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An Eighth Amendment State of Emergency - Prisoner Reduction Order as a Last Resort in Brown v. Plata

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AN EIGHTH AMENDMENT STATE OF EMERGENCY—PRISONER REDUCTION ORDER AS A LAST RESORT IN *BROWN V. PLATA*

*Neil Stockbridge**

CALIFORNIANS beware. Legions of prisoners may be prematurely released from your state's prison system and coming to a city near you. Or will they? Such a sinister warning amounts to no more than rhetoric, said the Supreme Court in *Brown v. Plata*, which affirmed a three-judge district court's order that California reduce its prison population to 137.5% of design capacity within two years.[1] The Court's decision—by a bare majority—quickly drew controversy.[2] The order could result in the release of approximately forty thousand prisoners.[3] More remarkable is that this remedy is not directly targeted at the two classes of plaintiffs—mentally and medically ill prisoners of California who received constitutionally insufficient care—but rather the entire state prison system.[4] Nevertheless, the Court ultimately reached the correct decision. It had a duty to remedy the constitutional violations, and no other remedy had been or could be successful until overcrowding receded.

The degree and reach of the constitutional violations in California's prison system were unprecedented.[5] At the time of the three-judge court's order, California's prison system had operated at nearly 200% of design capacity for over eleven years.[6] "Prisoners [were] crammed into spaces neither designed nor intended to house inmates."[7] Indeed, in

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1. Brown v. Plata, 131 S. Ct. 1910 (2011).

2. *See, e.g.*, Ben Kerschberg, *Supreme Court Addresses Inhumane Conditions in California Prisons, Orders Release of 46,000 Inmates*, FORBES.COM (May 23, 2011), http://www.forbes.com/sites/benkerschberg/2011/05/23/supreme-court-addresses-inhumane-conditions-in-california-prisons-orders-release-of-46000-inmates/.

3. *Plata*, 131 S. Ct. at 1923.

4. *Id.* at 1939. Many prisoners may be released early although they suffered no harm. *Id.*

5. The Eighth Amendment prohibits cruel and unusual punishment, U.S. CONST. amend. VIII, that denies prisoners "the essence of human dignity inherent in all persons." *Plata*, 131 S. Ct. at 1928.

6. *Id.* at 1923–24.

7. *Id.* at 1924.

2006, then-Governor Arnold Schwarzenegger declared in his Prison Overcrowding State of Emergency Proclamation that "'immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.'"[8] Mental and medical health care services for prisoners were seriously deficient, in large part due to overcrowding. Prisons simply ran out of space for inmates who required care. Constant "delays in access to necessary mental health care . . . 'result[ed] in exacerbation of illness and patient suffering.'"[9] No "'systematic program for screening and evaluating inmates'" for mental or medical illnesses existed.[10] Medications were not refilled timely, if they were available at all.[11] To make matters worse, the prisons' mental and medical care departments had "significant deficiencies" in record keeping and were "'significantly and chronically understaffed.'"[12] The medical facilities lacked necessary equipment, failed basic sanitation standards, and were "in an abysmal state of disrepair."[13]

Similarly unprecedented was the three-judge court's prisoner reduction order. The Prison Litigation Reform Act of 1995 (PLRA)[14] sets out the conditions under which a three-judge court—and only a three-judge court[15]—may issue a prisoner release order. Congress made clear that such a drastic remedy is to be used solely as a last resort.[16] A prisoner release order of this magnitude has never before been given.

This case resulted from the consolidation of two class-action lawsuits, the first of which, *Coleman v. Brown*, was filed in 1990, and involved the "class of seriously mentally ill persons in California prisons."[17] In 1995, the district court found "'overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates.'"[18] Although the court appointed a special master to oversee remedial efforts, it became clear by 2007 that any improvements in mental services were evaporating as a result of increased prison overcrowding.[19] The second case, *Plata v. Brown*, commenced in 2001. The class in *Plata* was composed of prisoners in California with serious medical conditions.[20] California conceded the Eighth Amendment violations and stipulated to a remedial injunction; however,

8. Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *23 (E.D. Cal. Aug. 4, 2009). As of 2005, "'on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system.'" *Id.* at *8.

9. *Id.* at *13 (alteration in original) (noting "backlogs of 300–400 inmates").

10. Coleman v. Wilson, 912 F. Supp. 1282, 1305 (E.D. Cal. 1995). Not surprisingly, then, "thousands of inmates suffering from mental illness [were] either undetected, untreated, or both." *Id.* at 1306.

11. *Schwarzenegger*, 2009 WL 2430820, at *13.

12. *Id.* (quoting *Wilson*, 912 F. Supp. at 1307).

13. Brown v. Plata, 131 S. Ct. 1910, 1927 (2011).

14. Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2006).

15. *Id.* § 3626(a)(3)(B).

