WHITTIER LAW SCHOOL

THE RIGHT TO USE THE BATHROOM

AND

THE TORTS INVOLVED WHEN FORCING THE RETENTION OF HUMAN WASTE

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ABSTRACT

"The danger is not that a particular class is unfit to to govern. Every class is unfit to govern . . .Power tends to corrupt, and absolute power corrupts absolutely." - Lord Acton

Power can be abused in the most unusual ways. One way to abuse power it to deny a person a basic human need, such as access to eliminate bodily waste in a bathroom. There are many possible civil, and even criminal, causes of action when one is deprived access to a bathroom. Rights and duties of individuals vary from situation to situation, depending on unique circumstances such as: age of the person denied access to the bathroom; legal status of the person being denied, whether that be a minor or a prisoner; reasons for the denial; the status of the person denying access to a bathroom; and whether the denial is State action or private action. Among the many possible legal theories to sue on are: false imprisonment, intentional infliction of emotional distress, negligence, and a Constitutional tort arising under 42 U.S.C. § 1983.

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INTRODUCTION

The following is a true story.[1] One day, a fourteen year old girl asked her teacher for permission to use the bathroom. The teacher denied her request. Because the girl was suffering from abdominal pain, she asked the teacher several more times while explaining the seriousness of her condition. Frustrated with the repeated requests, the teacher replied, "If you can't hold it, you should be wearing Pampers." Unfortunately, this young girl had a bowel movement in her pants while in the classroom.

This may sound like extreme or unusual treatment for the typical child under the care of her teacher. However, hundreds, if not thousands, of similar situations have been reported by children and their parents all across the United States.[2] Many schools all across the country are limiting or restricting access to bathrooms for children who need to use them.[3]

Even though convicted criminals in maximum security prisons have the freedom to use their own toilet whenever needed, children in many schools do not currently enjoy the same freedom.[4] Prisoners have the freedom to use the toilet when necessary, as well as employees of companies governed by the regulations promulgated by the Occupational Safety and Health Administration (OSHA).[5] OSHA is a Federal Agency with a mission to "…assure the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health."[6] OSHA requires that all employees be permitted to use the bathroom whenever

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1 Sofia Santana, *Miami Herald News*, Girl refused bathroom pass may sue teacher, http://web.archive.org/web/20020805133724/http://www.miami.com/mld/miamiherald/news/local/3429847.htm (accessed 6/09/2002).

2 Laurie A. Couture, *Letters from Parents About Denial of Toilet Usage in their Child's School*, http://www.childadvocate.org/1b_parentletters.htm (accessed 03/10/2006).

3 *Id.*

4 Michael Santos, http://www.michaelsantos.net/high.html (accessed 3/10/2006).

5 Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time, Linder, Marc & Nygaard, Ingrid (Ithica, NY: Cornell University Press, 1998.)

6 Occupational Safety and Heath Administration Home Page, http://www.osha.gov/ (accessed 4/10/2006).

necessary, without having to first obtain permission.[7]

The damage done by denial of access to a bathroom is in no way *de minimis*.[8] To the contrary, being forced to retain human waste can, and does, do both physiological and psychological damage.[9] For example, OSHA has found that

> Urine retention leads to distension of the bladder wall. Prolonged distention leads to a disturbance of the elastic components of the wall, causing flaccidity and consequently weakening the evacuation power of the bladder. When the bladder is unable to empty completely, residual urine remains. Urine…is a good culture medium for bacteria… Frequent, complete voiding of the bladder greatly reduces the concentration of bacteria.[10]

The potential for physical damage is heightened when dealing with young children.[11] Most pediatricians agree that some young elementary school students' bladders are not mature enough to handle restricted access to the bathroom, which could lead to potential problems such as infection and incontinence.[12]

Physical harm is not the only concern. Significant emotional and psychological damage can be done to the child who is denied her basic need to eliminate bodily waste.[13] There is a particularly disturbing psychological disorder called Urolagnia, a paraphilia listed in the DSM-IV, which is a sadomasochistic practice in which retaining urine, urinating in one's clothes or urinating upon another person to humiliate or punish them is deliberately practiced for sexual gratification.[14] Adults who engage in urolagnia are often reenacting scenes from childhood, some in which they were denied toilet use by school teachers or caretakers due to adult convenience or due to

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7 Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time, Linder, Marc & Nygaard, Ingrid (Ithica, NY: Cornell University Press, 1998.); *See also* Barbara Kate Repa, *When the Boss Doubles as a Bathroom Monitor*, http://www.vault.com/nr/printable.jsp?ch_id=402&article_id=5918070&print=1 (accessed 3/10/2006).

