of state would pose an insurmountable security risk. It is hardly surprising the district court thought this was an embellished concern. Kosilek had been transported to multiple doctor's appointments without issue, and it is illogical to think Kosilek would attempt to flee en route to the surgery she has dedicated decades of her life to obtaining. Also eminently unlikely is that during the transport home from highly invasive surgery, a sixty-five-year-old, recovering Kosilek would be able to escape the grasp of DOC personnel. Even Clarke thought it near certain that Kosilek could safely be transported to and from surgery.

With regard to housing Kosilek in a female prison, the DOC painted Kosilek as a highly-polarizing escape risk who could not possibly safely reside in MCI–Framingham's general population. It pointed to the comparatively weaker perimeter of MCI–Framingham, alleging that Kosilek's superior male strength and life sentence made her a flight risk. One can easily see why the district court was not buying this. Kosilek was advanced in age, physically slight, had taken female hormones for years, and had an excellent disciplinary record. And MCI–Framingham successfully housed approximately forty life offenders. The court also had reason to be skeptical of the DOC's adamant contention that Kosilek would cause inmate climate issues at MCI–Framingham due to the fact that she murdered her wife. Undoubtedly inmates find other inmates offensive for a plethora of reasons, such as, race, religion, gang affiliation, sexual orientation, or the crime committed. Prisons deal with these situations on a routine basis and the evidence established that MCI–Framingham had procedures in place to do just that.

***111** The DOC even admitted at oral argument that had a postoperative, transgender person out in free society committed murder, the DOC would have to figure out where to house that person. The DOC; however, did not think this a particularly important point, protesting that Kosilek presents unique concerns that separate her from this hypothetical inmate. I am unmoved. The fact that Kosilek's crime was one of violence against a woman could equally apply to another potential inmate. And the fact that Kosilek gained notoriety by litigating against the DOC all these years—in other words, successfully pursuing her constitutional right to adequate medical care—hardly seems a compelling consideration.

For the district court, also blunting the DOC's fervent cries of overwhelming security concerns were the alternatives to placing Kosilek in the general population of a Massachusetts prison. There was the option of transferring Kosilek to an out-of-state prison (though this scenario appears to have been left largely unexplored by the DOC). In fact, the evidence established that Clarke's former employer, the Washington Department of Corrections, housed a post-operative female transgender inmate, also serving a life sentence for murdering a female relative, without security or climate issues. The inmate's housing was so unremarkable that Clarke was not even aware of it during his tenure in Washington. Further, there was evidence that Kosilek's safety could be ensured by placing her in a segregated housing unit.

The DOC's past conduct was also relevant to the district court's credibility assessment. In connection with *Kosilek I*, then Commissioner Michael Maloney hammered the serious security concerns surrounding Kosilek remaining at MCI–Norfolk while receiving hormones, theorizing that an inmate living as a female (with female attributes) among sex offenders would create a risk of violence. However, once the DOC actually stopped to conduct a security review, it determined there were no current security concerns with Kosilek being provided estrogen therapy. Indeed no security issues ever arose. Kosilek has been safely housed at MCI–Norfolk for many years presenting herself as female. The DOC's reversal on this issue calls into question its stance before this court about the non-feasibility of housing a post-surgical Kosilek at MCI–Norfolk.

The DOC also expressed concern that providing Kosilek with surgery would encourage inmates to utilize suicide threats to receive a desired benefit, and the majority deems this concern reasonable. I am not convinced, and neither was the district court. Not only is there absolutely no evidence that Kosilek is trying to game the system, but the DOC, as it emphasized at trial, employs mental health professionals and has policies in place to deal with suicidality. Presumably, these tools can be used by the DOC to assess whether an inmate's particular suicide threat is manufactured or real, and it can be dealt with accordingly. That the DOC does not want to be inundated with a hypothetical influx of false suicide threats hardly seems a valid reason to deny a prisoner care deemed medically necessary.

For the district court, the public and political disapproval of Kosilek's surgical pursuit was another factor. It did not believe Dennehy's and Clarke's claims that the avoidance of controversy played no role in the DOC's decision to deny surgery. The majority concedes that it must give deference to the court's finding that Dennehy's motivations were colored by public pressure and so, instead, the majority hypes up the role of Commissioner Clarke by characterizing him as the ultimate decision ***112** maker. I see a few flaws with the majority's reasoning.

For one, the majority says the district court improperly imputed Dennehy's motivations to Clarke, thus ignoring the injunctive-relief requirement that it take into account the DOC's then present-day stance.[33] *See* *Farmer,* 511 U.S. at 845, 114 S.Ct. 1970 (quoting *Helling,* 509 U.S. at 36, 113 S.Ct. 2475) (The court considers deliberate indifference " 'in light of the prison authorities' current attitudes and conduct,' ... their attitudes and conduct at the time suit is brought and persisting thereafter."). The majority has it wrong. The court took testimony from Clarke, reviewed his written report, and spoke extensively in its decision about why it was not convinced that Clarke denied Kosilek surgery based on legitimate penological concerns. Of note, it was Kosilek who sought to have Clarke inform the court of his position, and the DOC, which stipulated at trial that Dennehy was the operative decision maker, actually objected to Clarke even testifying as he was simply "maintain[ing] the position set forth by the DOC through former Commissioner Dennehy."

Furthermore, though the majority defers to the court's take on Dennehy, it refuses to do so for Clarke, claiming that "Clarke was never found by the court to be non-credible." This is not entirely accurate. Clearly the import of the court's conclusion that Clarke's articulated security concerns were either false or exaggerated as a pretext to deny surgery means that the court did not think Clarke a completely credible witness. *See* *Kosilek,* 889 F.Supp.2d at 241 ("[T]he purported security considerations that Dennehy and Clarke claim motivated their decisions to deny Kosilek sex reassignment surgery are largely false and any possible genuine concerns have been greatly exaggerated to provide a pretext for denying the prescribed treatment.") In fact, the court specifically found certain claims made by Clarke not to be credible. *See* *id.* at 244 (finding that "neither Dennehy nor Clarke has provided a credible explanation for their purported belief that if Kosilek's genitalia are altered the risk to him and others at MCI Norfolk will be materially magnified" and "[t]he claims of Dennehy and Clarke that they have denied sex reassignment surgery for Kosilek in part because MCI Framingham is not sufficiently secure to prevent an escape by Kosilek, who has never attempted to flee, are not credible.") Therefore, as it did with Dennehy, the majority should be giving due regard to the court's conclusion that Clarke was not believable.

The majority also misses the mark with its contention that the "only evidence" tending to show Clarke may have considered public and political criticism were the two letters from the unhappy Massachusetts legislators. This is not the whole picture. In addition to the letters, what convinced the court that Clarke was improperly motivated was his advancing inflated security concerns following a hasty review, suggesting that he did not operate with an open mind. Having already detailed ***113** the evidence supporting

the court's distrust of the DOC's proffered security concerns, I will not rehash.

As for the thoroughness of Clarke's review, the court criticized Clarke for not consulting with Luis Spencer, who was Superintendent of MCI–Norfolk at the time, and for not reviewing the DOC's security-expert trial testimony, prior to deciding whether to deny surgery. The DOC counters that Clarke, pursuant to the court's order, was not required to do either of those things. It is both conceivable that Clarke's review was too cursory, or that he felt constrained by the court's order, though the fact that Clarke did not know significant details such as Kosilek's age and excellent disciplinary record favors the former possibility. Either way, both views are permissible, which means that the district court's choice of one of them cannot be clearly erroneous. *See Monahan,* 625 F.3d at 46. Nor is it appropriate for us to second-guess the court's tenable perception of Clarke's motivations, as deference extends to "inferences drawn from the underlying facts, and if the trial court's reading of the record [with respect to an actor's motivation] is plausible, appellate review is at an end." *Janeiro,* 457 F.3d at 138–39 (internal quotation marks omitted) (alteration in original).

Ultimately, there was adequate evidentiary support for the court's determination that the DOC was deliberately indifferent. The court did not obviously err in concluding the DOC delayed implementing medical treatment recommended by its own providers, sought out a more favorable medical opinion, engaged in a hasty, result-driven security review, offered a host of poorly thought out security concerns, and then denied surgery based not on any legitimate penological concerns but on a fear of controversy. Whether I, or any of my colleagues, would have drawn these same conclusions had we been presiding over this trial is irrelevant; our review is circumscribed. It is enough that the district court had a reasonable basis for its judgment. The district court's determination that the Eighth Amendment's subjective prong was satisfied should stand.

V. Conclusion

I am confident that I would not need to pen this dissent, over twenty years after Kosilek's quest for constitutionally adequate medical care began, were she not seeking a treatment that many see as strange or immoral. Prejudice and fear of the unfamiliar have undoubtedly played a role in this matter's protraction. Whether today's decision brings this case to a close, I cannot say. But I am confident that this decision will not stand the test of time, ultimately being shelved with the likes of *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), deeming constitutional state laws requiring racial segregation, and *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), finding constitutional the internment of Japanese–Americans in camps during World War II. I only hope that day is not far in the future, for the precedent the majority creates is damaging. It paves the way for unprincipled grants of en banc relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.

I respectfully dissent.

KAYATTA, Circuit Judge, dissenting.

Reading the majority's lengthy and oft-revisited discussion of the applicable standard of review, one would think that this ***114** case posed issues of law or application of law to fact. This is plainly not so.

There is not a comma, much less a word, of the applicable law that the district court did not expressly and correctly explain and apply. All the parties and all the judges in this case, including the trial judge, agree on the controlling principles of law, long ago established by the Supreme Court. *See Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also United States v. DeCologero,* 821 F.2d 39, 43 (1st Cir.1987). Under that law, a prison must supply medical care to its prisoners "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards." *DeCologero,* 821 F.2d at 43. The failure to provide such care, moreover, does not constitute an Eighth Amendment violation unless it rises to the level of "deliberate indifference" to a "serious medical need." "Deliberate indifference" means that the prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer,* 511 U.S. at 837, 114 S.Ct. 1970. A "serious medical need" is defined as, among other things, "one that has been diagnosed by a physician as mandating treatment." *Gaudreault v. Municipality of Salem, Mass.,* 923 F.2d 203, 208 (1st Cir.1990).

Our decision in this case therefore necessarily turns on the facts themselves. And we begin our review knowing that Kosilek does indeed have a serious medical need, and the prison's own doctors, as well as the specialists retained by those doctors, informed DOC that treatment of Kosilek's medical condition in accordance with prudent professional standards requires sex reassignment surgery (SRS).[34] That leaves only two factual questions: (1) Are the DOC's doctors correct that SRS is the only treatment for Kosilek's condition that is commensurate with modern medical science as practiced by prudent professionals;[35] and, if so, (2) Did prison officials nevertheless deny that treatment not because they disbelieved their own doctors, and not because of prison security considerations, but rather simply because they feared public ridicule. If the answer to each of these two questions is "yes," Kosilek should win. Otherwise, she loses.

Were I the trial judge charged with answering these two factual questions based solely on the written record, I would likely find against Kosilek on the first question for the reasons stated by the trial court's appointed independent expert, Dr. Levine. In a nutshell, Dr. Levine, who participated in drafting the Standards of Care, provided carefully nuanced and persuasive testimony that medical science has not reached a wide, scientifically driven consensus mandating SRS as the only acceptable treatment for an incarcerated individual with gender dysphoria. But I am not the trial judge in this case. Nor are my colleagues. And that is the rub.

The experienced jurist who was the trial judge in this case, and who actually sat and listened to the live testimony, found as a matter of fact that:

(1) Commensurate with modern medical science, no prudent professional would recommend ***115** any treatment for Kosilek other than SRS; and

(2) Prison officials nevertheless denied the treatment not because they rejected the accuracy of the medical advice tendered by their own doctors, and not because of security issues, but rather because they feared public ridicule. Their reasons for denying the necessary treatment were thus in bad faith.

The majority never explains why these two findings are not pure findings of fact, and are not therefore subject solely to review for clear error. Nor can it. After all, we are talking about, first, what the medical—not legal—standard of care is for a particular affliction, and second, whether Dennehy and Clarke were truthful in describing their security objections, such as their claim that they feared that Kosilek, after trying to get this surgery for twenty years, would escape on the way to the operating room or, fresh from the surgeon's knife, overpower her guards and run away. Let me be plain on this point: Until today, there was absolutely no precedent (and the majority cites none) for reviewing such quintessentially factual findings under anything other than the clear error test.

As Judge Thompson carefully explains, there is a considerable amount of evidence that directly supports the trial court's findings on these two points, depending on which witnesses one believes. I write separately only to stress that even if one agrees with the majority that the district court got the fact-finding wrong, we should defer unless the result is clearly erroneous. Of course, deferring to the trial judge's fact-finding happens to produce a result in this case that some of us find surprising, and much of the public likely finds shocking. Scientific knowledge advances quickly and without regard to settled norms and arrangements. It sometimes draws in its wake a reluctant community, unnerved by notions that challenge our views of who we are and how we fit in the universe. The notion that hard-wired aspects of gender may not unerringly and inexorably correspond to physical anatomy is especially unnerving for many.

The solution, I think, is to trust our trial judges to resolve these factual issues when the evidence supports a finding either way. Some will get it wrong; most will get it right. The arc of decision-making, over time, will bend towards the latter. For each instance of error in fact-finding, such as possibly this case itself, $25,000 or so may be lost. But doctors and lawyers will refine their presentations and other trial judges will make their own findings, not bound in any way by the fact-finding in this case.

Instead, by deciding the facts in this case as an appellate court essentially finding law, the majority ends any search for the truth through continued examination of the medical evidence by the trial courts. It locks in an answer that binds all trial courts in the circuit: no prison may be required to provide SRS to a prisoner who suffers from gender dysphoria as long as a prison official calls up Ms. Osborne or Dr. Schmidt.[36] Acknowledging that the majority may well be correct on the facts, I nevertheless decline the invitation to join the majority in embracing the authority to decide the facts. I suspect that our court will devote some effort in the coming years to

distinguishing this case, and eventually reducing it to a one-off reserved only for transgender prisoners.

All Citations

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Footnotes

1 The term “gender identity disorder” has recently been replaced with the term “gender dysphoria” in the medical community. *See* Am. Psychiatric Ass'n, *Gender Dysphoria,* http://www.dsm5.org/documents/gender % 20dysphoria% 20fact% 20sheet.pdf (last visited June 3, 2014). To maintain consistency with prior related litigation and evidence in the record, we continue to use the term “GID” in this opinion.

2 Facial hair removal was delayed because of difficulty finding a provider that was willing to perform these services on Kosilek. The minutes of the DOC's Executive Staff Meetings show that they proactively sought out service providers throughout this period of delay, and electrolysis was completed in November 2004.

3 The Standards of Care are a set of treatment recommendations issued by the Harry Benjamin International Gender Dysphoria Association that provide guidance on the treatment of individuals with GID. Relevant to *Kosilek II* is the sixth version of the Standards of Care. *See* Harry Benjamin Int'l Gender Dysphoria Ass'n, *Standards of Care for Gender Identity Disorders, Sixth Version* (2001) (“Standards of Care”). A seventh version of the Standards of Care was published in 2011, and adopts the Harry Benjamin Association's new name. *See* World Professional Ass'n for Transgender Health (“WPATH”), *Standards of Care for the Health of Transsexual, Transgender, and Gender–Nonconforming People, Version* 7 (2011). The Standards of Care “are intended to provide *flexible directions for the treatment* ” of GID, and state that “[i]ndividual professionals and organized programs may modify” the Standards' requirements in response to “a patient's unique ... situation” or “an experienced professional's evolving [treatment methodology].” Standards of Care at 1–2 (emphasis added).

4 This treatment plan aligns with the Standards of Care's triadic sequence for GID treatment. This sequence begins with diagnosis and the provision of therapy, progresses to endocrine treatments, and culminates with consideration of SRS after at least one full year living a “real life experience” in the preferred gender role. Many individuals with GID choose not to complete the full sequence.

5 Osborne previously worked with the Virginia and Wisconsin Departments of Correction regarding their treatment of prisoners with GID. It is unclear from the record whether the Fenway Center had previously developed treatment plans for GID within a penological setting. When the DOC asked what consideration the Fenway Center gave to issues such as “criminal history [and] violence against women,” the center responded that “independent of other psychological disorders [Fenway experts] don't consider criminal history, homicide, [or] brutality.” On January 5, 2005—before the Fenway Center released its report—the DOC's Director of Health Services “expressed concern” about these omissions.

6 The steps of this sequence, if fully completed, progress from GID diagnosis and therapeutic treatment, through endocrine treatment, and culminate—after at least a one-year-long real-life experience—with the consideration of SRS.

7 Although these cases address the second, subjective prong of the Eighth Amendment analysis, we have recognized that “the subjective deliberate indifference inquiry may overlap with the objective serious medical need determination” and that “similar evidence ... may be relevant to both components.” *Leavitt v. Corr. Med. Servs., Inc.,* 645 F.3d 484, 498 (1st Cir.2011) (internal quotation marks and brackets omitted); *see also* *DesRosiers v. Moran,* 949 F.2d 15, 18–19 (1st Cir.1991). As the adequacy of care is germane both to Kosilek's objective need for surgery and to the DOC's alleged deliberate indifference to that need, the principles of these cases are relevant to both steps of our analysis.

8 Although this case does not involve "an inadvertent failure to provide adequate medical care," *see* *Estelle,* 429 U.S. at 106, 97 S.Ct. 285, that fact alone does not elevate the DOC's choice among alternative treatments to "deliberate indifference" for purposes of the Eighth Amendment analysis.

9 For the sake of clarity, we reiterate that medical imprudence—without more—is insufficient to establish an Eighth Amendment violation. *See* *Estelle,* 429 U.S. at 105–06, 97 S.Ct. 285; *Watson,* 984 F.2d at 540. Instead, a prisoner must satisfy both prongs of the Eighth Amendment inquiry, proving that the level of care provided is "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle,* 429 U.S. at 106, 97 S.Ct. 285.

10 There are obvious reasons for the range of judgments in this area. Although the medical experts disagreed over whether experience in a prison setting could qualify as real-life experience, none of the experts who opined that it could do so appear to have considered the fact that after SRS, Kosilek would most likely be housed in the drastically different setting of a female facility. This distinction was reflected in Dr. Forstein's report, which stated that "[Kosilek's] 'real life experience' leads her to the conclusion that so long as she is in a male prison ... she cannot perceive herself as a true woman." This statement acknowledges that any real-life experience available to Kosilek was shaped by her current, all-male prison environment. Kosilek introduced no evidence to show that her experience there would satisfy the requirement that she have real-life experience in her post-operative housing environment.

11 The district court ignored or minimized significant portions of Dr. Levine's testimony on the theory that the doctor had based his evaluation of medical prudence on the "erroneous assumption[ ]" that Kosilek may not have had a real-life experience in prison and faced no other extrinsic obstacles to surgery. As explained above, in doing so the court improperly supplanted a question of medical opinion—on which experts may differ—with its own decision based on a layman's view, and terming all contrary views imprudent.

12 This holding in no way suggests that correctional administrators wishing to avoid treatment need simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary. We do not establish here a *per se* rule allowing a dissenting medical opinion to carry the day. Rather, our determination is limited to the particular record on appeal, which involves a medical condition that admits of a number of valid treatment options. This fact was testified to by Dr. Levine, recognized by the UMass doctors in their correspondence with the DOC, and corroborated by Dr. Forstein in his written report.

The DOC did not engage in a frenzy of serial consultations aimed at finding the one doctor out of a hundred willing to testify that SRS was not medically necessary. Rather, it made a considered decision to seek out a second opinion from an expert previously considered in its initial selection process. Our opinion rests on the facts presented in this record, and we find merely that the regimen of care provided by the DOC—which includes hormonal treatments as well as feminine products, clothing, and hair removal, and which has successfully alleviated the severity of a prisoner's distress—is not sufficiently harmful to Kosilek to constitute an Eighth Amendment violation.

13 Although the DOC has not specifically argued that the conflicting medical opinions preclude a finding of subjective deliberate indifference, we do not find this argument waived. As we have explained above, the subjective and objective analyses overlap. *See supra* note 7; *see also* *Leavitt,* 645 F.3d at 498. The DOC's contention that the district court erred in deeming SRS medically necessary and in rejecting Dr. Schmidt's approach as imprudent necessarily entails the DOC's subjective belief that SRS was unnecessary. The contrary position—*i.e.,* that SRS is not objectively necessary but that the DOC did not disagree as to the need for SRS—would be wholly illogical.

14 If the prison itself should have been aware that some of the medical advice it was receiving was imprudent—that is, if any layperson could have realized that the advice was imprudent—then the decision to still follow that advice may qualify as deliberate indifference. *See* *Farmer,* 511 U.S. at 846 n. 9, 114 S.Ct. 1970 ("If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness...."); *Hadix v.*

Johnson, 367 F.3d 513, 526 (6th Cir.2004) ("If [the challenged prison conditions] are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong because the same information that would lead to the court's conclusion was available to the prison officials."). The facts of this case, however, are highly distinct from such a scenario.

Nor did the district court's conclusion render the DOC's continued refusal to provide SRS deliberately indifferent. On the contrary, the evidence was conflicting as to the medical need for SRS. The choice between reasonable medical views was not for the district court to make, and the DOC remained entitled to reasonably rely on Schmidt's and Osborne's expert opinions. Moreover, even assuming arguendo that the DOC was on notice that its treatment was insufficient, the DOC's continued refusal also rested on valid security concerns, discussed below, such that its actions did not amount to deliberate indifference in any event.

15 These concerns were obvious to more than just those individuals within the DOC with significant penological experience. The likelihood that issues surrounding secure housing would arise after SRS was also acknowledged by Kosilek's treating psychologist, Mark Burrows, and by the Fenway Center doctors in their initial report.

16 Great weight was placed on the fact that Dennehy told a reporter that there were significant security concerns about post-operative housing three days before she met with Superintendents Spencer and Bissonnette. The record reveals, however, that discussions about housing had previously occurred at Executive Staff Meetings, and Dennehy testified that she had conducted phone calls with both Superintendents prior to meeting to formalize their security report. This timeline, therefore, is far from sufficient to establish that the DOC's security assessments were unprincipled or invalid.

17 That the DOC may have, in the district court's assessment, engaged in a pattern of prevarication regarding whether they understood that SRS was being recommended by UMass as medically necessary, does not undercut the consistency with which they identified safety and security concerns—concerns which are within their expert province—that would arise from the surgery.

18 Kosilek did cross-examine Commissioner Clarke to show that a transgendered prisoner had safely been housed in a Washington State prison under his supervision. Left unexplored, however, were the numerous ways in which MCI–Norfolk's environment, facilities, or population might be distinct from this prison in Washington. Neither was there a comparison between that prisoner's criminal history and the criminal history of Kosilek. That an individual was housed safely by Commissioner Clarke while employed in another state does not rebut Superintendent Bissonnette's testimony that moving her to MCI–Framingham would cause climate problems in that particular prison. *See Feeley v. Sampson,* 570 F.2d 364, 371 (1st Cir.1978) (rejecting uniform housing conditions for detainees, without regard to their disparate criminal history, because "Constitutional rights cannot be defined in terms of literal comparisons of this nature").

19 We further note that the DOC has not defended this case based on cost considerations relating to the provision of SRS.

20 The majority's decision to give little deference to the district court is undoubtedly a boon to the DOC, and given the DOC's garbled treatment of the standard of review issue on appeal, it is a downright windfall. In violation of our rules, the DOC did not include a standard of review in its opening brief. *See* Fed. R.App. P. 28(a)(8)(B). In its reply brief, the DOC gave us a bit more, arguing that the appropriateness of medical care called for de novo review but neglecting to indicate what scrutiny a deliberate indifference finding necessitated. In its petition for en banc review, the DOC's position continued to evolve. It contended that a heightened standard of review should be applied because this case involves intertwined issues of law and fact.

21 The majority also relies on *United States v. Bajakajian,* 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), an Eighth Amendment excessive punishment and fines case, for the same proposition it cites *Ornelas* for. Specifically, the majority states that in *Bajakajian,* the Supreme Court reasoned that the " 'application of a constitutional standard to the facts of a particular case' ... may appropriately require *de novo* appellate review to ensure consistency in the law's development." *Bajakajian* does not say this. The Court there did not address the concept of consistency of the law; it simply cited *Ornelas* for the narrower proposition that

de novo review attaches to the issue of whether a fine is constitutionally excessive. *See* *id.* at 336, n. 10, 118 S.Ct. 2028. For that reason I focus on *Ornelas.*

22 Indeed the majority dedicates over thirty pages of its opinion to the factual and procedural background in this case. This is not surprising; those facts are integral to the resolution of the constitutional question. What is surprising is the majority's failure to see the significance of the factually concentrated nature of this case.

23 Plus, even assuming that the conclusion that the DOC's refusal to provide care constituted an Eighth Amendment violation lands closer to the law side of the mixed-question spectrum, a measure of deference is still appropriate. *See* *Battista v. Clarke,* 645 F.3d 449, 454 (1st Cir.2011) ("The legal labels applied to facts are reviewed on appeal more closely than a district court fact-finding, but often with some deference to the district judge.").

24 Of course the majority then goes on to explain why the court's adverse credibility determination does not matter, a point I will get into later.

25 The Standards state: "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." Standards of Care, Version 6, at 2.

26 The majority makes much of the district judge faulting Dr. Schmidt for not writing letters of recommendation for patients seeking sex reassignment surgery, suggesting that the judge did not appreciate the nuance between opening the door for surgery and advocating for it. I suspect the judge was more broadly concerned with the fact that Dr. Schmidt did not think sex reassignment was ever medically necessary, nor had he ever seen a case where it was warranted. And despite having this strident perspective, Dr. Schmidt nonetheless opened the door for patients to undergo this major medical procedure.

27 The majority mentions that none of the experts who opined that Kosilek completed a real-life experience considered that she might be housed in a female facility post-surgery. This is hardly surprising as this is a theory of my colleagues' own making. The DOC never made any argument that a potential post-surgery housing change rendered Kosilek unable to complete the real-life experience, nor did any provider opine that it was even a consideration.

28 The Seventh Version of the Standards of Care came out in 2011. Notably it contains a new section devoted to scenarios where persons with gender identity disorder are living in institutional environments such as prisons or long-term care facilities. Standards of Care, Version 7, at 67. It provides that those individuals' health care "should mirror that which would be available to them if they were living in a non-institutional setting" and that "[a]ll elements of assessment and treatment as described in the [Standards of Care] can be provided to people living in institutions." *Id.*

29 Court-appointed expert, Dr. Stephen Levine, ultimately testified that from a purely medical perspective (absent considerations relative to the prison environment), a prudent professional would not deny Kosilek sex reassignment surgery. However, Dr. Levine initially opined that Dr. Schmidt's view was reasonable (if not popular), a discrepancy that apparently arose from Dr. Levine disregarding the district court's order to treat Kosilek as a patient in free society. Considering this incongruity, I do not list Dr. Levine as one of Dr. Schmidt's critics.

30 The court found Kosilek testified credibly that although hormone treatments had helped, she was distressed by her male genitalia and believed that she needed surgery. Antidepressants and psychotherapy, according to Kosilek, would not alter the fact that she did not want to continue living with her male genitalia.

31 When the DOC first informed the district court that it would not be providing Kosilek with surgery (back in June 2005 under Dennehy's watch), Dr. Schmidt had not even evaluated Kosilek let alone communicated his findings. At the time, the DOC was only armed with the report of Cynthia Osborne who had not met with Kosilek but rather had simply peer reviewed the Fenway Report.

32 The pattern in *Battista*—a case in which a transgender inmate sued the Massachusetts DOC for failing to provide doctor-recommended hormones—included an initial failure to take the inmate's diagnosis and hormone request seriously, the years it took for a solid security justification to be made, and the DOC's claim

that withholding hormones or placing the inmate in severely constraining protective custody were the only two options. In other words, there are some marked similarities between that case and this one. That is, apart from their outcomes. In *Battista,* this court affirmed the district court's deliberate indifference determination.

33 While a defendant's attitudes and conduct at the time a decision is rendered are relevant, what motivates the DOC today is not. This fact may be less than clear given the majority's reference to the DOC's present stance ("proof that the DOC remains motivated by pretextual or improper concerns") and the fact that Dennehy is now seven years removed from the decision-making process. To be clear, we are reviewing the district court's decision that the DOC, through Dennehy and Clarke, denied Kosilek surgery based on pretextual reasons. Indeed it would be an amazing feat of prescience for the district court to anticipate what the DOC's viewpoint would be two years after penning its decision.

34 None of these witnesses face challenge on the grounds that their opinions are outside the bounds of accepted science. *See* *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589–90, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

35 In the majority's words, "whether SRS is a medically necessary component of Kosilek's care, such that any course of treatment not including surgery is constitutionally inadequate." Op. at 86.

36 No prisoner is likely to have a more favorable record than Kosilek.

995 F.2d 1526
United States Court of Appeals,
Eleventh Circuit.

Anthony LaMARCA, Martin Saunders and Edwin Johnson, individually and on behalf of all others similarly situated, and David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon and Billy Joe Harper, individually, Plaintiffs–Appellees,
v.
R.V. TURNER, individually in his former capacity as Superintendent of Glades Correctional Institution, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution, Defendants–Appellants.

No. 90–5909.
|
July 7, 1993.

Synopsis
Present and former prison inmates brought civil rights action against prison officials. The United States District Court for the Southern District of Florida, No. 82–8196–CIV-JCP, James C. Paine, J., adopted report of magistrate and awarded damages, 662 F.Supp. 647, and then granted injunctive relief, and prison officials appealed. The Court of Appeals dismissed, 861 F.2d 724, and the District Court granted injunctive relief and prison officials appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) evidence sustained finding of constitutional violation due to failure to provide security; (2) court applied wrong test in finding liability; (3) prison official had not waived right to jury trial with respect to third amended complaint which added additional inmates with additional claims; (4) grant of injunctive relief was proper; but (5) portions of injunctive relief unnecessarily interfered with operation of prison.

Vacated in part, affirmed in part and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (36)

[1] **Sentencing and Punishment** Conditions of Confinement

To prevail on Eighth Amendment claim for damages in civil rights action, plaintiff must prove a condition of confinement that inflicted unnecessary pain or suffering, defendant's deliberate indifference to that condition, and causation. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

197 Cases that cite this headnote

[2] **Civil Rights** Use of force; protection from violence

Finding of infliction of unnecessary pain or suffering on inmates was supported in civil rights action by evidence of unjustified, constant, and unreasonable exposure to violence and sexual assaults. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

9 Cases that cite this headnote

[3] **Sentencing and Punishment** Deliberate indifference in general

In order to be deliberately indifferent, prison official must knowingly or recklessly disregard inmate's basic needs, so that knowledge can be inferred. U.S.C.A. Const.Amend. 8.

75 Cases that cite this headnote

[4] **Sentencing and Punishment** Deliberate indifference in general

Inmate seeking to recover for violation of Eighth Amendment in civil rights action must prove that official possessed both knowledge of the infirm condition and of means to cure that condition; if prison official attempts to remedy constitutionally deficient prison condition but fails in that endeavor, he cannot be deliberately indifferent unless he knows of but disregards

appropriate and sufficient alternative. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

95 Cases that cite this headnote

[5] **Sentencing and Punishment** Deliberate indifference in general

Requisite intent for deliberate indifference to inmate's needs is unlike the intent for demonstrating legislature's discriminatory intent under equal protection jurisprudence. U.S.C.A. Const.Amends. 8, 14.

[6] **Prisons** Care, Custody, Confinement, and Control

Sentencing and Punishment Deliberate indifference in general

State and its officials could be deliberately indifferent to inmate's needs if it acts in spite of impermissible conditions, unless the actions are justified by countervailing penological objectives. U.S.C.A. Const.Amends. 8, 14.

9 Cases that cite this headnote

[7] **Civil Rights** Criminal law enforcement; prisons

Evidence in civil rights action of incident reports, internal staff reports, and reports by external investigators supported finding that superintendent of correctional facility knew that unreasonable risk of violence existed and knew of alternative means that would have brought that risk to within constitutional norms. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[8] **Prisons** Care, Custody, Confinement, and Control

Mere knowledge by superintendent of infirm conditions existing in prison does not establish deliberate indifference; it must also be demonstrated that, with knowledge of infirm conditions, superintendent knowingly or recklessly declined to take actions that would have improved conditions. U.S.C.A. Const.Amend. 8.

52 Cases that cite this headnote

[9] **Sentencing and Punishment** Protection from violence

Where lack of funds contributes to conditions at prison, inmates asserting Eighth Amendment violation based on assaults must demonstrate that particular official had the capability, including the authority and means, to provide adequate security and did not do so. U.S.C.A. Const.Amend. 8.

10 Cases that cite this headnote

[10] **Civil Rights** Criminal law enforcement; prisons

Finding that prison superintendent had the capacity to improve prison safety, so that his failure to do so could be found to have violated Eighth Amendment rights of inmates, was supported by evidence that he could have minimized improper and inadequate staffing, failure to control illegal activities, inadequate supervision, lack of controls in dormitories, lack of investigation of incidents of alleged rapes, lack of controls on inmate movement within the facility, and failure to transfer assailants out of the facility. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[11] **Civil Rights** Prisons

Civil rights statute focuses court's inquiry in action based on Eighth Amendment violation on whether official's acts or omissions were cause, not merely contributing factor, of constitutionally infirm condition. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

28 Cases that cite this headnote

[12] **Civil Rights** Criminal law enforcement; prisons

Doctrine of respondeat superior does not apply to civil rights action against prison official for Eighth Amendment violation, but whether superintendent actually controls or fails to properly supervise a subordinate may be a relevant inquiry. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

69 Cases that cite this headnote

[13] **Civil Rights** Prisons

If civil rights plaintiff establishes causal link between prison official's acts or omissions and infirm condition at the prison, the official is precluded from contending that the unconstitutional condition was not at least a proximate cause of injuries that arose from the condition. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

20 Cases that cite this headnote

[14] **Civil Rights** Criminal law enforcement; prisons

Evidence that prison superintendent had means to improve safety at prison supported finding that he knew that actions which he undertook would be insufficient to provide inmates with reasonable protection from violence, thus providing causal link between the superintendent and the infirm conditions and between the unconstitutional conditions and injuries suffered by inmates as result of violence inflicted by other inmates. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

18 Cases that cite this headnote

[15] **Civil Rights** Prisons

It was error to apply standard of whether prison official knew or should have known that his actions infringe clearly established constitutional right of inmates when considering civil rights action based on claim of Eighth Amendment violation. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[16] **Civil Rights** Prisons

It was error to inquire in civil rights action based on Eighth Amendment violations into prison superintendent's knowledge during the "relevant time period of Plaintiffs' damage claims," rather than making a directed inquiry into the superintendent's knowledge at the time of each incident of which the inmates complained. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[17] **Civil Rights** Prisons

Merely showing that prison official had means to correct constitutional infirmity will not suffice to show causation required to recover for violation of civil rights. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[18] **Civil Rights** Criminal law enforcement; prisons

In order for prison inmates to demonstrate requisite causal nexus between prison superintendent's actions and injuries resulting from constitutional violations, they must show that prison superintendent had the means to correct alleged constitutional infirmities and that he at least recklessly disregarded the inadequacy of the approach which he took, the availability of other approaches, and the capacity to provide a cure. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

64 Cases that cite this headnote

[19] **Civil Rights** Use of force; protection from violence

Court's inquiry into causation in civil rights action brought against prison superintendent based on alleged Eighth Amendment violations

should have been circumscribed by the knowledge which the superintendent possessed concerning inadequacy of measures which he was taking at the time of each alleged assault for which inmate sought recovery, especially where conditions were slowly but continuously improving during superintendent's tenure. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[20] **Injunction** Prisons and Prisoners

Events subsequent to filing of complaint for injunctive relief against prison conditions, such as improvements in allegedly infirm conditions of confinement, while potentially relevant, are not determinative of propriety of injunctive relief.

3 Cases that cite this headnote

[21] **Civil Rights** Criminal law enforcement; prisons

Substitution of new prison superintendent as named defendant did not bar injunctive relief against unconstitutional conditions of confinement.

3 Cases that cite this headnote

[22] **Civil Rights** Criminal law enforcement; prisons

Absent existing constitutional violation in prison's security, court's power to grant equitable relief is limited to ensuring that prison continues to provide inmates with adequate protection.

5 Cases that cite this headnote

[23] **Civil Rights** Criminal law enforcement; prisons

Court hearing claim of Eighth Amendment violations brought by prison inmates had authority to order superintendent to maintain security policies, including that dorms and confinement areas be regularly patrolled and that patrols have clear views of relevant areas, the use and maintenance of metal detectors, regular shakedowns, disciplining of prisoners found in possession of contraband, but provision requiring that superintendent discipline his guards, detailing the type of sanctions and the conditions under which they should be employed, unnecessarily intruded on the prison's operations. U.S.C.A. Const.Amend. 8.

11 Cases that cite this headnote

[24] **Civil Rights** Criminal law enforcement; prisons

Where court hearing civil rights claim determined that conditions in protective confinement were punitive in nature originally but that, by the time of trial, that was no longer the case, court should have limited its injunctive relief to insuring that conditions continued to conform with Eighth Amendment standards and should not have fine tuned the existing conditions by eliminating double bunking, precluding stays in protective confinement in excess of 30 days, requiring transfer of inmates in protective confinement who could not be returned to general prison population, and ensuring that lighting in protective confinement conformed to certain standards. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

[25] **Sentencing and Punishment** Segregated or solitary confinement

Whether individually or taken together, double bunking, protective confinement stays in excess of 30 days, protective confinement for inmates who cannot be returned to general prison population, and lighting in protective confinement which does not conform to certain prison standards do not constitute cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[26] **Civil Rights** Criminal law enforcement; prisons

Court which found violation of Eighth Amendment in prison conditions which lacked security to prevent assaults on inmates properly

enjoined prison official to provide training to all prison guards in the handling of rape complaints, to require special training for staff psychiatrist and staff psychologist, and to promulgate official referral procedure for rape victims. U.S.C.A. Const.Amend. 8.

6 Cases that cite this headnote

[27] **Federal Courts** Jury

Court's denial of jury trial is reviewed with the most exacting scrutiny. U.S.C.A. Const.Amend. 7.

2 Cases that cite this headnote

[28] **Federal Courts** Jury

Unless error in denial of jury trial is harmless, court must reverse judgment founded upon unconstitutional denial of jury trial. U.S.C.A. Const.Amend. 7.

4 Cases that cite this headnote

[29] **Jury** Time for making demand

Party may waive right to jury trial by failing to make timely demand. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 38, 28 U.S.C.A.

29 Cases that cite this headnote

[30] **Jury** Time for making demand

Waiver of jury trial by failure to make timely demand applies only to issues raised by the pleading, and subsequent amendment to the pleadings may raise new issues to which the right to jury will remain. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 38, 28 U.S.C.A.

18 Cases that cite this headnote

[31] **Jury** Time for making demand

Jury Operation and effect of waiver

Where each new inmate added as plaintiff in civil rights action against prison official asserted individual claim for damages arising from separate assault at the prison, and where some of the assaults had not occurred at the time that prison official waived jury trial by failure to make a timely demand with respect to the initial complaint, waiver resulting from the failure to make a timely demand in response to the initial complaint did not apply to the amended complaints. Fed.Rules Civ.Proc.Rule 38, 28 U.S.C.A.

20 Cases that cite this headnote

[32] **Jury** Time for making demand

Jury Operation and effect of waiver

Assertion of right to jury trial in response to third amended complaint which added additional plaintiffs complaining of additional incidents did not affect defendant's waiver of right to jury trial with respect to claims made by initial plaintiffs in initial complaint. Fed.Rules Civ.Proc.Rule 38, 28 U.S.C.A.

37 Cases that cite this headnote

[33] **Federal Courts** Continuance and stay

Federal Courts Depositions and discovery

Federal Courts Trial

Refusal to continue trial, refusal following trial to consider depositions taken during and shortly after trial, and refusal to reopen record of trial are reviewed for abuse of discretion.

