"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates

James E. Robertson
Minnesota State University

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Retaliation is deeply engrained in the correctional office subculture; it may well be in the normative response when an inmate files a grievance, a statutory precondition for filing a civil rights action. This Article, the first to address comprehensively the sociological and constitutional aspects of retaliation, argues for protecting grievants through safeguards much like those accorded whistleblowers. Part I of the Article provides a socio-legal primer on correctional officer retaliation by addressing the frequency of retaliation, its causes, and its constitutional taxonomy. Part II describes the elements of a prima facie case of unconstitutional retaliation under § 1983. Part III examines the controversy over determining damages, with a single dollar bill symbolizing what prevailing inmates can expect from a civil rights suit alleging unconstitutional retaliation. Part IV contends that inmate grievants possess many of the characteristics of whistleblowers and thus recommends that adverse changes in a grievant's conditions of confinement within sixty days of filing a grievance ought to create a presumption of retaliation for administrative purposes, which, unless proven otherwise by clear and convincing evidence, would trigger administrative remedies intended to make the inmate whole as well as deter future retaliation.

INTRODUCTION

Inmate Roger Atkinson complained in vain of near-constant exposure to his cellmate’s cigarette smoke.¹ No matter that the Supreme Court had ruled earlier that environmental tobacco smoke could inflict cruel and unusual punishment in violation of the Eighth Amendment.² No matter that Atkinson was blind and diabetic to boot.³
If prison staff saw the blind and diabetic Atkinson as a nuisance they could ignore, they got it wrong. Alleging cruel and unusual punishment, Atkinson filed a civil rights action. He later amended that complaint to include a claim of retaliation for bringing his lawsuit. Correctional officers allegedly read his mail over the prison’s intercom system for all to hear, refused to provide him with requested law library materials, barred him from phoning his attorney, cursed at him, spoke derogatively of his blindness, subjected him to harassing strip searches, and threatened to “smash his face” and hang him.

Retaliation can take many forms in addition to assault and harassment, including fabricated disciplinary charges, placement in segregation, transfers to less desirable cells or prisons, and loss of prison jobs or vocational opportunities. Nonetheless, case law dictates that such claims must be examined “with skepticism and particular care.” As the Court of Appeals for the Second Circuit explained, “Retaliation claims by prisoners are ‘prone to abuse’ since prisoners can claim retaliation for every decision they dislike.”

This Article, the first to address the sociological and constitutional aspects of retaliation against inmates, consists of three parts. Part I provides a socio-legal primer on retaliation against inmates by addressing the frequency of retaliation, its causes, and its constitutional taxonomy. Part II describes the elements of a prima facie case of unconstitutional retaliation against an inmate under 42 U.S.C. § 1983. Part III examines the controversy over determining

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4. See id. at 259–60.
5. See id. at 260–61.
6. Id.
7. See, e.g., Hoskins v. Leneah, 395 F.3d 372, 373–74 (7th Cir. 2005).
8. See, e.g., Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997).
9. See, e.g., Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995).
11. See, e.g., Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction
damages, with a single dollar bill symbolizing what some prevailing inmates can expect from a civil rights suit subject to the Prison Litigation Reform Act of 1996 (PLRA). Part IV argues for the revision of grievance procedures so that inmates facing retaliation enjoy a legal status similar to that of government whistleblowers. Concluding remarks follow.

I. A Primer on Retaliation

A. Frequency

Correctional officers who retaliate against inmates cannot be regarded as rogue actors. They act within the norm. Vincent Nathan's groundbreaking survey of Ohio inmates found that 70.1% of inmates who brought grievances indicated that they had suffered retaliation thereafter; moreover, 87% of all respondents thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action in law, suit in equity, or other proper proceedings for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


and nearly 92% of the inmates using the grievance process agreed with the statement, "I believe staff will retaliate or get back at me if I use the grievance process." Among staff supervisors, only 21% believed that retaliation never happened, with one warden characterizing it as "commonplace" when inmates resort to the grievance process. In turn, a New York State study found that more than half of the inmates filing grievances reported subsequent retaliation.

Inmates’ fear of retaliation deters them from filing grievances. Some 60% of the prison supervisors surveyed by Nathan responded that a “substantial number of inmates” do not file grievances despite having legitimate “issues,” with fear of retaliation coming in a close second among the explanations for this phenomenon. Similarly, a study of New York prisoners reached the same conclusion. “[I]t is clear,” writes Professor Nathan, “that the level of actual retaliation, as well as the perception of likely retaliation among . . . inmates, is unacceptably high and constitutes the single most important and difficult obstacle to inmates’ use of the [grievance] system.” Moreover, when inmates abstain from filing grievances for fear of retaliation, they cannot bring the underlying complaint to federal court in most instances because the PLRA requires “exhaustion” as a precondition to filing suit.

19. Id. at 26-27.
22. See id. at 27, app. at 37, Table Inspector-11.
25. 42 U.S.C. § 1997e(a) (2006) (“No action shall be brought with respect to prison conditions under section 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 are available are exhausted.”). The Supreme Court in Booth v. Churner, 532 U.S. 731, 739 (2001), held that this statutory provision requires exhaustion even when the grievance process cannot provide an appropriate administrative remedy. See id. (arguing that the “statutory history[] confirms the suggestion that Congress meant to require procedural exhaustion regardless of the fit between a prisoner’s prayer for relief and the administrative remedies possible”). The Court reaffirmed Booth in Woodford v. Ngo, 548 U.S. 81 (2006), in ruling that the exhaustion requirement dictates that inmates comply with all the prison’s administrative procedures. See id. at 93 ("[W]e are persuaded that the PLRA exhaustion requirement requires proper exhaustion.").
Correctional officers possess extensive "surplus power"—a positive power differential between correctional officers and inmates. The cell door symbolizes surplus power: Correctional officers, not inmates, decide when to open and close it. Retaliation against inmates represents an extra-legal use of surplus power.

The prison as a "total institution"—where all aspects of an inmate's existence, including access to health care, food, exercise, and other necessities of life, are under the control of a single governmental authority—generates abundant surplus power. This power faces, however, several restraining forces: the expansion of inmate rights, an oppositional inmate subculture, and a rule-bound bureaucratic model of governance have constricted surplus power but by no means diminished its utility.

Prisons invest in correctional officers rule enforcement powers that readily mask retaliatory intent. As illustrated by rules

26. LORNA A. RHODES, TOTAL CONFINEMENT 57 (2004); see also SANTOS, supra note 14, at 135 ("Guards have an incredible amount of power over each prisoner's life.").

27. ERVING GOFFMAN, ASYLUMS (1961).

The central feature of total institutions can be described as a breakdown of the barriers separating three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled ... Finally, the various enforced activity are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

Id. at 6.

28. See infra note 250 (citing cases).

29. See infra notes 43, 48-51 and accompanying text (discussing the inmate subculture as oppositional).

30. See infra note 40 (describing the attributes of the bureaucratic prison).


Inmates are subject to a plethora of prison rules designed to regulate virtually every aspect of daily life. For instance, Wisconsin's disciplinary code is divided into the following categories of prohibited behavior: 1) bodily security (e.g., assault); 2) institutional security (e.g., inciting a riot); 3) institutional order (e.g., disrespect); 4) property (e.g., theft); 5) contraband (e.g., possession of money); 6) movement (e.g., loitering); 7) safety and health (e.g., dirty quarters); and 8) miscellaneous (e.g., refusal to work). Some of these prohibitions are malum in se and mirror criminal offenses. But the great bulk of prohibitions have no counterpart in the criminal law and are peculiar to life in "total institutions," where prisoners are stripped of their autonomy and subjected to round-the-clock surveillance.

Id. at 347 (footnotes omitted).
sanctioning "insubordination" and "disrespect," the frequent vagueness of disciplinary rules\textsuperscript{32} provides correctional officers ample leeway in deciding when and where to enforce these rules.\textsuperscript{33} Because inmates acquire "spoiled identities,"\textsuperscript{34} their claims of retaliation often carry little credibility in disciplinary hearings—the effect of which is to ensure that even the wholesale fabrication of disciplinary incidents will result in official sanctions for inmates. While procedural safeguards accompany such hearings,\textsuperscript{35} they almost always result in conviction.\textsuperscript{36} Consequently, inmates have long regarded disciplinary hearings as "kangaroo courts" due to the abundant opportunity for falsifying disciplinary charges.\textsuperscript{37}

Correctional officers' perception of inmates in general as "moral inferiors who deserve their state of reduced circumstances"\textsuperscript{38} led

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\item It is axiomatic that the more specific the rule, the more rules are required. Aware of this, prison officials have crafted small collections of vaguely worded "catchall" rules for their guards to enforce. In turn, guards hold wide authority to proscribe specific acts, a discretion not uniformly exercised. What, for example, constitutes "insubordination," "poor work," "disrespect," or "agitation"? Prisoners have had to either guess at what behavior a given guard will not tolerate or learn by harsh experience.


33. See, e.g., Robert Johnson, Hard Time 125 (2d ed. 1996) (observing that "[m]ost of their decisions involve discretion").

34. Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 8-9 (1963) (defining "spoiled identity" as having a discredited character); see also, e.g., Pamela S. Karlan, Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders, 71 N.D. L. Rev. 173, 176 (1995) (referring to inmates as "the least sympathetic group of 'outsiders' in our constitutional jurisprudence, since their banishment from free society is the result of their willful criminal behavior").

35. See Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974) (delineating procedural safeguards such as rights to notice and witnesses).


37. See William K. Bentley & James M. Corbett, Prison Slang 11 (1992) (explaining that "[t]he name [kangaroo court] implies an inmate is quickly in and out without any real justice taking place").