8 *de minimis*, adj. [Latin "of the least"] 1. Trifling; minimal. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case. 3. DE MINIMIS NON CURAT LEX. Black's Law Dictionary (8th Ed. 2004), *de minimis.*

9 52 Fed. Reg. 16050, 16059 (1987).

10 *Id.*

11 Kathleen Doheney, *Young Students Need More Bathroom Breaks*, http://web.archive.org/web/20031019110935/http://www.hon.ch/News/HSN/514829.html (accessed 3/10/06)

12 *Id.*

13 Laurie A. Couture, *Forced Retention of Bodily Waste: The Most Overlooked Form of Child Maltreatment*, http://www.nospank.net/couture4.htm (accessed 3/10/2006).

14 *Id.*

punishment or containment.[15] Due to the close proximity of the urethra and bladder to the sex organs, some adults who chronically suffered this form of bodily control as children conditioned wetting in their pants or bladder tension with sexual arousal.[16]

All Americans, including children, have Constitutional rights.[17] Among these rights is a fundamental substantive Due Process right to bodily integrity.[18] Using the bathroom is a basic human need of the body and is therefore protected by the Due Process clause of the Fourteenth Amendment.[19] The United States District Court for the Western District of Wisconsin has stated that "Defendants…are not entitled to qualified immunity because the law was well established when their acts are alleged to have occurred that it was unconstitutional to deprive a person of the ability and opportunity to urinate for a lengthy period of time."[20] The same court said, in an earlier case, "However primitive and ordinary, the right to defecate and to urinate without awaiting the permission of government…are rights close to the core of the liberty guaranteed by the due process clause of the Fourteenth Amendment. When government undertakes to eliminate or to impair either or both of these rights, it should be required to make a strong showing of necessity for the restrictive measure."[21] Indeed, we all have the "basic liberty of access to the bathroom when needed."[22]

People who believe they have the authority to deny access to a bathroom, especially teachers and educators throughout the country, need to be aware that denial of a pupil's right to use

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15 *Id.*
16 *Id.*
17 "A child, merely on account of minority, is not beyond the protection of the Constitution…Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" Bellotti v. Baird, 443 U.S. 622 (1979).
18 Rochin v. California, 342 U.S. 165 (1952); Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
19 "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 200, (1989)
20 Dvorak v. Marathon County, 2002 U.S. Dist. LEXIS 18503 (D. Wis. 2002).
21 Flakes v. Percy, 511 F. Supp. 1325, 1329 (D. Wis. 1981).
22 Jefferson v. Ysleta Independent School District, 817 F.2d 303, 305 (5th Cir. 1987).

the toilet could carry significant liabilities. Under 42 U.S.C. § 1983, a state actor can be held liable for both compensatory and punitive damages, including paying for the winner's attorney's fees.[23] In addition to liability under § 1983, a defendant could also be held liable for intentional infliction of emotional distress.[24] Depending on the facts of the case, other potential liabilities could arise from prohibiting a person from their *bona fide* need for access to a toilet. For these reasons, all people, especially young students, ought to be able to use the restroom whenever needed, without be required to first obtain permission.[25]

A. Fundamental Rights and Substantive Due Process

As the Supreme Court of Missouri has stated: "a person's right to use public restrooms is about as fundamental a right as one can imagine, probably equal to or more fundamental than speech rights." State v. Beine, 162 S.W.3d 483, 487 (Mo.banc 2005).

This right is recognized internationally. A French tribunal has said "a fundamental right of a human being ... the right to go to the toilet cannot be subject to authorization by a third party."[26]

The legal standard to prevail on a claim of violation of the fundamental right of bodily integrity is as follows: the plaintiff must generally show the defendant acted with deliberate indifference to a constitutional right in a manner that shocks the conscience.[27] Where the defendant did not have time for actual deliberation before committing the wrongful act, the

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23 "To state a claim under § 1983, the plaintiff must allege facts constituting a deprivation of a constitutional right, under color of state law. *** Furthermore, in order to recover against a teacher or a school administrator under § 1983, a student must establish not only that he or she was deprived of a constitutional right, but also that the person who deprived him or her of that right did so in bad faith or with deliberate indifference to his or her rights."
Boyett by Boyett v. Tomberlin, 678 So.2d 124, 127 (Ala.Civ.App.,1995).