[34] **Federal Civil Procedure** Amendments and change of parties

Grant of continuance from November 4 to December 2 when amended complaint was filed adding seven additional plaintiffs to the original three was not an abuse of discretion and defendants were not entitled to additional time.

3 Cases that cite this headnote

[35] **Federal Civil Procedure** Waiver of objections

Defendant waived objection to trial date by agreeing to magistrate's statement that he would allow defendants to take discovery depositions

during and after trial with the understanding that they could be made part of the trial record at a later date.

[36] **Federal Civil Procedure** Reopening case for further evidence

Federal Courts Powers, Duties, and Proceedings of Lower Court After Remand

District court had authority to reopen record and consider new evidence when appeal was dismissed and case was returned, at least until the time that it entered final judgment. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.Fla., Magistrate Judge Rule 4(b).

3 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Florida.

***1530** Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS [*] , Senior Circuit Judge.

Opinion

TJOFLAT, Chief Judge:

This is a suit brought by ten present and former inmates of Glades Correctional Institution (GCI), a Florida prison. They seek individually, under 42 U.S.C. § 1983 (1988), money damages for cruel and unusual punishment they allege they suffered because of the deliberate indifference of a former superintendent of the institution, Randall Turner. The plaintiffs still housed at GCI also seek an injunction, on behalf of all present and future inmates at the prison, against the current superintendent, Chester Lambdin, to correct certain allegedly unconstitutional conditions of confinement.

After the parties joined issue (on the plaintiffs' third amended complaint), the district court, having denied Turner's demand for a jury trial, tried the ten damages claims and entered judgment for eight of them. [1] Turner appealed, but we dismissed the appeal for want of a final judgment as the district court had not disposed of the still pending claim for injunctive relief. *LaMarca v. Turner,* 861 F.2d 724 (11th Cir.1988) (Table) (the first appeal). After our order dismissing the appeal reached the district court, Turner moved the court to reopen the record on the plaintiffs' damages claims so that he could introduce some additional evidence on the issue of liability. The court, concluding that it lacked jurisdiction to revisit those claims, denied the motion. The court then turned to the claim for injunctive relief.

After hearing five days of testimony relating to the current conditions of confinement, the court identified several areas of concern that "require[d its] attention." Although the challenged prison conditions had improved considerably, the court concluded that injunctive relief was necessary. The court's final judgment therefore granted injunctive relief and the money damages previously awarded, along with attorney's fees under 42 U.S.C. § 1988 (1988). The instant appeal is from that final judgment. Turner appeals the damages awards; Lambdin appeals the injunction.

We now vacate all of the damages awards and remand them for further proceedings. We do so as to five of the appellees because the court should have honored Turner's demand for a jury trial. As to the three remaining appellees, the court applied the wrong legal standard for Eighth Amendment damages liability and, moreover, erred in concluding that it lacked jurisdiction (following dismissal of the first appeal) to reopen the record and entertain the evidence Turner proffered in defense of the damages claims. Finally, we vacate in part the injunction against Lambdin and remand the matter of equitable relief for further proceedings.

Part I of this opinion outlines the case's procedural history and describes the facts underlying the damages claims and the claim for injunctive relief. Part II rejects Turner's argument that the plaintiffs failed to present sufficient evidence to prevail, but holds that the district court applied the wrong legal standard for Eighth Amendment liability for money damages. Part III addresses the district court's

grant of injunctive relief. Part IV considers Turner's Seventh Amendment jury demand. Finally, part V reviews Turner's attacks on the trial court's treatment of his motions to continue and to augment the trial record.

I.

A.

On May 14, 1982, Anthony LaMarca, then an inmate at GCI, filed a handwritten *pro se* complaint in the district court stating that he had "been countlessly approached, threatened with physical violence and assaulted by other inmates at [GCI] because [he] refused to participate in homosexual activities, or pay ***1531** protection to be left alone."[2] He alleged that "a severe lack of protection" existed at GCI and that "the institution seem[ed] unable or unwilling to handle the situation." On September 21, 1983, LaMarca, having obtained counsel, filed an amended complaint adding three other GCI prisoners as plaintiffs, Martin Saunders, Edwin Johnson, and Henry Rosenbaum.[3] Each prisoner sought damages under 42 U.S.C. § 1983, and, as class representatives, "injunctive relief for all ... present and future inmates of GCI."[4] On November 2, 1983, the defendants, Turner and Lambdin, filed their answer to the first amended complaint.[5]

On August 26, 1985, more than a year and a half after the defendants answered the first amended complaint, the plaintiffs moved the court to amend the complaint a second time, adding seven plaintiffs, David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon, and Keith Harris. Each alleged that he was assaulted while an inmate at GCI, and sought damages against Turner under 42 U.S.C. § 1983.

The defendants objected to the joinder of these additional plaintiffs, claiming that the joinder would unreasonably burden their preparation for trial which was then set for November 4, 1985. Nevertheless, the magistrate judge who was to hear the case granted plaintiffs' motion to amend.[6] The defendants immediately requested a continuance of the trial, arguing that in light of the presence of the seven new plaintiffs, they required at least ninety days for additional discovery and trial preparation. The magistrate judge granted the defendants a one-month continuance, resetting the trial for December 2, 1985. On November 8, 1985, the defendants filed a demand for jury trial "of all issues so triable."[7]

On November 13, 1985, Turner and Lambdin requested another continuance, claiming that they could not complete discovery and prepare for trial by the December 2 trial date. Two days later, before the court could act on the motion, the plaintiffs moved the court for leave to file a third amended complaint, adding another plaintiff, Billy Joe Harper, who sought damages against Turner, and dropping Harris from the suit. The court referred both motions to the magistrate judge. On November 28, the magistrate judge gave the plaintiffs leave to amend, but refused to grant the defendants a continuance or a jury trial. The defendants, pursuant to S.D.Fla.Mag.J.R. 4(a), immediately appealed the magistrate judge's rulings to the district court. On December 2, the court affirmed these rulings and the trial began.

To summarize, on December 2, the case proceeded to trial on the allegations of the third amended complaint. This complaint stated section 1983 claims for damages ***1532** against Turner, individually, by LaMarca, Saunders, and Johnson (the original plaintiffs), and Aldred, Bronson, Cobb, Durrance, Epprecht, Gordon, and Harper (the new plaintiffs). The original plaintiffs also served as representatives for purposes of the class action claim for injunctive relief against Lambdin in his official capacity as superintendent of GCI.

B.

The magistrate judge, operating under S.D.Fla.Mag.J.R. 1(f), commenced the bench trial. At the plaintiffs' request, the magistrate judge bifurcated the proceeding, indefinitely postponing consideration of the claim for injunctive relief. The trial, therefore, considered only the damages claims against Turner. The following is a brief statement of the facts the court found.[8]

The inmate assaults complained of occurred between 1981 and 1984, during Turner's tenure as superintendent. GCI had four dorms ("A", "B", "C", "D").[9] The A and D dorms each had two wings containing three rows of twenty bunk beds. The B and C dorms were smaller, but also had bunk beds arranged in three rows. Each dorm had a shower, located at one end of the building, and a "wicket," or cage, located in the center of the dorm, that provided officers with a vantage point from which to observe the inmates. A guard's view from

the wicket into the interior of the dorm and the shower area was obstructed by sheets and towels the inmates hung from their bunk beds, the placement of bunk beds next to the isles leading to the shower area, and opaque glass on the shower door. While officers were supposed to patrol the interiors of the dorms regularly, they did not.

The prison also maintained cells for disciplinary, administrative, and protective confinements. This special detention suffered from substandard conditions. The cells lacked adequate ventilation, had poor lighting, and were infested with roaches and vermin. Prisoners were allowed little or no exercise, only three showers a week, no canteen privileges, and only limited use of the law library. Inmates in the general population could gain access to the confinement area by crawling under a poorly maintained fence or with the permission of the guard in charge of the area. These confinements, therefore, failed to insulate inmates from their tormentors. Finally, an inordinate number of inmates requested protective confinement, leading to overcrowding and indicating that a serious problem existed in the general population. The court found that the conditions in protective confinement were substandard, and therefore discouraged inmates from remaining in this potential safe-haven.

Turner, in a July 16, 1981 letter to his superior, described the prevailing atmosphere at GCI: "On an almost daily basis I feel that our security staff is simply being tolerated by the inmate population rather than being in control of the operation of the institution." *LaMarca,* 662 F.Supp. at 673. The presence of contraband (weapons, alcohol, and drugs), corruption of GCI's staff, inmate violence, and homosexual activity were accepted as part of prison life.

While a minimal level of contraband may be an unavoidable aspect of prison life, excessive quantities of contraband flowed freely into and within the prison. Prison officials made "little or no effort ... to control illicit activity at GCI, resulting in readily-available contraband." *Id.* at 657. Inmates carried knives and openly used drugs. The contraband problem was compounded by staff corruption, as prison officials contributed to, and apparently profited from, the contraband, and utilized prisoners to "control" and punish other prisoners.

***1533** GCI's staff permitted regular, unsupervised showings of hard-core pornographic movies. As Dr. Swanson, an expert witness for the plaintiffs, testified, these movies "would only serve to maximize the possibility of sexual and other violence." Indicative of this observation, during the movies, "[s]ounds of inmates screaming and crying could be heard."

When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems "like men," that is, use physical force against the aggressive inmate. [10]

Several management problems persisted during Turner's tenure as superintendent: low morale among the prison's staff, high employee turnover (leading to a less experienced staff), high vacancy rates for staff positions, and inadequate supervision of employees. [11] As Turner confirmed, these problems had a direct effect on GCI's ability to maintain security. Certain of the prison's standard operating procedures were insufficient to protect prisoner safety. For example, the procedures for investigating rapes, to the extent such procedures existed, were not followed; some of the reported incidents were not investigated at all. The lack of such procedures created an atmosphere of tolerance of rape which enhanced the risk that incidents would occur. *Id.* at 678 (finding an atmosphere where "inmates could rape other vulnerable inmates without concern of being detected or deterred").

Aggression was commonplace and exacerbated by the readily available contraband and an excessively permissive atmosphere. While underfunding, overcrowding, and a lack of security personnel no doubt contributed to these problems, Turner could have controlled the permissive atmosphere through proper supervision and could have remedied the contraband problems with inexpensive modifications to the prison's procedures and physical plant. In sum, as the court concluded, "Turner's overall laxity in managing and controlling his staff" directly contributed to an unconstitutional condition of confinement at GCI consisting of an undeterred atmosphere of violence. *Id.* at 662, 684.

For purposes of this appeal, the appellants concede the credibility of the plaintiffs' accounts of the alleged assaults. A group of inmates, one brandishing a bush ax, made an unsuccessful attempt sexually to assault LaMarca in a dorm. Inmates raped Saunders in a small bathroom adjacent to the confinement area; he reported the incident but officials did not investigate and refused his request for a medical examination. Inmates repeatedly attacked Johnson while he was in protective confinement. Inmates raped Aldred and

Durrance in shower areas. Aldred reported the incident to an officer, but there was no investigation. Bronson was sexually assaulted with the handle of a baseball bat on GCI's recreation field. Cobb was stabbed by an inmate who, because of his cooperation with guards in conducting illicit activities, was protected.

C.

On January 8, 1986, after the parties had filed proposed findings of fact and conclusions of law, and had argued them before the magistrate judge, the magistrate judge issued a 135–page "Report and Recommendation" recommending a specific damages award for each of the ten plaintiffs. The district court reviewed the magistrate judge's report *de novo, see* Federal Magistrate's Act, 28 U.S.C. § 636(b)(1) (1988); S.D.Fla.Magis.J.R. ***1534** 4(b), and adopted his recommendations in all relevant detail as to eight of the plaintiffs. [12] The court entered judgment accordingly on June 4, 1987. [13]

As noted earlier, although the district court had neither addressed nor disposed of the claim for injunctive relief, Turner appealed to this court. We dismissed the appeal for want of a final judgment and returned the case to the district court for further proceedings on that claim.

D.

On the first day of trial before the district court on the claim for injunctive relief, David M. Lipman, counsel for the inmate class, conceded that the atmosphere at GCI had changed "in such a manner that as to [many] conditions and practices, [the class] no longer [sought] injunctive relief." [14] Although the district court observed that Superintendent Lambdin "appears to be a dedicated public servant," and that physical conditions at GCI were "generally satisfactory," the court found "ample room for improvement in the conditions at GCI." In the court's view, the superintendent and his staff still did not take the threat of inmate violence seriously enough. In particular, they failed to ensure that GCI's policies designed to protect prisoners, including regular security patrols, were properly carried out. Finally, the court concluded that GCI's failure to make adequate psychological counseling available to rape victims constituted cruel and unusual punishment because it constituted deliberate indifference to a serious medical need. [15] *See generally* *Estelle v. Gamble,* 429 U.S. 97, S.Ct. 285, 50 L.Ed.2d 251 (1976).

Concluding that Lambdin had not shown that "the wrongs of the past could not reasonably be expected to recur," the court ordered injunctive relief. On October 6, 1990, the court entered a final judgment (1) providing such relief, (2) incorporating by reference the judgment it had entered on June 4, 1987, which awarded eight of the plaintiffs money damages against Turner, and (3) awarding the plaintiffs attorney's fees.

II.

Turner challenges the court's determination that he was deliberately indifferent to the plaintiffs' safety in violation of the Eighth Amendment and 42 U.S.C. § 1983. He asserts that the plaintiffs failed to make out a case of liability against him—in particular, he claims that the evidence does not support the district court's findings of fact—and that the court applied the wrong legal standard in determining liability. We conclude that although the record contains sufficient evidence upon which the district court could find liability, the court failed to make certain essential findings of fact and erred in its legal analysis. Consequently, we return this case to the district court for further consideration.

In subpart A, we review the elements necessary to establish Turner's liability for money damages under section 1983 and the sufficiency of the evidence presented as to each element. We review the evidence presented at trial in the light most favorable to the plaintiffs. *Whitley v. Albers,* 475 U.S. 312, 322, 106 S.Ct. 1078, 1085, 89 L.Ed.2d 251 (1986). Because we conclude that the evidence was sufficient as to each element, in subpart B we address Turner's specific challenges ***1535** to the legal standard the district court employed. As discussed in part IV, Turner was entitled to a jury trial as to the new plaintiffs' claims; we, therefore, only review these challenges in the context of the original plaintiffs' claims.

A.

The plaintiffs claim that Turner failed to provide them with reasonable protection from prison violence in violation of

the Eighth Amendment. The plaintiffs do not argue that Turner knew of specific threats to their safety. Rather, they argue that Turner failed to ensure their protection from the general danger arising from a prison environment that both stimulated and condoned violence. This theory of liability creates substantial, but, as we shall see, not insurmountable obstacles to the plaintiffs' claims.

[1] To prevail on their Eighth Amendment claim for damages brought under section 1983, the plaintiffs must prove three elements: [16] (1) a condition of confinement that inflicted unnecessary pain or suffering, *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981), (2) the defendant's "deliberate indifference" to that condition, *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991), and (3) causation, *Williams v. Bennett,* 689 F.2d 1370, 1389–90 (11th Cir.1982). [17] For our purposes, the Eighth Amendment defines the contours of the first two elements and section 1983 delimits the third.

1.

[2] First, the condition must have inflicted unnecessary pain or suffering upon the prisoner. This objective standard "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...,' " but must be balanced against competing penological goals. *Gamble,* 429 U.S. at 102, 97 S.Ct. at 290 (quoting *Jackson v. Bishop,* 404 F.2d 571, 579 (8th Cir.1968)). The evidence presented at trial of an unjustified constant and unreasonable exposure to violence at GCI, as described in part I.B., clearly satisfies this standard. *Zatler v. Wainwright,* 802 F.2d 397, 400 (11th Cir.1986); *Williams,* 689 F.2d at 1376; *see Wilson,* 501 U.S. at ——, 111 S.Ct. at 2326–27; *Jones v. Diamond,* 636 F.2d 1364, 1374 (5th Cir.) ("When prison officials have failed to control or separate prisoners who endanger the physical safety of other prisoners and the level of violence has become so high ... it constitutes cruel and unusual punishment...."), *cert. dismissed,* 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), and *overruled on other grounds by International Woodworkers of Am. v. Champion Intern. Corp.,* 790 F.2d 1174 (5th Cir.1986); [18] *Gates v. Collier,* 501 F.2d 1291, 1308–10 (5th Cir.1974).

2.

Second, the plaintiffs must show the defendant's deliberate indifference to the conditions. The Supreme Court recently held that the Eighth Amendment contains a subjective component: whether the defendant wantonly permitted the constitutionally infirm condition to persist. *Wilson,* 501 U.S. at ——, 111 S.Ct. at 2323; *see also Gamble,* 429 U.S. at 104, 97 S.Ct. at 291. In prison condition cases, "deliberate indifference" constitutes wantonness. *Wilson,* 501 U.S. at ——, 111 S.Ct. at 2327.

[3] **[4]** **[5]** **[6]** To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs so that knowledge can be inferred. *Duckworth v. Franzen,* 780 F.2d 645, 652 (7th Cir.1985), *cert. denied,* 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986). Because the Eighth Amendment requires a subjective standard, ***1536** to demonstrate an official's deliberate indifference, a plaintiff must prove that the official possessed knowledge both of the infirm condition and of the means to cure that condition, "so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth,* 780 F.2d at 653. Thus, if an official attempts to remedy a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative. [19]

[7] In this case, the plaintiffs presented incident reports, internal staff reports, and reports by external investigators each supporting a finding that Turner knew that an unreasonable risk of violence existed at GCI and knew of alternative means that would have brought that risk to within constitutional norms. [20] For example, a January 30, 1980 Palm Beach County Grand Jury Presentment identified evidence of "lax security precautions," and recommended procedural changes in light of "accusations of drugs, alcohol, and other contraband, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI." Similarly, an external management review of GCI conducted from August 26 to 29, 1980, concluded that "[t]he assault trend,

both inmate on inmate and inmate on staff, from July 1979, through June 1980, has increased." Finally, Turner's July 16, 1981 letter to his superiors evidenced his knowledge of a lack of

> control of the operation of the institution.... Many of the officers that we have assigned to very sensitive security posts are so inexperienced or else have so little capability in this business that they simply do not realize the seriousness of dealing with the type of personnel that we are receiving.

The plaintiffs' evidence painted a dark picture of life at GCI; a picture that would be apparent to any knowledgeable observer, and certainly to an official in Turner's position.[21] An inference can be drawn from this evidence ***1537** that Turner did know that GCI failed to provide inmates with reasonable protection from violence.

[8] Mere knowledge of the infirm conditions persisting at GCI does not establish deliberate indifference. The plaintiffs must also demonstrate that, with knowledge of the infirm conditions, Turner knowingly or recklessly declined to take actions that would have improved the conditions.

Turner points to evidence of his actions to improve safety conditions at GCI to illustrate his affirmative efforts to improve the conditions of confinement there. Turner testified that he attempted to secure additional funds, make improvements to GCI's physical plant, expand recruitment efforts, and institute policies that would have reduced the risk of violence if his staff had followed them.[22] Turner argues that he was unable to ameliorate further the unsafe conditions at GCI; he did all he could within the budgetary constraints he faced, and, therefore, was not deliberately indifferent.

In rebuttal, the plaintiffs presented evidence (1) that Turner failed to ensure that his direct subordinates followed the policies he established, and (2) of specific, low-cost actions that Turner could have taken and that his successors successfully undertook. This evidence supports a finding that Turner knowingly "fail[ed] adequately to supervise correctional officers up to the lieutenant level[,] result[ing] in corruption and incompetence among the officers and a lack of reasonable protection of inmates." *LaMarca,* 662 F.Supp. at 665; *see* *Harris v. Thigpen,* 941 F.2d 1495, 1505 (11th Cir.1991) (suggesting that inadequate staffing may rise to deliberate indifference as to prisoner safety (citing *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir.1980, *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981))); *cf.* *Jordan v. Gardner,* 986 F.2d 1521, 1530 (9th Cir.1993) (en banc) ("It is simply not enough to say ... that [the official] gave the issue a great deal of thought. The 'sufficiently culpable state of mind' necessary to find deliberate indifference has more meaning than that.").

[9] Determining whether Turner otherwise lacked the means to correct GCI's failure adequately to protect inmates requires a more detailed analysis. In *Williams,* we held that an official "may not escape liability solely because of the legislature's failure to appropriate requested [and necessary] funds." 689 F.2d at 1387.[23] Where, as here, the lack of funds contributed to the condition, the plaintiffs must "demonstrate that a particular defendant [nevertheless] had the capability (authority and means) to provide adequate security and did not do so." *Id.* at 1389.

[10] To circumvent Turner's "insufficient funds defense," the plaintiffs presented evidence of Turner's capacity, within budgetary constraints, to improve prison safety. We agree with the district court that the plaintiffs' evidence supports the findings that Turner could have, but did not, take steps to minimize at least the following problems at GCI:

> (1) improper and inadequate staff training ..., (2) a staff out of control who did not report rapes, assaults, and illegal activities up through the chain of command, (3) ***1538** [Turner's] failure to supervise staff and administer measures which would "minimize the chance of error and maximize the full satisfaction of constitutional protection," in (i) not stationing officers to patrol throughout the dormitories, particularly at night, and leave the wicket cage, and in (ii) permitting the obscuring of vision of the officers in the wicket by allowing inmates to hang sheets ..., (4) [Turner's] shocking failure to employ any standard procedure to investigate incidents of alleged rapes, [(5)] [Turner's] failure to provide inmate movement controls thus reducing the casual egress and ingress of aggressive assailant wolves within the open dormitories, and [(6)] [Turner's] failure to transfer know[n] assailants or inmates who should have been known to be assailants out of GCI.

LaMarca, 662 F.Supp. at 708 (citations omitted).

Consideration of such evidence comes perilously close to second-guessing the difficult choices that prison officials must face and of improperly extending deliberate indifference

standards to mere "inadvertence or error[s] in good faith." *Wilson,* 501 U.S. at ——, 111 S.Ct. at 2324 (citing *Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)). Nevertheless, such evidence is probative of the means available to Turner and must be considered. This evidence directly addresses the question of whether monetary restraints frustrated Turner's good faith efforts, or whether he knowingly or recklessly disregarded solutions within his means.[24] While much of the record indicates that Turner did make good faith efforts to resolve the dilemmas facing GCI,[25] the evidence does support the plaintiffs' position that Turner recklessly disregarded the necessary means to protect inmate safety.

3.

[11] Third, section 1983 "requires proof of an affirmative causal connection between the actions taken by a particular person 'under color of state law' and the constitutional deprivation." *Williams,* 689 F.2d at 1380 (citing *Monell v. Department of Social Servs.,* 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978)); *Redman v. County of San Diego,* 942 F.2d 1435, 1439 (9th Cir.1991) (en banc) (requiring an act or omission causing the constitutional deprivation), *cert. denied,* 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992). Section 1983 thus focuses our inquiry on whether an official's acts or omissions were the cause—not merely a contributing factor—of the constitutionally infirm condition.

[12] "A causal connection may be established by proving that the official was personally involved in the acts that resulted in the constitutional deprivation." *Zatler v. Wainwright,* 802 F.2d 397, 401 (11th Cir.1986). Because the analysis focuses on the defendant's conduct, the doctrine of *respondeat superior* does not apply. Whether a defendant actually controls, or fails properly to supervise a subordinate, however, may prove to be relevant inquiries. *See Rizzo,* 423 U.S. at 375–76, 96 S.Ct. at 606.

[13] If a plaintiff establishes a causal link between the defendant's acts or omissions and the infirm condition, the defendant is "precluded from contending that the unconstitutional condition was not at least a proximate cause of ... injuries" that arose from that condition. *Williams,* 689 F.2d at 1389. This is not to say that a plaintiff need not show a causal link between the constitutionally infirm condition and the alleged injuries. Rather, the finding that a prison condition offends the Eighth Amendment presupposes the distinct likelihood that the harm threatened will result. The wrong in Eighth Amendment cases is the deliberate indifference to a constitutionally infirm condition; ***1539** that wrong must, in turn, have been the proximate cause of the plaintiffs' injuries, here the injuries brought about by the assaults.

In *Doe v. Sullivan County,* 956 F.2d 545 (6th Cir.), *cert. denied,* 506 U.S. 864, 113 S.Ct. 187, 121 L.Ed.2d 131 (1992), the Sixth Circuit addressed causation under section 1983 arising from allegations of "systematic deficiencies" in a prison's protection of inmates similar to those in the instant case. The plaintiff presented evidence of overcrowding, dark cells, insufficient staff, lack of mental and physical evaluations, and inadequate surveillance. *Id.* at 550. Additionally, a penological expert testifying for the plaintiff concluded that there was a pattern of violence among inmates at the prison and that because of the plaintiff's slight build and mental disability, prison officials should have placed him in protective custody. *Id.* at 549. In reviewing the sufficiency of the evidence to show causation, the Sixth Circuit concluded "that more is required than [a] naked assertion that the assault would not have occurred but for the offensive conditions. To hold otherwise would effectively transform the causality requirement from a substantive element of proof into one of pleading." *Id.* at 550. In this case, the plaintiffs presented evidence to support their allegations that Turner "was in a position to take steps that could have averted" the alleged unconstitutional condition at GCI, "but, through [deliberate] indifference, [he] failed to do so." *Williams,* 689 F.2d at 1384.

The plaintiffs presented evidence supporting five conditions of confinement that were under Turner's control and that together created an unconstitutional risk of violence at GCI: (1) a "prevalence of ... weapons" at GCI, (2) the lack of adequate patrols, (3) the lack of adequate reporting procedures for rapes and assaults, (4) the presence of "obvious and rampant indicia of homosexual activity," and (5) a lack of supervision of officers leading to corruption and incompetence. *LaMarca,* 662 F.Supp. at 664–65. The evidence supports the plaintiffs' assertion that Turner could

have brought GCI within constitutional norms through more diligent supervision of his officers, by establishing and enforcing rules and procedures to eliminate specific sources of danger to prisoners, and through low-cost modifications to GCI's physical plant. In particular, Turner could have taken significant steps to eliminate the highly permissive atmosphere at GCI both as to officers shirking their duties and as to prisoners engaging in extortion, harassment, sexual activity, and sexual and other assaults.

[14] As we discussed in part II.A.2., the evidence strongly supports a finding that, even within the constraints he faced, Turner had the means substantially to improve prisoner safety at GCI. This evidence also supports findings that Turner knew that the actions he undertook would be insufficient to provide inmates with reasonable protection from violence, and that other means were available to him which he nevertheless disregarded. Such evidence provides the necessary causal link between Turner and the infirm conditions at GCI.

Finally, the evidence shows a link between the unconstitutional conditions and the plaintiffs' injuries. The record supports the district court's finding "that due to [their] very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI.... [These conditions created] the background and climate which ... preordained homosexual rapes and other inmate assault[s]." *LaMarca,* 662 F.Supp. at 687. The evidence thus permits a finding of a causal link between the objectively intolerable conditions at GCI and the plaintiffs' injuries.

B.

Having determined that the plaintiffs presented sufficient evidence to establish liability on their damages claims against Turner, we turn to Turner's specific challenges to the legal standard the district court employed in assessing liability. Turner contends that the district court clearly erred in its analysis of (1) his deliberate indifference to the constitutionally infirm injury producing conditions, ***1540** and (2) causation. We disagree. [26]

1.

Turner challenges the district court's finding that he knew of several problems at GCI that contributed to the constitutionally infirm conditions. [27] He argues that without this finding, the district court might not have concluded that he knew of the infirm conditions and thus that he had been deliberately indifferent to the plaintiffs' safety. [28]

[15] Turner points to specific language in the district court's opinion indicating that the court applied a negligence standard to determine his knowledge of the infirm conditions and the problems that caused them. For instance, in its discussion of Turner's indifference to prisoner safety, the court stated that "[a] section 1983 plaintiff must prove either that the official knew or *should have known* that his action infringed a clearly established constitutional right of the plaintiff, regardless of the officials' subjective intent...." *LaMarca,* 662 F.Supp. at 663 (emphasis added) (internal quotations and citations omitted); *see also id.* at 658, 678–79 (relying on knowledge "discernable to any prudent prison administrator"). In light of *Wilson,* which has clarified that a subjective standard must be applied to Eighth Amendment claims, the district court's resort to such an objective standard was erroneous.

[16] The court also erred by inquiring as to Turner's knowledge during the "relevant time period of Plaintiffs' damage claims," instead of making a directed inquiry into Turner's knowledge at the time of each incident. *See, e.g., LaMarca,* 662 F.Supp. at 708–09 ("Plaintiffs' claims are not isolated incidents. They stem from a far ranging and serious failure of Defendant Turner to properly manage[ ] GCI."). The alleged assaults occurred over a three-year period, and, as one would expect, Turner's knowledge ripened during this period. The district court failed to determine properly whether Turner possessed the requisite knowledge at the time of each incident.

As we have already discussed, the evidence as a whole, and, in particular Turner's July 16, 1991 letter, provide strong support for the court's ultimate conclusion that Turner knew of the pervasively and obviously unsafe conditions at GCI. The district court, however, did not rely solely on such evidence. We therefore cannot conclude as a matter of law that Turner had a sufficient awareness of the infirm conditions to satisfy *Wilson* 's subjective standard. Thus, while sufficient evidence exists upon which to find knowledge of the conditions, *see supra* part II.A, the court must reconsider its findings as to

whether Turner had knowledge of or recklessly disregarded the constitutionally infirm conditions at the time of each incident.

2.

[17] **[18]** Turner also challenges the court's findings as to causation, i.e., whether his deliberate indifference caused the alleged constitutionally infirm condition, and whether the condition caused the assaults. The district court incorrectly stated that an official must "accomplish[ ] what [can] be accomplished within the limits of his authority." *LaMarca,* 662 F.Supp. at 664 (citing *Williams,* 689 F.2d at 1388). As our discussion ***1541** of Turner's deliberate indifference and causation indicates, *see supra* parts II.A.2 & 3, merely showing that an official had the means to correct a constitutional infirmity will not suffice. For the plaintiffs to demonstrate the requisite causal nexus, Turner must not only have had the means to correct the alleged constitutional infirmities, but also must have at least recklessly disregarded the inadequacy of the approach he took, the availability of other approaches, and their capacity to provide a cure. As we have already noted, it is, after all, " 'obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause....' " *Wilson,* 501 U.S. at ——, 111 S.Ct. at 2324 (quoting *Whitley,* 475 U.S. at 319, 106 S.Ct. at 1084) (citations omitted; internal quotations omitted; emphasis omitted); *cf.* *Fernandez v. United States,* 941 F.2d 1488, 1494 (11th Cir.1991) ("To establish a valid eighth amendment claim, 'a prisoner must allege acts or omissions sufficiently harmful to evidence [the] deliberate indifference [of prison officials]....' " (quoting *Gamble,* 429 U.S. at 106, 97 S.Ct. at 292)). This approach ensures that we do not question the direction taken by officials in performing the complex and arduous task of running prisons. *See* *Preiser v. Rodriguez,* 411 U.S. 475, 492, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439 (1973) ("Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems."). Thus, we must revisit our analysis of Turner's subjective intent to ensure that only evidence probative of causation in the Eighth Amendment context will be considered.

[19] The district court did not identify the potential solutions that Turner actually or recklessly disregarded. Additionally, the court's causation inquiry was not circumscribed by the knowledge Turner possessed at the time of each alleged assault, a particularly important consideration since the district court found that conditions slowly, but continuously, improved during Turner's tenure as superintendent. Instead, the court assumed that Turner actually knew, or should have known, of these measures. Thus, even though the plaintiffs' evidence supports a finding of causation, *see supra* part II.A.3, the court's finding that the solutions available to Turner were sufficient may have erroneously charged him with an Eighth Amendment duty he did not have. The court must, therefore, reconsider the issue of causation and determine whether Turner knowingly or recklessly disregarded any corrective measures. If he did, the court must then determine whether, taken as a whole, these measures would have eliminated the infirm conditions for which he was responsible.

III.

We now shift our focus from the retrospective analysis of the plaintiffs' damages claims against Turner to the prospective relief sought by the class of present and future inmates of GCI. Three challenges to the court's order granting injunctive relief merit discussion: (1) the conditions at GCI had improved, and, therefore, injunctive relief was no longer required, (2) Lambdin, GCI's current superintendent, had not been deliberately indifferent to prisoner safety, and (3) the district court's equitable grant unnecessarily intruded upon GCI's management.

A.

[20] First, Lambdin argues that because GCI reasonably protected inmates from violence at the time of trial, the court erred in granting injunctive relief. We disagree. Subsequent events, such as improvements in the allegedly infirm conditions of confinement, while potentially relevant, are not determinative. When a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state. *Jones,* 636 F.2d at 1375; *Ciudadanos Unidos de San Juan v. Hidalgo County Grand*

Jury Comm'rs, 622 F.2d 807, 822 (5th Cir.1980) (finding that "the defendant [must] demonstrate that there is no reasonable expectation that the wrong will be repeated" ***1542** (internal quotations omitted)), *cert. denied,* 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981). We have held that

> [j]urisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. To defeat jurisdiction on this basis, however, defendants must offer more than their mere profession that the conduct has ceased and will not be revived.

Hall v. Board of School Comm'rs, 656 F.2d 999, 1000–01 (5th Cir. Unit B 1981) (citations omitted). The burden is thus "a heavy one." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

The district court, in the damages phase of the case, found that GCI failed to provide inmates with reasonable protection from violence. On appeal, Lambdin has not challenged this determination, but has instead relied on GCI's elimination of the infirm conditions to defeat the court's grant of injunctive relief.[29] The district court, however, concluded that Lambdin had not taken sufficient steps to ensure that GCI's past wrongs would not be repeated. The record supports this finding. It was, therefore, appropriate for the court to consider granting the plaintiffs' request for injunctive relief.

B.

[21] Second, relying on the court's observation that Lambdin "appears to be a dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution," Lambdin argues that the court erred in ordering injunctive relief. In essence, he asserts that the court should have focused on his deliberate indifference, instead of the institution's historical indifference. The Supreme Court in *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), explained the significance of suits against state officials in their official capacities:

> Official-capacity suits ... "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

Id. at 165–66, 105 S.Ct. at 3105 (citations omitted); *see also* *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." (citing *Brandon v. Holt,* 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985))); *Owens v. Fulton County,* 877 F.2d 947, 951 n. 5 (11th Cir.1989). Thus, while changes in circumstances may change the nature of, or necessity for, injunctive relief, substitution of Lambdin as the named official does not bar such relief. *See* *Graham,* 473 U.S. at 166 n. 11, 105 S.Ct. at 3105 n. 11.

C.

Third, Lambdin challenges the scope of the district court's order. We must therefore determine whether the relief granted by the court squares with the alleged harm. The court's order dealt with three conditions of confinement: (1) GCI's protection of inmates, (2) conditions in protective confinement, and (3) counseling of rape victims. The later two conditions, although tangentially related to prisoner safety, required a separate constitutional foundation. We address each below.

1.

We have so far assumed, as the parties have, that at the time of the second trial (on the claim for injunctive relief), GCI provided inmates with reasonable, and constitutionally adequate, protection from violence. Although the district court did not reach this ***1543** issue, we are satisfied, after reviewing the record, that this assumption is correct.

[22] Absent an existing constitutional violation, the district court's power to grant equitable relief was limited to ensuring that GCI continued to provide inmates with adequate protection. *Cf.* *Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971) ("[T]he nature of the violation determines the scope of the remedy.") While district courts have broad discretion to fashion equitable relief, such relief must target the existing wrong. *Milliken v. Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation...."). Here, the wrong was the risk that GCI would once again disregard the safety of its inmates.

In *Jones,* we considered the appropriate form of relief when, during the pendency of the court's proceedings, the defendants cured the constitutionally infirm conditions alleged by inmate-plaintiffs. We stated that

> Judges are neither correctional officers nor penologists. Even if we had the expertise to analyze the practical and theoretical implications of the conditions of incarceration, we would have no warrant to impose our views, for a legislature—state or federal—is not required by the Constitution to operate penal institutions in accordance with criminological doctrine or to employ only experts in their management.... Moreover, we are aware that we should not, "in the name of the Constitution, become ... enmeshed in the minutiae of prison operations."

636 F.2d at 1368 (quoting *Bell v. Wolfish,* 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1974)). In keeping with the mandate of *Bell v. Wolfish,* we prescribed only general constraints designed to ensure that the prison would continue to operate in a constitutional manner.

[23] In this case, the district court ordered Lambdin to maintain policies requiring (1) that the dorms and confinement areas be regularly patrolled and that patrols have clear views of the relevant areas, (2) the use and maintenance of metal detectors, (3) regular shakedowns, and (4) the disciplining of prisoners found in possession of contraband. These aspects of the court's order, while not comprehensive, target GCI's potential to slacken its efforts to protect its inmates.

To effectuate its prescribed policies, however, the court also ordered Lambdin to discipline his guards, detailing the type of sanctions and the conditions under which they should be employed. We find that this unnecessarily intrudes on GCI's operations. *See* *Bell,* 441 U.S. at 547, 99 S.Ct. at 1878; *Rhodes v. Chapman,* 452 U.S. 337, 351, 101 S.Ct. 2392, 2401, 69 L.Ed.2d 59 (1981). The court should have "accorded wide-ranging deference in the adoption and execution of policies and practices that in [the prison official's] judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell,* 441 U.S. at 547, 99 S.Ct. at 1878. It was sufficient that the court enjoined Lambdin to ensure that the specific policies were carried out. Going beyond this to restrict the methods by which Lambdin effectuated these policies was an inappropriate use of the court's equity powers.

2.

[24] **[25]** The district court's injunctive order also addressed conditions in protective confinement. The court determined that during Turner's tenure, conditions in protective confinement were punitive in nature. By the time of the second trial, however, this was no longer the case. The court, therefore, should have limited its order to ensuring that the conditions continued to conform with Eighth Amendment standards. Instead, the court fine-tuned the existing conditions by (1) eliminating double-bunking, (2) precluding stays in protective confinement in excess of thirty days, (3) requiring the transfer of inmates in protective confinement who could not be returned to the general prison population, and (4) ensuring that the lighting in protective confinement conforms to American ***1544** Correctional Association guidelines. [30] The conditions targeted here, whether taken singularly or together, do not constitute cruel and unusual punishment and do not ensure that the prior infirm conditions will not recur. *See* *Wilson,* 501 U.S. at ——, 111 S.Ct. at 2327 (Separate failures of prison administration designed to protect inmates "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...."). We, therefore, vacate the district court's injunction and remand the claim for injunctive relief so that the court may determine whether an injunction is necessary to ensure the continuance of currently constitutionally adequate conditions in protective confinement.

3.

[26] Finally, the district court ordered psychological counseling of rape victims. The court found that GCI unnecessarily and wantonly inflicted pain upon prisoners by failing to provide them with post-rape psychological or psychiatric counseling. This aspect of the court's injunction was based on independent findings of fact that inmates are systematically denied access to such treatment, *cf. Harris,* 941 F.2d at 1505, and that such denials constitute deliberate indifference to a serious medical need, *see Gamble,* 429 U.S. at 104, 97 S.Ct. at 291; *Greason v. Kemp,* 891 F.2d 829, 834 (11th Cir.1990). These findings are well supported by the record. The court enjoined Lambdin to (1) provide training to all prison guards in the handling of rape complaints, (2) require special training for the staff psychiatrist and the staff psychologist, and (3) "promulgate an official referral procedure for all rape victims to the resident psychiatrist or psychologist for evaluation." We affirm these aspects of the injunction.

IV.

A.