16. H.R. REP. NO. 104-21, at 19 (1995), 1995 WL 56410 (Westlaw).

17. *Plata*, 131 S. Ct. at 1926.

18. *Id.* (quoting Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995)).

19. *Id.*

20. *Id.*

after the state failed to comply with the injunction, the court appointed a receiver in 2005 to take over remedial efforts.[21] In 2006, shortly after then-Governor Schwarzenegger's State of Emergency Proclamation, the *Coleman* and *Plata* plaintiffs filed motions to convene a three-judge court under the PLRA.[22] The motions were granted, and the two cases were consolidated before a three-judge court.[23] After a trial in late 2008 to determine whether a prisoner release order was appropriate, the three-judge court "issued a 184-page opinion, making extensive findings of fact," and "ordered California to reduce its prison population to 137.5% of the prisons' design capacity within two years."[24] California appealed the order to the United States Supreme Court.[25]

In a 5–4 decision, the Court held that the PLRA authorized the prison reduction measure ordered by the three-judge court and that it was "necessary to remedy the prisoners' constitutional rights."[26] The government has an obligation to provide basic sustenance, including medical care, to prisoners, which, if left unfulfilled, gives courts a "responsibility to remedy the resulting Eighth Amendment violation."[27] Although a court must be sensitive to the state's interests, it must "not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."[28] In this case, the Court agreed with the three-judge court that the constitutional violations remained despite remedial efforts lasting over fifteen years in *Coleman* and nine years in *Plata*.[29]

Before a three-judge court may even consider a prisoner reduction order, it must be properly convened. This requires that (1) a district court "has previously entered *an order* for less intrusive relief that has failed to remedy" the constitutional violation and (2) "the defendant has had a reasonable amount of time to comply with the previous *court orders*."[30] The Court held that the first condition had been satisfied after the appointment of the special master in *Coleman* and the stipulated injunction in *Plata*.[31] As to the second condition, the Court held that California had a reasonable amount of time to comply with all the previous court orders. A reasonable compliance period had lapsed despite that in 2006, only

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21. *Id.*

22. Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *23–24 (E.D. Cal. Aug. 4, 2009).

23. *Plata*, 131 S. Ct. at 1928.

24. *Id.* The Court outlined several possible plans that would not adversely affect public safety but deferred plan development to California. *Id.*

25. *See id.* at 1922.

26. *Id.* at 1923.

27. *Id.* at 1928.

28. *Id.* at 1928–29.

29. *Id.* at 1921.

30. Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(a)(3)(A)(i), (ii) (2006) (emphasis added).

31. *Plata*, 131 S. Ct. at 1930.

fourteen months before the order to convene the three-judge court,[32] the *Coleman* court approved a revised plan and the *Plata* court appointed a receiver.[33]

Once properly convened, the three-judge court must find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and "no other relief will remedy the violation of the Federal right."[34] Noting the ample evidence from expert testimony and reports filed by the receiver and special master, the Court upheld the three-judge court's conclusion—that overcrowding was the primary cause of the constitutional violations against the plaintiffs—and held that reducing overcrowding was necessary to remedy the constitutional violations.[35]

Finally, a prison reduction order must be narrowly drawn, extending no further than necessary to correct the constitutional violation, and must give substantial weight to "any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[36] When imposing a prison population cap, "the court must set the limit at the highest population consistent with an efficacious remedy [and] order the population reduction achieved in the shortest period of time reasonably consistent with public safety."[37] The Court held that the order was narrowly tailored, even though it may have collateral effects, such as reducing the number of prisoners outside the plaintiffs' classes.[38] And substantial evidence supported the three-judge court's conclusion that the prisoner reduction order would not have an "undue negative effect on public safety."[39] Thus, the Court held it was not clearly erroneous to set 137.5% of design capacity as the cap and two years as the time limit.[40]

California and the two dissenting opinions raised several concerns. California forcefully argued that it had not had a reasonable amount of time to comply with all previous court orders, most notably the implementation of the receiver's plan.[41] After all, only three months had passed since the receiver was appointed when the plaintiffs motioned for a three-judge court.[42] Additionally, the dissenting Justices believed that

32. *See* Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *11, *14, *25 (E.D. Cal. Aug. 4, 2009).

33. *Plata*, 131 S. Ct. at 1931 ("Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts.").

34. 18 U.S.C. § 3626(a)(3)(E)(i), (ii).

35. *Plata*, 131 S. Ct. at 1932–37, 1939 (stating that a necessary remedy need not be a sufficient one to meet requirements of PLRA).

36. 18 U.S.C. § 3626(a)(1)(A).

37. *Plata*, 131 S. Ct. at 1944.

38. *Id.* at 1940 ("The scope of the remedy must be proportional to the scope of the violation."). Moreover, the order afforded California much discretion and flexibility in determining how it would reach the required design capacity level. *Id.* at 1940–41.