38. John Irwin, The Warehouse Prison 65 (2005) (examining the origins of the conflict between guards and inmates, observing that their training, inculcation of the guard subculture and interaction with prisoners "results in guards . . . distrusting, demeaning, and often hating prisoners"); see also Leo Carroll, Hacks, Blacks and Cons 47 (1974) (observing that in a Rhode Island prison, "[h]acks stand on one side of the caste line"); Joycelyn M. Pollock, Prisons: Today and Tomorrow 309 (1997) ("The relationship between the correctional officer and inmate is one of 'structured conflict'.") (internal citation omitted);
gimimates extra-legal, retaliation-based sanctions. John Irwin, a former inmate himself, believes that guards imbue themselves and their social control function with a superior moral status in order to counter sympathy they might have for inmates and the many deprivations they face.⁹

Ironically, correctional officer retaliation sometimes arises from the diminution of guard authority brought about by the bureaucratization of the prison.⁴⁰ In the bureaucratic prison, correctional officers, like the inmates, must conform to "obedience and submission" rules and regulations.⁴¹ The grievance process is emblematic of how the bureaucratic style of prison administration attempts to rationalize guard power within a rule-bound framework that accords inmates the opportunity to challenge guard power, especially their rule enforcement power. Anecdotal accounts suggest that correctional officers "abhor" responding to inmate grievances presumably because they are an exercise in scrutinizing officer conduct.⁴²

All acts of retaliation occur against a backdrop of two prison subcultures, each with its own informal code of conduct, each in opposition to the other. In his seminal study of a New Jersey prison, Gresham Sykes identified an inmate culture that portrayed inmates and correctional officers as adversaries.⁴³ Many of its

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Jeffrey Ian Ross & Stephen C. Richards, Behind Bars 47 (2002) ("Within the prison are two mutually antagonistic groups, the convicts ... and the staff who supervise them."); Nancy Wolff et al., Physical Violence Inside Prisons, 34 CRIM. JUST. & BEHAV. 588, 597 (2007) (stating that inmates and custody personnel have "relations often fraught with tension and hostility").

39. Irwin, supra note 38, at 65.
40. Irwin and Austin describe the bureaucratic prison as follows:

The lines of authority, as well as the procedures, prescriptions, or guidelines for all practices, are formalized in the written rules and regulations appearing in elaborate manuals. An extensive and professionalized training program is needed to keep ... abreast of the most recent changes in an increasingly complex array of administrative regulations imposed by the central office.


41. Barbara A. Owen, The Reproduction of Social Control 101, 106 (1988) (examining guard power and asserting that they are "both the subject and object of social control").
42. Santos, supra note 14, at 136.
43. Gresham Sykes, The Society of Captives 32 (1958). Sykes posited that solidarity amongst inmates arose as a means of cooperatively addressing the deprivations of liberty, goods and services, heterosexual relationships, autonomy, and security. Id. at 65–88. Solidarity amongst inmates was exemplified by an inmate code comprising the following tenets:
provisions encourage solidarity among inmates, including 
condemnation of the "snitch," who is "hated [and] despised,"\textsuperscript{44} and subject to brutal treatment when unmasked.\textsuperscript{45} While the code identified by Sykes has evolved,\textsuperscript{46} the adversarial relationship between inmates and prison staff remains in place: "Prisoners [still] intensely dislike their overseers."\textsuperscript{47}

The inmate code's counterpart arises from the correctional officer subculture.\textsuperscript{48} An informal code largely defines the content of this subculture.\textsuperscript{49} The tenets of the correctional officer code include "don't rat," "never make an officer look bad in front of an

1) "Don't interfere with inmate interests"; 2) "Don't lose your head"; 3) "Don't exploit other inmates"; 4) "Don't weaken [Be tough]"; and 5) "Don't be a sucker [treat guards with constant suspicion]." Gresham M. Sykes & Sheldon L. Messinger, \textit{Inmate Social System, in 3 Crime and Justice} 77, 77-78 (Leon Radzinowicz & Marvin E. Wolfgang eds., 1971).


44. \textit{See} Raymond G. Kessler & Julian B. Roebuck, \textit{Snitch, in Encyclopedia of American Prisons} 449, 449 (Marilyn D. McShane & Frank D. Williams III eds., 1996) (explaining that snitches are "hated and despised . . . and may be the object of violent reprisal"); \textit{see also, e.g.}, Comstrock v. McCrary, 273 F.3d 693, 699 n.2 (6th Cir. 2001) ("Being labeled a 'snitch' was dreaded, because it could make the inmate a target for other prisoners' attacks."); Alberti v. Heard, 600 F. Supp. 443, 450 (S.D. Tex. 1984) ("[I]t is apparent that the inmates have an unwritten code of silence which results in most acts of violence going undetected.").

45. \textit{See, e.g.}, Benefield v. McDowall, 241 F.3d 1267, 1271 (10th Cir. 2001) (observing that a correctional officer "was aware of the obvious danger associated with a reputation as a snitch"); Reece v. Groose, 60 F.3d 487, 488 (8th Cir. 1995) (being known as a snitch placed one "at a substantial risk of injury at [other inmates'] hands"); Valandingham v. Bojorquez, 866 F.2d 1135, 1138–39 (9th Cir. 1989) (ruling that a correctional officer describing inmates as a "snitch" in the presence of other inmates is 'material' to a section 1983 claim for denial of the right not to be subjected to physical harm by employees of the state acting under color of law").

46. \textit{See, e.g.}, Joyceelyn M. Pollock, \textit{Prisons and Prison Life} 103 (2004) (observing that the contemporary prison is very different from that described by Sykes, but Pollock does not take issue with the adversarial relationship between prison and staff that is widely accepted today).

47. \textit{Irwin, supra} note 38, at 66.

48. \textit{Kelsey Kauffman, Prison Officers and Their World} 85 (1988) (observing that correctional officers "possess a distinct subculture," with "[t]heir own beliefs and code of conduct").

49. That Guards inflict severe informal sanctions on officers who violate the code speaks to its importance among correctional officers. For instance, in \textit{Fairley v. Fermaint}, 482 F.3d 897 (7th Cir. 2007), two guards at Chicago's Cook County Jail brought a civil rights suit alleging the following: "The defendants and their confederates bully and ostracize any guard who plays by the rules; these strong-arm tactics organize and protect guards who beat inmates at whim and then lie about their activities to their superiors, criminal investigators, and judges in any suits that the prisoners may file." \textit{Id.} at 899.
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inmate," "support officer sanctions against inmates," do not show "sympathy for or identification with inmates," and "maintain officer solidarity."

One commentator observed these norms "function to deny equal respect to inmates, the moral keystone of prisoners' rights."

C. Constitutional Taxonomy

The Court of Appeals for the Sixth Circuit has provided a functional typology of retaliation claims. A general claim of retaliation, in which the retaliation is itself unconstitutional, comprises the first category. This Article principally examines the second category—breaches of enumerated constitutional rights, most of which implicate the First Amendment.

In Thaddeus-X v. Blatter, the Sixth Circuit attributed this two-tier classification of retaliation claims to the Supreme Court's decision in Graham v. Connor. According to the Sixth Circuit, the Court in Graham distinguished infringements of rights having "explicit textual source[s]" from constitutional violations that are lumped under substantive due process, holding that the latter should be subjected to the "open-ended," "shock the conscience" substantive due process test, whereas the former would be governed by amendment-specific tests.

50. KAUFFMAN, supra note 48, at 85–114.
52. See infra notes 57–59 and accompanying text (discussing retaliation as a per se violation the Due Process Clause of the Fourteenth Amendment).
53. See infra notes 60–67 and accompanying text (discussing the role of retaliation in inflicting violations of the First Amendment).
54. 175 F.3d 378 (6th Cir. 1999).
56. Id. at 387. Nonetheless, not until Thaddeus-X did the Sixth Circuit employ this distinction, choosing instead to use the conscience shocking test even though the retaliation claims alleged violations of enumerated rights. As to the concept of substantive due process, in Rochin v. California, 342 U.S. 165 (1952), police pumped the stomach of a suspected drug dealer, leading the Court to find:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172.
1. General Claims of Retaliation

General claims of retaliation, in which the retaliation in and by itself violates the Due Process Clause, are rare and the most challenging for plaintiffs. As one court explained:

In the great majority of cases, inmates are unable to survive summary judgment under this demanding standard. The rare exceptions have been in cases where, for example, a prison official issued death threats against an inmate while holding a cocked pistol at his head, or where prison officials trumped up false disciplinary charges against an inmate and then proceeded to physically abuse him and levy harsh disciplinary sanctions against him.\textsuperscript{57}

This daunting standard conforms to the Supreme Court's proposition that "only the most egregious official conduct" constitutes "conscience shocking" behavior.\textsuperscript{58} Yet conscience shocking represents a vague standard which "precludes defining."\textsuperscript{59}

2. First Amendment Retaliation

In \textit{Hoskins v. Lenear},\textsuperscript{60} an inmate filed a grievance when a correctional officer directed a racial epithet at him.\textsuperscript{61} His grievance soon led to two fabricated disciplinary charges, subsequent convictions, and severe penalties.\textsuperscript{62} Nonetheless, the Seventh Circuit in \textit{Hoskins} held that the fabrication of disciplinary charges did not deprive him of a liberty interest and thus did not implicate his right to due process of law.\textsuperscript{63} On the other hand, the \textit{Hoskins} court also held that retaliation born of an inmate's "constitutionally protected activity" via the First Amendment—in this instance, using "grievance procedures without threat of recrimination"—stated a claim.\textsuperscript{64}

The overwhelming majority of retaliation actions brought under § 1983 assert violation of the grievant-inmate's First Amendment

\textsuperscript{59.} \textit{Rochin}, 342 U.S. at 173.
\textsuperscript{60.} 395 F.3d 372 (7th Cir. 2005).
\textsuperscript{61.} \textit{Id.} at 373.
\textsuperscript{62.} \textit{Id.} at 373-74.
\textsuperscript{63.} \textit{Id.} at 375.
\textsuperscript{64.} \textit{Id.}.
In *Bennett v. Hendrix*, the Eleventh Circuit spoke for many of its sister circuits in explaining that "[t]he gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech."  