[27] **[28]** Turner appeals the district court's ruling that he waived his Seventh Amendment right to jury trial as to the new plaintiffs' claims.[31] *See* Fed.R.Civ.P. 38(b), (d). The right to "trial by jury is a vital and cherished right, integral in our judicial system," *City of Morgantown v. Royal Ins. Co.,* 337 U.S. 254, 258, 69 S.Ct. 1067, 1069, 93 L.Ed. 1347 (1949), and a waiver of this right must be meaningful, *In re Zweibon,* 565 F.2d 742, 746 (D.C.Cir.1977) (Rule 38 was not "intended to diminish" the constitutional right to a trial by jury in civil cases, "and should be interpreted, where possible, to avoid giving effect to dubious waivers of rights."). Moreover, "as the right of jury trial is fundamental, [we must] indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393, 57 S.Ct. 809, 811–12, 81 L.Ed. 1177 (1937); *Borgh v. Gentry,* 953 F.2d 1309, 1311 (11th Cir.1992) ("[A] court's discretion [to deny a jury trial] is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." (quoting *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510, 79 S.Ct. 948, 956, 3 L.Ed.2d 988 (1959))). We therefore review the district court's denial of a jury trial with "the most exacting scrutiny." *City of Morgantown,* 337 U.S. at 258, 69 S.Ct. at 1070. Unless the error is harmless, we must reverse judgments founded upon an unconstitutional denial of a jury trial. *Western Elec. Co. v. Milgo Elec. Corp.,* 573 F.2d 255, 257 (5th Cir.), *cert. denied,* 439 U.S. 895, 99 S.Ct. 255, 58 L.Ed.2d 241 (1978).

[29] **[30]** The Federal Rules of Civil Procedure provide that "[t]he right to trial by jury as declared by the Seventh Amendment ***1545** to the Constitution ... shall be preserved to the parties inviolate." Fed.R.Civ.P. 38(a). A party may, however, waive this right by failing to make a timely demand upon the courts. Under Rule 38, as to "any issue triable of right by a jury," waiver occurs ten days after "service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b), (d); *see Guajardo v. Estelle,* 580 F.2d 748, 752–53 (5th Cir.1978). Such waivers apply only to the issues raised by the pleadings; subsequent amendments to the pleadings can raise "new issues" for which the right to a jury remains.

In this case, Turner did not demand a jury trial within ten days of his answer to the first amended complaint. He therefore waived his right to jury trial as to issues raised in that complaint. He argues, however, that he did not waive his right to jury trial as to the new plaintiffs' claims.

The district court, in rejecting Turner's demand for a jury trial, concentrated on Rule 38's use of the term "issue," which the court noted refers to those issues "raised in the original complaint." *LaMarca,* 662 F.Supp. at 652; *Rosen v. Dick,* 639 F.2d 82, 94 (2d Cir.1980) ("[T]he term 'issue' means something more than the evidence offered and the legal theories pursued.... [One must ask whether] the ultimate issue for decision is different."). The court concluded that no new issues were raised by the amended pleadings and struck Turner's jury demand.

[31] The district court's approach illustrates the difference between the jury's role in resolving specific factual issues, and the application of such determinations to legal theories. *Guajardo,* 580 F.2d at 753. New facts that "merely clarif[y] 'the same general issues' raised in the original complaint" do not create new issues of fact upon which to assert a jury demand. *Lanza v. Drexel & Co.,* 479 F.2d 1277, 1310 (2d Cir.1973) (en banc) (quoting *Moore v. United States,* 196 F.2d 906, 908 (5th Cir.1952)); *id.*

(The "underlying facts and basic legal theory [must be] changed by the amendments" in order to create new issues.). Amendments to pleadings thus may contain new facts which do not create new issues triable by a jury. *Id.*

These basic principles for identifying new issues were developed in cases where all relevant parties were before the trial court at the time of the initial waiver. In such cases, a trial court applies these principles to determine the extent of a demanding party's prior waiver. In this case, however, the second amended complaint added seven new plaintiffs permissively joined under Fed.R.Civ.P. 20(a). [32] Each new plaintiff asserted an individual claim for damages arising from a separate incident at GCI. Moreover, the incidents alleged by three of the new plaintiffs (Cobb, Durrance, and Aldred) had not occurred at the time Turner waived jury trial as to the issues raised by the first amended complaint. Turner asserts that waivers under Rule 38 do not apply in such circumstances. We agree.

The plaintiffs do not directly address whether the district court's approach of identifying new issues provides the proper analysis when newly joined parties raise unique claims. Instead, they tenaciously argue (as they successfully did below) that all issues raised in the second and third amended complaints arose from the same "general area" of dispute or involve the "same matrix of facts" identified in the first amended complaint. *See* *Lanza,* 479 F.2d at 1310. Thus, they contend that the second and third amended complaints do not raise new issues revitalizing Turner's right to jury trial. [33]

***1546** Underlying the plaintiffs' resistance to Turner's jury demand is their mistaken belief that this case involved only "one prison civil rights suit under 42 U.S.C. § 1983." This case involved eleven separate actions: ten independent damages actions and one class action for injunctive relief. Each of these actions raised distinct factual issues. Turner was not "put on notice [as to these claims] by the original round of pleadings in this case." *Cedars–Sinai Medical Ctr. v. Revlon, Inc.,* 111 F.R.D. 24, 30 (D.Del.1986). All he could have anticipated at the time of his waiver was that evidence of the incidents underlying the new plaintiffs' claims might be presented at trial. Even under its analysis, the district court erred by striking Turner's jury demand. [34]

Turner raises an alternative approach to analyzing his right to jury trial which determines which issues must, on remand, be tried before a jury. He observes that if the new plaintiffs had brought separate suits, an effective waiver under Rule 38 in one suit would not extend to the others. Under the district court's approach, however, permissive joinder provides a means to bypass a party's right to jury trial, thus making this fundamental right contingent upon the procedural mechanism through which a claim comes before a trial court. When such processes are within the sole control of one side of a dispute —here the plaintiffs—and subject only to the discretion of the trial court, application of the Federal Rules cannot extirpate a party's constitutional right to jury trial.

In this case, three and one-half years after LaMarca filed his *pro se* complaint, and only two months before trial, Turner demanded a jury trial as to all issues raised in the new plaintiffs' claims. The plaintiffs stress these dates as indicative of the frivolousness of Turner's position. Yet, the plaintiffs created this issue by seeking to join the new plaintiffs in the heat of trial preparation, and then insisting that Turner relinquish his right to present his case to a jury. Turner objected to the joinder of the new plaintiffs and stressed his intent to demand a jury trial on all issues raised by the new claims. Nevertheless, the court permitted joinder of the new claimants, and did so without preserving Turner's right to a jury trial. Turner's right to a jury trial thus fell victim to the trial court's discretionary decision to permit joinder of the new claimants. [35] Notwithstanding ***1547** any common thread that may have existed between the original and amended complaints, even if to a "sickening proportion," *LaMarca,* 662 F.Supp. at 653, we cannot sanction such a result. We hold, therefore, that Turner was entitled to a jury trial as to the new plaintiffs' claims. [36]

B.

[32] Turner argues that his right to jury trial as to the new plaintiffs' claims trumps his waiver as to common issues raised by the original plaintiffs' claims, [37] *see* *In re Kaiser Steel Corp.,* 911 F.2d 380, 388 (10th Cir.1990) (holding, in case with multiple parties, that waiver of common issue does not occur until ten days following the last pleading by any party), and therefore that he is entitled to a jury as to all claims. Turner concedes, however, that he knowingly waived his right to a jury as to the original plaintiffs' claims. Without a constitutional underpinning upon which to rest, Turner must demonstrate that the district court erred in its application of Rule 38 and that he was harmed by this error. *Cf. id.* (holding amendments to pleadings do not revive the right to jury trial

as to issues already framed). Because he has not done so, Turner's initial waiver as to the original plaintiffs' claims remains effective.

V.

[33] Turner next appeals (1) the district court's refusal to continue the December 2, 1985 trial; (2) the court's refusal following the trial to consider, as part of the trial record, several depositions taken during and shortly after the trial; and (3) the court's refusal to reopen the record of the trial to receive some additional evidence Turner obtained while the first appeal (of the damages awards) was pending in this court. We review these rulings for abuse of discretion. *Connecticut Gen. Life Ins. Co. v. Breslin,* 332 F.2d 928, 932 (5th Cir.1964).

[34] As indicated earlier, after the plaintiffs filed their second amended complaint (which added seven plaintiffs to the case) on August 26, 1985, the defendants moved for a continuance of the trial which had been set for November 4, 1985. The district court granted their motion on November 10, continuing the trial until December 2. The defendants wanted more time for discovery and to prepare for trial; we cannot say, however, that the court abused its discretion in giving them the extra time allotted. *See* *Edward Leasing Corp. v. Uhlig & Assocs.,* 785 F.2d 877, 881–82 (11th Cir.1986); *Menendez v. Perishable Distribs., Inc.,* 763 F.2d 1374, 1379 (11th Cir.1985). [38]

The defendants renewed their motion for a continuance on November 13, stating that they would not be able to complete their discovery by the scheduled trial date. According to the defendants, they needed to depose several witnesses who had been identified by the new plaintiffs when the defendants took their depositions. Whatever may have been the defendants' need for a continuance ***1548** at that time, the need increased when, as the trial was about to begin, the district court gave the plaintiffs leave to file their third amended complaint adding Billy Joe Harper's damages claim.

[35] Believing that Harper's claim raised no new issues, and thus created no need for additional discovery, the district court refused to grant a continuance. The court's belief was unfounded; Harper's claim raised several new issues requiring discovery. *See supra* note 34. After the trial began, the magistrate judge apparently had second thoughts about the defendants' need for a continuance; he permitted them to take discovery depositions both during and after the trial with the understanding that these depositions could be made a part of the trial record at a later date. The defendants accepted this arrangement, evidently believing that it would eliminate any prejudice the denial of the continuance otherwise might have occasioned. Given this acceptance by the defendants, we find that the defendants effectively waived their objection to the December 2 trial date.

The trial of the damages claims against Turner ended on December 16, 1985. That day, the magistrate judge instructed counsel to file their proposed findings of fact and conclusions of law by December 23, and scheduled oral argument for December 27. Oral argument was held that day, and the magistrate judge indicated in his report to the district court that he would find for the plaintiffs. On January 8, 1986, the plaintiffs moved the magistrate judge to exclude from the record seven depositions that defendants had taken with the permission of the plaintiffs and the court. Plaintiffs' counsel argued that the depositions should be excluded because the defendants had denied counsel access to the deponents' prison records and thus a meaningful opportunity to cross-examine the witnesses. The magistrate judge granted the motion, and the district court, after considering the magistrate judge's report and recommendation, affirmed.

In his brief to us, Turner does not explain how the exclusion of the seven depositions from the record prejudiced his case. Accordingly, Turner has shown no abuse of discretion.

Finally, while the district court's disposition of the plaintiffs' damages claims was before us on appeal, Turner's counsel searched for evidence to rebut Dr. Swanson's testimony as to the conditions prevailing at GCI during Turner's tenure. [39] They uncovered documentary evidence that, Turner represents, undermines the court's findings. [40] After we dismissed the first appeal and returned the case to the district court, Turner moved the court to "reopen" the record of the damages trial and consider the new evidence. The court, believing that it lacked jurisdiction to do so, refused. [41]

[36] The district court plainly had the authority to reopen the record and to consider the new evidence. The court had such authority at least until, on October 6, 1990, when it entered the final judgment. *See* Fed.R.Civ.Pro. 59; S.D.Fla.Magis.R. 4(b) (A ***1549** district court is free to "receive further evidence, recall witnesses, or recommit the matter to the Magistrate Judge with instructions."); *La Fever, Inc. v. All–Star Ins.*

Corp., 571 F.2d 1367, 1368 (5th Cir.1978). Prior to the entry of judgment (and the denial of the defendants' motion for a new trial), the court had the power to revisit the entire case.

Since we remand the damages claims of the new plaintiffs for trial before a jury, the district court's action in refusing to consider the new evidence only affects the claims brought by LaMarca, Saunders, and Johnson. Because the court might have considered Turner's new evidence, had it thought it had the power to do so, we instruct the court to consider Turner's proffer. We intimate no view, however, as to whether the court should accept it and reopen the proceedings as to these three plaintiffs.

VI.

Turner retained the right to trial by jury as to the new plaintiffs' claims. We therefore vacate the money judgments for Durrance, Cobb, Bronson, Aldred, and Harper, and remand their claims for a new trial. We remand the judgments favoring LaMarca, Johnson, and Saunders for reconsideration in light of our discussions in parts II and V. We affirm in part, and remand the court's grant of injunctive relief for further proceedings consistent with part III of our opinion. Finally, in light of these holdings, we must vacate the court's attorneys' fees award.

IT IS SO ORDERED.

All Citations

995 F.2d 1526

Footnotes

* Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

1 As we explain in the text *infra,* a magistrate judge actually heard the claims; the district court disposed of them after considering *de novo* the former's report and recommendation.

2 A more detailed exposition of the facts supporting the plaintiffs' damages claims is set out in the magistrate judge's Report and Recommended Findings of Fact and Conclusions of Law, *LaMarca v. Turner,* 662 F.Supp. 647, 667–717 (S.D.Fla.1987), which the district court reviewed *de novo* and adopted in all relevant parts, *see* *id.* at 650–667. The court's subsequent order granting injunctive relief was not published.

3 The court later severed Rosenbaum's claim, and it is not before us.

4 On April 13, 1984, the district court certified a class of “all those persons who are or will be incarcerated at the Glades Correctional Institution located in Belle Glade Florida.” *See* Fed.R.Civ.P. 23(a), (b)(2).

5 Actually, Turner answered the first amended complaint. Lambdin was not made a defendant until he became superintendent of GCI in December 1985. For convenience we refer to Lambdin throughout the opinion as the defendant for the injunctive relief claim.

6 The district court had referred the case to a magistrate judge to conduct an evidentiary hearing on all claims and to prepare a report and recommendation. *See* S.D.Fla.Mag.J.R. 1(f). We refer to this hearing as the “trial” or the “damages trial.”

7 The defendants made their jury demand, but did not answer the second amended complaint. Their failure to file an answer became unimportant when, as the following text indicates, the plaintiffs obtained leave to file a third amended complaint. Because the parties, below and on appeal, have assumed that the original jury demand was timely as to the third amended complaint, we do not address whether the demand actually was timely.

8 We recite the facts explicitly found by the magistrate judge and adopted by the district court. We also recite facts that we consider to have been implicitly found, because they were not in dispute. Since we must vacate and remand the money judgments for the plaintiffs, the district court's findings of fact will not be binding in the subsequent proceedings in this case.

9 GCI also had an “honor” dorm not relevant in this case.

10 The acceptance of this condition might be best illustrated by LaMarca's story (taken as credible by the district court) that when he asked a guard for protection, the guard gave him a knife.

11 In a survey, when GCI's staff were asked, “ ‘Did you receive instructions or guidelines on the responsibilities and supervisory functions of your job when you became supervisor?,’ they answered with a ‘resounding no.’ ” *Id.* at 674. The Department of Corrections, Office of Inspector General observed that “we fail to understand and appreciate laxity, in some instances, the disregard for established procedures.” *Id.* The court found that when staff engaged in egregious conduct, “so gross that immediate action should have been taken,” Turner did not act. *Id.* at 675. This “underscore[d] the day-to-day operation of GCI with its staff not controlled by Superintendent Turner.” *Id.* at 677.

12 The court concluded, however, that two plaintiffs, Epprecht and Gordon, had not proven that Turner's deliberate indifference to their need for safety caused their injuries. *LaMarca,* 662 F.Supp. at 665. Epprecht and Gordon have not appealed.

13 The court granted monetary awards to Anthony LaMarca, $9,000, Edwin Johnson, $13,000, Eddie Cobb, $6,500, and Martin Saunders, David Aldred, Steve H. Bronson, Ron Durrance, and Billy Joe Harper, each $30,000. *LaMarca,* 662 F.Supp. at 667, 715.

14 Lipman was still concerned about the adequacy of the security GCI's staff was providing the inmates, the conditions surrounding the protective confinement cells, the ready availability of counseling for inmates who had been raped, and the presence of contraband, in particular weapons and drugs.

15 The court cited as evidence of GCI's indifference to this medical need the testimony of GCI's staff psychiatrist, who stated that in his 15 years on the staff he had never been consulted regarding an inmate who had been sexually assaulted.

16 Section 1983, upon which this action is based, also requires that the defendant act “under color of state law.” 42 U.S.C. § 1983. This element is not at issue in this case.

17 The Supreme Court recently confirmed that the first two elements of an Eighth Amendment claim, the “objective” and “subjective” elements, must both be satisfied. *See Hudson v. McMillian,* 503 U.S. 1, ——, 112 S.Ct. 995, 999–1000, 117 L.Ed.2d 156 (1992).

18 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

19 The Seventh Circuit in *McGill v. Duckworth,* 944 F.2d 344 (7th Cir.1991), *cert. denied,* 503 U.S. 907, 112 S.Ct. 1265, 117 L.Ed.2d 493 (1992), noted a difference between “when [a state] acts *because of* [an] effect,” in which case the state intends a consequence, and “when it acts *in spite of* an effect,” in which case the state lacks the requisite intent. *Id.* at 344 (citing *Personnel Adm'r v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)). If such a standard were applicable to Eighth Amendment claims, the burden upon plaintiffs would become even more formidable. Yet, the requisite intent for deliberate indifference is unlike that for demonstrating a legislature's discriminatory intent under equal protection jurisprudence, as in *Feeney.* The *McGill* court's approach apparently provides officials a safe refuge from liability, much like a bystander is provided at common law. By doing so, the *McGill* court overlooks the significance of an official's duty not to impose cruel and unusual punishment upon prisoners—a duty firmly established in the Supreme Court's Eighth Amendment jurisprudence. A state—and similarly its officials—can be deliberately indifferent if it acts *in spite of* a condition violating the objective prong described above unless such actions are justified by countervailing penological objectives.

20 Turner testified as to additional sources through which he gained knowledge of the conditions at GCI. These included monthly meetings with key staff members, attendance at monthly meetings of each department, regular meetings with prisoner organizations, and his general practice of wandering through the prison compound.

Turner argues that the district court relied on notice created through telephone conversations between Turner and Saunders' mother. *See LaMarca,* 662 F.Supp. at 696. These conversations arguably showed general indifference on Turners' part toward inmates. Yet, because the conversations occurred after the alleged incidents, they were not relevant to Turner's pre-assault knowledge of unsafe conditions at the prison and were only marginally relevant to his alleged indifference to prisoner safety at the time of the alleged incidents.

21 In *Rizzo v. Goode,* 423 U.S. 362, 375–76, 96 S.Ct. 598, 606, 46 L.Ed.2d 561 (1976), the Supreme Court rejected a plaintiff's § 1983 claim based on pervasive unconstitutional police practices. "[T]he Court disapproved the imposition of liability for the officials' failure to act in the face of a statistical pattern of police misconduct absent proof that the supervisory defendants had '*direct* [ ] *responsibility* for the actions' of those police officers who had engaged in this misconduct." *Williams,* 689 F.2d at 1381 (quoting *Rizzo,* 423 U.S. at 375–76, 96 S.Ct. at 606). In this case, the trial court did not rely solely on statistical patterns. Moreover, Turner's supervisory role and the insular character of prison communities provided strong support for the court's conclusion that Turner must have known of these conditions.

22 Turner generally improved GCI's physical plant, modernized the prison's infirmary, decreased staff overtime, increased the number of confinement cells, and made a significant effort to document incidents at GCI (an effort necessary to proper management and safety). He also appeared before state legislative committees, wrote letters to Secretary Wainwright of the Department of Corrections, and identified the problems at GCI in his monthly reports.

Turner also appears to have made substantial efforts to improve recruiting of staff, a critical problem for GCI during Turner's tenure as superintendent. He testified that he sought to increase salaries (and was minimally successful), acquired a van for staff car-pooling from more distant locations (reducing the staff's transportation expenses), appeared at high school career days, and set up a program with the Florida State Employment Service. To control contraband, he attempted to utilize marijuana-sniffing dogs, but this proved ineffective in light of the confusing effluvium at GCI. The evidence does not indicate whether Turner intended that these actions resolve GCI's problem with prisoner safety.

23 In *Wilson,* the Court declined to address the applicability of an insufficient funds defense. 501 U.S. at ——, 111 S.Ct. at 2327.

24 The district court did not address this point, and, therefore, did not determine whether Turner knew of, or recklessly disregarded, the solutions suggested by the plaintiffs. On remand, the district court must reconsider whether Turner was deliberately indifferent to prisoner safety at the time of each incident for which an award of money damages is sought.

25 For example, Turner's July 16, 1981 letter suggests a deep concern for, and helplessness regarding, the state of affairs at GCI.

26 Turner has not challenged the district court's finding that GCI failed to provide inmates with reasonable protection from violence. We therefore assume that the plaintiffs satisfied the Eighth Amendment's objective component as to each incident for which money damages was sought.

27 On appeal, Turner draws our attention to nine factors identified by the district court as contributing to the unconstitutional conditions at GCI: (1) a lack of weapons training, marginally indicating a more general failure by Turner to train his staff, (2) the staff's failure to report rapes, (3) the staff's failure to report other illegal activity, (4) the staff's failure regularly to patrol dorms, (5) the staff's failure to ensure maximum visibility in the dormitories, (6) the lack of standard procedures for investigating rapes, (7) Turner's failure to avail himself of outside agencies for investigating rapes and assaults, (8) Turner's failure to establish inmate movement controls, and (9) Turner's failure to transfer problem inmates.

28 This argument conflicts with Turner's earlier contention that he was not deliberately indifferent because he took affirmative steps to improve prisoner safety. Yet, Turner could not actively seek to remedy a situation of which he was unaware. Turner's earlier arguments thus indicate an awareness of the infirm conditions.

29 On remand, Turner may challenge the district court's findings as to the objective unreasonableness of conditions at GCI at the time of the incidents underlying the original plaintiffs' damages claims. We recognize that this does create a potential for inconsistent findings in the damages and injunctive phases of the case.

30 The Supreme Court has rejected Eighth Amendment challenges to double-bunking. *See* *Bell,* 441 U.S. at 542, 99 S.Ct. at 1875 (rejecting any "sort of 'one man, one cell' principle"). Similarly, the district court's order precluding long-duration stays in protective confinement, and requiring timely transfers of inmates who cannot return to protective confinement, does not address a constitutional violation. *See* *Meriwether v. Faulkner,* 821 F.2d 408, 415–16 (7th Cir.), *cert. denied,* 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 269 (1987).

31 The Seventh Amendment preserves, "[i]n Suits at common law, ... the right of trial by jury...." U.S. Const. amend. VII.

32 The original plaintiffs' motion for leave to file a second amended complaint states that the addition of the new plaintiffs was consistent with Fed.R.Civ.P. 15(a). Since the new plaintiffs' claims raise independent causes of action, however, Fed.R.Civ.P. 20(a) controlled the insertion of these parties into the suit.

33 The plaintiffs point to, but do not discuss, three cases in which new plaintiffs were added after waiver, but, nevertheless, the right to a jury was not revived. *See* *Commonwealth of Penn. v. Sincavage,* 439 F.2d 1133 (3rd Cir.1971); *Barr v. Arco Chem. Corp.,* 529 F.Supp. 1275 (S.D.Tex.1982); *Ed Brawley, Inc. v. Gaffney,* 399 F.Supp. 115 (N.D.Cal.1975). These cases did not involve a jury demand by a defendant after the joinder of plaintiffs with distinct claims. Rather, each case involved a jury demand by an intervening plaintiff. *Sincavage,* 439 F.2d at 1134 (requiring plaintiff-intervenor to take case "in the status in which she found it"); *Barr,* 529 F.Supp. at 1276 ("new plaintiff merely reasserted rights alleged in the original complaint," and was joined to correct prior pleadings); *Ed Brawley,* 399 F.Supp. at 118 (same rights asserted by original and new plaintiffs). These cases suggest no justification for precluding Turner's jury demand.

34 The new issues included, at least, (1) whether each assault actually occurred, (2) the damages stemming from such assault, (3) the protection afforded to inmates at the time of each assault, (4) Turner's deliberate indifference to the unconstitutional condition at the time of each assault, and (5) the causal nexus between his indifference and the condition.

35 *Richland v. Crandall,* 259 F.Supp. 274 (S.D.N.Y.1966), illustrates another procedural rule, consolidation, which, if improperly applied in the Rule 38 context, can be used to bypass a party's Seventh Amendment right. In *Richland,* shareholders brought four suits derivatively, individually, and as class actions, against 20 defendants (officers, directors, and corporations) for violations of the Securities Exchange Act. Before consolidation, at least one of the 20 defendants had answered three of the four complaints. *Id.* at 281 & n. 9. The plaintiffs filed a demand for a jury trial within 10 days of service of the answers to the consolidated complaint by some of the defendants. The defendants in *Richland* argued that by not making a timely demand for a jury trial after the early answers to the original complaints, the plaintiffs waived their right to a jury as to the *issues* presented in each of the four original complaints. The court, however, observed that the "[d]efendants ignore[d] the fact that the defendants who answered some of the [original] complaints ... constitute[d] only 3 out of the 20 parties named as defendants in one or more of the underlying complaints and in the consolidated complaint, and that the issue was not joined as to the other 17 defendants until [the answers to the consolidated complaint had been filed]." *Id.* at 281.

The distinction noted by the *Richland* court is critical. Even though all claims involved the same transaction and there was substantial similarity of issues, the plaintiffs' Rule 38 jury demand was timely as to the claims by the 17 defendants who had not answered the original complaints.

We find the *Richland* court's analysis persuasive. The only relevant distinction between *Richland* and this case is the procedural mechanism through which the independent claims were joined; in *Richland* separate suits were filed and then consolidated; in the instant case, plaintiffs sought and obtained leave to join new parties with independent claims.

36 The plaintiffs' assertion that the original class action suit for injunctive relief incorporated the potential claims of the new plaintiffs is patently meritless.

37 Consistent with his other arguments, Turner maintains that the original and new plaintiffs' claims have few, and perhaps only one, common issue: “whether the prison conditions during the time frame relevant to their claims were in violation of the 8th and 14th Amendments.”

38 We reach this result even though the record indicates that the plaintiffs erroneously represented to the court that they were “ready for trial.” In fact, their own expert witnesses were unprepared at the time of the December 2, 1985 trial. Dr. Swanson, for instance, admitted on cross-examination that he bypassed potentially relevant sources of information because of severe time pressures. The district court postponed consideration of the injunction claim because Dr. Swanson was not fully prepared.

The plaintiffs' counsel further skewed the court's perception of the defendants' discovery problems by representing to the court that certain witnesses identified by the new plaintiffs in their depositions were not “actual” witnesses whom Turner might require time to contact. Plaintiffs' counsel stated that “I [have] never seen a deposition taken, particularly prisoners, [in an] inmate setting, where a deponent does not offer under skilled examination, such as defendants' counsel, a name of somebody that was a potential witness to an incident, a name of an alleged perpetrator, a name of somebody in the next cell who may have heard or seen [something].” (It seems apparent that Turner's counsel placed more stock in the credibility of the prisoners' stories than plaintiffs' counsel did.)

39 The court's extensive reliance on Dr. Swanson's testimony demonstrates the importance of this witness. Yet, Dr. Swanson did not begin his investigation until after October 4, 1985, and did not complete his interviews with the plaintiffs until December 1, 1985, the day before the damages trial began.

40 Turner described this evidence, in part, as

> more than 100 investigations were undertaken from 1980–84 ... in respect to sexual assaults, non-sexual assaults and batteries, possession of weapons, possession of drugs or alcohol and introduction of contraband; they reflect that, in virtually all instances, the Palm Beach County Sheriff's office was involved in the investigations; that prosecutions were undertaken; that, in respect to alleged sexual assault, rape kit tests were administered when appropriate; that there was an established procedure for investigation and handling of such claims.

41 The court stated that

> [i]f this Court's order was incorrect earlier in that respect in that we denied motions for continuance, and I think there was perhaps more than one of these, why, it seems to me ... that I may not have jurisdiction at this time since an appeal has been taken. [Counsel for Turner] asserts that we still do, and perhaps he is right, but it seems to me it is better to go ahead and stick with that earlier ruling, and let the appellate court review that point as well as this order which I am now making denying the motion....

957 F.2d 953
United States Court of Appeals,
First Circuit.

Jessica A. MANARITE, By and Through Her Next Friend, Carla MANARITE, and Carla Manarite as Administratrix of the Estate of Timothy Murray, Plaintiffs, Appellants,
v.
CITY OF SPRINGFIELD, Paul J. Fenton, Individually and in his Official Capacity as Former Chief of Police, Michael Somers and John Lynch, Individually and in Their Official Capacity as Police Officers, Defendants, Appellees.

No. 91–1491.
|
Heard Oct. 8, 1991.
|
Decided March 5, 1992.

Synopsis

Estate and minor daughter of detainee who committed suicide while in protective custody sued police chief and city under § 1983 for their alleged failure to prevent suicide. The United States District Court for the District of Massachusetts, Frank H. Freedman, J., granted summary judgment for defendants. Plaintiffs appealed. The Court of Appeals, Torruella, Circuit Judge, held that: (1) police chief's failure to insist that officers who implemented suicide prevention policies remove shoelaces from persons in protective custody was not "deliberate indifference"; (2) city was not deliberately indifferent by failing to provide training and education for police officers in suicide detection and prevention; and (3) daughter had no liberty interest protected by due process clause in her familial relationship with detainee.

Affirmed.

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

West Headnotes (7)

[1] **Civil Rights** Arrest and detention

When liability for pretrial detainee's serious harm or death, including suicide, is at issue in § 1983 case, plaintiff must demonstrate "deliberate indifference" by showing: unusually serious risk of harm (self-inflicted harm, in suicide case), defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and defendant's failure to take obvious steps to address that known, serious risk; risk, knowledge, and failure to do obvious, taken together, must show that defendant is "deliberately indifferent" to harm that follows.

42 U.S.C.A. § 1983.

91 Cases that cite this headnote

[2] **Civil Rights** Vicarious liability and respondeat superior in general; supervisory liability in general

Supervisor may be found liable under § 1983 only on basis of her or his own acts or omissions.

42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[3] **Civil Rights** Vicarious liability and respondeat superior in general; supervisory liability in general

Under § 1983, supervisory liability may arise from "deliberate indifference" to class of persons. 42 U.S.C.A. § 1983.

7 Cases that cite this headnote

[4] **Civil Rights** Medical care and treatment

Police chief's failure to insist that officers who implemented suicide prevention policies remove shoelaces from persons in protective custody was not "deliberate indifference" that would permit holding chief liable for suicide of person in protective detention; although

four detainees tried to hang themselves with shoelaces in preceding nine months, chief's conduct might have been negligent, but not deliberately indifferent. 42 U.S.C.A. § 1983.

41 Cases that cite this headnote

[5] **Civil Rights** Acts of officers and employees in general; vicarious liability and respondeat superior in general

Municipal liability under § 1983 cannot be based on respondeat superior; municipal liability lies only when municipal policy or custom causes alleged constitutional deprivation. 42 U.S.C.A. § 1983.

8 Cases that cite this headnote

[6] **Civil Rights** Criminal law enforcement; prisons

City's failure to provide training and education for police officers in suicide detection and prevention was not "deliberate indifference" in violation of § 1983; city's training and policies regarding suicide prevention were in accord with requirements of state law at time of detainee's suicide, and there was no basis for finding that his suicide was closely related to city's failure to train officers in suicide prevention. 42 U.S.C.A. § 1983.

21 Cases that cite this headnote

[7] **Civil Rights** Prisons

Constitutional Law Associational privacy

Constitutional Law Familial association, integrity, and privacy in general

Prison officials' failure to prevent suicide of detainee in protective custody did not violate detainee's minor daughter's right to familial associational privacy, and thus, afforded her no right of recovery under § 1983; daughter had no liberty interest protected by due process clause in her familial relationship with her father. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

18 Cases that cite this headnote

Attorneys and Law Firms

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Austin M. Joyce, with whom Reardon & Reardon, Worcester, Mass., was on brief, for defendant, appellee Michael Somers.

Before BREYER, Chief Judge, TORRUELLA, Circuit Judge, and WOODLOCK, * District Judge.

Opinion

TORRUELLA, Circuit Judge.

The Civil Rights Act, 42 U.S.C. § 1983, forbids state officials from depriving individuals of "any rights, privileges or immunities secured by the Constitution." In this appeal, we review the standards governing the liability of a municipality and its police chief under the Act for their alleged failure to prevent the suicide of a pretrial detainee and the issue of whether a minor child may assert a claim under the Act for loss of companionship and support of a natural parent.

I

On May 11, 1984, at approximately 4:45 p.m., two Springfield police officers encountered Timothy Murray in a highly intoxicated state on Main Street. The officers took Mr. Murray into protective custody and transported him to the Springfield police station. Mr. Murray was advised of the availability of a detoxification center and he expressed his desire to be taken to the center. However, since no beds were available there, he remained at the Springfield police station and was placed in the protective custody lock-up. Mr. Murray

informed the officer on duty that he had been in protective custody before, and that he had been held at the Hampden County Jail on drug charges three days earlier.

Officers Michael Somers and John Lynch were in charge of booking Mr. Murray. Officer Somers observed Mr. Murray to be highly intoxicated, unable to stand, to have slurred speech and to be indifferent to the booking procedure. Mr. Murray, however, exhibited no outward manifestations of suicidal tendencies.

In 1980, the Massachusetts Department of Public Safety issued new guidelines and procedures for implementation of the Protective ***955** Custody Law. Mass.Gen.L. ch. 111B, § 8. The new guidelines and procedures specified certain items to be removed from anyone held in protective custody, including shoelaces. These guidelines and procedures were disseminated to every officer of the Springfield police department by order of the Springfield police Chief, defendant Paul Fenton. They were also posted in the booking area. [1]

During the protective custody booking process, Officer Lynch prepared an inventory sheet for Mr. Murray, but failed to take Mr. Murray's shoelaces. Mr. Murray was placed in cell number 34, and routinely checked every thirty minutes. [2] He was the only person held in that aisle of cells.

At approximately 7:30 p.m., an officer found Mr. Murray hanging from the bar of the cell door with a shoelace tied around his neck. All efforts to resuscitate Mr. Murray by the officers and emergency medical personnel were unsuccessful, and he was pronounced dead at 7:53 p.m.

Jessica Manarite, the daughter of the decedent, and Carla Manarite, the administratrix of the decedent's estate, brought suit against the two booking police officers, the police chief and the City of Springfield under Section 1983 alleging that these defendants acted with deliberate indifference in violation of the constitutional rights of the decedent and plaintiff Jessica Manarite. [3]

After completion of discovery, the defendants filed motions for summary judgment. The district court heard argument on those motions and entered judgment for all defendants on April 23, 1991. Plaintiffs appeal the grant of summary judgment as to Chief Fenton and the City of Springfield. [4] We affirm.

II

We review the district court's grant of summary judgment *de novo* to determine whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324–25, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

We view the record in the light most favorable to plaintiffs and indulge all inferences favorable to them. *Space Master Int'l, Inc. v. Worcester,* 940 F.2d 16, 17 (1st Cir.1991). The materiality of a fact is determined according to the substantive law that governs the dispute. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact creates a genuine issue for trial "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

III

The Supreme Court has made clear that Section 1983 permits recovery for loss of life (or for serious physical harm) only where the defendant acts *intentionally* or with an analogous state of mind usually described as "*deliberate indifference*" to deprivation of the victim's constitutional right. *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 2323, 115 L.Ed.2d 271 (1991) ("deliberate indifference" standard in Eighth Amendment prison conditions case); *Canton v. Harris,* 489 U.S. 378, 388–90, 109 S.Ct. 1197, 1204–06, 103 L.Ed.2d 412 (1989) (same in Fourteenth Amendment municipal liability, police denial of medical treatment case); ***956** *Estelle v. Gamble,* 429 U.S. 97, 104–06, 97 S.Ct. 285, 291–92, 50 L.Ed.2d 251 (1976) (same in Eighth Amendment prison medical treatment case).

The Supreme Court has also made clear that, by "deliberate indifference," it means more than ordinary negligence, and probably more than gross negligence. *Canton,* 489 U.S. at 388 n. 7, 109 S.Ct. at 1204 n. 7 ("some [lower] courts have held that a showing of 'gross negligence' " is adequate,

"[b]ut the more common rule is ... 'deliberate indifference' "); *Daniels v. Williams,* 474 U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986) (civil rights laws do not permit recovery based on simple negligence).

Although some courts have used language suggesting that the deliberate indifference standard includes simple negligence —*see, e.g., Elliott v. Cheshire County,* 940 F.2d 7, 10–11 (1st Cir.1991) (defendant "reasonably should have known" of detainee's suicidal tendencies)—in their application of the deliberate indifference standard, courts have consistently applied a significantly stricter standard. In *DeRosiers v. Moran,* 949 F.2d 15 (1st Cir.1991), for example, this court stated that deliberate indifference requires

> the complainant [to] prove that the defendants had a culpable state of mind and intended wantonly to inflict pain ... While this mental state can aptly be described as "recklessness," it is recklessness not in the tort-law sense but in the appreciably stricter criminal-law sense, requiring actual knowledge [or wilful blindness] of impending harm, easily preventable.

Id. at 19 (citations omitted); *Gaudreault v. Salem,* 923 F.2d 203, 209 (1st Cir.1990) (standard of " 'reckless' or 'callous' indifference" for supervisors' liability), *cert. denied,* 500 U.S. 956, 111 S.Ct. 2266, 114 L.Ed.2d 718 (1991); *Walker v. Norris,* 917 F.2d 1449, 1455–56 (6th Cir.1990) ("deliberate indifference" standard in supervisory liability case); *Berry v. Muskogee,* 900 F.2d 1489, 1496 (10th Cir.1990) (same); *Sample v. Diecks,* 885 F.2d 1099, 1117–18 (3d Cir.1989) (same).

[1] The cases also indicate that, when liability for serious harm or death, including suicide, is at issue, a plaintiff must demonstrate "deliberate indifference" by showing (1) an unusually serious risk of harm (self-inflicted harm, in a suicide case), (2) defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk. The risk, the knowledge, and the failure to do the obvious, taken together, must show that the defendant is "deliberately indifferent" to the harm that follows. *See, e.g.,* (1) *risk: Torraco v. Maloney,* 923 F.2d 231, 236 (1st Cir.1991) (requiring "strong likelihood, rather than mere possibility, that self-infliction of harm will occur" (citation omitted)); *Cortés–Quiñones v. Jiménez–Nettleship,* 842 F.2d 556, 560 (1st Cir.) (placing schizophrenic prisoner in badly overcrowded cell "a recipe for an explosion" and "death"), *cert. denied,* 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988); (2) *knowledge: Gutiérrez–Rodriguez v. Cartagena,* 882 F.2d 553, 562–66 (1st Cir.1989) (supervisors' knowledge of risk inferred from many complaints of officer's violent behavior); *Layne v. Vinzant,* 657 F.2d 468, 471 (1st Cir.1981) (supervisor must have "actual notice" of risk); *Popham v. Talladega,* 908 F.2d 1561, 1564 (11th Cir.1990) (absent knowledge of suicidal tendencies, "cases have consistently held that failure to prevent suicide" does not "constitute deliberate indifference"); *Anderson v. Atlanta,* 778 F.2d 678, 682–84, 686 (11th Cir.1985) (supervisors' knowledge inferred from complaints of understaffing); (3) *obvious steps: Voutour v. Vitale,* 761 F.2d 812, 821 (1st Cir.1985) (police chief's failure to see that firearms training provided, despite statute requiring such training for officers), *cert. denied,* 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *see also DesRosiers,* 949 F.2d at 19 (suggesting that a finding of deliberate indifference may lie where harm was easily preventable).