24 Emotional Distress by Schoolteacher or Administrator, 18 Am. Jur. Proof of Facts 3d 103

25 Compare: Lamouroux v. SA Groupe Bigard, No. 9500433, slip op. at 13, 15 (March 18, 1996) (A labor court in France ruled in 1996 that "going to the toilet meets a physiological need which only the individual is in a position to judge. As a fundamental freedom of a human being, the right to go to the toilet cannot be subject to authorization by a third party or conditioned on the employer's finding a replacement. Consequently, employees are at liberty to respond to their needs outside of collective breaks so long as they inform their supervisors. Although workers do not need permission to void, the court held that abuses could be punished..").

26 Marc Linder & Ingrid Nygaard, Void Where Prohibited, 159 (1998).

27 *Putnam*, 332 F.3d at 548.

plaintiff must show the defendant acted with a degree of fault evincing malice or sadistic behavior.[28]

B. 42 U.S.C. § 1983 Overview

Section 1983 is a Constitutional tort claim.[29] "If a governmental body or official deprives an individual of 'rights, privileges, or immunities' secured by the U.S. Constitution, that person can bring a suit under 42 U.S.C. § 1983, enacted by Congress pursuant to Section 5 of the Fourteenth Amendment for damages and injunctive relief."[30] Damages can include both compensatory and punitive damages. State law sovereign immunity defenses are not available in a Section 1983 action brought in state or federal court.[31]

Section 1983 claims, whether filed in state or federal court, entitle a successful plaintiff to:

(1) Compensatory damages for physical and psychological injury, pain and suffering, and

(2) Economic damages (basic tort damages with no cap)

(3) Equitable or declaratory relief

(4) Punitive damages when "evil motive or intent, or ... reckless or callous indifference to the Federally protected right" is shown

(5) Costs, including Section 1988 attorney fees[32]

Deprivation of a constitutional right in and of itself is not compensable. Section 1983 damages are to be measured in the same manner as traditional out-of-pocket tort damages. Pain and suffering, as noted above, is included in "out-of-pocket" damages. By way of notation as to psychological harm or mental anguish claims, some jurisdictions allow recovery for this injury

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28 *County of Sacramento v. Lewis*, 523 U.S. at 833, 852-53, 118 S.Ct. 1708 (citing Whitley, 475 U.S. 312, 320-21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).

29 *Public School Liability: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Students*, 48 AMJUR TRIALS 587.

30 *West v. Dallas Police Dept.*, 1997 WL 452727, *5 (N.D.Tex.) (N.D.Tex.,1997)

31 *Public School Liability*, 48 AMJUR TRIALS 587.

32 *Id.*

without expert testimony solely upon the plaintiff's claim and testimony of emotional distress.[33]

I. Section 1983 Case Analysis: Glaspy v. Malicoat

In *Glaspy v. Malicoat*, plaintiff Glaspy, a 69 year old man, sued Malicoat, a corrections officer at a correctional facility, alleging Malicoat violated his constitutional rights when he refused Glaspy's request to use the bathroom while Glaspy was visiting his son.[34]

Glaspy went to visit his incarcerated son, Williams, at around 3:00 pm. Around 4:19 pm., Glaspy informed Williams that he needed to urinate. Williams then approached the desk in the visiting room to seek permission for his father to use the restroom. Williams asked Officer Davis if his father could use the restroom, but Davis denied the request stating that prisoner count was being taken and no prisoner or visitor movement was allowed during count. A minute later, Williams again approached the desk and told Malicoat that his father needed to use the restroom because he was in pain. Malicoat said Glaspy had to wait.

At 4:28 p.m, Glaspy himself approached the desk and asked Malicoat for permission to use the bathroom, this time explaining the urgency and the pain he was in, stating that he could not wait until count was completed. When Glaspy asked Malicoat about his rights, Malicoat said he lost his rights when he signed in to see his son.

At approximately 4:35 pm, Glaspy urinated in his pants. Glaspy then saw Malicoat laughing at him. Count was not completed until 4:42 pm. Glaspy did not suffer from any medical condition that required him to urinate. He also did not suffer any bodily injury as a result of not being able to use the restroom.