II. THE ELEMENTS OF PRIMA FACIE RETALIATION

A substantial body of case law describes three core elements of a prima facie case of retaliation. "To prevail on a retaliation claim," explained one court, "a prisoner [must] show that: (1) he engaged in protected expression; (2) he suffered an adverse action; and (3) the adverse action was causally related to the protected expression."  

A. A Protected First Amendment Activity

"Of fundamental import to prisoners," wrote the Court of Appeals for the Ninth Circuit, "are their First Amendment rights to

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66. 423 F.3d 1247 (11th Cir. 2005).

67. Id. at 1253 n.6 (internal quotation marks and citations omitted).

68. Hicks v. Ferrero, 241 F. App’x 595, 597 (11th Cir. 2007). As to the similarities between several circuits, the Fifth Circuit in *Freeman*, 369 F.3d 854, set forth the following test: "(1) the existence of a specific constitutional right; (2) the defendant’s intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation." Id. at 863. The Second Circuit in *Scott*, 344 F.3d at 288, advanced a similar test but divided it into three parts: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." Id. at 287 (internal quotation marks and citation omitted). A five-part test appeared in *Rhodes*, 408 F.3d. 559: "(1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Id. at 567 (footnote omitted).

The inmate has a heavy evidentiary burden to establish a prima facie case. See, e.g., Murphy v. Mo. Dep’t of Corr., 769 F.2d 502, 503 n.1 (8th Cir. 1985). Merely alleging that an act was retaliatory is insufficient. See, e.g., Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985).
file prison grievances and to pursue civil litigation in the courts.\textsuperscript{69} In turn, well-established law provides that grievance-motivated retaliation violates the First Amendment.\textsuperscript{70}

1. Variations of a Common Theme

Access to the courts is among the oldest of prisoners' rights. Its lineage begins with the Supreme Court's 1941 decision in \textit{Ex parte Hull}.\textsuperscript{71} The facts of \textit{Hull} tell of prison officials requiring habeas corpus petitions to come before an "institutional [prison] review board" to ensure that "they are properly drawn"\textsuperscript{72}—a made-to-order scenario for identifying jailhouse lawyers\textsuperscript{73} and subsequently retalia-

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\textsuperscript{69} Rhodes, 480 F.3d at 567 (internal quotation marks and citation omitted). But see Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000) ("This right is protected, however, only if the grievances are not frivolous.").

\textsuperscript{70} Defendants have commonly asserted qualified immunity. Qualified immunity is one of the fair warning defenses. As opposed to the void for vagueness doctrine, which guards against statutes that fail to give fair warning, this defense speaks to civil rights actions against public officials. It is also a defense from suit, and must be advanced and proven at the outset of the action. In \textit{Saucier v. Katz}, 533 U.S. 194 (2001), the Supreme Court delineated a two-step test, each of which is "separate and distinct":

A court required to rule upon the qualified immunity issue must consider this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

\textit{Id.} at 201.

Assuming that the plaintiff can aver facts that satisfy the first part of the test and thus show that his or her case is not frivolous, a defendant's claim of qualified immunity should fail because courts have long rejected defendants' assertions that the right is not clearly established. \textit{See}, e.g., \textit{Atkinson}, 316 F.3d at 269–70 (indicating that as early as 1981, in \textit{Milhouse}, 652 F.2d at 373–74, the circuit held that alleging retaliation for filing a civil rights suit "stated a cause of action for infringement of the prisoner's First Amendment right"); \textit{see also}, e.g., \textit{Rhodes}, 408 F.3d at 567 ("Of fundamental import to prisoners are their First Amendment 'right[s] to file prison grievances' . . . ." (quoting \textit{Bruce v. Ylst}, 351 F.3d 1283, 1288 (9th Cir. 2003) (footnote omitted)).

\textsuperscript{71} 312 U.S. 546 (1941).

\textsuperscript{72} \textit{Id.} at 548–49.


There is no clear definition of a jailhouse lawyer, but several characteristics are essential to any definition: all jailhouse lawyers are incarcerated; most do not have a law degree or any formal legal training; and all claim to possess some legal knowledge and are sought out by other prisoners for this reason. Some jailhouse lawyers serve as law clerks or legal assistants in prison libraries; others work as freelancers and provide
ating against them. The Court, however, would not address the motives of the Michigan prison officials. Its terse opinion stated in relevant part that

the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.\textsuperscript{74}

Inmates did not realize a meaningful right of access to courts until 1969, when the Court in \textit{Johnson v. Avery}\textsuperscript{75} held that jailhouse lawyers enjoy constitutional protection.\textsuperscript{76} In \textit{Bounds v. Smith},\textsuperscript{77} the Court upped the ante by imposing upon states "affirmative obligations to assure all prisoners meaningful access to the courts"\textsuperscript{78} through the availability of an "adequate" law library\textsuperscript{79} or "alternative sources of legal knowledge"\textsuperscript{80} such as the access to volunteer attorneys or paraprofessionals. More recently, however, in \textit{Lewis v. Casey},\textsuperscript{82} the Court partly closed the courthouse door by requiring an "actual injury" in claiming a deprivation of this right.\textsuperscript{83}

Meanwhile, lower federal courts have held that retaliation can implicate two other First Amendment rights. The Fifth Circuit in \textit{Freeman v. Texas Department of Criminal Justice}\textsuperscript{84} characterized retaliation as a violation of the First Amendment right to criticize prison officials.\textsuperscript{85} Although the court failed to identify the rationale for

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\item[] services that are completely independent of their penal institution. Although jailhouse lawyers are not supposed to be paid for their services, it is well-documented that most of them are compensated by money or other goods or favors.
\end{itemize}

\textit{Id.} at 1573–75 (footnotes omitted).

Jailhouse lawyers received constitutional protection in \textit{Johnson v. Avery}, 393 U.S. 483 (1969), which ruled that inmates can aid one another in seeking access to the courts in the absence of alternative means of legal assistance. \textit{See id.} at 490.

74. \textit{Hull}, 312 U.S. at 549.
76. \textit{See id.} at 490.
78. \textit{Id.} at 824.
79. \textit{Id.} at 828.
80. \textit{Id.} at 817.
83. \textit{Id.} at 349.
84. 369 F.3d 854 (5th Cir. 2004).
85. \textit{See id.} at 864.
this right, one need look no further than the landmark ruling in
New York Times Co. v. Sullivan:

[F]reedom to discuss public affairs and public officials is un-
questionably, as the Court today holds, the kind of speech the
First Amendment was primarily designed to keep within the
area of free discussion. To punish the exercise of this right to
discuss public affairs . . . is to abridge or shut off discussion of
the very kind most needed.

Lastly, several lower federal courts have deemed retaliation an
abridgment of the First Amendment right to petition for redress of
grievances. Long considered "among the most precious of the
liberties safeguarded by the Bill of Rights," it stands as one of the
earliest rights extended to inmates. "[P]ersons in prison, like other
individuals," explained the Supreme Court in its 1972 decision in
Cruz v. Beto, "have the right to petition the Government for re-
dress of grievances which, of course, includes access of prisoners to
the courts.

2. Caveats

a. The Turner Test

Prison officials can police prison speech. The Supreme Court's
landmark ruling Turner v. Safley granted wide latitude to prison

86. 376 U.S. 254, 296 (1964) (Black, J., concurring).
87. Id. at 296–97.
88. See, e.g., Powers v. Synder, 484 F.3d 929, 933 (7th Cir. 2007); Scott v. Coughlin, 344
   F.3d 282, 288 (2d Cir. 2003); Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000); Franco v. Kelly,
   854 F.2d 584, 589 (2d Cir. 1988); Hunter v. Heath, 95 F. Supp. 2d 1140, 1149 (D. Or. 2000).
90. 405 U.S. 319, 321 (1972).
91. Id. (internal quotation omitted).
92. 482 U.S. 78 (1987). By contrast, the speech of free people enjoys a "fundamental"
or "preferred" status. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (ruling that free speech
constitutes a fundamental right). Laws limiting such rights are subject to "strict scrutiny,"
whereby the government must demonstrate that the impediment advances a compelling
Serv. Comm'n, 447 U.S. 530, 535 (1980) (ruling that the right to receive mail is fundamental
and restrictions upon it are subject to "strict scrutiny"). In 1972 Professor Gerald Gunther
famously asserted that strict scrutiny is "strict in theory and fatal in fact." Gerald Gunther,
The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A
Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). But see Adarand Constructors,
Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is
'strict in theory, but fatal in fact.'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)
(Marshall, J., concurring)).
officials in censoring prison speech. It did so by mandating the least rigorous degree of scrutiny—whether the censorship in question "is reasonably related to legitimate penological interests." To determine reasonableness, the court advanced a four-pronged test: (1) whether the regulation limiting free speech rationally advances the governmental interest in rehabilitating offenders or safeguarding the public, staff, and inmates; (2) the availability of an alternative means of exercising freedom of speech; (3) the impact of accommodating the asserted right; and (4) the absence of a ready alternative to the challenged regulation.

