American Jail Association

33rd Annual Training Conference

LEGAL ISSUES IN JAILS-2014

Dallas, Texas

If the government is going to operate a jail system, "it is going to have to be a system that is countenanced by the Constitution of the United States"

Holt v. Sarver, 309 F. Supp., 362, 385 (E.D. Ark., 1970).

This workshop is sponsored by the
National Institute of Corrections, Jails Division

NEW LEGAL EAGLES

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The Docket

April 30th, 2014

- Basics of the Civil Litigation Process & Jail Liability Reduction Strategies
- Supervisor Liability
- RLUIPA (Religious Exercise)
- Searches
- Affordable Care Act
- National Origin Discrimination
- Use of Force
- Prison Litigation Reform Act (PLRA)
- Duty to Protect
- PREA
- LGBTI
- Stump the Chumps

The Basics of Civil Litigation
And
Jail Liability Reduction Strategies

- **Who Are The Defendants**
  - You
  - Administrator/Managers/bosses
  - Governing board, policy makers and funding sources like a county board
  - Supervisors
  - Contract vendors such as food services or medical staff

- **Essential elements of a Civil Rights Case**
  - Defendant acted under the color of law; and
  - Defendant violated a federal civil right of the plaintiff, and
  - The plaintiff suffered harm

Tort Claims Liability

intentional torts

negligence

Attorney fees and costs Civil Rights Cases

Mechanics of Lawsuits

How The Process Works.

Discovery

Parties seek to obtain potential evidence from each other

Often the most expensive part of suits

far ranging in content and costs

– **Summary Judgment motion is a frequently made by the defense to get a case dismissed prior to trial**

- Legal standard is no material fact in dispute and the party is entitled to judgment as a matter of law
- Qualified immunity may be used if you did not knowingly violate a well-established constitutional right
- Civil right cases are only ones that allow appeal of denial of summary judgment

In Correctional facilities the exhaustion requirements of the Prison Litigation Reform Act (PLRA) is a great tool

- **Use written policies and procedures on legal, operational and "philosophical" issues**
- **Staff should comply with these policies**
  - Keep policies and procedures current
  - Have legal advisor and/or risk manager review policies and procedures
  - Insure all staff know of and are trained on policies and procedures
  - Keep historical documents to show how policies and procedures evolve
  - On-going review and updates and train in updates
  - Critical that policy and practice match

Staff Training to Reduce Liability

- Train on techniques and applications.
- Train on “legal issues,” to insure basic understanding of constitutional and other legal requirements
- Keep records of who was trained, by who and what
- Monitor best practices and liability trends for training needs

Documentation

- **Staff must know what and how to document events that have liability implications**
  - Written reports.
  - Photographs, video, etc.
  - Train staff why documentation is important

Manage documentation on policies and procedures

Centralize record keeping on training

Give policy duties to a position with authority to act

Actively encourage staff participation at all levels

Keep current on constitutional decisions and statutory changes that can affect liability. Attorney or

staff member should be assigned to:

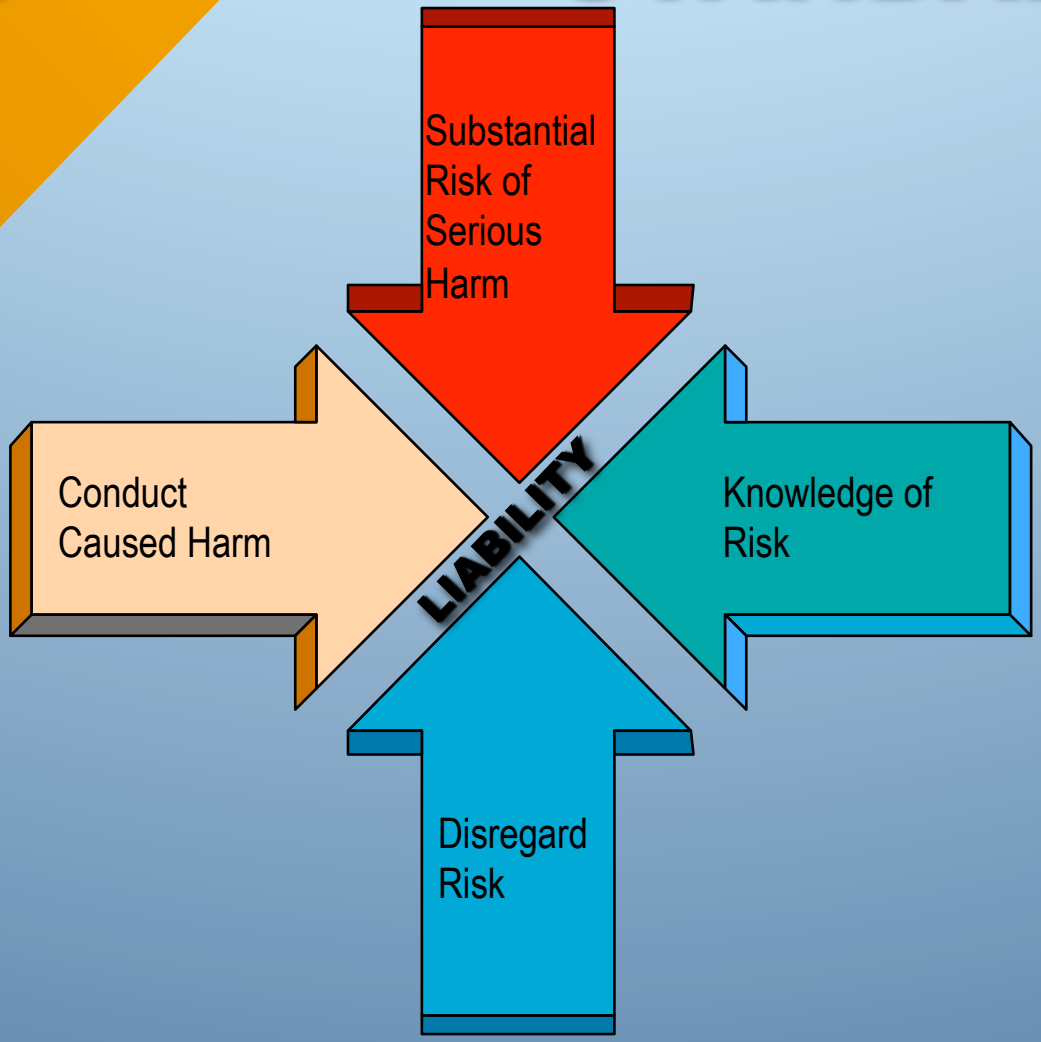
- Review every supreme court case on corrections as soon as issued
- Review every federal circuit case in your circuit on corrections as soon as it comes out
- Review trends in court cases on corrections from other jurisdictions
- After every legislative session review all new laws
- Monitor federal laws and rules that might impact operations- PREA, Affordable Health Care, etc.

Supervisor Liability

Deliberate Indifference: Supervisor Liability

- **Starr v. Baca**, 652 F.3rd 1202 (9th Cir. 2011)(cert. denied) (remanded)(remember talking about this)
  - Supervisor OR Sheriff may be personally liable for damages **IF** it can be shown that he or she was deliberately indifferent to the rights of inmates under their care/control.

The STANDARD



Farmer v. Brennan, 511 U.S. 825 (1994)

Deliberate Indifference Test

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Baca: Personal Liability Found

- **Willis v. Baca:** (Oct. 18 2013)
  - Baca personally liable for actions of his deputies who allegedly, severely beat inmate Willis (punched, kicked, multiple taser applications, and being struck in the ankle with a flashlight)
    - Head injuries and fractures were the resulting injuries
  - Plaintiff's verdict for $125,000 in compensatory damages. They stipulated to another $40,000 in punitive damages with Baca being liable for $100,000 of the judgment
    - "malicious, oppressive or in reckless disregard" of Willis' rights
  - Defendants are appealing claiming the use of force was "brought on by the inmate"

Custom, Policy, Practice vs. Isolated Incident

- **Porro v. Barnes, 624 F.3d 1322 (10th Cir. 2010)**
  - In general, **force inspired by malice**, or by unwise, excessive zeal amounting to an abuse of official power that **shocks the conscience.**
    - Inmate was acting in a disruptive manner in his cell, destroying parts of it.
    - CERT removed him from the booking area and placed him in the restraint chair
    - It was the events that happened AFTER this that brought the issue to the forefront.
    - Once restrained in the restraint chair, the Taser was applied three times.

Lessons learned: Applying Starr v. Baca and Willis v. Baca

- **After incident reviews** (informal)
  - BRIEFING? TRAINING? POLICY? DISCIPLINARY?
- **Looking "forward"**/critical to avoid allegations of "custom, policy or practice"
- **"Self Audit"** is a strong defense to ward off allegations of deliberate indifference

Avoiding deliberate indifference

- The law **does not** require "perfection" but requires that you are not "deliberately indifferent" to it.
  - **Do something!** Gather the requisite knowledge so that you are aware and take corrective action if necessary.

Avoiding Liability

- **DO YOUR JOB**
- **PROFESSIONALISM AND RESPECT**
- **KNOW THE LAW**
- **ARTICULATE YOUR RATIONALE FOR ALL DECISIONS MADE**
- **REPORTS**
  - NARRATIVE-RATIONALE
  - DO NOT SIGN OFF UNLESS THE RATIONALE IS ARTICULATED AND COMPLETE
- **AFTER INCIDENT REVIEWS**
  - BRIEFING? TRAINING? POLICY? DISCIPLINARY?
- **TRAINING/TESTING**
- **LEAD BY EXAMPLE: MENTOR**

April 11th 2014

- A federal grand jury indicted two recently fired Santa Barbara County Jail guards on multiple felony charges after an FBI investigation was launched into allegations that an inmate was handcuffed and forced to the ground where he was kneed and kicked during an unprovoked confrontation last summer.
- The charge carries a maximum penalty of 10 years in prison.
- Johnson is also charged with obstruction of justice for allegedly filing a false report with his jail supervisor, stating that Owens — a Lompoc gang member who has since been sentenced to life in prison without parole on murder and sex crimes convictions but was in County Jail at the time awaiting trial — was only handcuffed and taken to the ground when he physically resisted the deputies. The obstruction charge has a maximum sentence of 20 years in prison.

Retaliation: January 9, 2014

- **Headline from the Department of Justice:**
- **Custom, Policy and Practice….UGH!**

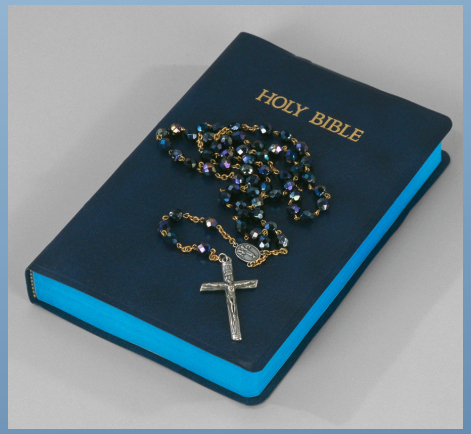
Two More Former Officers and Another Former Lieutenant at Roxbury Correctional Institution Plead Guilty for Conduct Related to the Assault of an Inmate

- According to court documents filed in connection with his guilty plea, Hinckle admitted that, during the 7 a.m.-3 p.m. shift on Mar. 9, 2008, that he, Dustin Norris and three other RCI officers assaulted K.D. in order to punish him for striking an officer during a prior shift. Hinckle also admitted that this assault in 2008 was consistent with prior incidents at RCI, where officers from three consecutive shifts would beat an inmate who had previously assaulted an officer. Finally, Hinckle admitted that he and other officers tried to cover up their involvement in, or knowledge of, the assault of K.D.

