Inmate Rights and Privileges



Course #3502

March 2022

Inmate Rights and Privileges

ABSTRACT

This course is designed to provide officers with the skills to reflect on pertinent case laws and make informed decisions based on historical precedence which has been set by the judicial branch of the United States Government. This course is one of the Intermediate Core courses required by TCOLE Rules for county corrections officers licensed after March 1993, in order to receive Intermediate Proficiency Certification as a County Corrections Officer.

**Note to Trainers: It is the responsibility of the training coordinator to ensure this curriculum and its materials are kept up to date. Refer to curriculum and legal resources for changes in subject matter or laws relating to this topic as well as the Texas Commission on Law Enforcement website at** [**www.tcole.texas.gov**](http://www.tcole.texas.gov) **for edits due to course review.**

**Target Population:** Texas County Jail Personnel.

**Student Prerequisites:**

* Basic County Jail License or employment in a jail

**Instructor Prerequisites:**

* Certified TCOLE Instructor and documented knowledge/training in course subject matter OR
* Documented subject matter expert

**Length of Course:** 16 hours minimum; 24 hours recommended

**Equipment:**

* None

**Training Delivery Method(s):**

* Online
* Instructor-led, classroom-based
* Instructor-led, virtual

**Method(s) of Instruction:**

* Lecture
* Discussion
* Videos

**Assessment:** Assessment is required for completion of this course to ensure the student has a thorough comprehension of all learning objectives. Training providers are responsible for assessing and documenting student mastery of all objectives in this course, using participant engagement with classroom discussion as well as a short exam after the conclusion of course materials.

In addition, the Commission highly recommends a variety of testing/assessment opportunities throughout the course which could include: oral or written testing, interaction with instructor and students, case study and scenario, and other means of testing students’ application of the skills, as the instructor or department deems appropriate.

Unless otherwise indicated, the minimum passing score shall be 70%.

**Reference materials:**

* American Correctional Association. 1982. *Legal Responsibility and Authority of Correctional Officers*.
* Americans for Effective Law Enforcement. The Jail and Prisoner Law Bulletin.
* Attorney General’s Criminal Law Updates.
* Civic Research Institute. *Correctional Law Reporter*.
* Collins, William C. 1987. *Legal responsibility and authority of correctional officers: a handbook on courts, judicial decisions, and constitutional requirements*. College Park, Md: The Association.
* Del Carmen, Rolando. 1984. *Legal Liabilities and Responsibilities of Corrections Agency Supervisors*.
* Del Carmen, Rolando 1990. *Legal Liabilities of Jail Personnel in Texas.*
* Del Carmen, Rolando & Walker, Jeffery T. (n.d.). *Briefs of 100 Leading Cases in Law Enforcement*.
* Kerper, Hazel B., and Janeen Kerper. 1979. *Legal Rights of the Convicted*. St. Paul, Minnesota: West Publications.
* Klotter, John C., Jeffery T. Walker, and Craig Hemmens. 2005. *Legal guide for police: constitutional issues*. [Newark, N.J.]: LexisNexis/Anderson Pub.
* Lund, Lynn J., Deland, Gary, Gallaher, Sharon, and Bowker, Gary. 1987. *A Correctional Law Study Guide: Rights of the Inmate Under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments*, National Institute of Corrections Information Center
* Miller, R.C., & Walter, D.J. (1994). *Detention and Correction Case law Catalog*, 7th Edition.
* National Academy of Corrections. *Legal Issues for Institutional Personnel: Lesson Plans*.
* National Institute of Corrections. 2012. *Legal Responses to Sexual Violence in Custody: Using Existing State Mandatory Reporting Statutes to Improve Disclosure of Sexual Violence in Correctional Settings*.
* National Institute of Corrections. 2014. *Legal Issues in Jails*.
* National Street Law Institute, Edward L. O'Brien, Margaret Fisher, and David Austern. 1981. *Practical law for correctional personnel instructor's manual: a resource manual and a training curriculum*.
* Texas Commission on Jail Standards. Texas Minimum Jail Standards.
* U.S. Bureau of Prisons. 2014. *Legal Resource Guide to the Federal Bureau of Prisons*.
* Walker, Jeffery T., and Craig Hemmens. 2019. *Legal Guide for Police: Constitutional Issues*.

Inmate Rights and Privileges

Learning Objectives

UNIT 1 Historical Perspective of Correctional Law

* 1. **Learning Objective:** The student will be able to describe the history of correctional law.
  2. **Learning Objective:** The student will be able to describe the evolution of inmate rights.
  3. **Learning Objective:** The student will be able to define the differences between inmate rights and privileges.
  4. **Learning Objective:** The student will be able to discuss the balancing test of correctional law.

UNIT 2 The First Amendment

* 1. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to religious issues.
  2. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to freedom of expression.
  3. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to freedom of the press.
  4. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to access to the courts and legal services.
  5. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to personal communications.
  6. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to right to assembly and association.
  7. **Learning Objective:** The student will be able to identify First Amendment rights of inmates as they relate to redress of grievances.

UNIT 3 The Fourth Amendment

* 1. **Learning Objective:** The student will be able to list general principles of Fourth Amendment rights of inmates.
  2. **Learning Objective:** The student will be able to identify Fourth Amendment rights of inmates as they relate to search of persons.
  3. **Learning Objective:** The student will be able to identify Fourth Amendment rights of inmates as they relate to search of cells.
  4. **Learning Objective:** The student will be able to identify Fourth Amendment rights of inmates as they relate to seizure of conversations and communications.
  5. **Learning Objective:** The student will be able to identify Fourth Amendment rights of inmates as they relate to privacy.

UNIT 4 The Fifth Amendment

* 1. **Learning Objective:** The student will be able to identify general principles of the Fifth Amendment rights of inmates.
  2. **Learning Objective:** The student will be able to identify Fifth Amendment rights of inmates as they relate to discipline.

UNIT 5 The Sixth Amendment

* 1. **Learning Objective:** The student will be able to identify general principles of the Sixth Amendment rights of inmates.
  2. **Learning Objective:** The student will be able to identify Sixth Amendment rights of inmates as they relate to access to attorney visits.

UNIT 6 The Eighth Amendment

* 1. **Learning Objective:** The student will be able to identify the Eighth Amendment ban on cruel and unusual punishment.
  2. **Learning Objective:** The student will be able to identify general principles of the Eighth Amendment rights of inmates.
  3. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to health care.
  4. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to diet and exercise.
  5. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to discipline.
  6. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to protection of inmates from violence.
  7. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to facility and physical conditions.
  8. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to classification.
  9. **Learning Objective:** The student will be able to identify Eighth Amendment rights of inmates as they relate to rehabilitation.

UNIT 7 The Fourteenth Amendment

* 1. **Learning Objective:** The student will be able to identify general principles of the Fourteenth Amendment rights of inmates.
  2. **Learning Objective:** The student will be able to identify Fourteenth Amendment rights of pretrial inmates.
  3. **Learning Objective:** The student will be able to identify due process requirements of the Fourteenth Amendment rights of inmates.

UNIT 8 Prison Rape Elimination Act 2003

* 1. **Learning Objective:** The student will be able to identify the general principles of the Prison Rape Elimination Act (PREA).

Legal Issues for County Corrections

# UNIT 1. Historical Perspective of Correctional Law

## The student will be able to describe the history of correctional law.

1. The most dynamic area of law over the last half-century has been correctional law, the body of law which concerns inmate rights and the administration of institutions of incarceration. The emphasis of the courts has shifted dramatically from law enforcement to corrections and few jails or prisons have been prepared for the suddenly aggressive judicial review of the policies and procedures involved in the housing of prisoners.
2. Prior to this new attitude and involvement by the courts, jail and prison administrators could function as they wished behind the safety of the court’s “hands-off doctrine.” The essence of this doctrine was stated particularly well in the following U.S. Circuit Court Cases.
   1. It is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined. *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1952); harmonized by *Sciolino v. Marine Midland Bank-Western*, 463 F. Supp. 128, 1979 U.S. Dist. LEXIS 15289 (W.D.N.Y. 1979).
   2. The power of establishing regulations necessary for the safety of the prison population and the public as well as for the maintenance and proper functioning of the institution is vested in correction officials with expertise in the field and not in the courts. There can be no question that they must be granted wide discretion in the exercise of such authority. *Long v. Perker*, 390 F.2d 816 (3rd Cir. 1968).
   3. Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations. *Banning v. Looney*, 213 F.2d 771 (l0th Cir. 1954), cert. den. 348 U.S. 859, 75 S.Ct. 84, 99 L.Ed. 677 (1954); cited by *Dreyer v. Jalet*, 349 F. Supp. 452 (5th Cir. 1972).
3. Even in laying the “hands-off doctrine” to rest, the Supreme Court did so gently and gave additional insight into the court’s willingness to give prison administrators as much latitude as could be justified.
   1. Traditionally, federal courts adopted a broad hands-off attitude toward the problems of prison administration. In part, this policy was the product of various limitations on the scope of federal review of conditions in state penal institutions.
   2. More fundamentally, this attitude springs from complementary perceptions about the nature of problems and the value of judicial intervention.
   3. Administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody.
4. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of incarceration in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
5. Beginning in the 1970s with the Warren Court, Americans realized a broad expansion of prisoner rights. “The October 1973 term of the Supreme Court of the United States will probably have more impact on the rights of confined persons than any other previous term”.
   1. Inmate discipline, *Wolff v. McDonnell*, 418 U.S. 539 (1974);
   2. Mail censorship, *Procunier v. Martinez*, 416 U.S. 396 (1974);
   3. Required assistance for inmates filing civil rights actions, *Wolff v. McDonnell*, supra.
6. The Warren Court heralded an emerging trend in societal expectations of equal rights for all citizens, including the incarcerated.
   1. “In years past, both society and the incarcerated individual accepted the fact that being confined because of antisocial behavior resulted in a loss of many basic privileges. The vast majority of inmates accepted such conditions of confinement, but those who did not—those who felt they were being deprived of certain basic rights guaranteed them under the Constitution of the United States—were, except in rare cases, powerless to change their conditions of confinement.
   2. Today, activism is replacing mute acceptance by the inmates of the conditions of their incarceration and attendant problems.
   3. Confined persons are now taking their grievances to readily accessible courts and thus causing correctional administrators to justify their actions so as to ensure that all inmates enjoy equal protection under the law.”

Source: The Emerging Rights of the Confined, South Carolina Department of Corrections, (1972)

1. Despite the latitude afforded prison administrators by the United States Supreme Court, federal courts of the 1970s entered an era of judicial activism where sweeping court orders mandated operating changes in prisons and jails. “Corrections have not been singled out for such treatment, but to the contrary, school administrators, mental health administrators and public employees have also been undergoing the same kind of challenges to their previously apparent omnipotence over their charges. Emerging Rights, op. cit. p. 28 (1972).
   1. In 1965, 218 civil rights cases were filed in federal court by prisoners seeking relief from conditions of their confinement.
   2. In 1976, 19,809 habeas corpus and civil rights petitions were filed in the federal courts, representing 15.2% of all cases filed that year.
   3. In 1978, 9,730 such actions were filed.

Source: “When Prisoners Sue: A Study of Prisoners Section 1983 Suits in the Federal Courts”, 92 Harv.L.Rev. 610, 611 (1978-79).

* 1. According to the 1978 Annual Report of the Director of the Administrative Office of the United Courts, civil rights petitions from state inmates increased by 379.3% between 1970 and 1978.
  2. Similar increasing trends have been noted in the three decades after that finding.
  3. In 2005, 14,993 such petitions were filed.

## The student will be able to describe the evolution of inmate rights.

1. “Slavery” Status
   1. At one time the prevailing legal view was that the deprivation of rights of convicted persons were essentially total.
   2. Both the Constitution and case law indicated a philosophy of slavery status for convicted persons.
      1. The inmate was considered a “slave of the State” in *Ruffin Commonwealth*,   
         62 Va. 790 (1871).
      2. The Thirteenth Amendment provided support for this concept forbidding slavery, “except as punishment for crime whereof the party shall have been duly convicted.”
      3. More recently, in [2016](https://www.theguardian.com/us-news/2018/aug/20/prison-labor-protest-america-jailhouse-lawyers-speak), 20,000 inmates across 24 prisons in 12 states protested the unfair use of prison labor, poor wages, and unsatisfactory living conditions. Most recently, inmates held sit-ins and staged strikes in [17](https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018) states to protest the existence of “modern slavery.”

**INSTRUCTOR NOTE:** Refer to <http://dukeundergraduatelawmagazine.org/2018/10/30/the-13th-amendment-exclusion-leads-to-modern-day-slavery/> as well as <https://truthout.org/articles/unpaid-labor-in-texas-prisons-is-modern-day-slavery/> for specific Texas related examples.

* 1. As recently as 2018, advocacy groups have petitioned for inmates to be paid minimum wage for the work they provide, claiming that inmates should still benefit from labor laws.

Source: [‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government (newsweek.com)](https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729)

1. Evolution of Case Law Concerning Inmate Rights
   1. 1935: “Probation or suspension of sentence comes as an act of grace to one convicted of a crime.” *Escoe v. Zerbst*, 295 U.S. 890 (1935).
   2. 1948: “Lawful incarceration brings about necessary withdrawal...of many privileges and rights, a restriction justified by the considerations underlying our prison system.” *Price v. Johnson*, 334 U.S. 226 (1948). This decision followed by four years *Coffin v. Reichard*, 143 F.2d, “A prisoner retains all rights of an ordinary citizen except those expressly, or by necessary implication taken from him by law.”
   3. 1951: “It is not the function of the courts to superintend the treatment and discipline of prisoners, but only to deliver from imprisonment those who are illegally confined.” *Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951).
   4. 1960’s: The type of prisoner incarcerated in local jails changed to include civil rights marchers and student activists protesting involvement in Vietnam. Many viewed themselves as political prisoners, instead of criminals, and challenged conditions of their confinement. Due to their middle-class status, these individuals were more apt to be heard by the public and the courts. The drug culture also brought many more middle-class prisoners to these facilities that were previously publicly ignored edifices.
   5. 1970: “Any prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment. A prisoner could be punished only if he acted or threatened to act in a way that breached or constituted a clear and present danger of breaching the justifiable regulation.” *Carothers v. Follette*, 314 F.Supp. 1014 (S.D.N.Y. 1970).
   6. 1971: The court *in Graham v. Richardson* rejected the idea that constitutional rights turn upon whether a government benefit is characterized as a “right” or “privilege.” Thus, the court rejected the “act of grace” theory of *Escoe v. Zerbst*, supra. *Graham v. Richardson*, 403 U.S. 365 (1971); cited by *Bhandari v. First Nat’l Bank of Commerce*, 494 U.S. 1061 (1990).

Note: From 1969 to 1971 a series of First Amendment cases required, “a compelling state interest.” In most other cases, at least a “substantial state interest” is necessary.

* 1. 1972: A series of U.S. Supreme Court decisions extended due process rights to parolees, see *Morrissey v. Brewer*, 408 U.S. 471 (1972); probationers, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and inmates, *Wolff v. McDonnell*, 418 U.S. 539 (1974).

*In Morales v. Schmidt*, 340 F.Supp. 544 (D.C. Wisc. 1972) a Wisconsin court stated that, “the balance must be struck in favor of individual rights of Prisoners...if one of these rules of institutional survival affects significantly a liberty which is protected among the general population and if its only justification is that the prison cannot survive without it, then it may well be that the Constitution requires that the prison be modified.”

* 1. 1971 to 1978: An 8th Circuit case, *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970) aff’d. 442 F.2d 304 (8th Cir. 1971) has been touted as the case which signaled the new judicial approach toward prison reform. “In that case, a federal court for the first time took a ‘totality of conditions’ approach to prison reform. It ruled that a multitude of prison conditions and practices which might not be unconstitutional if viewed individually could, when viewed as a whole, make confinement a cruel and unusual punishment.” *Criminal Law Reporter*, op. cit., p. 4 (1978). Judge Lay in his concurring opinion at 442 F.2d 304, 310 (8th Cir. 1971) noted that the record “reflects the prison system at Cummins Prison Farm to be not only shocking to ‘standards of decency’ but immoral and criminal as well.” Because the federal district courts have an opportunity to see first-hand the conditions in the jails and prisons, either through personal visits or graphic testimony, their decisions tend to reflect the activism through detailed orders mandating specific change.
  2. 1981: A later 8th Circuit decision, *Tatum v. Houser*, 642 F.2d 253 (8th Cir. 1981) held absolute liability of Sheriff for jail operations regardless of his personal knowledge of existing conditions, including mistreatment of inmates.

According to the Bureau of National Affairs “...one in every seven civil cases in federal courts throughout the country” was filed by a prisoner seeking some form of relief from confinement conditions. *Criminal Law Reporter*, op. cit. p. 3. In 1976, for example, this meant almost 20,000 cases. Reportedly, fewer than five percent of these petitions eventually got to trial. Nevertheless, the National Prison Project reports that as of February 1, 1981, “36 states (plus the District of Columbia, Puerto Rico and the Virgin Islands) were involved in court decrees or pending litigation concerning over-crowding and/or total conditions of confinement.” “Institutions I.E.”, Volume 4, No. 3, p. 10, March 1981.

Many of the court orders mandated sweeping reform due to the conditions.

* + 1. The state of Alabama was forced to reduce their populations (*Newman v. State of Alabama,* **349 F. Supp. 278 (M.D. Ala. 1972)**)
    2. Facility-related matters such as lighting, ventilation, recreation space, bathing facilities, dormitory use, and even the training of correctional staff all fell under judicial reform cases like *James v. Wallace* and *Pugh v. Locke*
  1. 1983: Inmates file most of their lawsuits in federal court under a law passed by Congress during post-Civil War Reconstruction. That law appears as Title 42 of the United States Code, in Section 1983. Rarely used before then, Section 1983 became the legal vehicle by which persons could sue government officials for violations of constitutional rights. A Section 1983 action then is simply the way you get to court to raise a question of a constitutional violation.

Section 1983 reads as follows:

*“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subject, 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.”*

* 1. 1996: Congress enacts the Prison Litigation Reform Act (PLRA). Pub. L. No. 104-34, 110 Stat. 1321 (1996). The PLRA placed substantial restrictions on prisoners’ access to the courts to vindicate constitutional and other legal rights. The Commission on Safety and Abuse in America’s Prisons reported problems of sexual and physical abuse of prisoners, failure to meet basic medical and mental-healthcare needs, and poor conditions of confinement in many prisons and jails across the country.
  2. 2003: President George W. Bush signed into effect the Prison Rape Elimination Act (PREA); addressing sexual assaults and sexual abuse in a correctional setting.
  3. 2006: Commission on Safety and Abuse in America’s Prisons, Confronting Confinement reported that the significant role of federal courts in answering Section 1983 claims of mistreatment of prisoners and violations of their rights has been negatively affected by the PLRA. Id. at 84-87.

## The student will be able to define the differences between inmate rights and privileges.

1. Rights: A right is a power, interest, or demand inherent in one person or established by law for protection and benefit of a person. Under normal conditions, a right may not be lawfully suspended without due process of law. A person’s basic rights remain protected regardless of incarceration; therefore, the policies and procedures of correctional facilities must not violate those constitutional rights.
   1. Constitutional Rights. Given by the constitution or through amendments.
   2. Statutory Rights. Given through passing of laws by legislatures.
   3. Regulatory Rights. Given by regulatory agencies (both state and federal).
   4. Case Law. Rights given or restored to the individual by the courts.
   5. Rights gained through policy and procedure. Rights given through department rules and regulations.

A prisoner is not stripped of all constitutional rights merely by virtue of incarceration. “Prison walls do not form a barrier separating prison inmates from the protection of the Constitution.” *Turner v. Safley*, 107 S Ct.2254, 2259 (1987). *Bell v. Wolfish*, 441 U.S. 520, 99 S. CT. 1861, 60 L.Ed. 2s 447 (1979). In order for prisoners to maintain a cause of action under Section 42 U.S.C. 1983, an abridgment or denial of a right which is protected under the United States Constitution must be alleged. Therefore, the crucial issue is whether the jail rule, policy, or procedure affects a recognized constitutional right.

**INSTRUCTOR NOTE:** While it is the intent of this training to delineate between those facets of the jail operation which are constitutionally protected and those which are not, state law has provided an additional responsibility to be considered in relation to the rights of pretrial detainees.

1. Privileges: A privilege is a particular benefit enjoyed by a person beyond the common advantage of other citizens. A privilege may be suspended but only in accordance with the department’s written disciplinary procedures, which have been approved by the Texas Commission on Jail Standards. The use and control of privileges comes under the authority of the correctional facility and not the scrutiny of the courts. Privileges may be allowed or suspended based on behavior and other criteria. Thus, jail administrators have full authority and wide discretion in the use and control of privileges.

**INSTRUCTOR NOTE:** Examples of privileges that an inmate may receive include: library services, telephone use, commissary, visitation (other than attorney, probation officer, clergyman), attending religious services, education, and right to vote (unless convicted of a felony).