Glaspy contended that his rights under the substantive due process component of the Fourteenth Amendment was violated. In response to his claim, the court stated:

"As seen from the facts above, Glaspy was not free to do as he pleased when he felt the need to

33 *Id.*
34 *Glaspy v. Malicoat*, 134 F.Supp.2d 890 (W.D.Mi., 2001).

urinate. He could not leave the Facility and he was required to obtain permission from the officer in charge of the desk; restroom facilities were not readily available and when Glaspy would be permitted to use them was left completely to prison officials. Thus, under these conditions, the Court concludes that the ability/opportunity to urinate, being a matter of bodily integrity, is a fundamental right subject to due process protection."[35]

The court then had to determine whether the government's actions involved the exercise of power without any reasonable justification in the service of a legitimate governmental objective. To this question, the court stated the rule that "when a substantive due process claim is based upon the specific act of a government official, the abuse of governmental power must rise to the conscience-shocking level, typically characterized as deliberate indifference to a citizen's constitutional rights."[36]

The court then held, "applying the deliberate indifference standard to the facts of this case, the Court concludes that Malicoat's conduct shocks the conscience because Malicoat was deliberately indifferent to Glaspy's federally protected rights."[37]

As for the final issue of damages, the court found that: "Glaspy did not suffer any physical harm from the incident, but suffered pain and discomfort for a period of time. Also, an adult urinating in his pants in front of others suffers extreme humiliation. The event also created inconvenience-- what to do with the wet clothes, how to sit when going home, etc. Therefore, the Court awards Glaspy $5,000 in compensatory damages. In addition, the Court will award Glaspy punitive damages of $5,000 against Malicoat because Malicoat's actions demonstrate evil motive or intent or callous indifference to Glaspy's federally protected rights ... The Court believes that this amount is sufficient to punish Malicoat for his conduct and to deter similar behavior in the

35 *Glaspy v. Malicoat*, 134 F.Supp.2d 890, 895 (W.D.Mich.,2001).
36 *Id.*
37 *Id.* at 896.

future."[38] The court also said that the Plaintiff may apply for attorneys fees and costs.

C. Intentional Infliction of Emotional Distress Overview

Generally speaking, the tort of the intentional infliction of emotional distress, also known as the tort of outrage, has four required elements:

(1) the conduct must be extreme and outrageous;

(2) it must be intentional or reckless;

(3) it must proximately cause emotional distress; and

(4) the distress must be extreme or severe.[39]

"It has been stated that to be actionable, the challenged conduct must have been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Another standard is whether the defendant's actions are so terrifying or insulting as naturally to humiliate, embarrass, or frighten the plaintiff."[40]

"In making that determination, the court should consider:

(1) the position occupied by the defendant;

(2) whether the plaintiff was particularly susceptible to emotional distress, and whether the defendant knew this;

(3) whether the defendant's conduct might have been privileged;

(4) whether the degree of emotional distress was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and

(5) whether the defendant was aware that there was a high probability that the conduct would cause severe emotional distress and proceeded in conscious disregard of it. A series of

38 *Id.* at 897.
39 *Emotional Distress by Schoolteacher or Administrator*,18 AMJUR POF 3d 103.
40 *Id.*

incidents or course of conduct is more likely to be considered outrageousness than a single incident."[41]

D. False Imprisonment Overview

The Restatement (Second) of Torts defines the interest in freedom from confinement as follows:

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.[42]

E. Worker's Rights to the Bathroom and the Occupational Safety and Health Administration

"Since 1971, federal regulations promulgated by the Occupational Safety and Health Administration (OSHA) have required most employers to provide toilets, but, according to OSHA policy-making and enforcement officials, these regulations did not require employers to permit workers to use them. Many workers, such as assembly line workers, teachers, pharmacists, and telemarketers have thus resorted to relieving themselves into adult diapers, the shop floor or, in the case of some teachers, bringing their entire class with them to the bathroom. Others refrain from drinking and from voiding during the workday, inviting a host of physiological problems such as urinary tract infections, perinatal complications, and, in extreme cases, renal damage."[43]

In April 1998, OSHA issued an interpretive memorandum instructing that the standard

41 *Id.*
42 REST 2d TORTS § 36
43 . . . AND IF NOT NOW, WHEN? Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time, Linde r, Marc & Nygaard, INgrid (Ithaca, NY: Cornell Universi ty Press, 1998. 244 Pp. Hardcover $27.50) 2 U. Pa. J. Lab. & Emp. L. 603, *604

requiring employers to make toilet facilities available also requires that employers provide *reasonable access* to these facilities so that employees "can use them when they need to do so." Iowa OSHA has issued an interpretive memorandum spelling out in detail more specific than federal OSHA's, workers' rights to use the bathroom when necessary, joining Minnesota as the second state in the nation with a law or regulation that specifically addresses bathroom access.[44]

Although relatively few U.S. workers have a statutory right to rest breaks, many workers nonetheless receive such breaks, either through collective bargaining agreements, or because of employer policy. Yet the provision of rest breaks has never been universal, and has declined over the past two decades. By contrast, most of the European countries that are the U.S.' world market competitors, some Latin American and Eastern European countries, as well as Israel, Japan, and all the Canadian provinces and territories except Nova Scotia, have statutorily mandated rest periods, many of which were first enacted, in some form, over a century ago.[45]