Using such standards in a case where a police officer shot an innocent plaintiff, we found the officer's supervisor liable, because citizen complaints and prior incidents had made the supervisor aware of the policeman's frequently brutal behavior, the ***957** supervisor had repeatedly dismissed complaints against the officer without making any effort to consider the officer's prior history of misconduct, and the supervisor administered a "grossly deficient" and "bankrupt" complaint procedure that inhibited proper police discipline. *Gutiérrez–Rodriguez,* 882 F.2d at 564–66. Similarly, the Third Circuit has found a municipality "deliberately indifferent" to a detainee suicide risk where the municipality did not provide any suicide-prevention training to police officers, and also failed to adopt known, inexpensive suicide-prevention measures (such as directives to keep intoxicated detainees under restraint or observation, or not to house them alone in an empty cellblock), applicable to a detainee who

had demonstrated suicide-risk symptoms. *Simmons v. Philadelphia,* 947 F.2d 1042, 1064–65, 1072–75 (3d Cir.1991).

On the other hand, where police departments have promulgated commonplace suicide-prevention policies, courts ordinarily have found supervisors not liable, *i.e.,* not to have been "deliberately indifferent" to deprivation of the detainee's "right to life," even if officers did not always follow the department's policy and even if other, better policies might have diminished suicide risks. *See, e.g., Belcher v. Oliver,* 898 F.2d 32, 34–36 (4th Cir.1990) (no liability; officers failed to remove belt and shoelaces, although ordinary practice and chief's directive was to do so; no "objective evidence" that victim was a special suicide risk, although better screening procedures might have identified him as such); *Edwards v. Gilbert,* 867 F.2d 1271, 1276 (11th Cir.1989) (no liability for suicide although a better, more up-to-date screening procedure might have identified victim as a risk requiring special procedures); *Molton v. Cleveland,* 839 F.2d 240, 246–47 (6th Cir.1988) (only negligence, not deliberate indifference, to detainee's suicide risk where, after eight suicides in a decade, city adopted suicide prevention policies, including removal of belts and surveillance of despondent persons, but still gave officers little suicide-prevention training), *cert. denied,* 489 U.S. 1068, 109 S.Ct. 1345, 103 L.Ed.2d 814 (1989).

A. *Chief Fenton*

[2] **[3]** **[4]** It is well established that a supervisor "may be found liable [under Section 1983] only on the basis of her [or his] own acts or omissions." *Gutiérrez–Rodriguez,* 882 F.2d at 562 (quoting *Figueroa v. Aponte–Roque,* 864 F.2d 947, 953 (1st Cir.1989)). Supervisory liability may arise from "deliberate indifference" to a class of persons. Appellants here must show a seriously elevated risk of suicide, Chief Fenton's knowledge of that risk, and Chief Fenton's failure to take obvious remedial steps, to the point where his culpability considerably exceeds negligence and, because it is "reckless" or "callous" or wanton, amounts to "deliberate indifference" to suicides in his jail.

The record contains evidence of the following key facts:

(1) *Risk of suicide.* In the three years before Murray's suicide, sixteen detainees attempted suicide in the Springfield lockup. In the preceding nine months, four detainees tried to hang themselves with shoelaces, an item that state and departmental policies tell police officers to remove from prisoners. Ten of the other twelve attempts involved items of clothing that these policies permit prisoners to retain, such as shirts, sweaters and socks.

(2) *Knowledge.* Chief Fenton knew of the suicide attempts. He received, and read, a special report about each suicide attempt. Although he knew of the four attempts with shoelaces, he says, without contradiction, that he did not realize that department policies called for the removal of a prisoner's shoelaces.

(3) *Obvious steps.* In January 1980, Chief Fenton promulgated commonplace suicide prevention policies, requiring officers to remove belts, shoelaces, neckties, necklaces, neckchains, matches, cigarette lighters and other "articles which may pose a danger of harm." He told commanding officers to distribute copies of the policies to all officers (and they were posted on the bulletin board of the jail where Murray was held in protective custody). In mid–1981, ***958** Fenton promulgated additional suicide-prevention policies. In May, officers were required to check detainee cells every half hour. In June, officers were told to take special steps if a detainee showed suicidal tendencies (*e.g.,* informing a superior officer, posting an officer near the cell, providing for transfer to a mental health facility). In July, Fenton told all commanding officers to "acquaint themselves" with protective custody procedures (including suicide-prevention procedures). The record also indicates that the Department had "no formal training program in suicide prevention" but it provided "in service" suicide-prevention training and it has sent some officers to a special suicide-prevention seminar.

Fenton's basic shortcomings, as far as the record reveals, were (1) a failure to realize, from the suicide reports, that an unusual number of suicide attempts involved shoelaces, which Department policies said that officers should remove; and (2) a consequent failure to insist that officers implement the specific shoelace policy. In retrospect, particularly when the four shoelace-related attempts are brought to our attention all at one time, it is tempting to say that Fenton should have noticed a kind of systemic failure and should have made certain that all Department officers carried out the shoelace removal policy. Yet, given the large number of detailed policies implemented by any police department and given the fact that suicide reports likely cross a supervisor's desk one

at a time, over a period of many weeks or months and mixed with many other urgent matters, it may, in fact, prove difficult for a chief to recollect (or notice) that department policies call for removal of shoelaces, along with belts (but not shirts). Still, given the number of recent shoelace suicide attempts (four), the chief's failure to take immediate corrective steps might well be negligent. But we fail to see how, without more evidence, one could call it "deliberate indifference."

Roughly comparable cases support this view. No case finds a supervisor "deliberately indifferent" (or the like) simply because he does not react when he learns of a significantly increased suicide attempt rate. Courts, including this one, have found supervisors to be deliberately indifferent only where a much fuller record than we have before us shows significantly more culpable behavior (or omissions). *See* *Gutiérrez–Rodriguez,* 882 F.2d at 564–66; *cf.* *Simmons,* 947 F.2d at 1064–65, 1072–75. Where one finds typical suicide prevention policies in place, at least some officer training, and records as empty of additional supporting detail as is this one, courts have consistently found no "deliberate indifference." *See* *Belcher,* 898 F.2d at 34–36; *Edwards,* 867 F.2d at 1276; *Molton,* 839 F.2d at 246–47.

B. *The City of Springfield*

[5] **[6]** Municipal liability under Section 1983 cannot be based on *respondeat superior.* *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Municipal liability lies only when a municipal policy or custom causes the alleged constitutional deprivation. *Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Municipal liability

> attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Pembaur v. Cincinnati, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986).

In *Canton,* the Supreme Court held that under certain limited circumstances a municipality may be "liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train municipal employees." 489 U.S. at 380, 109 S.Ct. at 1200. The Court made clear that an inadequacy in police training may provide the basis for Section 1983 liability whenever the municipality's failure to train its officers "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388, 109 S.Ct. at 1200.

***959** In this case, the City of Springfield implemented guidelines and procedures to prevent persons held in protective custody from inflicting harm on themselves. In the spring of 1984, three officers of the police department attended a seminar on suicide prevention at the Worcester police department. At the time of the decedent's suicide, the City had implemented the following additional policies to prevent suicides:

(1) a call-in emergency mental health network for detainees with an obvious need for counseling;

(2) checking the cell block on a half-hour basis by officers, and to ascertain compliance by the police officers, time clocks had to be punched;

(3) on cases involving protective custody due to intoxication, the police department contacted the detoxification center; [5]

(4) any detainee known to be a suicide risk was placed under constant observation.

Plaintiffs assert that the City of Springfield was deliberately indifferent by failing to provide training and education for the police officers of the City of Springfield in suicide detection and prevention. However, the evidence in this case indicates that in 1984 such failure at most constitutes negligence —it does not rise to the level of deliberate indifference required under *Canton.* "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983." 489 U.S. at 389, 109

S.Ct. at 1204. Significantly, plaintiff's own expert conceded that the City's training and policies in 1984 regarding suicide prevention were in accord with the requirements of state law at the time of the decedent's suicide.

Furthermore, *Canton* requires a plaintiff to show "both the existence of a policy or custom and a causal link between that policy and the constitutional harm." *Santiago v. Fenton,* 891 F.2d 373, 381 (1st Cir.1989). Plaintiffs here are unable to meet the causation element of *Canton,* which requires proof that "the identified deficiency in a city's training program must be closely related to the ultimate injury." 489 U.S. at 391, 109 S.Ct. at 1206. There is no basis here for finding that the decedent's suicide is closely related to the failure of the City of Springfield to train its officers in suicide prevention.

Plaintiffs have failed to adduce evidence of how a properly trained police officer in 1984 would have known, or would have to have been willfully blind not to have noticed, that the decedent posed a strong risk of suicide, particularly since the decedent exhibited no manifestations of suicidal tendencies. In fact, Mr. Murray told the officer on duty at the Springfield police department that he had been held in protective custody before, and that he had been held at the Hampden County Jail on drug charges three days earlier. These statements would lead a reasonable, properly trained officer, sensitive to the needs of intoxicated and potentially suicidal persons, to assume that the decedent did not present a high risk of suicide.

The only evidence plaintiff has offered is that the booking officers' negligent failure to follow established procedures, namely, removal of the shoelaces of persons held in protective custody, led to the decedent's suicide. This evidence, however, is insufficient to create a genuine issue of fact as to whether the police officers of the City of Springfield were inadequately trained in 1984. In *Canton,* the Supreme Court noted

> [t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program ... It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury 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 ***960** resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. at 390–91, 109 S.Ct. at 1206 (internal citation omitted).

In sum, there is no question that far from demonstrating deliberate indifference to the mental health needs of intoxicated and potentially suicidal detainees, the record shows that, in 1984 the policies implemented by the City of Springfield demonstrate an effort to ensure the safety of persons like the decedent.

IV

[7] In count III of the complaint, plaintiff Jessica Manarite, the daughter of the decedent, asserts that defendants' failure to prevent the decedent's suicide violated her right to familial associational privacy—a liberty interest protected by the substantive due process clause. The district court concluded that Jessica had no liberty interest protected by the due process clause in her familial relationship with her father. We agree.

In *Ortiz v. Burgos,* 807 F.2d 6 (1st Cir.1986) and *Pittsley v. Warish,* 927 F.2d 3 (1st Cir.1991), we held that a plaintiff may assert a violation of a right to familial associational privacy only when the state action is directly aimed at the parent-child relationship.

In *Ortiz,* this court reviewed the Supreme Court's precedents involving the familial liberty interest. These precedents fall

generally into two categories. The first category of cases holds that the substantive due process prevents governmental interference in "certain particularly private family decisions." *Id.* at 8 (citing as examples *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)). The second category holds that the substantive due process clause requires strict adherence to procedural protections whenever the "state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest ..." *Ortiz,* 807 F.2d at 8 (citing as examples *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Little v. Streater,* 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)).

Ms. Manarite's familial association claim falls under neither of these two categories. In failing to prevent decedent's suicide, the defendants were not interfering with "an individual's right to choose how to conduct his or her family affairs." *Ortiz,* 807 F.2d at 8. More fundamentally, there is no evidence to draw an inference that the defendants' failure to take preventive action was directly aimed at severing or affecting the parent-child relationship. As this court stated in *Pittsley:*

> [The] second category is implicated whenever the state directly seeks to change or affect the parent-child relationship. State action that affects the parental relationship only incidentally, however, even though the deprivation may be permanent, as in the case of unlawful killing by the police, is not sufficient to establish a violation of a identified liberty interest.
>
> *Ortiz,* 807 F.2d at 8. Therefore, *only the person toward whom the state action was directed, and not those incidentally affected,* may maintain a § 1983 claim [for a violation of the familial association right].

927 F.2d at 8 (emphasis added).

Viewing the record in the factual light most favorable to Ms. Manarite, we agree with the district court that she has no protected liberty interest for familial association under the facts of this case.

Affirmed.

All Citations

957 F.2d 953

Footnotes

* Of the District of Massachusetts, sitting by designation.

1 The guidelines provided in pertinent part:

> 13. An incapacitated person held in protective custody at the police station shall have the following property taken from him for safekeeping in accordance with departmental procedures:
> a. belts, shoe laces, kneckties (sic), knecklaces (sic), kneckchains (sic), matches, and cigarette lighters;
> b. all other articles which may pose a danger or harm to such person or to others; ...

2 According to the Springfield police department policy, all of the cells are checked every half hour.

3 In addition, the complaint alleged violations of Massachusetts tort law.

4 Plaintiffs have voluntarily dismissed their appeal as to the booking officers, defendants Michael Somers and John Lynch.

5 A procedure that was followed in this case.

KeyCite Red Flag - Severe Negative Treatment
Overruling Recognized by Gevas v. McLaughlin, 7th Cir.(Ill.), August 20, 2015

944 F.2d 344
United States Court of Appeals,
Seventh Circuit.

Herbert F. McGILL, Plaintiff–Appellee/Cross–Appellant,
v.
Jack R. DUCKWORTH, et al.,
Defendants–Appellants/Cross–Appellees.

Nos. 90–1845, 90–1945.
|
Argued Feb. 20, 1991.
|
Decided Sept. 17, 1991.

Synopsis

Inmate brought action against prison officials and prison guard after he was attacked by another inmate. Following judgment for inmate, defendants moved to judgment notwithstanding verdict, for new trial, or for amendment of judgment. The United States District Court for the Northern District of Indiana, Robert L. Miller, J., 726 F.Supp. 1144, denied the motion in part, and appeals were taken. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) inmate failed to show requisite recklessness to hold the defendants liable under the Eighth Amendment, and (2) inmate's decision to accept the risk precluded blaming the defendants on negligence theory.

Affirmed in part, reversed in part.

Cudahy, Circuit Judge, concurred in part and dissented in part with opinion.

West Headnotes (15)

[1] **Prisons** Discipline, security, and safety in general

State with constitutional duty to attend to prisoners' medical problems, even though problems are not of state's creation, has no lesser obligation to attend to need for physical safety. U.S.C.A. Const.Amend. 8.

11 Cases that cite this headnote

[2] **Sentencing and Punishment** Protection from violence

Sentencing and Punishment Medical care and treatment

Whether injury inflicted on inmate by fellow prisoners, or the pain of a medical condition, is "punishment" within meaning of Eighth Amendment depends on mental state of those who cause or fail to prevent it. U.S.C.A. Const.Amend. 8.

26 Cases that cite this headnote

[3] **Sentencing and Punishment** Intentional conduct

State "intends" consequence, for Eighth Amendment purposes, when it acts because of that effect; when state acts in spite of an effect, it does not intend that effect. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[4] **Sentencing and Punishment** Deliberate indifference in general

Reckless behavior by prison officials, resulting in harm to inmate, violates Eighth Amendment only if officials have actual knowledge of impending harm easily preventable, so that conscious, culpable refusal to prevent the harm could be inferred from officials failure to prevent it; ordinary negligence and even "gross negligence" in tort sense are not enough. U.S.C.A. Const.Amend. 8.

327 Cases that cite this headnote

[5] **Sentencing and Punishment** Segregated or solitary confinement

Prison officials decision to place inmate in segregation unit was not sufficient evidence of

"recklessness" to give rise to Eighth Amendment claim when the inmate was sexually assaulted, on ground that officials should have known higher risk of assaults faced by small, young prisoners, and those in protective custody; there was no evidence that officials put inmate in the segregation unit because of, rather than in spite of, risk to him, risk in general population would have been greater, and evicting another inmate from unit dedicated to protective custody would have shifted incidents of risk without reducing risk to vulnerable inmates as group. U.S.C.A. Const.Amend. 8.

57 Cases that cite this headnote

[6] **Sentencing and Punishment** Protection from violence

Prison guard in charge of monitoring shower area to protect inmates from each other was not liable under Eighth Amendment to inmate who was raped in the shower when the guard left his post without authorization; evidence indicated that the guard left to take an inmate to the hospital. U.S.C.A. Const.Amend. 8.

7 Cases that cite this headnote

[7] **Prisons** Discipline, security, and safety in general

Prisons Health and Medical Care

Under Indiana law, prison officials and guards are required to take reasonable precautions to preserve inmate's health and safety.

32 Cases that cite this headnote

[8] **Negligence** Existence as Defense

Negligence Assumption of risk

"Incurred risk" is affirmative defense under Indiana law which defendants bear burden of proof and which bars plaintiff from recovering anything even though defendant was negligent.

4 Cases that cite this headnote

[9] **Negligence** Assumption of risk

Under Indiana law, court may find incurred risk as matter of law if plaintiff's own evidence shows that he had actual knowledge of specific risk and understood and appreciated the risk.

6 Cases that cite this headnote

[10] **Negligence** Elements in general

Under Indiana law, when plaintiff's own evidence establishes that he knew of specific risk and consciously preceded despite fact that he easily could have avoided the problem, he is treated as incurring the risk.

3 Cases that cite this headnote

[11] **Torts** Contributory fault in general

Torts Assumption of risk; consent or waiver

Defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts.

1 Cases that cite this headnote

[12] **Prisons** Protection from violence, assault, or abuse

Prison inmate incurred the risk, and thus prison guards and officials could not be found liable under Indiana law on negligence theory for injuries inflicted on inmate when he was raped in shower by another inmate; the plaintiff inmate could have remained in his cell or alerted guards to risk of attacks but failed to do so and passed guard in silence on his way to shower.

51 Cases that cite this headnote

[13] **Witnesses** Subpoena

District court did not abuse its discretion in refusing to compel attendance of three of the defendant prison officials in action brought by inmate, even though inmate allegedly expected them to attend trial because he listed them as witnesses on several pretrial documents, and even though inmate asked district judge to order the defendants to attend when he learned that

they did not plan to attend; judge invited inmate to issue subpoenas to the three and the inmate declined, and inmate failed to explain why the defendants' testimony was needed. Fed.Rules Civ.Proc.Rule 45(a), (e)(1), 28 U.S.C.A.

6 Cases that cite this headnote

[14] **Witnesses** Subpoena

The way to test whether a witness is beyond federal court's power to hale them into court is to issue subpoena. Fed.Rules Civ.Proc.Rule 45(a), 28 U.S.C.A.

2 Cases that cite this headnote

[15] **Constitutional Law** Discipline and classification

Prisons Time for proceedings; prior notice and hearing

Failure to give inmate a hearing before reassigning the inmate from general population to disciplinary unit did not violate due process, where the inmate asked to be reassigned to the unit for greater protection. U.S.C.A. Const.Amends. 5, 14.

Attorneys and Law Firms

***345** Donald W. Pagos (argued), F. Parkerson, Sweeney, Dabagia, Donoghue & Thorne, Michigan City, Ind., for plaintiff-appellee.

Linley E. Pearson, Atty. Gen., David A. Arthur, Deputy Atty. Gen., Thomas D. Quigley (argued), Federal Litigation, Indianapolis, Ind., for defendants-appellants.

Before WOOD, Jr., CUDAHY and EASTERBROOK, Circuit Judges.

Opinion

EASTERBROOK, Circuit Judge.

Prisons are dangerous places. Housing the most aggressive among us, they place violent people in close quarters. Those who have difficulty conforming to society's norms outside prison may find obedience no more attractive inside—and the threat of punishment for violence is diminished for one already serving a long term. Herbert McGill asks the federal courts to hold prison officials to answer for the injuries that their charges inflict on each other.

***346** I

In 1983 McGill shot and killed (and then robbed) David Anderson. McGill pleaded guilty to voluntary manslaughter and robbery. He is serving a 27–year sentence in an Indiana prison. McGill was assigned to a cell in the general population and began to receive sexually suggestive notes and comments from other inmates. (McGill is slightly built, and word spread that the Anderson murder had homosexual overtones.) McGill asked to be moved to another institution; prison officials denied this request but moved McGill closer to the officers' station.

McGill was labelled a "snitch" after he testified against an inmate who assaulted a guard. He asked to be placed in protective custody after he was assaulted because of his testimony. Prison officials obliged; McGill was sent to one of the prison's segregation units, I Cellhouse ("IDU"). IDU houses not only inmates in need of protection but also those on disciplinary segregation status. These groups were placed in the same unit temporarily: another unit of the prison houses only inmates in protective custody, but there was no room at the time for McGill. Prisoners in IDU are locked in their cells at least 23 hours a day. They may spend the remaining hour as they wish. They may shower or go to the gym with other inmates. Alternatively they may arrange for individual time out of their cells (eliminating all risk of assault). The most timorous may choose to remain locked in their cells 'round the clock.

Soon after McGill arrived in IDU, two inmates on disciplinary status—Ausley and Halliburton—began harassing him through the bars of his cell. McGill asked prison officials to remove him from IDU because it wasn't what he expected; he did not tell them about the inmates' threats. (McGill did not want the guards to return him to the general population. He wanted, rather, to go to a protective-custody-only unit. But the prison could not accommodate that request without bumping another protective-custody inmate into the general population or the IDU.) On his third day in IDU, McGill was leaving his cell for a shower when Ausley approached him and made sexually suggestive comments. McGill continued

on to the showers. Ausley and Halliburton followed McGill down the range, threatening him as they walked along. On the way McGill encountered two correctional officers—Webb and Jones. He spoke with the two briefly about some property McGill was trying to locate but did not ask them for help. Ausley and three other men entered the shower room as McGill shampooed his hair. While the three stood guard at the door, brandishing homemade knives, Ausley raped McGill in the anus after gagging him with a washcloth. (The defendants denied that a rape occurred, but the jury resolved that question adversely to them.) Ausley and the others then escorted McGill back to his own cell.

McGill sued four prison administrators (Gordon Faulkner, Cloid Shuler, Jack Duckworth, and Robert Bronnenberg) and four prison guards (Jeff Fisher, Jerry Jones, Jay Kirkpatrick, and Brian Webb) under 42 U.S.C. § 1983, maintaining that they violated the eighth amendment's prohibition of cruel and unusual punishment (applied to Indiana through the fourteenth amendment) and the due process clause of the fourteenth. He also presented a pendent claim of negligence under Indiana law. The case went to trial with six defendants after McGill dismissed guards Kirkpatrick and Fisher. At the close of McGill's evidence, the district court granted a directed verdict in favor of two administrators (Faulkner and Shuler) on all issues and a directed verdict in favor of the four remaining defendants on McGill's due process claim only. The jury returned a verdict in favor of McGill against Duckworth, Bronnenberg, and Webb on both the eighth amendment and negligence claims, while absolving Jones on all claims against him. Special verdict forms revealed that the jury awarded $10,000 on *each* of the constitutional and tort claims, raising the question whether the jury meant to award a total of $10,000 or $20,000. The district judge decided that the jury intended one $10,000 award for McGill's damages, and entered ***347** judgment on the eighth amendment claim alone. He rejected defendants' objections to the jury instructions and their request for judgment notwithstanding the verdict. 726 F.Supp. 1144 (N.D.Ind.1989).

II

Courts properly start with common law and statutory issues, seeking to avoid decision on constitutional questions. Doing so initially looks attractive here, for the district judge concluded that the jury meant to return a single $10,000 award, which could be supported on either state-law or constitutional grounds. Two considerations, however, require us to consider both the common law and constitutional issues. First, McGill's cross-appeal contends that the jury really awarded him $20,000, half on the constitutional question. Second, McGill wants an award of attorneys' fees under 42 U.S.C. § 1988 as the prevailing party on the constitutional claim. Defendants argue, and McGill agrees, that an award of fees is not possible under state tort law. We must therefore address both constitutional and common law theories of liability, and we start with the eighth amendment.

A

[1] Ausley, who raped McGill, is not among the defendants. Indiana did not harm McGill; rather it failed to prevent harm. Although the Supreme Court has never held that the eighth amendment requires the state to protect prisoners from each other, the duty to do so is a logical correlative of the state's obligation to replace the means of self-protection among its wards. *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Archie v. Racine,* 847 F.2d 1211 (7th Cir.1988) (in banc). A state with a constitutional duty to attend to prisoners' medical problems, even though the problems are not of the state's creation, *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), has no lesser obligation to attend to the need for physical safety. *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), although decided under the due process clause of the fourteenth amendment, assumes that the prison system may not ignore prisoners' risk of harm at the hands of other inmates.

[2] A prisoner's interest in safety does not lead to absolute liability, however, any more than the state is the insurer of medical care for prisoners. Not only *Estelle* but also more recent cases such as *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), and *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), hold that the eighth amendment has a mental component. The eighth amendment addresses only punishment. Whether an injury inflicted by fellow prisoners, or the pain of a medical condition, is "punishment" depends on the mental state of those who cause or fail to prevent it. If prison officials put McGill into the IDU so that a bigger inmate would have

a better chance to rape him, then it is as if the officials inflicted that pain and humiliation themselves. Other mental states, including total indifference to risks, come so close to deliberateness that courts treat them alike. Thus judges speak, as in *Estelle* and *Archie,* of "deliberate indifference" or "recklessness" as the functional equivalent of intent. Although there are shadings of meaning here, total unconcern for a prisoner's welfare—coupled with serious risks—is the functional equivalent of wanting harm to come to the prisoner.

[3] Once we equate "recklessness" with intent, however, it becomes important to give recklessness a definition that separates "punishment" (with which alone the eighth amendment is concerned) from the unwelcome injuries that occur when so many violent persons are locked up together. Wardens and guards do not desire these injuries, do not "intend" them in any useful sense. And although one could say that the state as an entity knows that intra-inmate violence is inevitable and intends the natural and probable consequences of its acts in confining prisoners, the state as entity is not a defendant here—and even if it were could not be held liable on this theory. In constitutional law there is a ***348** gulf between what a government intends and what it knows will happen. A state "intends" a consequence when it acts *because of* that effect; when it acts *in spite of* an effect it does not intend that effect. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Common law courts have given the term "reckless" different meanings, depending on context, and these differences have consequences. We must select the meaning suited to the substantive constitutional provisions.

The instructions to the jury in this case came from *Benson v. Cady,* 761 F.2d 335 (7th Cir.1985). *Benson* defined recklessness as disregarding a substantial risk of danger that either is known or "would be apparent to a reasonable person" in the defendant's position. 761 F.2d at 339. This language is a staple tort law definition of recklessness, drawn out of William Prosser, *The Law of Torts* § 34 (4th ed. 1971) —an objective standard, for it depends in part on what a "reasonable person" would perceive. Some cases in this circuit have applied the tort law's objective approach to eighth amendment questions after prison guards failed to protect their charges from attack. E.g., *Wilks v. Young,* 897 F.2d 896 (7th Cir.1990); *Richardson v. Penfold,* 839 F.2d 392, 395 (7th Cir.1988).

Other cases in this circuit take a different approach. *Duckworth v. Franzen,* 780 F.2d 645, 652–53 (7th Cir.1985), for example, asked how "recklessness" should be defined in the subjective sense that under *Estelle* (and lately *Wilson* and *Whitley*) pertains to the eighth amendment. *Franzen* looked to the criminal law, which typically uses subjective mental standards, and held that recklessness violates the eighth amendment only if the prison official had "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." 780 F.2d at 653. Ordinary negligence and even "gross negligence" in the tort sense are not enough. *Id.* at 652–53. *Whitley* cited *Franzen* with approval, 475 U.S. at 321, 106 S.Ct. at 1085, as did *Wilson v. Seiter,* 111 S.Ct. at 2325; our in banc opinion in *Archie* extended its approach to cognate questions under the due process clauses. 847 F.2d at 1218–20. Several of our opinions stand with *Franzen* in applying the subjective standard of recklessness when guards have failed to protect prisoners from assault. E.g., *Santiago v. Lane,* 894 F.2d 218, 221 n. 7 (7th Cir.1990); *Goka v. Bobbitt,* 862 F.2d 646, 649–50 (7th Cir.1988); *Walsh v. Mellas,* 837 F.2d 789, 794–96 (7th Cir.1988); *Campbell v. Greer,* 831 F.2d 700, 702 (7th Cir.1987). Cf. *Salazar v. Chicago,* 940 F.2d 233, 238–41 (7th Cir.1991) (using the criminal law definition of recklessness to identify punishment of pretrial detainees).

Decisions such as *Benson, Richardson,* and *Wilks* are hard to reconcile with decisions such as *Franzen, Santiago, Goka, Walsh,* and *Campbell.* The district judge recognized the conflict and gave the instruction he did because he deemed *Richardson* the prevailing rule. 726 F.Supp. at 1151. Our court has not added to the lists recently, but the Supreme Court's opinion in *Wilson* has substantial bearing, as we shall see.

Debating the meaning of "recklessness" might be quibbling—so McGill argues—but is not. Prisoners are dangerous (that's why many are confined in the first place). Guards have no control over the temperament of the inmates they supervise, the design of the prisons, the placement of the prisoners, and the ratio of staff to inmates. Some level of brutality and sexual aggression among them is inevitable no matter what the guards do. Worse: because violence is inevitable unless all

prisoners are locked in their cells 24 hours a day and sedated (a "solution" posing constitutional problems of its own) it will *always* be possible to say that the guards "should have known" of the risk. Indeed they should, and do. Applied to a prison, the objective "should have known" formula of tort law approaches absolute liability, rather a long distance from the Supreme Court's standards in *Estelle* and its offspring.

Although the guards can influence the number of assaults, many of the levers ***349** that increase or decrease risk are manipulated by others. The size of prisons, the number of separate areas, and so on, are in the hands of the state. Legislatures decide how many prisons to build (and how many guards per prisoner to hire); architects design the buildings; judges fill them. Crowding is endemic, as taxpayers reluctant to foot the bill for increased space also clamor for longer sentences that may increase the prison population. Administrators in many states (Indiana among them) consequently are unable to house each inmate only with those of a similar status. A Herbert McGill will be small, young, labelled as a snitch, and therefore at high risk no matter where he is placed—and the defendants, who know the risk unless they are unbelievably dense, had limited options in choosing his placement. The "should have known" approach allows plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control. It may be appropriate to require "the state" (to personify a complex of persons and traditions) to bear these costs, so that it considers them when deciding how many prisons to build and whether to increase the sentences for crimes. However valuable this may be as a tort rule applied to the states, it has tenuous standing as an interpretation of the eighth amendment applied to guards and wardens.

[4] When deciding *Davidson,* a prison assault case under the due process clause, the Court made clear that failure to prevent aggression is actionable only if intentional. 474 U.S. at 348, 106 S.Ct. at 670. *Wilson* shows that shifting ground to the eighth amendment does not make it easier for the prisoner to recover. *Wilson* resolved the conflict between the objective and subjective understandings of recklessness in favor of *Franzen* 's subjective standard. *Wilson* holds that only by demonstrating the defendants' mental state may a prisoner establish that unpleasant happenings are "punishment". In the process the Court rejected objective approaches like the one in *Benson.* The Supreme Court relied on our survey of the language and history of the "cruel and unusual punishments" clause in *Franzen* and concluded that, no matter how deplorable, prison conditions that are undesired are not "punishment". 111 S.Ct. at 2324–26. *Wilson* 's understanding of intent tracks our own in *Archie,* 847 F.2d at 1219, which explicitly adopted the subjective (criminal law) sense of recklessness. *Franzen* therefore represents the law of the circuit. Contrary expressions in *Benson, Wilks,* and *Richardson* do not survive *Wilson.* See also *Salazar* (disapproving *Kincaid v. Rusk,* 670 F.2d 737 (7th Cir.1982), the parallel to *Benson, Wilks,* and *Richardson* for pretrial detainees).

It follows that the instructions to the jury were erroneous to the extent they allowed the jury to find the defendants liable if they "should have known" that McGill was at risk. Defendants maintain that McGill would not prevail under the approach of *Franzen,* so that there is no point in remanding for a second trial. McGill had to show that the defendants had actual knowledge of the threat Ausley posed, that the rape was readily preventable, but that instead of intervening the guards allowed Ausley to proceed. Proving (as the jury found McGill did) that the guards *should have known* of Ausley's threat is not enough. The defendants say that McGill had no evidence to make out his case under *Franzen.*

[5] A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. E.g., *Santiago,* 894 F.2d at 223–24; *Goka,* 862 F.2d at 647–48; *Walsh,* 837 F.2d at 795–96, 798. McGill admits that he did not complain: he testified that he never told any of the defendants that Ausley had threatened him. The only complaints McGill made to prison officials came while he was in the general population after being harassed as a snitch: he asked for protective custody and got it. Other circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage. See *Ruefly v. Landon,* 825 F.2d 792 (4th Cir.1987), and *Blankenship v. Meachum,* 840 F.2d 741 (10th Cir.1988). Cf. ***350** *Bell v. Stigers,* 937 F.2d 1340 (8th Cir.1991) (same principle applied to suicide). These decisions are sound and require judgment for the defendants. McGill's is an easier case, for to the extent the defendants knew of threats they took immediate action to remove McGill from the general population. It makes no sense to infer that they wanted him humiliated, or didn't give a fig for his welfare, when they acted promptly to protect his safety. The eighth amendment does not guarantee success.

McGill tried to demonstrate the defendants' knowledge of an impending attack by showing that they knew he was a member of two groups that face a higher risk of assaults: (1) small, young prisoners, and (2) those in protective custody. The second strikes us as topsy-turvy. That McGill was in protective custody demonstrates that the defendants were trying to aid him, not that they intended his injury. McGill says that the defendants knew that putting small, young protective custody inmates in the same unit as disciplinary status inmates would lead to trouble. During the first three months of 1984 five violent incidents took place in the segregation unit, all involving inmates in protective custody. McGill then argues that "common sense" dictates that inmates under protective custody should not be placed with inmates on disciplinary status. This is a species of the "should have known" approach—and it fixes liability on guards for prison housing arrangements that they cannot control. It shows vividly how McGill's analysis holds guards personally liable for the consequences of budgetary decisions made elsewhere. Inmates can be classified into innumerable groups such as "young" or "small". Half of all prisoners are smaller than average, and we may assume that they face higher risks. This hardly shows that the guards wanted injury to come to McGill, or did not care whether it did; it does not even show that McGill faced a substantial risk. The record does not show how many protective custody inmates passed through the IDU in the first quarter of 1984; we know that only five of what must be a much larger number were assaulted. Prisoners in protective custody are no saints themselves (McGill himself is in prison for killing another person in a rage). Inmates in protective custody may detest each other. McGill would have been at some risk anywhere.

Nothing in this record implies that the warden or guards put McGill in the IDU *because of,* rather than *in spite of,* the risk to him. The risk in the general population would have been greater, and evicting another inmate from the unit dedicated to protective custody, in order to make room there for McGill, would have shifted the incidence of risk without reducing risk to vulnerable inmates as a group. Cf. *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991) (reiterating that for constitutional purposes a state actor does not "intend" anticipated but unwelcome consequences of acts undertaken for other reasons). McGill does not dispute the defendants' submission that they would have liked to separate all protective custody inmates from all disciplinary inmates but could not because of lack of space and money—things that only the legislature can provide. McGill put in no evidence that some alternative strategy the defendants could have followed within their budget would have reduced the injury rate. And even if he had proved this, he would have established only negligence. The administrative defendants are entitled to judgment as a matter of law.

[6] Brian Webb presents a different situation. He was in charge of monitoring the shower area to protect the inmates from each other. Webb left his post without authorization and admitted at trial he was wrong. McGill's theory is that Webb left to take an inmate to the hospital. A prison log sheet shows that Webb signed out to the hospital at the time that McGill was assaulted. Why this is even negligence eludes us. It violated the prison's rules, to be sure, but under *Estelle* prisons must provide medical care for their inmates. An inmate with a problem requiring hospitalization takes priority. You can imagine the reaction if Webb had continued patrolling the shower while the other inmate's medical problem went unattended. Would Webb have had a good defense to ***351** the *other* inmate's eighth amendment suit that he had to remain on station, until relieved, lest mayhem break out in the shower? McGill introduced no evidence that Webb knew that McGill was about to be raped. (McGill admits that he spoke to Webb on his way to the shower and expressed no fear of an impending attack.) Is Webb to be held liable on the ground that he was supposed to know McGill's danger better than McGill himself? That would be the "should have known" approach run riot.

Estelle and subsequent cases equate "deliberate indifference" with intent. This seeming oxymoron has given us, in company with other courts of appeals, fits. How do we simultaneously honor both the "deliberate" and the "indifference" aspects? Criminal law suggests a way. Suspecting that something is true but shutting your eyes for fear of what you will learn satisfies scienter requirements. Going out of your way to avoid acquiring unwelcome knowledge is a species of intent. See *United States v. Giovannetti,* 919 F.2d 1223, 1226–29 (7th Cir.1990); *United States v. Ramsey,* 785 F.2d 184, 189–91 (7th Cir.1986). Being an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent. *Giovannetti,* 919 F.2d at 1228; *Ramsey,* 785 F.2d at 189. Because it is sufficient for criminal liability it is sufficient for liability under the eighth amendment's subjective standard. But McGill did not pursue this avenue at trial; the jury was never given an "ostrich" instruction of the kind we discussed in *Ramsey,* and we need not speculate on where this possibility may take us tomorrow.

B

McGill won a verdict on his state law negligence claim even though the district judge eventually entered judgment on the eighth amendment claim alone. McGill asks us to invoke the special verdict on negligence to support $10,000 in damages. Duckworth, Bronnenberg, and Webb argue there is insufficient evidence to allow a jury to deem them negligent, and that at all events McGill assumed the risk by leaving his cell and proceeding into the showers when he knew that Ausley and pals were on his heels.

[7] Indiana requires prison officials and guards to take reasonable precautions to preserve an inmate's health and safety. *Johnson v. Bender,* 174 Ind.App. 638, 642, 369 N.E.2d 936, 939 (3d Dist.1977); *Roberts v. State,* 159 Ind.App. 456, 462, 307 N.E.2d 501, 505 (2d Dist.1974). We may assume that the defendants breached this duty —Duckworth and Bronnenberg by failing to take greater care to see that disciplinary status inmates were separated from those in protective custody, Webb by leaving his post without authorization. Assuming negligence is a dubious step. Duckworth and Bronnenberg assert, without contradiction in the record, that any alternative housing arrangements within their budget would have been *more* dangerous for protective custody inmates. McGill points to no equally affordable option that would have been safer for inmates as a group, and McGill has no entitlement to be preferred over others. Nonetheless, we pass this by, as the defendants focus their energy on the question whether McGill assumed the risk of attack.

[8] "Incurred risk" (Indiana's mixture of contributory negligence and assumption of risk) is an affirmative defense on which the defendants bear the burden of proof. *Get–N–Go, Inc. v. Markins,* 544 N.E.2d 484, 486 (Ind.1989); *Ridgway v. Yenny,* 223 Ind. 16, 22–23, 57 N.E.2d 581, 583 (1944). Incurred risk bars the plaintiff from recovering anything even though the defendant was negligent. *Ridgway,* 223 Ind. at 22, 57 N.E.2d at 583. The Supreme Court of Indiana describes the defense as one that focuses on the plaintiff's actual knowledge of a specific risk and voluntary acceptance of that risk. *Get–N–Go,* 544 N.E.2d at 486; *Beckett v. Clinton Prairie School Corp.,* 504 N.E.2d 552, 554–55 (Ind.1987). It requires looking at the plaintiff's "state of venturousness". *Id.* at 555.

McGill's lawyer probed his knowledge of the danger and acceptance of the risk. After establishing that Ausley and Halliburton ***352** had been threatening McGill since the day he took up residence in IDU, and that Ausley began to harass him immediately after he left his cell to take a shower, they had the following exchange:

> Q: Why did you still go in the shower if you were receiving these threats?
>
> A: Well, I figured ... when I went in the shower that ... since I had my shower things and [Ausley and the others] were by themselves, I didn't figure, you know, nothing would happen....
>
> Q: Could you have gone back in your cell and closed the door?
>
> A: Yes.
>
> Q: Is there some reason you didn't do that?
>
> A: I don't know why.

Shortly thereafter McGill revealed that, with Ausley not far behind, he encountered Officers Jones and Webb on his way to the shower, spoke to them about some property that he was trying to locate, but said nothing about Ausley's threats.