## The student will be able to discuss the balancing test of correctional law.

1. Pretrial Detainees: The Supreme Court held in *Bell v. Wolfish*, 441 U.S. 520 (1979) that the proper inquiry in reviewing conditions of confinement of pretrial detainees is whether the condition amounts to punishment. It is important in reviewing jail regulations to be able to identify why the regulation exists; what purpose it serves. For example, the Supreme Court specifically noted that the state has a legitimate interest in maintaining security and order in the jail and in assuring that no weapons or illicit drugs reach detainees. In a footnote the *Bell v. Wolfish* decision, the court acknowledged that “security measures may directly serve the Government’s interest in ensuring the detainee’s presence at trial.” (441 U.S. 520, 538 footnote 22).
2. No constitutional right is absolute. An inmate, just as the man on the street, may not do anything he/she wishes in the name of a constitutional right. The balancing test weighs the competing interest of the state institutional needs against that of the individual constitutional rights of the inmates. Prisoners’ rights cases typically are not situations wherein one party is right, and the other is wrong. Instead, both parties are usually right: however, one is more right than the other.
3. The following have been recognized as legitimate administrative concerns which represent the state’s interest in detention.
   1. Security: Procedures which prevent escapes and riots, control introduction of contraband into the facility, and promote inmate safety and welfare.
   2. Management and custody: Utilization of space and other institutional resources, particularly manpower.
   3. Order: Procedures to maintain order including discipline.
   4. Punishment: Allows the abridgment or denial of privileges in order to maintain order or serve as a deterrent.
   5. Rehabilitation: Relates to the treatment of the inmate for his/her institutional adjustment as well as for future reintegration into society which includes the maintenance of positive and constructive influence over inmates.
   6. Resource limitation: Courts consider this the weakest of all justifications when balanced against constitutional rights; some courts will not consider this concern. According to *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977), budget may be a consideration as to how but not whether a constitutional right will be provided. *Bounds v. Smith* was overturned in part and significantly limited in scope by *Lewis v. Casey*, 518 U.S. 343 (1996) holding that 1) an inmate who, in a federal court suit, alleged a violation of *Bounds v Smith* had to show actual injury pursuant to the federal constitutional doctrine of standing, 2) the District Court’s injunctive order was improper, where (a) after the trial, the District Court had found actual injury on the part of only one named plaintiff, who was illiterate, and (b) the inadequacy that caused the actual injury to the named plaintiff was not widespread enough to justify system wide relief, and 3) the District Court’s injunctive order also was improper on the ground that the District Court had failed to accord adequate deference to the judgment of the prison authorities.
   7. The factors the courts will consider if the restrictions placed on inmates could infringe on a constitutionally protected right, the Turner Test (*Turner v. Safley*, 107 S.Ct. 2254, 2259 (1987).
      1. The relationship between the restriction and a legitimate penological interest, (which is most commonly security).
      2. Alternative ways the inmate may have for exercising the general right in question.
      3. The impact on staff, inmates, and institution resources if the inmate’s requests were accommodated.
      4. Are there other, obvious ways (“ready alternative”) of accommodating both the inmate’s requests and the need of the institution?
      5. In developing policies and procedures for your jails, it is important to relate them to your “legitimate interest” in maintaining security and order. There must be a “rational relationship” between the restriction or procedure and the “legitimate interest.”
4. “Prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. See *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. 119, 129 (1977); *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974); *Pell v. Procunier, 417 U.S. 817, 822 (1974).*
5. “There is no iron curtain drawn between the constitution and the prisons of this country.” *Wolff v. McDonnell*, supra, at 556. [However], simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Price v. Johnston*, 334 U.S. 266, 285 (1948); see *Jones v. North Carolina Prisoners’ Labor Union*, supra. at 1256, *Wolff v. McDonnell*, supra, at 555; *Pell v. Procunier*, supra. at 822. There must be a “mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” *Wolff v. McDonnell*, supra. at 556. “[Thus], maintaining institutional order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.” *Bell v. Wolfish*, 441 U.S. 520, 543-544 (1979).

# UNIT 2. The First Amendment

## The student will be able to identify First Amendment rights of inmates as they relate to religious issues.

1. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
   1. “Establishment” Clause
      1. No jail or prison would be allowed to require religious activity nor to require adherence to any one religion as opposed to any other religion.
      2. Compelled prayer/church attendance as parole factor, or other activities would generally be prohibited by the establishment clause.
      3. Allowing religious volunteers into the cell block does not constitute an impermissible establishment of religion by the state. The court implied, however, that all prisoners in the cellblock must be willing to listen to the preaching. *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980).
   2. “Free Exercise” Clause
      1. The vast majority of religion cases fall under the free exercise clause. In *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed. 2d 264 (1972), the Supreme Court ruled that the First Amendment prohibits the government from prohibiting free exercise of religion and that reasonable opportunities must be afforded all prisoners to exercise religious beliefs.
      2. The First Amendment embraces two concepts: “freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 54 L.Ed. 2d 1213 (1940).
      3. “Freedom of religion can never mean freedom to interfere with the peaceful rights of others, or freedom to flagrantly disregard reasonable rules of conduct in or out of prison.” *Evans v. Ciccone*, 377 F.2d 4, 6 (8th Cir. 1967). “While freedom to believe is absolute, the exercise of religion is not.” *Sharp v. Sigler*, 408 F.2d 966, 970 (8th Cir. 1969).
      4. The Religious Freedom Reform Act was passed into law in 1993, and the “objectively reasonable” standard for practicing one’s faith was expanded by statute to the right to receive facilities or personnel identical to that of more populous denominations. *Ganther v. Ingle*, 75F.3d 207 (5th Cir. 1996).
      5. The usual issues in religion cases include:
         1. What is religion?
         2. Restricting services
         3. Access of “ministers”
         4. Access to religious writings
         5. Restricting wearing of religious medals or medallions
         6. Lack of religious counseling
         7. Access to facilities for services
         8. Special diets
         9. Personal appearance and hair length.
2. What is a “Religion”?
   1. Longevity. In *Cruz V. Beto*, 405 U.S. 319 (1972), the Supreme Court mentioned the length of existence of the Buddist religion “established 600 B.C., long before the Christian era” as justification allowing worship.
   2. Sincerity of Belief. This is a legitimate consideration in most circuits and stems from *U.S. v. Ballard*, 322 U.S. 78 (1944).
      1. Guy Ballard represented himself to be “a divine messenger,” medium for the “ascended masters” Saint Germain, Jesus, George Washington, and Godfre Ray King. The communications in his teachings formed the “I Am” movement. The Ballards were charged and convicted of mail fraud, accused of soliciting funds “by means of false and fraudulent representations, pretenses and promises” by claiming the ability to cure ailments. The conviction hinged on the courts assertion that the Ballards’ “well knew” that their claimed spiritual powers were false.
      2. The Ninth Circuit reversed the conviction and ordered a new trial, concluding that “the restriction of the issue in question to that of good faith was error,” and should have reached a conclusion of weather the religion was enlightened.
      3. The U.S. Supreme Court, however, now repudiated that line of reasoning, stating, Religious truth cannot be adjudicated, because “Heresy trials are foreign to our constitution… If one could be sent to jail because a jury in a hostile environment found teachings to be false, little indeed would be left of religious freedom. The Ballard Court found the pivotal distinction between protected religious practice and unprotected fraud to reside not in the truth of the content of the claims, but in the defendant’s internal, psychological condition when asserting them.

**INSTRUCTOR NOTE:** A more concise reference can be found at: <https://uscivilliberties.org/themes/4488-sincerity-of-religious-belief.html>

* 1. Identifiable Structure. Inmates are not allowed to practice a religion found to be a “sham.” The tests for deciding if it qualifies as a religion:
     1. addresses question of human morality or purpose of life
     2. cohesiveness and commonality of beliefs characteristic of accepted religions; and
     3. structural characteristics of a traditional religion. Jacques v. Hilton, 569 F.Supp. 730 (D.N.J. 1983).
  2. The court also distinguishes between an “Absolute Ban” and a “Qualified Right.”
     1. Satanists were given religious status but were not allowed to keep Baphomets, bells, candles, pointing sticks, gongs, incense or black robes in their cells. *Kennedy v. Meacham*, 382 F. Supp. 996 (D.Wyo. 1974). A similar result was reached by the 7th Circuit, which upheld a lower court opinion finding no constitutional violation created by the denial of an inmate’s request to practice Satanism. The implements of the religion were considered a threat to safety and security, and a lower court finding that Satanism is not a religion was not overturned. *Childs. v. Duckworth*, 705 F.2d 915 (Court of Appeals 7th Cir. 1983).
     2. In the case of the Black Muslims, the courts’ views have gradually changed since the early 1960s.
        1. In the early 1960s, the courts ruled the Black Muslims were not considered a legitimate religion. Religious restrictions were upheld by invoking security and discipline concerns. In *re Ferguson*, 55 Cal. 2nd 663, 361 P.2d 427 (1961).
        2. The 1970s have seen acceptance of Black Muslims as a religion. See   
           *Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973).
  3. Indian religions have been recognized by the 8th Circuit and cited by others as being legitimate religions justifying accommodations by prison officials to allow free exercise. *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975).

1. Religions Subject to Regulation

While the freedom to act in the exercise of religious belief is subject to regulation for the protection of society, such regulations must not unduly infringe the protected freedom. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Institution officials must be given liberal discretion in running the facility where no constitutional violations occur. All regulations were found to be rationally related to legitimate interests. *Rogers v. Scurr*, 676 F.2d 1211 (CA 8 1982).

1. Restricting Services
   1. *St. Claire v. Culver*, 634 F.2d 109 (3rd Cir. 1980). The court, in reversing the District Court, stated that “First Amendment freedoms may be curtailed when prison officials reasonably believe that exercise of such freedoms would be likely to result in disruption to the prison’s order and stability.”
   2. Segregated prisoners may be refused opportunity to attend regular Sunday religious services. The freedom to believe is absolute; the freedom to exercise is not. *Sharp v. Sigler*, 408 F.2d 966 (8th Cir. 1969). Likewise, prisoners may be denied access to congregate services on the basis of their classification*. Jackson v. Hogan*, 446 N.E.2d 692 (Sup.Ct. Mass. 1983).
   3. The right to attend religious services can be prohibited in such cases only when it can be shown that institutional security is threatened. *Konigsberg v. Ciccone*, 285 F.Supp. 585 (W.D. Mo. 1968).
   4. Prisoners justifiably isolated may be denied the right to attend religious services. *Pinkston v. Bensinger*, 359 F.Supp. 95 (N.D. Ill 1973).
   5. Prisoners with history of disruptive activity may be denied attendance at services. *LaReau v. MacDougall*, 473 F.2d 974 (2nd Cir. 1972), cert. denied 414 U.S. 878.
   6. Services must be permitted equally for all religions, although the time and frequency may be regulated. *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Cruz v. Beto*, 329 F.Supp. 443 (S.D. Texas 1970). The institution officials may schedule and regulate chapel. Convenience of prisoners in chapel use is not a cause of action. *Rogers v. Scurr*, supra.
   7. In these cases, the courts upheld the right of prison authorities to deny attendance at chapel with the general prison population based on the overriding security considerations. In each instance, however, the prisoners were allowed access to ministers. “Prisoners in segregation are entitled at least to individual religious ministration in their cells.” *Wojtczak v. Cuyler*, 480 F. Supp 1288, 1300 (E.D. Pa. 1979).
   8. “Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escapes or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.” *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 1878 (1979).
   9. Native American inmates at the South Dakota State Penitentiary claimed that Christian inmates were allowed to have their families and friends, children included, inside the prison to attend and participate in religious services but that the same privilege was denied to them. The court ruled that the plaintiff’s contentions raised claims of a constitutional dimension. The case has been remanded and the State must show that it had a legitimate need, either for security or other reasons, for the restriction. It had the burden of proving that it was using the least restrictive method to reach its proven, legitimate need. *Native American Council of Tribes v. Solem*, 691 F.2d 382 (8th Cir. 1982).
   10. The U.S. District Court for the District of South Dakota in *Crowe v. Erickson*, Cir. No. 72-4101 (1975), ordered the following:
       1. Official recognition of Indian religious activities, provision of routine Indian religious ceremonies including a sweat lodge and medicine men ceremonies, equal to the amount expended for Catholic or Protestant ceremonies.
       2. Allowance of traditional Indian food at reasonable intervals, allowance of inmates to wear headbands and other paraphernalia subject to security requirement.
       3. That the hair length regulation of the South Dakota Penitentiary as applied to members of the plaintiff Indian sub-class, is unconstitutional.
2. Access to Ministers
   1. Reasonable opportunities must be afforded to all prisoners to exercise their religious freedom guaranteed by the First Amendment and the Fourteenth Amendment. However, ministers need not be provided for every faith regardless of the extent of the demand. *Cruz v. Beto*, 92 S.Ct. 1079, 1981 footnote 2 (1972).
   2. A prison must supply at its expense Muslim ministers where it pays for Catholic, Jewish, and Protestant ministers. *Northern v. Nelson*, 315 F.Supp. 687 (N.D. Cal. 1970).
   3. There was no right to services of a Jewish rabbi where small percentages of population were Jewish. *Gittlemacker v. Prasse*, 428 F.2d 1 (3rd Cir. 1970). In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976).
   4. Security and visiting rules were sufficient grounds for refusing to allow Mormon family home evening contact for an “adopted” prisoner. *Fallis v. U.S.*, 476 F.2d 619 (5th Cir. 1973)
3. Access to Religious Writings
   1. Unless a clear and present danger exists, religious literature is permitted. *Northern v. Nelson*, 315 F.Supp. 687 (N.D. Cal. 1970); *Long v. Parker*, 390 F.2d 816 (3rd Cir. 1968).
   2. Muslim writings banned in 1960s now generally allowed. *Long v. Parker*, 390 F.2d 816 (3rd Cir. 1968).
   3. Refusal to allow sharing of material is unreasonable. *Cruz v. Beto*, 405 U.S. 319 (1972).
4. Restricting Wearing of Religious Medallions
   1. Restrictions on wearing of metal ornaments which might be used as weapons are justified. *Coleman v. District of Columbia Commissioners*, 234 F.Supp. 408 (E.D. Va. 1964).
   2. If one religious group is allowed medallions, then all others must be given the same privilege. *Coleman v. District of Columbia Commissioners*, supra.
5. Access to Facilities for Services
   1. Organized religions must be provided a place for services; however, the administration may allocate the largest areas to groups with the largest membership. *Long v. Katzenback*, 258 F.Supp. 89 (M.D. Pa. 1966). Modified 390 F.2d 816 (3rd Cir. 1968).
   2. The size of groups at services may be restricted. *Lee v. Crouse*, 284 F.Supp. 541 (D. Kan. l976).
   3. Government is required to make institutional religious facilities available to all groups. *Fulwood v. Clemmer*, 206 F.Supp. 370 (D.C. Cir. 1962).
   4. Where lay witnesses were allowed to enter the cellblocks to “preach, sing, and witness” to the inmates, the 8th Circuit Court cautioned that “forced inculcation (teaching)...would clearly contravene the Free Exercise Clause of the Constitution”. From the record, it appeared that the witnessing was often allowed to take place in such a manner as to make it nearly impossible for the inmates to “escape” the preaching. The court suggested that jail officials may need to set aside a separate place for the witnesses to meet with the inmates. *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980).
6. Special Diets
   1. Cases upholding administrators serving a standard diet:
      1. When the menu allows for a selection and pork-free items offered are sufficient to prevent malnutrition, prison officials need not offer a special diet to religious sects. *Elam v. Henderson*, 472 F.2d 583, (5th Cir. 1973).
      2. Security concerns justified refusal of Muslims’ request to have meals after sunset. *Walker v. Blackwell*, 411 F.2d 23 (D.C. Cir. 1969) Regardless, all food received by inmates must be reasonably adequate. *Ndaula v. Holliday*, 2007 U.S. Dist. LEXIS 27135 (2007).
      3. Accommodations should be made within budgetary constraints. *Barnett v. Rogers*, 410 F.2d 995 (D.C. Cir. 1969).

A prisoner brought action to require prison officials to provide him with a special diet consistent with religious beliefs. The court of appeals held that probable proliferation of special religious dietary requests, and undue costs and administrative burdens resulting there from, implicated a governmental interest sufficiently strong to outweigh the prisoner’s first amendment right to be provided with a special diet. The inmate’s religious dietary demands would have placed an undue burden on the penal system to the extent that there was good reason not to provide him with his requested diet of organic fruits, juices, vegetables, and meats, in addition to raw milk and distilled water. The evidence was substantial that such a diet would be administratively difficult to furnish, exceedingly expensive, compromising to security, and disruptive of the prison population insofar as it could lead to a proliferation of similar claims by other inmates. Udey v. Kastner, 805 F.2d 1218 (5th Cir. 1986).

* + 1. The denial of a kosher meal is not a breach of prisoner rights. *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. Tex. 2007).
  1. Cases going against administrators:
     1. A modest degree of official deference to Black Muslim dietary requirements required. When the non-pork diet was alleged to be nutritionally inadequate and the burden was shifted to the prison to show why it could not prepare a pork-free diet. *Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973).
     2. Black Muslim diets must be recognized if other special diets are recognized. *Jackson v. Pate*, 382 F.2d 517 (7th Cir. 1967).
     3. One full-course, pork-free diet once a day represents the minimum jail authorities are required to do. *Barnett v. Rogers*, 410 F.2d 995 (D.C. Cir. 1969). Also see Prushinowski v. Hambric, 570 F.Supp. 863 (E.D.N.C. 1983).

Appellants do not seek, either for themselves or other Muslims, a full menu tailored specially to their religious beliefs. Their request for “one full-course pork-free diet once a day and coffee three times daily” is essentially a plea of a modest degree of official deference to their religious obligations. Certainly, if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities...are constitutionally required to do, not only for Muslims, but indeed for any group of inmates with religious restrictions on diet. 410 F.2d at 1001.

* + 1. Attempts to establish a kosher kitchen for Passover did not satisfy court that it was “kosher” according to the prisoner’s religious beliefs. Prison officials were ordered to make accommodations assuring that the prisoner could prepare kosher food. *Schlesinger v. Carlson*, 489 F.Supp. 612 (1980).

1. Personal Appearance and Hair Length
   1. Regulations covering hair length and facial hair have been held not to raise constitutional issues. Administrators can justify such regulations to achieve purposes of identification, hygiene, discipline, and prevention of concealment of contraband. *Blake v. Pryse*, 444 F.2d 218 (8th Cir. 1971). Also see *Furgan v. Georgia State* *Board of Offender Rehabilitation*, 554 F.Supp. 873 (N.D. Ga. 1982)
   2. When beliefs concerning appearance and hair style or length conflict with jail or prison regulations, religious belief must yield. *Williams v. Batton*, 342 F.Supp. 1110 (E.D.N.D. 1972); *Brooks v. Wainwright*, 428 F.2d 652 (5th Cir. 1970); *Bell v. Stalder*, 111 F. Supp. 2d 796 (W.D. La. 2000).
   3. Pretrial detainees have been given more right to maintain appearance than convicted prisoners.

Health or security consideration may nullify the pretrial detainee’s right to maintain hair style or appearance. *Seale v. Manson*, 326 F.Supp. 1375 (D. Conn. 1971).

* 1. However, where the wearing of long braided hair is shown to be a practice deeply rooted in religious belief; that the prisoner was sincere in his belief; and that the legitimate institutional needs can be served by less restrictive means (than by a requirement to cut the hair) which will not unduly burden the administrator’s task, then the challenged regulation will be found to impermissibly infringe on the prisoner’s right under the First Amendment to the free exercise of his religion. *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975).
  2. Courts will balance constitutional interest of a Cherokee Indian’s (inmate) claim that his hair length had religious significance against the prison’s need to promote health, security, and safety. *Weaver v. Jago*, 675 F.2d 116 (6th Cir. 1982).
  3. Regulation requiring inmates to keep their hair at collar length or shorter unconstitutionally restricted a Cherokee Indian’s right to exercise his religious beliefs and found that least restrictive alternatives were available. *Gallahan v. Hollyfield* 670 F.2d 1345 (4th Cir. 1982).
  4. Prisoners alleged that the Texas Department of Criminal Justice (TDCJ) prohibition against long hair and beards violated their First Amendment right to exercise their religion freely. The court found no infringement and the court of appeals found that the policy rationally related to the achievement of the goal of advancing prison security by preventing the concealment of weapons and contraband in hair and beards and rationally related to a security related goal of identifying prisoners. *Powell v. Estelle*, 959 F.2d 22 (5th Cir. 1992).
  5. Approving hair cut regulations, noted that the 10th Circuit even permits the cutting of Indian school children’s hair to meet regulations of educators. *Valesquez v. Shulsen*, No. C-84-0597A (D. Utah 1985) (magistrate’s Decision).

## The student will be able to identify First Amendment rights of inmates as they relate to freedom of expression.

1. Justification for Allowing Free Expression
   1. Allowing more freedom of expression opens channels of communication through which administrators monitor the pulse of the jail and keep track of what is right and wrong with the jail climate and operation.
   2. “A prisoner retains all rights of an ordinary citizen except those expressly or by necessity taken from him by law.” *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944).
2. Justification for Restriction
   1. Silence requirements at certain times and places.
      1. Some facilities do not allow talking in chow lines, when walking to and from cells, or at other times and places during incarceration. Such rules show no substantial deprivation since such prisoners may converse later in dayrooms, at recreation, etc. See Singer and Statsky, Rights of the Imprisoned, (1974).
      2. “Lights out” regulations which require termination of talking are similarly justified.
   2. Inflammatory or disruptive speech may be prohibited. *Fulwood v. Clemmer*, 206 F.Supp. 370 (D.D.C. 1962).
      1. When a Black Muslim inmate preached a black supremacy doctrine which maligned the white race and which could be easily heard by white inmates, the court ruled in Fulwood that the speech was not protected, and it could be prohibited.
      2. The special circumstances that exist in prisons present potentially explosive situations when inflammatory or disruptive speech is permitted.
   3. “Fighting words” not protected.

“It is generally held that speech, which is obscene, libelous, or contains ‘fighting words’—those which by their very utterance inflict injury or tend to create an immediate breach of the peace is of such little social value that it does not deserve protection.” Singer and Statsky, Rights of the Imprisoned, (1974).

## The student will be able to identify First Amendment rights of inmates as they relate to freedom of the press.

1. Access of the Press to the Jail or Prison
   1. “It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally...Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, the meetings of other official bodies in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”
   2. Appeals court upholds prison regulation which limits prisoner’s interviews with representatives of the news media noting that newsmen have no constitutional rights of access to prisons or their prisoners beyond that afforded the general public. *Jersawitz v. Hanberry*, 783 F.2d 1532 (11th Cir. 1986), U.S. cert. denied. in 107 S.Ct. 272.
   3. The media has no constitutionally protected right to interview specific individual inmates. *Pell v. Procunier*, 417 U.S. 817 (1974). Alternative methods exist for communication with the press without requiring jail and prison administrators to allow interviews with specific inmates. Such alternatives include:
      1. Correspond with media by mail. *Procunier v. Martinez*, 416 U.S. 396 (1974). Information can be transmitted from persons who have general visiting rights; (e.g., family, friends, attorneys, clergy, etc.) to the media.
      2. In California, an additional alternative allows the media to visit the institution and talk randomly to available inmates. (Refer to “Big Wheel” theory e.g., a celebrity in jail).
   4. Institution rules that prohibit anyone except family, friends, clergymen, and attorneys from designating and visiting a particular inmate upheld in *Saxbe v. Washington Post Company*, 417 U.S. 843 (1974).
   5. The right of the press to access the jail is no greater than that of the general public.
2. Access of Prisoners to the Press
   1. The right to correspond is protected under the free speech clause of the First Amendment. See *Palmigiano v. Travisono*, 317 F.Supp. 776 (D.R.I. 1970); and *Procunier v. Martinez*, 416 U.S. 396 (1974).
   2. Written communication should be limited only if contraband, escape plans, etc. is/are involved. See *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) and *Procunier v. Martinez*, supra.
   3. Face-to-face contact with the press is not required. *Pell v. Procunier*, supra. As with the access of press to inmates, the access of inmates to press may be handled with the alternate means outlined above.
      1. While there is no legitimate governmental interest to justify substantial restrictions on written communication by inmates, when the question involves the entry of people into the prisons for face-to-face communication, limitations may be placed on such visitations. *Pell v. Procunier*, supra.; *Cruz v. Beto*, supra.
      2. “So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved...in drawing such lines, “prison officials must be accorded great latitude.” *Pell v. Procunier*, supra.; *Cruz v. Beto*, supra.
      3. When the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation. *Pell v. Procunier*, supra.