The Religious Land Use and Institutionalized Persons Act (RLUIPA)

and

"The Sincerity Test"



Basics

- Prisoners do not lose all constitutional rights as a consequence of incarceration
- One of the rights prisoners retain is their right to Freedom of Religion
- Freedom of Religion guarantees that individuals have the right to freely exercise the religion of their choice without fear of discrimination by the government

Infringement on prisoner rights

- Although prisoners enjoy the same basic rights that are enjoyed by those who are not incarcerated, jails and prisons may find it necessary to infringe upon those rights for the safe and efficient operation of the facility
- Generally, if a jail regulation impinges upon a prisoner's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78 (1987)
- In Olone v. Shabazz, 482 U.S. 342 (1987), the USSC applied the Turner "reasonable relationship test" to a free exercise challenge by Muslim inmates, and upheld a prison regulation that made it impossible for Muslim inmates to attend Friday religious services

RFRA

- The Religious Freedom Restoration Act of 1993 (RFRA) was Congress' first attempt to accord religious exercise heightened protection from government-imposed burdens
- RFRA prohibited government from "substantially burdening" a persons exercise of religion unless the government can demonstrate that the burden;
  - Is in furtherance of a compelling government interest, AND
  - Is the least restrictive means of furthering that interest
- The USSC found that that Congress had exceeded its power when it enacted RFRA, and declared it unconstitutional. City of Boerne v. Flores, 521 US 507 (1997)

RLUIPA

- In response to the **City of Boerne** decision, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA)
- During Congressional hearings on RLUIPA, there were reports that inmates were not being permitted to practice their faith in prisons
- For example:
  - Jewish inmates were deprived of matzo and prayer shawls
  - Catholic inmates were deprived small amounts of sacramental wine
  - Bibles, Talmuds, and Korans were confiscated

RLUIPA

- RLUIPA provides that no state or local government shall impose a substantial burden on the religious exercise of a person residing in or confined in an institution unless the government shows that:
  - The burden furthers a "compelling governmental interest" AND
  - Does so by the "least restrictive means."
- "Institution" includes prisons and jail facilities

What is a 'Substantial Burden'?

- More than an inconvenience
- Requiring a person to do something against their beliefs
- Preventing person from engaging in conduct that their faith requires.

What is Religion?

- "[T]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333 (1890)
- All sincere beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." United States v. Seeger, 380 U.S. 163 (1965)

What is Religion?

- Purely secular views or personal preferences do not constitute religious beliefs and will not support a Free Exercise claim. Wisconsin v. Yoder, 406 U.S. 205 (1972)
- Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. Thomas V. Review Bd., 450 U.S. 707 (1981)

What is a 'Religious Exercise' under RLUPA?

- Any exercise of religion, whether or not compelled by, or central to, a system of religious belief
- RLUIPA protects any act of religion whether or not it is mandated by the individual's religion
- Religious act need not be "central" to a particular religion to have protection

Religious Belief Must Be "Sincere"

- RLUIPA does not preclude inquiry into the sincerity of a prisoner's professed religion. Cutter v. Wilkinson, 544 U.S. 709, 725 n. 13 (2005)
- '[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.' Gillette v. U.S., 401 U.S. 437 (1971), *quoting* **U.S. v. Seeger**, 380 U.S. 163 (1965)

Determining Sincerity

- Sincerity is generally presumed or easily established
- Primarily look at the words or actions of the inmate
- "The important inquiry was what the prisoner claimed was important to him." McAllister v. Livingston, 348 Fed.Appx. 923 (5th Cir. 2009).

Orthodoxy of Religious Practice

- Prison officials may not determine which religious observances are permissible or orthodox. Grayson v. Schuler, 666 F.3d 450 (7th Cir. 2012)
- RLUIPA covered a prisoner's request for a veggie diet even though there were no dietary restrictions compelled by or central to his professed faith. Koger v. Bryan, 523 F.3d 789 (7th Cir. 2008).
- Prison could not force prisoner to cut his hair based on the premise that only those whose faiths "officially" require the wearing of dreadlocks may wear them. Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004).

Reliance on Clergy

- Florida DOC's policy of excluding prisoners from kosher diet based on clergy interpretations of religious doctrine, or on prisoners' knowledge of religious laws and doctrine, violates RLUIPA. **United States v. Florida Dept. of Corrections**, 2013 WL 6697786 (Fla. S. D. Ct. 2013).
- Sincerity of a prisoner's religious beliefs-not the decision of Jewish religious authorities-determines whether prisoner was entitled to kosher meals. **Newingham v. Magness**, 364 F. App'x 298 (8th Cir. 2010)

Guaging Sincerity

- Tread lightly
- Do not base decision on any one factor
- Gather information from the inmate:
  - Claimed faith
  - Contact information for clergy and/or family member
  - Requested accommodation

Gauging Sincerity

- Enlist "assistance" from clergy
  - Educate clergy before interview
  - Goal is to determine sincerity - not whether the inmate is an actual member of the faith, or even whether he/she has a deep knowledge of the central tenets of the faith
  - "Why" are you seeking this accommodation?
  - Don't defer to clergy
- Review incarceration records
  - Change of faiths
  - Commissary ordering history (non-kosher v. "not certified as" kosher)
  - Violation of diet rules (eating off of regular diet tray, sharing diets, etc.)

Gauging Sincerity

- If you have doubts about an inmate's sincerity, tell him/her exactly what those doubts are
- Give the inmate an opportunity to explain his/her actions before denying or revoking the accommodation
- Give the inmate a second chance.
  - "A few lapses in perfect adherence do not negate a prisoner's overarching display of sincerity." **Moussazadeh v. Texas Dept. of Criminal Justice**, 703 F.3d 781 (5th Cir. 2012).

Pending before the Supreme Court RLUIPA: Beards

Holt v. Hobbs, (8th Cir. 2013)

- Issues:
  - The Supreme Court granted cert to Holt's handwritten prisoner petition with the following issues:
    - (1) Whether the Arkansas Department of Corrections' no beard growing policy violates the Religious Land Use and Institutionalized Persons Act (RLUIPA) or the First Amendment; and
    - (2) whether a ½ inch beard would satisfy the security goals sought by the policy.
- Holt says his Muslim beliefs require him to grow a beard.
- Arkansas corrections officials claim their grooming policy prohibiting beards promotes hygiene and safety.

RLUIPA: TEST

- Has the policy **substantially burdened** the exercise of the religion? Inmate Proves
- **If "yes"** does the regulation create a substantial burden on the prisoner's free exercise of religion, then officials must have a compelling governmental interest for its actions. Jail/Prison Proves
- **If "yes"** then the religious practice must be restricted in the least restrictive means. Jail/Prison Proves
  - Use objective criteria; and
  - Make a genuine effort to consider alternatives.

Searches

Value of Street Drugs in Your Jails

California

- One MJ "joint" = roughly $5.00
- 1/8 oz of Meth = $200
- 1 pack of cigs = $10
- One OXY pill= about 2 soups.

Flash incarcerations

Constitutional Standards

- 4th Amendment (usually governs)
  - Search and Seizure
- 1st Amendment
  - Cross gender searches violating inmate's religious beliefs
- 8th Amendment
  - Manner in which the search was conducted violated the cruel and unusual punishment clause

Constitutional Standards

- 4th Amendment
  - **Your report must articulate your LGI:**
    - "specific and articulable facts taken, together with rational inferences from those facts, reasonably warrant a belief that the arrestee is hiding contraband or a weapon." U.S. v. Payne, 181 F.3d 781, 786 (6th Cir. 1999)

Constitutional Standards

- "correctional facilities are 'unique place[s] fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence."
- "Prisons [and jails], by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others."
- For searches to be reasonable, they should further a legitimate institutional interest (safety, security, order, discipline, control)

Clothing and Property Searches

Clothing & Property

- **RULE:** pre-incarceration searches of an inmate's clothing and property is not only reasonable, **but is required**
  - Anything that arrives at the institution with the inmate is subject to search
  - Probable Cause is NOT required
- **RATIONALE:**
  - Protects inmate from theft and careless handling by staff;
  - Deter false property theft or loss claims by inmates;
  - Remove dangerous contraband and items which inmate could use to harm himself or others; and to verify and ascertain an inmate's identity.
- **JUSTIFICATION: Illinois v. Lafayette**, 461 US 647 (1983)

Clothing & Property

- **RULE:** "It is the fact of the lawful arrest which establishes the authority to search."

Cell Phones: Searches

- **People v. Diaz**, #S166600, 2011 Cal. Lexis 1
  - The California Supreme Court, in a 5–2 decision, held that if a cell phone is found on a custodial arrestee, incident to a lawful arrest, a search warrant is not required to view the contents of the cell phone.
    - The applicable warrant exception, ruled the court, entitles the —police not only to ‗seize' anything of importance they find on the arrestee's body … but also to open and examine what they find ‖ - including opening and examining a cell phone. ‖
- **Riley v. California:** Case Pending Before Supreme Court: **(argued 4/29/14)**
  - Whether a cell phone/smart phone can be searched incident to a lawful arrest?

Personal Searches

Personal Searches

- **RULE:** Searches of a person, both routine and random, must:
  - Further a legitimate corrections interest;
  - Balance the legitimate safety, security and management needs against the invasion of the inmate's right to privacy; and
  - Be conducted in a reasonable manner.
    - Jails/prisons are "unique place[s] fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." Bell v. Wolfish, at 559.

Personal Searches

- **Scope of Intrusion**
  - **RULE:** the greater the intrusion, the greater the reason for the search must be
  - **Levels of Intrusion**
    - Frisk Searches
    - Strip Searches
    - Physical Body Cavity Searches

Frisk Searches/Pat Searches

- **Definition**
  - The patting of the exterior of a subject's clothing in an attempt to detect contraband
  - Incidental touching of genitals may result
- **Amount of Intrusion** (Very Low)
  - Less likely to detect small or well-hidden contraband
- **Justification**
  - The fact that a prisoner is in custody is sufficient justification to conduct a frisk search
  - **Illinois v. Lafayette**, 462 U.S. 640, 644 (1983)

Strip Searches

Arrestee Strip Searches: Where Are We At?

- "Arrestee" strip search cases were litigated!
  - Huge monetary awards
- The Supreme Court had not addressed this issue since It's decision in **Bell v. Wolfish** in 1979.
- **Monumental decision** by the Supreme Court in April of 2012 regarding "strip searches" **Florence v. Board of Freeholders.**
- Although more of a jail issue, the high court's holding has a significant impact on every correctional facility.
- Affirmed **Turner v. Safley** and **Bell v. Wolfish**
- Added powerful language **"substantial deference"**

Arrestee Strip Searches: Constitutional Standards: <u>Bell Test (Still Good Law)</u>

- Balance need for the search against the invasion imposed on the inmate:
  - Institution's **need** for the search; against
  - How **intrusive** is the search;
  - The **manner** in which the search is conducted; and
  - The **place** in which the search is to be conducted.
- More intrusive the search, the greater the institution's need.
- Institution's need is usually safety and security.
  - Prevention indiction of contraband into the facility

Turner TEST (You have to know it)

Turner v. Safley, 482 U.S. 78 (1987).