The ruling in Freeman v. Texas Department of Criminal Justice illustrates the tenuous state of free speech under the Turner test. Prison staff allegedly retaliated against the plaintiff because of his public criticism of a prison chaplain for his "depart[ure] from the faith." Authorities had allowed the plaintiff to read his criticisms of the chaplain during a church service, but his presentation ended prematurely when the chaplain in question ordered him to stop, which he did. After officials escorted Freeman from the place of worship, some fifty inmates prematurely left in protest. Prison staff then charged and convicted him of a disciplinary violation and transferred him to a more restrictive living unit. While acknowledging inmates' "general right" to criticize prison officials, the court held that it must be exercised "in a manner consistent with [their] status as [prisoners]." The court concluded that the plaintiff had crossed the line, as evidenced by the walkout he inspired.

b. The Public Importance Test

Does the content of speech determine whether the speaker can be subjected to retaliation by a government institution? In Pickering v. Board of Education of Township High School District 205, Will County and Connick v. Myers the Court answered affirmatively. Both cases addressed retaliatory actions taken against public employees. In

93. Turner, 482 U.S. at 89.
94. See id. at 92–93.
95. 369 F.3d 854 (5th Cir. 2004).
96. Id. at 858.
97. Id.
98. Id.
99. Id.
100. Id. at 864.
101. Id.
Pickering, the Court held that the speech in question would not enjoy the Constitution's protection unless it addressed matters of "public concern" and, on balance, that the employee's right to free expression outweighed the proper functioning of the employing governmental agency.\textsuperscript{104} Later, the Connick Court ruled that the "content, form, and context of a given statement, as revealed by the whole record," addressed matters of "public concern" as opposed to "personal interest."\textsuperscript{105}

Recently, in Garcetti v. Ceballos,\textsuperscript{106} the Supreme Court departed from precedent and diminished First Amendment protection for speech of public importance. The Court advanced a two-part test for determining when employee speech receives First Amendment protection from employer discipline. The first part requires the speech in question to address a "matter of public concern."\textsuperscript{107} The second part stipulates that public employees must speak as citizens and thus outside their official capacity as public employees.\textsuperscript{108} In Garcetti, the Court concluded that a deputy district attorney acted "pursuant" to his official "duties as a calendar deputy"—as juxtaposed to speaking as a "citizen" for First Amendment purposes—when writing a disposition memorandum.\textsuperscript{109} What the attorney had characterized as "retaliation" thus became constitutionally permissible "employer discipline."\textsuperscript{110}

Only the Seventh Circuit has expressly limited retaliation claims to matters of public importance. In McElroy v. Lopac\textsuperscript{111} the plaintiff alleged that the defendant correctional officers removed him from his prison job in retaliation for inquiring whether he and his fellow sewing shop workers would receive "lay-in pay"—a form of unemployment compensation—upon the closing of the prison's sewing shop.\textsuperscript{112} The court concluded that it did not need to address whether retaliation occurred because the speech in question, in this instance the query about "lay-in pay," lacked public importance or concern.\textsuperscript{113} Without further explanation, the court characterized this matter as a "personal" one and thus lacking constitutional protection.\textsuperscript{114} One member of the three-judge panel dissented, arguing

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{104} See Pickering, 391 U.S. at 568.
  \item \textsuperscript{105} Connick, 461 U.S. at 147–48.
  \item \textsuperscript{106} 547 U.S. 410 (2006).
  \item \textsuperscript{107} Id. at 418.
  \item \textsuperscript{108} See id. at 421–22.
  \item \textsuperscript{109} Id. at 421.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} 403 F.3d 855 (7th Cir. 2005).
  \item \textsuperscript{112} See id. at 857.
  \item \textsuperscript{113} See id. at 858.
  \item \textsuperscript{114} Id.
\end{itemize}
\end{footnotesize}
that the question of "lay-in pay" impacted "a group of prisoners" and thus constituted a public concern, rendering it a proper subject for First Amendment protection.\textsuperscript{115}

Later, in \textit{Pearson v. Welborn}\textsuperscript{116} an inmate argued that the defendant prison employee had filed a trumped-up charge of "masturbation"—a violation of prison rules—because the plaintiff had refused to become an informant and had complained about a lack of outdoor exercise as well as the practice of shackling inmates during their group therapy.\textsuperscript{117} The defendant officer contended that the plaintiff's complaints were "personal gripes about unimportant matters."\textsuperscript{118} The court disagreed, characterizing them as of public importance because they related to prison policy and addressed the treatment of a group of prisoners.\textsuperscript{119} The Seventh Circuit chose not to address whether the plaintiff's refusal to act as an informant per se met the public importance test.\textsuperscript{120}

c. An Actual Injury

Most courts posit that a retaliation claim brought under § 1983 must show "actual injury."\textsuperscript{121} Their rationale rests on the nature of § 1983 actions. Starting with \textit{Monroe v. Pape},\textsuperscript{122} the Supreme Court has read § 1983 "against the background of tort liability"\textsuperscript{123} as justification for barring recovery for the presumed or abstract value of substantive constitutional rights\textsuperscript{124} or the inherent value of procedural constitutional rights.\textsuperscript{125} Consequently, tort-based restrictions apply, the most significant of which requires an "actual injury," as opposed to a de minimis injury such as being "squeezed."\textsuperscript{126}

\begin{enumerate}
\item See id. at 859 (Fairchild, C.J., dissenting) (emphasis added).
\item 471 F.3d 732 (7th Cir. 2006).
\item See id. at 736–37.
\item \textit{Id}. at 740.
\item \textit{See id}. at 741.
\item \textit{See id}. at 740.
\item \textit{See}, e.g., Siggers-E1 v. Barlow, 412 F.3d 693, 701 (6th Cir. 2005); \textit{Ali} v. Szabo, 81 F. Supp. 2d 447, 467 (S.D.N.Y. 2000).
\item 365 U.S. 167 (1961).
\item \textit{Id}. at 187.
\item \textit{Ali}, 81 F. Supp. 2d at 467, n.11.
\end{enumerate}
B. An Adverse Action

"Adversity," a term taken from employment case law, provides the second element in a grievance-motivated retaliation claim. The attributes of a hardship of this magnitude remain unclear, but several unifying themes emerge from the case law.

First, the requisite degree of adversity does not necessarily entail the violation of statutory or constitutional rights. For instance, in *Hoskins v. Lenear* the adversity consisted of a disciplinary punishment leading to the segregation of the plaintiff and his transfer to another prison. Inmate Hoskins contended that the defendant had framed him after he filed a grievance. The grievance stated that the defendant, a civilian food service supervisor, had called Hoskins a racial epithet when he could not locate cartons of chocolate milk. Three days later the defendant charged Hoskins with "insolence," a disciplinary violation. According to the plaintiff, a fellow inmate had told of overhearing a shift supervisor encourage the defendant officer to "ticket" the plaintiff so that "he could take care of Hoskins." The defendant did just that. A disciplinary tribunal pronounced the plaintiff guilty and as punishment stripped him of his desirable job in the prison cafeteria. Shortly thereafter, a prison captain allegedly told him that the disciplinary charge would "go away" if he dropped his grievance. The inmate failed to take this advice, and his keepers soon charged Hoskins with a second offense, making "possible verbal threats towards staff." A hearing officer pronounced him guilty and imposed two months of solitary confinement and transfer to another prison as his punishment. While none of these hardships arguably deprived this inmate of the liberty protected by procedural due process, the court held that "[c]onduct that does not independently violate the

129. 395 F.3d 372.
130. See id. at 374.
131. See id.
132. See id. at 373.
133. See id.
134. Id. at 373–74.
135. See id. at 374.
136. Id.
137. Id.
138. See id.
Constitution can form the basis for a retaliation claim, if that conduct is done with an improper, retaliatory motive.\textsuperscript{139}

The second theme posits a widely used test for determining which hardships are constitutionally cognizable. For instance, in \textit{Thaddeus-X v. Blatter}\textsuperscript{140} the Sixth Circuit concluded that reprisals resulting in transfer to administrative segregation\textsuperscript{141} would be “adverse” and lesser retaliatory acts would reach this threshold should they “deter a[n] [objective] person of ordinary firmness” from the exercise of the right at stake.\textsuperscript{142} The court attributed its test to Judge Posner’s opinion in \textit{Bart v. Telford},\textsuperscript{143} which addressed workplace harassment. Judge Posner observed: “[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise...”\textsuperscript{144} Judge Posner’s test does not require an actual or putative chilling of speech, just the objective capacity to do so.\textsuperscript{145}

The following cases chart the often vague boundaries of Posner’s standard. The unpublished opinion in \textit{Jackson v. Madery}\textsuperscript{146} illustrates an adverse action that fails this test. The plaintiff complained of a “conspiracy” by the defendants in response to his filing grievances and bringing a legal action alleging racism on their part.\textsuperscript{147} This alleged “conspiracy” led to his reclassification to “modified access status,” which dictated that he submit his grievance petitions to an officer charged with screening out frivolous complaints.\textsuperscript{148} The court held that this adversity would not deter “an ordinary

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        \parbox{\textwidth}{
        \textit{Dirty Secrets of American Corrections}
        \textsuperscript{629}
    }
\end{tikzpicture}
person of reasonable firmness” from either filing grievances or bringing a lawsuit.\textsuperscript{149}

The Sixth Circuit in \textit{Brown v. Crowley}\textsuperscript{150} applied the same test to the plaintiff’s confinement in punitive segregation.\textsuperscript{151} According to the plaintiff, defendant prison staff fabricated a major misconduct charge and as punishment moved him to punitive segregation. Although his prior confinement in administrative segregation imposed many of the hardships found in punitive segregation,\textsuperscript{152} the court held that his reclassification would “deter a person of ordinary firmness” from engaging in constitutionally protected activity.\textsuperscript{153} The court pointed to a hardship uniquely imposed upon inmates in punitive segregation—the inability to accumulate “good time,” resulting in a longer prison sentence.\textsuperscript{154}

