

Case Note

No Cure for a Broken Heart

Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998).

In November 1996, Michael Lee Davis, an inmate at D.C. Central Prison at Lorton, Virginia, was taken to the hospital by ambulance. At a prison checkpoint, a guard named Dwight Bynum entered the vehicle, recognized Davis, and read his sealed medical file, which noted that Davis was infected with HIV. The two men, it seems, had mutual acquaintances outside of Lorton. During the three days Davis spent in the hospital, Bynum told several of Davis's friends that Davis had AIDS. Word reached Davis's fiancée, and by the time he returned to prison, their relationship was over.¹ Davis filed a 42 U.S.C. § 1983 suit pro se for the violation of his constitutional right to privacy, seeking \$1.5 million in compensatory and punitive damages. The district court dismissed the claim sua sponte, relying on a section of the newly enacted Prison Litigation Reform Act (PLRA), entitled "Limitation on Recovery": "No 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."²

Davis challenged this physical injury requirement on equal protection grounds, but in *Davis v. District of Columbia*³ the D.C. Circuit held that there is no cure for a broken heart. The court reasoned that, even assuming that Davis had suffered a violation of fundamental privacy rights,⁴ the

1. See Brief of Appellant at 1-2, *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998).

2. 42 U.S.C.A. § 1997e(e) (West Supp. 1999) (amending the Civil Rights of Institutionalized Persons Act).

3. 158 F.3d 1342 (D.C. Cir. 1998).

4. See *id.* at 1345 ("Here the central claim is that Davis's right to privacy is a 'fundamental right' . . . and that it was unconstitutionally invaded when Corporal Bynum broke the seal on his file and disclosed his medical condition to outsiders. We will assume as much for the purposes of argument.").

physical injury requirement is not subject to strict scrutiny.⁵ The court construed the requirement to deny prisoners damages remedies only. Under this construction, because declaratory and injunctive relief remained open to prisoners, the provision had only a “marginal and incidental” effect on their constitutional rights and therefore did not warrant a heightened standard of review.⁶ The court upheld the physical injury requirement as being rationally related to the government’s interest in “cutting back meritless prisoner litigation,”⁷ and Davis’s claim was dismissed with prejudice.

This Case Note argues that the *Davis* court erred by its own terms in failing to apply strict scrutiny to the physical injury requirement. Rather than being a marginal burden on Davis’s privacy rights, the physical injury requirement dispositively burdened them, as it would for any right that can only be remedied retrospectively. Declaratory or injunctive relief would never vindicate Davis’s rights—not because the violation of them was trivial, but rather because it was unlikely to be repeated and because the lasting harm from the violation could not be discontinued. The court’s reasoning makes an implicit judgment about the relative values of different rights, a judgment not far removed from overtly redrawing constitutional boundaries.

Much of the *Davis* court’s reasoning takes its cue from a statute that wrongly assumes that meritorious and nonmeritorious claims can be distinguished on the basis of physical injury. As cases such as *Davis* construe the PLRA narrowly in order to find it constitutional, a misguided statute is generating a body of case law that goes beyond legitimating the psychological abuse of inmates. Courts may read the physical injury requirement to limit only monetary remedies, but there are rights that, when violated, almost never yield physical injuries and can only be vindicated with a damages remedy. *Davis* raises the question of whether such rights have any value at all.

I

The PLRA’s sponsors envisioned that the statute would “take the frivolity out of frivolous inmate litigation.”⁸ Introducing the legislation on the Senate floor, Bob Dole declared that prisoners brought tens of thousands of claims each year over such trivial issues as “insufficient storage locker space, a defective haircut by a prison barber, the failure of

5. *See id.* at 1347.

6. *Id.* at 1346-47.

7. *Id.* at 1347.

8. 141 CONG. REC. S14,414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”⁹ As one of numerous provisions in the PLRA designed to take away prisoners’ incentives to litigate,¹⁰ the physical injury requirement has provided the basis for many dismissals of prisoner claims.¹¹

Even though supporters of the PLRA maintained that the act would not affect meritorious litigation,¹² the broad language of the physical injury requirement has raised concern among commentators that legitimate constitutional claims would be shut out of court.¹³ No court has invalidated the physical injury requirement, but many courts have construed it narrowly.¹⁴ The most significant narrowing interpretation appeared in the

9. *Id.* at S14,413.