1. Is there a 'valid, **rational connection'** between the regulation and the **legitimate governmental interest** put forward to justify it?
2. Are there **alternative means** of exercising the basic right that remain available to the inmate?
3. The impact accommodation of the asserted right will have on officers and other inmates and on the allocation of prison resources? **(ripple effect)**
4. The existence of obvious, easy alternatives-"**exaggerated response"**

United States Supreme Court Rules

Moving Into General Population-Reasonable Suspicion NOT Required

- **Florence v. Board of Chosen Freeholders of the County of Burlington, (566 U.S. - 2012)**
  - Reasonable suspicion **is not required** prior to moving arrestees into **general population**
  - The Court relied and upheld on **Bell v. Wolfish and Turner v. Safley.**
    - In a 5-4 decision the Justices justify the strip searching of all arrestees entering "general population" for the following reasons:
    - (1) the prevention of disease, specifically MRS). Of these three, the potential for smuggling of weapons, drugs, and other contraband poses the greatest security threat. (2) the identification of gang members by observing their tattoos, and (3) the detection and deterrence of smuggling weapons, drugs or other contraband into the facility,
  - It was a case of first impression for the High Court.
  - Substantial Deference to the administrator!!!!!!!

United States Supreme Court Rules

Justice Kennedy delivered the 5/4 opinion

- Correctional officials have a **legitimate interest,** indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population.

United States Supreme Court Rules

- The difficulties of operating a detention center must not be underestimated by the courts. Turner v. Safley, 482 U. S. 78, 84–85 (1987). Jails (in the stricter sense of the term, excluding prison facilities) **admit more than 13 million inmates a year.**
- Maintaining safety and order at these institutions re- quires the expertise of correctional officials, who must have **substantial discretion** to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests.

United States Supreme Court Rules

- Jails are often crowded, unsanitary, and dangerous places. There is a substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when he is admitted to the general population.
- **People detained for minor offenses can turn out to be the most devious and dangerous criminals**

United States Supreme Court Rules

- **Even if** people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others.
- If, for example, a person arrested and detained for unpaid traffic citations is not subject to the same search as others, this will be well known to other detainees with jail experience. A hardened criminal or gang member can, in just a few minutes, approach the person and coerce him into hiding the fruits of a crime, a weapon, or some other contraband. **Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility. This is a substantial reason not to mandate the exception petitioner seeks as a matter of constitutional law.**

United States Supreme Court Rules

- The Court held that **security imperatives involved in jail supervision override the privacy interests** "on any suspected offender who will be admitted to the general [inmate] population . . . ."

United States Supreme Court Rules

- It also may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search. **Jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset.**
- The record provides evidence that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption.

United States Supreme Court Rules

- It also may be difficult to classify inmates by their current and prior offenses before the intake search. Jail officials know little at the outset about an arrestee, who may be carrying a false ID or lie about his identity. The officers conducting an initial search often do not have access to criminal history records. And those records can be in- accurate or incomplete.
- Even with accurate information, officers would encounter serious implementation difficulties. They would be required to determine quickly whether any underlying offenses were serious enough to authorize the more invasive search protocol. Other possible classifications based on characteristics of individual detainees also might prove to be unworkable or even give rise to charges of discriminatory application.
- **To avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population. While the restrictions petitioner suggests would limit the intrusion on the privacy of some detainees, it would be at the risk of increased danger to everyone in the facility, including the less serious offenders.** The Fourth and Fourteenth Amendments do not require adoption of the proposed framework. Pp. 13–18, 19.

Unaddressed issues in opinion IV

- This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held **without assignment to the general jail population** and **without substantial contact** with other detainee
  - The accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue.
- There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here.

Supreme Court: New Definition of Strip Search

Strip Search defined-imprecise but all inclusive

- It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more;
- it may mean a visual inspection from a closer, more uncomfortable distance;
- it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there;
- or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.

Since Florence…..It Ain't Over

- **Haas and Szczpaniak v. Burlington County**, Civ. No. 08-1102 (November 13th, 2012)
  - Plaintiffs allege Burlington County Jail violated their constitutional rights when they were strip searched after being arrested for "minor offenses."
  - The case was stayed pending the outcome of the Florence decision.
  - After judicial review, the complaint pleads a plausible claim for relief and is not "futile".

Since Florence…..Haas continued….

- Specifically, IV of the decision where the Supreme Court specifically noted that it **was not ruling** on whether a strip search "would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."
  - **Both arrested for minor offenses and claiming they could have been housed without having to go into general population.**

Since Florence…..Haas continued….

- **Chief Justice Roberts'** concurring opinion reflects his reservation about establishing a blanket rule that all arrestees may be strip searched. He wrote, "it is important for me that the Court does not foreclose the possibility of an exception to the rule it announces." Id. at 1523. He also wrote, "[t]he Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we not embarrass the future."
  - (so the question is whether or not these arrestees posed the type of scenario to create an exception) Defendants are arguing NO

Since Florence…..Haas continued….

- **Justice Alito** also wrote: It is important to note . . . that the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who **could be** held in available facilities apart from the general population. . . . The Court does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer.

Since Florence…..Haas continued….

- Although Florence left many questions unanswered, one thing is plain--that is, that a minimum of five Justices (Alito and the four dissenters) **did not endorse** a blanket rule that all persons may be strip searched after they are arrested.
- In addition, except for Justice Thomas, the Supreme Court appears to be **receptive to an exception** to a blanket strip search policy that applies to all arrestees.
- Although the exception to the Florence holding has not been defined, at a minimum *it appears to include a situation/exception* where a person arrested for a "minor" offense, who will not be admitted to the general population, who will not have substantial contact with other inmates, and where no reasonable suspicion exists.

Questions for Haas Court

- **Issues in Haas**
  - What is a "minor offense"?;
  - Whether a jail has a "duty" to create a separate holding area for a person arrested for a "minor offense" if none already exist?;
  - **How long** may an arrestee be held in a separate area before she/he is admitted to the general population; and
  - What type of search is permitted?

After Florence: Carrie's "Non-Legal" Advice☺

Reasonable Suspicion ***is not*** required **prior to moving an arrestee** into **general population**

After Florence: Carrie's "Non-Legal" Advice☺

Reasonable Suspicion **is not** required prior to moving an arrestee into **general population**

- Define "general population" (see my recommendation)
- Define "arrestee"
- Define "strip search" (using the Supreme Court's definition)
- Define "pat search"
- Verify that you do not have any current statutory language; standards; consent decrees that restrict you.
  - If so, you must have them either amended or changed.
- Know the difference between a strip search and forced clothing removal.

After Florence: Carrie's "Non-Legal" Advice☺

- **Be ready** for issues regarding transsexual, transgendered, intersex arrestees
- **Pat Searches**: females inmates-female officers; male inmates-either male or female correctional officers
- Absent an exigent circumstance, **cross gender strip searches are unconstitutional**

After Florence: Carrie's "Non-Legal" Advice☺

- Provide **training and testing** on search
- Draft **legal based policies and procedures** with rationale statements
- **Professionalism and Respect** for Privacy are Key
- **Bell v. Wolfish; Turner v. Safley; and Florence vs. Board of Chosen Freeholders** are your key leading Supreme Court decisions regarding search. Use them! **Articulate your rationale!**

Affordable Care Act

JAILS, HEALTH CARE COSTS AND THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Before or as part of ACA dig into state laws on medical care for inmates, insurance, co-pays and such

Many states impose self-inflicted wounds on jails

Consider state legislation changes as needed

Example Minn. Stat. 641.15 caps what providers can charge jails for inmate care

DO NOT FORGET CO-PAYS TO EXTENT AUTHORIZED BY LAW

COLLECT INSURANCE RELATED INFORMATION AT BOOKING

BILL INSURANCE-WILL INCREASE AS ACA GOES FULLY OPERATIONAL

Patient Protection and Affordable Care Act (PPACA) provides new health insurance options by expansion of Medicaid eligibility and creating state-based health insurance exchanges

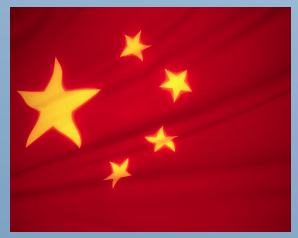
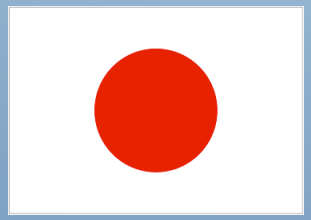
- PPACA provision impacts jails, which states “an individual shall not be treated as a qualified individual if at the time of enrollment the individual is incarcerated other than incarceration pending disposition of charges”.
- Likely allows eligible individuals in custody pending disposition of charges to enroll in a health plan or maintain coverage if already enrolled
- PPACA expands Medicare eligibility to include individuals under age 65 including adults without children who have incomes up to 133% of the federal poverty level (FPL)
- Large number of inmates are young low-income males who did not previously qualify for the program
- Unless future administrative actions change federal rules while these individuals will be eligible to enroll in the program they will not be able to receive MA benefits in 2014
- Means jails will still have to cover their care costs

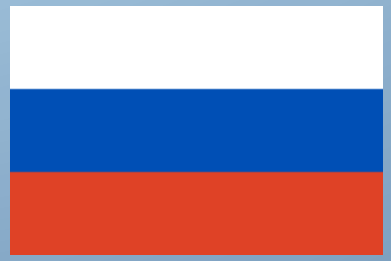
- Federal law does not allow for payment of inmate medical care under MA
- Exception states federal financial participation (FFP) is permitted "during that part of the month in which the individual is not an inmate of a public institution"
- Centers for Medicare and Medicaid Services verified by letters in 1997 and 1998 this exception applies to persons admitted as inpatient in hospital, nursing facility, psychiatric facility or intermediate care facility not part of state or local correctional system
- If inmate is eligible for MA and transported out of jail to receive inpatient hospital services MA may be billed
- State law must allow- Minnesota law was amended in 2013 to use this exception for inmates sent out of the facility for in-patient care

Issues Related to Enrolling Inmates

National Origin Discrimination

NATIONAL ORIGIN DISCRIMINATION AS APPLIED TO "LIMITED-ENGLISH PROFICIENCT" INMATES



Title VI of the Civil Rights Act of 1964

- **Section 601 of Title VI of the Civil Rights Act of 1964 (42 USC 2000d) provides that:**
  - No person shall on the ground of race, color, or **national origin**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

Federal Regulations

- Section 602 of Title VI authorizes and directs Federal agencies who extend Federal financial assistance to promulgate rules, regulations, and orders to effectuate the provisions of the Civil Rights Act.
- Department of Justice (DOJ) regulations forbid recipients of Federal funds from utilizing criteria or methods of administration which "have the effect" of subjecting individuals to discrimination because of their race, color, or national origin.