For the District of Columbia Court of Appeals in \textit{Crawford-El v. Britton},\textsuperscript{155} Judge Posner’s “ordinary firmness” test represented a “sensible standard” for determining cognizable First Amendment injuries inflicted upon inmates.\textsuperscript{156} Inmate Crawford-El had complained of prison practices to the \textit{Washington Post} and then brought a civil rights action, leading the defendant prison officer to paint him as “too big for his britches.”\textsuperscript{157} Crawford-El later claimed that the defendant retaliated against him by “misliver[ing]” his personal property during the course of his transfer to other prison.\textsuperscript{158} The court addressed whether the plaintiff’s “pecuniary losses . . . in the form of the costs of shipping his boxes and replacing clothing” would deter an inmate of ordinary firmness from exercising protected speech.\textsuperscript{159} “[T]hough small,” wrote the circuit panel, “[these losses] might well deter a person of ordinary firmness in Crawford-El’s position from speaking again. We agree that the acts asserted pass that test.”\textsuperscript{160}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{149} Id. at 660.
\item \textsuperscript{150} 312 F.3d 782 (6th Cir. 2002).
\item \textsuperscript{151} Id. at 789.
\item \textsuperscript{152} Brown, 312 F.3d at 789.
\item \textsuperscript{153} See id.
\item \textsuperscript{154} See id. “Good time” represents “[c]redit based early release from prison or jail.”
\item David Weisburd & Ellen F. Chayet, \textit{Good Time Credit}, in \textit{Encyclopedia of American Prisons} 220, 220 (Marilyn D. McShane & Frank F. Williams III eds., 1996). Typically, inmates forfeit ability to earn good time upon placement in punitive segregation as a punishment for violating a prison rule.
\item \textsuperscript{155} 93 F.3d 813 (D.C. Cir. 1996).
\item \textsuperscript{156} Id. at 818.
\item \textsuperscript{157} Id. at 826.
\item \textsuperscript{158} Id. at 815.
\item \textsuperscript{159} Id. at 826.
\item \textsuperscript{160} Id. Subsequently, the same court held that an allegedly retaliatory prison transfer met this standard given that the plaintiffs reclassification barred him from working as a tutor and distanced him from his ill parents and prospective witnesses who would speak on his
\end{itemize}
\end{footnotesize}
Only one court has explicitly addressed the vexing issue of whether Judge Posner's "ordinary firmness" test has two distinct branches: one for civilians and one for inmates. In Siggers-El v. Barlow, the Sixth Circuit answered in the affirmative but without elaboration: "prisoners are expected to endure more than the average citizen" before they experience cognizable First Amendment injuries arising from retaliation. The circuit panel did indicate that "routine" hardships, such as transferring inmates from one prison to another, would not deter a prisoner of ordinary firmness from engaging in constitutionally protected activities. In this instance, however, the foreseeable consequences of the retaliatory transfer—"[Siggers-El] lost his high paying job . . . that he needed to pay his attorney . . . [and] the transfer made it more difficult for his attorney to visit and represent him"—led the court to conclude that the plaintiff had experienced actionable hardships.

Earlier, in Bell v. Johnson, the Sixth Circuit held that the prevailing "ordinary firmness" test bars recovery for "only inconsequential" adverse actions. The plaintiff in Bell alleged two retaliatory "shakedowns" of his cell and the accompanying seizure of his medical diet snacks and legal papers following his filing of a civil rights lawsuit. In finding that the plaintiff's allegations met the evidentiary burden, the court held that adverse action must be merely "more than a de minimis injury." Lastly, some circuits have held that deterring free speech is itself a cognizable injury and is thus actionable as a constitutional tort. As the Seventh Circuit observed in Power v. Summers, a §1983 cause of action does not require an "adverse employment action" behalf at a future parole hearing. See Toolashprashad v. Bureau of Prisons, 286 F.3d 576, 585 (D.C. Cir. 2002). Surprisingly, the Second Circuit in Morales v. Machalm, 278 F.3d 126 (2d Cir. 2002), held that calling an inmate a informant in front of other inmates was not sufficiently adverse. See id. at 131. The court also indicated that transferring an inmate to a psychiatric hospital was sufficiently adverse. See id. at 132; see also Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003) ("Insulting or disrespectful comments . . . generally do not rise to this level."). On the other hand, destroying legal papers makes the grade. See Green v. Johnson, 977 F.2d 1389, 1389–91 (10th Cir. 1992). So does the confiscation of tennis shoes. See Hall v. Sutton, 755 F.2d 786, 787–88 (11th Cir. 1985). Ditto for denying access to the prison law library. See Zimmerman v. Tribble, 226 F.3d 568, 573–74 (7th Cir. 2000).

161. 412 F.3d 693 (6th Cir. 2005).
162. Id. at 701.
163. See id. at 701–02.
164. Id. at 702.
165. See id.
166. 308 F.3d 594 (6th Cir. 2002).
167. Id. at 606.
168. Id. at 602.
169. Id. at 606.
170. 226 F.3d 815 (7th Cir. 2000) (citation omitted).
within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964. Rather, "[a]ny deprivation . . . that is likely to deter the exercise of free speech . . . is actionable." The Seventh Circuit applied this approach to prisoners in Babcock v. White. The court held that placement in administrative segregation did not deprive the plaintiff of a protected liberty interest, but that it did constitute an adverse action. The court explained that "the crux of his claim is that state officials violated his First Amendment rights by retaliating against him for his protected speech activities." The Ninth Circuit has explicitly embraced this view, ruling that "a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights." The Eleventh Circuit has ruled similarly.

C. Motivation/Causation

An adverse action must be "motivated or substantially caused by" the inmate's exercise of a protected expression. The defendant's own admission of a retaliatory motive constitutes the most compelling evidence. Because such direct evidence is hard to come by, circumstantial evidence can sometimes establish a retaliatory motive. As the District of Columbia Circuit wrote, "the distinction between direct and circumstantial evidence has no direct correlation with the strength of the plaintiff's case." In Hines v. Gomez, for example, the plaintiff argued that the defendant correctional officer framed him for a disciplinary violation in retaliation for his

171. Id. at 820.
172. Id.
173. 102 F.3d 267 (7th Cir. 1996).
174. See id. at 274.
175. Id. at 275.
176. Gomez v. Vernon, 255 F.3d 1118, 1127 (9th Cir. 2001). In Pratt v. Rowland, 65 F.3d 802 (9th Cir. 1995), a prisoner complained of being double-celled after a long stretch of being single-celled, and claimed that prison officials made the change to retaliate for his agreement to participate in a television interview. This court noted that the prisoner had no constitutionally protected liberty interest in being held in a given facility. Id. at 806-07. Pratt then concluded that "it would be illegal for [prison] officials to transfer and double-cell Pratt solely in retaliation for his exercise of protected First Amendment rights." Id. at 807.
177. See Farrow v. West, 320 F.3d 1235, 1248 (11th Cir. 2003) ("A prisoner can establish retaliation by demonstrating that the prison official's actions were the result of his having filed a grievance concerning the conditions of his imprisonment." (quoting Wildberger v. Bracknell, 869 F.2d 1467, 1468 (11th Cir. 1989))).
179. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (noting that one of the defendants allegedly informed the plaintiff of a retaliatory conspiracy against him).
181. 108 F.3d 265 (9th Cir. 1997).
filing a grievance. A federal jury agreed. On appeal, the defendant responded that the plaintiff failed to produce any direct evidence that he knew of the grievance in question. The court of appeals upheld the jury's verdict for the plaintiff upon finding "the inference that . . . [the defendant] knew, at least to some extent, of Hines' use of the grievance system." According to the circuit panel, the defendant, as well as other correctional officers, knew of the plaintiff's reputation for filing "many" grievances—which had earned him the reputation for "whining."

"Temporal proximity" between an inmate's exercise of a protected right and an adverse change in his or her conditions of confinement provides circumstantial, yet sufficient evidence of a retaliatory motive. Take the facts of Bennett v. Goord. The court found that prison officials initiated inmate Bennett's transfer to New York's infamous, high security prison at Attica during the final stages of his securing a favorable settlement of a civil rights action against them. Moreover, the uncontested facts showed that prison officials brought disciplinary charges after he successfully thwarted the transfer through administrative remedies. Upholding these charges, the state department of corrections transferred him to Attica. At Attica, inmate Bennett successfully grieved the disciplinary charges but obtained no meaningful relief in that the defendant officers continued to confine him at Attica and later at one of its satellite prisons. He then brought suit for retaliation, sustained the defendants' successful motion for

\[\text{182. See id. at 267.}\]
\[\text{183. See id. at 268.}\]
\[\text{184. Id.}\]
\[\text{185. Id.}\]
\[\text{186. See, e.g., Marshall v. Knight, 445 F.3d 965, 971 (7th Cir. 2006); Muhammad v. Close, 379 F.3d 413, 417–18 (6th Cir. 2004); DiCarlo v. Potter, 358 F.3d 408, 422 (6th Cir. 2004); Bennett v. Goord, 343 F.3d 133, 138 (2d Cir. 2003); Jackson v. Madery, 158 F. App'x 656, 661 (6th Cir. 2005); Rodriguez v. McClennan, 399 F. Supp. 2d 228, 236 n.71 (S.D.N.Y. 2005). Some courts require a "chronology of events" but the key consideration remains temporal proximity. See Marshall, 445 F.3d at 971 (stating that "a complaint need only allege a chronology of events from which retaliation may be inferred") (internal quotation marks and citation omitted); Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995) ("The inmate must produce direct evidence of motivating or, the more probable scenario, allege a chronology of events from which retaliation may plausibly be inferred.") (internal quotation marks and citation omitted). But see McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) ("Our recent cases have rejected any requirement that an inmate allege a chronology of events in order to state a claim of retaliation because such a requirement is contrary to the federal rule of notice pleading.").}\]
\[\text{187. 343 F.3d 133 (2d Cir. 2003).}\]
\[\text{188. See id. at 135.}\]
\[\text{189. See id.}\]
\[\text{190. See id.}\]
\[\text{191. See id. at 135–36.}\]
summary judgment,\textsuperscript{192} but ultimately prevailed before the Second Circuit.\textsuperscript{193} While acknowledging the lack of direct evidence linking this inmate's earlier, successful civil suit against his keepers to a series of alleged retaliatory disciplinary charges and the improper transfer, the court concluded that the "temporal proximity" between them constituted "[sufficiently compelling] circumstantial evidence of retaliation."\textsuperscript{194}