10. *See, e.g.*, 18 U.S.C.A. § 3626(a)(1)(A) (West Supp. 1999) (requiring that courts narrowly tailor prospective relief to the rights violation in need of correction); *id.* § 3626(f) (limiting fees for attorneys and special masters); 28 *id.* § 1346(b)(2) (adding a physical injury requirement to the Federal Tort Claims Act); *id.* §§ 1915(g), 1932 (penalizing prisoners for bringing frivolous or malicious lawsuits); *id.* § 1915A (mandating *sua sponte* dismissal of meritless claims); 42 *id.* § 1997e(d) (limiting attorney’s fees).

11. *See, e.g.*, *Valentino v. Jacobson*, No. 97 Civ. 7615 (WK), 1999 WL 14685, at *3 (S.D.N.Y. Jan. 15, 1999) (dismissing a psychological injury claim brought by a prisoner who was kept in solitary confinement for 12 days after his administrative sentence expired); *Singleton v. Alameda County Sheriff’s Dep’t*, No. C 98-4037 VRW, 1998 WL 754593, at *1 (N.D. Cal. Oct. 26, 1998) (dismissing a claim for “severe emotional trauma” brought by an inmate who was forced out of bed to take his medication while he was feeling dizzy); *Hobson v. DeTella*, No. 96-C3800, 1997 WL 619822, at *3 (N.D. Ill. Sept. 30, 1997) (cautioning a plaintiff that 1997e(e) will not sustain an emotional distress claim stemming from a strip search in front of female prison personnel).

12. *See* 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (“I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.”); 141 CONG. REC. H1563 (daily ed. Feb. 10, 1995) (statement of Rep. Canady).

13. *See, e.g.*, Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 66 n.325 (1997) (“Read as a limitation on remedies rather than an elimination of a cause of action, the statutory provision appears to deprive those subject to cruel psychological punishment (for example, extreme sexual harassment) of their only effective remedy; neither nominal damages nor injunctive relief would seem sufficient for someone who has suffered such punishment.”); Stacey Heather O’Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act’s Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1202-11 (1997); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 153 (1997).

14. *See, e.g.*, *Robinson v. Page*, No. 96-4239, 1999 WL 138746, at *2 (7th Cir. Mar. 16, 1999) (“It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits. The domain of the statute is limited to suits in which mental or emotional injury is claimed.”); *Craig v. Eberly*, 164 F.3d 490, 493-94 (10th Cir. 1998) (prohibiting retroactive application of the physical injury requirement to cases brought before the PLRA’s enactment); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that First Amendment violations do not constitute “mental or emotional injury” for the purposes of the physical injury requirement); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (holding that 1997e(e) does not apply to suits brought by former prisoners); *Mason v. Schriro*, No. 97-4305-CV-C-5, 1999 WL 167001, at *10 (W.D. Mo. Feb. 2, 1999) (“Given the legislative focus on frivolous lawsuits relating to conditions of confinement . . . it does not appear likely that Congress

Seventh Circuit's widely cited opinion, *Zehner v. Trigg*.¹⁵ In *Zehner*, the court affirmed the dismissal of a suit brought by inmates who had been exposed to asbestos while working in the prison kitchen. The court held that the physical injury requirement only limits a prisoner's ability to win damages and does not affect the ability to get injunctive and declaratory relief. This reading of the requirement "beg[an] from the premise that 'Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.'" ¹⁶ In fact, *Zehner*'s holding did not prohibit any remedies available to the plaintiffs—with few exceptions, courts have held that no claim exists for emotional distress in cases of mere exposure to asbestos.¹⁷ Because the *Zehner* plaintiffs could have brought claims for equitable relief, the court held that the physical injury requirement did not sufficiently burden a fundamental right to merit strict scrutiny.¹⁸

In *Zehner*, the plaintiffs lost none of the remedies available to them when the court read the physical injury requirement to eliminate damages but not prospective remedies. The same reading in *Davis* foreclosed the only remedies available to the plaintiff; equitable relief would do no good for the victim of a one-time violation of privacy. By reviewing the physical injury requirement under rational basis scrutiny, even for constitutional claims that injunctive and declaratory relief could never plausibly redress, the *Davis* court interpreted the requirement to allow Congress to prohibit all effective remedies for the violation of a fundamental right—precisely the result that *Zehner* declared it could not reach.

intended an expansive interpretation of section 1997e(e)—one that would disturb the existing and well-settled constitutional jurisprudence relating to Fourteenth Amendment equal protection claims.")