**INSTRUCTOR NOTE:** Also, under Access see: *Houchins v. KQED*, 438 U.S. 1, 15 (1978); *Travis v. Lockhart*, 607 F.Supp. 1083 (D.C. Ark. 1985); *Burton v. Foltz*, 599 F.Supp. 114 (E.D. Mich. 1984).

1. Press Privilege
   1. While monitoring of interviews by correctional personnel is permissible, the inmate may not be subjected to reprisal, retribution, or retaliation because he granted the interview or because of what he said to the interviewer. *Burnham v. Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).
   2. The officer monitoring the interview has a security responsibility only and cannot interrupt or interfere with the interview. *Burnham v. Oswald*, supra.
   3. Cases which granted “privilege” status to media and inmate communication include:
      1. *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F. 2d 1062 (9th Cir. Court of Appeals 1973)
      2. *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. Court of Appeals 1978) (inspect only in inmate’s presence)
2. Access to Publications
   1. Religious Publications
      1. Publications of religious nature have generally been allowed.
      2. See “Religion” section of this outline for freedom of religion cases.
   2. Non-Religious Publications
      1. Compelling interest must be shown to justify regulation of inmate access to reading material.
         1. Any cases involving procedures limiting inmates’ First Amendment rights come to the court bearing a heavy presumption against its constitutional validity. *Heller v. New York*, 413 U.S. 483 (1973).
         2. Regulations must not infringe upon inmate rights nor be more restrictive than the state interest justifies. *Newkirk v. Butler*, 364 F Supp. 497 (S.D.N.Y. 1973), affirmed in relevant part 499 F.2d 1214 (2nd Cir. 1974).
         3. Prohibition of a publication which contains distorted or untrue articles about prisons, or which might embarrass institution officials not justified. *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D.N.Y. 1970).
         4. Racial minority publications may be excluded only if officials can show prison security is threatened. *Collins v. Schoonfield*, 344 F.Supp. 257 (D. Md. 1972).
      2. First Amendment rights are not absolute, however. Corrections officials may develop justification to regulate access to reading material.
         1. Some courts allow restriction of access to desired publications to maintain order and security and to punish misconduct.
         2. Cutting off access to reading material while an inmate is under disciplinary sentence serves a legitimate state interest in the discipline of an inmate. *Johnson v. Anderson*, 370 F.Supp. 1373 (D. Del. 1974).
         3. Restricting Black Panther Newspaper could be justified with adequate due process. *Hopkins v. Collins*, 548 F.2d 503 (4th Cir. 1977).
         4. Restricting access to obscene material has brought about both support and rejection of regulation. Some cases support of regulation of reading material for various reasons.
            1. Violation of Supreme Court standards for the general population. *Miller v. California*, 413 U.S. 15 (1973), rehearing denied 414 U.S. 881.
            2. Danger of homosexual attack. *Washington Post v. Kliendienst*, 357 F.Supp. 770 (D.C. Cir. 1973) aff’d 494 F.2d004 (1st Cir. 1974). Reversed on other grounds 417 U.S. 843 (1974).
            3. Censorship of sex manuals where prurient interest and sexual arousal were only purpose of material, and where material was of questionable literary value. *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976).
            4. Pornographic publications to be denied on an issue-by-issue basis. *Montana v. Commissioners Court*, 659 F.2d 19 (5th Cir. 1981).
            5. The court upheld the jail’s rule prohibiting prisoners from receiving magazines and books depicting nudity or pandering to sexual interest because the materials could lead to violence among prisoners. *Wagner v. Thomas*, 608 F.Supp. 1095 (D.C. Tex. 1985).
      3. “Publisher Only Rule”
         1. Bureau of Prison’s rule permitted inmates to receive magazines and paperback books from any source, but hard cover books could be received only directly from the publisher, book clubs, and bookstores. The “publisher only” rule was justified on the basis that hard cover books were a “more dangerous source of risk to institutional security.”
            1. The Supreme Court upheld the regulation stating that it did not violate the First Amendment rights of the inmates. “That limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hard cover books are especially serviceable for smuggling contraband into an institution.” *Bell v. Wolfish*, 99 S.Ct. 1861, 1880, (1979).
            2. The court’s decision that the rule did not infringe on First Amendment rights was influenced by several other factors.

Rule operates in a neutral fashion, without regard to content of the expression.

There are alternative means of obtaining reading material that have not been shown to be burdensome.

magazines and paperbacks from any source

prison had “relatively large” library for use by inmates

* 1. Some Due Process Required in Regulation of Access
     1. Fair procedures including: (Hopkins v. Collins, supra.)
        1. 48-hour notice of intent to withhold
        2. review of less restrictive alternatives
        3. an opportunity for the inmate to reply
        4. a listing of reasons for prohibiting the publication
     2. State should justify reasons for restricting access with fact, not conjecture. *Washington Post Company v. Kleindienst*, supra; *Collins v. Schoonfield*, 344 F.Supp. 257, Supra; *U.S. ex rel Marricone v. Corso*, 365 F.Supp. 576 (E.D.N.Y. 1973); and *Rowland v. Sigler*, 327 F.Supp. 821 (D. Neb. 1971), aff’d. 452 F.2d 1005 (8th Cir. 1971).
  2. Pretrial Detainees
     1. Restraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would have experienced had he been released while awaiting trial. *Bell v. Wolfish*, 99 S.Ct. 1861, 1874, (1979).
     2. A jail rule limiting pretrial detainees to non-pornographic, soft bound, non-pictorial reading material such as Reader’s Digest and the Bible violated the First Amendment rights of the detainees. The rule could not be justified on the theory that newspapers would be more likely to be used to start toilet fires or that hard bound books could cause injury by being thrown. *Kincaid v. Rusk*, (7th Cir. Court of Appeals 1982) No. 78-1822.
     3. A pretrial detainee challenged the sheriff’s regulation limiting access to periodicals only from the publisher. The court upheld and the appeals court in affirming found that the sheriff had the authority to adopt the rule and the rule did not violate First Amendment rights. The regulation was content neutral and necessary to serve a legitimate and neutral objective of jail quality. *Ward v. Washtenaw County Sheriff’s Dept.*, 881 F.2nd (6th Cir. 1989).

## The student will be able to identify First Amendment rights of inmates as they relate to access to the courts and legal services.

1. General Access
   1. The right of prisoners to access to the courts is guaranteed by the Constitution and has been affirmed repeatedly by the courts.
      1. “It is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.” *Johnson v. Avery*, 393 U.S. 483 (1969).
      2. The inmate’s constitutional right of access to the courts is a fundamental freedom which includes, among other things, the right to correspond directly with them. (See this case for a general discussion on all aspects associated with inmate access to the courts.) *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981).
      3. Access to the courts may be denied if the inmate has no “legal standing” to challenge a particular practice or jail condition; but this decision is to be made by the court system, not the Sheriff or jail officers. *Leeke v. Timmerman*, 454 U.S. 83, 102 S.Ct. 69 (1981).
   2. Mail censorship to the courts [*Procunier v. Martinez*, 416 U.S. 396 (1974).]
      1. The Director of the California Department of Corrections has approved censorship of mail if it included correspondence that “unduly complained, magnified grievances, expressed inflammatory political, racial, religious or other views or beliefs,” or contained matters deemed “defamatory” or “otherwise inappropriate.”
      2. This censorship was deemed vague and did not serve a legitimate governmental interest.
      3. The court required that an inmate be notified of the rejection of correspondence and that the author of the correspondence be allowed to protest the decision and secure review by a prison official other than the original censor.
   3. Prisoners may not be punished for making allegations in petitions or other communications against the institution or institution officials. Corby v. Conboy 457 F.2d 251 (1972); *Christman v. Skinner* 468 F.2d 723 (1972).
   4. Prisoners may not, as a result of disciplinary action, be denied access the courts or counsel. *Johnson v. Anderson*, 370 F.Supp. 1373 (D. Del. 1974)
      1. This dispute arises from actions taken after a brutal attack on an officer.
      2. After the attack, all plaintiffs alleged of the attack were placed in the “Isolation Section of the Maximum-Security Building.”
      3. During this time, the alleged were restricted access to legal materials which other inmates had access to.
      4. The Warden was also recorded stating, “You are now in the Isolation Section or ‘the hole’, and you will remain here until I am ordered to leave you out, and if I am order to leave you out before I think you should come out, I no longer want to be warden of this institution.” (Superintendent acknowledged during his testimony that this was “a fair report.”)
   5. Effect of Prisoners’ Financial Capability
      1. A prisoner cannot be denied access to a court or a Habeas corpus claim because of his statutory filing fees. *Smith v. Bennett*, 365 U.S. 708 (1961).
      2. Other topics which involve access to legal assistance by inmates who are financially disadvantaged will be covered later in this section. Those topics will cover jail house lawyers, access to legal materials and other legal alternatives.
2. Outgoing Mail
   1. Letters to the Court
      1. Censoring, intercepting and refusal to mail.
         1. An inmate’s right of access to the court is as complete as that of any citizen. *Corby v. Conboy*, 457 F.2d 25 (2nd Cir. 1972).
         2. All inmate rights are dependent upon access to the courts. If those rights are to be more than illusory, judicial review is necessary to ensure that institution administrators are meeting those rights. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
         3. Mail from inmates to the courts cannot be censored, read, or refused delivery. Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y. 1970); *McDonnell v. Wolff*, 483 F.2d 1059, 1067 (8th Cir. 1973).
         4. Censorship of outgoing mail serves no substantial governmental interest.
      2. The courts have not been entirely clear or united on the matter of opening outgoing mail to courts. It would be safe to follow the guidelines:
         1. A blanket procedure of opening all mail to the courts would not be upheld. In fact, some recent cases would seem to forbid any opening of this mail. Barlow v. Amiss, 477 F.2d 896 (5th Cir. 1973). The 8th Circuit noted that opening outgoing mail marked “court client” was “unconstitutional and unjustified.” *Wycoff v. Brewer*, 572 F.2d 1260, 1266 (8th Cir. 1978).
         2. About the only justification for opening mail to the courts would be the reasonable belief that the letter contained something which presented a physical danger to persons who might handle the letter. *Collins v. Schoonfield*, 344 F.Supp. 257 (D. Md. 1972).
         3. Mail concerning the prison administration or civil litigation is entitled to privileged status. Where outgoing privileged mail is opened and inspected for contraband, it must be opened in the presence of the inmate. No reading, censoring or refusing to mail is allowed. *Ramos v. Lamm*, 639 F.2d 559 (l0th Cir. 1981). (Also ruled that where a substantial portion of the population does not speak English [at least as a primary language], limiting all correspondence to English is irrational and violates the First Amendment.)
         4. Reading, censoring, or refusing court mail is not allowed.
   2. Letters to Attorneys
      1. Inspecting inmate mail to attorneys is ill-advised and would require compelling justification by institution officials. The 8th Circuit noted that the opening of mail to attorneys was “unconstitutional and unjustified.” *Wycoff v. Brewer*, 572 F.2d 1260 (8th Cir. 1978).
      2. Officials would have to show how the outgoing mail created the danger to order or security. It’s highly unlikely that an administrator could demonstrate how contraband leaving the jail created such a danger.
      3. *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979) outgoing mail to attorneys, courts, and court officials must be sent unopened; *Wycoff v. Brewer*, 572 F.2d 1260 (8th Cir. 1978) opening of mail to attorneys was unconstitutional and unjustifiable; *Gates v. Collier*, 349 F.Supp. 881, aff’d 489 F.2d 298 (5th Cir. 1973); outgoing mail addressed to courts, administrative and public officials, and attorneys may not be opened by prison officials; *Battle v. Anderson*, 376 F.Supp. 402 (D. Okla. 1994) and prison regulations limiting confidential treatment to correspondence with one attorney, state courts and state government officials, but not with their federal counterparts constituted arbitrary and unreasonable intrusion upon inmates’ right to freely petition their government and courts. Attorney mail cannot be read.
3. Incoming Mail from Courts and Attorneys
   1. Inspecting Incoming Mail
      1. All incoming privileged mail may be opened and inspected for contraband but only in the presence of the inmate.
         1. Opening incoming mail violates no inmate right. *Frye v. Henderson*, 474 F.2d 1265 (5th Cir. 1973).
         2. “The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials in opening letter.” *Wolff v. McDonnell*, 418 U.S. 439 (1974).
      2. Mail from courts or attorneys, particularly if marked privileged, should be opened in the presence of the inmate. *Wolff v. McDonnell*, supra.
   2. Procedure for Regulating
      1. In *Wolff v. McDonnell*, the Supreme Court approved a procedure which required the mail to be identifiably from an attorney and stamped “privileged.” It is also proper to require that any letters be specially marked as originating from an attorney with his name and address being given.
      2. It is also permissible that authorities require that a lawyer desiring to correspond with a prisoner first identify himself and his client to institution officials, to assure the letters marked privileged are from members of the bar.
      3. Once identified as privileged communication, letters from attorneys and courts should be opened in the presence of the inmate, and inspected for contraband, but not read.
   3. Since privileged mail cannot be opened outside the presence of the inmate, and cannot be read, it goes without saying that censoring that mail is beyond the institution’s authority.

**INSTRUCTOR NOTE:** Additional information regarding access to attorney visits is covered in   
Unit 5, the Sixth Amendment.

1. Access to Jail House Lawyers
   1. General Rule
      1. In the absence of “reasonable alternatives,” an inmate may receive legal help from jail house lawyers (inmate writ writers). *Johnson v. Avery*, 393 U.S. 483 (1969).
      2. Assistance is not restricted to habeas corpus actions but may be required for civil rights actions under 1983. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
   2. Regulation of Jail House Lawyers
      1. Even when a jail or prison is required to allow the “jail house lawyer” function because it lacks adequate alternatives, officials may reasonably regulate the process. *Johnson v. Avery*, supra, *Wells v. McGinnis*, 344 F.Supp. 594 (S.D.N.Y. 1972). In Re Harrell, 87 Cal. Rptr. 504, 470 P.2d 640 (1970).
      2. An inmate has right to be represented, but he does not have a right to represent.
   3. Reasonable Access Alternative
      1. “The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” 430 U.S. at 828
      2. Commenting on available alternatives officials may consider in providing access to the courts, the Court stated: “This is not to say economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial.” *Bounds v. Smith*, 430 V.S. 817 (1977).
      3. The Supreme Court in 1977 reaffirmed its decision in Younger, and ruled again that reasonable alternatives are required if law libraries are not available. The court listed as possible acceptable alternatives the use of paralegals, paraprofessionals, law students, and legal associations. *Bounds v. Smith*, 97 S.Ct. 147 (1977).
      4. *Bounds v. Smith*. The court held the following in Bounds: “The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”
         1. Emphasis was placed on the term adequate in reference to the amount of resources available within the law library
         2. Emphasis was also placed on the term adequate in reference to the level of assistance provided from a person “trained” in the law.
      5. Where a law library was not unquestionably accessible to the jail inmates and where counsels were not always willing to handle civil actions, the failure of the County to provide a law library in the county jail constituted a violation of the right of inmates’ access to the courts. *Leeds v. Watson*, 630 F.2d 674 (9th Cir. 1980).
   4. Regulation of Legal Materials in cells
      1. There is general agreement in recent court decisions permitting an inmate to purchase law books for use in his cell, particularly if that alternative is needed to insure access to the courts.
      2. Reasonable limits on the number of law books a prisoner may keep in his cell will be upheld.
      3. Time limits may be set on use of the law library to ensure that one inmate does not deny other inmates equal opportunity. *Cruz v. Beto*, 329 F.Supp. 443 (S.D. Tex. 1970) (12 hours per week maximum) aff’d 445 F.2d 801 (5th Cir. 1971) vacated 405 U.S. 319 (1972) (to consider adequacy of library). *Jordan v. Johnson*, 381 F.SUPP. 600 (E.D. Mich. 1974) (11 1/2 hours per week).
      4. Restrictions on the use of typewriters, legal pads, carbon paper and duplicating machines have been held to be reasonable. *Noorlander v. Ciccone*, supra, *Hampton v. Sebauer*, 361 F.Supp. 641 (D. Colo. 1973); *Parks v. Ciccone*, supra.
         1. Limit of ten sheets of paper per day. *Conklin v Wainwright*, 424 F.2d 516 (5th Cir. 1970).
         2. Refusal of prison to type writs. *Durham v. Blackwell*, 409 F.2d 838 (5th Cir. 1969).
         3. Legal pads, typing paper, etc. prohibited. *McKinney v. DeBord*, 324 F.Supp. 928 (E.D. Cal. 1970).
         4. Ownership of typewriter in institution prohibited. *Williams v. U.S. Dept. of Justice*, 433 F.2d 958 (5th Cir. 1970); *Gittlemaker v. Prasse*, 428 F.2d 1 (3rd Cir. 1970).

## The student will be able to identify First Amendment rights of inmates as they relate to personal communications.

1. Mail
   1. Authority to regulate inmate mail. *Procunier v. Martinez*, 4316 U.S. 396 (1974).
      1. The regulation must further an important or legitimate governmental interest unrelated to suppression of expression. The interests must be one or more of the following:
         1. Security
         2. Order
         3. Rehabilitation
      2. Restrictions must be no greater than is necessary to protect the government interest involved.
         1. This does not mean that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter.
         2. Neither incoming nor outgoing mail may be censored but may be opened and inspected. Incoming mail must be delivered to an inmate within 24 hours. *Vest v. Lubbock County*, 444 F.Supp. 824 (N.D. Tex. 1977).
      3. Rehabilitation is a punishment-related interest and may not be used to justify regulation of pretrial detainees’ mail.
   2. Procedural safeguards in rejecting inmate mail. *Procunier v. Martinez*, supra.
      1. Inmates must be protected against arbitrary governmental invasion.
      2. A letter written by or addressed to an inmate is rejected, it is necessary that:
         1. The inmate is notified of the rejection.
         2. The author is given a reasonable opportunity to protest that decision.
         3. The matter should be decided by someone other than the mail officer who refused the letter originally.
   3. Inspection of Incoming Mail
      1. Incoming inmate mail may be inspected for contraband. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, supra.
      2. It is also clear that reading of incoming mail can be justified as a legal issue. *Smith v. Shimp*, 562 F.2d 423 (CA.7 1977); *Guajardo v. Estelle*, 580 F.2d 748 1978); *U.S. v. Dawson*, 516 F.2d 796 (CA.9 1975).
      3. Inspection for contraband is not censorship. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
   4. Justification for censoring or rejecting mail. *Procunier v. Martinez*, supra.
      1. The Supreme Court cited in Martinez examples of types of letters which could justifiably be rejected. “Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages.”
      2. The court in Martinez refused to try to list all the possible justifications but settled on trying to establish a standard for determining if a particular prison regulation restricting mail “constitutes an un-permissible restraint of First Amendment liberties.”
         1. The reading of incoming mail is generally viewed by jail officials as impractical and unrewarding as a daily practice.
         2. Circumstances allowing inspection should be established in policy and procedures.
      3. Prior to Martinez, other courts had approved restrictions which may be imposed. For example, requiring approved mail correspondence lists, limiting the number, type and identity of persons was upheld. *O’Brien v. Blackwell*, 421 F.2d 844 (5th Cir. 1970).
      4. Since Martinez, the courts have reviewed the restrictions based on the two-prong test enunciated above and have found most restrictions to be unwarranted.
         1. The 8th Circuit has forbidden the use of approved mailing lists where the justifications were based on:
            1. spurious intent to investigate potential visitors,
            2. a contention that people, because of their criminal backgrounds have no right to correspond with prisoners, and
            3. a belief that some people may not wish to receive mail from prisoners. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 211 (8th Cir. 1974).
         2. Deliberate withholding of mail, copying, or censorship may be accomplished only if the prison officials comply with the Procunier test and procedures or with the Fourth Amendment requirements, *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).
         3. County jail’s practice of refusing to permit inmates to receive mail, except privileged mail, unless they consented to having their mail opened violated inmates’ and their correspondents’ First Amendment rights. *Ahrehs v. Thomas*, 434 F.Supp. 873 (W.D Mo 1977) aff’d. 570 F.2d 286 (8th Cir. 1978).
      5. *Gary Carpenter v. State of South Dakota*, 536 F.2d 759 (8th Cir. 1976). Censorship by the South Dakota Penitentiary of publications mailed to prisoners was constitutionally permissible only if it furthered the penitentiary’s substantial interest in security, order or rehabilitation and no less restrictive means would be sufficient to protect the penitentiary’s interests. Court ruled that penitentiary officials have a heavy burden of proving that censorship is warranted, but that the penitentiary’s censorship board had acted pursuant to the district court order establishing censorship guidelines and state regulations adopted accordance with that court order, banning receipt of prisoner mail containing sexually explicit material. Board members could not be held liable in damages for violating prisoner’s civil rights.
      6. *Thibodeaux v. State of South Dakota*, 553 F.2d 558 (8th Cir. 1977). The court recognized that a publication could be censored if it was found to be detrimental to rehabilitative aims but could not be censored merely on a finding that a publication was of no value in rehabilitation. The fact that there was no finding that the release of materials would have a detrimental effect on rehabilitation put this case in a different light than the Carpenter decision and led the court to order that the case should not have been dismissed by the trial court. The court also noted that the South Dakota Penitentiary officials carried a heavy burden of proving the need for censorship, and that they had not discharged that heavy burden.
   5. Outgoing Mail
      1. Reading of outgoing mail can be justified but is a questionable practice and should be limited. *Smith v. Shimp*, supra.
      2. One court has gone so far as to require a search warrant to open outgoing mail. *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970).
      3. The 8th Circuit has upheld a district court order that outgoing mail may not be opened or inspected unless “Prison authorities can show that the regulation of an inmate’s right to send and receive mail furthers a substantial interest, and that the incidental restrictions placed on the inmate’s rights are no greater than essential to further that interest.” *McDonnell v. Wolff*, 483 F.2d 1059, 1067 (8th Cir. 1973).
      4. The 8th Circuit reversed a lower court decision prohibiting an inmate to correspond with a former correctional officer. The court found that the prison’s security concerns could be adequately protected by reviewing the inmate’s mail. *Stevens v. Ralston*, 674 F.2d (8th Cir. 1982).

**INSTRUCTOR NOTE:** Also see: *Procunier v. Martinez*, 4316 U.S.5. 395 (1974); *Guajardo v. Estelle*, 580 F. 2d 748 (CA 5 1978) for cases approving opening and reading outgoing mail. Also *Golden v. Coombe*, 508 F.Supp. 156 (SDNY 1981).