The plaintiff's prior commendable conduct can also inferentially establish a retaliatory motive. Take Colon v. Coughlin,\textsuperscript{195} where the plaintiff had filed two previous lawsuits against his captors. He claimed that the defendants had retaliated by falsely charging him with two disciplinary infractions when a search of his cell purportedly yielded a knife and marijuana.\textsuperscript{196} Despite his claims of innocence and his previous record of good conduct, a hearing officer sentenced him to 360 days in solitary confinement.\textsuperscript{197} In holding that his retaliation claim survived a motion for a summary judgment, the court observed that "Colon alleges ... that he had never previously been found in possession of either drugs or weapons while in prison, and we have determined that evidence of prior good behavior also may be circumstantial evidence of retaliation."\textsuperscript{198}

What if the hardship experienced by the plaintiff would have arisen regardless of his keeper's retaliatory motive? The Court of Appeals for the Second Circuit in Scott v. Coughlin\textsuperscript{199} addressed this issue:

Regardless of the presence of retaliatory motive, however, a defendant may be entitled to summary judgment if he can show dual motivation, \textit{i.e.}, that even without the improper motivation the alleged retaliatory action would have occurred. Plaintiff has the initial burden of showing that an improper motive played a substantial part in defendant's action. The burden then shifts to defendant to show it would have taken exactly the same action absent the improper motive.\textsuperscript{200}

\begin{itemize}
\item \textsuperscript{192} See id. at 136–37.
\item \textsuperscript{193} See id. at 139.
\item \textsuperscript{194} Id. at 138.
\item \textsuperscript{195} 58 F.3d 865, 872 (2d Cir. 1995).
\item \textsuperscript{196} See id. at 867–68.
\item \textsuperscript{197} Id. at 868.
\item \textsuperscript{198} Id. at 872.
\item \textsuperscript{199} 344 F.3d 282 (2d Cir. 2003).
\item \textsuperscript{200} Id. at 287–88 (citation omitted).
\end{itemize}
The Scott plaintiff’s difficulties began after he attested to seeing guards assault a fellow inmate. Two correctional officers, one of whom he implicated in the assault, independently brought disciplinary charges against him when he allegedly resisted a pat-frisk search. At a hearing to adjudicate the two sets of disciplinary charges, the plaintiff characterized the incident as a “pretext” for an officer-led retaliatory assault upon him. A hearing officer found against him after receiving disciplinary reports from the two officers. The plaintiff’s suit alleged in relevant part that the resulting disciplinary sanctions arose from a retaliatory motive. For the Second Circuit, the outcome depended on whether there existed a proper motive alongside an improper one for the disciplinary sanctions imposed on the plaintiff. The Second Circuit ruled that it could not make this determination and remanded the case for additional findings of fact.

III. Damages

Are sixty days in solitary confinement—the price the plaintiff in Royal v. Kautzky paid for asserting his First Amendment rights—worth no more than the $1 in nominal damages awarded by the court? Meeting en banc, the Eighth Circuit in Royal joined the majority of circuits in concluding that the absence of a physical injury precludes compensatory damages for an inmate alleging unconstitutional retaliation. The court had applied one of the most noxious provisions of the PLRA, § 1997e(e), which provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” As in the Royal case, retaliation arising from the filing of grievances, lawsuits, or other protected activities under the First

201. See id. at 284–85.
202. See id.
203. See id. at 285.
204. See id.
205. See id. at 288–89.
206. See id. at 287–88.
207. See id. at 290.
208. 375 F.3d 720, 727 (8th Cir. 2004).
209. See, e.g., Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (addressing First Amendment free exercise of religion claims); Royal, 375 F.3d at 722–23 (addressing claims of retaliation for exercising First Amendment Rights); Searles v. Van Bebber, 251 F.3d 869, 875–76 (10th Cir. 2001) (addressing First Amendment free exercise of religion claims).
Amendment has rarely resulted in physical injury.211 And courts have held that the routine discomforts of imprisonment fall outside the statute’s concept of a cognizable physical injury.212

The plaintiff in Royal had filed several grievances concerning allegedly inadequate medical care for his spinal cord injury.213 Having “tired” of his grievances, the defendant correctional officer transferred him to solitary confinement for sixty days.214 Consequently, the plaintiff brought a retaliation lawsuit. Because he failed to allege a physical injury, the Eighth Circuit upheld the trial court’s decision to award no compensatory damages for his lengthy solitary confinement despite the district court’s finding of unconstitutional retaliation.215 Nor did the circuit panel award punitive damages, explaining in part that the defendant acted not out of “evil motive or reckless indifference, but out of frustration and a desire to protect his staff from [the plaintiff’s] abuse.”216 Thus, the sixty days of illegal segregation earned this inmate one dollar in nominal damages, with his attorney receiving a fee of $1.50, which represented 150% of the damages awarded.217

Most courts, with the notable exception of the District of Columbia Circuit, have concluded that the physical injury requirement set forth in § 1997e(e) does not bar nominal or punitive damages.218 Case law suggests that juries will occasionally award sig-

214. Id. at 722.
216. Id.
217. See id. at 725–26. The Act requires the trial court to set aside up to 25% of the damages for plaintiff’s attorney fees, which can never exceed the lesser of the following: 150% of the monetary award or 150% of the hourly rate of appointed counsel in a federal criminal prosecution. 42 U.S.C. § 1997e(d)(1)–(3) (2006).
significant punitive damages in prison retaliation cases. For instance, the Sixth Circuit in *Bell v. Johnson*\(^{219}\) upheld a jury verdict of $28,000 in punitive damages.\(^{220}\) Earlier, in *Maurer v. Patterson*,\(^{221}\) the jury awarded $75,000 in punitive damages.\(^{222}\) The largest award may be that upheld by the District Court for the Eastern District of Michigan in *Siggers-El v. Barlow*.\(^{223}\) The facts tell of the defendant transferring the plaintiff to another prison after the inmate twice complained of the defendant's failure to disburse money from the plaintiff's account to pay for attorney fees.\(^{224}\) The court upheld the jury's award to the plaintiff of $4,000 in economic damages, $15,000 in mental or emotional damages, and $200,000 in punitive damages.\(^{225}\) As to the high ratio of punitive damages to compensatory damages, the court answered that "[i]n constitutional cases such as this one, where economic damages are typically small, the Sixth Circuit has condoned punitive damages which greatly exceed compensatory damages."\(^{226}\)

However, significant punitive awards like that upheld in *Siggers-El* face substantive due process challenges. In *BMW of North America, Inc. v. Gore*,\(^{227}\) a civil action alleging fraud, the Supreme Court voided a jury’s $4 million punitive damage judgment as constitutionally excessive where the jury assessed compensatory damages at a mere $4000.\(^{228}\) In 2008, the Court in *Exxon Shipping Co. v. Baker*\(^{229}\) embraced Gore's multiplier approach in ruling that a punitive award exceeding a one-to-one ratio to compensatory damages raises constitutional concern.\(^{230}\) While the Court expressly limited this ratio to maritime cases,\(^{231}\) Justice Souter’s majority opinion observed that

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\(^{219}\) 404 F.3d 997 (6th Cir. 2005).

\(^{220}\) See id. at 1002.

\(^{221}\) 197 F.R.D. 244 (S.D.N.Y Feb. 4, 2000).

\(^{222}\) See id. at 246. The federal district court later reduced the jury award to $20,000. See id. at 250.


\(^{224}\) See id. at 814–15.

\(^{225}\) See id. at 815.

\(^{226}\) Id. at 818.


\(^{228}\) See id. at 574–75. The Court set forth three guideposts for determining when punitive awards violated the Constitution: "the degree of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." Id.

\(^{229}\) 554 U.S. 570 (2008).

\(^{230}\) See id. at 598 ("[W]e consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.").

\(^{231}\) See id.
"[t]here is better evidence of an accepted limit of reasonable civil penalty... in several studies... showing the median ratio of punitive to compensatory verdicts [of less than 1:1]."

On the other hand, a minority line of cases posits that the physical injury requirement of §1997e(e) does not apply when the underlying constitutional right in jeopardy is one possessing intrinsic value. These rights include procedural due process, equal protection, freedom from illegal confinement, religious freedom, freedom from First Amendment retaliation, and other First Amendment rights.

The District Court for the Western District of Michigan has articulated a second reason for not applying §1997e(e) in First Amendment retaliation cases. In refusing to set aside a jury award of $15,000 for mental or emotional damages, the district court in Siggers-El v. Barlow asserted that Congress "did not intend to allow prison officials to violate inmate First Amendment rights with impunity, resolute with the knowledge that First Amendment violations will almost never result in physical injuries."

The Supreme Court has yet to address the scope of §1997e(e). Its dicta in Memphis Community School District v. Stachura included the observation that "the abstract value of a constitutional right may not form the basis for §1983 damages." The Court added that "[o]ur discussion of that issue makes clear that nominal damages, and not damages based on some indefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." However, the Stachura Court cautioned that

[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of

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232. Id. at 597–98.
236. See, e.g., Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).
238. Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999); Canell, 143 F.3d at 1213.
239. 433 F. Supp. 2d 811.
240. Id. (internal quotation marks omitted).
242. Id. at 308.
243. Id. at 308 n.11.
presumed damages may possibly be appropriate. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.  

Damages possess an expressive significance. They are estimations of the value of a constitutional right and of the person asserting the right. As a normative accounting of how prisoners should be treated, the PLRA’s constraints on damages, including those arising from retaliation, indicate that the drafters of the Act possessed little regard for prisoners’ rights.