15. 133 F.3d 459 (7th Cir. 1997).

16. *Id.* at 461 (quoting *Zehner v. Trigg*, 952 F. Supp. 1318, 1329 (S.D. Ind. 1997)). *Zehner*'s limitation of the physical injury requirement to damages claims does not derive from the plain meaning of the statutory text—rather, the decision is an effort to avoid the serious constitutional questions that would arise from an interpretation affecting all remedies for rights violations. *See Zehner*, 952 F. Supp. at 1329 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988), to support the idea that courts should not interpret a statute to preclude judicial review of constitutional claims absent a clear statement of congressional intent).

17. *See Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 435-36 (1997) (noting the concern in the case law that allowing recovery for exposure alone might drain limited resources that should be preserved for people who get asbestos-related illnesses years from now).

The *Zehner* court kept its holding steeped in this case law. *See Zehner*, 133 F.3d at 461, 463 (citing *Puthe v. Exxon Shipping Co.*, 2 F.3d 480, 484 (2d Cir. 1993), and *Buckley*, 521 U.S. at 424). Within this context, the district court understandably found that "[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without in essence taking away the rights themselves by rendering them utterly hollow promises. That point has not been reached by the enactment of § 1997e(e) as applied here." *Zehner*, 952 F. Supp. at 1331.

18. *See Zehner*, 133 F.3d at 462-63.

II

In rejecting strict scrutiny, *Davis* misinterpreted precedent. The court relied on *Lyng v. Castillo*,¹⁹ in which the plaintiffs had alleged that amendments to the Food Stamp Act of 1964 violated fundamental rights to free association by favoring nuclear families over more distantly related or unrelated groups of people. The Supreme Court declined to apply strict scrutiny because the law did not “directly and substantially” burden rights to association: “It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps.”²⁰ Following this logic, the *Davis* court assumed that inmates could get injunctive or declaratory relief for most violations of privacy rights. As a result, the physical injury requirement does not “directly and substantially” interfere with constitutional rights; thus, strict scrutiny was not applied: “That *Davis* is not among the plaintiffs whose claims survive speaks more to the slightness of his injury than to any great severity in the congressional curtailment of remedies.”²¹

Lyng v. Castillo's use of the “direct and substantial” test, however, does not translate seamlessly to the situation in *Davis*. People affirmatively exercise the right to association, and an infinite number of factors will affect the precise manner in which they choose to fulfill that right. If a law decreasing food stamps benefits changes how people associate, so might any number of other laws—housing regulations, zoning ordinances, the tax code—and so might rising rents. The “direct and substantial” test reflects the difference between affecting rights and foreclosing them—a law does not merit strict scrutiny review just because it happens to alter people's choices and incentives.

But *Davis* had no choice about the violation of his privacy rights. Unlike the right to association, the right to privacy is not a right to do something; it is a right to be free from something. Privacy rights—like Fourth and Eighth Amendment rights—guarantee a general legal scheme to deter violations and, ideally, a retrospective remedy in the event that such a violation should occur.²² Read as a limitation on recovery, the physical

19. 477 U.S. 635 (1986).

20. *Id.* at 638.

21. *Davis*, 158 F.3d at 1347.

22. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991). Of course, the Constitution does not guarantee “an individually effective remedy—and certainly not a damages remedy—for every constitutional violation.” *Zehner*, 952 F. Supp. at 1328. Qualified immunity doctrine may prevent the vindication of many constitutional claims; nevertheless, the implications of *Davis* would exceed any plausible grounds for qualified immunity. The emotional distress claims that the Constitution recognizes involve some of the most egregious misconduct by government officials.

injury requirement would seem a significant burden on rights that, to a great extent, have only one remedy. Certainly, without a damages remedy, Davis's rights ceased to exist.