* 1. Use of Inmate Mail as Evidence
     1. The Supreme Court upheld the right of prison officials to use as evidence in court, admissions made by an inmate in letters found in his cell or passed on for mailing. *Stroud v. United States*, 251 U.S. 15 (1919).
     2. Inmate correspondence to another inmate was given to the warden instead, and the evidence contained in the letter was used to convict him of murder. The court ruled that “the messages in question came into the possession of the penitentiary officials under established practices reasonably designed to promote discipline of the institution.” *Denson v. United States*, 424 F.2d 329 (l0th Cir. 1570); also see *Hayes v. U.S.*, 367 F.2d 216 (l0th Cir. 1966); *United States v. Wilson*, 477 F.2d 1 (9th Cir. 1971).

1. Visitation
   1. Need for Visiting
      1. The need for visiting is well established in the jail and prison systems. Such visits benefit both the inmates and the institution. *Pugh v. Locke*, 406 F.Supp. 318, 1327 (M.D. Ala. 1976).
      2. Regulation of visiting is both necessary and supported by law. Regulation of visiting is essential to institutional security. *Overton v. Bazzetta*, 539 U.S. 126 (2003)
      3. Officials while allowed to reasonably regulate visiting, may be required to justify specific regulations if they are unnecessarily restrictive. A balance must be struck between the legitimate needs of inmates and security of the institution. *Block v. Rutherford*, 104 S.Ct. 3227 (1984) and *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). *Rhem v. Malcolm*, 371 F.Supp. 594 (S.D.N.Y. 1974); aff’d. 507 F.2d 333 (2nd Cir. 1974); *Patterson v. Walters*, 363 F.Supp. 486 (W.D. Pa. 1973).
      4. The 5th Circuit Court of Appeals has held that convicted criminals do not have a right to visitation except for legal counsel, whereas pretrial detainees’ rights are limited in that they must yield, where necessary, to the needs of institutional security. *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979).
   2. Regulation of Visiting
      1. Who may visit?
         1. Visits can be required to be limited to immediate family. *Saxbe v. Washington Post*, 417 U.S. 843 (1974). *Overton v. Bazzetta*, 539 U.S. 126 (2003).
         2. Visits can be restricted to previously submitted lists. *Overton v. Bazzetta*, 539 U.S. 126 (2003)
         3. Clergy and attorneys are allowed to visit.
      2. Visits may be denied
         1. Sister denied when suspected of bringing gun. *Rowland v. Wolff*, supra.
         2. Wife with criminal record. *Walker v. Pate*, 356 F.2d 502 (7th Cir. 1966).
         3. Former prisoners have been restricted from visiting; with an appeal process in place. *Overton v. Bazzetta*, 539 U.S. 126 (2003)
         4. Denial or suspension of pretrial detainee’s visitation requires minimum due process procedures. *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979*); Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).
      3. Contact visits with spouses, relatives, children, and friends may be denied. The U.S. Supreme Court in Block stated: “Here, the Central Jail’s blanket prohibition on contact visits is an entirely reasonable, non-punitive response to legitimate security concerns, consistent with the Fourteenth Amendment.”
      4. Contact visits invite a host of security problems
         1. They open a detention facility to the introduction of drugs, weapons, and other contrabands.
         2. Moreover, to expose to others those detainees who are often awaiting trial for serious violent offenses or have prior convictions, carries with it the risks that the safety of innocent individuals will be jeopardized.
         3. Totally disallowing contact visits is not excessive in relation to the security and other interests at stake.
         4. There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visits such as that imposed here.
         5. Nothing in the constitution requires that detainees be allowed contact visits; responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility and other persons.” *Block v. Rutherford*, 104 S Ct. 3227 (1984) and *Hudson v. Palmer*, 104 S.Ct. 3194 (1984).
      5. Conjugal visits
         1. Conjugal visits have been denied. There have been two approaches. One approach involves the rights of the inmate to sexual contact with spouse and the other approach involves the due process rights of the spouse. *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswald v. Connecticut*, 381 U.S. 479 (1965); *Lyons v. Gilligan*, 382 F.Supp. 996 (D. Wyo. 1974); *Payne v. District of Columbia*, 253 F.2d 867 (D.C. Cir. 1958) (rights of spouse); In Re Flowers, 292 F.Supp. 390 (E.D. Wis. 1968) (interference with marriage contract).
         2. Restrictions on conjugal visits have been unsuccessfully challenged on privacy issues also. See *Payne v. District of Columbia*, supra.
      6. Strip searches before/after visits
         1. Strip searches of prisoners before/after contact visits are allowed. *Daugherty v. Harris*, 486 F.2d 292 (l0th Cir. 1958).
         2. Body cavity searches following contact visits upheld. *Bell v. Wolfish*, supra.
         3. When searches involve body cavities (rectum, vagina), medical personnel are advisable. *Henderson v. United States*, 389 F.2d 805 (9th Cir. 1968).
         4. The 8th Circuit Court of Appeals reviewed the strip search policy for visitors at the Iowa State Reformatory. Officers attempted to search visitors based on an anonymous tip that visitors were attempting to bring drugs in the institution. The court held that authorities must have more than a casual suspicion to search. They must have reasonable cause to believe that drugs or other contraband are concealed in the particular place to be searched. The court also pointed out alternatives to a search by providing for non-contact visits. Mere suspicion alone can justify denial of contact visits if non-contact visits are available. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982).
      7. Other regulations
         1. Privacy not required.
         2. Approved visiting lists may be required.
         3. Monitoring of non-attorney conversations are not prohibited. *Lanza v. N.Y.*, 370 U.S. 139 (1962); *U.S. v. Stumes*, 549 F.2d 831 (CA.8 1977); *U.S. v. Paul*, 614 F.2d 115 (CA.6 1980); *U.S. v. Hearst*, 563 F.2d 1331 (CA.9 1977). *Christman v. Skinner*, 468 F.2d 723 (2nd Cir. 1972). Also, see opposite holding, *DeLancie v. Superior Court*, 159 Cal. Rptr. 20 Cal. App. 1979.
   3. Pretrial detainees appear to have greater visitation rights which may be regulated solely on the basis of security or maintaining order. Regulations, such as approved lists which may be justified on rehabilitation grounds, may not be used to restrict detainee non-contact visitation.
      1. County jail facilities for visitation which did not allow for any privacy and which made conversation difficult violated inmates’ First Amendment rights to communicate with their friends and relatives. *Ahrens v. Thomas*, 434 F.Supp. 873 (W.D. Mo. 1977) aff’d. 570 F.2d 286 (8th Cir. 1978).
      2. Pretrial detainees have a constitutional right secured by First Amendment to communicate with persons from outside prison by means of mail, visits and telephone calls. *Moore v. Janning*, 427 F.Supp. 567 (D. Neb. 1976); *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977).
      3. Under the *Bell v. Wolfish* guidelines, the court, while deferring to the jail administration, must still ensure that the administration’s response to problems is “reasonable.” Based on the applicable law and the evidence adduced at trial, the court finds unconstitutional the ban imposed by the defendants on visitation by children. The court finds that this prohibition is not reasonably related to any legitimate goal of the Passaic County Jail. It represents the judgment of the jailer that it is not in the best interests of the children to visit their parents while those parents are in jail.” *Valentine, v. Englehardt*, 474 F.Supp. 294 (1979). Also see *Inmates of the Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (D. Mass. 1973); *Nicholson v. Choctaw Co.*, 498 F.Supp. 295 (S.D. Ala. 1980).
2. Telephone
   1. The right to telephone usage by inmates has generally been related to the inmates’ right of access to the court: i.e., telephone communications with an attorney. *Collins v. Schoonfield*, 344 F.Supp. 257 (D. Md. 1972); Jones v. *Wittenberg*, 330 F.Supp. 707 (N.D. Ohio 1971). Also, see *Duran v. Elrod*, 542 F.2d 998 (CA.7 1976).
   2. Courts have also viewed the telephone as a means for pretrial detainees to maintain contact with family and friends, a right protected under the First Amendment, *Dillard v. Pitchess*, 399 F.Supp. 1225 (D.C. Cal. 1975); and since denial or restriction of such contact is viewed as punishment, it becomes a right which is guaranteed under the Fifth Amendment Due Process Clause and may only be restricted for reasons related to security or order of the institution. *Moore v. Janning*, 427 F.Supp. 567 (D. Neb. 1976). Other courts have found no inmate right to telephones for personal calls. *Hill v. Estelle*, 537 F.2d 214 (CA.5 1976).
   3. Security considerations permit the institution to monitor all telephone calls and justify a requirement that all calls be made in English. *Rodriguez v. Blaedow*, 497 F.Supp. 558 (E.D. Wisc. 1980).
   4. Privacy
      1. No expectation of privacy: Courts saying there is no expectation of privacy. *Crooker v. U.S. Dept. of Justice*, 497 F.Supp. 500 (D. Conn. 1980); *U.S. v. Paul*, 614 F.2d 115 (CA.6 1980) (as long as the monitoring is for security purposes); *Rodriguez v. Blaedow* 497 F.Supp. 558 (E.D. Wisc. 1980); *State v. Fischer*, 270 N.W. 345 (Sup.Ct. N. Dak. 1978).
      2. Privacy required: Jail house telephone calls may be monitored where there is no expectation of privacy. Courts requiring a privacy right. *Campiti v. Walonis*, 611 F.2d 387 (CA.l 1979) (ruled that monitoring violates Title III of the Omnibus Crime Bill); *Mitchell v. Untreiner*, 421 F.Supp. 886 (N.D. Fla. 1976).
   5. Defendant’s statements made in telephone conversation with his wife while he was detained in jail as evidence against him did not violate Fourth Amendment where jailer was present in the same room within a few feet of defendant as he was engaged in the phone conversation, since anything said could not legitimately have been intended as private. *State of South Dakota v. McKercher*, 332 N.W.2d, 286 (S.D. 1983). The best practice is not to monitor the attorney/client conversation. This could be considered eavesdropping and constitute a criminal violation.
   6. As it relates to phone calls the basic tenets are:
      1. There must be notification to the individual that the calls are to be monitored.
      2. The monitoring is established as a practice to preserve the security and orderly management of the institution and to protect the public. *Crooker v. U.S. Dept. of Justice*, 497 F.Supp. 500 (D. Conn. 1980)
   7. In recent judgements (February 2019) No. 9 *The People, Respondent v. Emmanuel Diaz, Appellant*. Contestation was brought regarding a pretrial detainee’s right to privacy versus those who are sentences to prison. Comparisons were draw as follows:
      1. Those incarcerated in pretrial status should be afforded the same rights to privacy as those who are out on bond on pretrial status.
      2. Even though notification was made that calls were being monitored, via recording, there was no notification that those recordings could be used in a court of law, or that they would be provided to the prosecution.
      3. The court’s decision ultimately has been upheld that the inmate’s status as a pretrial detainee has no bearing on the expectation of privacy due to the necessity for an administration to provide for the safety and security of the institution and the general public.

## The student will be able to identify First Amendment rights of inmates as they relate to right to assembly and association.

1. Religious Assembly (See “Religion” referenced above)
2. Unionization of Inmates
   1. Inmates do not have a constitutionally protected right to form labor unions while in custody.
      1. In Michigan, inmates at the Michigan State Prison were refused recognition by the court as public employees. The court said their “employment” was more correctional than industrial. *Prisoners’ Labor Union at Marauette v. Michigan*, 232 N.W.2d 699 (Mich. App. 1975).
      2. In a North Carolina case, the U.S. Supreme Court refused to recognize a constitutionally protected right for inmates to unionize and overturned gains made in lower courts in that case. *Jones v. North Carolina Prisoners’ Labor Union*, 97 S.Ct. 2532 (1977). Also see *North Carolina Prisoners’ Labor Union v. Jones*, 409 F.Supp. 937 (E.D.N.C. 1976).
   2. Some earlier cases have indicated inmates may read and talk about unionization absent any showing interference with institution operation. See *National Prisoners’ Reform Association v. Sharkey*, 347 F.Supp. 1234 (D.R.I. 1972).
   3. The court must balance the inmates’ rights under the First Amendment to associate with others in a group and to take action as a group against the needs of the institution to maintain order and security. *Parks v. Manson*, 16 Cr.L.Rptr. 2257 (D. Conn. 1974).

## The student will be able to identify First Amendment rights of inmates as they relate to redress of grievances.

1. Best to Develop a Grievance System in the Institution
   1. Courts are “ill-suited to act as the front-line agencies for the infinite variety of prisoner complaints...the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase in prisoner complaints.” *Procunier v. Martinez*, 416 U.S. 396 (1974).
   2. The Texas Commission on Jail Standards (TCJS) requires that county jails have a grievance procedure plan. (Texas Administrative Code Title 37 Part 9 Chapter 283 Rule §283.3)
      1. U.S. Bureau of Prisons procedures pursuant to that recommendation required wardens to answer prisoner complaints within 15 days.
      2. At least two federal circuits have required inmates to exhaust that procedure before filing a claim in federal court. See *Thompson v. United States Federal Industries*, 492 F.2d 1082 (5th Cir. 1974); *Jones v. Carlson*, 495 F.2d 209 (5th Cir. 1974); *Waddle v. Allredge*, 480 F.2d 1078 (3rd Cir. 1973); and (Toal) Recent Developments in Correctional Case Law (1975).
2. Access to Public Officials
   1. Inmates must be allowed to correspond with public officials. Institution administrators may not, therefore, intercept, refuse or fail to deliver or otherwise interfere with the inmates’ right to correspond.
   2. Refer to “Mail” in objectives 2.4 and 2.5 for citations and additional information.

# UNIT 3. The Fourth Amendment

## The student will be able to list general principles of Fourth Amendment rights of inmates.

1. Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
2. Since 1979, the U. S. Supreme Court has decided several cases that have served to clarify inmate rights and the Fourth Amendment. The Supreme Court has consistently ruled that searches in all cases must be reasonable and justified in terms of legitimate security concerns. In *Bell v. Wolfish*, Supra, the Supreme Court required that detention officials’ “restrictions and practices must be rationally related to legitimate non-governmental purposes.” Also, see *Block v. Rutherford*, 104 S. 3227 (1984), *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) and *Giles v. Ackerman*, 746 F.2d 614 (9th Circuit, 1984) cert. denied 105 S. Ct. 214 (1985).
3. In establishing written policies and procedures relating to searches and seizures within the jail facility, the jail administrator need not be confused. The courts have quite clearly set out the constitutional protections that survive incarceration. But the jail manager should be knowledgeable in the entire range of search and seizure issues. He then may more comfortably set those policies and procedures that pertain to the inmates in his facility.
4. Objects of a Jail Search
   1. Contraband: anything that is illegal in and of itself (e.g. narcotics).
      1. In the outside world, contraband must be forbidden by statute or ordinance. In a jail facility, however, it can be literally anything named by the jail administrator that even remotely relates to the security of the jail operation. Examples: newspapers, food, extra blanket, weapons, etc.
      2. The courts have stated that they are not about to attempt to outguess jail officials in what items may or may not affect the security operation of the facility. They will only look to see that items labeled as “contraband” are documented in writing in a policies and procedures manual and that enforcement procedures are applied equally to all inmates (the equal protection clause of the Fourteenth Amendment). The overwhelming majority of jail searches are for contraband.
      3. From a management standpoint, it is best to write procedures and rules and regulations that state which items inmates are allowed. All other items can then be classified as contraband.
   2. Evidence: In this context evidence has been defined as anything that will aid the jail in an investigation of an incident.
5. Conditions
   1. Incident to an arrest, including an inventory search.
      1. It is well established law that a jailer, usually the booking officer, may search an inmate and anything he brings to the facility. In fact, all custodial searches are presumed reasonable unless “[they] violate the dictates of reason either because of their number or their manner or perpetration.” *Charles v. U.S.*, 278 F.2d 386 (9th Cir.) cert. denied 364 U.S. 831.
      2. The law is less clear with regard to “second looks” at inmate property after it has been inventoried and placed in property storage. The New York Supreme Court has ruled that police were allowed to examine an arrestee’s belongings after they had been inventoried and locked away. The detainee’s wallet and personal property were sealed in an envelope and placed in the property room. Later, his wallet was removed from the envelope and a search revealed a piece of paper with the name, address and telephone number of one of the victims. The court upheld the search and stated:

“It is now beyond doubt that under the Fourth Amendment an arresting officer may, without a warrant, search a person validly arrested. The fact of a lawful arrest, standing alone, authorizes the search (*Michigan v. Defillippo*, 443 U.S. 31, 99 S. Ct. 2627; *Gustafson v. Florida*, 414 U.S. 260, 94 S. Ct. 488; *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467).

* + 1. Inventory Search: That there may be some time interval between the arrest and the subsequent taking of property for use as evidence does not change this principle, nor does the fact that “the clothing or effects are immediately seized upon arrival at the jail, held under the defendant’s name the property room’ of the jail, and at a later time, searched and taken for use during the subsequent trial.” *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 1239.
  1. The Consent Search
     1. The consent search is not applicable to the jail search.
     2. Of course, these searches should not be for the express purpose of harassment and must be consistent with equal protection issues.
     3. The standard remains via *Bell v. Wolfish*, that the institution must provide and does, in this case a legitimate governmental interest in the security of inmates and the management of the institution.
  2. Exigent (Emergency) Circumstances
     1. The jail, by its very nature, is a perpetual exigent circumstance and all personal and cell searches/seizures will be upheld by the court unless inmates can show outrageous conditions with no justifiable cause.
     2. Security is the primary objective and jail administrators have a duty to maintain a facility in which inmates may reside without fear for their lives. The administrator may conduct inmate and cell shakedowns in almost any degree he chooses. The court will uphold such searches if only remotely connected in a reasonable manner to the security of the facility. “...the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves...Prison administrators, therefore, 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 v. Wolfish*, 99 S. Ct. 1861 (1979).

## The student will be able to identify Fourth Amendment rights of inmates as they relate to search of persons.

1. Pat down searches of inmates moving about within the jail has been found reasonable by courts, if conducted according to documented procedures. Cross-sexual searches have been approved according to the following courts: *Madyun v. Franzen*, 704 F. 2d 954 (CA7 1983); *Roscom v. City of Chicago*, 570 F. Supp. 1259 (N.D. Ill. 1982). These rulings are seen as a balancing response by the courts in response to the requirement that detention and corrections facilities provide equal employment opportunities for females.
   1. The courts generally allow females to pat search males (given that the genital area is avoided) but have been more restrictive with males pat searching females.
   2. Female officers may frisk search male prisoners, even in spite of religious objections. *Madyun v. Franzen*, 704 F.2d 954 (CA 7 1983), cert. denied 104 S. Ct. 493 (1983).
   3. However, in *Rivera v. Smith*, 462 N.Y.S. 2d 352 (App. 1983), aff’d 472 5.2d 210 (1983), the court permitted Muslim inmate to refuse search by female.
2. A skin or strip search is not a body cavity search, although an exterior viewing of body cavities (without exploratory touching) may be made if it is not done in such a manner so as to be unduly degrading to human dignity (Justice Brennan of the U.S. Supreme Court). The courts universally have upheld skin/strip searches any time an inmate has been in contact with the outside world and may be bringing contraband back to the facility. It cannot be over stressed, however, that the jail administrator must have documented policies and procedures covering this aspect of jail operations and those policies are equally enforced to all.
3. For a strip search of a prisoner to be conducted the government must show reasonableness, not probable cause, that there is contraband on the individual. The more intensive the search, the heavier the burden is on the government to prove reasonableness. *United States v. York*, 578 F.2d 1036 (5th Cir. 1978) cert. denied, 439 U.S. 1005 (1978).
4. An inmate brought a Section 1983 action alleging that the presence of female guards during a strip search invaded his constitutional right to privacy. The appeals court, affirming the decision, found that the presence of female guards during a strip search of a male inmate following a food throwing incident that involved eighteen or nineteen inmates did not violate a constitutional right of privacy. *Letcher v. Turner*, 968 F.2d 508 (5th Cir. 1992).

The 5th Circuit has repeatedly ruled that arrestees cannot be stripped searched without reasonable suspicion.

* 1. Requirement for all arrestees to submit to strip search at booking/intake violates the Fourth Amendment.
  2. Strip search of female traffic offender upheld by district court was overturned by Court of Appeals. U.S. Supreme Court denied cert. (1985) allowing appellate decision to stand.
     1. A woman in Idaho filed suit against the Bonneville County Sheriff’s Office after she was strip searched following arrest for failure to appear and pay parking tickets.
     2. Although the district court judge found the circumstances unusual and was sympathetic, he held that it was not unreasonable to search the woman after it became clear that she would not be released on bond prior to her hearing in court.
     3. Finding that the policy requiring a strip search of every prisoner processed into the general population of the facility was reasonable, he held that it was not a violation of the Fourteenth Amendment.
     4. On appeal, the Appeals Court found that the search violated the plaintiff’s Fourth Amendment rights and reversed the lower court decision, holding that “...arrestees for minor offenses may be subjected to a strip search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering from a communicable disease.”
     5. The ruling further stated, “County policy of strip searching all persons admitted to county jail, regardless of severity of charges or whether suspicion that arrestee is concealing contraband, and unsupported by any indication that strip searches effectively deter smuggling of contraband into jail, violates Fourth Amendment: strip search of person who was arrested for minor traffic offense and was described as cooperative and orderly violated Fourth Amendment in absence of individualized suspicion that she was carrying contraband or was in any way threatening jail security.” *Giles v. Ackerman*, 559 F Supp. 226 (D. Ida. 1983) reh’g. denied, 746 F.2d 614, cert denied, 105 S.Ct. 2114.