F. Arrestee Rights under the 4th Amendment and Intentional Infliction of Emotional Distress

I. Case Analysis: *Carroll v. Village of Homewood*

In *Carroll v. Village of Homewood*[46], plaintiff Carroll, a police officer, was arrested for suspicion of driving under the influence of alcohol. After his arrest by arresting officer Kaiser, Carroll told Kaiser that he needed to urinate and asked several times if he could use the restroom at the store where he was stopped. Kaiser refused. While Carroll was being transported in Officer Harris' squad car, he again requested to use the restroom, but Harris ignored him. Finally, once at the station Carroll again told both Kaiser and Harris that he needed to urinate and asked to use the bathroom. Kaiser told Carroll that he could not use the bathroom. Approximately one hour after he

44 *Id.*
45 *Id.*
46 *Carroll v. Village of Homewood*, 2001 WL 1467708, *1 (N.D.Ill.) (N.D.Ill.,2001).

was taken into custody, Carroll urinated in his pants in front of Kaiser, Harris, and other members of the Police Department. Carroll was then ridiculed by Kaiser.

Carroll claimed that the Police used excessive force and unlawful punishment during his arrest. Defendants argued that their refusal to allow Carroll to use the bathroom was not a constitutional violation. In addition defendants argued that they were entitled to qualified immunity.

As to qualified immunity, the court said: "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."[47] The court stated that there is clear precedent that the denial of bathroom use can constitute a constitutional violation.[48]

Carroll also alleged a claim for intentional infliction of emotional distress. The court said that "to establish such a claim, a plaintiff must show that (1) defendants' conduct was extreme and outrageous; (2) defendants intended to inflict severe emotional distress or knew there was a high probability that the conduct would cause such distress; (3) defendants' conduct did, in fact, cause severe emotional distress."[49]

In applying the constitutional standards to the facts of the case, the court said: "Carroll's being arrested without probable cause, subject to a racial slur, forced to urinate in his pants, and forced to endure two separate legal proceedings related to the DUI charge ... are sufficient allegations to support a finding of ***intentional infliction of emotional distress***. It appears that recitation of the facts to an average member of the community would arouse in him resentment against the actor, and lead him to exclaim 'Outrageous!'"[50]

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47 *Id.* at 12.
48 *Id.* at 13.
49 *Id.* at 16.
50 *Id.* at 6.

G. Pretrial Detainee Rights under the 14th Amendment

I. Case Analysis: *West v. Dallas Police Department*

In *West v. Dallas Police Department*, plaintiff West was prevented from having access to a restroom while a pretrial detainee at the Dallas County Jail.[51] West asked Police Officers, Nelson and Williams, several times if he could use the restroom, but they repeatedly denied his requests. West then chose to expose himself and urinate on the floor of the book-in room. Before West could put his penis back into his pants, a police officer hand-cuffed him, causing his penis to remain exposed during a trip to Parkland. Plaintiff West then proceeded *pro se,* seeking an injunction and monetary damages. Defendants filed a motion for summary judgment.[52]

Plaintiff West mistakenly attempted to proceed under the Eighth Amendment, which protects individuals who have already been convicted of crimes.[53] The court construed his *pro se* complaint liberally, and properly proceeded under the procedural and substantive due process guarantees of the Fourteenth Amendment, rather than the Eight Amendment.

The Court then went on to state the rules regarding rights to urinate or defecate in reasonable privacy. It stated:

> "Although this Circuit has never expressly addressed whether an individual has a Fourteenth Amendment right to urinate or defecate in reasonable privacy, there can be little denying that such a right exists. Indeed, there are few activities that appear to be more at the heart of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment than the right to eliminate harmful wastes from one's body away from the observation of others . . . this Court finds that an individual's ability to urinate or defecate in reasonable privacy is clearly established as a right which affords Fourteenth Amendment protection . . . because of the nature of confinement that pretrial detainees and prisoners experience, the government has a duty to protect an inmate's basic human needs . . . it would be unfathomable to suggest that courts should be unwilling to include the ability to urinate or defecate as a part of these basic needs. Therefore, if Plaintiff West provides sufficient summary judgment evidence to prove that Defendants acted with subjective deliberate indifference to deny West's access to a restroom as punishment or as an attempt to otherwise deny him his basic human needs, this

51 *West v. Dallas Police Dept*, 1997 WL 452727, *1 (N.D.Tex.) (N.D.Tex.,1997).
52 *Id.* at 2.
53 *Id.* at 3.