Lau v. Nichols, 414 U.S. 563 (1974)

- Non-English speaking students of Chinese origin alleged that the San Francisco school district failed to afford them equal educational opportunities as compared with English speaking students
- School district required English-proficiency to graduate, but did not provide English instruction

Lau v. Nichols

- Court explained that discrimination which "has that effect" is barred by Title VI even though no purposeful design is present
- Held that practices and policies which discriminate against persons who are limited-English proficient (LEP) constitutes "national origin" discrimination prohibited under Title VI

Application of Title VI to jails

United States v. Maricopa County Arizona

- In May 2012, U.S. government files lawsuit against Sheriff Arpaio and Maricopa County, AZ alleging that they conduct their jail operations in English and provide inadequate assistance to its large Latino LEP population, thereby denying Latino LEP inmates meaningful access to jail programs such as sanitary needs, food, clothing, legal information, and religious services
- Sheriff moved to dismiss the case alleging that Title VI's prohibition against intentional discrimination on the ground of race, color, or national origin, does not cover language proficiency.
- Court: Motion to dismiss denied
  - Longstanding case law, federal regulations, and agency interpretations of those regulations hold that language-based discrimination constitutes national origin discrimination under Title VI

Executive Order 13166

- Executive Order 13166, entitled "Improving Access to Services for Persons with Limited English Proficiency" was issued on August 11, 2000 by President Clinton
- EO 13166 requires every federal agency that provides federal financial assistance to publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI

DOJ Guidance

- On January 16, 2001, the DOJ issued "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons"
- The DOJ document provides LEP guidance to:
  - Police and Sheriff's Departments
  - Departments of corrections, jails, and detention facilities
  - Courts
  - Other entities with public safety and emergency services missions

WHO IS COVERED UNDER TITLE VI?

- All recipients of Federal financial assistance (FFA)
- FFA includes grants, training, use of equipment, donations of surplus property
- Most of the DOJ's FFA goes to:
  - Police and sheriff's departments
  - Departments of corrections, jails, and detention facilities
  - Courts
- Title VI coverage extends to a recipients **entire** program or activity, i.e., to **all** parts of a recipients operations, even if only one part receives FFA.

Who is LEP Under Title VI?

- Persons who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be LEP
- High likelihood of LEP persons in the following populations:
  - Persons subject to law enforcement activities (suspects, witnesses, victims)
  - Persons who are in custody, including juveniles, detainees, wards, and inmates

To What Extent Must An FFA Recipient Provide LEP Services?

- **Obligations are based upon a balancing of four factors:**

  1. The number or proportion of LEP persons likely to be served by the program
  2. The frequency with which LEP individuals come in contact with the program
  3. The nature and importance of the program, activity, or service provided, and
  4. The resources available to the recipient and costs

1. The Number or Proportion of LEP Persons Likely to Be Served by the Program

- The greater the number or proportion of these LEP persons, the more likely language services are needed
- 2011 American Community Survey of Language Use in the United States:

13 **a. Does this person speak a language other than English at home?**

- ☐ Yes
- ☐ No → *SKIP to question 14*

b. What is this language?

For example: Korean, Italian, Spanish, Vietnamese

c. How well does this person speak English?

- ☐ Very well
- ☐ Well
- ☐ Not well
- ☐ Not at all

Survey Results

- Approximately 20% of the US population (over 5 YOA), or roughly 61,000,000 people, spoke a language other than English (LOTE) at home
- 22% of those, or roughly 13,000,000 people, spoke English "not well" or "not at all"
- Laredo, Texas – 92.1% spoke language other than English at home!
  - 98.8 % spoke Spanish

States With High LOTE Populations

- California – 43.8%
- Texas – 34.7%
- New Mexico – 36.5%
- New Jersey – 30.4%
- New York – 30.1%
- Nevada – 29.7%
- Florida – 27.6%

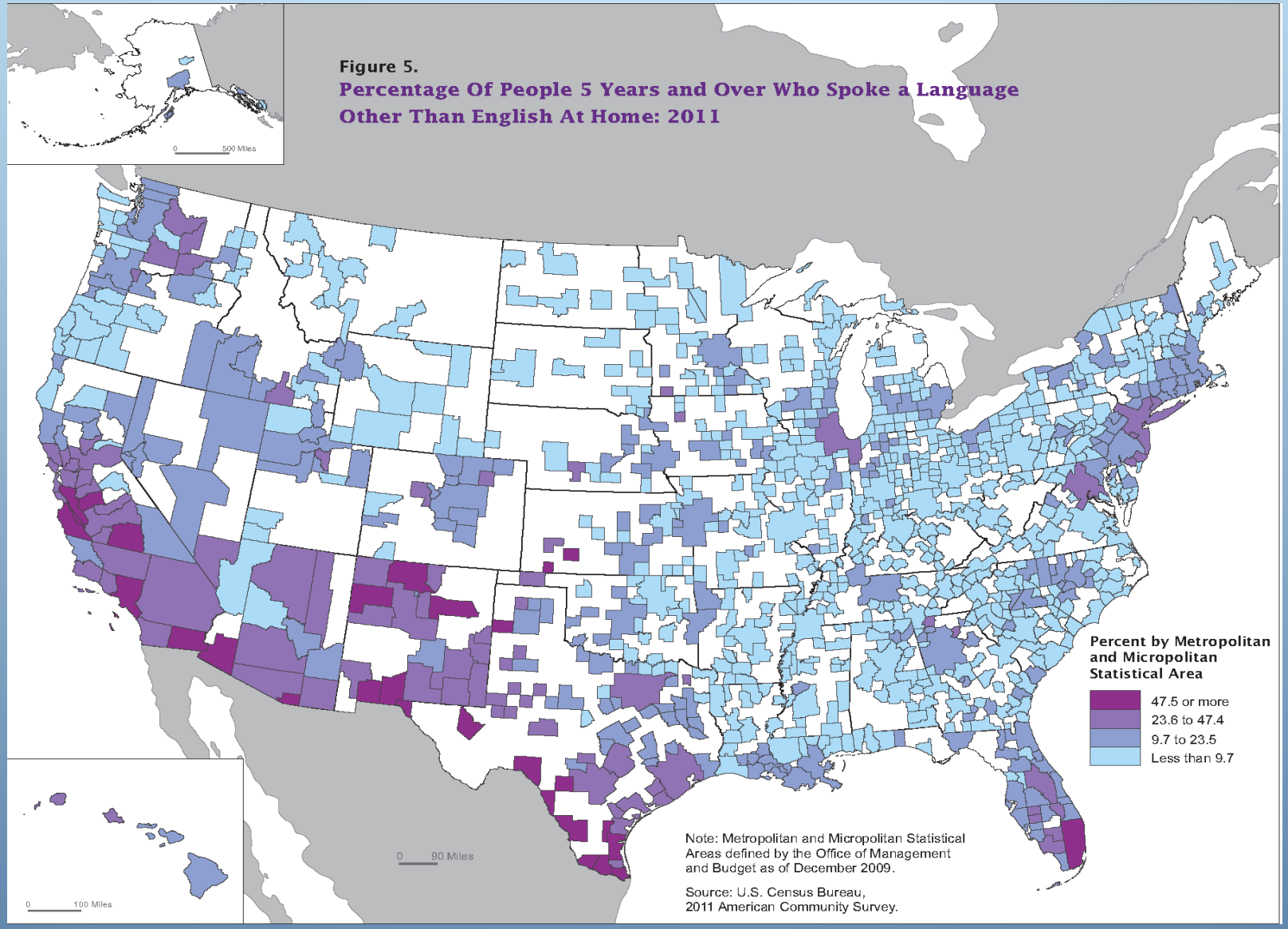


Figure 5.
Percentage Of People 5 Years and Over Who Spoke a Language Other Than English At Home: 2011
0 500 Miles
Percent by Metropolitan and Micropolitan Statistical Area
47.5 or more
23.6 to 47.4
9.7 to 23.5
Less than 9.7
0 90 Miles
0 100 Miles
Note: Metropolitan and Micropolitan Statistical Areas defined by the Office of Management and Budget as of December 2009.
Source: U.S. Census Bureau, 2011 American Community Survey.

2. Frequency Of Contact With LEP Persons

- Frequent contact with a particular language group may require enhanced language assistance services
- Less frequent contact with a particular language group may suggest a less intensified solution

3. Nature And Importance Of Program, Activity, Or Service Provided

- The more important the activity, service, or program, the more likely language services are needed
- Examples:
  - Rights to a person who is arrested
  - Information about medical care to an inmate

4. Resources Available To The Recipient And cost

- Smaller FFA recipients with limited budgets are not expected to provide the same level of language services as recipients with larger budgets
- Large entities and those serving large LEP populations should ensure that resource limitations are well-substantiated before using this factor as a reason to limit language assistance

Ways To Provide Language Services

- Oral interpretation
  - Onsite interpreters
    - Competency of interpreter should be ensured
  - Telephonic interpretation services
- Written translation
  - Translation of an entire document (e.g., Miranda rights waiver)
  - Translation of a short description of a document
- Determination on what services to use should be based on the four-factor analysis

Oral Interpretation

- Hiring bilingual staff
- Hiring staff interpreters
- Contracting with interpreters
- Using telephonic interpretation services
- Using community volunteers
- Use of family members, friends, other inmates
  - Should not be relied upon as primary method
  - May be used in exigent circumstances and no confidentiality or privacy matters discussed

Intake/Detention Considerations

- Gathering general information from LEP arrestees, such as name and address
- Medical screening questions to elicit information on inmate:
  - medical needs, including medications
  - suicidal inclinations
  - presence of contagious disease
- Assessing the need to segregate the arrestee from other prisoners

Orientation Considerations

- Orientation provides prisoners with crucial information about their incarceration
  - Obligation to comply with system rules
  - Participation in education and training
  - Accessing medical care
  - Accessing the grievance process, visitation, or recreation
- Facilities with large LEP populations may choose to translate rules, notices, and other important information (use of video)

Disciplinary Considerations

- Has the LEP inmate received adequate notice of the rule in question?
- Is the LEP inmate able to meaningfully understand and participate in the disciplinary process?
- Will translation services be needed, and who will provide them?

Program Considerations

- Program participation by LEP inmates:
  - Should not adversely impact sentence length
    - Sentence mitigation for completion of substance abuse programs, life skills programs, GED programs
  - Should not adversely affect conditions of confinement
- Options:
  - Make program accessible to the inmate through oral interpreters and/or written translation
  - Develop substitute programs
  - Waive the requirement

Language Assistance Plan

Develop an effective language assistance plan based on the four-factor analysis

- Identify LEP individuals who needs language assistance
- Determine how language assistance will be provided for each program
- Train staff
- Provide notice to LEP persons that language services are available at no cost
- Monitor and update the plan as necessary

Force Update

USE OF FORCE: Response to Resistance

- The officer's **"rationale"** for the Use of Force (USF) must be documented and justified.
- **Discipline and order are valid penological reasons** to maintain and ensure the safety and security of staff, inmates and the facility.

USE OF FORCE: Response to Resistance

- Correctional Institutions house a large number of **"society's most dangerous persons** against their will in finite spaces simply relocates and concentrates violent offenders (and their violent acts) (from the community) to corrections facilities. CMR June/July 1998
- "**Responding to violence,** as a general rule, requires some use of force and restraint measures by staff."
- "**Depending upon the perceived threat,** the response may range from simply coercing prisoners to comply with the orders to the use of deadly force."