IV. WHISTLEBLOWING BEHIND BARS

A. Surplus Power and Prisoners’ Rights

The surplus power of prison staff lies at the core of retaliation. The foremost disparity of power between the “keepers” and the “kept” arose under the “slave of the state” doctrine of the nineteenth century and its successor, the “hands-off” doctrine. As one commentator observed, “[u]ntil the courts abandoned their hands-off policy, wardens and their deputies held nearly unlimited

244. Id. at 310–11 (citations omitted).
245. See Robertson, supra note 51, at 28 (“Denial of inmates’ rights constitutes ‘rights robbery,’ and is thus worthy of public approbation [through the award of punitive damages].”) (footnote omitted).
247. For the greater half of the twentieth century, courts embraced a “hands-off” approach to prisoners’ civil rights claims. See, e.g., Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) (“[C]ourts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases.”); United States ex rel. Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956) (“We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners... .”) (internal quotation marks and citations omitted); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) (“[C]ourts have no supervisory jurisdiction over the conduct of the various institutions... .”); Taylor v. United States, 179 F.2d 640, 643 (9th Cir. 1950) (“It is not within the province of the courts to supervise the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.”); Shepherd v. Hunter, 163 F.2d 872, 874 (10th Cir. 1947) (“[I]t is not within the province of the courts to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.”); United States ex rel. Palmer v. Ragen 159 F.2d 356, 358 (7th Cir. 1947) (“Under repeated decisions, state governmental bodies, who are charged with prosecution and punishment of offenders, are not to be interfered with except in case of extraordinary circumstances.”) (internal quotation marks and citations omitted).
authority to administer their own system of punishments and rewards.

With the demise of the hands-off approach in the late 1960s, prisoners' rights expanded, which dramatically reduced the power disparity between prison staff and inmates. However, commencing in 1979, a host of Supreme Court rulings has halted and reversed this trend. Commentators have described the current

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248. James G. Fox, Organizational and Racial Conflict in Maximum-Security Prisons 13 (1982). See also, e.g., Kenneth J. Peak, Justice Administration 218 (2d ed. 1998) ("Until the 1970s conditions in many prisons were almost insufferable for both staff members and inmates. . ."); Richard McGeery, Communication Patterns as a Bases of Systems of Authority and Power, in Theoretical Studies in Social Organization of the Prison 49, 52 ("Control, rather than 'justice' in the familiar sense, was the object. Hence, there was no place for a body of principles or 'constitutional' rights to restrain disciplinary procedure."); James E. Robertson, Judicial Review of Prison Discipline in the United States and England: A Comparative Study of Due Process and Natural Justice, 26 Am. Crim. L. Rev. 1323, 1328 (1989) ("Correctional officials exercised virtually unlimited power over inmates prior to the 1970s.")

249. The factors leading to the demise of the hands-off doctrine included: (1) attorneys committed to prison reform; (2) prison disturbances and riots that exposed the severe shortcomings of the penal system; and (3) the Supreme Court's commitment to advancing the rights of powerless minority groups. See Lynn S. Brantham & Sheldon Krantz, Cases and Materials on the Law of Sentencing, Corrections, and Prisoners' Rights 283 (5th ed. 1997).


251. In 1979 in Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court began a concerted effort to end the expansion of prisoners' rights by espousing a policy of deference to prison staff:
era as a “new” hands-off approach to prisoners by the courts.\(^{292}\) It breaks with its older counterpart by asserting that prisons have become rational, bureaucratic institutions and as such treat inmates fairly.\(^{293}\) Retaliation, however, represents a revolt against bureaucratization and undermines the legitimacy of this model.

\[\text{[C]ourts must heed our warning that “[penal] considerations are peculiarly within the province and professional expertise of correctional officials, and in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”}\]


After \textit{Bell}, in case after case the Supreme Court disappointed prisoners’ rights advocates. \textit{See, e.g.,} Laura B. Meyers & Sue Titus Reid, \textit{Modern Prisons: 1960 to the Present}, in \textit{Encyclopedia of American Prisons} 239, 243 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (“In the 1980s and 1990s, the pendulum appears to have shifted back with a more conservative Supreme Court once again emphasizing the need for institutional security, upholding more restrictive administrative policies.”).

\textit{Compare} Farmer v. Brennan, 511 U.S. 825, 837–38 (1994) (ruling that prison conditions inflict cruel and unusual punishment when (1) defendants evince deliberate indifference, that is, actual knowledge of a high risk of injury; and (2) fail to respond in a reasonable manner in light of that risk), with Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (ruling that prison conditions, when considered in their totality, must be intolerable if they are to inflict cruel and usual punishment; and implying that the defendant’s state of mind is not relevant for Eighth Amendment purposes); Sandin v. Conner, 515 U.S. 472, 485–84 (1995) (ruling that state-created liberty interests are deprived by atypical, significant hardships), with Hewitt v. Helms, 459 U.S. 460, 472 (1983) (ruling “that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest”).


253. \textit{See} Robertson, supra note 40, at 182 (“The Supreme Court has attached great significance to the rise of the bureaucratic prison. According to the Court, correctional staff invariably exercise ‘considered’ judgment and their backgrounds ensure that they are ‘trained’ in prison administration. Implicit in these characterizations is the assertion that we can suspend the Constitution’s distrust of governmental power when the conduct of prison workers is at issue.”) (footnotes omitted).

A bureaucratic organization is characterized by the following components:

1. \textit{Rutification and routinization}. Organizations stress continuity. Rules save effort by eliminating the need to derive a new solution for every situation. They also facilitate standard and equal treatment of similar situations.

2. \textit{Division of Labor}. Labor division involves marking off performance functions as part of a systematic division of labor and providing the necessary authority to perform these functions.
At the onset of the prisoners' rights movement some of its supporters touted prison grievance systems as a "better way" of safeguarding inmates from abuse. They did not foresee the emergence of a new, transformative adjudicative model: structural reform. Whereas the passive “received tradition” of judging envisaged adjudication as “deciding” the dispute and “declaring” what the law would be in the future, the structural reform model recast the trial judge as the “creator and manager of complex forms of ongoing relief.” By 1990, structural reform adjudication had ameliorated unconstitutional prison conditions to a degree unprecedented in the history of the American prison. Feeley and Hanson described this now bygone era of judicially-driven prison reform as “perhaps second in breadth and detail only to the courts’ earlier role in dismantling segregation in the nation’s public schools.”

Grievance procedures only acquired prominence with the passage of the controversial Prison Litigation Reform Act (PLRA). By requiring inmates to exhaust administrative remedies and thus use the grievance process, even in those instances in which those remedies did not include the relief sought by prisoners, the

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3. *Hierarchy of authority.* The organization of offices follows the principle of hierarchy; each office is under the control and supervision of a higher one.

4. *Expertise.* Specialized training is necessary. It is thus normally true that only a person who has demonstrated an adequate technical training is qualified to be a member of the administrative staff.

5. *Written rules.* Administrative acts, decisions, and rules are formulated and recorded in writing.

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PEAK, *supra* note 248, at 23 (footnote omitted).


260. See supra note 25 (briefly discussing Woodford v. Ngo, 548 U.S. 81 (2006), and Booth v. Churner, 532 U.S. 731, 739, (2001)). Prior to Booth, the Second Circuit indicated that re-
drafters of the Act sought to curb structural reform adjudication and frivolous filings.\textsuperscript{261} The rate of filings has since dropped some 60\% per 1,000 inmates, but at a high price: "The resulting harm is not only to the claimants in the particular cases that have been dismissed notwithstanding their constitutional merit. The harm is to the entire system of accountability that ensures that prison and jail officials comply with constitutional mandates."\textsuperscript{263}

taliation could estop defendants from raising the non-exhaustion defense. See Hemphill v. New York, 380 F.3d 680, 689 (2d Cir. 2004) (stating that "it is possible that some individual defendant [prison staff] may be estopped" from raising non-exhaustion because of threatened retaliation should the plaintiff proceed with the grievance he filed); Ziemba v. Wezner, 366 F.3d 161, 163 (2d Cir. 2004) ("As a matter of first impression in this circuit, we ... hold that the affirmative defense of exhaustion is subject to estoppel" when prison officials threatened retaliation should the inmate file a grievance); cf. Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (stating that "[t]he 42 U.S.C. § 1997e exhaustion requirement is not jurisdictional and may be subject to certain defenses such as waiver, estoppel or equitable tolling"). After the Ngo ruling, the Second Circuit in Macias v. Zenk, 495 F.3d 37 (2d Cir. 2007), continued to cite Woodford and Ziemba as applicable precedent regarding the application of estoppel when threatened retaliation deterred the plaintiff from exhausting administrative remedies. Id. at 41 ("The court should also inquire as to ... whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense.") (quoting Hemphill, 380 F.3d at 686).

\textsuperscript{261} 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham), reprinted in \textit{1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996}, PUB. L. No. 104-134, supra note 16, at doc. 15141 ("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason."); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("The text of the Prison Litigation Reform Act itself reflects that the drafters' primary objective was to curb prison condition litigation.").

\textsuperscript{262} See, e.g., 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"), reprinted in \textit{1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996}, PUB. L. No. 104-134, supra note 16, at doc. 14; Mitchell v. Farcass, 112 F.3d 1483, 1488 (11th Cir. 1997) ("Congress promulgated the Act to curtail abusive prisoner ... litigation."); United States v. Simmonds, 111 F.3d 797, 743 (10th Cir. 1997) ("The main purpose of the Prison Litigation Reform Act was to curtail abusive prison-condition litigation."); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts."); Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous.").

\textsuperscript{263} Margo Schlanger & Giovanna Shay, \textit{Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act} (American Constitution Society Issue Brief, Mar. 2007), available at http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf. As Schlanger observed, irrespective of retaliation, the PLRA enhanced the surplus power of prison staff by according them great discretion in mechanics of the grievance process:

\[\text{[T]he PLRA imposes no constraints on the structure or rules of any grievance processing regime. The administrative review scheme can, for example, have as short a deadline for inmates and as many layers of review (to each of which the inmate must}\]
Through its exhaustion requirement, the Act has favorably influenced the cost-benefit ratio of correctional officer retaliation by enhancing the benefit. First, the filing of a grievance identifies targets who may seek judicial relief for officer misconduct. Second, retaliation against the targets acquires a functional quality, to wit, the prospect of deterring the target from filing suit and deterring other inmates from filing grievances. Third, by forbidding damages for mental or emotional suffering absent a causally-related physical injury, the Act effectively immunizes retaliatory measures from compensatory damage awards if they stop short of physical injury.