1. Must be specific for cause and reason to strip-search at intake.
   1. While the courts are consistent on when a strip search can be conducted for newly admitted detainees, the following rules should be followed when developing strip search procedures:
      1. Serve the needs of the facility for security, order and discipline as specified in departmental policies/procedures.
      2. Not constitute an exaggerated response to legitimate institutional needs.
      3. Generally, the least intrusive security measure should be used.
      4. Detainees being held for minor misdemeanor charges should not be routinely strip searched; rather, the detainee could be searched when “reasonable suspicion”:
         1. the nature of the offense
         2. if the prisoner’s behavior creates reasonable suspicion
         3. the prisoner’s prior record
         4. belief that a weapon or contraband is being concealed
         5. if contraband is discovered during the pat search or the prisoner refuses the pat search
      5. Be conducted by staff members of the same sex without unnecessary force, is not demeaning, preserves the dignity of the prisoner and officers refrain from inappropriate comments.
      6. Conducted in a private area out of the view of any persons of the opposite sex.
      7. Documentation of the search and findings and any special reasons for conducting the search.
      8. Review of state laws, standards, and applicable court decisions.
   2. Strip searches have been considered appropriate by the courts after prisoners have had the opportunity to secure contraband, e.g., after contact visits, after transports, upon arrival from another facility, and after leaving the security perimeter of the facility.
      1. In dealing with non-violent misdemeanors, the following two rules should be followed:
         1. If a quick “turnaround”, do not strip search unless an articulable cause.
         2. If going into general population, must have reasonable cause to believe that there is disease, contraband, weapons, or safety issues involved; then can be strip searched.
      2. An indiscriminate strip search policy routinely applied to detainees cannot be justified simply on the basis of administrative ease in attending to security considerations. Courts will consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it was conducted. *Logan v. Shealy*, 660 F.2d 1007 (CA4 1981). See also *Hunt v. Polk County*, 551 F. Supp. 399 (S.D. Iowa 1982).
2. Body Cavity Searches
   1. The Supreme Court has firmly put to rest the line of court decisions which ruled that visual body cavity searches could only be conducted where reasonable cause existed and a substantial security justification had been demonstrated. In reviewing Fourth Amendment rights of pretrial detainees subjected to body cavity searches following all contact visits with a person from outside the institution, the court stated that the “Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.” (*Bell v. Wolfish*, supra).
   2. Visual body cavity search of female arrestees by another female officer was constitutional. (*Dufrim v. Spreen*, 712 F.2s 1084 (CA6 1983).
      1. “We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner.” Bell v. Wolfish, supra. A search conducted without privacy and accompanied by “a lot of oohs and aahs and ‘good show’“ will not be tolerated. *Frazier v. Ward*, 426 F. Supp. 1354 (N.D.N.Y. 1977).
      2. Body cavity searches which go beyond a visual search to a probe must, however, be conducted in a more careful manner and be conducted by medically trained personnel in private. *Daugherty v. Harris*, 476 F.2d 292, cert. denied 414 U.S. 872, 94 S. Ct. 112, 38 L. Ed. 2d 91 (l0th Cir. 1973).
3. The Supreme court of North Dakota held that a prisoner’s required participation in a prison urine screening program, used as a means of controlling drug usage in the institution, did not constitute an unreasonable search and seizure and did not violate the prisoner’s right against self-incrimination. Refusal to submit to the urine sample resulted in the same penalties as a positive finding (loss of good time). The court stated that since drug traffic within the penitentiary presents a threat to institutional security and internal order and discipline, minimizing such traffic is a legitimate state interest. The urine screening program was a reasonable attempt to minimize drug usage at the prison and was not intrusive on the inmate’s Fourth Amendment rights. *Hampson v. Satran*, 319 N.W.2d, 786 (N.D. 1982).
4. Search of Visitors
   1. The 8th Circuit has ordered a change in the visitor strip search policy at Iowa State Prison. Three women attempted visits at three different facilities in the state and were subjected to strip searches based on uncorroborated, anonymous tips containing an allegation that they were carrying drugs into the institution. The court noted that the penal environment is fraught with serious security dangers, and that a central objective of prison administrators is to safeguard institutional security by using all reasonable means to exclude contraband.
   2. However, the court stated that to justify the strip search of a prison visitor, prison officials must point to specific objective facts and rational inferences that they are entitled to draw from these facts in light of their experience. Unspecified suspicions fall short of providing reasonable grounds to suspect that a visitor will attempt to smuggle drugs or other contraband into the prison. The court granted the plaintiffs declaratory and injunctive relief and suggested that Iowa prison authorities arrange for facilities to provide non-contact visits between prisoners and their guests, deeming such a solution an economical alternative method for preventing the introduction of contraband into the prison. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982); *Commonwealth v. LaPia*, 457 A. 2d 877.

## The student will be able to identify Fourth Amendment rights of inmates as they relate to search of cells.

1. The U.S. Supreme court has ruled that inmates are not protected by the Fourth Amendment right against random search and seizure in their cells. The majority of those sitting on the U.S. Supreme Court have recently ruled in favor of correctional institutions to promote effective security through random searches. In *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), the court ruled that prisoners have no Fourth Amendment right against unreasonable and random search and seizure in their cells. A right of privacy under the Fourth Amendment was “fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order”, the court stated.
   1. The Hudson court extended the reasoning in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), by holding that intentional deprivations of property, as well as negligent deprivations, did not constitute a violation of due process because meaningful post-deprivation remedies for the loss were available under state law. It said there was no logical reason to make a distinction between intentional and negligent deprivations of property for the purposes of post-deprivation remedies.
   2. In another case involving pretrial detainees, *Block v. Rutherford*, 104 S. Ct. 3227 (1984), the majority allowed for irregular shakedown searches of cells out of the detainees’ presence while they were at meals, recreation, or other activities. Again, the ruling was in the interest of jail security.
2. Jail policies and procedures must clearly specify the time, manner, and place of searches in order to avoid accusations that the searches “violate the dictates of reason either because of their number or their manner of perpetration.” *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234 39 L. Ed. 2d 771 (1974). Searches must not be conducted in a manner which may amount to harassment and must be applied to all prisoners of the same classification equally. In *Brown v. Halton*, 492 F.Supp. 771 (D.H.J. 1980), inmate has a right against unreasonable searches. A search which leaves the cell a shambles and damages personal property is unreasonable.

## The student will be able to identify Fourth Amendment rights of inmates as they relate to seizure of conversations and communications.

1. Since prisoners have no “reasonable expectation of privacy” within a jail setting, seizure of conversation between inmates and with visitors has been upheld, if there is prominent posting notifying the inmate and visitor that there is no expectation of privacy. *Lanza v. New York*, supra. Also see *State v. Fischer*, 270 N.W. 2d 345 (N.D. 1978).
2. See prior section regarding conversation between prisoner and counsel. However, “...the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection...” *Lanza*, supra. Thus, conversations between prisoners and their attorneys or their authorized representatives, clergy or doctor may not be monitored or recorded.
3. Interception and photocopying by a prison security officer of a letter written by the defendant to an inmate of another penitentiary constituted a violation of the accused’s rights under the Fourth Amendment, “absent a showing of some justifiable purpose of imprisonment or prison security.” *United States v. Savage*, 482 F.2d 1371 (9th Cir. 1973) cert. denied 415 U.S. 932, 94 S. Ct. 1446, 39 L. Ed. 2d 491. Also see *Stroud v. U.S*.
4. Must have articulable cause.

## The student will be able to identify Fourth Amendment rights of inmates as they relate to privacy.

1. In balancing the inmates’ rights to privacy (from involuntary viewing of unclothed or partially clothed bodies) against the rights of opposite sex guards to equal employment, one court has upheld the right of male guards to work in a female prison hospital. The guards’ right to equal employment was protected because several accommodations were made to protect the privacy of the female inmates. For example, translucent shields were erected in front of the showers, inmates were allowed to close their cell doors and cover the window for 15-minute periods for undressing and using the toilet both during the day and at night, and accommodations were made for distribution of sleepwear. *Forts v. Ward*, 621 F.2d 1210 (2nd Cir. 1980).
2. The 7th Circuit Court of Appeals has held that a pat down search by a female prison guard of a male inmate is permissible so long as the search does not extend to the genital area. The inmate was subjected to a frisk search which encompassed the head, neck, back, chest, stomach, waist and the outside of the legs and thighs. The court held that because the inmate was fully clothed during the search and the search did not extend to the genital or anal area, it was reasonable and did not violate his right or privacy or the Eighth Amendment’s prohibition against cruel and unusual punishment. *Smith v. Fairman*, 5.2d No. 80-14015 (7th Cir. 1982).
3. Accommodations should be made to protect the inmate’s privacy, if the officer is of the opposite sex.

# UNIT 4. The Fifth Amendment

## The student will be able to identify general principles of the Fifth Amendment rights of inmates.

1. The Fifth Amendment States, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
2. Double Jeopardy
   1. An inmate may be charged administratively and criminally on the same charges without double jeopardy.
   2. An inmate may be acquitted in a court of law (where the standard of proof is greater) but found guilty in an administrative discipline hearing (where the burden of proof is less) without constituting double jeopardy.
3. Witness Against Self
   1. Inmates have no right to remain silent in defense of administrative charges against them.
   2. An inmate’s failure to testify at a discipline hearing can result in an adverse inference. *Baxter v. Palmigiano*, 425 U.S. at 326-30 (1976).

## The student will be able to identify Fifth Amendment rights of inmates as they relate to discipline.

1. Written Rules and Regulations Critical
   1. Before an inmate can be disciplined, there must be written rules and regulations available so that he knows what is expected of him. This need was addressed in *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971):
   2. “The evidence, however, shows that the purposes of the constitutional requirement of reasonable specificity--fair warning so that one may conform to the rules, and exactness so that arbitrary penalties or penalties for protected conduct will not be imposed-have been ill-served by rules against Virginia prisoners.”
   3. “A rule or regulation, the violation of which can result in disciplinary proceedings, must apprise inmates of the proscribed conduct.” *Laaman v. Helgemoe*, 437 F.Supp. 269, 321 (D.N.H 1977).
   4. The rule must be clearly stated so that no doubt exists as to what conduct is prohibited. “The usual rule is that a statute or regulation must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden...” no person of ordinary intelligence could reasonably understand exactly what behavior is proscribed as each enforcer will have his own idea as to what conduct is “poor”. *Laaman v. Helgemoe*, supra. (holding a prison rule which authorized discipline for “poor conduct” as unconstitutionally vague).
   5. The governing body or Commission responsible for the operation of the jail shall adopt written policies and procedures for the regulation of the jail on the following subjects: ... (8) the punishment of prisoners for violation of the policies and procedures of the jail. (South Dakota CL 24-11-23).
2. Discipline Due Process Requirements
   1. The following procedures are set down in *Wolff v. McDonnell*, by the U.S. Supreme Court:
      1. Written notice of charges must be given to the offending inmate 24 hours prior to a hearing; 24 to 72 hours (excluding holidays and weekends) is reasonable for a disciplinary hearing.
      2. Hearing by an impartial board was required on any serious disciplinary action.
         1. *Wolff* in 1974 set requirements for “grievous” disciplinary actions. *Baxter v. Palmigiano*, 425 U.S. 308 (1976), reaffirmed the Supreme Court’s ruling that the hearing requirement applied to “grievous” actions.
         2. The person who initially makes the incident report for which disciplinary action may be taken, may not sit on the discipline board to decide the sanction to be applied. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974).
   2. An inmate should be allowed to call witnesses and present documentary evidence in his defense if permitting him to do so will not jeopardize institutional safety or correctional goals. *Wolff v. McDonnell*, *Baxter v. Palmlgiano*, supra.
      1. Failure to provide the inmate with polygraph results (exculpatory evidence) tending to exonerate him was an actionable violation of his constitutional right to due process. *Chavis v. Rowe*, 643 F.2d 1281 (7th Cir. 1981).
      2. The magistrate judge could uphold the prison authorities’ decision to bar character witnesses from testifying at disciplinary hearings only after conducting proceedings to ascertain the substance of witnesses’ testimony and to discover whether proffered testimony would be unduly hazardous to institutional safety or correctional goals or would have been likely to jeopardize life or safety of persons or security and order of the institution. It was found that the prison disciplinary board could not, as a matter of due process, rely solely on the testimony of the charging officer regarding hearsay statements of an unidentified informer to support a revocation of the inmate’s good time credits, absent some independent evaluation of the credibility and reliability of the informer. *Spellmon-Bey v. Lynaugh*, 778 F.Supp. 338 (E.D. Tex. 1991), dismissed, 12 F.3d 1097.
   3. The inmate has no constitutional right to confrontation and cross-examination. Because of the potential danger that procedure would present in the prison environment, it will be discretionary with prison officials.
   4. Prison officials have wide discretion in conducting prison disciplinary hearings and reaffirmed *Wolff v. McDonnell* with regard to presentation of testimony. A correctional officer did not have to reveal information disclosing the informant in the interest of safety. The court relied on the Wolff ruling in that “the right (to present evidence) shall be allowed when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals” *Smith v. Rabalais*, 659 F.2d 539 (5th Cir. 1981).
   5. Right to counsel was not required by the court, although counsel substitute was recommended in actions where the inmate is illiterate or where unusually complex issues exist. There is no right to remain silent in a disciplinary hearing.
      1. The Supreme Court went further in Baxter when it ruled: “Neither Miranda nor Mathis has any substantial bearing on the question whether counsel must be provided at prison disciplinary hearings (which) are not a part of criminal prosecution.”
      2. In Baxter, the court also said: “The short of it is that permitting an adverse inference to be drawn from an inmate’s silence at his disciplinary proceeding is not, on its face, an invalid practice.”
   6. Written findings of fact are required. It is important that the findings of fact to determine guilt are documented.
   7. There must be allowance for review by, and appeal to, a higher authority; generally, the jail or prison administration.
   8. Inmates have right to judicial review in state courts of administrative action resulting in loss of good time. *Tibbetts v. State*, 336 N.W.2d 658 (South Dakota Supreme Court, 1983). This case was specific to inmates in the South Dakota State Prison.
3. Court Review of Disciplinary Measures
   1. In reviewing disciplinary actions, the test is whether there exists any basis in fact to support the action taken by the jail officials. *Jackson v. McLemore*, 523 F.2d 939 (8th Cir. 1975), *Willis v. Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974). Otherwise the federal court would assume the task of retrying all prison disciplinary disputes. *Willis v. Ciccone*, supra. Courts sit to decide whether proper constitutional rights are protected, not to second-guess the actions of prison officials. *Bell v. Wolfish*, supra.
   2. The disciplinary action taken will come under the court’s review if the Eighth Amendment’s proscription against cruel and unusual punishment is alleged. This will be discussed in the next section.
   3. The prisoner could not be subjected to discipline for violation of a solitary confinement requirement that trays be left within the confines of the cell because the prisoner had no notice of that rule in advance of committing the infraction. *Reeves v. Pettcox*, 19 F.3d 1060 (5th Cir. 1994).

**INSTRUCTOR NOTE:** You may choose to address these issues under the prior section on the Fifth Amendment.

1. Due Process and Equal Protection Considerations
   1. There are two key factors in inmate discipline: due process (Fifth Amendment) and equal protection (Fourteenth Amendment; discussed further in Unit 7). Both have been made applicable to inmates, particularly in pretrial detainees.
   2. In all cases of major infractions by inmates, a due process hearing is required under the Fifth Amendment of the Constitution before the jail/prison official can administer the discipline. *Wolff v. McDonnell*, 418 U.S. 539 (1974). In determining the procedural due process, a prisoner is entitled to a disciplinary hearing; the test is the severity of the potential punishment, not the actual punishment. While prisoner only suffered loss of recreational privileges, he was exposed to a loss of good time, therefore was entitled to due process safeguards. *Ward v. Johnson*, 690 F.2d 1098 (1981).
      1. There is one notable exception to the rule. In an emergency situation where the inmate is a danger to himself or others, the jail administrator may take whatever action is reasonable under the circumstances to quell the emergency. The “after the fact” due process hearing then becomes a “justification hearing” on the reasonableness of the action taken.
      2. Infliction of summary punishment upon prisoners without any semblance of due process is impermissible: where such summary punishment is likely to recur, court may appropriately enjoin correctional personnel from summarily beating or otherwise physically mistreating prisoners; *Diamond v. Thompson*, 364 F.Supp. 659 (M.D. Ala. 1973).
   3. Equal protection simply means that the rules of inmate discipline apply equally to all inmates. In order to show that a facility is not violating an inmate’s equal protection rights, the jail administrator must have documented (written) policies, procedures, and records. There is no other way he can demonstrate to the court “what is good for one in the facility is good for all.”
2. Punishment must be for a Legitimate Governmental Purpose
   1. The fact that prison officials may not inflict summary punishment without any semblance of due process does not mean that prison officials may not use reasonable force to move prisoners, maintain order, or insure compliance with regulations *Diamond v. Thompson*, supra.
   2. Inmates may not be punished for religious beliefs and related activities, *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972).
   3. Inmates may not be punished for exercise of their constitutional right to petition the courts for redress or wrongs. *Carothers v. Follette*, 314 F.Supp. 1014 (D.C.N.Y. 1970).
3. Infliction of Corporal Punishment Prohibited
   1. In general, corporal punishment is unconstitutional and is a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. (The Eighth Amendment is discussed further in Unit 6.)
   2. The constitution not only protects individuals from unjustified beatings meted out by state officials but also against the unjustified administration of tranquilizing drugs. *Davis v. Schmidt*, 57 F.R.D. 37 (D. Wis. 1972).
   3. Use of chemical agents as punitive measure rather than as control device, or without justification, and in excessive amounts constitutes cruel and unusual punishment. *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974). Use of tear gas and chemical agents against individual prisoners in their cells is unjustified and unconstitutional absent a clear and present danger of riotous proportions. *Spain v. Procunier*, 408 F. Supp. 534 (N.D. Cal. 1976).
   4. Use of Restraints Restricted
      1. Finding that one prisoner had been restrained in his solitary cell by handcuffing him, chaining his body to the cell bars, wrapping tape around his neck and securing that to the bars also, and that he remained in that position for 14 hours while another prisoner had been chained to the cell bars by his waist and arms in such a position that he could just barely recline; that the chaining had caused both prisoners lack of sleep and prolonged physical pain and that neither prisoner was released to respond to a call of nature or to eat. The court said that corporal punishment by chaining was outmoded and was forbidden by the constitution. Landman v. Royster, supra.
      2. Generally, the softer the restraint used, the lesser the liability.
      3. The practice of restraining prisoners by chaining them on their backs to beds for days at a time, on occasion without timely access to toilet facilities, does not comport with the standards of decency of a civilized society. Certainly, the practice of restraining human beings in this manner amounts to cruel and unusual punishment. Restraints may not be used as punishment but only when necessary to control prisoner’s behavior for short periods of time. In the situations where restraints are necessary, the inmate should receive medical attention and care. Any use of restraints beyond the time required to receive this attention should be under control of medical personnel. *Steward v. Rhodes*, 473 F.Supp. 1185 (1979).
   5. Threats of corporal punishment in connection with actual physical punishment violate the Eighth Amendment. For example, a prisoner was compelled, under threat of violence, to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 a.m. to 10:00 p.m. every day and was not permitted to sleep during those hours under the pain and threat of being beaten. *Wright v. McMann*, 387 F.2d 519 (2nd Cir. 1967).
   6. Methods of corporal punishment used in prison, including the administering of milk of magnesia, stripping inmates of clothes, turning fan on inmates while naked and wet, and cuffing inmates to fence and to cells for long periods of time, shooting at or around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps or otherwise to maintain awkward positions for prolonged periods violated the Eighth Amendment. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).
4. When Use of Force Allowed
   1. Force is properly employed by prison personnel in self-defense, in breaking up fights between inmates, in compelling obedience to lawful orders where milder measures fail, in connection with preventing escapes, in protecting state property, and at times, in connection with recapturing escaped convicts. *Holt v. Hutto*, 363 F.Supp. 194 (E.D. Ark.).
   2. Not every push or shove, even if it may seem unnecessary in the place of the judge’s chambers, violates a prisoner’s constitutional rights: in determining whether the constitutional line has been crossed, a court must look to the following factors:
      1. Need for the application of force.
      2. Relationship between the need and the amount of force used.
      3. Extent of injury inflicted.
      4. Whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm. *Johnson v. Gluck*, 481 F.2d 1028 (2nd Cir. 1973).
      5. A new test for Eight Amendment excessive force claims, adopted by the U.S. Court of Appeals for the Fifth Circuit, requires the showing of:
         1. a significant injury (which also)
         2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
         3. objectively unreasonable
         4. the action constituted and unnecessary and wanton infliction of pain. *Adams v. Hansen*, 906 F.2d 192 (5th Cir. 1990).
      6. The U.S. Supreme Court found that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the prisoner does not suffer serious injury. Whenever prison officials stand accused of using excessive physical force in violation of the cruel and unusual punishment clause, the core of judicial inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *Hudson v. McMillian*, 112 S.Ct. 995 (1992).
   3. Use of tear gas against prisoners who are locked behind bars of their cell is not per se cruel and unusual punishment but use of such gas should be strictly limited to circumstances presenting utmost degree of danger and loss of control.
   4. The use of mace, tear gas, fire hoses and stun guns have been upheld “if reasonably applied under proper warranting circumstances.” Properly warranting circumstances are viewed under the least restrictive alternative doctrine.
   5. The appeals court found that the guard’s assault on the prisoner who was cutting his wrist in a suicide attempt did not involve unconstitutionally excessive force. According to the court, the prisoner did not allege how many times he was struck, whether the blows were significant, or how many people hit him. As the guards were obligated to prevent the prisoner form committing suicide, some force was called for. *Martin v. Harrison County Jail*, 975 F.2d 192 (5th Cir. 1992).
5. Punitive Segregation/Solitary Confinement
   1. In regard to Solitary Confinement the “why” becomes the all-important word. Administrative segregation is not per se a violation of the Eighth Amendment, but several safeguard procedures must be implemented. The validity of segregation depends upon the existence of valid and subsisting reasons for segregation and the relative humanness of the conditions. Where an inmate is held in segregation for a prolonged or indefinite period, due process requires that the situation be reviewed periodically, meaningfully and by relevant standards. The decision as to administrative segregation should be made by or under the supervision of the warden. *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1975).
      1. Inmates are entitled to due process procedures (notices, hearings, etc.) before being placed in disciplinary segregation.
      2. The segregation must be justified based on one of the following:
         1. Security reasons:
            1. Personal
            2. Facility
         2. Protection of the inmate population
         3. Health reasons
         4. Prevent Escape
         5. Punishment
      3. The cell cannot be completely devoid of facilities: i.e., bunk, toilet, etc. Prisoners in solitary confinement may not be deprived of the basic necessities, including heat, light, ventilation, sanitation, clothes and an adequate diet. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974).
      4. The inmate may have reduced rations, but the jail administrator must be able to document that the inmate is receiving a balanced diet (most courts have held 2,500 calories as a minimum daily intake).
      5. Inmates in isolation must be afforded regular opportunities to exercise. *Pugh v. Locke*, supra.; *Laaman v. Helqemoe*, supra.
      6. The inmate is still entitled to mail privileges. Emphasis is added concerning court related mail.
      7. The inmate is entitled to equal protection procedures. The Supreme Court has said, “Segregation is, of course, one of the most serious punishments an inmate may face.”
      8. The inmate is still entitled to medical and health care.
      9. The inmate may be placed in segregation for discipline (punishment) but the stay cannot be excessive and the placement must be preceded by a due process hearing. A punishment segregation has all of the safeguards listed above: i.e., inmate cannot be unreasonably denied mail or meal privileges, cell cannot be devoid of facilities, etc.
      10. Over 30 days in solitary (poor conditions) found unconstitutional in Arkansas, *Hutto v. Finney*.
   2. The importance of the jail/prison administrator having written procedures for placing an inmate in segregation cannot be over stressed. Virtually all courts have stated the “absence of records is too much of an opportunity for abuse of discretion.”
   3. A jail administrator or jail staff member having charge of an inmate may use only such means as are necessary to control inmate behavior. If an inmate confined in any jail is disorderly or willfully destroys jail property, the jail administrator may cause the inmate to be secured or kept in solitary confinement.
6. Summary
   1. “Reasonableness under the circumstances” is the key phrase in inmate discipline. Any discipline cannot be disproportionate to the offense committed, nor can it be of such nature to shock the conscience of a modern society. The courts will examine “applied force” situations in light of the doctrine “the least restrictive alternative available” (could any less force accomplish the objective).
   2. The presumption of law is with the jail administrator, and his acts or acts of his personnel are presumed reasonable unless “reasonable people could not differ that their actions were gross” (clear as a matter of law concept), which shifts the burden of proof to jailer/jail administrator to prove their actions were reasonable.
   3. All major cases of discipline such as segregation should be preceded by a due process hearing unless emergency circumstances exist.