[9] **[10]** Disputes about knowledge and mental states—disputes, that is, of the kind the defense of incurred risk engenders—are classic questions of fact for resolution by the jury. See *Mauller v. Columbus,* 552 N.E.2d 500, 502 (Ind.App. 1st Dist.1990); *Kroger Co. v. Haun,* 177 Ind.App. 403, 407, 379 N.E.2d 1004, 1007 (2d Dist.1978). Still, an Indiana court may find incurred risk as a matter of law if the plaintiff's own evidence shows that he had actual knowledge of the specific risk and understood and appreciated the risk. *Beckett,* 504 N.E.2d at 555–56; *Mauller,* 552 N.E.2d at 502–03. Continued exposure to a known danger is incurred risk only if there is a "reasonable opportunity to escape from it", and the exposure was not the result of inducement that negates the element of voluntariness. *Get–N–Go,* 544 N.E.2d at 487. McGill relies on cases dealing with continued exposure by persons who have no safe way to escape. *Get–N–Go* presented

such a problem. An elderly woman walked several steps into a parking lot before she discovered how icy it was. Faced with a choice of retreating or proceeding—both of which involved walking on ice—she chose to proceed and slipped. The Supreme Court of Indiana held that someone whose only way out of a pickle created by the defendants is to continue on through the hazard has no reasonable opportunity to escape from the dangerous condition and therefore does not incur the risk. 544 N.E.2d at 487. See also *Ridgway,* 57 N.E.2d at 583–84 (plaintiff was driven into remote area during snowstorm before driver started driving dangerously and crashed); *Alexandria v. Allen,* 552 N.E.2d 488, 497–98 (Ind.App.2d Dist.1990) (fireman drove broken fire truck when all others were broken too); *Hollowell v. Midwest Smorgasbord, Inc.,* 486 N.E.2d 16, 18 (Ind.App. 1st Dist.1985) (plaintiff walked part way across wet floor before realizing the danger). But when the plaintiff's own evidence establishes that he knew of a specific risk and consciously proceeded despite the fact that he easily could have avoided the problem, Indiana treats him as incurring the risk. *Mauller* approved of summary judgment against a softball player who saw unsafe conditions around home plate on a softball field but slid into home anyway. 552 N.E.2d at 503–04. See also *Beckett,* 504 N.E.2d at 555–56 (summary judgment against baseball player who collided with another player during practice); *St. Mary's Byzantine Church v. Mantich,* 505 N.E.2d 811, 813–14 (Ind.App.3d Dist.1987) (reversing jury verdict for plaintiff who slipped on a steep ramp when there were other alternatives). The dividing line lies between cases where the plaintiff's alternatives are "fraught with their own perils" and those where the plaintiff has safe alternatives that would avoid the danger. *St. Mary's,* 505 N.E.2d at 814.

[11] **[12]** If this were a suit against Ausley and his confederates, McGill's failure to return to his cell or alert the guards would be no defense. No one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood. Rape is an intentional tort, and defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts. W. ***353** Page Keeton and others, *Prosser & Keeton on Torts* 462 (5th ed. 1984). So, too, these defenses often fall away when the defendant acts recklessly or wantonly. *Ibid.* But McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety, and we are persuaded that the courts of Indiana would not require Webb (let alone the warden) to compensate McGill for injuries Ausley inflicted, after McGill passed Webb in silence.

This case lies closer to *Beckett, St. Mary's,* and *Mauller* than to cases such as *Get–N–Go, Ridgway,* and *Hollowell.* McGill knew, far better than his guards, of a risk of attack: Ausley had been making sexual threats since the day McGill arrived in IDU. McGill admitted he had easy means of avoidance: he could have retreated to his cell, locked the door, and waited to take his shower. Retreat did not imply that McGill had to give up showers, for he could have arranged for an individual shower period. He did neither; he chose to continue on to the showers, believing that "nothing would happen". McGill had yet another chance to escape danger just before he entered the showers: he encountered Officers Webb and Jones on the way, but made not a peep about Ausley. McGill was not trapped in a situation with risks at every turn.

McGill calls attention to his testimony that after he came out of his cell, Ausley began pushing him toward the shower and threatening to throw him over the cell range if he resisted. The district court saw this as evidence that McGill's exposure to the risk was the result of "inducement to continue despite the danger" and did not constitute incurred risk. 726 F.Supp. at 1157–58, citing *Get–N–Go,* 544 N.E.2d at 487. But this testimony relates to what happened *after* McGill left his cell, saw Ausley heading his way making threats, and made the decision to take a shower anyway. McGill could have stayed in his cell or arranged for individual shower and recreation periods—and as we have emphasized, he could have alerted the guards he passed on the way. (A belief McGill kept his mouth shut as he passed Jones and Webb only because he feared immediate attack collides with McGill's own testimony that he does not know why he failed to alert the guards.) McGill's decision to accept the risk precludes blaming the guards and higher-ups in the prison system.

III

McGill raises three issues by cross-appeal. The first, his objection to the district court's decision to enter judgment for $10,000 on the eighth amendment claim alone, is of no moment given our conclusion that he cannot recover

under either theory. The other two issues require only brief comment.

[13] McGill wanted to call three of the defendants (Faulkner, Shuler, and Jones) as witnesses. He says that he expected them to attend the trial because he had listed them as witnesses on several pretrial documents. One week before trial McGill learned the three did not plan to attend, and on the first day of trial he asked the district judge to order them to do so. Persons need not attend the proceedings just because they have been named as parties, so Judge Miller invited McGill to issue subpoenas to the three. McGill, who was represented by counsel, declined. He conceded (at trial and on appeal) that he could have procured subpoenas, but he says that he preferred to rely on Judge Miller's "inherent power as a judge" to compel defendants to attend trial.

[14] McGill should not have resisted the court's repeated invitations to subpoena the three defendants. Fed.R.Civ.P. 45(a) provides a simple procedure: a litigant asks the clerk of the district court (*not* the district judge) to command someone to attend trial and give testimony. The judge has the power to enforce the subpoena if the witness opposes the demand to appear. Maybe McGill knew (or feared) that the three defendants were outside the court's subpoena power, which under Rule 45(e)(1) is limited to its district and a 100–mile ***354** radius around the courthouse. The record shows that Jerry Jones was working in California at the time of trial. Faulkner and Shuler no longer worked for the Indiana prison system, but the record is silent on their domicile at the time of trial. The way to test whether a witness is beyond a federal court's power to hale him into court is to issue a subpoena under Rule 45(a). Although federal judges have some "inherent powers", these are limited by statutes and rules. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991). Relying on "inherent powers" to compel the attendance of a witness who is outside the court's subpoena power would make the restrictions in Rule 45(e) meaningless. McGill chose not to subpoena the three, even after the judge insisted that this was his only recourse. The district judge was correct in refusing to order their appearance in the absence of a subpoena. Cf. *United States v. Burton*, 937 F.2d 324, 329 (7th Cir.1991); *United States v. Taylor*, 562 F.2d 1345, 1361 (2d Cir.1977); and *Johnson v. United States*, 426 F.2d 651, 656 (D.C.Cir.1970) (in banc), all dealing with the nearly identical provisions of Fed.R.Crim.P. 17. At all events, McGill was none too specific about the testimony he expected these witnesses to provide. He told Judge Miller only that they were "necessary" and that he hoped to force them to "implicate themselves", but he did not explain why or how. It is no abuse of discretion to refuse to compel the attendance of a witness when the party requesting the order not only disdains proper procedures but also fails to explain why the testimony is needed.

[15] McGill also says that he should have received a hearing before being reassigned from the general population to the disciplinary unit. Yet McGill *asked* to be reassigned to a unit for greater protection. Indiana did not shortcut necessary procedures; it acceded to a request. The due process clause gives an *opportunity* for a hearing, which people can elect to forego. That the request is ill-starred is irrelevant to the question whether the state skimped on procedures. In the end McGill is repackaging his eighth amendment claim that he should have been sent to a protective-custody-only unit rather than the IDU. His problem is not that he was moved without a hearing, but that he did not like the destination. It is a complaint about the substance of the assignment, not the procedures (or lack of them) used to get him there. The defendants were entitled to a directed verdict on McGill's due process claim.

On the defendants' appeal, No. 90–1845, the judgment is reversed. On McGill's cross-appeal, No. 90–1945, the judgment is affirmed.

CUDAHY, Circuit Judge, concurring in part and dissenting in part.

The majority goes to wholly implausible lengths to overturn a jury verdict of negligence. It argues that McGill somehow voluntarily assumed the risk of rape by leaving his cell for the unexceptionable purpose of taking a shower and failing to run for home when an unsavory fellow prisoner popped up at his heels. I don't know what this approach to risk assumption in rape cases holds in store for multitudes of females innocently walking the streets or taking the sun on the beach. But it certainly is a novel (and unfashionable) approach.

McGill testified that, soon after he left his cell, Ausley began pushing him toward the shower and threatened to throw him over the cell range if he offered any resistance. The district court found, therefore, that McGill did not voluntarily incur the risk of rape but instead was induced to continue despite the danger. For under Indiana law, a plaintiff assumes the risk of a known danger *only* if there is a reasonable opportunity

to escape from it and if the exposure to the risk was not itself the result of inducement negating voluntariness. In *Get–N–Go, Inc. v. Markins,* 544 N.E.2d 484 (Ind.1989), for example, an elderly woman took several steps into a parking lot before she realized how icy it was. Faced with the choice of retreating or proceeding, both of which presented the risk of falling on the ice, she chose to proceed and fell. *See also* ***355** *Hollowell v. Midwest Smorgasbord, Inc.,* 486 N.E.2d 16 (Ind.App.1985) (no assumption of risk when plaintiff continued walking on wet floor after he had walked part way before realizing the danger).

Attempting to distinguish *Get–N–Go,* the majority suggests that McGill possessed a number of alternatives: he could have retreated to his cell and locked the door as soon as he saw Ausley coming his way, he could have arranged in advance for an individual shower period or he could have alerted the prison guards to his danger. But the majority's perception of McGill's situation runs up against a stone wall of stark reality. For, as the majority opines (without contradiction from me), "prisons are dangerous places." An inmate's decision to leave his cell is always fraught with peril. But certainly no inmate (no matter how "attractive") assumes the risk of rape simply by leaving his cell when he knows other inmates lurk at large. The unsoundness of this proposition is revealed by extending it to heterosexual conduct in the world at large. Admittedly, this is a negligence action against a third party, not a suit against the rapist, but the burden of an exaggerated risk assumption doctrine upon rape victims in any such situation conflicts with the trend of the law.

In any event, the elderly woman in *Get–N–Go* could have refrained (as McGill is urged to do here) from leaving her home in inclement weather when she was well aware of the icy conditions outside. McGill's situation precisely parallels that of the plaintiff in *Get–N–Go:* once he left his cell to take a shower during the one-hour recreation period and discovered Ausley close on his heels threatening to throw him over the cell range, his options ran out. McGill's decision to proceed to the showers and not request help from the prison guards, while he was terrified by the threatening Ausley close behind, certainly does not amount to a deliberate or conscious acceptance of risk. *See Mauller v. City of Columbus,* 552 N.E.2d 500 (Ind.App.1990) (" 'By definition ... the very essence of incurred risk is the conscious, deliberate and intentional embarkation upon a course of conduct with knowledge of the circumstances.' ") (quoting *Power v. Brodie,* 460 N.E.2d 1241, 1243 (Ind.App.1984)).

The burden of establishing the affirmative defense of assumption of risk, moreover, lies with the defendants and not with McGill. The Indiana Supreme Court instructs that "[w]hen a trial court decides an issue adversely to a party who has the burden of proof on that issue, the appellate court is not free to reweigh the evidence or judge the credibility of the witnesses. Reversal of the trial court is warranted only if the evidence which is not in conflict leads solely to a conclusion contrary to that reached by the jury." *Get–N–Go,* 544 N.E.2d at 486. Attempting to draw a fine line between "cases where the plaintiff's alternatives are 'fraught with their own perils,' " *supra* at 352, and cases where "the plaintiff has safe alternatives that would avoid the danger," *supra* at 352, the majority strains to put this case in the "safe alternatives" category. I am not sure the issue is even close here. Certainly the evidence does not "lead[ ] solely to a conclusion contrary to that reached by" the district court. Likening this case to *Get–N–Go,* the district court reasonably concluded, based upon all the evidence, that McGill did not voluntarily assume the risk of a homosexual rape. It is certainly not for us to reweigh the evidence and second-guess the district court's determination on this sensitive, fact-intensive question. To do so is virtually to exculpate prison authorities in advance for any responsibility to provide protection against homosexual rape. I therefore respectfully dissent. [1]

All Citations

944 F.2d 344, 60 USLW 2217, 20 Fed.R.Serv.3d 1247

Footnotes

1 I agree that the Eighth Amendment theory may not fly because McGill could not establish that the defendants had *actual knowledge* of the threat of rape and yet failed to intervene.

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Issues
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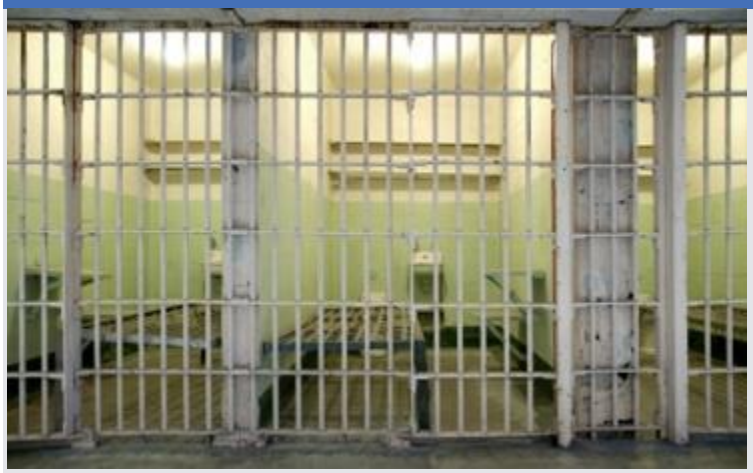

Transgender people are too frequently targeted for violence and abuse because of their gender identity or presentation. Routinely, however, that violence and abuse comes from the very authorities entrusted with their safety. Police frequently harass and profile transgender people of color, sowing distrust among the very communities they have sworn to serve. According to the 2015 US Transgender Survey, a majority (57%) of transgender people are afraid to go to the police when they need it.

Transgender people in prison are exposed to horrific rates of abuse by both staff and their fellow inmates, facing physical and sexual assault at much higher rates than their counterparts. As the USTS found, transgender people are ten times as likely to be sexually assaulted by their fellow inmates and five times as likely to be sexually assaulted by staff. Transgender prisoners also face numerous other challenges behind bars, including denials of medical care and lengthy stays in solitary confinement.

Across the country, local advocates and communities are working to hold officials accountable and foster relationships meant to ensure the safety and rights of all. NCTE seeks to empower these advocates to effect change where it is needed most by providing publications, research, and technical assistance to local advocates. In 2019, NCTE published *Failing To Protect & Serve,* an audit of the

policies at the 25 largest police departments and a model policy to help local advocates and law enforcement.

If you are working to improve the standards faced by transgender people in prison or the treatment of transgender people by your local police department, please contact NCTE at ncte@transequality.org.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Warsoldier v. Woodford, 9th Cir.(Cal.), July 29, 2005

107 S.Ct. 2254
Supreme Court of the United States

William R. TURNER, et al., Petitioners
v.
Leonard SAFLEY, et al.

No. 85–1384.
|
Argued Jan. 13, 1987.
|
Decided June 1, 1987.

Synopsis
Class action was brought to determine constitutionality of prison's mail and marriage regulations. The United States District Court for the Western District of Missouri, Howard F. Sachs, J., 586 F.Supp. 589, declared that regulations were unconstitutional, and appeal was taken. The Court of Appeals, Nichol, Senior District Judge, 777 F.2d 1307,affirmed, and plaintiffs petitioned for writ of certiorari. The Supreme Court, Justice O'Connor, held that: (1) inmate-to-inmate correspondence rule was reasonably related to legitimate security concerns of prison officials, so as not to be facially invalid, but (2) inmate marriage regulation, which prohibited inmates from marrying other inmates or civilians unless prison superintendent determined that there were compelling reasons for marriage, was not reasonably related to any legitimate penological objective.

Affirmed in part, reversed in part and remanded.

Justice Stevens concurred in part and dissented in part and filed opinion, in which Justice Brennan, Justice Marshall, and Justice Blackmun joined.

West Headnotes (11)

[1] **Federal Courts** Imprisonment and incidents thereof

Federal courts must take cognizance of valid constitutional claims of prison inmates.

352 Cases that cite this headnote

[2] **Constitutional Law** Prisons
Constitutional Law Prisons

Prison administration is task that has been committed to responsibility of legislative and executive branches, and "separation of powers" concerns counsel policy of judicial restraint in prisoners' rights cases.

329 Cases that cite this headnote

[3] **Prisons** Regulation and supervision in general; role of courts

When prison regulation impinges on inmates' constitutional rights, regulation is valid if it is reasonably related to legitimate penological interest.

5185 Cases that cite this headnote

[4] **Prisons** Regulation and supervision in general; role of courts

In deciding whether prison regulation which impinges on inmates' constitutional rights can be sustained as "reasonably related" to legitimate penological interest, court should consider: whether there is valid, rational connection between prison regulation and legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that remain open to inmates; whether accommodation of asserted rights will have significant "ripple effect" on fellow inmates or prison staff; and whether there is ready alternative to regulation that fully accommodates prisoners' rights at de minimis cost to valid penological interest.

7066 Cases that cite this headnote

[5] **Prisons** Regulation and supervision in general; role of courts

Prison regulation which impinges on inmates' constitutional rights cannot be sustained as "reasonably related" to legitimate penological interest, where logical connection between regulation and asserted goal is so remote as to render policy arbitrary or irrational, or where goal is not legitimate and neutral one.

3747 Cases that cite this headnote

[6] **Prisons** Regulation and supervision in general; role of courts

When accommodation of inmate's asserted constitutional right will have significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to informed discretion of corrections officials in adopting regulation which impinges on that right.

458 Cases that cite this headnote

[7] **Prisons** Regulation and supervision in general; role of courts

If inmate who challenges prison regulation as violation of constitutional rights can point to alternative regulation that would fully accommodate prisoner's rights at de minimis cost to valid penological interest, then court may consider this as evidence that regulation is not reasonably related to valid penological interest.

2562 Cases that cite this headnote

[8] **Prisons** Internal; inmate-to-inmate

Inmate-to-inmate correspondence rule, permitting correspondence between immediate family members who were inmates at different institutions or to extent it related to legal matters, but allowing other inmate correspondence only if it was in best interest of parties, was "reasonably related" to legitimate security concerns of prison officials, so as not to be facially invalid. U.S.C.A. Const.Amends. 1, 14.

329 Cases that cite this headnote

[9] **Marriage and Cohabitation** Civil status or condition

Prisons Particular rights and disabilities

Right to marry, like many other rights, is subject to substantial restrictions as result of incarceration.

89 Cases that cite this headnote

[10] **Constitutional Law** Family and family law in general

Marriage and Cohabitation Civil status or condition

Prisons Particular rights and disabilities

Right of inmate to marry is one protected by Constitution.

178 Cases that cite this headnote

[11] **Marriage and Cohabitation** Civil status or condition

Prisons Particular rights and disabilities

Inmate marriage regulation, which prohibited inmates from marrying other inmates or civilians unless prison superintendent approved marriage after finding that there were compelling reasons for doing so, was not reasonably related to any legitimate penological objective, so as to be facially invalid as denial of inmates' constitutional rights. U.S.C.A. Const.Amends. 1, 14.

211 Cases that cite this headnote

****2255** *Syllabus* *

***78** Respondent inmates brought a class action challenging two regulations promulgated by the Missouri Division of Corrections. The first permits correspondence between immediate family members who are inmates at different institutions within ****2256** the Division's jurisdiction, and between inmates "concerning legal matters," but allows other inmate correspondence only if each inmate's classification/ treatment team deems it in the best interests of the parties. The second regulation permits an inmate to marry only with the prison superintendent's permission, which can be given only when there are "compelling reasons"

to do so. Testimony indicated that generally only a pregnancy or the birth of an illegitimate child would be considered "compelling." The Federal District Court found both regulations unconstitutional, and the Court of Appeals affirmed.

Held:

1. The lower courts erred in ruling that *Procunier v. Martinez,* 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), and its progeny require the application of a strict scrutiny standard of review for resolving respondents' constitutional complaints. Rather, those cases indicate that a lesser standard is appropriate whereby inquiry is made into whether a prison regulation that impinges on inmates' constitutional rights is "reasonably related" to legitimate penological interests. In determining reasonableness, relevant factors include (a) whether there is a "valid, rational connection" between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; (b) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and (d) whether the regulation represents an "exaggerated response" to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at *de minimis* ***79** costs to valid penological interests being evidence of unreasonableness. Pp. 2259–2262.

2. The Missouri inmate correspondence regulation is, on the record here, reasonable and facially valid. The regulation is logically related to the legitimate security concerns of prison officials, who testified that mail between prisons can be used to communicate escape plans, to arrange violent acts, and to foster prison gang activity. Moreover, the regulation does not deprive prisoners of all means of expression, but simply bars communication with a limited class of people—other inmates—with whom authorities have particular cause to be concerned. The regulation is entitled to deference on the basis of the significant impact of prison correspondence on the liberty and safety of other prisoners and prison personnel, in light of officials' testimony that such correspondence facilitates the development of informal organizations that threaten safety and security at penal institutions. Nor is there an obvious, easy alternative to the regulation, since monitoring inmate correspondence clearly would impose more than a *de minimis* cost in terms of the burden on staff resources required to conduct item-by-item censorship, and would create an appreciable risk of missing dangerous communications. The regulation is content neutral and does not unconstitutionally abridge the First Amendment rights of prison inmates. Pp. 2263–2264.

3. The constitutional right of prisoners to marry is impermissibly burdened by the Missouri marriage regulation. Pp. 2264–2266.

(a) Prisoners have a constitutionally protected right to marry under *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Although such a marriage is subject to substantial restrictions as a result of incarceration, sufficient important attributes of marriage remain to form a constitutionally protected relationship. ****2257** *Butler v. Wilson,* 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974), distinguished. Pp. 2264–2265.

(b) The regulation is facially invalid under the reasonable relationship test. Although prison officials may regulate the time and circumstances under which a marriage takes place, and may require prior approval by the warden, the almost complete ban on marriages here is not, on the record, reasonably related to legitimate penological objectives. The contention that the regulation serves security concerns by preventing "love triangles" that may lead to violent inmate confrontations is without merit, since inmate rivalries are likely to develop with or without a formal marriage ceremony. Moreover, the regulation's broad prohibition is not justified by the security of fellow inmates and prison staff, who are not affected where the inmate makes the private decision to marry a civilian. Rather, the regulation represents an exaggerated response to the claimed security objectives, since allowing marriages unless the warden finds a threat to security, order, or the public safety represents ***80** an obvious, easy alternative that would accommodate the right to marry while imposing a *de minimis* burden. Nor is the regulation reasonably related to the articulated rehabilitation goal of fostering self-reliance by female prisoners. In requiring refusal of permission to marry to all inmates absent a compelling reason, the regulation sweeps much more broadly than is necessary, in light of officials' testimony that male inmates' marriages had

generally caused them no problems and that they had no objections to prisoners marrying civilians. Pp. 2265–2267.

777 F.2d 1307 (CA8 1985), affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and SCALIA, JJ., joined, and in Part III–B of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Henry T. Herschel, Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the briefs were *William L. Webster,* Attorney General, and *Michael L. Boicourt.*

Floyd R. Finch, Jr., argued the cause and filed a brief for respondents.*

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Cohen,* and *Roger Clegg;* and for the State of Arkansas et al. by *Thomas J. Miller,* Attorney General of Iowa, *Brent R. Appel,* Deputy Attorney General, *John Steven Clark,* Attorney General of Arkansas, *John K. Van de Kamp,* Attorney General of California, *Lacy H. Thornburg,* Attorney General of North Carolina, *Nichaolas Spaeth,* Attorney General of North Dakota, *T. Travis Medlock,* Attorney General of South Carolina, *Mark V. Meierhenry,* Attorney General of South Dakota, *Gerald L. Baliles,* Attorney General of Virginia, and *Robert M. Spire,* Attorney General of Nebraska.

Briefs of *amici curiae* urging affirmance were filed for the Correctional Association of New York by *John H. Hall* and *Steven Klugman;* for Prisoners' Legal Services of New York, Inc., et al. by *Robert Selcov;* and for Guadalupe Guajardo, Jr., et al. by *Harry M. Reasoner* and *Ann Lents.*

Jim Mattox, Attorney General of Texas, *Mary F. Keller,* Executive Assistant Attorney General, and *F. Scott McCown* and *Michael F. Lynch,* Assistant Attorneys General, filed a brief for the State of Texas as *amicus curiae.*

Opinion

***81** Justice O'CONNOR delivered the opinion of the Court.

This case requires us to determine the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate correspondence. The Court of Appeals for the Eighth Circuit, applying a strict scrutiny analysis, concluded that the regulations violate respondents' constitutional rights. We hold that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules. Applying that standard, we uphold the validity of the correspondence regulation, but we conclude that the marriage restriction cannot be sustained.

I

Respondents brought this class action for injunctive relief and damages in the United States District Court for the Western District of Missouri. The regulations challenged in the complaint were in effect at all prisons within the jurisdiction of the Missouri Division of Corrections. This litigation focused, however, on practices at the Renz Correctional Institution (Renz), located in Cedar City, Missouri. The Renz prison population includes both male and female prisoners of varying security levels. Most of the female prisoners at Renz are classified as medium or maximum security inmates, while most of the male prisoners are classified as minimum security offenders. Renz is used on occasion to provide protective custody for inmates from other prisons in the Missouri system. The facility originally was built as a minimum ****2258** security prison farm, and it still has a minimum security perimeter without guard towers or walls.

Two regulations are at issue here. The first of the challenged regulations relates to correspondence between inmates at different institutions. It permits such correspondence "with immediate family members who are inmates in other correspondence institutions," and it permits correspondence between inmates "concerning legal matters." Other correspondence between inmates, however, is permitted only ***82** if "the classification/treatment team of each inmate deems it in the best interest of the parties involved." App. 34. Trial testimony indicated that as a matter of practice, the determination whether to permit inmates to correspond was based on team members' familiarity with the progress reports, conduct violations, and psychological reports in the inmates'

files rather than on individual review of each piece of mail. See 777 F.2d 1307, 1308 (CA8 1985). At Renz, the District Court found that the rule "as practiced is that inmates may not write non-family inmates." 586 F.Supp. 589, 591 (WD Mo.1984).

The challenged marriage regulation, which was promulgated while this litigation was pending, permits an inmate to marry only with the permission of the superintendent of the prison, and provides that such approval should be given only "when there are compelling reasons to do so." App. 47. The term "compelling" is not defined, but prison officials testified at trial that generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason. See 586 F.Supp., at 592. Prior to the promulgation of this rule, the applicable regulation did not obligate Missouri Division of Corrections officials to assist an inmate who wanted to get married, but it also did not specifically authorize the superintendent of an institution to prohibit inmates from getting married. *Ibid.*

The District Court certified respondents as a class pursuant to Federal Rule of Civil Procedure 23. The class certified by the District Court includes "persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities." It also encompasses a broader group of persons "who desire to ... marry inmates of Missouri correctional institutions and whose rights of ... marriage have been or will be violated by employees of the Missouri Division of Corrections." See App. 21–22.

***83** The District Court issued a memorandum opinion and order finding both the correspondence and marriage regulations unconstitutional. The court, relying on *Procunier v. Martinez,* 416 U.S. 396, 413–414, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974), applied a strict scrutiny standard. It held the marriage regulation to be an unconstitutional infringement upon the fundamental right to marry because it was far more restrictive than was either reasonable or essential for the protection of the State's interests in security and rehabilitation. 586 F.Supp., at 594. The correspondence regulation also was unnecessarily broad, the court concluded, because prison officials could effectively cope with the security problems raised by inmate-to-inmate correspondence through less restrictive means, such as scanning the mail of potentially troublesome inmates. *Id.,* at 596. The District Court also held that the correspondence regulation had been applied in an arbitrary and capricious manner.

The Court of Appeals for the Eighth Circuit affirmed. 777 F.2d 1307 (1985). The Court of Appeals held that the District Court properly used strict scrutiny in evaluating the constitutionality of the Missouri correspondence and marriage regulations. Under *Procunier v. Martinez, supra,* the correspondence regulation could be justified "only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary or essential to protect that interest." 777 F.2d, at 1310. The correspondence regulation did not satisfy this standard because ****2259** it was not the least restrictive means of achieving the security goals of the regulation. In the Court of Appeals' view, prison officials could meet the problem of inmate conspiracies by exercising their authority to open and read all prisoner mail. *Id.,* at 1315–1316. The Court of Appeals also concluded that the marriage rule was not the least restrictive means of achieving the asserted goals of rehabilitation and security. The goal of rehabilitation could be met through alternatives such ***84** as counseling, and violent "love triangles" were as likely to occur without a formal marriage ceremony as with one. *Ibid.* Absent evidence that the relationship was or would become abusive, the connection between an inmate's marriage and the subsequent commission of a crime was simply too tenuous to justify denial of this constitutional right. *Id.,* at 1315.

We granted certiorari, 476 U.S. 1139, 106 S.Ct. 2244, 90 L.Ed.2d 691 (1986).

II

[1] We begin, as did the courts below, with our decision in *Procunier v. Martinez, supra,* which described the principles that necessarily frame our analysis of prisoners' constitutional claims. The first of these principles is that federal courts must take cognizance of the valid constitutional claims of prison inmates. *Id.,* at 405, 94 S.Ct. at 1807. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government

for the redress of grievances, *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment, *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968); and they enjoy the protections of due process, *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Because prisoners retain these rights, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez,* 416 U.S., at 405–406, 94 S.Ct., at 1807–08.

[2] A second principle identified in *Martinez,* however, is the recognition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.,* at 405, 94 S.Ct., at 1807. As the *Martinez* Court acknowledged, "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Id.,* at 404–405, 94 S.Ct., at 1807. Running a prison ***85** is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez,* additional reason to accord deference to the appropriate prison authorities. See *id.,* at 405, 94 S.Ct., at 1807.

Our task, then, as we stated in *Martinez,* is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the "policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." *Id.,* at 406, 94 S.Ct., at 1808. As the Court of Appeals acknowledged, *Martinez* did not itself resolve the question that it framed. *Martinez* involved mail censorship regulations proscribing statements that "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views." *Id.,* at 415, 94 S.Ct., at 1812. In that case, the Court determined that the proper standard of review for prison restrictions on correspondence between prisoners and ****2260** members of the general public could be decided without resolving the "broad questions of 'prisoners' rights.' " *Id.,* at 408, 94 S.Ct., at 1809. The *Martinez* Court based its ruling striking down the content-based regulation on the First Amendment rights of those who are not prisoners, stating that "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." *Id.,* at 408, 94 S.Ct., at 1809. Our holding therefore turned on the fact that the challenged regulation caused a "consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners." *Id.,* at 409, 94 S.Ct., at 1809 (emphasis added). We expressly reserved the question of the proper standard of ***86** review to apply in cases "involving questions of 'prisoners' rights.' " *Ibid.*

In four cases following *Martinez,* this Court has addressed such "questions of 'prisoners' rights.' " The first of these, *Pell v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), decided the same Term as *Martinez,* involved a constitutional challenge to a prison regulation prohibiting face-to-face media interviews with individual inmates. The Court rejected the inmates' First Amendment challenge to the ban on media interviews, noting that judgments regarding prison security "are 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." 417 U.S., at 827, 94 S.Ct., at 2806.

The next case to consider a claim of prisoners' rights was *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). There the Court considered prison regulations that prohibited meetings of a "prisoners' labor union," inmate solicitation of other inmates to join the union, and bulk mailings concerning the union from outside sources. Noting that the lower court in *Jones* had "got[ten] off on the wrong foot ... by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement," *id.,*

at 125, 97 S.Ct., at 2537, the Court determined that the First and Fourteenth Amendment rights of prisoners were "barely implicated" by the prohibition on bulk mailings, see *id.*, at 130, 97 S.Ct., at 2540, and that the regulation was "reasonable" under the circumstances. The prisoners' constitutional challenge to the union meeting and solicitation restrictions was also rejected, because "[t]he ban on inmate solicitation and group meetings ... was rationally related to the reasonable, indeed to the central, objectives of prison administration." *Id.*, at 129, 97 S.Ct., at 2539.

***87** *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), concerned a First Amendment challenge to a Bureau of Prisons rule restricting inmates' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores. The rule was upheld as a "rational response" to a clear security problem. *Id.*, at 550, 99 S.Ct., at 1880. Because there was "no evidence" that officials had exaggerated their response to the security problem, the Court held that "the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here." *Id.*, at 551, 99 S.Ct., at 1880. And in *Block v. Rutherford,* 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), a ban on contact visits was upheld on the ground that "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility," and the regulation was "reasonably related" to these security concerns. *Id.*, at 589, 586, 104 S.Ct., at 3234, 3232.

In none of these four "prisoners' rights" cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens ****2261** fundamental rights is "reasonably related" to legitimate penological objectives, or whether it represents an "exaggerated response" to those concerns. The Court of Appeals in this case nevertheless concluded that *Martinez* provided the closest analogy for determining the appropriate standard of review for resolving respondents' constitutional complaints. The Court of Appeals distinguished this Court's decisions in *Pell, Jones, Bell,* and *Block* as variously involving "time, place, or manner" regulations, or regulations that restrict "presumptively dangerous" inmate activities. See 777 F.2d, at 1310–1312. The Court of Appeals acknowledged that *Martinez* had expressly reserved the question of the appropriate standard of review based on inmates' constitutional claims, but it nonetheless believed that the *Martinez* standard was the proper one to apply to respondents' constitutional claims.

We disagree with the Court of Appeals that the reasoning in our cases subsequent to *Martinez* can be so narrowly ***88** cabined. In *Pell,* for example, it was found "relevant" to the reasonableness of a restriction on face-to-face visits between prisoners and news reporters that prisoners had other means of communicating with members of the general public. See 417 U.S., at 823–824, 94 S.Ct., at 2804–2805. These alternative means of communication did not, however, make the prison regulation a "time, place, or manner" restriction in any ordinary sense of the term. As *Pell* acknowledged, the alternative methods of personal communication still available to prisoners would have been "unimpressive" if offered to justify a restriction on personal communication among members of the general public. *Id.*, at 825, 94 S.Ct., at 2805. Nevertheless, they were relevant in determining the scope of the burden placed by the regulation on inmates' First Amendment rights. *Pell* thus simply teaches that it is appropriate to consider the extent of this burden when "we [are] called upon to balance First Amendment rights against [legitimate] governmental interests." *Id.*, at 824, 94 S.Ct., at 2805.

Nor, in our view, can the reasonableness standard adopted in *Jones* and *Bell* be construed as applying only to "presumptively dangerous" inmate activities. To begin with, the Court of Appeals did not indicate how it would identify such "presumptively dangerous" conduct, other than to conclude that the group meetings in *Jones,* and the receipt of hardback books in *Bell,* both fall into that category. See 777 F.2d, at 1311–1312. The Court of Appeals found that correspondence between inmates did not come within this grouping because the court did "not think a letter presents the same sort of 'obvious security problem' as does a hardback book." *Id.*, at 1312. It is not readily apparent, however, why hardback books, which can be scanned for contraband by electronic devices and fluoroscopes, see *Bell v. Wolfish, supra,* 441 U.S., at 574, 99 S.Ct., at 1882 (MARSHALL, J., dissenting), are qualitatively different in this respect from inmate correspondence, which can be written in codes not readily subject to detection; or why coordinated inmate activity within the same prison is categorically different ***89** from inmate activity coordinated by mail among different prison institutions. The determination that an activity is

"presumptively dangerous" appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards of review.

[3] If *Pell, Jones,* and *Bell* have not already resolved the question posed in *Martinez,* we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations." ****2262** *Jones v. North Carolina Prisoners' Union,* 433 U.S., at 128, 97 S.Ct., at 2539. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration." *Procunier v. Martinez,* 416 U.S., at 407, 94 S.Ct., at 1808.

[4] **[5]** As our opinions in *Pell, Bell,* and *Jones* show, several factors are relevant in determining the reasonableness of the regulation at issue. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Block v. Rutherford, supra,* 468 U.S., at 586, 104 S.Ct., at 3232. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy ***90** arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression. See *Pell v. Procunier,* 417 U.S., at 828, 94 S.Ct., at 2807; *Bell v. Wolfish,* 441 U.S., at 551, 99 S.Ct., at 1880.

A second factor relevant in determining the reasonableness of a prison restriction, as *Pell* shows, is whether there are alternative means of exercising the right that remain open to prison inmates. Where "other avenues" remain available for the exercise of the asserted right, see *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S., at 131, 97 S.Ct., at 2540, courts should be particularly conscious of the "measure of judicial deference owed to corrections officials ... in gauging the validity of the regulation." *Pell v. Procunier, supra,* 417 U.S., at 827, 94 S.Ct., at 2806.

[6] A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. Cf. *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S., at 132–133, 97 S.Ct., at 2541.

[7] Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. See *Block v. Rutherford, supra* 468 U.S., at 587, 104 S.Ct., at 3233. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns. This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating ***91** the claimant's constitutional complaint. See *ibid.* But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

III

Applying our analysis to the Missouri rule barring inmate-to-inmate correspondence, we conclude that the record clearly demonstrates that the regulation was reasonably related to legitimate security interests. ****2263** We find that the marriage restriction, however, does not satisfy the reasonable relationship standard, but rather constitutes an exaggerated response to petitioners' rehabilitation and security concerns.

A

[8] According to the testimony at trial, the Missouri correspondence provision was promulgated primarily for security reasons. Prison officials testified that mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts. 2 Tr. 76; 4 *id.,* at 225–228. Witnesses stated that the Missouri Division of Corrections had a growing problem with prison gangs, and that restricting communications among gang members, both by transferring gang members to different institutions and by restricting their correspondence, was an important element in combating this problem. 2 *id.,* at 75–77; 3 *id.,* at 266–267; 4 *id.,* at 226. Officials also testified that the use of Renz as a facility to provide protective custody for certain inmates could be compromised by permitting correspondence between inmates at Renz and inmates at other correctional institutions. 3 *id.,* at 264–265.

The prohibition on correspondence between institutions is logically connected to these legitimate security concerns. Undoubtedly, communication with other felons is a potential spur to criminal behavior: this sort of contact frequently is ***92** prohibited even after an inmate has been released on parole. See, *e.g.,* 28 CFR § 2.40(a)(10) (1986) (federal parole conditioned on nonassociation with known criminals, unless permission is granted by the parole officer). In Missouri prisons, the danger of such coordinated criminal activity is exacerbated by the presence of prison gangs. The Missouri policy of separating and isolating gang members—a strategy that has been frequently used to control gang activity, see G. Camp & C. Camp, U.S. Dept. of Justice, Prison Gangs: Their Extent, Nature and Impact on Prisons 64–65 (1985)—logically is furthered by the restriction on prisoner-to-prisoner correspondence. Moreover, the correspondence regulation does not deprive prisoners of all means of expression. Rather, it bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned—inmates at other institutions within the Missouri prison system.

We also think that the Court of Appeals' analysis overlooks the impact of respondents' asserted right on other inmates and prison personnel. Prison officials have stated that in their expert opinion, correspondence between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security. As a result, the correspondence rights asserted by respondents, like the organizational activities at issue in *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike. Indeed, the potential "ripple effect" is even broader here than in *Jones,* because exercise of the right affects the inmates and staff of more than one institution. Where exercise of a right requires this kind of tradeoff, we think that the choice made by corrections officials—which is, after all, a judgment "peculiarly within [their] province and professional expertise," ***93** *Pell v. Procunier,* 417 U.S., at 827, 94 S.Ct., at 2806—should not be lightly set aside by the courts.