USE OF FORCE: Street-4th Amendment

- **Leading Authority**: **Objective Reasonableness**

  Graham v. Connor, 490 U.S. 386 (1989)

  – **1. The severity of the crime at issue,**

  – **2. Whether the suspect poses an immediate threat to the safety of the officers or others, and**

  – **3. Whether he is actively resisting arrest or attempting to evade arrest by flight**

Applying Graham: 4th Amendment

Marquez v. City of Phoenix, 2012 U.S. App. LEXIS 19048 (September 11, 2012)(Street case applying Graham)

- Receiving nine (9) five-five-second cycles from the Taser,(two while it was ineffectively deployed in probe mode and seven when it was deployed in drive-stun mode), was a reasonable use of force.
  - The officers had reason to believe a serious crime had occurred;
  - Individual was actively resisting arrest; and
  - The officers could have reasonably believed that he posed an immediate risk to themselves and to others in the room

Use of Force: 14th Amendment

Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973)

2nd Circuit decision from the 1970's, articulating that the 14th Amendment might be the applicable Amendment for pretrial detainees. (Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952))(Shocks the conscience)

While the *Rochin test, "conduct that shocks the conscience," 342 U. S. at 172, 72 S.Ct. 205, is not one that can be applied by a computer, it at least points the way (*"shocks the conscience", Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952)

Use of Force: 14th Amendment

- **Porro v. Barnes, 624 F.3d 1322 (10th Cir. 2010)(applying the Johnson v. Glick standard of the 2nd Circuit)**
  - Excessive force claims, for pretrial detainees, are analyzed in light of 3 factors: (analyzed under the14th Amendment)
  1. The **relationship** between the amount of force use and the need presented.
  2. The **extent of the injury** inflicted
  3. The **motives** of the state actor.
  - In general, force inspired by malice, or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience.
  - This is the standard applied by the 10th Circuit and not the United States Supreme Court . (The Hudson 5 factors of the 8th Amendment apply beautifully)

USE OF FORCE: 8th Amendment

- **Leading Authority**: **Good Faith Effort to Maintain and Restore Order or Malicious and Sadistic for the Very Purpose of Causing Harm**

  Whitley v. Albers, 475 U.S. 312 (1986)

  Hudson v. McMillian, 112 S.Ct. 995 (1992)(5 part test)

  Wilkins v. Gaddy, 2010 U.S. LEXIS 1036

USE OF FORCE

- **Aldini v. Johnson,** Civ. No. 09-3183 (6th Cir., June 29th, 2010)
  - The 6th Circuit ruled that the **Fourth Amendment**, not the Fourteenth, protects pre-trial detainees arrested *without a warrant* through the completion of this probable-cause hearing.
  - **The objective reasonableness test would apply**. (The Fourth Amendment's standard only permits an officer to use reasonable force to protect himself from a reasonable threat)
  - The court stated: "Placing the dividing line at the probable-cause hearing for those arrested without a warrant does, however, have a basis in Supreme Court precedent. The Court noted in dicta in Wolfish that individuals who have not had a probable-cause hearing are not yet pretrial detainees for constitutional purposes. 440 U.S. at 536."
  - Thus, while force found to shock the conscience under the Fourteenth Amendment will necessarily violate the Fourth Amendment's reasonableness test, force that does not shock the conscience may nevertheless be unreasonable under the Fourth Amendment.

USE OF FORCE: Jail/Prison

- **Whitley** set the standard for use-of-force scenarios which involve **"exigent circumstances"**
  - "Maliciously or sadistically for the very purpose of causing harm".
  - "Deliberate Indifference" is not the test.
- **Hudson** is a use-of-force case which did not involve a need to restore order. It **set the standard for all other use-of-force scenarios by establishing a five-part test.**
  - Even use of force which results in minor injuries may state a cause of action if it involves a malicious, wanton, purposeless, or sadistic use of force. Hudson (Unlike other 8th Amendment claims, "serious harm" is not a required element.)

USE OF FORCE: Jail/Prison

- The U.S. Supreme Court's clear intent that the Eighth Amendment's prohibition against "Cruel and Unusual" punishments extends to Use of Force situations as well.
- "Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however, 'After incarceration, only the 'unnecessary and wanton infliction of pain'…constitutes cruel and unusual punishment forbidden by the Eighth Amendment."

USE OF FORCE: Response to Resistance

- Unlike other 8th Amendment claims, "serious harm" **is not** a required element.
- Even use of force which results in minor injuries may state a cause of action if it involves a malicious, wanton, purposeless, or sadistic use of force. **Hudson v. McMillian**

USE OF FORCE: Response to Resistance

- "In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. See **Hudson v. McMillian**, 112 S.Ct. 995 (1992)."

USE OF FORCE: Whitley v. Albers

- **Exigent Circumstances:**
  - Precedent: **Whitley v. Albers**, 475 U.S. 312 (1986)
  - Issue: Whether force was applied in a **good faith effort** to maintain or restore discipline or **maliciously and sadistically** for the very purpose of causing harm?

USE OF FORCE: Hudson v. McMillian

- **All Other Use of Force Scenarios:**
  - Precedent: **Hudson v. McMillian**, 112 S.Ct. 995 (1992)
  - Issue: Whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer injury?
  - Holding:
    - The extent of the injury is "one" of the factors considered in determining whether the force was necessary and wanton.
    - The use of excessive force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury.

USE OF FORCE: Hudson v. McMillian

Key Factors in determining whether excessive force (malicious and sadistic) was used?

1. **Threat perceived** by a reasonable officer.
2. **Need** for Use of Force
3. **Amount of Force used in relation to the need** for force
4. **Effort(s) made to temper** forceful response
5. **Extent of the Injury**
   A. Exigent circumstances: one factor to be considered in determining whether the use of force was wanton and unnecessary.
   B. All other use of force scenarios- serious injury is not a requirement.

This isn't the goal: Threat Perceived Not Articulated or heard by judge

- A Cook County inmate convicted of killing 7 people (shooting and stabbing) during a botched robbery at a local restaurant, was awarded nearly $500K in which he alleged a jail officer punched him in the face.
- Now serving a life sentence, intent is that the inmate never see a dime of that money.
- Frustration: The judge would not allow any evidence about the viciousness of the killings which was known by the officer involved in the use of force.
- Based on that knowledge, his perception was that he had to be more aggressive with this inmate, based on the inmate's history of violence.

"Asphyxia": Threat Not Articulated In Report

- **Abston v. City of Merced**, Civ. No. 11-16500 (9th Cir. January 13, 2013) Remanded.
  - At issue, Abston being in the prone position, hands behind his back for 1 minute, 7 seconds and whether he was violently resisting to justify the use of the force.
    - A reasonable fact-finder could conclude that defendants' use of body compression as a means of restraint was unreasonable and unjustified by any threat of harm or escape when Abston was handcuffed and shackled, in a prone position, and surrounded by numerous officers. *Drummond ex rel. Drummond v. City of 2 Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003) (concluding that "the force allegedly employed was severe and, under the circumstances, capable of causing death or serious injury" where defendant officers allegedly "continued to press their weight on [plaintiff's] neck and torso as he lay handcuffed on the ground and begged for air").*

Holding

- It was clearly established that defendants' use of body compression to restrain a prone and bound suspect, who was in no position to offer any meaningful resistance, would violate the rule established by *Drummond nearly five years earlier, in 2003.*
- In contrast, it was not clearly established at the time of Abston's arrest that the use of four, five-second Taser cycles within a span of approximately two minutes against a suspect who appeared unarmed, fell to the ground following the first tasing and thereafter presented no real threat of escape, and was surrounded by three officers, was objectively unreasonable. *See Bryan v. MacPherson*
- **What is not clear is whether Abston continued to resist during this period and, if so, whether his resistance was anything more than minimal, considering that he was handcuffed and ankle- shackled.**

Failure to Articulate Continued Threat/Need: You Have To Tell Me

- **An arrestee who appeared intoxicated actively resisted officers both during the process of being arrested and when taken into jail. He was handcuffed and pepper sprayed. Then, at the jail, when he continued to resist, he was held down and a Taser was applied to him three times in the stun mode. He was held face down, ceased breathing, and was taken to a hospital where he died.**
- **A medical expert for the plaintiff expressed the opinion that his cause of death was traumatic asphyxia due to compression of his neck and back while being restrained.**
- **A federal appeals court ruled that the defendant officers were entitled to qualified immunity when there was insufficient evidence to support the strangulation theory, since only the expert's conclusory opinion supported it. That opinion was contradicted by other evidence, including the testimony of all the officers and two EMTs.**

Burdine v. Sandusky County, Ohio, #12-3672, 2013 U.S. App. Lexis 7691, 2013 Fed. App. 376N, 2013 WL 1606906 (Unpub. 6th Cir.).

Amount of Force: Spitting

- **MARION COUNTY, Fla. —The Marion County corrections officer accused of slamming an inmate's head into a wall had accepted a plea deal from the State Attorney's Office.**

  A camera was rolling where Officer slammed an inmate's head into a wall. The video shoes the officer presing his fist into the side of the inate's neck who appears o be unconscious after a few seconds.

- **The officer surrendered his law enforcement certificate in exchange for his charges of batter and malpractice by a jailer being dropped.**
- **http://www.wesh.com/news/central-florida/corrections-officer-accused-of-slamming-inmates-head-into-wall-takes-plea-deal/24531474#ixzz308eOA9uB**

SHERIFF'S OFFICE HAZARD REPORT

Deputies Name: Rank: Assignment: Date & Time of Incident:

- Subjects Name: Sex: Race: Age: Location of Occurrence:
- Witness Names: Rank / Assignment: Type of Force Used: ( ) Physical Force ( ) Chemical Agent ( ) Firearm ( ) Other:________________
- Your report must describe in detail the events which caused you to employ force and the nature of the force used. Attach your report and copies of all other staff reports of the incident. Reports are required from all staff members involved in or witnessing the incident.
- Reporting Deputy's signature:__________________ Date:________
  ****
- Sergeant's Review of the Incident:
- What was the threat reasonably perceived by the staff involved:
- Describe the need for the application of force used:
- What was the relationship between the need and the amount of force used:
- Describe any efforts made by the staff to temper the severity of the forceful response:.
- What were the extent of the injuries suffered by the inmate if any:
- Sergeant's Signature:________________________________Date:_____________ Lieutenant's Signature:__________________________Date:______________
- Captain's Signature:_____________________Date:________
- FORWARD THROUGH THE CHAIN OF COMMAND TO THE SHERIFF.THIS REPORT SHOULD NOT BE KEPT WITH INMATE RECORDS OR DUPLICATED.

United States Supreme Court regarding "Videos"

- **Scott v. Harris**, 127 S.Ct. 1769 (2007)
  - High speed police officer case
  - In a SJ dispute, the disputed facts are considered in a light most favorable to the non-moving party (the plaintiff).
  - Not anymore.
  - When one story blatantly contradicts the record (video) so that no reasonable jury could believe it, the court should adopt the version of the facts supported by the facts.
  - Justice Scalia stated the officers' version of the facts should have been considered versus the plaintiff's "driving test" description.
  - This is extremely relevant in Use of Force litigation. Video tape when and where possible.