# UNIT 5. The Sixth Amendment

## The student will be able to list general principles of Sixth Amendment rights of inmates.

1. The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you.
2. Inmate rights for the sixth amendment do not apply the way as they do when not in jail. Inmates will not have the right to a jury when it comes to hearings on rule violations but they are still afforded the right of the notice of the charges brought against them.
3. There is no right to counsel in prison disciplinary hearings; if an attorney attends they typically cannot participate and may be permitted to be present as observers.

## The student will be able to identify Sixth Amendment rights of inmates as they relate to access to attorney visits.

1. Access to Attorney Visits
   1. *Nees v. Bishop*, (D.C. Colo.) No. 77-2-541 (November 2, 1981)
      1. FBI agent erroneously instructed the Sheriff to not allow his prisoner access to a public defender.
      2. The right to counsel is so basic that is was inconceivable and unreasonable for an agent of the FBI to give erroneous instructions and to make improper representations to law officers from another jurisdiction concerning the basic right to an attorney visit.
   2. Regulation of Attorney Visits Allowed
      1. Restrictions on attorney visits are justified for reasons which range from security to the simple need to have housekeeping rules.
      2. Restrictions which have been permitted include:
         1. Limiting the number of attorneys who may visit an inmate.
         2. Banning visits during mealtimes. *Souza v. Travisono*, 386 F.Supp. (D.R.I. 1973), aff’d 498 F.2d 1120 (lst Cir. 1974); *Via v. Cliff*, 470 F.2d 271 (3rd Cir. 1972).
      3. Restrictions on attorney visits should be based on a substantial state interest of security, order, or discipline to ensure judicial support and avoid expensive suits under 42 USC 1983. See *Via v. Cliff*, supra.
   3. There should be adequate area for attorney visits in jails. *Collins v. Schoonfield*, 344 F.Supp. 255 (D. Md. 1972); State v. Jones, 37 Ohio St. 2d 221, 306 N.E.2d 409 (1974).
   4. Privacy for attorney visits
      1. When security requires observation, it may be permitted, but observation must be accomplished without listening to the conversation. *Baker v. Beto*, 349 F.Supp. 1263 (S.D. Tex. 1972) vacated on procedural grounds 491 F.2d 417 (5th Cir. 1974).
      2. Conversations between attorney and client may not be monitored. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Souza v. Travisono*, supra.
   5. Agents of Attorneys
      1. Visits with attorneys cannot be restricted just to the attorney himself. An attorney may be represented by a law student, law clerk, or other legal paraprofessional. *Procunier v. Martinez*, 416 U.S. 396 (1974); *Souza v. Travisono*, supra, N.D.C.C. 12-44.1-14.
      2. Institutions as a matter of security can require attorneys to provide notification that an inmate interview will be conducted by his agent to ensure that persons do not secure visits under false pretenses.
      3. Privacy is important in attorney visitation; however, institutional security may also be considered. *Bounds v. Smith*, 430 U.S. 817 (1977); *Dreher v. Seilaff*, 636 F.2d 1141 (CA 7 1980); *Back v. Illinois*, 504 F 1100 (CA 7 1974).

# UNIT 6. The Eighth Amendment

## The student will be able to identify the Eighth Amendment ban on cruel and unusual punishment.

1. The Eighth Amendment reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
2. Section 1 of the Fourteenth Amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection or the laws.”
   1. The Fourteenth Amendment is cited here due to the *Bell v. Wolfish* decision on pretrial detainees.
   2. Even though we are discussing Eighth Amendment issues, for pretrial detainees it is the Fourteenth Amendment through which the rights develop, and relief is sought. See *Bell v. Wolfish*, supra.
3. The United States Supreme Court has ruled that the Eighth Amendment’s ban on cruel and unusual punishment is obligatory on the states through the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1972).
4. What is cruel and unusual punishment?
   1. Cruel and unusual punishment prohibition of the Eighth Amendment applies to county jails as institutions.
   2. “Convicted prisoners are protected by the Eighth Amendment to the United States Constitution which prohibits the imposition of cruel and unusual punishment. Like most constitutional declarations, the exact meaning of ‘cruel and unusual punishment’ is somewhat elusive. Consequently, we look to the broad principle underlying the constitutional terms.”
   3. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man... The words of the amendment are not precise... Their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society...” The amendment prohibits penalties that transgress today’s “broad and idealistic concept of dignity, civilized standards, humanity, and decency.” *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980), *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Trop v. Dulles*, 356 U.S. 86 (1958).
   4. Petitioner Hudson, a Louisiana prison inmate, testified that minor bruises, facial swelling, loosened teeth, and a cracked dental plate he had suffered resulted from a beating by respondent prison guards McMillian and Woods while he was handcuffed and shackled following an argument with McMillian, and that respondent Mezo, a supervisor on duty, watched the beating, but merely told the officers “not to have too much fun.” *Hudson v. McMillian* (1992).
5. An important distinction exists within the Eighth Amendment between pretrial detainees and post-trial convicted misdemeanants and felons. Since the due process clause prohibits punishment prior to conviction, the constitutional issue rests on determination of whether the conditions of confinement are punitive in nature. This deals, in part, with the intention of detention facility officials; however, courts have held that, even in the absence of expressed punitive intent, “if a restriction or condition is not reasonably related to a legitimate goal—be it arbitrary or purposeless—a court permissibly may infer that a purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees.” *Bell v. Wolfish*, 441 U.S. 520 (1979); *Campbell v. Cauthron*, supra.

## The student will be able to identify general principles of the Eighth Amendment rights of inmates.

1. The jail administrator has no control over the first two parts of this amendment, bail and fines, but recent U.S. Supreme Court and circuit court decisions dictate that the third part of this amendment, cruel and unusual punishment, is very applicable to the jail/prison administrator in his/her day-to-day management procedures of the jail/prison facility.
   1. The Eighth Amendment proscribes the “unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).
   2. The Eighth Amendment proscribes more than physically barbarous punishments. Its prohibition extends to penal measures which are incompatible with “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Confinement itself, under certain conditions, may violate the Amendment’s prohibition of cruel and unusual punishment.
   3. The Eighth Amendment proscription of cruel and unusual punishment “is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison,” *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974).
   4. “Confinement itself within an institution may amount to cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people...” *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970) aff’d 442 F.2d 304 (8th Cir. 1971).
2. In determining whether particular prison conditions are cruel and unusual, the courts have been guided by certain basic tests or standards which have evolved over years in Eighth Amendment litigation. Thus, depending upon the test or combination of tests focused upon by the court, a prison treatment or condition may be held cruel and unusual because:
   1. it is of such “inherent cruelty” that no conduct upon the part of inmates can warrant it,
   2. although perhaps not frowned upon in the past, it is abhorrent to contemporary society,
   3. it is “excessive” either in the sense that it is disproportionate infraction of prison rules for which it was imposed or in the sense that it is not justified by legitimate penal purposes or aims (even if a severe prison treatment does to some extent serve a legitimate penal aim, it will not be considered permissible if some less drastic means of achieving that aim exists), and
   4. it is administered arbitrarily or discriminatorily.

Comment Note - Prison Conditions Amounting to Cruel and Unusual Punishment, 51 A.L.R.3d 111 (1973).

1. There are five major areas in jail/prison administration will be examined by the courts for violations of cruel and unusual punishment:
   1. Health care
   2. Diet and exercise
   3. Discipline
   4. Protection of inmates from violence
   5. The facility and its physical condition

## The student will be able to identify Eighth Amendment rights of inmates as they relate to health care.

1. Inmates have a basic right to medical care
   1. For some years now, the federal courts have ruled that inmates have a basic Constitutional right to “adequate medical and health care.” Failure to provide such care entitles the inmate to file a legal action against the facility and its administrator. This concept was upheld by the U.S. Supreme Court as late as 1976 in *Estelle v. Gamble*, 97 S.Ct. 285 (1976).

**INSTRUCTOR NOTE:** A more recent case may be more appropriate, such as Gibson v Collier, 5th U.S. Circuit Court of Appeals, (No. 16-51148.) This would illustrate that there is still some ambiguity in this area and is still a relevant issue, particularly in today’s highly controversial environment.

* 1. “[The] principles [behind the guarantee against cruel and unusual punishment] establish the government’s obligation to provide medical [health] care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs: if authorities fail to do so, those needs will not be met.” [*Estelle v. Gamble*, 1976].
  2. The Estelle decision clearly establishes an inmate’s “right” to health care but the court left unanswered such questions as “What standard of care is the inmate entitled to?”; “Must every medical need be met?”; “What about elective medical care etc.?”

1. A common question asked is, “Was this reasonable and adequate under the circumstances?”
   1. The question is probably best answered in the decision of *Mills v. Oliver*, 367 F.Supp. 77 (D.Vir. 1973). “Under the totality of the circumstances, adequate medical care [must be] administered when and where there is reason to believe it is needed. In short, there is a Constitutional right to ‘reasonable medical care’ that is ‘adequate’ under the circumstances.”
   2. Both of these standards are abstract, and a review of other cases is needed to understand “reasonable under the circumstances.” For example, $100,000 in damages to prisoner for excessive force and no medical care. *Rock v. McCoy* 763 F.2d 394 (CA 10, 1985).
2. Standard of Care
   1. In *Church v. Hegstrom*, 416 F.2d 449 (2nd Cir. 1969), the court stated that the failure to provide medical care must be some “barbarous act” or some conduct that shocks the conscience (of a reasonable prudent person). “Mere negligence in giving or failing to supply medical treatment alone will not suffice.”
   2. In *Martinez v. Mancusi*, 443 F.2d 921 (2nd Cir. 1970), the court stated that “deliberate indifference to serious and obvious injuries constitutes gross negligence” that meets the Church standard that “shocks the conscience (of a reasonable person).”
   3. In *Stakes v. Hurdle*, 393 F.Supp. 757 (D. Mo. 1975), the court asserted that the deprivation or inadequacy of “essential” medical care is unreasonable. The court defined essential medical care as: “Whether a physician exercising ordinary skill and judgment would have concluded the symptoms evidenced a serious injury and whether the potential for harm by reason of delay or denial of medical care was substantial.”
3. Denial of Medical Care Violates the Eighth Amendment
   1. A deprivation or inadequacy relative to medical care is actionable under the civil rights act if the complaint alleges a deliberate indifference to a prisoner’s serious medical needs.
   2. Prisoner receives $60,000 from sheriff, county, and state because medication withheld. A prisoner who suffers from epilepsy suffered seizures after his medication was taken from him upon admission to the jail. *Harris County v. Jenkins*, 678 S.W. 2d 639 (Tex. App. 1984).
   3. A punitive damages award was sufficiently supported by evidence of the warden’s callous indifference to the inmate’s serious medical needs, in failing to deprive him of death dealing instrumentalities and placing him in solitary confinement even though he knew or should have known of the inmate’s suicidal tendencies. *Lewis v. Parish of Terrebonne*, 894 F.2d 142 (5th Cir. 1990).
   4. Deliberate Indifference
      1. Denial of necessary medical treatment requested by the inmate.
      2. Where prison officials are cognizant of the urgent need of a prisoner for immediate medical attention and fail to provide it on their own initiative.
      3. Where prison officials ignore or interfere with medical treatment ordered by a physician, 28 A.L.R. Fed. 269, 290.
      4. Jury awarded $99,000 damages against jailer and sheriff for death of county jail prisoner. Although informed of the prisoner’s need for medication, jail officials did not respond to his repeated requests. The jury found the officials were callously indifferent to the prisoner’s known medical needs. *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979).
      5. The appeals court noted that, at the time the pretrial detainee committed suicide in 1989, jail officials were under a clearly established constitutional duty to respond to the detainee’s serious medical needs, including suicidal tendencies and attempts to commit suicide. She was placed in an isolated cell which was not visually monitored, and which could not be reached by a trustee or the dispatcher on duty. *Hare v. City of Corinth, Miss*., 22 F.3d 612 (5th Cir. 1994).
   5. Serious Medical Need
      1. One that has been diagnosed by physician as mandating treatment.
      2. One that is so obvious that even a lay person would easily recognize necessity for doctor’s attention. *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).
   6. A prison health care delivery system was held unconstitutional because access to primary care physicians was denied or substantially delayed by initial screening procedures and inadequate recording. *Todaro v. Ward*, 431 F.Supp. 1129 (S.D.N.Y. 1977) aff’d 565 F.2d 48 (2nd Cir. 1977).
4. Facilities and Personnel
   1. The most critical problem is the shortage of qualified personnel leading to failure to treat or protracted delays in the rendering of treatment. “Certainly, if the infirmity—lack of attention—is of constitutional magnitude, then the deficiency which spawns the infirmity—lack of available personnel, and ill-conceived emergency and referral procedures—can also be deemed to be of constitutional import.” *Newman v. Alabama*, 349 F.Supp. 278 (M.D. Ala. 1972) aff’d in part 503 F.2d 1320 (5th Cir. 1974) cert. denied, 421 U.S. 928 (1975).
   2. “The medical staff and available facilities fail to provide adequate medical care. Inmates have been allowed to perform important medical functions for which they are not qualified. Necessary emergency equipment is lacking, unsanitary conditions prevail in and near the hospital, and inmates with serious contagious diseases are not quarantined.” *Gates v. Collier*, 349 F.Supp. 881 (N.D. Miss. 1972). Additional staff ordered.
   3. Medical facilities are totally inadequate (insufficient personnel, equipment, facilities, medical record keeping). Individuals with contagious diseases and the mentally ill are at large in the population. There is not even basic emergency service much less more complete medical treatment. The district court was ordered to enter a decree with specific requirements and time limits for implementation, *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). Must ensure that every inmate in need of medical attention would be seen by qualified physician when necessary.
   4. States must treat prisoners’ serious medical needs, a constitutional duty obviously requiring outlays for personnel and facilities. *Bounds v. Smith*, 430 U.S. 817, 825 footnote 12 (1977).
   5. In a city jail, there was no constitutional need for in-house medical facilities but inmates must be afforded access to such facilities to assure prompt attention to medical needs. Thorough and detailed observation and guidance by unbiased and highly competent medical experts are solely needed. *Collins v. Schoonfield*, 344 F.Supp. 257 (D. Md. 1972).
   6. Staff shortages render medical services below constitutional muster if the shortage is such that it endangers the health of the inmate population by either lack of medical coverage or by use of unqualified persons to staff the facility. *Laaman v. Helqemoe*, supra. at 312, Finney, supra. 505 F.2d at 202-04.
   7. Lack of action by a correctional officer can be considered “deliberate indifference” if officer intentionally refuses to provide or arrange for treatment. *Robinson v. Moreland*, 665 F.2d 887 (8th Cir. 1981).
   8. Confining a non-violent mentally ill pretrial detainee in a strip cell without clothing, items of personal hygiene, bed or bedding and without out-of-cell recreation for nearly 56 days is punishment and thus, violates due process. The intent to punish and the knowledge of conditions are implied from the facts. *Littlefield v. DeLand*, 641 F.2d 729 (l0th Cir. 1981).
   9. Costs: Court upheld $3 per visit medical fees charged to inmates. *Shapley v. Nevada Board of Prison Commissioners*, 766 F.2d 404 (CA9 1985). U.S. Supreme Court rules the city is not automatically liable for inmate medical bills. *City of Revere v. Massachusetts General Hospital*, 103 S. Ct. 2979 (1983).
5. Mental Health Care
   1. A convicted prisoner is entitled to psychological or psychiatric care for serious mental or emotional illness. There is “no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.” *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977).
   2. “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 that which 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....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....” *Inmates of Alleqhany County Jail v. Pierce*, 612 F.2d 754, 763 (3rd Cir. 1979).
   3. Prison officials were required to identify those inmates who require mental health care and to make arrangements for the provision of such care whether it be in the facility or elsewhere and were required to hire mental health professionals and support personnel. *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976).
   4. To consider deliberate indifference: [*Woodall v. Foti*, 648 F.2d 268 (5th Cir. 1981)]:
      1. The seriousness of the illness
      2. The need for immediate treatment
      3. The likely duration of incarceration
      4. The possibility of harm through postponement of treatment
      5. The possibility of cure or improvement in the condition
      6. The extent to which the inmate is a danger to self or others
         1. The availability and expense of psychiatric treatment
         2. The effect of such treatment on the operation of the institution
         3. Jails should not be used to hold persons awaiting involuntary civil commitments. *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984).
6. Physical Examination/Intake Screening
   1. “An inmate’s dependency upon the prison’s medical system includes, of necessity, the diagnostic stage of medical treatment. The failure to discover and/or diagnose serious medical problems can lead to the same evils as does the lack of therapeutic attention once an illness or injury is known. If one is to be considered as a shocking failure on the part of the government to fulfill its duty to provide adequate medical care, so must the initial failure of the system to provide for discovery of latent and incubating diseases and medical problems. Furthermore, the systematic absence of complete routine physical examinations, blood tests, syphilis tests, and other ordinary preventative medical measures can endanger the entire prison community.” *Laaman v. Helqemoe*, supra. at 312.
   2. The Circuit Court of Appeals ruled the city had been deliberately indifferent to the prisoner’s serious medical needs, determining that suicidal behavior constituted a serious need and that protecting prisoners from themselves is “an aspect of the broader constitutional duty to provide medical care.” *Partridge v. Two Unknown Police Officers*, 751 F.2d 1448 (5th Cir. 1985).
   3. A reasonable medical exam must be given to each entering prisoner. *Jones*, supra.
   4. Inmates remaining over seven days must be given a physical examination. *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (D. Mass. 1973).
   5. Sick call is to be held by a physician at least twice a week. Examination facilities are to be provided. *Vest v. Lubbock County*, 444 F.Supp. 824 (N.D. Tex. 1977).
   6. All pretrial detainees must be given a pre-detention physical examination. *Ahrens v. Thomas*, 434 F.Supp. 873 (W.D. Mo. 1977) aff’d 570 F.2d 286 (8th Cir. 1978). Prisoner died and $147,000 judgment for failure to provide proper intake screening. *Garcia v. Salt Lake County*, 76B F.2d 303 (CA 10 1985).
7. Summary of Inmate’s Health Care Rights
   1. Inmates of jails/prisons have a constitutional right under the Eighth Amendment and the Civil Rights Act to reasonable medical care. The courts, including the U.S. Supreme Court, have defined what violates the “entitled to reasonable health care” standard in threefold definition:
      1. If the lack of health care is of such “deliberate indifference” to “shock the conscience of the court”
      2. If the treatment of the prisoner is “grossly negligent” or constitutes some “barbarous act;” and,
      3. “If the deprivation of care would, in the judgment of a physician exercising ordinary care and judgment, seriously endangers the prisoner’s well-being.”
   2. These negative definitions are helpful. From them, it can be determined that jail/prison officials are not required to provide “perfect or superior” medical care to inmates, but only that care that is reasonably designed to meet routine and emergency health care needs of the facility. *Battle v. Anderson*, (1974).
   3. The courts have essentially used these same standards in relating to the-adequacy of facilities and physicians’ competence (*Seward v. Hutto*, 525 F.2d 1024 8th Cir.), sanitation and overcrowding (*Newman v. Alabama*, 503 F.2d 1320, 1975), and specialized treatment (*Mosby v. O’Brien*, 414 F.Supp. 36 Mo. 1976). Mere negligence or less than “ideal” circumstances do not constitute a cause for action under either the Federal Civil Rights Act, the Eighth Amendment’s prohibition against cruel and unusual punishment, or a regular tort action.
   4. The negligence must be “gross” or “shocking,” but if the level of medical care is gross or shocking, jail/prison administrators cannot use economic considerations as a defense in court, i.e., “We don’t have the money to provide reasonable care.” *Newman v. Alabama*, (1975).
   5. Again, economic considerations do not constitute a valid defense. Supreme Court Justice Blackman said, “Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.” Everything said about inmates applies to an even greater degree to the un-convicted pretrial detainee.