Court will find that West has met his burden of proving that his constitutional rights were violated."[54]

In a nearly incomprehensible turn from its clear statement of the Constitutional right to urinate, the Court then went on to accord the jail officials "wide-ranging deference" to an official's attempt to maintain order, discipline, and security in the jail. The Court granted the defendant's motion for summary judgment.

H. Prisoner Rights under the 8th Amendment

There are many cases that have addressed the issue of a prisoner's right to use the bathroom. The U.S. Supreme Court has said, "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Due Process Clause." [55]

A prisoner alleging an Eighth Amendment violation must prove both an objective and subjective element.[56] The defendant's conduct must objectively rise to the level of a constitutional violation by depriving the plaintiff of the "minimal civilized measure of life's necessities."[57] The defendant's conduct must also reflect a subjective state of mind evincing deliberate indifference to the health or safety of the prisoner.[58] To establish deliberate indifference, the plaintiff must show the defendant was substantially aware of but disregarded an excessive risk to inmate health or safety.[59]

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54 *Id.* at 5-6.
55 *County of Sacramento v. Lewis*, 523 U.S. 833, 851, 118 S.Ct. 1708, 1719 (U.S.Cal.,1998).
56 See *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).
57 *Rhodes v. Chapman*, 452 U.S. 337, 342, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).
58 *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1977).
59 *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Prisoners have sued over allegations of unclean and inadequate restrooms.[60] The court will apply the Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, and prohibits the infliction of cruel and unusual punishments on those convicted of crimes.[61]

In *Jarrell v. Seal*, plaintiff Chuck Jarrell, a state prisoner, filed suit alleging that his rights were violated when he was not taken to the restroom during a court appearance, thereby causing him to urinate on himself in public.[62] The court found no evidence of defendant acting with deliberate indifference, and accordingly, it granted the defendant's motion for summary judgment and dismissed plaintiff's claims with prejudice.

In *Dvorak v. Marathon County*, plaintiff Nancy Dvorak, an inmate at a jail was not provided a catheter for 12-15 hours so that she could urinate. The court found that "it is a violation of the Eighth Amendment to put a person into a restraining cell for hours without a catheter, knowing that the person could not urinate without one."[63] As to qualified immunity, the court said that the defendants were not entitled to qualified immunity because the law was well established when their acts occurred that it was unconstitutional to deprive a person of the ability and opportunity to urinate for a lengthy period of time.[64]

I. Involuntarily Committed Patient Rights in Psychiatric Hospitals

"Although an involuntarily committed patient of a state hospital is not a prisoner *per se*, his confinement is subject to the same safety and security concerns as that of a prisoner . . . an involuntarily committed patient has substantive due process rights under the Fourteenth Amendment"[65]

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60 *Wilson v. Seiter*, 501 U.S. 294, 296, 111 S.Ct. 2321, 2323 (U.S.Ohio,1991)
61 *Id.*
62 *Jarrell v. Seal*, 2004 WL 241712 (2004).
63 *Dvorak v. Marathon County*, 2002 U.S. Dist. LEXIS 18503 (2002).
64 *Id.*
65 *Revels v. Vincenz*, 382 F.3d 870, 874 (C.A.8 (Mo.),2004).

In *Revels v. Vincenz*, the court held that a hospital employee did not act with deliberate indifference toward patient by denying him the opportunity to use the bathroom for a few seconds, and that the employee did not violate the patient's substantive due process rights.[66]

In *Flakes v. Percy*, the plaintiff class was all patients at the hospital who were confined to cells without sinks or toilets.[67] The official policy at the ward was that all patients locked in cells without toilets were to be released promptly at any time to use the ward toilets.[68] The court said, in most pertinent parts, "it is unusual within the institutions of the State of Wisconsin and within federal institutions in which persons are involuntarily confined, to lock persons into cells in which there are no toilets or sinks."[69] "However primitive and ordinary, the right to defecate and to urinate without awaiting the permission of government, and, while eating or at rest, . . . are rights close to the core of the liberty guaranteed by the due process clause of the Fourteenth Amendment. When government undertakes to eliminate or to impair . . . these rights, it should be required to make a strong showing of necessity for the restrictive measure."[70] "(I)t falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet."[71]

J. School Children's Rights

Over a hundred years ago, the Supreme Court of Indiana said, "The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained."[72]

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66 *Id.*
67 *Flakes v. Percy*, 511 F.Supp. 1325 (D.C.Wis., 1981).
68 *Id.* at 1327.
69 *Id.* at 1329.
70 *Id.*
71 *Id.* at 1330.
72 *Cooper v. McJunkin*, 1853 WL 3329, *2 (Ind.) (Ind. 1853).