Videotaping

- **Molina v. Gallegos,** Civ. No 12-424 (District of New Mexico, March 13, 2013).
  - Inmate claimed the officers used excessive force against him.
  - Video showed the officers responded to the inmate's grabbing of the officers genitals.
    - Inmate booked in for DUI. Inmate claimed he needed his medication for his mental illness. Told the medication was not in yet. Inmate threatened litigation. While being moved to segregation, he became combative. Taken to the floor.
  - The question is not whether the force used by defendants was the most suitable but whether it was grossly disproportionate to plaintiff's conduct. (applying the 14th Amendment standard)
  - Even in the light most favorable to the inmate, the evidence does not support a 14th Amendment violation.

Videotaping

- **Plumhoff v. Rickard**, No. 12-1117 Supreme Court of the United States (November 15, 2013)
  - The 6th Circuit denied the officer's qualified immunity request in regards to a high speed pursuit case and allegations of excessive force.
  - This is a 4th Amendment case, applying Graham v. Connor and Tennesse v. Garner. The qualified immunity issue is in dispute and ultimately, the crux of the case and the reason for the appeal.
  - The 6th Circuit found that the video neither supported, confirmed or denied the officer's or the plaintiff's position specifically as to the degree of danger presented to the officers.
  - It is a case with potentially a huge impact on how the "threat level" is determined regarding the use of force as applied to law enforcement and the ultimate application of qualified immunity.
  - Case arising from Estate of v. Allen v. Plumhoff, Civ. No. 11-5266 (6th Cir. November 14, 2012)

Prison Litigation Reform Act

Prison Litigation Reform Act

- The Prison Litigation Reform Act (PLRA) 18 USC §3626 was enacted in 1996 by Congress.
- It is one of the most important developments in prisoner litigation.
- PLRA has the effect of discouraging frivolous litigation.
- PLRA has reduced the number of §1983 lawsuits by almost half.
- PLRA does not apply in state court actions
  - Many states (like Utah) have adopted legislation which mirrors PLRA

Prison Litigation Reform Act: Restrictions on Inmate:

- **No inmate may file a lawsuit without first exhausting their administrative remedies.**
  - "Applicability of Administrative Remedies. No action shall be brought with respect to prison conditions under §1983 of this title, or any other Federal law by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as available are exhausted." 42 U.S.C. § 1997e(a)

Prison Litigation Reform Act

- **Woodford v. Ngo**, 548 U.S. 81 (2006)(the Court reversed the Ninth Circuit, ruling that the Prison Litigation Reform Act requires prisoners to comply with "proper" and not merely "simple" exhaustion of administrative remedies before bringing suit in federal court.
  - Incentive (correct errors)
  - Quantity (reduce number of frivolous lawsuits)
  - Quality (administrative record)

Prison Litigation Reform Act

Jones v. Bock, 549 U.S. 199 (2007)

+ The PLRA does not require the inmate/plaintiff to allege and demonstrate exhaustion in his complaint
+ or to permit suit only against those defendants named in the original grievance
+ nor to allow the court to dismiss the entire complaint if the prisoner fails to satisfy the exhaustion requirement as to any single claim. The 6th Circuit's rules exceeds the limits of the judicial role. (Exhaustion is an affirmative defense)

Huge Decision by the 9th Circuit

***Albino v. Baca**, 10-55702 (April 2014)*

- A jail inmate's failure to exhaust administrative remedies after he was allegedly beaten by fellow inmates **does not bar his suit against LA County and former Sheriff Baca.**
- **En banc decision (8-3)**

Exhaustion

- **No inmate may file a lawsuit without first exhausting their administrative remedies continued…**
  - **Lira v. Herrera**, Civ. No. 02-16325 (9th Cir. November 1, 2005) The court need not dismiss the entire complaint when it contains both exhausted and unexhausted claims.

No need to Exhaust

TUCKEL V. GROVER, 660 F.3d 1249 (10th Cir. 2011)

Prison Litigation Reform Act: Exhaustion of Remedies A prisoner who claimed that he was beaten by correctional personnel in retaliation for having filed a grievance filed a federal civil rights lawsuit over the beating without first filing a new grievance over it. The defendants argued that the suit should be dismissed, given the requirement in PLRA that requires a prisoner to exhaust available administrative remedies BEFORE filing.

The appeals court disagreed. The inmate could proceed with his lawsuit IF he could show that his fear of additional retaliation "reasonably deterred" him from filing another grievance.

When a prison officials inhibits an inmate from utilizing the administrative process through intimidation, that process can no longer be said to be available.

Prison Litigation Reform Act

- **Injunctive Relief:**
  - Relief may go no further than necessary to take care of the constitutional violation.
  - The relief must be the least intrusive means of remedying the constitutional violation.
    - Instead, we have upheld as sufficient under the PLRA overall statements by the district court that the need-narrowness-intrusiveness standard has been met
  - The relief must be narrowly drawn.
  - The court must consider what effect the proposed relief would have on the state or local criminal justice system and public safety. Turner v. Safley
  - There must be proof of physical harm to one or more prisoners.
  - **Armstrong v. Schwarzenegger**, Civ. No. 09-17144 (9th Cir. September 7, 2010)

Prison Litigation Reform Act

- **Damage Awards:**
  - No damages without **actual injury.**
  - Restitution must be paid first.
  - Reasonable efforts must be made to inform victim of award (file a claim).

Prison Litigation Reform Act

- **Litigation Costs:**
  - Inmates must pay the filing fee (@ $150).
  - Inmates cannot be denied access to courts because they are indigent.
    - Inmate must submit a 6-month history of his financial account at the institution
    - Run a negative balance
    - Inmate must pay 20% of the filing fee or 20% of the monthly average of deposits in the last 6 months in their institutional accounts.
    - Inmate must continue to pay balance thereafter on the same basis.
    - Officials must send $ to the courts whenever the inmate's account exceeds $10.00 until paid.
    - Case may be dismissed if indigency claim is not substantiated.
    - Costs are not dischargeable in bankruptcy.

Prison Litigation Reform Act

* **Attorney Fee Awards:**
  * Fees must be incurred proving an **actual violation.**
  * The fee award is proportional to the inmate's degree of success.
  * Fees may be incurred to enforce an order. The fees must be directly related to enforcing order.
  * Attorney fees can be no higher than 150% of the fees paid for court appointed criminal attorneys (@ $125/hour).
  * If the inmate agrees to a higher fee, than the inmate is responsible for the additional cost.
  * Up to 25% of any damage award may be applied to the payment of the attorney's fees.

PLRA: Attorney's Fees

- **JIMENEZ V FRANKLIN, Civ. No. 10-56199 (9th Cir.)**
  - **Deputies were liable for attorney fees.**
    - **Prison Litigation Reform Act: Attorneys' Fees A pretrial detainee received a jury verdict against four deputy sheriffs on excessive force claims arising from separate incidents when he was in the county jail. The jury only awarded $1 in damages against one of the defendants. The other three deputies were liable, respectively, for $5,000 in compensatory and $10,000 in punitive damage, $50,000 in compensatory and $50,000 in punitive damages, and $100,000 in compensatory and $150,000 in punitive damages, for a total award of $365,001. The trial court awarded $505,671.40 in attorneys' fees and $24,549.94 in costs, ordering the plaintiff to pay $5,000 of the fee award. The court ordered that all four defendants bee jointly and severally liable for the remaining $500,671.40, to ensure that the attorneys' fees were paid. This action was taken, in part, because the county indicated that it might not indemnify the defendant against whom the largest award was made because he was in prison and thought to be judgment-proof. An appeal of the judgment on liability was affirmed,**

Attorney's Fees continued…..

- A federal appeals court rejected the argument by the deputy found liable for the $1 that he could not be held jointly and severally liable for the unpaid fees because of the statute's attorneys' fee cap of 150% of damages, as he had not raised the issue in the earlier appeal.

Prison Litigation Reform Act

- **Prisoner Release: Before a court can order inmates released due to overcrowding:**
  - Officials must have a reasonable amount of time to remedy the violation.
  - There must have been a previous order which failed to remedy the problem.
  - There must be a finding that the overcrowding caused the constitutional violation.
  - The standard of proof to establish the overcrowding of a specific violation is clear and convincing evidence.
  - Order must be issued by a 3-judge panel.
  - The plaintiff must affirmatively request the 3-judge panel.

Prison Litigation Reform Act

* **Consent Decrees:**
  * Consent decrees must be narrowly drawn and cannot exceed what is necessary to remedy the constitutional violation.
  * The consent decree may only correct an **immediate violation**.
  * Consent decrees can be terminated after **TWO years.**
  * No consent decrees may be approved unless it meets all of the criteria for relief under the Act and is narrowly drawn.
  * Private settlements are permitted.

Prison Litigation Reform Act

- **Frivolous Lawsuits:**
  - Defendants may waive the right to reply to a lawsuit if they feel the suit has no merit.
  - Courts are required to review inmate litigation.
  - The inmate's complaint may be dismissed by the court if:
    - Frivolous on its face;
    - Malicious on its face;
    - Fails to state a claim; and
    - Seeks $ damages from someone legally immune.
  - If a court finds possible merit, no order may be issued until the defendants have had a chance to respond.
  - **Three Strikes and the Inmate is Out!!!** If 3 previous suits have been dismissed, the inmate may not file any additional suits unless there is an immediate threat to his life or serious bodily harm.

Prison Litigation Reform Act

- **Special Masters:**
  - Special Masters may only be appointed in the remedial phase of the litigation.
  - Special Masters may only be appointed if a finding is made that the issues in the case are too complex for resolution by the parties without the master.
  - No special master may be appointed by a single judge.
  - No state or local government can be required to pay the costs of appointed and retaining a special master.
  - Defendants are entitled to an immediate appeal from any order appointing a special master.
  - Fees paid to a special master may not exceed $125/hour.

Prison Litigation Reform Act

- Special Masters Continued:
  - Special Masters must be totally disinterested parties.
  - Candidates come from a list of 5 names submitted by each party. Each side strikes 3 names submitted by the opposing party.
  - Appointment and need must be reviewed every 6 months.
  - Ex parte communication between the special master and the parties is strictly forbidden.

Prison Litigation Reform Act

- **Other Issues:**
  - Pre-trial proceedings may be handled over the telephone, video conferencing etc…
  - The DOJ cannot intervene without the express approval from the U.S. Attorney General.
  - The DOJ may only seek injunctive relief; not monetary damages.
  - PLRA does not appear to cover private facilities.

Duty to Protect

DUTY TO PROTECT

SOURCE OF DUTY TO PROTECT

- Derives from the 8th Amendment right to be free from "cruel and unusual punishments"
- Prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).
- For pretrial detainees, this right arises under the due process clause of the 14th Amendment

Failure to Protect Constitutional Violation

Two Part Test

1. Objective Component
2. Subjective Component

Objective Component

- Inmate is incarcerated under conditions posing a "substantial risk of serious harm"
- Conditions must be "objectively, sufficiently serious"
- Objective component satisfied by showing that reasonable precautions would have prevented the inmate from being exposed to harm

Seriousness of Harm

- Although prison officials have a duty to protect inmates from violence at the hands of other inmates, not every injury within a prison will support an Eighth Amendment violation. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002).