## The student will be able to identify Eighth Amendment rights of inmates as they relate to diet and exercise.

1. Diet
   1. A bread and water diet is inconsistent with minimum standards of respect for human dignity and violates the Eighth Amendment. *Landman v. Royster*, 333 F.Supp. 621, 647 (E.D. Va. 1971), *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1969).
   2. Depriving a prisoner of basic necessities such as adequate food is cruel and unusual punishment. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974).
   3. Every prisoner is to be served three wholesome and nutritious meals per day, served with proper utensils and prepared under the supervision of a dietitian with a bachelor’s degree or its equivalent. The Board of Corrections shall employ a registered dietitian as a nutrition consultant. Special diets required by individuals for health or religious reasons shall be provided. *Pugh v. Locke* 406 F.Supp. 318 (M.D. Ala. 1976); *Laaman v. Helaemoe*, 437 F.Supp. 269 (D.N.H. 1977).
   4. All food is to be stored under sanitary conditions. The diet is to be prepared under the supervision of a trained dietitian. All kitchen personnel are to be properly trained and given physical examinations so as to prevent the spread of illness and disease as a result of contact with food and utensils. *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D. Ill. 1980).
2. Exercise
   1. Confinement to cell for periods up to one year without any opportunities for physical exercise, work, or education programs violates the Eighth Amendment. All inmates must be afforded reasonable time outside their cells daily for the purpose of exercise or other forms of recreation. When weather permits, the inmates shall be allowed outdoors during at least part of this exercise period. *Battle v. Anderson*, 376 F.Supp. 402 (E.D. Okla. 1974).
   2. Inmates suffer physical deterioration from lack of opportunities for exercise and recreation. Adequate equipment and facilities shall be provided to offer recreational opportunities to every inmate. *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976).
   3. Failure to provide physical exercise for a reasonable period of time constitutes a threat to the well-being of prisoners which is cruel and unusual punishment. A lack of adequate facilities for exercise poses a similar threat. Prisoners in isolation shall be allowed 30 minutes of physical exercise daily. *Laaman v. Helgemoe*, supra.
   4. Inmates confined to their cell for more than 16 hours a day must be given an opportunity to exercise one hour per day. The determination of the type of exercise equipment and facilities available for this purpose shall be within the discretion of jail officials. They must, however, provide a meaningful opportunity for exercise. Being allowed to walk around a narrow corridor is not sufficient. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir.1980).
   5. Daily recreation required. *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (CA3 1983); *Moore v. Janning*, 427 F. Supp. 566 (D. Neb. 1976); *Bono v. Saxbe*, 482 F. Supp. (E.D. Ill. 1978).
   6. Three hours per week. *Alberte v. Sheriff of Harris Co.*, 406 F. Supp. 649 (S.D. Tex. 1975); *Johnson v. O’Brian*, 445. F. Supp. 122 (E.D. Mo. 1977).
   7. The importance of recreational programs in jails is underscored by a recent court decision which held that a permanent recreational program was essential to the proper administration of a jail facility and ordered that each inmate should be provided a minimum of one- hour recreation off the tier at least five days a week. The court ordered the construction of the recreation area and that additional security personnel be hired. *Franklin v. State of Oregon*, State Welfare Division, 662 F.2d 1337, 46 (9th Cir. 1981).
   8. Cases requiring outdoor recreation are: *Ahrens v. Thomas*, 434 F.Supp. 872 (W.D. Mo. 1977); *Spain v. Procunier*, 600 F.2d 187 (9th Cir. Court of Appeals 1979); *Dillard v. Pitchess* 399 F.Supp. 1225 (C.D. Calif. 1975). But *Jones v. Diamond*, 594 F.2d 997 (5th Cir. Court of Appeals 1979) did not require outdoor recreation.
   9. A review of the court decisions indicates that the length of confinement and conditions of confinement are relevant considerations in determining an inmate’s right to exercise.

## The student will be able to identify Eighth Amendment rights of inmates as they relate to discipline.

1. Cruel and Unusual Punishment Generally
   1. The Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, supra.
   2. Justice Brennan of the U.S. Supreme Court said this of punishment: “Punishment must not...be degrading to the dignity of human beings.” Physical abuse is definitely not allowed any physical restraint must be just that--only restraint. And the standard for that restraint is to be “the least restrictive alternative after a clear and present danger is shown.” This concept means that any force applied to an inmate will be examined to see if a danger did exist and if less force would have accomplished the same objective. If physical abuse or excessive force can clearly be shown, the jail administrator as well as his personnel can be found civilly liable under several different causes of action.
2. Test for Cruel and Unusual Punishment
   1. In all cases of inmate discipline three tests will be applied by the courts to determine if “cruel and unusual punishment” has occurred. These three tests are as follows:
      1. Is the punishment disproportionate to the offense?
      2. Whether the punishment is of such a nature as to shock the general conscience of a modern society (e.g. putting naked inmates in cold, unheated cells).
      3. Although applied in pursuit of a legitimate penal aim, did the punishment go beyond that necessary to achieve the objective? *Roper v. Simmons*, 543 U.S. 551 (2005); *Weems v. United States*, 217 U.S. 349, (1910), *Landman v. Royster*, 333 F.Supp. 621 (D. Va. 1971).
   2. The standard again is “the evolving standard of decency in a modern society.” Physical abuse in any form will not be tolerated by the courts and such abuse subject’s jailer and the jail administrator to severe liability under the Federal Civil Rights Act, civil tort law, and a 1983 action for violation of the prohibition of “cruel and unusual punishment” portion of the Eighth Amendment.
   3. Even in emergency situations requiring physical force, the courts will examine the circumstances in light of the doctrine of “The Least Restrictive Alternative;” that is, “would any less force have been just as effective in accomplishing the legitimate objective of the facility?”
   4. It should be stated that the law presumes the jailer/jail administrator acted reasonably in any situation requiring physical force, and until it becomes “clear as a matter of law” (so clear that reasonable people cannot differ over the results) that the negligence or the physical force were gross, the plaintiff (person suing) has the burden to prove negligence or abuse as a matter of law: then the burden of proof shifts and the jailer and the jail administrator now have the burden of proving to the court that their actions under the circumstances were reasonable. There is a saying in legal circles, “He who has the burden, loses the case.”
      1. A prison warden was personally liable to a prisoner whose Eighth Amendment rights were violated. The warden admitted knowing that the prisoner was kept in segregation for nine months after he refused to clean pork off trays on religious grounds and did nothing about it even after receiving a letter from his supervisor.
      2. The warden was in the best position to know that a constitutional deprivation had occurred and had the authority to remedy the situation but did nothing. *Chapman v. Pickett*, 801 F.2d 912 (7th Cir. 1986), remanded by *Chapman v. Pickett*, 840 F.2d 20 (1988).

## The student will be able to identify Eighth Amendment rights of inmates as they relate to protection of inmates from violence.

1. The U.S. Supreme Court has upheld a jury award of $25,000 in compensatory damages and $5,000 in punitive damages against a guard who showed reckless and careless disregard and indifference to inmate’s safety by placing a third inmate in the cell where plaintiff was beaten and sexually assaulted by the new cellmate. The guard knew or should have known the third inmate was violent and an assault would take place. *Smith v. Wade*, 103 S.Ct. 1625 (1983).
2. The state must assume responsibility for the safekeeping of prisoners. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). Under the Eighth Amendment, prisoners are entitled to protection from the assaults of other prisoners. *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).
3. The state has a duty to provide reasonable protection from constant threat of violence, *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976); and to provide freedom from assaults or threat of violence, *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).
4. If inmates are confined in open barracks, the state has a constitutional duty to provide guards. Reports that prisoners are frequently assaulted and raped and that no adequate means exist to protect inmates from assaults clearly confirm the district courts’ findings of Eighth Amendment violations, *Holt*, supra.
5. Inmates are subjected to cruel and unusual punishment by not providing adequate protection against assaults, through failure to classify them and segregate the violent from the nonviolent and by use without supervision of incompetent and untrained inmate “trusties” to guard other inmates. *Gates v. Collier*, 349 F.Supp. 881 (N.D. Miss. 1972) aff’d 501 F.2d 1291 (5th Cir. 1974).

**INSTRUCTOR NOTE:** It is important to note the modern-day reference to not using “trusties” to guard inmates. The course content presentation should not give an inappropriate recommendation that this is currently allowed.

* 1. Especially in Texas, this decision abolished the use of “Building Tenders.”
  2. Building Tenders were inmates who kept other inmates in line in exchange for privileges from administration. They were physically powerful and intimidating inmates, who enforced their wills on other inmates, often through brutal beatings.

1. “The number of guards necessary to assure a constitutional level of inmate safety must bear reasonable relationship to the total number of inmates.” The evidence for the proper staff-inmate ratio may be provided by examining the kinds of facilities, their capacities and purposes, and the number of guards required for security in each. The court upheld the order requiring the presence of two guards in open dormitories at all times. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977).
2. Other Examples
   1. (South Dakota CL 24-11-13 and 24-11-23) specify the responsibility of the Sheriff and governing body with respect to the supervision of the jail.
   2. Sheriff has duty to use reasonable care and prudence for safety and protection of prison inmates and while he is not insurer of safety of prisoners, he has duty to protect them from injury which he should have reasonably foreseen or anticipated. *Blakey v. Boos*, 153 N.W.2d 305 (1967).
   3. The jail authorities did not violate the inmate’s constitutional rights simply by placing him in the same cell as an inmate who had tested positive for AIDS, absent any allegation or proof of sexual contact among the inmates or other activities that could pose serious risk of transmission of AIDS, such as sharing of needles for intravenous drug use. *Welch v. Sheriff, Lubbock County, Tex.*, 734 F.Supp. 765 (N.D. Tex. 1990).
   4. The Supreme Court, found that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 114 S.Ct. 1970 (1994); *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (2007).

**INSTRUCTOR NOTE:** Texas Commission on Jail Standards (TCJS) currently requires a staffing ratio of one officer per 48 or any part of 48 inmates, and sufficient other staff to perform necessary functions.

## The student will be able to identify Eighth Amendment rights of inmates as they relate to facility and physical conditions.

1. Specific Conditions Found Wanting
   1. Justices: Brennen, Blackmun, and Stevens (1981) listed items which would determine whether a facility has such poor conditions as to violate the Eighth Amendment: (applying to long term prison population)
   2. Physical plant conditions: lighting, heat, plumbing, ventilation, living space, noise levels, and recreation space.
   3. Sanitation: control of vermin, and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working.
   4. Safety: protection from violent, deranged, or diseased inmates, fire protection and emergency evacuation.
   5. Staffing: trained and adequate guards and other staff, and avoidance of placing inmates in positions of authority over other inmates.
   6. Recently, more and more facilities are being successfully sued as violating the Eighth Amendment. The circuit courts and the U.S. Supreme Court have applied the three tests of cruel and unusual punishment (mentioned in the preceding section on discipline) and have found the following to be a violation of the Eighth Amendment:
      1. Small, dark, unventilated cells without toilets
      2. Gross unsanitary conditions
      3. Gross overcrowding
      4. Insects and vermin in cells
      5. No medical/health care facilities
      6. Unheated cells in cold climates
   7. Environmental tobacco smoke (ETS). The Supreme Court ruled that the inmate’s Eighth Amendment claim could be based upon possible future harm to his health, as well as present harm, arising out of exposure to ETS. *Helling v. McKinney*, 113 S.Ct. 2475 (1993); *Erickson v. Pardus*, 127 S. Ct. 2197 (2007).
   8. National Fire Protection Association (NFPA) Life Safety Code required in *Ramos v. Lamm*, supra.
2. Fire Safety
   1. Courts have required jails to install modern fire equipment and take modern fire safety precautions. See *Watson v. Ray*, S.Dist.Ia. 78-106-1 (March 2, 1981):
      1. No styrene butadiene mattresses nor polyurethane
      2. Electrical wiring to 1981 National Code standards
      3. Fire extinguishers installed and maintained
      4. No padlocks on any occupied cells
      5. Use of personal padlock by inmate only when occupied
      6. Two fire exits per building and range smoke exhaust ventilation equipment
3. Shift in Liability
   1. A facility itself may violate the Eighth Amendment, although there is little a jail administrator can do about the problem, but proper notification to commissioners can shift liability. A facility cannot be grossly overcrowded or unsanitary. Cells must be heated, with reasonable bunk and toilet facilities. Last, pretrial detainees are entitled to greater safeguards than convicted prisoners.
   2. Totality of Circumstances
      1. “Modern courts have increasingly acknowledged that the concept of cruel and unusual punishment is not limited to situations in which a particular inmate is subjected to punishment directed toward him as an individual, it is often being said that confinement within an institution where offensive practices and conditions generally prevail can itself expose the inmate to cruel and unusual punishment, even though he has never been subjected to specific disciplinary action.
      2. More and more, the judicial approach has been to consider cruel and unusual punishment claims considering the totality of the circumstances surrounding life within a penal institution.
      3. In furtherance of this approach, many courts have focused their attention not upon the question of whether several prison conditions individually inflict cruel and unusual punishment, but upon the broader question of whether cruel and unusual punishment attends the overall confinement of inmates within an institution where such conditions, taken together, exist.... A proscription against cruel and unusual punishment can be violated by the cumulative effect of several prison conditions which considered independently might or might not approach the requisite seventy.” 51 A.L.R.3d 111, 207 (1973).
4. Space/Overcrowding
   1. The issue of space requirements for prisoners and overcrowding has been the subject of many court decisions which have ordered reductions in prison population and increases in inmate square footage from 50 square feet to 80 square feet per prisoner. See *Gates v. Collier*, supra.; *Pugh v. Locke*, supra.; *Battle v. Anderson*, supra.; *Laaman v. Helgemoe*, supra.; and *Palmlgiano v. Garraty*, supra.
   2. The question of whether a prison is overcrowded to the point of unconstitutionality involves more than determining how many square feet of living space are allocated to individual inmates. Regard must be had to the quality of the living quarters and to the length of time which inmates must spend in their living quarters each day...” *Finney v. Hutto*, 410 F.Supp. 251, 254 (E.D. Ark. 1976) aff’d 548 F.2d 740 (8th Cir. 1976). The length of incarceration also is a consideration, *Bell v. Wolfish*, supra.
   3. There is no evidence that double bunking under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment. The Constitution does not mandate comfortable prisons, and prisons of the Southern Ohio Correctional type, which house persons convicted of serious crimes, cannot be free of discomfort. *Rhodes v. Chapman*, S.Ct. 2392 (1981). Keep in mind this Ohio State prison was very modern with numerous inmate programs and activities.
   4. The district court found that the fact that the inmate was temporarily forced to sleep on the jail floor due to overcrowding did not give rise to a violation of his constitutional rights. *Castillo v. Bowles*, 687 F.Supp 277 (N.D.Tex. 1988).
   5. The determination of space needs is made by the courts on a case-by-case basis.
      1. The 8th Circuit Court has ruled that it is unconstitutional to hold two inmates in 47 sq. ft. and three inmates in 65 sq. ft. cells and advised the district court to reevaluate double celling in 65 sq. ft. cells, suggesting that double-celling be eliminated. *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979) aff’d *Burks v. Walsh*, 461 F.Supp. 454 (W.D. Mo. 1978).
      2. “Six inmates, who are released from their cells for eight hours per day or more may be housed in the 130 to 154 sq. ft. cells. Comparable space requirements shall apply to such inmates housed in larger or smaller cells and the number of bunks shall not exceed the maximum number of inmates permitted. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980).
   6. The test for space needs for pretrial detainees was enunciated by the Supreme Court stating, “Confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the due process clause as to whether those conditions amount to punishment...” *Bell v. Wolfish*, supra., 441 U.S. at 542, 99 S.Ct. at 1875.

## The student will be able to identify Eighth Amendment rights of inmates as they relate to classification.

1. To date, the courts have not determined that there exists a constitutional right to a classification system. However, several courts have ordered the establishment of a classification system as a remedy to eradicate abuses that were themselves unconstitutional, to assure safety of prisoners.
   1. The 5th Circuit affirmed the establishment of a classification system noting the state’s duty to provide protection against assaults and its failure to classify inmates according to the severity of their offense. *Gates v. Collier*, 349 F.Supp. 881 (N.D. Miss. 1972) aff’d 501 F.2d 1291 (5th Cir. 1974).
   2. Racially discriminatory classification is prohibited. *Gates v. Collier*, supra.
   3. Classification is essential to an orderly and safe prison. *Palmigiano v. Garrahy*, 443 F.Supp. 956, (D.R.I. 1977).
   4. Adequate classification is needed for officials to fulfill their duty to diagnose and treat inmates’ medical and psychological needs and to protect them from assaults. *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977).
   5. The classification process’ failure to function results in the unnecessary debilitation of the inmates in violation of their constitutional rights. *Trigg v. Blanton*, No. A-6047 (Davidson Co., Tenn. Chancery Ct. August 23, 1978).
   6. Officials must establish classification system which will make it possible to determine which inmates require maximum security confinement, to separate violent from non-violent prisoners. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).
   7. The classification should include:
      1. age,
      2. length of sentence,
      3. nature of crime,
      4. past offenses.

*Doe v. Lally*, 467 F.Supp. 1339 (D.Md. 1979).

* 1. Federal appeals court found that a state prison’s classifications and assignment procedures are unconstitutional insofar as they do not even require a review of an inmate’s file before assigning him a cell or work partner. *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988).

1. Where a classification system exists, classification decisions cannot be arbitrary, irrational, or discriminatory, *Johnson v. California*, 543 U.S. 499 (2005); *Laaman v. Helgemoe*, 437 F.Supp. 269 (D.N.H. 1977); *Washington v. Lee*, 263 F.Supp. 327 (M.D. Ala. 1966), aff’d mem. sub. mon., *Lee v. Washington*, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968).

## The student will be able to identify Eighth Amendment rights of inmates as they relate to rehabilitation.

1. Right to Rehabilitation
   1. State law does not require the governing body of each jail to formulate a plan whereby the resources of the community are utilized to provide inmates with available educational, vocational, counseling and work release opportunities. Each jail administrator should, if possible, provide opportunities for access to available religious, mental health, alcoholism, and addiction counseling by inmates desirous of such counseling.
   2. The 8th Circuit has indicated that the lack of rehabilitation programs could, in the face of other conditions, be a violation of the Eighth Amendment. *Finney v. Arkansas* *Board of Corrections*, 505 F.2d 194 (8th Cir. 1974).
   3. “In *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed. 2d 435 (1972), Mr. Justice Blackman stated: At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” Id. at 738, 92 S.Ct. at 1858. The Supreme Court has recognized rehabilitation as one of the ends of correctional confinement. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 412-413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974).” *Finney*, supra. at 208.
   4. Absence of rehabilitation programs constitutes a constitutional failure, *Palmiqiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977); *Rhodes v. Chapman*, 452 U.S. 337 (1981)
   5. An inmate’s right to a particular classification or work assignment is not controlled by federal law but will be determined by state standards, law and guidelines. *Peck v. Huff*, 660 F.2d 371 (8th Cir. 1981).
   6. In the absence of grievously debilitating prison conditions, failure to provide vocational and educational training does not violate the Constitution. Likewise, the diminution of the educational opportunities available to such prisoners is not a deprivation as to constitute punishment under the Eighth Amendment. *Peck v. South Dakota Penitentiary Employees*, 332 N.W.2d 714 (1983).
2. Required Attendance
   1. Where rehabilitative programs, including work programs, exist, prison officials may mandate attendance. *Jackson v. McLemore*, 523 F.2d 838 (8th Cir. 1975).
      1. Unless ordered by the courts pretrial detainees may not be subjected to mandated programming.
      2. Inmates sentenced to serve their sentence in county jails may be required to participate in court ordered programming.
   2. Refusal by a prisoner to participate may properly result in disciplinary action. *Jackson*, supra.

# UNIT 7. The Fourteenth Amendment

## The student will be able to identify general principles of the Fourteenth Amendment rights of inmates.

1. The Fourteenth Amendment contains several important concepts, most famously state action, privileges and immunities, citizenship, due process, and equal protection—all of which are contained in Section One. Section One will be covered in detail; however, the Fourteenth Amendment contains four other sections.
   1. Section Two deals with the apportionment of representatives to Congress.
   2. Section Three forbids anyone who participates in “insurrection or rebellion” against the United States from holding federal office.
   3. Section Four addresses federal debt and repudiates debts accrued by the Confederacy.
   4. Section Five expressly authorizes Congress to enforce the Fourteenth Amendment “by appropriate legislation.”
2. Section One has two parts:
   1. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”
   2. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”
3. The Fourteenth Amendment makes all the other amendments applicable to the states.
4. Section One has three major provisions that are applicable to jail administrators.
   1. No state may enforce any law which shall abridge the privileges or immunities of citizens of the United States.
   2. No state shall deprive a person of life, liberty, or property without due process (mentioned under due process).
   3. Nor deny any person equal protection (mentioned previously).

## The student will be able to identify Fourteenth Amendment rights of pretrial inmates.

1. Pretrial detainees also retain the express guarantees of the Constitution found in the First, Fourth, Fifth, Sixth and Eighth Amendments (discussed previously).
2. While the Eighth Amendment specifically protects against “cruel and unusual punishment” the Fourteenth Amendment grants detainees protection from punishment found in due process and equal protection clauses. *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3rd Cir. 1976).
3. In addition to any of the express guarantees of the Constitution is the pretrial detainee’s right to be free from punishment. “In 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 that the proper inquiry is whether those conditions amount to punishment of the detainee.
   1. For under the due process clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.
   2. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime.” *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).
4. The court of appeals held that due process clause accords pretrial detainees rights not enjoyed by convicted inmates; while a sentenced inmate may be punished in any fashion not cruel and unusual, the due process clause forbids punishment of a person held in custody awaiting trial but not yet adjudged guilty of any crime. *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981); overruled in unrelated part in *International Woodworkers of Am. v. Champion Int’l Corp*., 790 F.2d 1174 (1986).
   1. Not every disability imposed during pretrial detention amounts to “punishment” in the constitutional sense, however. Once the government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention.
   2. For example, the government must be able to take steps to maintain security and order-at the institution and make certain no weapons or illicit drugs reach detainees.
   3. In addition to ensuring the detainee’s presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.” Bell, supra.
5. What Is Punishment?

**INSTRUCTOR NOTE:** This section is important, particularly in the realm of understanding what the constitution views as punishment. It is important for jail administrators to understand what can be mandated for pretrial detainees. Refer to the Criminal Law publication at: <https://open.lib.umn.edu/criminallaw/>

* 1. Punishment has five recognizable purposes:
     1. Deterrence
     2. Incapacitation
     3. Rehabilitation
     4. Retribution
     5. Restitution
  2. Deterrence has two types
     1. Specific deterrence is specific to the individual, when the government punishes an individual, in theory, that individual is less likely to commit another crime because of the fear associated with the punishment or fear associated with a more severe punishment.
     2. General deterrence is regarding the public’s knowledge of the punishment. When the public learns of a punishment of an individual, the public is, in theory, less likely to commit a crime because of the fear associated with a similar experience.
  3. Incapacitation prevents future crime by removing the individual from society. Examples include incarceration, house arrest, or execution pursuant to the death penalty.
  4. Rehabilitation prevents future crime by altering a defendant’s behavior. Examples include educational and vocational programs, treatment center placement, behavioral therapies, and counseling.
     1. The court can combine rehabilitation with incarceration or with probation or parole.
     2. In some states, for example, nonviolent drug offenders must participate in rehabilitation in combination with probation, rather than submitting to incarceration (Ariz. Rev. Stat., 2010).
     3. This lightens the load of jails and prisons while lowering recidivism, which means reoffending.
  5. Retribution prevents future crime by removing the desire for personal avengement against the defendant. Once the victim of a crime, or society, discovers that a defendant has been adequately punished, they achieve a certain satisfaction regarding the effectiveness of the criminal justice system.
  6. Restitution theoretically reduces criminal activity by punishing the defendant financially. Restitution is when the courts order the defendant to pay the victim for any harm, this resembles a civil litigation damages award.