Finally, there are no obvious, easy alternatives to the policy adopted by petitioners. Other well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and security. See, *e.g.,* 28 CFR § 540.17 (1986). As petitioners have shown, the only alternative proffered by the claimant prisoners, ****2264** the monitoring of inmate correspondence, clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals. Prison officials testified that it would be impossible to read every piece of inmate-to-inmate correspondence, 3 Tr. 159, 4 *id.,* at 42–43, and consequently there would be an appreciable risk of missing dangerous messages. In any event, prisoners could easily write in jargon or codes to prevent detection of their real messages. See Camp & Camp, *supra,* at 130 (noting "frequent" use of coded correspondence by gang members in federal prison); see also Brief for State of Texas as *Amicus Curiae* 7–9. The risk of missing dangerous communications, taken together with the sheer burden on staff resources required to conduct item-by-item censorship, see 3 Tr. 176, supports the judgment of prison officials that this alternative is not an adequate alternative to restricting correspondence.

The prohibition on correspondence is reasonably related to valid corrections goals. The rule is content neutral, it logically advances the goals of institutional security and safety identified by Missouri prison officials, and it is not an exaggerated response to those objectives. On that basis, we conclude that the regulation does not unconstitutionally abridge the First Amendment rights of prison inmates. *

***94 **2265** B

In support of the marriage regulation, petitioners first suggest that the rule does not deprive prisoners of a constitutionally ***95** protected right. They concede that the decision to marry is a fundamental right under *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), but they imply that a different rule should obtain "in ... a prison forum." See Brief for Petitioners 38, n. 6. Petitioners then argue that even if the regulation burdens inmates' constitutional rights, the restriction should be tested under a reasonableness standard. They urge that the restriction is reasonably related to legitimate security and rehabilitation concerns.

[9] We disagree with petitioners that *Zablocki* does not apply to prison inmates. It is settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier, supra,* 417 U.S., at 822, 94 S.Ct., at 2804. The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements ***96** are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

[10] Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context. Our decision in *Butler v. Wilson,* 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974), summarily affirming *Johnson v. Rockefeller,* 365 F.Supp. 377 (SDNY 1973), is not to the contrary. That case involved a prohibition on marriage only for inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime. See *id.,* at 381–382 (Lasker, J., concurring in part and dissenting in part) (asserted governmental interest of punishing crime sufficiently important to justify deprivation of right); see generally *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below").

[11] The Missouri marriage regulation prohibits inmates from marrying unless the prison superintendent has approved the marriage after finding that there are compelling reasons for doing so. As noted previously, generally only pregnancy or birth of a child is considered a "compelling reason" to approve ***97** a marriage. In determining whether this regulation impermissibly burdens the right to marry, we note initially that the regulation prohibits marriages ****2266** between inmates and civilians, as well as marriages between inmates. See Brief for Petitioners 40. Although not urged by respondents, this implication of the interests of nonprisoners may support application of the *Martinez* standard, because the regulation may entail a "consequential restriction on the [constitutional] rights of those who are not prisoners." See *Procunier v. Martinez,* 416 U.S., at 409, 94 S.Ct., at 1809. We need not reach this question, however, because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny.

Petitioners have identified both security and rehabilitation concerns in support of the marriage prohibition. The security concern emphasized by petitioners is that "love triangles" might lead to violent confrontations between inmates. See Brief for Petitioners 13, 36, 39. With respect to rehabilitation, prison officials testified that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed. 3 Tr. 154–155. The superintendent at Renz, petitioner William Turner, testified that in his view, these women prisoners needed to concentrate on developing skills of self-reliance, 1 *id.,* at 80–81, and that the prohibition on marriage furthered this rehabilitative

goal. Petitioners emphasize that the prohibition on marriage should be understood in light of Superintendent Turner's experience with several ill-advised marriage requests from female inmates. Brief for Petitioners 32–34.

We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests. No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an ***98** exaggerated response to such security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives. See, *e.g.,* 28 CFR § 551.10 (1986) (marriage by inmates in federal prison generally permitted, but not if warden finds that it presents a threat to security or order of institution, or to public safety). We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns. Moreover, with respect to the security concern emphasized in petitioners' brief—the creation of "love triangles"—petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements. Common sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one. Finally, this is not an instance where the "ripple effect" on the security of fellow inmates and prison staff justifies a broad restriction on inmates' rights—indeed, where the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.

Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal. First, in requiring refusal of permission absent a finding of a compelling reason to allow the marriage, the rule sweeps much more broadly than can be explained by petitioners' penological objectives. Missouri prison officials testified that generally they had experienced no problem with the marriage of male inmates, see, *e.g.,* 2 Tr. 21–22, and the District Court found that such marriages had routinely been allowed as a matter of practice at Missouri correctional institutions prior to adoption of the rule, 586 F.Supp., at 592. The proffered justification thus does not explain the adoption of a rule banning ***99** marriages by these inmates. ****2267** Nor does it account for the prohibition on inmate marriages to civilians. Missouri prison officials testified that generally they had no objection to inmate-civilian marriages, see, *e.g.,* 4 Tr. 240–241, and Superintendent Turner testified that he usually did not object to the marriage of either male or female prisoners to civilians, 2 *id.,* at 141–142. The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates marrying other inmates or ex-felons; it does not account for the ban on inmate-civilian marriages.

Moreover, although not necessary to the disposition of this case, we note that on this record the rehabilitative objective asserted to support the regulation itself is suspect. Of the several female inmates whose marriage requests were discussed by prison officials at trial, only one was refused on the basis of fostering excessive dependency. The District Court found that the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of *all* female inmates were scrutinized carefully even before adoption of the current regulation—only one was approved at Renz in the period from 1979–1983—whereas the marriages of male inmates during the same period were routinely approved. That kind of lopsided rehabilitation concern cannot provide a justification for the broad Missouri marriage rule.

It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place. See Brief for Respondents 5. On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.

IV

We uphold the facial validity of the correspondence regulation, but we conclude that the marriage rule is constitutionally ***100** infirm. We read petitioners' additional challenge to the District Court's findings of fact to be a claim that the District Court erred in holding that the correspondence regulation had been applied by prison officials in an arbitrary and capricious manner. Because the Court of Appeals did not address this question, we remand the issue to the Court of Appeals for its consideration.

Accordingly, the judgment of the Court of Appeals striking down the Missouri marriage regulation is affirmed; its judgment invalidating the correspondence rule is reversed;

and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, concurring in part and dissenting in part.

How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation. This case provides a prime example.

There would not appear to be much difference between the question whether a prison regulation that burdens fundamental rights in the quest for security is "needlessly broad"—the standard applied by the District Court and the Court of Appeals—and this Court's requirement that the regulation must be "reasonably related to legitimate penological interests," *ante,* at 2261, and may not represent "an 'exaggerated response' to those concerns." *Ante,* at 2260. But if the standard can be satisfied by nothing more than a "*logical* connection" between the regulation and any legitimate penological concern perceived by a cautious warden, see *ante,* at 2264, n. (emphasis in original), it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination ****2268** of the ***101** warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it. Thus, I dissent from Part II of the Court's opinion. [1]

I am able to join Part III–B because the Court's invalidation of the marriage regulation does not rely on a rejection of a standard of review more stringent than the one announced in Part II. See *ante,* at 2266. The Court in Part III–B concludes after careful examination that, even applying a "reasonableness" standard, the marriage regulation must fail because the justifications asserted on its behalf lack record support. Part III–A, however, is not only based on an application of the Court's newly minted standard, see *ante,* at 2259, but also represents the product of a plainly improper appellate encroachment into the factfinding domain of the District Court. See *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986). Indeed, a fundamental difference between the Court of Appeals and this Court in this case—and the principal point of this dissent—rests in the respective ways the two courts have examined and made use of the trial record. In my opinion the Court of Appeals correctly held that the trial court's findings of fact adequately supported its judgment sustaining the inmates' challenge to the mail ***102** regulation as it has been administered at the Renz Correctional Center in Cedar City, Missouri. In contrast, this Court sifts the trial testimony on its own [2] in order to uphold a general prohibition against correspondence between unrelated inmates.

I

This is not a case in which it is particularly helpful to begin by determining the "proper" standard of review, as if the result of that preliminary activity would somehow lighten the Court's duty to decide this case. The precise issue before us is evident from respondents' complaint, which makes clear that they were not launching an exclusively facial attack against the correspondence regulation. Respondents instead leveled their primary challenge against the application of this regulation to mail addressed to or sent by inmates at Renz:

> "20. On information and belief, correspondence between non-family members at different institutions within the Missouri Division of Correction system is permitted at all institutions with the exception of Renz. On information and belief, defendant Turner and other employees of the Missouri Division of Corrections have a pattern and practice of refusing to permit inmates of Renz to correspond with or receive letters from inmates at other correctional institutions, a situation which appears to be unique within the Missouri Division of Corrections.
>
> "21. On information and belief, the reason given for refusing such correspondence ****2269** is that Superintendent Turner feels that correspondence between inmates is not ***103** in the best interest of any inmate. In this manner defendant Turner has violated the constitutional right of every inmate residing at Renz and any inmate who desires to correspond with an inmate residing at Renz." Amended Complaint, App. 11–12.

On their face, the regulations generally applicable to the Missouri Correctional System permit correspondence between unrelated inmates "if the classification/treatment team of each inmate deems it in the best interests of the parties involved."[3] After a bench trial, however, the District Court found that there was a total ban on such correspondence at Renz:

> "6. The provisions of the divisional correspondence regulation allowing the classification/treatment team of each inmate to prohibit inmate-to-inmate correspondence have not been followed at Renz. Theoretically the classification/treatment team uses psychological reports, conduct violations, and progress reports in deciding whether to permit correspondence. At Renz, however, the rule as practiced is that inmates may not write non-family inmates or receive mail from non-family inmates. The more restrictive practice is set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The restrictive rule at Renz is commonly known throughout the Missouri Correctional System.
>
> "7. The Renz rule against inmate-to-inmate correspondence is enforced without a determination that the security or order of Renz or the rehabilitation of the inmate would be harmed by allowing the particular correspondence to proceed and without a determination that there is no less restrictive alternative to resolve any legitimate concerns of the Department of Corrections short of prohibiting all correspondence.
>
> ***104** "8. Inmates at most institutions in the Missouri Correctional System are permitted to correspond with inmates in most other institutions. The greatest restriction on inmate correspondence is practiced at Renz." 586 F.Supp. 589, 591 (WD Mo.1984).
>
> "13. Correspondence between inmates has been denied despite evidence that the correspondence was desired simply to maintain wholesome friendships." *Id.,* at 591–592.

These factual findings, which bear out respondents' complaint, served as the basis for the District Court's injunction:

> "Even if some restriction on inmate-to-inmate correspondence can be justified, the regulations and practices at bar must fall. The prohibitions are unnecessarily sweeping. Correspondence is a sufficiently protected right that it cannot be cut off simply because the recipient is in another prison, and the inmates cannot demonstrate special cause for the correspondence....
>
> "Defendants have failed to demonstrate that the needs of Renz are sufficiently different to justify greater censorship than is applied by other well-run institutions." *Id.,* at 596.

After reviewing the District Court's findings and conclusions, the Court of Appeals held:

> "[W]ithout strong evidence that the relationship in question is or will be abusive, the connection between permitting the desired correspondence or marriage and the subsequent commission of a crime caused thereby is *simply too tenuous* to justify denial of those constitutionally protected rights. As to the security concerns, we think the prison officials' authority to open and read all prisoner mail is sufficient to meet the problem of illegal conspiracies." 777 F.2d 1307, 1315–1316 (CA8 1985) (emphasis added).

***105** ****2270** The Court of Appeals' affirmance of the District Court thus ultimately rests upon a conclusion with which I fully agree: absent a showing that prison officials would be unable to anticipate and avoid any security problems associated with the inmate-to-inmate mail that would result from application of the correspondence rule as it is written and as enforced at other Missouri prisons, the total ban at Renz found by the District Court offends the First Amendment.

The ostensible breadth of the Court of Appeals' opinion[4] furnishes no license for this Court to reverse with another unnecessarily broad holding. Moreover, even under the Court's newly minted standard, the findings of the District Court that were upheld by the Court of Appeals clearly dictate affirmance of the judgment below.

II

Without explicitly disagreeing with any of the District Court's findings of fact, this Court rejects the trial judge's conclusion that the total ban on correspondence between inmates at Renz and unrelated inmates in other correctional facilities was "unnecessarily sweeping" or, to use the language the Court seems to prefer, was an "exaggerated response" to the security

problems predicted by petitioner's expert witnesses. Instead, the Court bases its holding upon its own highly selective use of factual evidence.

The reasons the Court advances in support of its conclusion include: (1) speculation about possible "gang problems," escapes, and secret codes, *ante,* at 2262–2264; (2) the fact that the correspondence regulation "does not deprive prisoners of all means of expression," *ante,* at 2263; and (3) testimony indicating ***106** "that it would be impossible to read every piece of inmate-to-inmate correspondence," *ante,* at 2264. None of these reasons has a sufficient basis in the record to support the Court's holding on the mail regulation.

Speculation about the possible adverse consequences of allowing inmates in different institutions to correspond with one another is found in the testimony of three witnesses: William Turner, the Superintendent of Renz Correctional Center; Sally Halford, the Director of the Kansas Correctional Institution at Lansing; and David Blackwell, the former Director of the Division of Adult Institutions of the Missouri Department of Corrections.

Superintendent Turner was unable to offer proof that prohibiting inmate-to-inmate correspondence prevented the formation or dissemination of escape plots. He merely asserted that the mail regulation assisted him in his duties to maintain security at Renz "[f]rom the standpoint that we don't have escapes, we don't have the problems that are experienced in other institutions." 2 Tr. 75. Nor did the Superintendent's testimony establish that permitting such correspondence would create a security risk; he could only surmise that the mail policy would inhibit communications between institutions in the early stages of an uprising. *Id.,* at 76. The Superintendent's testimony is entirely consistent with the District Court's conclusion that the correspondence regulation was an exaggerated response to the potential gang problem at Renz. [5]

***107** Neither of the outside witnesses had any special knowledge of conditions at Renz. Ms. Halford had reviewed the prison's rules and regulations relevant to this ****2271** case, had discussed the case with Superintendent Turner, and had visited Renz for "a couple of hours." 3 *id.,* at 146. Mr. Blackwell was charged with the overall management of Missouri's adult correctional facilities and did not make daily decisions concerning the inmate correspondence permitted at Renz. *Id.,* at 259–260. He was "not sure" if he was specifically familiar with the policy at Renz that an inmate is allowed to correspond with inmates of other institutions only if they are members of the inmate's immediate family. 4 *id.,* at 44.

Neither of them, and indeed, no other witness, even mentioned the possibility of the use of secret codes by inmates. The Kansas witness testified that Kansas followed a policy of "open correspondence.... An inmate can write to whomever they please." 3 *id.,* at 158. She identified two problems that might result from that policy. First, in the preceding year a male inmate had escaped from a minimum security area and helped a female inmate to escape and remain at large for over a week. The witness speculated that they must have used the mails to plan their escape. The trial judge discounted this testimony because there was no proof that this or any other escape had been discussed in correspondence. *Id.,* at 158–159. Second, the Kansas witness suggested that a ban on inmate correspondence would frustrate the development of a "gang problem." *Id.,* at 160. In view of her acknowledgment that no gang problem had developed in Kansas despite its open correspondence rule, ***108** *id.,* at 158, the trial judge presumably also attached little weight to this prediction. Indeed, there is a certain irony in the fact that the Kansas expert witness was unable to persuade her superiors in Kansas to prohibit inmate-to-inmate correspondence, *id.,* at 168, yet this Court apparently finds no reason to discount her speculative testimony. [6]

The Missouri witness, Mr. Blackwell, also testified that one method of trying to discourage the organization of "gangs" of prisoners with ethnic or religious similarities is "by restricting correspondence." *Id.,* at 267. He did not testify, however, that a total ban on inmate-to-inmate correspondence was an appropriate response to the potential gang problem. Indeed, he stated that the State's policy did not include a "carte blanche" denial of such correspondence, [7] and he did not even know that Renz was enforcing such a total ban. [8] His assertion that an open corres ****2272** pondence ***109** policy would pose security problems was backed only by speculation:

> "[A]: ... I am sure that there are some inmates at Renz who would write other inmates at other facilities in an illegitimate fashion. I also feel certain that there is more of a probability that they would be writing about things other than just sound positive letter writing, given the nature of the offenders at Renz.

> "Q: What percentage of the [mail] inmate-to-inmate from Renz Correctional Center have you personally read?
>
> "A: Very, very little.
>
> "Q: So you are basically speculating about what inmates might write about?
>
> "A: Yes." 4 *id.,* at 82–83.

Quite clearly, Mr. Blackwell's estimate of the problems justifying some restrictions on inmate-to-inmate correspondence provides no support for the Renz policy that he did not even know about and that did not conform to the more liberal policy applicable to other institutions in which more serious offenders are incarcerated.[9] As the District Court concluded, petitioners "failed to demonstrate that the needs of Renz are sufficiently different to justify greater censorship than is applied by other well-run institutions." 586 F.Supp., at 596.

***110** The Court also relies on the fact that the inmates at Renz were not totally deprived of the opportunity to communicate with the outside world. This observation is simply irrelevant to the question whether the restrictions that were enforced were unnecessarily broad. Moreover, an evenhanded acceptance of this sort of argument would require upholding the Renz marriage regulation—which the Court quite properly invalidates—because that regulation also could have been even more restrictive.

The Court's final reason for concluding that the Renz prohibition on inmate-to-inmate correspondence is reasonable is its belief that it would be "impossible" to read all such correspondence sent or received by the inmates at Renz. No such finding of impossibility was made by the District Court, nor would it be supported by any of the findings that it did make. The record tells us nothing about the total volume of inmate mail sent or received at Renz; much less does it indicate how many letters are sent to, or received from, inmates at other institutions. As the State itself observed at oral argument about the volume of correspondence:

> "The difficulty with our position in the case is, since we had never permitted [mail between inmates], we didn't have an idea except to say that—you know, except that we had 8,000 inmates, and we figured that they would write." Tr. of Oral Arg. 14.

The testimony the Court does cite to support its conclusion that reviewing inmate-to-inmate mail would be an insurmountable task was provided by Mr. Blackwell and Ms. Halford. Mr. Blackwell testified that "[t]here is no way we can read all the mail nor would we want to ... it is impossible." 4 Tr. 41–43.[10] Ms. Halford ****2273** gave similar testimony, ***111** [11] but again she was referring to "all incoming mail," not to inmate-to-inmate correspondence and, of course, her testimony related to Kansas, not to the relatively small facility at Renz.[12] In short, the evidence in the record is plainly ***112** insufficient to support the Court's *de novo* finding of impossibility.[13] It does, however, adequately support this finding by the District Court that the Court ignores:

> "14. The staff at Renz has been able to scan and control outgoing and incoming mail, including inmate-to-inmate correspondence." 586 F.Supp., at 592.

Because the record contradicts the conclusion that the administrative burden of screening all inmate-to-inmate mail would be unbearable, an outright ban is intolerable. The blanket prohibition enforced at Renz is not only an "excessive response" to any legitimate security concern; it is inconsistent with a consensus of expert opinion—including Kansas correctional authorities—that is far more reliable than the speculation to which this Court accords deference.[14]

III

The contrasts between the Court's acceptance of the challenge to the marriage regulation as overbroad and its rejection of the challenge to the correspondence rule are striking ***113** and puzzling.[15] The Court ****2274** inexplicably expresses different views about the security concerns common to prison marriages and prison mail. In the marriage context expert speculation about the security problems associated with "love triangles" is summarily rejected, while in the mail context speculation about the potential "gang problem" and the possible use of codes by prisoners receives virtually total deference. Moreover, while the Court correctly dismisses as a defense to the marriage rule the speculation that the inmate's spouse, once released from incarceration, would attempt to aid the inmate in escaping,[16] the Court grants virtually total credence to similar speculation about escape plans concealed in letters.

In addition, the Court disregards the same considerations it relies on to invalidate the marriage regulation when it turns to the mail regulation. The marriage rule is said to sweep too broadly because it is more restrictive than the routine practices at other Missouri correctional institutions, but the mail rule at Renz is not an "exaggerated response" even though it is more restrictive than practices in the remainder of the State. The Court finds the rehabilitative value of marriage apparent, but dismisses the value of corresponding with a friend who is also an inmate for the reason that communication with the outside world is not totally prohibited. The Court relies on the District Court's finding that the marriage regulation operated on the basis of "excessive paternalism" ***114** toward female inmates, *ante,* at 2266, but rejects the same court's factual findings on the correspondence regulation. Unfathomably, while rejecting the Superintendent's concerns about love triangles as an insufficient and invalid basis for the marriage regulation, the Court apparently accepts the same concerns as a valid basis for the mail regulation. [17]

***115** ****2275** In pointing out these inconsistencies, I do not suggest that the Court's treatment of the marriage regulation is flawed; as I stated, I concur fully in that part of its opinion. I do suggest that consistent application of the Court's reasoning necessarily leads to a finding that the mail regulation applied at Renz is unconstitutional. [18]

IV

To the extent that this Court affirms the judgment of the Court of Appeals, I concur in its opinion. I respectfully dissent from the Court's partial reversal of that judgment on the basis of its own selective forays into the record. When all ***116** the language about deference and security is set to one side, the Court's erratic use of the record to affirm the Court of Appeals only partially may rest on an unarticulated assumption that the marital state is fundamentally different from the exchange of mail in the satisfaction, solace, and support it affords to a confined inmate. Even if such a difference is recognized in literature, history, or anthropology, the text of the Constitution more clearly protects the right to communicate than the right to marry. In this case, both of these rights should receive constitutional recognition and protection.

All Citations

482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64, 55 USLW 4719

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.

* Suggesting that there is little difference between the "unnecessarily sweeping" standard applied by the District Court in reaching its judgment and the reasonableness standard described in Part II, see *post,* at 2270, Justice STEVENS complains that we have "ignore[d] the findings of fact that were made by the District Court," *post,* at 2268, n. 2, and have improperly "encroach[ed] into the factfinding domain of the District Court." *Post,* at 2268.

The District Court's inquiry as to whether the regulations were "needlessly broad" is not just semantically different from the standard we have articulated in Part II: it is the least restrictive alternative test of *Procunier v. Martinez,* 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). As *Martinez* states, in a passage quoted by the District Court:

> "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence ... will ... be invalid *if its sweep is unnecessarily broad.*" *Id.,* at 413–414, 94 S.Ct., at 1811 (emphasis added).

The District Court's judgment that the correspondence regulation was "unnecessarily sweeping," 586 F.Supp. 589, 596 (WD Mo.1984), thus was a judgment based on application of an erroneous legal standard. The District Court's findings of fact 7 and 13 likewise are predicated on application of the least restrictive means standard. Finding 7 is that the correspondence rule was applied without a letter-by-letter determination of harm, and without a showing that "there is no less restrictive alternative" available; finding 13 reiterates that the correspondence rule operated as a complete ban. See *id.,* at 591–592. These findings are important only if petitioners have to show that the correspondence regulation satisfies a least restrictive alternative test: they are largely beside the point where the inquiry is simply whether the regulation is reasonably related to a legitimate governmental interest.

Justice STEVENS' charge of appellate fact-finding likewise suffers from the flawed premise that Part III–A answers the question Justice STEVENS would pose, namely, whether the correspondence regulation satisfies strict scrutiny. Thus, our conclusion that there is a *logical* connection between security concerns identified by petitioners and a ban on inmate-to-inmate correspondence, see *supra,* at 2263, becomes, in Justice STEVENS' hands, a searching examination of the record to determine whether there was sufficient proof that inmate correspondence had actually led to an escape plot, uprising, or gang violence at Renz. See *post,* at 2270–2272. Likewise, our conclusion that monitoring inmate correspondence "clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals," *supra,* at 2263, is described as a factual "finding" that it would be "an insurmountable task" to read all correspondence sent to or received by the inmates at Renz. *Post,* at 2272. Nowhere, of course, do we make such a "finding," nor is it necessary to do so unless one is applying a least restrictive means test.

Finally, Justice STEVENS complains that Renz' ban on inmate correspondence cannot be reasonably related to legitimate corrections goals because it is more restrictive than the rule at other Missouri institutions. As our previous decisions make clear, however, the Constitution "does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." *Bell v. Wolfish,* 441 U.S. 520, 554, 99 S.Ct. 1861, 1882, 60 L.Ed.2d 447 (1979). Renz raises different security concerns from other Missouri institutions, both because it houses medium and maximum security prisoners in a facility without walls or guard towers, and because it is used to house inmates in protective custody. Moreover, the Renz rule is consistent with the practice of other well-run institutions, including institutions in the federal system. See Brief for United States as *Amicus Curiae* 22–24.

1 The Court's rather open-ended "reasonableness" standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest. Judge Kaufman's opinion in *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1033 (CA2 1985), makes a more careful attempt to strike a fair balance between legitimate penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration.

2 The Court cites portions of the trial transcript and the *amicus curiae* brief filed by the State of Texas, *ante,* at 2262, 2263, and 2264, but completely ignores the findings of fact that were made by the District Court and that bind appellate courts unless clearly erroneous. Fed.Rule Civ.Proc. 52(a). The Court does not and could not deem these particular findings clearly erroneous.

3 586 F.Supp. 589, 591 (WD Mo.1984).

4 The Court of Appeals may have used unnecessarily sweeping language in its opinion:

"We conclude that the exchange of inmate-to-inmate mail is not presumptively dangerous nor inherently inconsistent with legitimate penological objectives. We therefore affirm the district court's application of the *Martinez* strict scrutiny standard and its decision finding the Renz correspondence rule unconstitutional." 777 F.2d, at 1313.

5 Superintendent Turner had not experienced any problem with gang warfare at Renz. 2 Tr. 117. He had not found any correspondence between gang members coming into Renz. *Id.,* at 118. He also conceded that it would be possible to screen out correspondence that posed the danger of leading to gang warfare:

"Q: Is there any reason that you could not read correspondence from other institutions to determine if these people were writing about gang warfare or something like that?

"A: I think from the standpoint of the dictates of the department and, of course, the dictates of the court, I could if there was a problem. From the standpoint of dealing with these people individually or personally, no. It would be a problem." *Ibid.*

"Q: Now, let's limit it to people who you suspect might be involved in gang warfare, for example. Do you have any reason to say it would be impossible to read all the mail of those particular people?

"A: Those that we know of that have been identified, no, it wouldn't be impossible." *Id.,* at 119.

6 There is a further irony. While Missouri ostensibly does not have sufficient resources to permit and screen inmate-to-inmate mail, Kansas apparently lacks sufficient resources to ban it. Ms. Halford testified that open correspondence was not abrogated in the Kansas correctional system despite security concerns because her superiors felt that it was "too much of an effort to restrict it, that it tied up staff to send out all forms to the various and sundry institutions. So I think we're all basically in agreement that even though it is a problem to have open correspondence, the reason that we don't do it is simply staff time." 3 *id.,* at 168.

7 "Q. Those inmates who are allowed to write, you do not find it necessary to stop their correspondence as a matter of course; isn't that true?

"A. No, we don't stop it as a matter of course and we don't authorize it as a matter of course. There is no carte blanche approval or denial at any facility. It is done on a case by case individual basis and would have to be.

"Q. Let me refer specifically to inmate-to-inmate. Are you saying there is no carte blanche denial of inmate-to-inmate or the inmates aren't told that at Renz Correctional Center?

"A. The Division policy is not carte blanche [to] deny inmate-to-inmate, or to approve it." 4 *id.,* at 43.

8 "Q. You do know that is the rule at Renz that they cannot write to other institutions unless the inmate is a relative?

"A. I am not certain that that is the rule, no.

"Q. Let me hand you Plaintiffs' Exhibit B, excuse me, Defendants' Exhibit B. I don't have the plaintiffs' number. This is in evidence. It is the inmate orientation manual, February 1983. I direct your attention to the paragraph that says correspondence with inmates of other institutions is permitted with immediate family members only.

"Now, were you familiar with that being the policy at Renz Correctional Center?

"A. I am not sure if I was specifically or not." *Id.,* at 44.

9 At the time of trial, the Renz Correctional Center contained both male and female prisoners of varying security level classifications. Most of the female inmates were medium and maximum security offenders, while most of the male inmates were minimum security offenders. 777 F.2d 1307, 1308 (CA8 1985).

10 "Q. The question was do you realize the plaintiffs in this case accept the rights of the Division of Corrections to read all their mail if the Division wants to?

"A. There is no way we can read all the mail nor would we want to." 4 Tr. 41.

"Q. Let me hand you Exhibit No. 3, sir, the mail and visiting rule for the Department of Corrections, specifically concerning inmate mail signed by you.

"I direct your attention to paragraph 1(C), outgoing letters will not be sealed by the inmate. And further down in the paragraph, all letters may be inspected in the mail room and examined for contraband, escape plots, forgery, fraud, and other schemes.

"Now, tell me, sir, how do you examine a letter for an escape plot without reading it?

"A. We do not read mail. This does not say mail will be read. The only time we read a letter is when we have reason to believe, for example, that an escape is being planned. [W]hen a letter is being planned, there is no way we want to or know to read all inmate mail. It is impossible." *Id.,* at 42–43.

There was no record indication of the amount of correspondence between inmates that would occur if it were permitted. Mr. Blackwell stated only that in his opinion, "if we do allow inmates to write other inmates pretty much at will, the vast majority will be writing one another, at least one other offender in another institution. I think it is obvious what it will do to mail room load." *Id.,* at 108.

11 "[I]n Kansas we have, our rules and regulations allow us to read all incoming mail. Due to the volume of mail that is absolutely impossible to do." 3 *id.,* at 159.

12 The average population at Renz in the 1983 fiscal year was 270. See American Correctional Assn., Juvenile and Adult Correctional Departments, Institutions, Agencies, and Paroling Authorities 214 (1984).

When Ms. Halford was asked why the prison officials did not read all of the inmate mail, she gave this response:

"A. To begin with it's very boring reading. Another thing, I think it's a poor use of staff time. If I get more staff in, I would like to have them doing something more important than reading inmate mail. That seems to me to be kind of a waste of time." Tr. 176.

Earl Englebrecht testified that at Renz he scanned the contents of all approved incoming mail from other institutions, and that this task and scanning some outgoing mail together took approximately one hour a day. 5 *id.,* at 97, 99. He could not indicate with any certainty the additional screening burden that more frequent inmate-to-inmate correspondence would impose on him and on the mail room. *Id.,* at 102. The testimony of these two witnesses is hardly consistent with the Court's assumption that it would be "impossible" to read the portion of the correspondence that is addressed to, or received from, inmates in other institutions.

13 The Court's speculation, *ante,* at 2261, 2263, about the ability of prisoners to use codes is based on a suggestion in an *amicus curiae* brief, see Brief for State of Texas as *Amicus Curiae* 7–9, and is totally unsupported by record evidence.

14 See ABA Standards for Criminal Justice 23–6.1, Commentary, p. 23•76 (2d ed. 1980) ("[P]risoners can write at any length they choose, using any language they desire, to correspondents of their selection, including present or former prisoners, with no more controls than those which govern the public at large"). The American Correctional Association has set forth the "current standards deemed appropriate by detention facility managers and recognized organizations representing corrections." ACA, Standards for Adult Local Detention Facilities xiii (2d ed. 1981). Standard 2–5328 requires clear and convincing evidence to justify "limitations for reasons of public safety or facility order and security" on the volume, "length, language, content or source" of mail which an inmate may send or receive. *Id.,* at 88.

15 The Court's bifurcated treatment of the mail and marriage regulations leads to the absurd result that an inmate at Renz may marry another inmate, but may not carry on the courtship leading to the marriage by corresponding with him or her beforehand because he or she would not then be an "immediate family member."

16 Explaining why the request of inmate Diana Finley to be married to inmate William Quillam was denied, Superintendent Turner stated: "If he gets out, then we have got some security problems.... The threat, if a man gets out of the penitentiary and he is married to her and he wants his wife with him, there is very little that we can do to stop an escape from that institution because we don't have the security, sophisticated security, like a maximum security institution." 1 Tr. 185–186. See also *id.,* at 187.

17 One of Superintendent Turner's articulated reasons for preventing one female inmate from corresponding with a male inmate closely tracks the "love triangle" rationale advanced for the marriage regulation:

"Q: Let's take Ms. Flowers. Do you know of any reason why she should not be allowed to write to Mr. Barks?

"A: Yes.

"Q: Why?

"A: She has two other men. One she wants to get married to, another man that she was involved with at Renz resides with Mr. Barks.

"Q: Let me ask you this. You have mentioned on two or three occasions that people want to get married to one man or the other. Is it your understanding that the only possible relationship between a woman and a man is one of intending to get married?

"A: Well, when they speak of love and want to marry two people, I think that one of them is going to be cut short." *Id.,* at 237–238.

The Superintendent later elaborated on redirect examination:

"Q: Now you have given an example of a problem that in your opinion justifies restrictions on correspondence as being, say, two men who were corresponding with a particular woman. Would it also be possible to call the two men in and have a chat with them in your office and try to resolve that between them?

"A: I don't see where that is necessary in my position." 2 *id.,* at 116–117.

The paternalistic enforcement of the correspondence rule to "protect" female inmates prevents them from exchanging letters with more than one male inmate. Assuming a woman has received permission to correspond with a man:

"Q: Now, what if the female inmate finds somebody new in the institution, and that person gets [pa]roled, can she then write to the new fellow?

"A: Then we have two situations then.

"Q: And, therefore, she cannot?

"A: I would say that would be a positive [triggering security concerns] situation. It wouldn't be a wholesome situation, no." *Id.,* at 134–135.

"Q: And suppose she comes to you and says, I don't want to write this old fellow anymore, I want to write to the new fellow. Is she then allowed to write to the new fellow?

"A: Then we still have a problem.

"Q: Once an inmate makes a decision to write to—once a female inmate makes a decision to write to another male inmate, then she can't write to anybody?

"A: You keep saying females. We have the same situation with the male, too, that could exist." *Id.,* at 135.

David Blackwell testified along the same lines:

"If, for example, a male offender was believed to be in love with a female offender and another male offender wants to cause him some difficulty, he can start a rumor or confront the man with her seeing someone else or *corresponding with someone else;* and it's caused a variety of security problems by way of love triangles and situations such as that." 3 *id.,* at 271 (emphasis added).

Donald Wyrick, Director of Adult Institutions, Missouri Department of Corrections, similarly testified on the security considerations raised by women writing men at other prisons:

"Well, many times love affairs develop, then the inmate inside ... becomes extremely worried about the female inmate, he thinks she is messing around with somebody else, all those kind of things. He becomes agitated, worried, and frustrated, this type thing. In my professional opinion, that could cause him to do bad things. It might even cause him to explode and hurt someone or attempt to escape." 4 *id.,* at 231–232.

18 Having found a constitutional violation, the District Court has broad discretion in fashioning an appropriate remedy. Cf. *United States v. Paradise,* 480 U.S. 149, 155–156, n. 4, 107 S.Ct. 1053, 1058, n. 4, 94 L.Ed.2d 203 (1987) (STEVENS, J., concurring in judgment). The difficulties that a correspondence policy is likely to impose on prison officials screening inmate-to-inmate mail bear on the shaping of an appropriate remedy. It is improper, however, to rely on speculation about these difficulties to obliterate effective judicial review of state actions that abridge a prisoner's constitutional right to send and receive mail.

KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by Blouin ex rel. Estate of Pouliot v. Spitzer, 2nd Cir.(N.Y.), February 2, 2004

110 S.Ct. 1028
Supreme Court of the United States

WASHINGTON, et al., Petitioners
v.
Walter HARPER.

No. 88–599.
|
Argued Oct. 11, 1989.
|
Decided Feb. 27, 1990.

Synopsis
Mentally ill state prisoner filed civil rights action challenging prison policy that authorized his treatment with antipsychotic drugs against his will without judicial hearing. The Washington Supreme Court, 110 Wash.2d 873, 759 P.2d 358, found policy to violate due process, and state appealed. The Supreme Court, Justice Kennedy, held that: (1) case was not rendered moot by virtue of fact that prisoner was not currently being treated with antipsychotic drugs against his will; (2) treatment of prisoner against his will did not violate substantive due process where prisoner was found to be dangerous to himself or others and treatment was in prisoner's medical interest; and (3) administrative procedures set by policy, including provision for review by administrative panel as opposed to judicial decision maker, comported with requirements of procedural due process.

Reversed and remanded.

Justice Blackmun concurred and filed an opinion.

Justice Stevens, with whom Justice Brennan and Justice Marshall joined, concurred in part, dissented in part, and filed an opinion.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] Constitutional Law Mootness

Mentally ill state prisoner's due process challenge to his treatment with antipsychotic drugs against his will without judicial hearing was not rendered moot by virtue of fact that state had ceased administering antipsychotic drugs; prisoner was still diagnosed as suffering from schizophrenia, continued to serve his sentence in state prison system, and was subject to transfer to center for mentally ill prisoners, to which he had already been transferred twice, at any time.
U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

45 Cases that cite this headnote

[2] Constitutional Law Administration of Drugs

As a matter of state law, policy promulgated by center for mentally ill prisoners concerning treatment of nonconsenting prisoners with antipsychotic drugs conferred upon such prisoners a protected liberty interest in being free from arbitrary administration of antipsychotic medications; policy was mandatory in character and, by permitting treatment of nonconsenting prisoners only if they were found to be mentally ill and gravely disabled or dangerous, policy created justifiable expectation on part of prisoners that drugs would not be administered unless such conditions existed.

194 Cases that cite this headnote

[3] Constitutional Law Medical Care and Treatment
Prisons Psychological Treatment

Mentally ill state prisoner possessed significant liberty interest in avoiding unwanted administration of antipsychotic drugs under due process clause of Fourteenth Amendment.
U.S.C.A. Const.Amend. 14.

1036 Cases that cite this headnote

[4] Prisons Regulation and Supervision in General; Role of Courts

Proper standard for determining validity of prison regulation claimed to infringe on inmate's constitutional rights is whether regulation is reasonably related to legitimate penological interests, and such is true even when constitutional right claimed to have been infringed is fundamental and state under other circumstances would have been required to satisfy more rigorous standard of review.

245 Cases that cite this headnote

[5] **Constitutional Law** Administration of Drugs

Proper standard for determining validity of prison regulation authorizing treatment of nonconsenting mentally ill prisoners with antipsychotic drugs, purportedly in violation of prisoners' due process rights, was whether regulation was reasonably related to legitimate penological interests. U.S.C.A. Const.Amend. 14.

231 Cases that cite this headnote

[6] **Constitutional Law** Administration of Drugs

Prisons Psychological Treatment

Prison policy authorizing treatment of nonconsenting mentally ill prisoner with antipsychotic drugs comported with requirements of substantive due process and did not unduly infringe upon prisoner's liberty interest in avoiding unwanted treatment, notwithstanding contention that alternatives to forced treatment existed, e.g., state could find prisoner incompetent and obtain court approval of treatment or could make use of physical restraints; regulation applied only to prisoners who were mentally ill and who, as result of their illness, were gravely disabled or represented significant danger to themselves or others, drugs could be administered for no purpose other than treatment and only under direction of licensed psychiatrist, and alternatives suggested by prisoner would not effectively respond to state's legitimate interests. U.S.C.A. Const.Amend. 14.

310 Cases that cite this headnote

[7] **Constitutional Law** Administration of Drugs

Given requirements of prison environment, due process clause permits state to treat prison inmate who has serious mental illness with antipsychotic drugs against his will, if inmate is dangerous to himself or others and treatment is in inmate's medical interest. U.S.C.A. Const.Amend. 14.

393 Cases that cite this headnote

[8] **Constitutional Law** Administration of Drugs

Prisons Right to Intervention or Review; Jurisdiction

Administrative hearing procedures set by state prison policy concerning treatment of mentally ill prisoners with antipsychotic drugs against their will comported with requirements of procedural due process even though review was by administrative panel consisting of correctional official and medical professionals as opposed to judicial decision maker; after psychiatrist made decision that prisoner should be treated with antipsychotic drugs, administrative panel could review that decision and had to determine whether prisoner suffered from mental disorder and whether, as result of that disorder, he was dangerous to himself, others, or their property; moreover, no member of administrative panel could be involved in prisoner's current treatment or diagnosis, prisoner could be assisted by independent lay advisor although not by counsel, and requiring judicial hearing could divert scarce prison resources from care and treatment of prisoners. U.S.C.A. Const.Amend. 14.