- The harm that the prisoner was in danger of suffering must be an **objectively serious one**. Farmer v. Brennan.

When is harm "Objectively Sufficiently Serious"?

- Schoelch v. Mitchell, 625 F.3d 1041 (8th Cir. 2010).
  - Schoelch assaulted two times by fellow inmate known by jail officials to have threatened him, and known to exhibit aggressive unpredictable behavior, but was not injured
  - Court: No evidence that detainee suffered objectively serious injury, as detainee suffered no physical or mental injury from the assault.
- Doe v. Welborn, 110 F.3d 520 (7th Cir. 1997)
  - Prisoner who alleged that he experienced terror, psychological harm and deterioration of his mental state, resulting from living in constant fear of fellow prisoners, while in protective custody for two months awaiting a transfer to another facility, failed to establish compensable injuries under Eighth Amendment.

Risk of harm from Inadequate staffing

- Inadequate staffing can create an objective risk of substantial harm in a prison setting that is sufficient to satisfy the objective prong of the deliberate indifference test. Hoptowit v. Ray, 682 F.2d 1237, 1251 (9th Cir.1982)
- "[H]aving stripped [inmates] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer v. Brennan, 511 U.S. at 833, (1970)

Subjective Component

- Corrections officials acted with "deliberate indifference" to the risk of harm
  - Corrections officials **knew** that there was a substantial risk of the inmate suffering the harm
  - Corrections officials disregarded that risk

Proving Knowledge

- Must show that corrections officials:
  - Were aware of the facts from which an inference can be drawn that a substantial risk of serious harms exists; and
  - That they actually draw that inference
- Do not need to prove that officials intended harm to be caused to the inmate
- More than negligence, less than actual intent to harm

Evidence of Knowledge

- The existence of knowledge is a question of fact, which may be proved many ways, including from circumstantial evidence.
- The very fact that the risk was obvious may justify an inference that the prison official knew of the substantial risk of harm. **Farmer v. Brennan**
- Note: The obvious nature of the risk does not itself establish deliberate indifference
- The defendant must have been aware of the risk, and the obviousness is merely used as an evidentiary fact to show that the defendant's awareness.

Sources of Knowledge of Risk

- Internal Sources:
  - Inmate
    - General vs. Specific threat
  - Staff observations
    - Altercations, vulnerable, effeminate, very young, very old
  - Charges
    - Child offender, criminal history
  - Previous institutional history
  - Notoriety
    - Famous, media attention, politician, law enforcement
- External Sources:
  - Family/Friends
  - Law Enforcement
  - Attorneys

Knowledge of Threat

- Bistrian v. Levi, 696 F.3d 352 (3rd Cir. 2012)
  - Violent gang member in Bistrian's unit asks him to pass note to other gang members
  - Bistrian informs officials who ask him to continue to pass notes while they investigate
  - Bistrian later tells officials that gang members are aware of cooperation, that he received threats in the rec yard, and that he would be seriously harmed if place in rec yard with them
  - Officials take no action - place Bistrian in rec yard where he is brutally attacked by gang members
  - Court: Bistrian adequately stated a deliberate indifference claim:
    - Gang members knew of Bistrian's cooperation
    - Officials made no attempt to prevent Bistrian's placement in rec yard with gang members despite Bistrian advising them of the threat

Reasonable Response to Risk of Harm

- Even where officials are actually aware of a substantial risk of serious harm to an inmate, they may be found free of liability if they responded reasonably to the risk even if the harm is not averted. Farmer v. Brennan at 844.

- Smith v. Sangamon County Sheriff's Dept., 715 F.3d 188 (7th Cir. 2013)
  - Non-violent inmate housed in maximum custody attacked and seriously injured by violent inmate
  - Alleges that classification system failed to separate violent from non-violent inmates
  - Court: No deliberate indifference
    - No evidence that classification policy created an obvious and systemic risk to inmate safety and that the Sheriff's Dept. ignored that risk
    - Sheriff's Dept. used an objective classification system based on standards recommended by the American Correctional Association

Risk of Future Harm

- While prison authorities must protect an inmate against current threats from fellow prisoners, they also must guard against sufficiently imminent dangers that are likely to cause harm in the next week, month, or year.
- Horton v. Cockrell, 70 F.3d 397 (5th Cir. 1995).
  - Horton reported to officials that another inmate was attempting to extort money from him
  - Horton and the other inmate had several physical altercations that did not result in any serious injuries
  - The trial court dismissed the claim as frivolous
  - Appellate court reversed finding that:
  - "Although Horton did not sustain serious injuries, he could have been severely injured either in one of those two altercations, or at a later time. This is arguably the type of "imminent danger" against which a prison official must protect."

Poor Judgment?

- The mere fact that prison officials showed poor judgment does not necessarily demonstrate a conscious disregard of a known risk to prisoner safety. Lewis v. Richards, 107 F.3d 549 (7th Cir. 1997).

- Fisher v. Lovejoy, 414 F.3d 659 (7th Cir. 2005)
  - Officer Lovejoy observes Fisher being stabbed by another inmate
  - Housing unit erupts into a riot
  - Lovejoy enters unit and places all inmates against the wall
  - Lovejoy walks the unit and locates a knife
  - While Lovejoy at far end of unit, Fisher attacked and stabbed again
  - Court: No deliberate indifference
    - While searching or isolating inmates might have prevented the second attack, the fact that another attack occurred does not mean that Lovejoy's response was unreasonable
    - Response reasonable in a chaotic situation – taken to avert further violence

Willful ignorance?

– A prison official may not fail to investigate suspicions of risk, such as refusing to verify underlying facts that the official strongly suspects to be true, or declining to confirm inferences of risk that the official strongly suspected to exist.
Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811, 822 (1994).

You Make the Call!

- Dorsey v. Bailey, 511 Fed.Appx. 949 (11th Cir. 2013):
  - Dorsey asked Bailey, the shift commander, to relocate cellmate to another cell because of an earlier "disagreement"
  - Bailey did not relocate Dorsey because the inmate control officer determined that Dorsey and the cellmate were not "validated enemies"
  - Dorsey suffered injuries during a fight with his cellmate
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Bailey aware of risk of harm? Disregard it?
- Court: No deliberate indifference
  - Dorsey and Terry had lived peaceably for months
  - Dorsey told Bailey he didn't feel comfortable living with Terry, but did not state that he had been threatened by him
  - Bailey "arguably" should have separated them, "but merely negligent failure to protect an inmate from an attack does not justify liability [for deliberate indifference]"

You Make the Call!

- Amick v. Ohio Dept. of Rehab., 521 Fed.Appx. 354 (6th Cir. 2013)
  - Corrections officer ordered by a supervisor not to place Amick, who was diagnosed with schizophrenia, in a cell with other inmates
  - Despite order, Officer places Amick in cell with another inmate.
  - Within hours, Amick and cellmate began fighting, resulting in Amick's death.
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Officer aware of risk of harm? Disregard it?
- Court: Allegations sufficient to show deliberate indifference
  - The potential reasons for ordering single cell placement are limited
  - Measure generally taken to avoid or minimize risk of harm to one or both of the inmates who would otherwise be placed together
  - "Obvious" that Officer's supervisor ordered him to place Amick in a single cell to ensure inmate safety in face of perceived risk of harm.

You Make the Call!

- **Shields v. Dart, 664 F.3d 178 (7th Cir. 2011)**
  - After expressing concerns for his safety, jail officials move Shields from the max custody unit of the Cook County jail to the "shank deck" housing prisoners charged with possessing weapons at jail
  - When being placed in the "shank deck," officials falsely identify him as being a gang leader with "Black Disciples" within earshot of other inmates
  - Shields does not report any concerns to the jail officials
  - Four days later Shields is stabbed by two other detainees
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Officials aware of risk of harm? Disregard it?
- Court: No deliberate indifference
  - Detainee did not report any problems with fellow detainees or fear of attacks after being moved, even after officers misidentified him as a gang leader
  - General risk of harm in a max security unit does not by itself establish knowledge of a substantial risk of harm

You Make the Call!

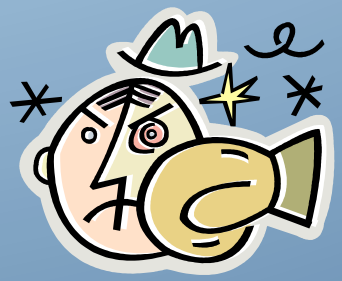
- **Albino v. Baca, 697 F.3d 1023 (9th Cir. 2012)**
  - Albino arrested for rape.
  - Classified at booking and housed in the general population
  - Albino orally requests to be placed into protective custody, but is refused
  - Albino is raped, and again orally asks for protective custody but is refused a second time
  - Albino is assaulted on two additional occasions.
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Officials aware of risk of harm? Disregard it?
- Court: Claim Dismissed! (Likely would have found DI)
  - LA County Jail has a grievance process
  - Albino failed to exhaust his administrative remedies (claimed he was unaware that it existed)
  - PLRA!

You Decide!

- **Robinson v. S. Carolina DOC, (Dist. Ct. S. Carolina – 2012)**
  - **Robinson moved from suicide cell back to housing unit**
  - Robinson told prison officials that he did not feel comfortable returning to his cell because his cell mate had been accused of committing a violent crime
  - Robinson placed in cell anyway and a fight ensued with cell mate
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Officials aware of risk of harm? Disregard it?
- Court: No deliberate indifference
  - Generalized concern about safety or welfare insufficient to meet objective element of DI claim
  - No evidence that officials actually knew of or disregarded a serious risk of harm ("Obscure warning is insufficient to place prison officials on notice that [cellmate] posed a substantial risk of harm.")

You Decide!

- **Cornelio v. Hirano 2012 WL 851642 (D. Hawaii 2012)**
  - Cornelio (male) disciplined for having unauthorized contact with a female inmate
  - Cornelio placed in housing unit with female inmate's husband
  - Cornelio claimed purpose was to provoke a confrontation between the two
  - Cornelio was assaulted by the husband resulting in a broken nose and concussion
- Deliberate Indifference?
  - Risk of harm objectively sufficiently serious?
  - Officials aware of risk of harm? Disregard it?



