Identifying Civil Rights Violations

Lawyers who don't typically handle civil rights cases can identify potential violations and help those who are being mistreated.

By || **James D. Leach**

In the past several years, I have seen firsthand—through three cases I handled—how pursuing federal civil rights lawsuits challenging decades-long abusive treatment of criminal suspects or prisoners can lead to meaningful systemic changes. In each case, I asked myself the same question: How could lawyers who knew about these practices have identified the constitutional violations earlier? Not all lawyers know how to bring a civil rights case, nor do they have the time to undertake the steep learning curve needed to do so. But I believe that every lawyer can tell when something may be wrong.

It doesn't take any special training to have a sense that people are being mistreated. Law is grounded in a sense of right and wrong. To identify potential civil

rights violations, lawyers need to step away from the overwhelmingly cognitive focus that we learned in law school and that drives most of our work as lawyers. We need to remember what Antoine de Saint-Exupéry wrote in *The Little Prince*: "One sees clearly only with the heart."[1] Seeing with our hearts allows us to see wrong for what it is.

We need to look at the bigger picture of what is happening in a prison or jail that doesn't seem right or fair. It can be daunting to know where to start when you observe conduct or conditions that appear to cross the constitutional line. These cases are examples of mistreatment of suspects and prisoners.

Stopping Forcible Catheterization of Drug Suspects

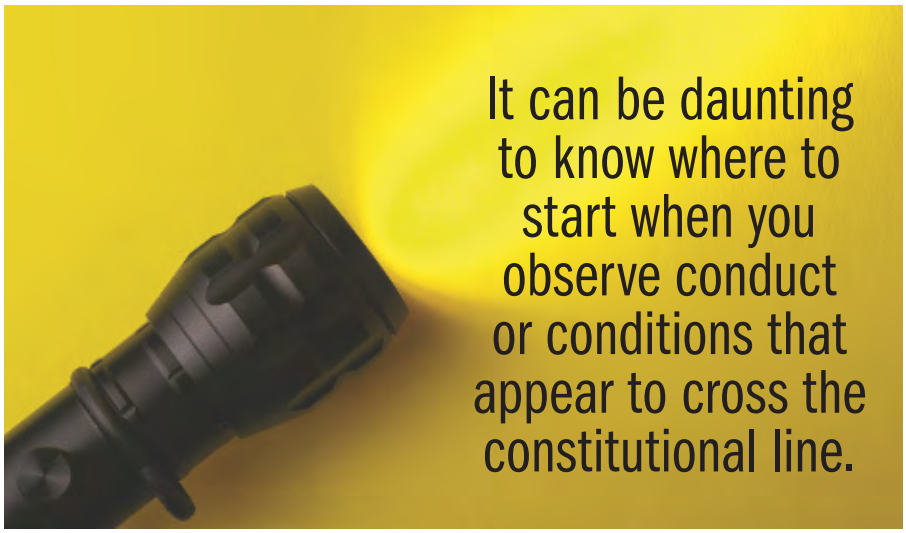
For more than 20 years, when suspected drug users refused to give a urine sample, police in some parts of South Dakota took them to a local hospital or clinic and physically restrained them while a nurse forced a catheter into the suspect's urethra and bladder to obtain a urine sample. Police video showed the agony this draconian procedure inflicted. The victims described lasting emotional damage.

I learned about this practice and researched the law. After investigating, I came to represent six victims of this abuse pro bono.[2] I filed suit in federal court, alleging that forcible catheterization to seek evidence of drug use, even when conducted with a search warrant, violates the Fourth Amendment. The police had video-recorded three of the catheterizations. The videos proved the extraordinary pain the victims experienced. After discovery and in response to the plaintiffs' motion for partial summary judgment, the court agreed that the catheterizations violated the Fourth Amendment.[3]

This ruling and the resulting public awareness make it highly unlikely that forcible catheterization will happen again in South Dakota. But the practice still occurs elsewhere and should be stopped.