86 Cases that cite this headnote

[9] **Constitutional Law** Administration of Drugs

Prisons Right to Intervention or Review; Jurisdiction

Procedural due process did not require that judicial decision maker, as opposed to administrative committee that included medical professionals, address mentally ill state prisoner's challenge to his involuntary treatment with antipsychotic drugs as authorized by state prison policy, even though prisoner's interest in avoiding unwarranted administration of antipsychotic drugs was not insubstantial in view of possible side effects. U.S.C.A. Const.Amend. 14.

398 Cases that cite this headnote

****1030** *Syllabus* [*]

***210** Respondent Harper has been a ward of the Washington state penal system since his 1976 robbery conviction. Both as an inmate and while temporarily on parole, he received psychiatric treatment, including the consensual administration of antipsychotic drugs. He has engaged in violent conduct, and his condition has deteriorated when he did not take the drugs. On two occasions, he was transferred to the Special Offender Center (SOC or Center), a state institute for convicted felons with serious mental illness, where he was diagnosed as suffering from a manic-depressive disorder. While at the Center, he was required to take antipsychotic drugs against his will pursuant to an SOC Policy. The Policy provides, *inter alia,* that, if a psychiatrist orders such medication, an inmate may be involuntarily treated only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself or others; that, after a hearing and upon a finding that the above conditions are met, a special committee consisting of a psychiatrist, a psychologist, and a Center official, none of whom may be currently involved in the inmate's diagnosis or treatment, may order involuntary medication if the psychiatrist is in the majority; and that the inmate has the right to notice of the hearing, the right to attend, present evidence, and cross-examine witnesses, the right to representation by a disinterested lay adviser versed in the psychological issues, the right to appeal to the Center's Superintendent, and the right to periodic review of any involuntary medication ordered. In addition, state law gives him the right to state-court review of the committee's decision. Both of the involuntary treatment proceedings were conducted in accordance with the SOC Policy. During his second stay at the Center, but before his transfer to a state penitentiary, Harper filed suit in state court under 42 U.S.C. § 1983. The trial court rejected his claim that the failure to provide a judicial ****1031** hearing before the involuntary administration of antipsychotic medication violated the Due Process Clause of the Fourteenth Amendment. The State Supreme Court reversed and remanded, concluding that, under the Clause, the State could administer such medication to a competent, nonconsenting inmate only if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the State proved by "clear, cogent, and convincing" evidence that ***211** the medication was both necessary and effective for furthering a compelling state interest.

Held:

1. The case is not rendered moot by the fact that the State has ceased administering antipsychotic drugs to Harper against his will. A live case or controversy remains, since there is no evidence that Harper has recovered from his mental illness; he continues to serve his sentence in the state prison system; and there is a strong likelihood that he may again be transferred to the Center, where officials would seek to administer antipsychotic medication pursuant to the Policy. Thus, the alleged injury likely would recur but for the decision of the State Supreme Court. P. 1035.

2. The Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest. Although Harper has a liberty interest under the Clause in being free from the arbitrary administration of such medication, the Policy comports with substantive due process requirements, since it is reasonably related to the State's legitimate interest in combating the danger posed by a violent, mentally ill inmate. The Policy is a rational means of furthering that interest, since it applies exclusively to mentally ill inmates who are gravely disabled or represent a significant danger to themselves or others; the drugs may be administered only for treatment and under the direction of a licensed psychiatrist; and there is little dispute in the psychiatric profession that the proper use of the drugs is an effective means of treating and controlling a mental illness likely to cause violent behavior. Harper's contention that, as a precondition to antipsychotic drug treatment, the State must find him incompetent, and then obtain court approval of the treatment using a "substituted judgment" standard, is rejected,

since it does not take account of the State's legitimate interest in treating him where medically appropriate for the purpose of reducing the danger he poses. Similarly, it has not been shown that the alternatives of physical restraints or seclusion would accommodate his rights at *de minimis* cost to valid penological interests. Pp. 1035–1040.

3. The Policy's administrative hearing procedures comport with procedural due process. Pp. 1040–1044.

(a) The Due Process Clause does not require a judicial hearing before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. Harper's not insubstantial liberty interest, when considered with the government interests involved and the efficacy of the particular procedural requirements, is adequately protected, and perhaps better served, by allowing the decision to medicate to be made by ***212** medical professionals rather than a judge. It cannot be assumed that a mentally disturbed patient's intentions, or a substituted judgment approximating those intentions, can be determined in a single judicial hearing apart from the realities of frequent and ongoing medical observation. Nor can it be ignored that requiring judicial hearings will divert scarce prison resources from the care and treatment of mentally ill inmates. Moreover, the risks associated with antipsychotic drugs are for the most part medical ones, best assessed by medical professionals. The Policy contains adequate procedural safeguards to ensure that the prisoner's interests are taken into account. In particular, the independence of the decisionmaker is adequately ****1032** addressed, since none of the hearing committee members may be involved in the inmate's current treatment or diagnosis, and the record is devoid of evidence that staff members lack the necessary independence to provide a full and fair hearing. Pp. 1040–1044.

(b) The Policy's procedures satisfy due process requirements in all other respects. The provisions mandating notice and the specified hearing rights satisfy the requirement of a meaningful opportunity to be heard, and are not vitiated by prehearing meetings between the committee members and staff absent evidence of resulting bias or that the actual decision is made before the hearing. The hearing need not be conducted in accordance with the rules of evidence, and the state court's "clear, cogent, and convincing" standard of proof is neither required nor helpful when medical personnel are making the judgment required by the Policy. An inmate may obtain judicial review of the committee's decision, and the trial court found that the record compiled under the Policy was adequate to allow such a review. Nor is the Policy deficient in not allowing representation by counsel, since the provision of an independent lay adviser who understands the psychiatric issues is sufficient protection given the medical nature of the decision to be made. P. 1044.

110 Wash.2d 873, 759 P.2d 358, (1988); reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, IV, and V, in which REHNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 1044. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 1045.

Attorneys and Law Firms

William L. Williams, Senior Assistant Attorney General of Washington, argued the cause for petitioners. With him on the briefs were *Kenneth O. Eikenberry,* Attorney General, and *Glenn L. Harvey,* Assistant Attorney General.

***213** *Paul J. Larkin, Jr.,* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief was *William C. Bryson,* Acting Solicitor General.

Brian Reed Phillips, by appointment of the Court, 490 U.S. 1002, argued the cause for respondent. With him on the brief was *Leonard Rubenstein.**

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Briefs of *amici curiae* urging affirmance were filed for the Mental Health Legal Advisors Committee of the Massachusetts Supreme Judicial Court et al. by *Stan Goldman, Robert D. Fleischner,* and *Steven J. Schwartz;* for the National Association of Protection and Advocacy

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Opinion

Justice KENNEDY delivered the opinion of the Court.

The central question before us is whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. Resolution of the case requires us to discuss the protections afforded the prisoner under the Due Process Clause of the Fourteenth Amendment.

I

Respondent Walter Harper was sentenced to prison in 1976 for robbery. From 1976 to 1980, he was incarcerated at the Washington State Penitentiary. Most of that time, respondent was housed in the prison's mental health unit, where he consented to the administration of antipsychotic drugs. ***214** Antipsychotic drugs, sometimes called "neuroleptics" or "psychotropic drugs," are medications commonly used in treating mental disorders such as schizophrenia. Brief for American Psychiatric Association et al. as *Amici Curiae* 2–3, n. 1. As found by the trial court, the effect of these and similar drugs is to alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rational state of mind. See App. to Pet. for Cert. B–7. [1]

Respondent was paroled in 1980 on the condition that he participate in psychiatric treatment. While on parole, he continued to ****1033** receive treatment at the psychiatric ward at Harborview Medical Center in Seattle, Washington, and was later sent to Western State Hospital pursuant to a civil commitment order. In December 1981, the State revoked respondent's parole after he assaulted two nurses at a hospital in Seattle.

Upon his return to prison, respondent was sent to the Special Offender Center (SOC or Center), a 144–bed correctional institute established by the Washington Department of Corrections to diagnose and treat convicted felons with serious mental disorders. At the Center, psychiatrists first diagnosed respondent as suffering from a manic-depressive disorder. [2] At first, respondent gave voluntary consent to treatment, including the administration of antipsychotic medications. In November 1982, he refused to continue taking the prescribed medications. The treating physician then sought to medicate respondent over his objections, pursuant to SOC Policy 600.30.

***215** Policy 600.30 was developed in partial response to this Court's decision in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). The Policy has several substantive and procedural components. First, if a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property. [3] Only a psychiatrist may order or approve the medication. Second, an inmate who refuses to take the medication voluntarily is entitled to a hearing before a special committee consisting of a psychiatrist, a psychologist, and the Associate Superintendent of the Center, none of whom may be, at the time of the hearing, involved in the inmate's treatment or diagnosis. If the committee determines by a majority vote that the inmate suffers from a mental disorder and is gravely disabled or dangerous, ***216** the inmate may be medicated against his will, provided the psychiatrist is in the majority.

Third, the inmate has certain procedural rights before, during, and after the hearing. He must be given at least 24 hours' notice of the Center's intent to convene an involuntary medication hearing, during which time he may not be medicated. In addition, he must receive notice of the tentative diagnosis, the factual basis for the diagnosis, and why the staff believes medication is necessary. At the hearing, the inmate has the right to attend; to present evidence, including witnesses; to cross-examine staff witnesses; and to the assistance of a lay adviser who has not been involved in his case and who understands ****1034** the psychiatric issues involved. Minutes of the hearing must be kept, and a copy provided to the inmate. The inmate has the right to appeal the committee's decision to the Superintendent of the Center within 24 hours, and the Superintendent must decide the appeal within 24 hours after its receipt. See App. to Pet. for Cert. B–3. The inmate may seek judicial

review of a committee decision in state court by means of a personal restraint petition or extraordinary writ. See Wash.Rules App.Proc. 16.3 to 16.17; App. to Pet. for Cert. B–8.

Fourth, after the initial hearing, involuntary medication can continue only with periodic review. When respondent first refused medication, a committee, again composed of a nontreating psychiatrist, a psychologist, and the Center's Associate Superintendent, was required to review an inmate's case after the first seven days of treatment. If the committee reapproved the treatment, the treating psychiatrist was required to review the case and prepare a report for the Department of Corrections medical director every 14 days while treatment continued. [4]

***217** In this case, respondent was absent when members of the Center staff met with the committee before the hearing. The committee then conducted the hearing in accordance with the Policy, with respondent being present and assisted by a nurse practitioner from another institution. The committee found that respondent was a danger to others as a result of a mental disease or disorder, and approved the involuntary administration of antipsychotic drugs. On appeal, the Superintendent upheld the committee's findings. Beginning on November 23, 1982, respondent was involuntarily medicated for about one year. Periodic review occurred in accordance with the Policy.

In November 1983, respondent was transferred from the Center to the Washington State Reformatory. While there, he took no medication, and as a result, his condition deteriorated. He was retransferred to the Center after only one month. Respondent was the subject of another committee hearing in accordance with Policy 600.30, and the committee again approved medication against his will. Respondent continued to receive antipsychotic drugs, subject to the required periodic reviews, until he was transferred to the Washington State Penitentiary in June 1986.

In February 1985, respondent filed suit in state court under 42 U.S.C. § 1983 (1982 ed.) against various individual defendants and the State, claiming that the failure to provide a judicial hearing before the involuntary administration of antipsychotic medication violated the Due Process, Equal Protection, and Free Speech Clauses of both the Federal and State Constitutions, as well as state tort law. He sought both damages and declaratory and injunctive relief. After a bench trial in March 1987, the court held that, although respondent had a liberty interest in not being subjected to the involuntary administration of antipsychotic medication, the ***218** procedures contained in the Policy met the requirements of due process as stated in *Vitek.*

On appeal, the Washington Supreme Court reversed and remanded the case to the trial court. 110 Wash.2d 873, 759 P.2d 358 (1988). Agreeing with the trial court that respondent had a liberty interest in refusing antipsychotic medications, the court concluded that the "highly intrusive nature" of treatment with antipsychotic medications warranted greater procedural protections than those necessary to protect the liberty interests at stake in *Vitek.* 110 Wash.2d, at 880–881, 759 P.2d, at 363. It held that, under the Due Process Clause, the State could administer antipsychotic ****1035** medication to a competent, nonconsenting inmate only if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the State proved by "clear, cogent, and convincing" evidence that the administration of antipsychotic medication was both necessary and effective for furthering a compelling state interest. [5] *Id.,* at 883–884, 759 P.2d, at 364–365.

We granted certiorari, 489 U.S. 1064, 109 S.Ct. 1337, 103 L.Ed.2d 807 (1989), and we reverse.

II

[1] Respondent contends that because the State has ceased administering antipsychotic drugs to him against his will, the case is moot. We disagree.

Even if we confine our attention to those facts found in the record, [6] a live case or controversy between the parties remains. ***219** There is no evidence that respondent has recovered from his mental illness. Since being sentenced to prison in 1976, he has been diagnosed and treated for a serious mental disorder. Even while on parole, respondent continued to receive treatment, at one point under a civil commitment order, at state mental hospitals. At the time of trial, after his transfer from the Center for a second time, respondent was still diagnosed as suffering from schizophrenia.

Respondent continues to serve his sentence in the Washington state prison system, and is subject to transfer to the Center at any time. Given his medical history, and the fact that he has been transferred not once but twice to the Center from

other state penal institutions during the period 1982–1986, it is reasonable to conclude that there is a strong likelihood that respondent may again be transferred to the Center. Once there, given his medical history, it is likely that, absent the holding of the Washington Supreme Court, Center officials would seek to administer antipsychotic medications pursuant to Policy 600.30.

On the record before us, the case is not moot. The alleged injury likely would recur but for the decision of the Washington Supreme Court. This sufficiently overcomes the claim of mootness in the circumstances of the case and under our precedents. See *Vitek,* 445 U.S., at 486–487, 100 S.Ct., at 1260–1261.

III

The Washington Supreme Court gave its primary attention to the procedural component of the Due Process Clause. It phrased the issue before it as whether "a prisoner [is] entitled to a judicial hearing before antipsychotic drugs can be administered against his will." 110 Wash.2d, at 874, 759 P.2d, at 360. The court, however, did more than establish judicial ***220** procedures for making the factual determinations called for by Policy 600.30. It required that a different set of determinations than those set forth in the Policy be made as a precondition to medication without the inmate's consent. Instead of having to prove, pursuant to the Policy, only that the mentally ill inmate is "gravely disabled" or that he presents a "serious likelihood of harm" to himself or others, the court required the State to prove that it has a compelling interest in administering the medication ****1036** and that the administration of the drugs is necessary and effective to further that interest. The decisionmaker was required further to consider and make written findings regarding either the inmate's desires or a "substituted judgment" for the inmate analogous to the medical treatment decision for an incompetent person. *Id.,* 110 Wash.2d, at 883–884, 759 P.2d, at 365.

The Washington Supreme Court's decision, as a result, has both substantive and procedural aspects. It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake. But identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right. "[T]he substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." *Mills v. Rogers,* 457 U.S. 291, 299, 102 S.Ct. 2442, 2448, 73 L.Ed.2d 16 (1982) (citations omitted).

Restated in the terms of this case, the substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient. The Washington Supreme Court in effect ruled upon the substance of the inmate's right, as well as the ***221** procedural guarantees, and both are encompassed by our grant of certiorari. [7] We address these questions beginning with the substantive one.

[2] As a matter of state law, the Policy itself undoubtedly confers upon respondent a right to be free from the arbitrary administration of antipsychotic medication. In *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), we held that Pennsylvania had created a protected liberty interest on the part of prison inmates to avoid administrative segregation by enacting regulations that "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed, and that administrative segregation will not occur absent specified substantive predicates—viz., 'the need for control,' or 'the threat of a serious disturbance.' " *Id.,* at 471–472, 103 S.Ct., at 871 (citations omitted). Policy 600.30 is similarly mandatory in character. By permitting a psychiatrist to treat an inmate with antipsychotic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the Policy creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist. See also *Vitek,* 445 U.S., at 488–491, 100 S.Ct., at 1261–1263.

[3] We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the ***222** Fourteenth Amendment. See *id.,* at

491–494, 100 S.Ct., at 1262–1264; *Youngberg v. Romeo,* 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982); **1037 *Parham v. J.R.,* 442 U.S. 584, 600–601, 99 S.Ct. 2493, 2503–2504, 61 L.Ed.2d 101 (1979). Upon full consideration of the state administrative scheme, however, we find that the Due Process Clause confers upon respondent no greater right than that recognized under state law.

Respondent contends that the State, under the mandate of the Due Process Clause, may not override his choice to refuse antipsychotic drugs unless he has been found to be incompetent, and then only if the factfinder makes a substituted judgment that he, if competent, would consent to drug treatment. We disagree. The extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement. The Policy under review requires the State to establish, by a medical finding, that a mental disorder exists which is likely to cause harm if not treated. Moreover, the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement.[8] These standards, which recognize *223 both the prisoner's medical interests and the State's interests, meet the demands of the Due Process Clause.

[4] [5] The legitimacy, and the necessity, of considering the State's interests in prison safety and security are well established by our cases. In *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), we held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." *Turner, supra,* 482 U.S., at 89, 107 S.Ct., at 2261. This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. *Estate of Shabazz, supra,* 482 U.S., at 349, 107 S.Ct., at 2404–05. The Washington Supreme Court declined to apply this standard of review to the Center's Policy, reasoning that the liberty interest present here was distinguishable from the First Amendment rights at issue in both *Turner* and *Estate of Shabazz.* 110 Wash.2d, at 883, n. 9, 759 P.2d, at 364, n. 9. The court erred in refusing to apply the standard of reasonableness.

**1038 Our earlier determination to adopt this standard of review was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult *224 decisions regarding prison administration. *Turner, supra,* 482 U.S., at 84–85, 107 S.Ct., at 2259–60; *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 128, 97 S.Ct. 2532, 2539, 53 L.Ed.2d 629 (1977). These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment. We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights. See *Turner,* 482 U.S., at 85, 107 S.Ct., at 2259 ("Our task ... is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights' ") (citation omitted); *id.,* at 89, 107 S.Ct., at 2261 ("If *Pell* [*v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974)], *Jones,* and *Bell* [*v. Wolfish,* 441 U.S. 520, 60 L.Ed.2d 447 (1979)] have not already resolved the question posed in [*Procunier v.*] *Martinez,* [416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974),] we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Estate of Shabazz, supra,* 482 U.S., at 349, 107 S.Ct., at 2404 ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). In *Turner* itself we applied the reasonableness standard to a prison regulation that imposed severe restrictions on the inmate's right to marry, a right protected by the Due Process Clause. See *Turner, supra,* 482 U.S., at 95–96, 107 S.Ct., at 2265 (citing *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54

L.Ed.2d 618 (1978), and *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)). Our precedents require application of the standard here.

In *Turner,* we considered various factors to determine the reasonableness of a challenged prison regulation. Three are relevant here. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." ***225** 482 U.S., at 89, 107 S.Ct., at 2262 (quoting *Block v. Rutherford,* 468 U.S. 576, 586, 104 S.Ct. 3227, 3232, 82 L.Ed.2d 438 (1984)). Second, a court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 482 U.S., at 90, 107 S.Ct., at 2262. Third, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation," but this does not mean that prison officials "have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.,* at 90–91, 107 S.Ct., at 2262; see also *Estate of Shabazz, supra,* 482 U.S., at 350, 107 S.Ct., at 2405.

[6] Applying these factors to the regulation before us, we conclude that the Policy comports with constitutional requirements. There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here. There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, "by definition," is made up of persons with "a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer,* 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984); *Jones, supra,* 433 U.S., at 132, 97 S.Ct., at 2541; ****1039** *Wolff v. McDonnell,* 418 U.S. 539, 561–562, 94 S.Ct. 2963, 2977–2978, 41 L.Ed.2d 935 (1974). We confront here the State's obligations, not just its interests. The State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution. Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, see *Hewitt,* 459 U.S., at 473, 103 S.Ct., at 872, but also the duty to take reasonable measures for the prisoners' own safety. See *Hudson, supra,* 468 U.S., at 526–527, 104 S.Ct., at 3200–3201. These concerns have added weight when a penal institution, like the SOC is restricted to inmates with mental illnesses. Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the ***226** danger to others necessarily encompasses an interest in providing him with medical treatment for his illness.

SOC Policy 600.30 is a rational means of furthering the State's legitimate objectives. Its exclusive application is to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others. The drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist. There is considerable debate over the potential side effects of antipsychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior. [9]

The alternative means proffered by respondent for accommodating his interest in rejecting the forced administration of antipsychotic drugs do not demonstrate the invalidity of the State's policy. Respondent's main contention is that, as a precondition to antipsychotic drug treatment, the State must find him incompetent, and then obtain court approval of the treatment using a "substituted judgment" standard. The suggested rule takes no account of the legitimate governmental interest in treating him where medically appropriate for the purpose of reducing the danger he poses. A rule that is in no way responsive to the State's legitimate interests is not a proper accommodation, and can be rejected out of hand. Nor are physical restraints or seclusion "alternative[s] that fully accommodat[e] the prisoner's rights at *de minimis* cost to valid penological interests." *Turner, supra,* 482 U.S., at 91, 107 S.Ct., at 2262. Physical restraints are effective only in the short term, and can have serious physical side effects when used on a resisting ***227** inmate, see Brief for American Psychiatric Association et al. as *Amici Curiae* 12, as well as leaving the staff at risk of injury while putting the restraints on or tending to the inmate who is in them. Furthermore, respondent has failed to demonstrate that physical restraints or seclusion are acceptable substitutes for antipsychotic drugs, in terms of either their medical effectiveness or their toll on limited prison resources. [10]

[7] We hold that, given the requirements of the prison environment, the Due Process Clause permits the State to

treat a prison inmate who has a serious mental illness with **1040 antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest. Policy 600.30 comports with these requirements; we therefore reject respondent's contention that its substantive standards are deficient under the Constitution. [11]

*228 IV

[8] Having determined that state law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs unless certain preconditions are met, we address next what procedural protections are necessary to ensure that the decision to medicate an inmate against his will is neither arbitrary nor erroneous under the standards we have discussed above. The Washington Supreme Court held that a full judicial hearing, with the inmate being represented by counsel, was required by the Due Process Clause before the State could administer antipsychotic drugs to him against his will. In addition, the court held that the State must justify the authorization of involuntary administration of antipsychotic drugs by "clear, cogent, and convincing" evidence. We hold that the administrative hearing procedures set by the SOC Policy do comport with procedural due process, and conclude that the Washington Supreme Court erred in requiring a judicial hearing as a prerequisite for the involuntary treatment of prison inmates.

A

[9] The primary point of disagreement between the parties is whether due process requires a judicial decisionmaker. As *229 written, the Policy requires that the decision whether to medicate an inmate against his will be made by a hearing committee composed of a psychiatrist, a psychologist, and the Center's Associate Superintendent. None of the committee members may be involved, at the time of the hearing, in the inmate's treatment or diagnosis; members are not disqualified from sitting on the committee, however, if they have treated or diagnosed the inmate in the past. The committee's decision is subject to review by the Superintendent; if the inmate so desires, he may seek judicial review of the decision in a state court. See *supra,* at 1034. Respondent contends that only a court should make the decision to medicate an inmate against his will.

The procedural protections required by the Due Process Clause must be determined with **1041 reference to the rights and interests at stake in the particular case. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); *Hewitt,* 459 U.S., at 472, 103 S.Ct., at 871–72; *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979). The factors that guide us are well established. "Under *Mathews v. Eldridge,* 424 U.S. 319, 335 [96 S.Ct. 893, 903, 47 L.Ed.2d 18] (1976), we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment." *Hewitt, supra,* 459 U.S., at 473, 103 S.Ct., at 872.

Respondent's interest in avoiding the unwarranted administration of antipsychotic drugs is not insubstantial. The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. Cf. *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); *Schmerber v. California,* 384 U.S. 757, 772, 86 S.Ct. 1826, 1836–37, 16 L.Ed.2d 908 (1966). The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. See n. 1, *supra.* While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper *230 body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. See Finding of Fact 9, App. to Pet. for Cert. B–7; Brief for American Psychological Association as *Amicus Curiae* 6–9. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. See *Mills,* 457 U.S., at 293, n. 1, 102 S.Ct., at 2445, n. 1. The State, respondent, and *amici* sharply disagree

about the frequency with which tardive dyskinesia occurs, its severity, and the medical profession's ability to treat, arrest, or reverse the condition. A fair reading of the evidence, however, suggests that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe. Brief for American Psychiatric Association et al. as *Amici Curiae* 14–16, and n. 12; see also Brief for American Psychological Association as *Amicus Curiae* 8. [12]

**1042 *231 Notwithstanding the risks that are involved, we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge. The Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham,* 442 U.S., at 607, 99 S.Ct., at 2506–07. Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms. See *id.,* at 607–609, 99 S.Ct., at 2506–2508; cf. *Youngberg,* 457 U.S., at 322–323, 102 S.Ct., at 2461–2462. Particularly where the patient is mentally disturbed, his own intentions will be difficult to assess and will be changeable in any event. Schwartz, Vingiano, & Perez, Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication, 39 Hospital & Community Psychiatry 1049 (1988). Respondent's own history of accepting and then refusing drug treatment illustrates the point. We cannot make the facile assumption that the patient's intentions, or a substituted judgment approximating those intentions, can be determined in a single judicial hearing apart from the realities *232 of frequent and ongoing clinical observation by medical professionals. Our holding in *Parham* that a judicial hearing was not required prior to the voluntary commitment of a child to a mental hospital was based on similar observations:

> "... [D]ue process is not violated by use of informal, traditional medical investigative techniques.... The mode and procedure of medical diagnostic procedures is not the business of judges....
>
> . . . . .
>
> "Although we acknowledge the fallibility of medical and psychiatric diagnosis, see *O'Connor v. Donaldson,* 422 U.S. 563, 584 [95 S.Ct. 2486, 2498, 45 L.Ed.2d 396] (1975) (concurring opinion), we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decisionmaker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real." *Parham,* 442 U.S., at 607–609, 99 S.Ct., at 2506–2508.

Nor can we ignore the fact that requiring judicial hearings will divert scarce prison resources, both money and the staff's time, from the care and treatment of mentally ill inmates. See *id.,* at 605–606, 99 S.Ct., at 2505–2506.

Under Policy 600.30, the decisionmaker is asked to review a medical treatment decision made by a medical professional. That review requires two medical inquiries: first, whether the inmate suffers from a "mental disorder"; and second, whether, as a result of that disorder, he is dangerous to himself, others, or their property. Under the Policy, the hearing *233 committee reviews on a regular basis the staff's choice of both the type and dosage of drug to be administered, and can order appropriate changes. 110 Wash.2d, at 875, 759 P.2d, at 360. The risks associated with antipsychotic drugs are for the most part medical ones, best assessed by medical professionals. A State may conclude with good reason that a judicial hearing will not **1043 be as effective, as continuous, or as probing as administrative review using medical decisionmakers. We hold that due process requires no more.

A State's attempt to set a high standard for determining when involuntary medication with antipsychotic drugs is permitted cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account. Adequate procedures exist here. In particular, independence of the decisionmaker is addressed to our satisfaction by these procedures. None of the hearing

committee members may be involved in the inmate's current treatment or diagnosis. The record before us, moreover, is limited to the hearings given to respondent. There is no indication that any institutional biases affected or altered the decision to medicate respondent against his will. The trial court made specific findings that respondent has a history of assaultive behavior which his doctors attribute to his mental disease, and that all of the Policy's requirements were met. See App. to Pet. for Cert. B–4 to B–5, B–8. The court found also that the medical treatment provided to respondent, including the administration of antipsychotic drugs, was at all times consistent "with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances." *Id.,* at B–8. In the absence of record evidence to the contrary, we are not willing to presume that members of the staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the Policy. In previous cases involving medical decisions implicating similar ***234** liberty interests, we have approved use of similar internal decisionmakers. See *Vitek,* 445 U.S., at 496, 100 S.Ct., at 1265–66; *Parham, supra,* 442 U.S., at 613–616, 99 S.Ct., at 2509–2511. [13] Cf. *Wolff,* 418 U.S., at 570–571, 94 S.Ct., at 2981–2982 (prison ***235** officials sufficiently impartial to conduct prison disciplinary hearings). As we reasoned in *Vitek,* it is only by permitting persons connected with the institution ****1044** to make these decisions that courts are able to avoid "unnecessary intrusion into either medical or correctional judgments." *Vitek, supra,* 445 U.S., at 496, 100 S.Ct., at 1265; see *Turner,* 482 U.S., at 84–85, 89, 107 S.Ct., at 2259–60, 2261–62.

B

The procedures established by the Center are sufficient to meet the requirements of due process in all other respects, and we reject respondent's arguments to the contrary. The Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses. See *Vitek, supra,* 445 U.S., at 494–496, 100 S.Ct., at 1264–66. The procedural protections are not vitiated by meetings between the committee members and staff before the hearing. Absent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing respondent to contest the staff's position at the hearing satisfies the requirement that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). We reject also respondent's contention that the hearing must be conducted in accordance with the rules of evidence or that a "clear, cogent, and convincing" standard of proof is necessary. This standard is neither required nor helpful when medical personnel are making the judgment required by the regulations here. See *Vitek, supra,* 445 U.S., at 494–495, 100 S.Ct., at 1264–66. Cf. *Youngberg,* 457 U.S., at 321–323, 102 S.Ct., at 2461. Finally, we note that under state law an inmate may obtain judicial review of the hearing committee's decision by way of a personal restraint petition or petition for an extraordinary writ, and that the trial court found that the record compiled under the Policy was adequate to allow such review. See App. to Pet. for Cert. B–8.

***236** Respondent contends that the Policy is nonetheless deficient because it does not allow him to be represented by counsel. We disagree. "[I]t is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." *Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 330, 105 S.Ct. 3180, 3194, 87 L.Ed.2d 220 (1985) (emphasis in original). Given the nature of the decision to be made, we conclude that the provision of an independent lay adviser who understands the psychiatric issues involved is sufficient protection. See *Vitek, supra,* 445 U.S., at 499–500, 100 S.Ct., at 1267–1268 (Powell, J., concurring).

V

In sum, we hold that the regulation before us is permissible under the Constitution. It is an accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others. The Due Process Clause does require certain essential procedural protections, all of which are provided by the regulation before us. The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring.

I join the Court's opinion. The difficult and controversial character of this case is illustrated by the simple fact that the American Psychiatric Association and the American Psychological Association, which are respected, knowledgeable, and informed professional organizations, and which are here as *amici curiae,* pull the Court in opposite directions.

I add a caveat. Much of the difficulty will be lessened if, in any appropriate case, the mentally ill patient is formally committed. This on occasion may seem to be a bother or ****1045** a nuisance, but it is a move that would be protective for all ***237** concerned, the inmate, the institution, its staff, the physician, and the State itself. Cf. *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100. It is a step that should not be avoided or neglected when significant indications of incompetency are present.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and dissenting in part.

While I join the Court's explanation of why this case is not moot, I disagree with its evaluation of the merits. The Court has undervalued respondent's liberty interest; has misread the Washington involuntary medication Policy and misapplied our decision in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); and has concluded that a mock trial before an institutionally biased tribunal constitutes "due process of law." Each of these errors merits separate discussion.

I

The Court acknowledges that under the Fourteenth Amendment "respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs," *ante,* at 1036, but then virtually ignores the several dimensions of that liberty. They are both physical and intellectual. Every violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. [1] Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment. [2] And when the purpose ***238** or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense.

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values. [3] ****1046** ***239** The record of one of Walter Harper's involuntary medication hearings at the Special Offense Center (SOC) notes: "Inmate Harper stated he would rather die th[a]n take medication." [4] That Harper would be so opposed to taking psychotropic drugs is not surprising: as the Court acknowledges, these drugs both "alter the chemical balance in a patient's brain" and can cause irreversible and fatal side effects. [5] ***240** The prolixin injections that Harper was receiving at the time of his statement exemplify the intrusiveness of psychotropic drugs on a person's body and mind. Prolixin acts "at all levels of the central nervous system as well as on multiple organ systems." [6] It can induce catatonic-like states, alter electroencephalographic tracings, and cause swelling of the brain. Adverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms. As with all psychotropic drugs, prolixin may cause tardive dyskinesia, an often irreversible syndrome of uncontrollable movements that can prevent a person from exercising basic functions such as driving an automobile, and neuroleptic malignant syndrome, which is 30% fatal for those who suffer from it. [7] The risk of side effects increases over time. [8]

**1047 The Washington Supreme Court properly equated the intrusiveness of this mind-altering drug treatment with electroconvulsive therapy or psychosurgery. It agreed with the Supreme Judicial Court of Massachusetts' determination that the drugs have a " 'profound effect' " on a person's " 'thought *241 processes' " and a " 'well-established likelihood of severe and irreversible adverse side effects,' " and that they therefore should be treated " 'in the same manner we would treat psychosurgery or electroconvulsive therapy.' " 110 Wash.2d 873, 878, 759 P.2d 358, 362 (1988) (quoting *In re Guardianship of Roe,* 383 Mass. 415, 436–437, 421 N.E.2d 40, 53 (1981)). There is no doubt, as the State Supreme Court and other courts that have analyzed the issue have concluded, that a competent individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection. [9]

II

Arguably, any of three quite different state interests might be advanced to justify a deprivation of this liberty interest. The State might seek to compel Harper to submit to a mind-altering drug treatment program as punishment for the crime he committed in 1976, as a "cure" for his mental illness, or as a mechanism to maintain order in the prison. The Court today recognizes Harper's liberty interest only as against the first justification.

Forced administration of antipsychotic medication may not be used as a form of punishment. This conclusion follows inexorably from our holding in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), that the Constitution provides a convicted felon the protection of due process against an involuntary transfer from the prison population to a mental hospital for psychiatric treatment. We explained:

> *242 "Appellants maintain that the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence, at least after certification by a qualified person that a prisoner suffers from a mental disease or defect. We cannot agree. None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *Jackson v. Indiana,* 406 U.S. 715, 724–725, 92 S.Ct. 1845, 1851–1852, 32 L.Ed.2d 435 (1972). A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State **1048 to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections."
>
> *Id.,* 445 U.S., at 493–494, 100 S.Ct., at 1264.

The Court does not suggest that psychotropic drugs, any more than transfer for medical treatment, may be forced on prisoners as a necessary condition of their incarceration or as a disciplinary measure. Rather, it holds:

> "[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others *and the treatment is in the inmate's medical interest.* Policy 600.30 comports with *243 these requirements; we therefore reject respondent's contention that its substantive standards are deficient under the Constitution." *Ante,* at 1039–1040 (emphasis added).

Crucial to the Court's exposition of this substantive due process standard is the condition that these drugs "may be administered for no purpose other than treatment," and that "the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Ante,* at 1039, 1037. Thus, although the Court does not find, as Harper urges, an absolute liberty interest of a competent person to refuse psychotropic drugs, it does recognize that the substantive protections of the Due Process Clause limit the forced administration of psychotropic drugs to all but those inmates whose medical interests would be advanced by such treatment.

Under this standard the Court upholds SOC Policy 600.30, determining that this administrative scheme confers, as a matter of state law, a substantive liberty interest coextensive with that conferred by the Due Process Clause. *Ante,* at 1036–1037. Whether or not the State's alleged interest in providing medically beneficial treatment to those in its custody who are mentally ill may alone override the refusal of psychotropic drugs by a presumptively competent person, a plain reading of Policy 600.30 reveals that it does not meet the substantive standard set forth by the Court. Even on the Court's terms, the Policy is constitutionally insufficient.

Policy 600.30 permits forced administration of psychotropic drugs on a mentally ill inmate based purely on the impact that his disorder has on the security of the prison environment. The provisions of the Policy make no reference to any expected benefit to the inmate's medical condition. Policy 600.30 requires:

> "In order for involuntary medication to be approved, it must be demonstrated that the inmate suffers from a mental disorder and as a result of that disorder constitutes a likelihood of serious harm to himself or others ***244** and/or is gravely disabled." Lodging, Book 9, Policy 600.30, p. 1.

"Likelihood of serious harm," according to the Policy,

> "means either (i) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (ii) a substantial risk that physical harm will be inflicted by an individual upon another as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (iii) a substantial risk that physical harm will be inflicted by an individual upon the property of others as evidenced by behavior which has caused substantial loss or damage to the property of others." [10]

****1049** Thus, the Policy authorizes long-term involuntary medication not only of any mentally ill inmate who, as a result of a mental disorder, appears to present a future risk to himself, but also of an inmate who presents a future risk to other people or mere property.

Although any application of Policy 600.30 requires a medical judgment as to a prisoner's mental condition and the cause of his behavior, the Policy does not require a determination that forced medication would advance his medical interest. [11] Use of psychotropic drugs, the State readily admits, ***245** serves to ease the institutional and administrative burdens of maintaining prison security and provides a means of managing an unruly prison population and preventing property damage. [12] By focusing on the risk that the inmate's mental condition poses to other people and property, the Policy allows the State to exercise either *parens patriae* authority or police authority to override a prisoner's liberty interest in refusing psychotropic drugs. Thus, most unfortunately, there is simply no basis for the Court's assertion that medication under the Policy must be to advance the prisoner's medical interest. [13]

Policy 600.30 sweepingly sacrifices the inmate's substantive liberty interest to refuse psychotropic drugs, regardless of his medical interests, to institutional and administrative ***246** concerns. The State clearly has a legitimate interest in prison security and administrative convenience that encompasses responding to potential risks to persons and property. However, to the extent that the Court recognizes "both the prisoner's medical interests and the State's interests" as potentially *independent* justifications for involuntary medication of inmates, [14] it seriously misapplies the standard announced in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). In *Turner,* we held that a prison regulation that impinges on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." ****1050** *Id.,* at 89, 107 S.Ct., at 2261. Under this test, we determined that a regulation barring inmate-to-inmate correspondence was adequately supported by the State's institutional security concerns. *Id.,* at 93, 107 S.Ct., at 2263–64. We also unanimously concluded that a regulation prohibiting inmate marriage, except with consent of the prison superintendent made upon proof of compelling circumstances, was an "exaggerated response" to the prison's claimed security objectives and was not reasonably related to its articulated rehabilitation goal. *Id.,* at 97–98, 107 S.Ct., at 2266.

The State advances security concerns as a justification for forced medication in two distinct circumstances. A SOC Policy provision not at issue in this case permits 72 hours of involuntary medication on an emergency basis when "an inmate is suffering from a mental disorder and as a result of that disorder presents an *imminent* likelihood of *serious*

harm to himself or others." Lodging, Book 9, Policy 600.30, p. 2 (emphasis added). In contrast to the imminent danger of injury that triggers the emergency medication provisions, a general risk of illness-induced injury or property damage —evidenced by no more than past behavior—allows long-term, involuntary medication of an inmate with psychotropic drugs ***247** under Policy 600.30. This ongoing interest in security and management is a penological concern of a constitutionally distinct magnitude from the necessity of responding to emergencies. See *Whitley v. Albers,* 475 U.S. 312, 321–322, 106 S.Ct. 1078, 1085–1086, 89 L.Ed.2d 251 (1986). It is difficult to imagine what, if any, limits would restrain such a general concern of prison administrators who believe that prison environments are, " 'by definition,' ... made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.' " *Ante,* at 1038 (quoting *Hudson v. Palmer,* 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984)). A rule that allows prison administrators to address potential security risks by forcing psychotropic drugs on mentally ill inmates for prolonged periods is unquestionably an "exaggerated response" to that concern.