1. Pretrial detainees are not convicted, by definition, and should not be subjected to any hardships or restrictions except those justified by the “compelling necessities” of jail administration, or that are “absolutely requisite” for the purpose of confinement.
2. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be found to be cruel and unusual.
3. The Fourteenth Amendment does not prevent detainees from voluntarily participating in rehabilitative programs during the pretrial phase of their incarceration; however, the standards of the Eighth Amendment must be upheld in regard to cruel and unusual punishment, regardless of conviction status.
4. If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not without more (i.e., it is not an excessive response) 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 (because they are) detainees. Bell, supra.
5. Least Restrictive Means for Detainees is the “why” of jail rules and restrictions becomes critical in determining whether they may be appropriately applied to pretrial detention. In addition, jail administrators must ensure that the “least restrictive means” is used in the rule’s application to pretrial detainees. The bottom line is that pretrial detainees are entitled to greater freedom and more rights than are convicted prisoners. A review of jail population statistics shows that at least 80 percent of the jail’s population is pretrial detainees. Therefore, it is important for jail administrators to carefully review the intent and purpose of their policies and procedures.

## The student will be able to identify due process requirements of the Fourteenth Amendment rights of inmates.

1. Major Rule Violation - The Supreme Court noted in its *Wolff v. McDonnell* decision that prisoners who violated major prison rules which could result in serious punishment including loss of good time, solitary confinement, or loss of privileges for an extended period of time were entitled to due process hearing.
2. Due process requires not only that prisoners have prior notice of what behavior is prohibited but also that when a rule is violated, they be given:
   1. notice of the charge
   2. time to prepare a response
   3. an impartial hearing
   4. right to call witnesses
   5. written findings of fact
3. Segregation for Safety Purposes - If the intent of segregation is to ensure the safety of the prisoner not punishment, then due process requirements are not applicable. *Cummings v. Roberts*, 628 F.2d 1065 (8th Cir. 1980
4. Adverse Inference from Silence - Permitting an adverse inference to be drawn from an inmate’s silence at his disciplinary hearing is not, on its face, an invalid practice. *McKune v. Lile*, 536 U.S. 24 (2002); *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).
5. The transfer of an inmate to segregation for non-punitive reasons does not require procedural due process. *St. Louis County Jail, Cummins v. Roberts*, 628 F.2d 1065 (8th Cir. 1980). Only an informal, non-adversary review is required. *Hewitt v. Helms*, 103 S.Ct. 864 (1983).

# UNIT 8. Prison Rape Elimination Act 2003

## The student will be able to identify the general principles of the Prison Rape Elimination Act (PREA).

1. The Prison Rape Elimination Act of 2003 was passed unanimously by Congress and signed by the President in 2003.
   1. Addresses the detection, elimination, and prevention of sexual assault and rape in correctional systems, including lock-ups operated by law enforcement.
   2. Funds the development of national standards of compliance and accountability.
   3. Directs collection and dissemination of information on the incidence of arrestee-on-arrestee sexual violence as well as staff sexual misconduct with arrestees.
   4. Awards grants and technical assistance to help agencies implement the Act.
2. For the purposes of PREA, the term “prison” applies to all federal, state, and local prisons, jails, police lock-ups, temporary holding cells, private facilities, and community settings such as residential facilities. The term “inmate” applies to any person held in a custodial setting for any length of time by any of the facility types mentioned above.
3. PREA and Law Enforcement
   1. PREA addresses the safety of arrestees while in the custody of the agency—including arresting agencies—from sexual assault, sexual harassment, “consensual sex” with employees, and arrestee-arrestee sexual assault.
   2. PREA also directs agencies to maintain data regarding arrestee-arrestee sexual assaults, nonconsensual sexual acts, and staff sexual misconduct.

**INSTRUCTOR NOTE:** PREA standards can be found at the PREA Recourse Center found at: <https://www.prearesourcecenter.org/implementation/prea-standards/prisons-and-jail-standards>.

# APPENDIX A: SUMMARY OF CONSTITUTIONAL RIGHTS

A. Right to exercise one’s religion

B. Right to freedom of speech and communication

C. Right of access to the press

D. Right to petition the Government for redress of grievance

E. Right to be protected against unreasonable searches

F. Right to access to courts and attorneys

G. Right to know the charges against oneself

H. Right to be free from cruel and unusual punishment

I. Right to due process

J. Right to equal protection of the laws, rules or regulations

K. Right to be free from discriminatory practices

# APPENDIX B: STUDENT HANDOUTS

**INSTRUCTOR NOTE:** Instructors are not required to use the below student handouts. They are included as additional resources to assist the instructor in presenting the course material as needed.

* Prison Rape Elimination Act of 2003
* Bureau of Justice Statistics Status Report: PREA Data Collection Activities 2021 (<https://bjs.ojp.gov/library/publications/prea-data-collection-activities-2021>) or current year when it comes available
* The New Standard. September 2004: *Former Inmate Can Sue Texas Official for Rights Violations*
* The Texas Tribune. November 2020: *U.S. Supreme Court allows inmate to sue prison officers after he was forced to spend six days in unsanitary cells with human waste*
* Texas Jail Project. July 2009. *Dallas County to Settle Two Jail Inmate Lawsuits.* [*https://www.texasjailproject.org/2009/07/dallas-county-to-settle-two-jail-inmate-lawsuits/*](https://www.texasjailproject.org/2009/07/dallas-county-to-settle-two-jail-inmate-lawsuits/)
* Texas Jail Project. November 2009. *Prison Legal News Sues Texas Dept of Criminal Justice for Censoring Books*. <https://www.texasjailproject.org/2009/11/prison-legal-news-sues-texas-dept-of-criminal-justice-for-censoring-books/>
* National Institute of Corrections. 2007. *Jails and the Constitution- An Overview*.
* Geographic Boundaries of United States of Appeals and United States District Courts
* Federal Judicial Districts within the State of Texas

# APPENDIX C: NUTS AND BOLTS OF LAWSUIT

**INSTRUCTOR NOTE:** Double click on the icon to access the resource.



# APPENDIX D: TEXAS JAIL PROJECT—IN THE NEWS; SELECTED MEDIA REPORTS

**Prison Legal News Sues Texas Dept. of Criminal Justice for Censoring Books**

***November 17, 2009***

Prison Legal News is an independent national publication that covers both prison and jail news/issues. Some jail and prison administrators in Texas have tried to block inmates from receiving it, despite that being unconstitutional. In 2007, PLN won a suit against Dallas County Jail which had tried to ban newspapers and magazines for inmates. Prison Legal News has now teamed up with the Texas Civil Rights Project in an important new case described in the following press release.

Corpus Christi, TX -- Prison Legal News (PLN), a non-profit monthly publication that reports on criminal justice-related issues, has filed suit in federal district court against Brad Livingston, Executive Director of the Texas Dept. of Criminal Justice (TDCJ), and other TDCJ officials.

According to PLN’s complaint, TDCJ has inappropriately censored books sent to Texas state prisoners. One of the censored books was Women Behind Bars: The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi. Ms. Talvi is an accomplished journalist and award-winning author. Her book on incarcerated women was described by one reviewer as a “comprehensive and passionately argued indictment of the inhumane treatment of female prisoners ... the sort of shocking expose too seldom seen in these media days of so much celebrity fluff.” Two other Texas prisoners also were not allowed to receive Women Behind Bars after placing book orders with PLN.

The case is Prison Legal News v. Livingston, U.S. District Court (S.D. Texas, Corpus Christi Division), Case No. 2:09-cv-00296. PLN is ably represented by Scott Medlock with the Texas Civil Rights Project and by HRDC general counsel Daniel E. Manville in Ferndale, Michigan.

PLN contends that the censorship of Women Behind Bars, which was upheld by senior prison officials, was improper. Further, the TDCJ did not notify PLN of the censorship decision which would have provided PLN an opportunity to respond and contest that decision.

TDCJ staff also censored another book ordered from PLN, The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, on the basis that the book mentions “rape.” In fact, as PLN explains in its federal complaint, Perpetual Prisoner Machine “quotes from a 1968 Philadelphia District Attorney’s Office investigation into sexual assault in prison, and describes crimes committed against prisoners.” Again, the TDCJ did not notify PLN of this censorship.

“It is a sad commentary when government officials censor books sent to prisoners -- particularly books that deal with prisoners’ rights and conditions in our nation’s prisons,” stated PLN editor Paul Wright. “Apparently, the TDCJ prefers that prisoners remain uninformed about issues that directly affect them. We believe this is a poor rationale for censorship.”

“For decades, Texas prisoners have had the right to read most books while they are incarcerated,” said Scott Medlock, Director of the Texas Civil Rights Project’s Prisoners’ Rights Program. “If there is anything everyone should be able to agree on, it’s that encouraging prisoners to read is a good thing.”

PLN is seeking compensatory, punitive and nominal damages plus declaratory and injunctive relief for violation of its rights under the First and Fourteenth Amendments, as well as attorney fees and costs.

Prison Legal News (PLN), founded in 1990 and based in Seattle, Washington, is a non-profit organization dedicated to protecting human rights in U.S. detention facilities. PLN publishes a monthly magazine that includes reports, reviews and analysis of court rulings and news related to prisoners’ rights and criminal justice issues. PLN has almost 7,000 subscribers nationwide and operates a website ([www.prisonlegalnews.org](http://www.prisonlegalnews.org)) that includes a comprehensive database of prison and jail-related articles, news reports, court rulings, verdicts, settlements and related documents. PLN is a project of the Human Rights Defense Center.

**Dallas County to Settle Two Jail Inmate Lawsuits**

***July 21, 2009***

Dallas County commissioners voted Tuesday to settle two federal jail neglect lawsuits for close to a half-million dollars.

County officials say the lawsuits are the last major legal claims related to prior conditions in the jail system, which were described a few years ago by federal investigators as being dangerous to inmates’ well-being.

Sims, 60, who was mentally ill, died in the Dallas County jail in 2005.

Her family filed a wrongful death lawsuit, claiming she died of pneumonia after guards and a nurse refused to take her to the infirmary.

Sims, who suffered from paranoid schizophrenia, spent more than a year and a half in the jail awaiting trial before her death.

She didn’t receive medical treatment or “even a routine physical examination” during that time, according to the lawsuit. The guards found Ms. Sims lying on the floor in her own waste after she collapsed in her cell but didn’t take her to be examined, the suit said.

The story of Sims’ lifelong struggle with schizophrenia and her treatment while in custody were told in a series of articles in The Dallas Morning News in 2006.

**Original article no longer available but copied below for reference.**

**Dallas County to settle two jail inmate lawsuits**

07:53 AM CDT on Wednesday, July 8, 2009

**By KEVIN KRAUSE / The Dallas Morning News**[**kkrause@dallasnews.com**](mailto:kkrause@dallasnews.com)

[Dallas County commissioners](http://topics.dallasnews.com/topic/Dallas_County_commissioners) voted Tuesday to settle two federal jail neglect lawsuits for close to a half-million dollars.

County officials say the lawsuits are the last major legal claims related to prior conditions in the jail system, which were described a few years ago by federal investigators as being dangerous to inmates’ well-being.

As a result of the settlements, the family of former inmate Rosie Sims will receive $250,000, and former inmate Bruce A. McDonald will receive $190,000, minus legal expenses.

Sims, 60, who was mentally ill, died in the Dallas County jail in 2005.

Her family filed a wrongful death lawsuit, claiming she died of pneumonia after guards and a nurse refused to take her to the infirmary.

Sims, who suffered from paranoid schizophrenia, spent more than a year and a half in the jail awaiting trial before her death.

She didn’t receive medical treatment or “even a routine physical examination” during that time, according to the lawsuit. The guards found Ms. Sims lying on the floor in her own waste after she collapsed in her cell but didn’t take her to be examined, the suit said.

The story of Sims’ lifelong struggle with schizophrenia and her treatment while in custody were told in a series of articles in *The Dallas Morning News* in 2006.

McDonald contended in his suit that the county violated his constitutional rights by denying him treatment in the jail after he was punched in the eye by another inmate in 2005.

He said he lost vision in the eye after the injury went untreated for seven weeks despite the fact that doctors said on three different occasions that he needed surgery.

Both lawsuits were headed for trial after the county tried unsuccessfully to have them dismissed.

“They’re definitely acknowledging that there was a problem. They’ll settle when they think they’d get a worse outcome when they go to court,” said Scott Henson, a criminal justice expert.

County Judge Jim Foster said he voted for the settlements because it was “the right thing to do” and because it’s expensive to defend lengthy lawsuits.

Commissioner [John Wiley Price](http://topics.dallasnews.com/topic/John_Wiley_Price) called it a “fair resolution to the case” and added that there shouldn’t be any more such settlements down the road.

“The faucet turns off,” he said.

Tuesday’s approved payouts follow several other settlements and judgments against the county related to allegations of mistreatment in the jails:

•In April, a federal jury in Dallas awarded more than $300,000 to former inmate Mark Duvall, who alleged that a staph infection he caught while in jail in 2003 left him blind.

•In 2008, a federal jury ordered the county to pay $900,000 to former inmate Stanley Shepherd for denying him proper medical care while he was in custody in 2003.

In recent years, county commissioners have spent more than $100 million improving jail conditions and jail health.

# APPENDIX E: TEXAS JAIL PROJECT—HARLIGEN JAIL LACKS SHOWERS, PILLOWS, AND SOAP

|  |  |
| --- | --- |
| **Special Report: Harlingen Jail Lacks Showers, Pillows And Soap**   **Reported by: Jordan Williams**   HARLINGEN - Municipal judges are putting people behind bars in a jail that’s not prepared to protect or care for them.   Judges say people can’t pay their fines, so sometimes they send them to jail. Norma De La Cruz’s sister is one of the people locked up. Del La Cruz is worried, because her sister is diabetic.   “She’s got kids and she’s also sick from diabetes... and it’s not good for her to be in there,” she tells us.   De La Cruz says her sister spent at least eight days in jail, and she doesn’t know what kind of health care she’s getting.   She says, “I just know that if she gets sick, they just come and supposedly try to help her out.”   Families tell us the cold and crowded jail doesn’t have pillows, soap, or showers.   “We’ve been bringing meals for my sister,” De La Cruz adds.   CHANNEL 5 NEWS reviewed Harlingen jail inmate logs and found some people served as many as 10 days in a row. That means inmates have gone as long as 10 days without a bath.   “We would provide these basic things to dogs... but do we provide them to humans is the question. That’s the problem we’re seeing, “says Corinna Spencer-Scheurich, an attorney with the South Texas Civil Rights Project.   CHANNEL 5 NEWS learned no one from the state is watching the Harlingen jail or any city jail. No set safety standards or rules exist to protect inmates in municipal jails. | |
| We asked if there’s a limit to the number of days a person can stay in the Harlingen jail. The head jailer tells us the judge decides the length of time.   Harlingen’s municipal judges refused to speak with CHANNEL 5 NEWS on-camera about what’s happening.   Gabe Gonzalez, the city manager, tells us, “There isn’t anything saying that we can’t keep them there for 10 days or more. Let me make it clear, we’re not violating any policy by keeping them there for that many days.”   He defended the judges’ sentences.   “We can’t tell the judge how to sentence their prisoners. We can’t interfere in that process,” he explains.   Gonzalez says it’s rare for people to get sentenced to serve long periods of time. We told him about Norma De La Cruz’s story.   “Well I think the facility is adequate . . . and like I said, we try to keep people there for three days or less,” he says.   What’s happening in Harlingen has the attention of state lawmakers. The lieutenant governor has ordered a Senate committee to investigate whether municipal jails should be regulated.   Adan Munoz heads the Texas Commission on Jail Standards and looks after county jails. We asked him about municipal jails.   “There’s not state oversight at all,” he tells us.   Munoz says he’s concerned about Harlingen’s jail policies   “There’s all sort of things that can happen . . . absolutely,” he adds.   “For somebody to realize and understand that they’re going to be housed for five to 10 days, or even two to three days, without amenities - without just simple basic life-necessities, such as showers or mattresses - you’re at risk for somebody either developing some sort of infection or some sort of illness,” Munoz explains.   CHANNEL 5 NEWS asked the city manager about that concern.   “That’s a hypothetical situation, because it hasn’t happened,” says Gonzalez. “No one has come back to us afterward and said, ‘Look I was in your jail and I got sick.’“   Food is another issue. The city manager tells us inmates do eat.   “We feed them. But there’s no kitchen,” he explains. “We have to purchase our food. We can’t cook it there.”   “Obviously they’re out there just buying sandwiches off the shelf... for every meal. This is what we hear constantly. ‘I’m getting a sandwich for breakfast,’“ says Munoz.   One person told CHANNEL 5 NEWS they got an oatmeal cookie with icing in the middle with coffee. We shared that with Munoz.   “Well let’s put that into perspective,” he says. “Let’s just say that the guy in jail is allergic or is a diabetic . . . and needs something nutritious. What if the lack of proper nutrition causes him to go into a diabetic attack?”   Munoz fears it’s only a matter of time before someone sues.   He adds, “I think it would be in the best interest of all of the inmates” for the state to look into the matter.   But the Harlingen city manager says people shouldn’t worry.   “Anyone who is incarcerated shouldn’t be concerned about their safety from the facility itself,” says Gonzalez.   Attorneys at the South Texas Civil Rights Project are concerned. They say the conditions at the Harlingen jail raise constitutional questions.   “We’re not treating people with the basic human rights that they deserve,” says Spencer-Scheurich.   Families whose loved ones are locked up agree.   “They need something better than what they’re doing,” says De La Cruz.   Very little will likely change until the state steps in and corrects the lockup loophole at municipal jails.   CHANNEL 5 NEWS asked Harlingen city leaders whether it makes good financial sense to house the inmates.   We want to know how much it costs the city and also the jailers’ qualifications. So far, we haven’t gotten those answers. | **Harlingen Municipal Jail Lacks Clear Oversight**   **By Nick Braune**   If you spend ten days in jail in Harlingen, Texas, you will not get a chance to shower, according to a KRGV Channel Five news report.   The report said, “Municipal judges are putting people behind bars in a jail that’s not prepared to protect or care for them…Families tell us the cold and crowded jail doesn’t have pillows, soap or showers.”   KRGV’s report points up a number of interesting problems. Although the jail is really not prepared to hold someone over a day or two (no kitchen to prepare food, no medical facility, no shower), people are still being ordered to spend a week there for not paying traffic fines and for other offenses. KRGV questioned the head jailer, who pointed the finger at the local judges. But the judges refused to speak on camera.   City Manager Gabe Gonzalez seemed defensive speaking to the reporters: “We can’t tell judges how to sentence prisoners. We can’t interfere in that process. There isn’t anything saying that we can’t hold them there for 10 days or more. Let me make it clear, we’re not violating any policy by keeping them there for that many days.” However, that apparent lack of policy is one of the problems.   KRGV concluded that “no set safety standards or rules exist to protect inmates in municipal jails.” Channel Five interviewed Adan Munoz, the head of the Texas Commission on Jail Standards, but he is charged only with watching County Jails. Munoz says there is “no state oversight at all” over municipal jails. Munoz told KRGV that it is just a matter of time before there is going to be a lawsuit, that someone who is kept there for five or ten days without the basic necessities like mattresses is going to become ill or get an infection.   He raises the question of how someone who is diabetic is treated; the article says that the jailers go out and pick up sandwiches off the shelf and cookies for the inmates. There seems to be no concern about nutrition. One person reported their meal was a cream filled cookie and coffee; others report having a sandwich for breakfast. KRGV also interviewed one woman whose sister is diabetic and being held for eight days.   I did a quick interview with Corinna Spencer-Scheurich, an attorney from the South Texas Civil Rights Project.   Braune: I noticed that you were quoted on air that STCRP is watching the situation. It was a really good TV news piece.   Spencer-Scheurich: Yes it was, and I hope there is a follow-up, but one angle didn’t come up that I would like to mention. There may be thousands of outstanding warrants in Harlingen and poor people are being thrown into jail for nonpayment.   Some protection has to be granted to the indigent -- the criteria for which is that the person is receiving public benefits (food stamps, Medicare) or their expenses exceed their income -- these people are being put in jail essentially for failure (inability) to pay.   Going over the speed limit or failing to fasten the seatbelt is hardly a jailable offence. But they are in jail for not paying fines or missing payments on them. They shouldn’t be in jail. Judges should not put the indigent in there. The founders of this country intended to protect us from debtors prison. Braune: Do you think it may be worse in Harlingen than other places?   Spencer-Scheurich: Yes. So far, it does seem worse, egregious. Why are they using jail stays so much, and why such long stays? I’m not sure at this point. They do have a new jail, maybe they just want to make sure it’s used.   Braune: I agree with Adan Munoz of the Texas Commission, it probably won’t be much longer before there is a lawsuit on this.   Spencer-Scheurich: Well, we are hoping people come forward to tell their stories now.   \* \* \*   Mayoral candidate Joe Rubio, who spent years on Harlingen’s police department and has some fame for asking difficult questions of city leaders, posted a follow-up on a local website.   He asks if there is consideration given to pregnant women held for three days in the cold cells and only receiving a cookie and two sandwiches. And what if a young man vomits all over his shirt and the jailer throws away his shirt? Isn’t he left shirtless with his complaints unheeded?   Rubio says people wait outside in rain or heat for over an hour to bring a relative a bag of chips -- this is allowed -- but one person’s gift was rejected last week because the bag was too large: “You are limited to a small bag of chips and one drink.” |
| **Press Release**   **South Texas Civil Rights Project Concerned about Rights of Poor in Harlingen**   **Civil Rights Lawyers Seek Complaints About the Harlingen Municipal Court and Jail**   South Texas Civil Rights Project (STCRP) lawyers are concerned that the constitutional rights of the poor in Harlingen are being violated. In a special investigative report, KRGV’s Channel Five exposed the poor conditions at the Harlingen Municipal Jail. The piece was a follow up to its story that Harlingen has 37,000 pending arrest warrants, which is one arrest warrant for over half of the City’s population. The Municipal Court is putting people in jail for as many as twelve days because of a failure to pay fines. Many of the fines are not from felonies or other serious crimes, but instead come from violations of city ordinances and traffic laws.   “The Court could be violating the United States Constitution if it puts people in jail because they cannot pay fines on minor violations and these people are living in poverty,” said STCRP attorney Luis Echeverria. “Debtor’s prisons are illegal in this country and the City of Harlingen gets no exception.” Attorneys say that people can prove that they cannot pay the fine and should not go to jail. Proof could be anything that shows that they qualify for Social Security disability (SSI); food stamps; Temporary Assistance for Needy Families (TANF); Medicaid; WIC benefits; or public housing. Also, people can list all of their monthly expenses and income to show that they spend more on necessities than they make each month.   “It is bad enough that the City is arresting so many people and keeping them in such deplorable conditions,” said Echeverria. “But, we need to know if the City of Harlingen is violating the rights of its residents.” STCRP is a non-profit legal organization that represents low income Texans. Members of public are encouraged to contact STCRP at (956) 787-8171 if they receive any public benefits and/or have expenses that are greater than what they earn and have spent time in the Harlingen jail for failure to pay a ticket. | |