The *Davis* court reasoned that because many privacy claims can get prospective relief rather than damages, the physical injury requirement only affects a few claims and thus only marginally burdens the right.²³ But this application of the "direct and substantial" test is inappropriate. Even if the vast majority of privacy rights can be protected by injunctive relief, itself a debatable proposition,²⁴ the physical injury requirement will dispositively—that is, directly and substantially—burden some heretofore cognizable rights. By finding this effect "marginal" nonetheless, the court made an implicit judgment about what is a bona fide violation of constitutional rights and what is not. Refracted through *Davis*'s "direct and substantial"

The Supreme Court's standards for excessive force claims, for example, require acts to be "repugnant to the conscience" for them to be cognizable under the Eighth Amendment in the absence of any physical injury. *Hudson v. McMillian*, 503 U.S. 1, 9-10 (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Such acts would never be covered by qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 54-57 (1998) (discussing the "centrality of fault" in qualified immunity doctrine). Qualified immunity is supposed to yield a better working government. See *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). To extend immunity to "repugnant" acts yields quite the opposite policy effect.

23. See *Davis*, 158 F.3d at 1347 ("Of course a constitutionally permissible curtailment of remedies might still constitute enough of an impingement on the assumed fundamental right to trigger strict scrutiny. But here the remaining remedies are ample.").

24. The *Davis* court assumed that the violations that could be remedied prospectively are system-wide, administratively authorized infringements on privacy. Davis was not entitled to equitable relief because "[n]ot only does Davis fail to allege any District policy leading to Bynum's alleged conduct, but his own brief explicitly claims that the conduct violated District rules." *Id.* at 1348.

Davis's situation was a one-time, possibly malicious violation of a fundamental right. Such one-time violations seem just as common and at least as serious as systemic violations. While systemic violations have not always yielded cognizable claims, see, e.g., *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991) (upholding the segregation of HIV-positive inmates in Alabama prison), the case law is settled in holding that the non-consensual, unnecessary disclosure of HIV status is a violation of privacy rights, see, e.g., *Harris*, 941 F.2d at 1513 (assuming that prisoners have a privacy right in preventing unwarranted disclosure of HIV status to other inmates and to family members); *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wisc. 1988) (finding a violation of privacy rights where prison medical personnel unnecessarily revealed an inmate's HIV status to prison staff and other inmates); *Inmates of N.Y. State with Human Immune Deficiency Virus v. Cuomo*, No. 90-CV-252, 1991 WL 16032, at *3 (N.D.N.Y. Feb. 7, 1991) ("[T]he federal Constitution protects against the unwarranted and indiscriminate disclosure of the identity of HIV-infected individuals and of their medical records . . .").

Although they do not usually rise to constitutional infringements, affronts by guards to the dignity of prisoners are an inescapable part of prison life. See generally SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* 180 (1997) ("During my incarceration these past months I have known what it is to be ignored and subjected to incredible rudeness."). That some affronts do rise to an actionable level is entirely predictable, and they hardly seem the "marginal and incidental" infringements that the *Davis* court would imagine them to be. *Davis*, 158 F.3d at 1347.

test, the physical injury requirement ceases to function merely as a limitation on remedies or as a jurisdictional mandate that would require prisoners to file their claims in state courts. It is as if *Davis* has painted certain rights out of the constitutional landscape.²⁵

The *Davis* approach has broad potential to affect rights outside the privacy context. For example, even if Bynum's disclosure of Davis's HIV status was not a malicious infliction of mental pain for Eighth Amendment purposes, the court's opinion has serious implications for Eighth Amendment cases.²⁶ Though most violations of the Eighth Amendment result in physical injuries, the Supreme Court held in *Hudson v. McMillian*²⁷ that courts must focus less on the severity of the injury suffered than on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."²⁸ Case reporters are filled with examples of one-time constitutional violations that do not involve physical injury.²⁹ *Davis* would suggest that cases alleging