In *Turner* we concluded on the record before us that the marriage "regulation, as written, [was] not reasonably related to ... penological interests," and that there were "obvious, easy alternatives" that the State failed to rebut by reference to the record. 482 U.S., at 97–98, 107 S.Ct., at 2266. Today the Court concludes that alternatives to psychotropic drugs would impose more than *de minimis* costs on the State. However, the record before us does not establish that a more narrowly drawn policy withdrawing psychotropics from only those inmates who actually refuse consent [15] and who do not pose ***248** an imminent threat of serious harm [16] would increase the marginal costs of SOC ****1051** administration. Harper's own record reveals that administrative segregation and standard disciplinary sanctions were frequently imposed on him over and above forced medication and thus would add no new costs. *Lodging,* Book 1. Similarly, intramuscular injections of psychotropics, such as those frequently forced on Harper, *id.,* Book 7, entail no greater risk than administration of less dangerous drugs such as tranquilizers. [17] Use of psychotropic ***249** drugs simply to suppress an inmate's potential violence, rather than to achieve therapeutic results, may also undermine the efficacy of other available treatment programs that would better address his illness. [18]

The Court's careful differentiation in *Turner* between the State's articulated goals of security and rehabilitation should be emulated in this case. The flaw in Washington's Policy 600.30—and the basic error in the Court's opinion today—is the failure to divorce from each other the two justifications for forced medication and to consider the extent to which the Policy is reasonably related to either interest. The State, and arguably the Court, allows the SOC to blend the state interests in responding to emergencies and in convenient prison administration with the individual's interest in receiving beneficial medical treatment. The result is a muddled rationale that allows the "exaggerated response" of forced psychotropic medication on the basis of purely institutional concerns. So serving institutional convenience eviscerates ***250** the inmate's substantive liberty interest in the integrity of his body and mind. [19]

****1052** III

The procedures of Policy 600.30 are also constitutionally deficient. Whether or not the State ever may order involuntary administration of psychotropic drugs to a mentally ill person who has been committed to its custody but has not been declared incompetent, it is at least clear that any decision approving such drugs must be made by an impartial professional concerned not with institutional interests, but only with the individual's best interests. The critical defect in Policy 600.30 is the failure to have the treatment decision made or reviewed by an impartial person or tribunal. See *Vitek,* 445 U.S., at 495, 100 S.Ct., at 1264–65. [20]

The psychiatrists who diagnose and provide routine care to SOC inmates may prescribe psychotropic drugs and recommend involuntary medication under Policy 600.30. The Policy provides that a nonemergency decision to medicate for up ***251** to seven consecutive days must be approved by a special committee after a hearing. The committee consists of the Associate Superintendent of SOC, a psychologist, and a psychiatrist. Neither of the medical professionals may be involved in the current diagnosis or treatment of the inmate. The approval of the psychiatrist and one other committee member is required to sustain a 7–day involuntary medication decision. Lodging, Book 9, Policy 600.30, p. 2, § 3.B. A similarly composed committee is required to authorize "long term" involuntary medication lasting over seven days. Policy 600.30 does not bar current treating professionals or previous committee members from serving on the long-term

committee. This committee does *not* conduct a new hearing, but merely reviews the inmate's file and minutes of the 7–day hearing. Long-term approval, if granted, allows medication to continue indefinitely with a review and report by the treating psychiatrist every 14 days. *Id.,* Book 9, Policy 600.30, p. 2, § 3.C. [21]

These decisionmakers have two disqualifying conflicts of interest. First, the panel members must review the work of treating physicians who are their colleagues and who, in turn, regularly review their decisions. Such an in-house system pits the interests of an inmate who objects to forced medication against the judgment not only of his doctor, but often his doctor's colleagues. [22] Furthermore, the Court's ***252** conclusion that "[n]one ****1053** of the hearing committee members may be involved in the inmate's current treatment or diagnosis," *ante,* at 1043, overlooks the fact that Policy 600.30 allows a treating psychiatrist to participate in all but the initial *7–day* medication approval. This revolving door operated in Harper's case. Dr. Petrich treated Harper through 1982 and recommended involuntary medication on October 27, 1982. Lodging, Book 8, Oct. 27, 1982. Dr. Loeken, staff psychologist Giles, and Assistant Superintendent Stark authorized medication for seven days after a 600.30 hearing on November 23, 1982. Dr. Petrich then replaced Dr. Loeken on the committee, and with Giles and Stark approved long-term involuntary medication on December 8, 1982. Solely under this authority, Dr. Petrich prescribed more psychotropic medication for Harper on December 8, 1982, and throughout the following year. [23]

***253** Second, the panel members, as regular staff of the Center, must be concerned not only with the inmate's best medical interests, but also with the most convenient means of controlling the mentally disturbed inmate. The mere fact that a decision is made by a doctor does not make it "certain that professional judgment in fact was exercised." *Youngberg v. Romeo,* 457 U.S. 307, 321, 102 S.Ct. 2452, 2461, 73 L.Ed.2d 28 (1982). The structure of the SOC committee virtually ensures that it will not be. While the initial inquiry into the mental bases for an inmate's behavior is medical, the ultimate medication decision under Policy 600.30 turns on an assessment of the risk that an inmate's condition imposes on the institution. The prescribing physician and each member of the review committee must therefore wear two hats. This hybrid function disables the independent exercise of each decisionmaker's *professional* judgment. [24] The ***254** structure of the review committee further confuses the objective of the inquiry; two of the committee members are not trained or licensed to prescribe psychotropic drugs, and one has no medical expertise at all. The trump by institutional interests is dramatized by the fact that appeals of committee decisions under ****1054** the Policy are made solely to the SOC Superintendent. [25]

The Court asserts that "[t]here is no indication that any institutional biases affected or altered the decision to medicate respondent against his will" and that there is no evidence that "antipsychotic drugs were prescribed not for medical purposes, but to control or discipline mentally ill patients." *Ante,* at 1043, and n. 13. A finding of bias in an individual case is unnecessary to determine that the structure of Policy 600.30 fails to meet the due process requirements of the Fourteenth Amendment. In addition, Harper's own record illustrates the potential abuse of psychotropics under Policy 600.30 for institutional ends. For example, Dr. Petrich added Taractan, a psychotropic drug, to Harper's medication around October 27, 1982, noting: "The goal of the increased medication to sedate him at night and relieve the residents and evening [*sic*] alike of the burden of supervising him as intensely." [26] A 1983 examination by non-SOC physicians ***255** also indicated that Harper was prophylactically medicated absent symptoms that would qualify him for involuntary medication. [27]

The institutional bias that is inherent in the identity of the decisionmakers is unchecked by other aspects of Policy 600.30. The committee need not consider whether less intrusive procedures would be effective, or even if the prescribed medication would be beneficial to the prisoner, before approving involuntary medication. Findings regarding the severity or the probability of potential side effects of drugs and dosages are not required. And, although the Policy does not prescribe a standard of proof necessary for any factual determination upon which a medication decision rests, the Court gratuitously advises that the "clear, cogent, and convincing" standard adopted by the State Supreme Court would be unnecessary. [28]

***256** Nor is the 600.30 hearing likely to raise these issues fairly and completely. An inmate recommended for involuntary medication is no more capable of " 'speaking effectively for himself' " on these "issues which ****1055** are 'complex or otherwise difficult to develop or present' " than an inmate recommended for transfer to a mental hospital. *Vitek,* 445 U.S., at 498, 100 S.Ct., at 1266–67 (Powell, J., concurring in part). Although single doses of

some psychotropic drugs are designed to be effective for a full month, the inmate may not refuse the very medication he is contesting until 24 hours before his hearing.[29] Policy 600.30 also does not allow the inmate to be represented by counsel at hearings, but only to have present an adviser, who is appointed by the SOC. Lodging, Book 9, Policy 600.30, pp. 3–4. These advisers, of questionable loyalties and efficacy, cannot provide the "independent assistance" required for an inmate fairly to understand and participate in the hearing process. 445 U.S., at 498, 100 S.Ct., at 1266–67.[30] In addition, although the Policy gives the inmate a "limitable right to present testimony through his own witnesses and to confront and cross-examine witnesses," in the next paragraph it takes that right away for reasons that "include, but are not limited to such ***257** things as irrelevance, lack of necessity, redundancy, possible reprisals, or other reasons relating to institutional interests of security, order, and rehabilitation." Lodging, Book 9, Policy 600.30, p. 3. Finally, because Policy 600.30 provides a hearing only for the 7-day committee, and just a paper record for the long-term committee, the inmate has no opportunity at all to present his objections to the more crucial decision to medicate him on a long-term basis.

In sum, it is difficult to imagine how a committee convened under Policy 660.30 could conceivably discover, much less be persuaded to overrule, an erroneous or arbitrary decision to medicate or to maintain a specific dosage or type of drug. See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Institutional control infects the decisionmakers and the entire procedure. The state courts that have reviewed comparable procedures have uniformly concluded that they do not adequately protect the significant liberty interest implicated by the forced administration of psychotropic drugs.[31] I agree with that conclusion. Although a review procedure administered by impartial, nonjudicial professionals might avoid the constitutional deficiencies in Policy 600.30, I would affirm the decision of the Washington Supreme Court requiring a judicial hearing, with its attendant procedural safeguards, as a remedy in this case.

***258** I continue to believe that "even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution ****1056** may never ignore." *Meachum v. Fano,* 427 U.S. 215, 233, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (dissenting opinion). A competent individual's right to refuse psychotropic medication is an aspect of liberty requiring the highest order of protection under the Fourteenth Amendment.[32] Accordingly, with the exception of Part II, I respectfully dissent from the Court's opinion and judgment.

All Citations

494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178, 58 USLW 4249, 1 NDLR P 17

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 The drugs administered to respondent included Trialafon, Haldol, Prolixin, Taractan, Loxitane, Mellaril, and Navane. See App. to Pet. for Cert. B–7. Like the Washington Supreme Court, we limit our holding to the category of antipsychotic drugs. See 110 Wash.2d 873, 876, n. 3, 759 P.2d 358, 361, n. 3 (1988).

2 Since that initial diagnosis, respondent has also been thought to have been suffering from schizo-affective disorder, and his current diagnosis is that he is schizophrenic.

3 The Policy's definitions of the terms "mental disorder," "gravely disabled," and "likelihood of serious harm" are identical to the definitions of the terms as they are used in the state involuntary commitment statute. See App. to Pet. for Cert. B–3. "Mental disorder" means "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." Wash.Rev.Code § 71.05.020(2) (1987). "Gravely disabled" means "a condition in which a person, as a result of a mental disorder:

(a) [i]s in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety." § 71.05.020(1). "Likelihood of serious harm" means "either: (a) [a] substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others." § 71.05.020(3).

4 The Policy was later amended to allow treatment for up to 14 days after the first hearing. Further treatment could be authorized only after the same committee conducted a second hearing on the written record. Thereafter, the treating psychiatrist was required to submit bi-weekly reports to the Department of Corrections medical director. At the end of 180 days, a new hearing was required to consider the need for continued treatment.

5 Because it decided the case on due process grounds, the court did not address respondent's equal protection or free speech claims, and they are not before us here. The court also concluded that the individual defendants were entitled to qualified immunity, but remanded the case to the lower court for further consideration of respondent's claims for injunctive and declaratory relief under § 1983, as well as of his claims under state law. See 110 Wash.2d, at 885–886, 759 P.2d, at 366.

6 In response to our questions at oral argument, counsel for the State informed us that respondent was transferred back to the Center in April 1987 and involuntarily medicated pursuant to the Policy from September 1987 until May 1988. Counsel also informed us that, at the time of oral argument, respondent was at a state mental hospital for a competency determination on an unrelated criminal charge, and that regardless of the outcome of this criminal charge, respondent will return to the state prison system to serve the remainder of his sentence.

7 The two questions presented by the State in its petition for certiorari mirror the division between the substantive and procedural aspects of this case. In addition to seeking a grant of certiorari on the question whether respondent was entitled to "a judicial hearing and attendant adversarial procedural protections" prior to the involuntary administration of antipsychotic drugs, the State sought certiorari on the question, assuming that respondent "possesses a constitutionally protected liberty interest in refusing medically prescribed antipsychotic medication," whether the State must "prove a compelling state interest ... or [whether] the 'reasonable relation' standard of *Turner v. Safley,* [482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987),] control[s]." Pet. for Cert. i.

8 Justice STEVENS contends that the SOC Policy permits respondent's doctors to treat him with antipsychotic medications against his will without reference to whether the treatment is medically appropriate. See *post,* at 1048–1049. For various reasons, we disagree. That an inmate is mentally ill and dangerous is a necessary condition to medication, but not a sufficient condition; before the hearing committee determines whether these requirements are met, the inmate's treating physician must first make the decision that medication is appropriate. The SOC is a facility whose purpose is not to warehouse the mentally ill, but to diagnose and treat convicted felons, with the desired goal being that they will recover to the point where they can function in a normal prison environment. App. to Pet. for Cert. B–2. In keeping with this purpose, an SOC psychiatrist must first prescribe the antipsychotic medication for the inmate, and the inmate must refuse it, before the Policy is invoked. Unlike Justice STEVENS, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary. See Hippocratic Oath; American Psychiatric Association, Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, in Codes of Professional Responsibility 129–135 (R. Gorlin

ed. 1986). This consideration supports our interpretation of the State's Policy as ensuring that antipsychotic medications will be administered only in those cases where appropriate by medical standards. We therefore agree with the State's representations at oral argument that, under the Policy, anti-psychotic medications can be administered only for treatment purposes, with the hearing committee reviewing the doctor's decision to ensure that what has been prescribed is appropriate. See Tr. of Oral Arg. 13, 16.

9 See Brief for American Psychiatric Association et al. as *Amici Curiae* 10–11 ("Psychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia"); Brief for American Psychological Association as *Amicus Curiae* 6.

10 There is substantial evidence to the contrary. See Brief for American Psychiatric Association et al. as *Amici Curiae* 11–12; Soloff, Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice, in Clinical Treatment of the Violent Person 119–137 (L. Roth ed. 1987) (documenting the risks and costs of using physical restraints and seclusion on violent patients).

11 Perhaps suggesting that the care given to respondent and the Center's utilization of Policy 600.30 may have been suspect, Justice STEVENS uses random citations from exhibits and documents submitted to the state trial court. By using isolated quotations of a few passages from medical and other records running into the hundreds of pages, Justice STEVENS risks presenting a rather one-sided portrait of what they contain. An overview of these extensive materials reveals that respondent has a long history of serious, assaultive behavior, evidenced by at least 20 reported incidents of serious assaults on fellow inmates and staff. Respondent's doctors attributed these incidents to his severe mental illness and believed that his assaultive tendencies increased when he did not receive medication. See App. to Pet. for Cert. B–5. Respondent's opposition to the involuntary administration of antipsychotic drugs was premised at least in part upon his desire to self-medicate with street drugs, especially cocaine. See Lodging filed by Kenneth Eikenberry, Attorney General of Washington, Book 3, July 25, 1984, Progress Report. Finally, the records show without doubt that respondent has been the recipient of painstaking medical diagnosis and care while at the SOC. In any event, the trial court did not indicate which portions, if any, of these records, all of which are hearsay, it credited or relied upon in making its findings.

For these reasons, we do not intend to engage in a debate with Justice STEVENS over how respondent's medical and institutional records should be interpreted. We rely upon the findings of the trial court that "at all times relevant to this action, [respondent] suffered from a mental disorder and as a result of that disorder constituted a likelihood of serious harm to others," App. to Pet. for Cert. B–8, and that "the medical treatment provided to [respondent] by defendants, including the administration of anti-psychotic medications, was consistent with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances." *Ibid.* Contrary to Justice STEVENS' cramped reading of this last finding, see *post,* at 1049, n. 13, the breadth of its meaning equals the breadth of its language.

12 Justice STEVENS is concerned with "discount[ing] the severity of these drugs." See *post,* at 1046, n. 5. As our discussion in the text indicates, we are well aware of the side effects and risks presented by these drugs; we also are well aware of the disagreements in the medical profession over the frequency, severity, and permanence of these side effects. We have set forth a fair assessment of the current state of medical knowledge about these drugs.

What Justice STEVENS "discount[s]" are the benefits of these drugs, and the deference that is owed to medical professionals who have the full-time responsibility of caring for mentally ill inmates like respondent and who possess, as courts do not, the requisite knowledge and expertise to determine whether the drugs should be used in an individual case. After admitting that the proper administration of antipsychotic drugs is one of the most effective means of treating certain mental illnesses, Justice STEVENS contends that the drugs are not indicated for "all patients," and then questions the appropriateness of the treatment provided to respondent. See *post,* at 1050–1051, n. 16. All concede that the drugs are not the approved treatment in all cases. As for whether respondent's medical treatment was appropriate, we are not so sanguine as

to believe that on the basis of the limited record before us, we have the medical expertise and knowledge necessary to determine whether, on the basis of isolated parts of respondent's medical records, the care given to him is consistent with good medical practice. Again, we must defer to the finding of the trial court, unchallenged by any party in this case, that the medical care provided to respondent was appropriate under medical standards. See n. 11, *supra.*

13 In an attempt to prove that internal decisionmakers lack the independence necessary to render impartial decisions, respondent and various *amici* refer us to other cases in which it is alleged that antipsychotic drugs were prescribed not for medical purposes, but to control or discipline mentally ill patients. See Brief for Respondent 28; Brief for American Psychological Association as *Amicus Curiae* 14. We rejected a similar claim in *Parham,* and do so again here, using much the same reasoning. "That such a practice may take place in some institutions in some places affords no basis for a finding as to [Washington's] program," *Parham,* 442 U.S., at 616, 99 S.Ct., at 2511, particularly in light of the trial court's finding here that the administration of anti-psychotic drugs to respondent was consistent with good medical practice.

Moreover, the practical effect of mandating an outside decisionmaker such as an "independent psychiatrist" or judge in these circumstances may be chimerical. Review of the literature indicates that outside decisionmakers concur with the treating physician's decision to treat a patient involuntarily in most, if not all, cases. See Bloom, Faulkner, Holm, & Rawlinson, An Empirical View of Patients Exercising Their Right to Refuse Treatment, 7 Int'l J. Law & Psychiatry 315, 325 (1984) (independent examining physician used in Oregon psychiatric hospital concurred in decision to involuntarily medicate patients in 95% of cases); Hickman, Resnick, & Olson, Right to Refuse Psychotropic Medication: An Interdisciplinary Proposal, 6 Mental Disability Law Reporter 122, 130 (1982) (independent reviewing psychiatrist used in Ohio affirmed the recommendation of internal reviewer in 100% of cases). Review by judges of decisions to override a patient's objections to medication yields similar results. Appelbaum, The Right to Refuse Treatment With Antipsychotic Medications: Retrospect and Prospect, 145 Am. J. Psychiatry 413, 417–418 (1988). In comparison, other studies reveal that review by internal decisionmakers is hardly as lackluster as Justice STEVENS suggests. See Hickman, Resnick, & Olson, *supra,* at 130 (internal reviewer approved of involuntary treatment in 75% of cases); Zito, Lentz, Routt, & Olson, The Treatment Review Panel: A Solution to Treatment Refusal?, 12 Bull.American Academy of Psychiatry and Law 349 (1984) (internal review panel used in Minnesota mental hospital approved of involuntary medication in 67% of cases). See generally Appelbaum & Hoge, The Right to Refuse Treatment: What the Research Reveals, 4 Behavioral Sciences and Law 279, 288–290 (1986) (summarizing results of studies on how various institutions review patients' decisions to refuse antipsychotic medications and noting "the infrequency with which refusals are allowed, regardless of the system or the decisionmaker").

1 Cf., *e.g., Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) (surgery); *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (use of physical "soft" restraints for the arms and "muffs" for hands).

2 See *Mills v. Rogers,* 457 U.S. 291, 294, n. 4, 299, n. 16, 102 S.Ct. 2442, 2446, n. 4, 2448, n. 16, 73 L.Ed.2d 16 (1982) (recognizing common-law battery for unauthorized touchings by a physician and assuming liberty interests are implicated by involuntary administration of psychotropic drugs); *United States v. Stanley,* 483 U.S. 669, 710, 107 S.Ct. 3054, 3066, 97 L.Ed.2d 550 (1987) (O'CONNOR, J., concurring in part and dissenting in part) (the Constitution's promise of due process of law guarantees at least compensation for violations of the principle stated by the Nuremberg Military Tribunals "that the 'voluntary consent of the human subject is absolutely essential ... to satisfy moral, ethical and legal concepts' "); *Doe v. Bolton,* 410 U.S. 179, 213, 93 S.Ct. 739, 758–59, 35 L.Ed.2d 201 (1973) (Douglas, J., concurring) (the Fourteenth Amendment protects the "freedom to care for one's health and person" (emphasis deleted)). Harper was not adjudged insane or incompetent. 110 Wash.2d 873, 882, 759 P.2d 358, 364 (1988).

3 See also *Stanley v. Georgia,* 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (“Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds”).
“It is obligatory that Helsinki signatory states not manipulate the minds of their citizens; that they not step between a man and his conscience or his God; and that they not prevent his thoughts from finding expression through peaceful action. We are all painfully aware, furthermore, that governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people.” Hearings on Abuse of Psychiatry in the Soviet Union before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs, 98th Cong., 1st Sess., 106 (1983) (Remarks by Max Kampelman, Chair of the U.S. Delegation, to the Plenary Session of the Commission on Security and Cooperation in Europe).

4 Lodging filed by Kenneth O. Eikenberry, Attorney General of Washington (hereinafter Lodging), Book 8, Jan. 5, 1984, Hearing (Harper testified: “Well all you want to do is medicate me and you've been medicating me.... Haldol paral[y]zed my right side of my body.... [Y]ou are burning me out of my life ... [Y]ou are burning me out of my freedom”).
The Lodging includes “books” of discovery material that the parties stipulated “could be considered by the [Trial] Court as substantive evidence and the [Trial] Court ... considered those documents.” App. to Pet. for Cert. B–1. They are hereinafter referred to by Book number and the date of the entry, where applicable. I use the Lodging not to “engage in a debate” over the assessment of Harper's treatment, *ante,* at 1040, n. 11, but simply to illustrate the boundaries of Policy 600.30 in operation.

5 *Ante,* at 1041. The Court relies heavily on the Brief for American Psychiatric Association et al. as *Amici Curiae* (Psychiatrists' Brief), see *ante,* at 1032, 1039, and n. 9, 1039, and n. 10, 1041, to discount the severity of these drugs. However, medical findings discussed in other briefs support the conclusions of the Washington Supreme Court and challenge the reliability of the Psychiatrists' Brief. For example, the Brief for American Psychological Association as *Amicus Curiae* (Psychologists' Brief) points out that the observation of tardive dyskinesia has been increasing “at an alarming rate” since the 1950–1970 data relied on by the Psychiatrists' Brief 14–16, and that “the chance of suffering this potentially devastating disorder is greater than one in four.” Psychologists' Brief 8. See also Brief for Coalition for Fundamental Rights and Equality of Ex–Patients as *Amicus Curiae* 16–18 (court findings and recent literature on side effects); Brief for National Association of Protection and Advocacy Systems et al. as *Amici Curiae* 7–16 (same). Psychiatrists also may not be entirely disinterested experts. The psychologists charge: “As a psychiatrist has written, ‘[l]itigation from patients suffering from TD [tardive dyskinesia] is expected to explode within the next five years. Some psychiatrists and other physicians continue to minimize the seriousness of TD ... [despite] continual warnings.’ ” Psychologists' Brief 4 (quoting R. Simon, Clinical Psychiatry and the Law 74 (1987)).

6 Physician's Desk Reference 1639 (43d ed. 1989).

7 *Id.,* at 1640; Trial Court Finding 9, App. to Pet. for Cert. B–7 to B–8; Guzé & Baxter, Neuroleptic Malignant Syndrome, 313 New England J. Med. 163, 163–164 (1985).

8 Physician's Desk Reference, *supra,* at 1639. Harper voluntarily took psychotropic drugs for six years before involuntary medication began in 1982, by which time he had already exhibited dystonia (acute muscle spasms) and akathesia (physical-emotional agitation). *E.g.,* Lodging, Book 2, May 28, 1982, Aug. 4, 1982; see also Trial Court Findings 9–10, App. to Pet. for Cert. B–7 to B–8. Although avoidance of akathesia and the risk of tardive dyskinesia require reduction or discontinuance of psychotropics, *ibid.,* Harper's involuntary medication was continuous from November 1982 to June 1986, except for one month spent at Washington State Reformatory. Lodging, Book 8; Trial Court Findings 4–6, 9, App. to Pet. for Cert. B–4 to B–8.

9 110 Wash.2d, at 878, 759 P.2d, at 362. See, *e.g., Large v. Superior Court,* 148 Ariz. 229, 714 P.2d 399 (1986) (en banc); *Riese v. St. Mary's Hospital and Medical Center,* 209 Cal.App.3d 1303, 243 Cal.Rptr. 241 (1st Dist.1988), review granted but dism'd, 259 Cal.Rptr. 669, 774 P.2d 698 (1989); *People v. Medina,* 705 P.2d 961 (Colo.1985) (en banc); *Rogers v. Commissioner of Dept. of Mental Health,* 390 Mass. 489,

458 N.E.2d 308 (1983); *Rivers v. Katz,* 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986); *In re Mental Health of K.K.B.,* 609 P.2d 747 (Okla.1980). Cf. *In re Schuoler,* 106 Wash.2d 500, 723 P.2d 1103 (1986) (right to refuse electroconvulsive therapy).

10 Lodging, Book 9, Policy 600.30, p. 1. Revised Policy 620.200, effective February 18, 1985, retained these substantive definitions. Lodging, Book 9, Policy 620.200, p. 1.

11 The Court's reliance on the Hippocratic Oath to save the constitutionality of Policy 600.30 is unavailing. *Ante,* at 1037, n. 8. Whether or not the Oath binds treating physicians with a "medical interest" requirement in prescribing medications, it has no bearing on the SOC review committees, which are governed solely by the administrative criteria of Policy 600.30 in authorizing involuntary medication. Nor can the Court possibly believe that any "treatment" is talismanically in a patient's "medical interest." Treatment of a condition with medication facilitates a specific physiological result, which may or may not be in the overall medical interest of the patient. For example, the patient's medical interest in reducing his own violence or in altering his mental condition may be often outweighed by the risk or onset of severe medical side effects. See *supra,* at 1046–1047. Finally, the qualitative judgment of what is a patient's best interest cannot be made without reference to his own preferences. The Policy does not account for either a physician's determination of medical interest or the inmate's wishes.

12 See, *e.g.,* Brief for Petitioners 29 ("Harper's history of assaultive behavior requires that the state exercise its police power to appropriately medicate him for the protection of others"); *id.,* at 17 ("The policy assists prison administrators in meeting their 'unquestioned duty to provide reasonable safety for all residents and personnel within the institution' "). See also Brief for United States as *Amicus Curiae* 17 ("The paramount concerns in running a prison or a prison mental health facility are maintaining institutional security, preserving internal order, and establishing a therapeutic environment.... [I]t goes without saying that the interest in preventing violence and maintaining order is significantly amplified when an entire ward consists of mentally ill prisoners, as at the SOC").

13 The trial court did not attempt to separate the medical and institutional objectives of Policy 600.30. Nor did it construe the Policy's terms to require that an inmate's best medical interests be served by medication. The trial court's findings were limited to Harper's case. Findings 11–12, App. to Pet. for Cert. B–8. They shed no light on whether Harper's doctors did—or "a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances" as a SOC psychiatrist could—order medication for any combination of therapeutic or institutional concerns. Finding 12, App. to Pet. for Cert. B–8.

14 *Ante,* at 1037. The Court further conflates its analysis by suggesting that "[t]he State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution." *Ante,* at 1039.

15 There is no evidence that more than a small fraction of inmates would refuse drugs under a voluntary policy. Harper himself voluntarily took psychotropics for six years, and intermittently consented to them after 1982. Lodging, Books 2 and 8. See *e.g., Rogers v. Okin,* 478 F.Supp. 1342, 1369 (Mass.1979) (only 12 of 1,000 institutionalized patients refused psychotropic drugs for prolonged periods during the two years that judicial restraining order was in effect), modified, 634 F.2d 650 (CA1 1980), vacated and remanded *sub nom. Mills v. Rogers,* 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982). The efficacy of forced drugging is also marginal; involuntary patients have a poorer prognosis than cooperative patients. See Rogers & Webster, Assessing Treatability in Mentally Disordered Offenders, 13 Law and Human Behavior 19, 20–21 (1989).

16 As the Court notes, properly used, these drugs are "one of the most effective means of treating and controlling" certain incurable mental illnesses, *ante,* at 1039, but they are not a panacea for long-term care of all patients. "[T]he maintenance treatment literature ... shows that many patients (approximately 30%) relapse despite receiving neuroleptic medication, while neuroleptics can be withdrawn from other patients for many months and in some cases for years without relapse. Standard maintenance medication treatment strategies, though they are indisputably effective in group comparisons, may be quite inefficient in addressing the treatment

requirements of the individual patient." Lieberman et al., Reply to Ethics of Drug Discontinuation Studies in Schizophrenia, 46 Archives of General Psychiatry 387 (1989) (footnotes omitted).

Indeed, the drugs appear to have produced at most minor "savings" in Harper's case. Dr. Petrich reported that "medications are not satisfactory in containing the worst excesses of his labile and irritable behavior. He is uncooperative when on medication," Lodging, Book 2, Nov. 10, 1982, and a therapy supervisor reported before Harper's involuntary medication began:

"[D]uring the time in which he assaulted the nurse at Cabrini he was on neuroleptic medication yet there is indication that he was psychotic. However, during his stay at SOC he has been off of all neuroleptic medications and at times has shown some preoccupation and appearance of psychosis but has not become assaultive. His problems on medication, such as the paradoxical effect from the neuroleptic medications, may be precipitated by increased doses of neuroleptic medications and may cause an exacerbation of his psychosis. Though Mr. Harper is focused on psychosomatic problems from neuroleptic medications as per the side effects, the real problem may be that the psychosis is exacerbated by neuroleptic medications." *Id.,* Book 3, May 6, 1982, p. 6.

17 Because most psychotropic drugs do induce lethargy, drowsiness, and fatigue, *e.g.,* Physician's Desk Reference 1126, 1236, 1640, 1755, 1788, 1883 (43d ed. 1989), this form of "medical treatment" may reduce an inmate's dangerousness, not by improving his mental condition, but simply by sedating him with a medication that is grossly excessive for that purpose.

18 For example, although psychotropic drugs were of mixed value in treating Harper's condition, *supra,* at 1050–1051, n. 16, they became the primary means of dealing with him. *E.g.,* Lodging, Book 8, Nov. 7, 1984, Hearing (Dr. Petrich reports: "The patient is still not able to negotiate with the treatment staff or work collectively with them. We have no idea as to the extent of his psychosis nor do we have any working relationship upon which to build internal and external controls"); *id.,* Book 8, Feb. 26, 1985 (Dr. Loeken reports: "because of his lack of participation in therapy it is recommended that the involuntary medication policy continue in use").

Forcing psychotropics on Harper also provoked counterproductive behavior. *E.g., id.,* Book 8, Dec. 16, 1982 (Report of Dr. Petrich that Harper's assault on a male nurse and damage to a television were "in the context of his complaining about medication side effects. Overall the issue of involuntary medications and side effects is a major issue in his management"); *id.,* Book 8, Oct. 7, 1983 (therapist's report that Harper has indicated "that he is going to destroy unit property until the medications are stopped. He has recently destroyed the inmates['] stereo as an example of this").

19 *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), and *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), are inapposite. Neither involved care of a presumptively competent individual; Romeo, a profoundly retarded adult with the mental capacity of an 18–month-old child, had been committed by the court to a state hospital for treatment, 457 U.S., at 309, 102 S.Ct., at 2454–55, and J.R. and appellees were children, 442 U.S., at 587, 99 S.Ct., at 2496. In addition, the deprivations of liberty at issue in both cases—use of physical restraints in *Youngberg* and institutionalization in *Parham*—fall far short of Harper's interest in refusing mind-altering drugs with potentially permanent and fatal side effects. Cf. *Bee v. Greaves,* 744 F.2d 1387, 1395–1397 (CA10 1984) (forcible medication with psychotropics is not reasonably related to prison security), cert. denied, 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985).

20 It is not necessary to reach the question whether the decision to force psychotropic drugs on a competent person against his will must be approved by a judge, or by an administrative tribunal of professionals who are not members of the prison staff, in order to conclude that the mechanism of Policy 600.30 violates procedural due process. The choice is not between medical experts on the one hand and judges on the other; the choice is between decisionmakers who are biased and those who are not.

21 Revised Policy 620.200 authorizes up to 14 consecutive days of involuntary medication before long-term committee approval is required, and adds a committee hearing to review continuing involuntary medication every 180 days thereafter. It also bars current treating personnel from sitting on the long-term committee. Lodging, Book 9, Policy 620.200, pp. 3–4.

22 As regular SOC staff, 600.30 committee members are
"susceptible to implicit or explicit pressure for cooperation ('If you support my orders, I'll support yours'). It is instructive that month after month, year after year, this 'review' panel *always* voted for more medication —despite the scientific literature showing that periodic respites from drugs are advisable and that prolonged use of antipsychotic drugs is proper only when the medical need is clear and compelling." Psychologists' Brief 26–27 (footnote omitted).
Rates of approval by different review bodies are of limited value, of course, because institutions will presumably adjust their medication practices over time to obtain approval under different standards or by different reviewing bodies. However, New Jersey's review of involuntary psychotropic medication in mental institutions is instructive. In 1980 external review by an "independent psychiatrist" who was not otherwise employed by the Department of Human Services resulted in discontinuation or reduction of 59% of dosages. After the Department moved to an internal peer review system, that percentage dropped to 2.5% of cases. Brief for New Jersey Department of Public Advocate as *Amicus Curiae* 38–54.

23 All of Harper's prescription entries from November 20, 1982, through December 8, 1982, were made "per Dr. Petrich." Lodging, Book 7, primary encounter reports of Nov. 20, 1982, Dec. 2, 1982, Dec. 8, 1982. After Harper's return to the SOC in December 1983, Dr. Loeken became his primary physician, and committees again approved 7–day, then long-term, involuntary medication. Although Dr. Petrich was not on these committees, he sat on the next three 180–day review committees, voting to authorize forced medication through January 1986. Trial Court Finding 7, App. to Pet. for Cert. B–7.

24 The Court cites *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), and *Parham* as "previous cases involving medical decisions implicating similar liberty interests [in which] we have approved use of similar internal decisionmakers." *Ante,* at 1043. Aside from the greater liberty interest implicated by forced psychotropic medication, SOC decisionmakers face different demands than their professional counterparts in *Vitek* and *Parham.* In *Vitek,* the Nebraska state transfer policy at issue affected only prisoners determined to be mentally ill who could not "adequately be treated within the penal complex." 445 U.S., at 489, 100 S.Ct., at 1262. We found that the determination of the necessity of transfer for treatment, "a question that is essentially medical," could be made fairly by professionals after a meaningful hearing. *Id.,* at 495, 100 S.Ct., at 1264–65. Similarly, we understood the civil commitment decision at issue in *Parham* to involve examination of the child, review of medical records, and a diagnosis and determination of "whether the child will likely benefit from institutionalized care," emphasizing that "[w]hat is best for a child is an individual medical decision ... of what the child requires." 442 U.S., at 614–615, 608, 99 S.Ct., at 2510–2511, 2507. Both of these procedures sought to reach an accurate medical determination of the patient's treatment needs without reference to the institution's separate interests. We concluded that, despite their positions inside the Nebraska prison and Georgia hospital, these medical professionals were capable of exercising the independence of professional judgment required by due process. None of the medical professionals at the SOC, charged with making medication decisions in light of the inmate's impact on the institution and its needs, can claim such independence.

25 Lodging, Book 9, Policy 600.30, p. 4. The Court notes that an inmate may bring a personal restraint petition or seek an extraordinary writ under Wash.Rules App.Pro. 16.3 to 16.17, *ante,* at 1034, 1044. However, a nonemergency involuntary medication decision demands—as the existence of a SOC Policy attests—meaningful administrative review of this deprivation of liberty, not merely the existence of collateral judicial mechanisms. Cf. *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

26 Lodging, Book 8, Oct. 27, 1982. Indeed, a "psychiatric security attendant," not a doctor, made the first recorded request for involuntary medication after Harper attempted to pull the guard's hand through a food slot. The guard filed a disciplinary "Infraction Report" which concluded: "Suggestion: This inmate is in need of involuntary medication. He is a threat to the safety + security of the institution." *Id.,* Book 1–2, Oct. 22,

1982. Five days later, Dr. Petrich, citing the incident, recommended involuntary medication. *Id.,* Book 8, Oct. 27, 1982.

27 Harper was transferred on November 16, 1983, to Washington State Reformatory, where a psychiatrist on its Multidisciplinary Advisory Committee found:

"To this date, he has not exhibited behavior in the presence of any committee members or custody staff that would qualify him under involuntary medication policy. He does have a long history of recurrent difficulty and as best as we can tell SOC instituted the involuntary policy and *continued it on the basis of past bad faith;* however, we do not have any of that data available to us." *Id.,* Book 3, Nov. 30, 1983 (emphasis added).

See also *id.,* Book 8, May 1, 1985, Hearing ("[T]he inmate[']s behavior during the committee hearing did not meet the criteria for gravely disabled or self injurious behavior. Involuntary medication is continued on the basis of potential violent behavior towards others which has been well documented in the inmate's history").

28 *Ante,* at 1042. In *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), we held that the medical conditions for civil commitment must be proved by clear and convincing evidence. The purpose of this standard of proof, to reduce the chances of inappropriate decisions, *id.,* at 427, 99 S.Ct., at 1810, is no less meaningful when the factfinders are professionals as when they are judges or jurors.

29 Lodging, Book 9, Policy 600.30, p. 2. Prolixin decanoate, for example, is "a highly potent behavior modifier with a markedly extended duration of effect"; onset is between 24 to 72 hours after injection and effects can last 4–6 weeks. Physician's Desk Reference 1641–1642 (43d ed. 1989).

30 The prisoner is introduced to, and may consult with, his appointed adviser at the commencement of the hearing. Harper's adviser on November 23, 1982, a nurse practitioner from Washington State Reformatory, asked Harper three questions in the hearing. Lodging, Book 8, Nov. 23, 1982, Hearing. The other five advisers appointed for Harper never spoke in the hearings. All five were apparently staff at the SOC: SOC Psychiatric Social Worker Hyden (who sat for the SOC Assistant Superintendent on the next 180–day committee that reapproved Harper's medication), a prison chaplain, two registered nurses, and a correctional officer. *Id.,* Book 8, Dec. 8, 1982, Dec. 30, 1983, Jan. 5, 1984, Oct. 31, 1984, and Nov. 7, 1984, Hearings.

31 Many States require a judicial determination of incompetence, other findings, or a substituted judgment when a patient or inmate refuses psychotropic drugs. *E.g., Riese v. St. Mary's Hosp. and Medical Center,* 209 Cal.App.3d 1303, 243 Cal.Rptr. 241 (1st Dist.1988), review granted but dism'd, 259 Cal.Rptr. 669, 774 P.2d 698 (1989); *People v. Medina,* 705 P.2d 961 (Colo.1985) (en banc); *In re Boyd,* 403 A.2d 744 (D.C.1979); *In re Mental Commitment of M.P.,* 510 N.E.2d 645 (Ind.1987); *Rogers v. Commissioner of Dept. of Mental Health,* 390 Mass. 489, 458 N.E.2d 308 (1983); *Jarvis v. Levine,* 418 N.W.2d 139 (Minn.1988); *Opinion of the Justices,* 123 N.H. 554, 465 A.2d 484 (1983); *Rivers v. Katz,* 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986); *In re Mental Health of K.K.B.,* 609 P.2d 747 (Okla.1980); *State ex rel. Jones v. Gerhardstein,* 141 Wis.2d 710, 416 N.W.2d 883 (1987).

32 Only Harper's due process claim is before the Court. *Ante,* at 1035, n. 5. His First Amendment, equal protection, state constitutional, and common-law tort claims have not yet been considered by the Washington state courts.