Closing a Dungeon

Built in 1907, the Walworth County Jail in sparsely settled north-central South Dakota was in deplorable condition by 2020. In 2014, the sheriff told the county commissioners who oversaw the jail: "It doesn't take a rocket scientist to go to the jail and see that it needs to be replaced."[4] In response, the commissioners hired an expert from the National Institute of Corrections, which is part of the U.S. Department of Justice. He told them that in his 25 years' experience he had "never seen anything like it."[5]



The expert cited inadequate security, unsanitary conditions, fire hazards, lack of fire escapes, lack of intercoms for prisoners to contact jailers in an emergency, pests, vermin, mold, inadequate cells for inmates on suicide watch, and failure to comply with the Prison Rape Elimination Act and the Civil Rights for Institutionalized Persons Act.[6]

The archaic jail, and the county's underfunding and misoperation of it, predictably led to significant injuries to inmates, resulting in serious personal injury claims. One case was brought by an inmate who had a stroke, but correctional officers refused to take her for medical care because they accused her of faking it.[7] Another inmate sued after jailers ignored his broken arm and refused to provide his prescribed medication for pain, anxiety, and depression.[8] A third sued after jailers withheld his diabetes medication for four months.[9]

A lawyer who handled one of these cases had resolved her case, but her insistence during settlement negotiations that the jail be closed met blank stares and shuttered minds. She had accumulated a wealth of factual materials about the jail during her case, and she contacted me. Our strategy for shutting down the jail was to sue on behalf of current prisoners, seeking a permanent injunction closing it as an ongoing violation of the Eighth and Fourteenth Amendments.[10] We carefully studied the Prison Litigation Reform Act, because we knew that failing to meet its dictates could be fatal to our case.[11]

We filed the case as a Federal Rule of Civil Procedure 23(b)(1) and (2) class action because otherwise the claim for injunctive relief would become moot as soon as the individual plaintiffs, all short-term prisoners, were released.[12] With our clients' approval, we did not seek damages because we thought a

jury would assess minimal damages for short-term prisoners who had not been injured. Also, seeking damages would have required us to bring the class action under Rule 23(b)(3), raising significant and unnecessary additional issues.[13]

The jail's condition made our case unassailable. Within two months of when we filed it, and without any discovery or hearings, the county agreed to our demand to shut down the jail for good.

Accessing Prescribed Controlled Substance Medications

The Brown County Jail, in Aberdeen, S.D., refused to allow inmates to have their prescribed controlled substance medications. A criminal defense attorney contacted me on behalf of his client, who has multiple sclerosis and took three controlled substance prescription medications to mitigate its effects: Adderall for fatigue, Xanax for anxiety and panic attacks, and oxycodone for pain. She was about to be jailed for 30 days and would not be allowed to have her medications.[14]

A quick search of the relevant law showed that the jail's policy was unconstitutional.[15] Again using a Rule 23(b)(1) and (2) class action for the same reasons as in the Walworth County Jail case, the lawsuit sought an injunction requiring the jail to change its policy and allow the medications. The class action did not seek damages, because of the difficulty of proving them and because seeking them would raise the additional complexities of a Rule 23(b)(3) class action.

Within 30 days of filing suit, instead of attempting to defend the case, the jail changed its policy to allow inmates to have their prescribed controlled substance medications.[16]

Civil rights and class action law require lawyers to navigate multiple roadblocks, including qualified immunity—a doctrine created and then vastly expanded by supposedly "textualist" judges and now used to bar many otherwise meritorious claims.[17] Lawyers who venture into civil rights actions without adequately understanding what they are getting into risk both losing the case and making bad law. These fields are too land mine-laden to learn as one goes.[18]

If we band together and challenge potential constitutional violations, we can effect meaningful change for inmates who are being mistreated. Most experienced civil rights lawyers welcome the opportunity to help lawyers analyze whether a civil rights violation exists, and if so, to challenge it and seek justice. T