Consequently, retaliation weakens the two intended functions of a grievance system: to safeguards inmates from governmental abuse and neglect without resorting to lengthy and frequently ineffective litigation, and to "absorb the . . . outrage" felt by inmates, which a generation ago fueled structural reform adjudication. Grievance-motivated retaliation deters inmates from filing grievances and itself generates litigation, as evidenced by the growing case law on this topic. This Article advocates reform grounded in a new perspective of grieving inmates.
B. Grieving and Whistleblowing

Inmates who file grievances about matters of public importance become the penal counterpart of civilian, governmental whistleblowers. The two groups share several characteristics. Like whistleblowers, inmates experiencing retaliation sometimes possess information that has not been disseminated publicly; like whistleblowers, inmates acquire this information because of their institutional membership; and inmates and whistleblowers alike function as intermediaries by providing information to a third party, be it a government watchdog agency, a court, or, because of the exhaustion requirement of the PLRA, a grievance officer. Furthermore, both whistleblowers and inmates face retaliation because they reside in institutions that do not readily tolerate dissent.

By residing in a “total institution”—where all aspects of their existence, “24–7,” occur under the control of the state—inmates live in a self-contained community, not unlike a small city. To maintain the daily operation of that small city, inmates have historically performed many maintenance and administrative duties central to the day-to-day operations of the prison. By virtue


269. See Kathleen F. Brickey, From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley, 81 Wash. U. L.Q. 357, 365 (2003) (stating that “the Government Accountability Project[] found that about ninety percent of whistleblowers are subjected to reprisals or threats”); GOFEMAN, supra note 27, at 1-124.


Although laments over the “idleness” of prisoners are not uncommon, well over 600,000, and probably close to a million, inmates are working full time in jails and prisons throughout the United States. Perhaps some of them built your desk chair: office furniture, especially in state universities and the federal government, is a major prison labor product. Inmates also take hotel reservations at corporate call centers, make body armor for the U.S. military, and manufacture prison chic fashion accessories, in addition to the iconic task of stamping license plates.

Id. at 868 (footnotes omitted); see also, e.g., Brian Hauck, Prison Labor, 37 Harv. J. on Legis. 279, 279 (2000) (stating that “[p]rison labor is almost as old as prisons”); James J. Misrahi, Factories With Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective, 33 Am. Crim. L. Rev. 411, 413 (1996) (“The history of American prisons is also the history of labor in prisons. Inmate idleness was not simply a concomitant problem of incarceration but rather a cause of deviant behavior. Work was therefore considered necessary to
of their housekeeping functions, inmates live as both institutional residents and workers, which situates them to experience, observe, or otherwise detect improper, criminal, or unconstitutional practices by correctional staff. Moreover, the jailhouse lawyers within their ranks sometimes possess familiarity with the administrative, statutory, and constitutional constraints that ought to govern prisons. Consequently, inmates filing grievances alleging institutional wrongdoing expose themselves to substantial risk of retaliation by the “other” workers: prison employees with supervisory authority over inmates. Moreover, without the oversight of “whistleblowing” inmates, wrongdoing would not likely be detected because of the correctional officer code of silence.

Unlike their civilian counterparts employed by the United States government, inmate “whistleblowers” enjoy none of the protections of the Whistleblower Protection Act of 1989. This Act shields a federal employee from a retaliatory personnel action for disclosing what the employee reasonably believes are violations of law or instances of gross mismanagement. . . . When the employee proves that the agency manager taking the adverse action knew of the disclosure, and the discipline’s timing is such that a reasonable person could believe that the disclosure contributed to it, the agency must prove by clear and convincing evidence it would have taken the same action in the absence of the protected disclosure.

Because inmates using the grievance process function as de facto whistleblowers when addressing matters of public importance, this Article recommends the revision of grievance procedures so as to

instill discipline in the inmate and to set him onto the path of righteousness through an institutional routine.” (footnotes omitted).

272. See JIM THOMAS, PRISONER LITIGATION (1988), who posits the following about jailhouse lawyers:

First, they take their jobs . . . seriously. . . . Second, their tasks fill both a legal and institutional void in which they serve a variety of unmet prisoner needs. Third, they clearly do not, as a group, either file or encourage the “frivolous suit,” as critics charge. . . . Finally, conspicuously absent from their story (and from observations) are connections with outside political activists.

Id. at 242; see also supra note 73 (defining “jailhouse lawyers”).

273. See supra note 49 and accompanying text (discussing solidarity among correctional officers and the ostracism experienced by officers who transgress it).


include the most important protections provided by the Whistleblower Protect Act. First, grievance procedures should include a rebuttable presumption of retaliation if the grieving inmate experiences unscheduled adversities for a reasonable period—for example, sixty days—following the filing of a grievance. Second, clear and convincing evidence of a legitimate basis for the adverse action in question would rebut the presumption. While a presumption might encourage the filing of frivolous grievances, explicit rules making a baseless grievance filing a disciplinary violation could deter such conduct.

Moreover, the protections given whistleblowing inmates should include a meaningful remedy if the officers in question fail to overcome the rebuttable presumption of retaliation. The remedy ought to address two objectives: making the aggrieved inmate “whole” by, for example, restoring lost wages should a retaliatory sanction deprive him of his prison job; and deterring future acts of retaliation by imposing administrative sanctions, such as a letter of reprimand or a monetary judgment, sufficient to alter the now favorable cost-benefit ratio.


Hospital Workers Protected From Retaliation

California governor Gray Davis recently signed a bill (S.B. 97) purposed to protect hospital employees and patients from retaliation or discrimination for whistleblowing about hospital conditions and/or practices. This legislation has been recognized as creating a “rebuttable presumption” that discriminatory treatment by a healthcare organization taken against an employee within 120 days after a complaint is filed, is retaliation. 1999 CA S.B. 97

Id. at 636 (emphasis added); see also Valerie P. Kirk & Ann Clarke Snell, The Texas Whistleblower Act: Time for a Change, 26 Tex. Tech. L. Rev. 75 (1995).

The current Whistleblower Act contains a presumption that an employee suspended or terminated within ninety days after making a report was suspended or terminated in retaliation for making that report. Only one other state, South Carolina, had this presumption, but the South Carolina legislature dropped the presumption in its 1993 revisions. This leaves Texas as the sole state providing what has been termed as an “incentive” for whistleblowers. One court has analyzed the weight of this presumption, stating it is an “ordinary” rebuttable presumption or a presumption “which can stand only in the absence of evidence to the contrary.” However, even an ordinary rebuttable presumption shifts the burden of proof unfairly when an employer has legitimate reasons for taking adverse personnel action. This presumption should be eliminated or counteracted with another provision protecting employers when a case involves mixed motives.

Id. at 99 (footnotes omitted).
CONCLUSION

Does the Constitution provide the foundation for a just prison? Before the demise of the hands-off doctrine, surely not.\footnote{277. See, e.g., Norman A. Carlson et al., Corrections in the 21st Century 502 (1999) (observing that the hands-off doctrine caused some inmates to "suffer[] under conditions of squalor and inhumane treatment by correctional personnel and had nowhere to turn for help"); Peak, supra note 248, at 218 ("Until the 1970s conditions in many prisons were almost insufferable for both staff members and inmates.").} Since then, the efficacy of litigated reform has been much debated.\footnote{278. See, e.g., Clear & Cole, supra note 257, at 410 (concluding that judicial review had abated the most vile features of prison life); Diulio, supra note 257, at 291 (characterizing judicial intervention as a "qualified success").} Yet, as Stuart Scheingold has asserted, "the myth of rights"—that the Constitution provides the basis for "a just political order"—has prevailed both in and out of prison. Prisoners have a particularly strong incentive to embrace this myth. Powerless and despised,\footnote{279. See supra notes 18–51 and accompanying text (examining the causes and frequency of correctional officer retaliation).} can they look elsewhere for relief?

Yet Congress, in enacting the Prison Litigation Reform Act, asserted that inmates can indeed look elsewhere—to grievance mechanisms created by and administered by "the man." Retaliation by prison staff undermines this expectation. Retaliation remains deeply engrained in the correctional officer subculture; it may well be the normative response when an inmate files a grievance.\footnote{280. Robertson, supra note 13, at 124–40 (2000) (describing inmates as a largely black subgroup that experiences racial segregation, prejudice, disenfranchisement, and impoverishment); see also, e.g., Christopher E. Smith, Courts, Politics, and the Judicial Process 288 (1993) ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials."). But see, e.g., U.S. v. King, 62 F.3d 891, 895 (7th Cir. 1995) ("Prisoners are not a suspect class."); Wilson v. Giesen, 956 F.2d 738, 744 (7th Cir. 1992) ("But prisoners are not a suspect class."); Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990) ("Prisoners do not constitute a suspect class.").} The commonplace nature of retaliation demonstrates that correctional officers still command too much surplus power some forty years after the demise of the hands-off doctrine. Although the PLRA-mandated grievance process provides a venue for complaints, including those about extra-legal uses of surplus power, the Act provides no protection from retaliation during exhaustion of administrative remedies;\footnote{281. See supra notes 18–51 and accompanying text (examining the causes and frequency of correctional officer retaliation).} and, should a federal court
eventually sustain a complaint of unconstitutional retaliation, the Act precludes damages for mental or emotional injuries in the absence of physical harm.\textsuperscript{283}

The burden now rests on state departments of corrections to end retaliation. Measures such as those recommended in this Article could severely diminish the surplus power held by correctional officers that makes retaliation a common and efficacious deterrent of legitimate inmate complaints of mistreatment.\textsuperscript{284} But for now, inmates pondering the pros and cons of grieving should expect the worst.

\textsuperscript{283} \textit{Id.} § 1997e(e) (stating that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury") (emphasis added).

\textsuperscript{284} See supra notes 21–24 and accompanying text (discussing the extent to which fear of retaliation deters legitimate complaints).