- Court: No deliberate indifference
  - Cornelio fails to show that officials were aware of any facts that put them on notice of any significant risk of harm when they placed him in new housing location

PREA

PREA IMPLEMENTATION SAMPLE TRAINING TOPICS

Staff Misconduct Liability Issues

- Criminal Prosecution
- Civil Rights Suits
- Intentional Torts
- Negligence Suits
- Employment Issues

Consent

Consent is not a defense to criminal charge of staff sexual misconduct

Effects of Conviction

- Felony Record
- Jail/Prison/Fines
- Firing
- Registration as Predatory Offender
- Collateral Consequences of Being Convicted Felon

Civil Rights Suits

42 U.S.C. 1983

A person under color of law violates federally protected constitutional or statutory protected rights

Intentional Torts – Offending Staff

Assault and Battery

Intentional Infliction Emotional Distress

Punitive Damages

Negligence – General Elements

Duty

Breach

Cause of Harm

Damages or Harm

Riley v. Olk-Long, 282 F.3rd 592 (8th Cir. 2002)

- Eighth Amendment action against Warden and Security Director
- Male staff forced sexual relations with plaintiff
- Warden and Director found liable
  - Warden ($25,000);
  - Director ($20,000)

Ortiz v. Jordan (S.Ct. 1/24/11)

- Jordan wrote incident report falsely stating Ortiz would not name her assailant;
- Jordan did not notify supervisor(report two days later)
- Later that day Ortiz again sexually assaulted by Schultz and reported it
- Investigator Bright placed Ortiz in solitary confinement; Ortiz claims this was retaliation

Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005)

- Inmate alleged sexual assaults by jail administrator and officer (son-in-law of Sheriff)
- Written statements provided by women to Sheriff
- Sheriff delayed moving women from jail or moving officers
- Both later convicted of assault

Kahle v. Leonard (8th Cir. 2007)

- FTO could be held liable for trainee behavior
- Work station had lights indicating cell door was open
- Testimony he could see cell from supervisor station
- No logs of any entry into cell

Defenses – Staff Members

Do not do it

Report any inmate misconduct/potential set-ups

Assist in Discipline of Inmates

Look out for each other

Supervise inmates, third parties, contractors, volunteers

Defenses –

- Detailed background investigation prior to hire
- Background outside parties
- Policy strongly written, enforced
- Policy communicated to staff & third parties
- Policy communicated to inmates
- Training staff, all who may have inmate contact

Training – Consequences of Misconduct

Avoiding set-ups

Duty to protect

Criminal Consequences

Who to turn- not just staff- everyone

Document training

Defenses (continued)

- Aggressive/Pro-active Investigations
- Referral for Prosecution
- Discipline/Firing
- Termination of Vendors, Third parties
- Discipline Inmates for False Reports

LGBTI

Legal Issues Pertaining to Lesbian, Gay, Bisexual, and Transgender Inmates

Challenges for the Inmate and for the Facility

- LGBT individuals face unique challenges when they are arrested and incarcerated
- Likewise, prison and jail officials tasked with providing for the care, custody, and control of LGBT inmates also face unique challenges
- Requires a balance between the rights of the LGBT inmate and the safety and security needs of the correctional facility

LGBT Right to Privacy

- Griswold v. Connecticut, 381 U.S. 479 (1965)
  - First case to specifically recognize a constitutional right of privacy within the 1st Amendment to the U.S. Constitution
- Bowers v. Hardwick, 478 U.S. 186 (1986)
  - Constitutional right to privacy does not extend to homosexual acts between consenting adults
- Lawrence v. Texas, 539 U.S. 558 (2003)
  - Specifically overrules Bowers
  - Holds that all adults, including LGBT individuals, have the right to engage in intimate conduct with another adult in private.

Right to Confidentiality in Sexual Orientation and Gender Identity

- Does intentional disclosure of inmate sexual orientation constitute "deliberate indifference" to a serious risk of harm in violation of 8th Amendment?
- Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)
  - Eighth Amendment is violated when an inmate endures verbal sexual harassment from prison guards plus physical sexual assault or threats of physical sexual assault.
- Thomas v. Dist. of Columbia, 887 F. Supp. 1 (D. D.C. 1995)
  - Physical harm with which the inmate was threatened as a result of intentional disclosure of sexual orientation, and the psychic injuries suffered from unnecessary, cruel and outrageous conduct were sufficiently harmful to state an 8th amendment claim

Right to Confidentiality in Sexual Orientation and Gender Identity

- Does intentional disclosure violate the right to privacy guaranteed by the 1st Amendment?
  - Gender Identity
    - Powell v. Schriver, 175 F.3d 107 (2nd Cir. 1999)
      - Prisoner's transgender status found to be among those constitutionally protected personal matters and a prison official may not violate prisoner's right to privacy by disclosure of gender identity unless that disclosure is reasonably related to legitimate penological interests.
  - Sexual Orientation
    - At least two cases have found that disclosure of a prisoner's sexual orientation may give rise to a violation of the constitutional right to privacy
      - Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000)
      - Johnson v. Riggs, 2005 WL 2249874 (E.D. Wis. 2005)
    - At least one case holds that it does not:
      - Disclosure of sexual orientation does not rise to the level of a breach of a "fundamental" right under the Constitution. Lee v. Willey 2012 WL 4009629 (E.D. MI 2012).

Transgender Access to Gender-Related Medical Care

- Estelle v. Gamble, 429 U.S. 97 (1976)
  - "Deliberate indifference" to a prisoner's serious medical needs violates the 8th amendment right to be free from cruel and unusual punishment
- Courts have consistently held that "transsexualism," a/k/a "gender identity disorder" or "gender dysmorphia," is a serious medical need

Gender Reassignment Surgery

- **Kosilek v. Spencer**, 889 F.Supp.2d 190 (D. Mass 2012)
  - Court finds 8th Amendment violated by prison's denial of sex reassignment surgery to prisoner with "severe gender identity disorder" where evidence established surgery medically necessary.
    - "Defendant has refused to provide the only adequate treatment for Kosilek's serious medical need in order to avoid public and political criticism."
  - Prison ordered to provide Kosilek sex reassignment surgery
  - UPDATE: 1/17/2014 – Affirmed by 1st Circuit
    2/12/2014 – Rehearing En Banc Granted

Gender Reassignment Surgery

- **De'Lonta v. Johnson**, 708 F.3d 520 (4th Cir. 2013)
  - De'Lonta is a pre-operative transsexual suffering from severe gender identity disorder, with "overwhelming" urges to perform self-surgery, especially after therapy sessions.
  - Prison denied De'Lonta's repeated requests to be evaluated for sex reassignment surgery, and advised her to continue with therapy
  - Court holds that De'Lonta sufficiently stated a claim for deliberate indifference to a serious medical need in violation of the 8th Amendment where she alleged that she was denied consideration for sex reassignment surgery despite fact that other treatments were not working

Transgender Access to Gender-Related Medical Care

- **Access to Hormonal Treatment**
  - Courts generally recognize the transgender prisoner is entitled to *some type* of medical treatment, but not to a particular type of treatment
  - In some cases, courts have found that providing alternative treatments such as psychological counseling are sufficient
  - However, some courts have found that hormonal treatment is required as long as the inmate was undergoing such treatment before entering prison
    - De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003)
      - Terminating transgender prisoners hormone treatment abruptly, which led to self-mutilation, could constitute deliberate indifference
    - Wolfe v. Horn, 130 F.Supp. 648 (E.D. Pa. 2001)
      - Discontinuing a prisoner's hormone treatment that the prisoner was receiving for almost a year might constitute deliberate indifference

Transgender Housing

- Most correctional facilities recognize only the male and female gender and segregate them accordingly
- Transgender prisoners are generally housed either according to the gender they were born with, or by their genitalia

Transgender Housing

- Courts have been generally deferential to corrections officials on housing decisions involving transgender inmates
  - Farmer v. Haas, 990 F.2d 319 (7th Cir. 1993)
    - Noting plaintiff's incarceration with the male population despite undergoing estrogen therapy and receiving silicone breast implants.
  - Crosby v. Reynolds, 763 F. Supp. 666 (D. Me. 1991)
    - Upholding placement of pre-operative transgender person undergoing hormone treatment, at her request and on the recommendation of the jail's contract physician, within the female population, even in the face of a challenge by the prisoner's female cellmate, who alleged it was a violation of her right to privacy
  - Lucrecia v. Samples, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995)
    - Noting that prisoner who had not as yet completed the transformation from male to female, while incarcerated in a federal prison, lived within a female housing unit as a female, and later lived in a male housing unit as a male

Segregation and Protective Custody for LGBT Inmates

- In federal facilities, LGBT prisoners may not be segregated solely on the basis being LGBT
- In contrast, many state facilities segregate LGBT prisoners
  - Segregation generally motivated by a desire to protect LGBT prisoners who are perceived as more vulnerable to attacks from other prisoners

Segregation and Protective Custody for LGBT Inmates

- Segregation among facilities varies
  - Entire wings (NYC/LA County)
  - Protective custody units housing several inmates
  - Single cells
- Potential consequences of segregation
  - More restrictive conditions of confinement
    - Limited recreation, limited out-of-cell time, limited visitation
  - Limited access to services and programs

Segregation and Protective Custody for LGBT Inmates

- Liability Concerns in PC housing of LGBT inmates
  - Due Process
    - Under Sandin v. O'Connor, 515 U.S. 472 (1995), an inmate is entitled to a limited right to due process *only* if the challenged condition of confinement "imposes an atypical and significant hardship in relation to the ordinary incidences of prison life"
    - Absent extraordinary circumstances, courts generally find that placement in segregation is an ordinary incidence of prison life which does not require due process
  - Equal Protection
    - Hudson v. Palmer, 468 U.S. 517 (1984)
      - unequal treatment among inmates is justified if it bears a rational relation to legitimate penal interest.
    - Williams v. Lane, 851 F.2d 867 (7th Cir. 1988)
      - PC prisoners equal protection rights violated where prison officials failed to provide them with access to same programs and services as those offered to GP prisoners, and officials failed to establish a rational basis for the unequal treatment

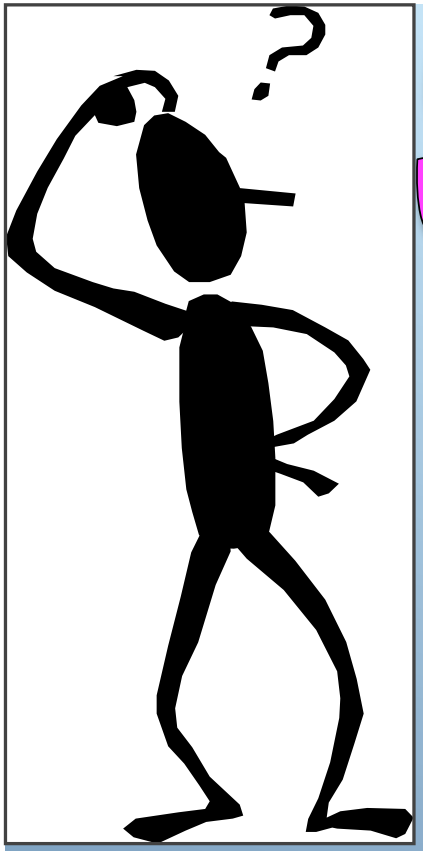
Access to Visitation

- Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002)
  - Homosexual partner of state prisoner had standing to assert that Arizona DOC regulation prohibiting same-sex kissing and hugging among non-family member during prison visits violated equal protection clause.
- Doe v. Sparks, 733 F.Supp. 227 (W.D. Pa. 1990)
  - Penn. prison policy prohibiting visitation between homosexual inmates and their partners declared invalid in violation of equal protection clause

Access to Programs

- Work Details
  - Davis v. Prison Health Services, 679 F.3d 433 (6th Cir. 2012)
    - Homosexual state inmate's allegations that he was improperly removed from his employment in a prison public works program because of his sexual orientation stated a plausible equal protection claim
- Religious Services
  - Phelps v. Dunn, 965 F.2d 93 (6th Cir. 1992)
    - Summary judgment for prison officials reversed on allegations that state prison inmate was denied access to Christian religious services by prison chaplain because he was a homosexual

SEE YOU ALL NEXT YEAR…..



Stump The Chumps ! !