25. Following *Davis*, state courts may decline to hear any of these claims. Arizona, which enacted its own prisoner litigation statute before the PLRA, has a physical injury requirement that limits all claims, including those for equitable relief. See ARIZ. STAT. ANN. § 31-201.01(L). Prisoners will still be able to file claims in state court under 42 U.S.C. § 1983, but if the right at issue is no longer cognizable, there will not be a § 1983 claim. See, e.g., *Luczak v. Cooper*, No. 98-C6807, 1999 WL 91893, at *4 n.4 (N.D. Ill. Feb. 11, 1999) (suggesting in dicta that psychological torture may no longer be a cognizable Eighth Amendment claim because of the physical injury requirement); *Ellis v. Illinois*, No. 96-C5268, 1997 WL 51502, at *3-4 (N.D. Ill. Feb. 4, 1997) (citing the requirement to call into question prior case law holding that the deliberate infliction of mental pain can violate the Eighth Amendment). *Luczak* and *Ellis* are hardly authoritative; after all, "Congress . . . has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997). But *Davis* comes close to a judicial reworking of constitutional rights.

26. Regardless of the merits of Davis's claim, the court's opinion assumes that Davis suffered a violation of a fundamental constitutional right. See *Davis*, 158 F.3d at 1345. At least three Eighth Amendment cases have already cited *Davis*. See *Robinson v. Page*, No. 96-4239, 1999 WL 138746, at *1 (7th Cir. Mar. 16, 1999); *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 808 & n.6 (10th Cir. 1999); *James v. Reno*, No. Civ. A. 98-1750 (RWR), 1999 WL 156343, at *4 (D.D.C. Mar. 11, 1999).

27. 503 U.S. 1 (1992).

28. *Id.* at 7 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). Although physical injury is an important factor in this determination, it is not crucial:

That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. . . . The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind."

Id. at 9-10 (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Justice Blackmun's concurrence provides a widely cited example of an actionable non-physical injury, that of a "guard placing a revolver in inmate's mouth and threatening to blow prisoner's head off." *Id.* at 16 (referring to the facts alleged in *Wisniewski v. Kennard*, 901 F.2d 1276, 1278 (5th Cir. 1990)).

29. See, e.g., *Chandler v. D.C. Dep't of Corrections*, 145 F.3d 1355, 1361 (D.C. Cir. 1998) (holding that an inmate stated a claim for an Eighth Amendment violation where a guard threatened to kill him); *Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996) ("To require a threshold showing of an 'objective' injury, the sort of thing that might reveal itself on an x-ray, or in missing teeth, or in a bruised and battered physical appearance, would confer immunity from

great harm without physical injury can be dismissed because most Eighth Amendment claims happen to involve a physical injury or are remedied by injunctive relief. Acts universally recognized as repugnant would go unpunished.³⁰

The *Davis* court blurs the distinction made in *Zehner v. Trigg* between cases in which damages are one of many potential remedies and cases in which damages are essential to vindicate a fundamental right. A proper application of the *Zehner* logic and of the “direct and substantial” test cited in *Davis* would mandate strict scrutiny of the physical injury requirement as it relates to violations of fundamental rights that cannot be remedied by prospective relief. Otherwise, as courts continue to interpret the physical injury requirement, *Davis* would stand for the perverse result that many of the claims screened out are those alleging the most outrageous conduct by prison officials.

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claims of deliberate indifference on sadistic guards, since it is possible to inflict substantial and prolonged pain without leaving any ‘objective’ traces on the body of the victim.”); *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988) (“Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of ‘Space 1999’—may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks.”); *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (finding an Eighth Amendment violation where a prison guard threatened a paraplegic prisoner with a knife, put food just out of reach, and let him sit for hours in his own feces).

30. Note how the Senate defined torture when it ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses of personality.

136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990). An amicus brief proposes that courts should read the physical injury requirement narrowly to avoid the abrogation of treaty obligations for the prevention of torture and other cruel, inhuman or degrading treatment. See Brief for Amicus Curiae Law Professors, *Harris v. Garner* (11th Cir. argued Mar. 15, 1999) (No. 98-8899) (available at <<http://diana.law.yale.edu/diana/db/110998-2.html>>).