Despite the general abandonment of corporal punishment as a means of punishing criminal offenders in the United States, the practice of corporal punishment in the classroom continues to play a role in the public education of schoolchildren in nearly every part of the United States.[73] Several of the case examples and stories in this paper portray an image of a classroom more as a battlefield or a prison than a hall of learning.

Pathological thinking on the part of some schoolteachers may be the cause of wrongful denial to bathroom access, and unmistakably some teachers derive satisfaction from it.[74] The rationale behind allowing teachers such power and control is that a schoolteacher stands in *loco parentis* to pupils who have been assigned to him, and may exercise powers of control, restraint, and correction to enable him to perform his duties as teacher and to accomplish the purposes of education.[75] However, as will be demonstrated, the schoolteacher's power and control has its limits.

I. Sovereign Immunity

When naming a governmental entity as a defendant, there are many complicated issues regarding sovereign immunity that may arise. While an in-depth discussion of sovereign immunity is beyond the scope of this paper, it can be said generally that "most jurisdictions adhere to the rule that governmental entities operating public schools are immune from tort liability for personal injuries or death occurring in connection with such operation, unless the entity has assumed liability by constitutional or legislative provisions, at least where the particular function in connection with which the injury or death occurred was governmental, as distinguished from propriety, in character."[76]

"It is a well-established rule of the law of torts that a teacher is immune from liability for

73 *Teacher's Use of Excessive Corporal Punishment*, 20 AMJUR POF 2d 511.
74 *Teacher's Use of Excessive Corporal Punishment*, 20 AMJUR POF 2d 511.
75 *Id.*
76 *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R.3d 703.

physical punishment, reasonable in degree, administered to a pupil. The teacher is held (and in some jurisdictions is stated by statute) to stand in *loco parentis*, and to share the parent's right to obtain obedience to reasonable commands by force."[77]

"But a teacher's right to use physical punishment is a limited one. His immunity from liability in damages requires that the evidence show that the punishment administered was reasonable, and such a showing requires consideration of the nature of the punishment itself, the nature of the pupil's misconduct which gave rise to the punishment, the age and physical condition of the pupil, and the teacher's motive in inflicting the punishment. If consideration of all of these factors indicates that the teacher violated none of the standards implicit in each of them, then he will be held free of liability; but it seems liability will result from proof that the teacher, in administering the punishment, violated any one of such standards."[78]

As stated above in the *42 U.S.C. § 1983 Overview*, State law sovereign immunity defenses are not available in a Section 1983 action brought in state or federal court.[79]

II. Constitutional Rights of Children/Minors/Infants

The Supreme Court of the United States has been clear concerning the Constitutional rights of children:

"A child, merely on account of minority, is not beyond the protection of the Constitution… Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[80] "Although the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, *Tinker* … illustrates that it may not arbitrarily deprive them of their freedom of action altogether."[81]

77 *Teacher's civil liability for administering corporal punishment to pupil*, 43 A.L.R.2d 469
78 *Id.*
79 *Public School Liability*, 48 AMJUR TRIALS 587.
80 *Bellotti v. Baird*, 443 U.S. 622 (1979).
81 *Id.*

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[82] "Corporal punishment of school-children implicates constitutionally protected liberty interest."[83]

"Undifferentiated fear or apprehension of disturbance is not enough to overcome right to freedom of expression."[84] "School officials do not possess absolute authority over their students."[85] "Students in school as well as out of school are 'persons' under the Constitution and are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state."[86]

"We decline to . . . establish that the Constitution does not secure minors' fundamental right to free movement against the government acting without regard to the parents' wishes."[87]

"The Supreme Court has articulated three specific factors that, when applicable, warrant differential analysis of the constitutional rights of minors and adults:

(1) the peculiar vulnerability of children;

(2) their inability to make critical decisions in an informed, mature manner; and

(3) the importance of the parental role in child rearing." [88]

"Although the state may have a compelling interest in regulating minors differently than adults, we do not believe that this lesser degree of scrutiny is appropriate to review burdens on minors' fundamental rights… Accordingly, we apply strict scrutiny."[89]

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82 *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).
83 *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).
84 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
85 *Id.*
86 *Id.*
87 *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).
88 *Nunez* at 945.
89 *Id.*

III. Criminal Liability

"A teacher may be held criminally liable where he abuses his power of disciplinary punishment when, for example, he uses the punishment under a pretense of administering correction simply to gratify his own evil passions, or where the punishment inflicted is inconsistent with the purpose of correction because it seriously endangers the pupil's life, limbs, or health, disfigures the pupil, or causes him any other permanent injury."[90]

As discussed earlier, forced retention of bodily waste can cause permanent injury both to the body and the mind. Incontinence is the most prevalent concern when a full bladder is forced to remain full for extended periods of time. Many teachers deny their pupils access to the bathroom for the simple reason of maintaining order and control of their classroom, while others may actually do it out of malice or gratification of their evil passions.