James D. Leach *is an attorney in Rapid City, S.D., and can be reached at jim@southdakotajustice.com. Stephanie Pochop of Gregory, S.D., and Maren Chaloupka of Scottsbluff, Neb., contributed significantly to this article.*

Notes

1. Antoine De Saint-Exupéry, *The Little Prince* 63 (Richard Howard, trans., 2000) (1943).
2. I followed the ABA's Model Rule of Professional Conduct 7.3(b), which most states have adopted. It prohibits direct solicitation of a client only "when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain[.]" The "significant motive" standard provides a safe harbor for lawyers who provide their services without pay. Ala. Ethics Op. 03-1 (2003) ("when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of 'pecuniary gain' within the meaning of [Rule 7.3(a)]"). Annotated Model Rules of Professional Conduct (American Bar Association, 9th ed. 2019) at 657. My fee agreement in all these cases is that I provide my services at no charge, and I pay all costs. Doing this, which I recommend, brings the case within Model Rule of Professional Conduct 7.3(b) and still allows attorneys to try to force the defendants to pay fees and costs under 42 U.S.C. §1988 if the plaintiff prevails.
3. *Riis v. Shaver*, 458 F. Supp. 3d 1130, 1177 (D.S.D. 2020).
4. Class Action Compl. for Injunctive & Declaratory Relief, *Agard v. Walworth Cty.*, No. 1:20-cv-01018-CBK 7 (D.S.D. Sept. 5, 2020), https://tinyurl.com/7p7st6cc.
5. *Id.* at 11.
6. *Id.* at 12–16.
7. Compl. with Req. for Trial by Jury, *Brandner v. Walworth Cty.*, No. 1:18-cv-01005-CBK 9 (D.S.D. Mar. 8, 2018), https://tinyurl.com/4af5kcsf.
8. Fourth Am. Compl., *Maxfield v. Jungwirth*, No. 1:18-cv-01006-KES (D.S.D. Mar. 2, 2020), https://tinyurl.com/6bnmvbnh. For more on this case, see *Maxfield v. Larson*, 2019 WL 1060720, at *1 (D.S.D. Mar. 6, 2019).
9. *Blazer v. Gall*, 2020 WL 999459, at *3–5 (D.S.D. Mar. 2, 2020).
10. The Eighth Amendment applies to prisoners who have been convicted and are serving their time; the Fourteenth Amendment applies to pretrial detainees. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).
11. 42 U.S.C. §1997e(a).
12. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).
13. Fed. R. Civ. P. 23(b)(3) has requirements not found in Fed. R. Civ. P. 23(b)(1) and (2). Injury claims can be adjudicated in class actions only with great difficulty, or not at all. *See Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).
14. Am. Class Action Compl. for Injunctive & Declaratory Relief, *Voeltz-Schmit v. Brown Cty.*, No. 1:20-cv-1024-CBK 4–5 (D.S.D. Nov. 5, 2020), https://tinyurl.com/3vasww82.
15. *Phillips v. Jasper Cty. Jail*, 437 F.3d 791, 796 (8th Cir. 2006) ("[T]he knowing failure to administer prescribed medicine can itself constitute deliberate indifference" to a prisoner's serious medical needs, thereby subjecting the prisoner to cruel and unusual punishment in violation of the Eighth Amendment.).
16. *Voeltz-Schmit*, Docs. 31 and 31-1.
17. *See generally Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020), which is the most spellbinding judicial opinion I have ever read. It thoroughly explains the havoc wrought on civil rights law by the qualified immunity doctrine. Conservative and liberal lawyers have challenged the doctrine in the Supreme Court in recent years, so far without success.
18. Maren Chaloupka & Jeffry Patterson, *"Innocent" Is Not Enough: Barriers to Compensation for the Wrongfully-Prosecuted and -Convicted*, 20 Neb. Lawyer, May/June 2017, at 37, https://issuu.com/nebraskabar/docs/tnl-mayjune17_mag.