IV. Case Example: <u>Jefferson v. Yselta Independent School District</u>

In *Jefferson v. Yselta Independent School District*, a second grade girl was literally tied to a chair for the entire school day and denied access to the bathroom.[91] This treatment "was not for punishment but was part of an instructional technique imposed by school policy."[92] The court analyzed a student's right to be free from bodily restraint, free from damage to bodily integrity as protected by the Fourteenth Amendment guarantee of due process.[93] In the end, the court said in most relevant part that, "A young student who is not being properly punished or disciplined has a constitutional right not to be lashed to a chair through the school day and denied, among other things, the basic liberty of access to the bathroom when needed."

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90 *Teacher's Use of Excessive Corporal Punishment*, 20 AMJUR POF 2d 511
91 *Jefferson v. Ysleta Independent School Dist.*, 817 F.2d 303 (C.A.5 (Tex.),1987).
92 *Id.* at 304.
93 *Id.* at 305.

V. Case Analysis: Boyett v. Tomberlin[94]

This case is perhaps the most directly on-point case discussed in this paper. Boyett, the plaintiff, and a senior in high school, had diarrhea one day during his last year of high school. He went to school anyway, and had been excused from classes earlier in the day to go to the bathroom. However, in his last class of the day, Boyett asked his teacher if he could be excused to the bathroom. The teacher denied his request. When Boyett left the classroom anyway, he received a ten day detention as punishment for his choice to leave.

The student then brought an action against his teacher, principal, superintendent and county board of education, asserting state law tort claims and a 42 U.S.C. § 1983 claim for violation of his rights under Fourteenth Amendment, in connection with discipline received for leaving class, without permission, to go to restroom.

The Court of Civil Appeals in Alabama, speaking through Judge CRAWLEY, said, "The Due Process Clause of the Fourteenth Amendment simply does not guarantee a student the right to be excused from a classroom upon demand, even if the asserted reason is to use the toilet. In the case, the student neither showed the deprivation of a constitutional right nor established bad faith or deliberate indifference on the part of the teach and the administrators."

In the end, the trial court's entry of summary judgment for all the defendants was affirmed.

VI. Students and Bathroom Denial in the News

It was reported in the Tampa Tribune on March 2, 2006, that a high school junior urinated in a trash can during his second period English class because his teacher would not allow him to go to the bathroom.[95] Campbell. the teacher who denied the student's request to use the restroom, was recommended for a 10-day suspension without pay. The school district claimed that Campbell violated its policy that prohibits a teacher from making inappropriate remarks to a student or

94 *Boyett by Boyett v. Tomberlin*, 678 So.2d 124 (Ala.Civ.App.,1995).
95 *Restroom Refusal May Result in Suspension*, 3/2/06 TAMPATRIB 1

expose a student to unnecessary embarrassment or disparagement. The remainder of the news story continues with a pro-teacher, and anti-bathroom rights, bias.

The Washington Post reported on June 6, 2006, that a high school student endured a full bladder throughout his history class all through the year in order to trade his two hoarded restroom passes for six points of extra credit.[96] It was enough to raise his grade from a C+ to a B. The article reported that "bladder control, especially in an era of 90-minute classes, is a vital skill in many Washington high schools, where administrators often limit access to restrooms during class to reduce interruptions and quash potential mischief in areas without adult supervision."[97] Critics say that it is unfair to give anyone an academic advantage based on something as unacademic as bathroom habits. One student, a senior, reportedly said, "We can vote. We can go to war. We should be able to pee whenever we want." Beverly Ellis, a history teacher, said "I discourage them from leaving unless it's a real emergency. They've got to convince me."

CONCLUSION

Denying a human access to a bathroom when needed is clearly a wrong cognizable under the law today. It is the sort of wrong that could be called *malum in se*, where no law is necessary to be on the books to recognize such an act as inherently wrong. Prisoners, arrestees, the insane, and especially schoolchildren, have a Constitutional right to use the bathroom in privacy whenever necessary. No person should abuse the power of their position by denying such a basic human need. When this basic right is denied, there may very well be ample remedies available in tort.

96 *How Bad Do You Have to Go?*, by Ian Shapira, 6/6/2006.
97 *Id.*