39. *Id.* at 1944.

40. *Id.* at 1945.

41. *Id.* at 1931; Transcript of Oral Argument at 10–11, Brown v. Plata, 131 S. Ct. 1910 (2011) (No. 09-1233), 2010 WL 4859507.

42. Transcript of Oral Argument, *supra* note 41, at 30.

this prison reduction order constituted impermissible policy making by judges[43] and was directed at the penal system as a whole, rather than the specific classes of plaintiffs before the three-judge court.[44]

The dissenting Justices also believed that the three-judge court violated the terms of the PLRA: the prisoner release order was not narrowly drawn, other remedies were available, and public safety will now be at great risk.[45] It was the mental and medical care system that was constitutionally deficient, not the prison system as a whole; and alleviating overcrowding was admittedly insufficient to cure the deficiency.[46] Moreover, many options were available short of releasing prisoners. California could, for example: enforce sanitary procedures, purchase sufficient supplies, implement an adequate system of records management, increase medical staff, repair and expand current medical facilities, or transfer or release prisoners from the plaintiffs' classes.[47] In light of these other remedies, the effective release of over forty thousand inmates is not narrowly drawn and not aimed at the particular classes of plaintiffs. Furthermore, this release is sure to have a deleterious effect on public safety. When Congress passed the PLRA, it was well aware of a previous prisoner release order of a few thousand inmates in Philadelphia. That order resulted in a sharp increase in crime, including "79 murders, 90 rapes, 1,113 assaults, 959 robberies, 701 burglaries, and 2,748 thefts" during only an eighteen-month period.[48] If Philadelphia was so afflicted by the release of a mere few thousand inmates, imagine the havoc that will be wrought in California from the effective release of some *forty thousand* inmates. Lastly, the three-judge court erroneously disregarded the State's conclusion that "'reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety.'"[49]

Despite these concerns, the Court correctly affirmed the three-judge court's prisoner reduction order because California prisoners had been deprived of constitutionally adequate care for over twenty years and substantial evidence showed that no remedies could be effective until crowding was substantially reduced. That is not to say California and its courts, special masters, and receivers have not tried to remedy the violations—they certainly have. But they have been treating the symptoms, not the underlying cause. Overcrowding is the root cause—not just the "primary impediment"[50] to their relief. To treat overcrowding, California's Legis-

43. *Plata*, 131 S. Ct. at 1953–55 (Scalia, J., dissenting); *id.* at 1964 (Alito, J., dissenting).
44. *Id.* at 1951–53 (Scalia, J., dissenting); *id.* at 1960 (Alito, J., dissenting).
45. *See id.* at 1950–59 (Scalia, J., dissenting); *see id.* at 1959–68 (Alito, J., dissenting).
46. *Id.* at 1936 (majority opinion). Indeed, Justice Alito noted the special master's finding "that even releasing 100,000 inmates (two-thirds of the California system's entire inmate population!) would leave the problem of providing mental health treatment 'largely unmitigated.'" *Id.* at 1963 (Alito, J., dissenting).
47. *Id.* at 1964–65 (Alito, J., dissenting).
48. *Id.* at 1965–66; H.R. REP. NO. 104-21, at 10 (1995).
49. *See Plata*, 131 S. Ct. at 1967.
50. *See* Transcript of Oral Argument, *supra* note 41, at 22.

lature needs to act. But it has been either unable or unwilling to do so.[51] Therefore, even though prisoner reduction orders intrude into the realm of prison administration, the courts must step in.

California's most recent remedial developments were more of the same.[52] The special master had issued over seventy orders aimed at construction, hiring, and procedure, but the constitutional violations remained.[53] These remedies had already proven unsuccessful. The courts must not allow these egregious constitutional violations to continue. The PLRA specifically authorizes a prisoner reduction order, and its several, specific conditions ensure that such relief will be used only as a last resort.[54] Every condition was met in this case; therefore, the three-judge court had a duty to act. The entire prison system was at risk of violating the Eighth Amendment until overcrowding was solved.

To remedy the longstanding violations, the three-judge court ordered a crowding-reduction measure—not a prisoner release order.[55] Prisoners may be transferred to other states, county jails, and rehabilitation programs. With funding from the legislature, facilities can be constructed or repaired. Furthermore, numerous experts testified that reducing the population to 137.5% of design capacity in two years could be done safely.[56] Apart from construction, many safe strategies could be implemented immediately, such as expanding good time credits, diverting low-risk offenders to community programs, and punishing technical parole violations through community-based programs.[57] Most importantly, this order should not be viewed as a massive release order, but rather like a defibrillation—a needed shock to revive the failing prison system. California is not required to keep its prison system at 137.5% of design capacity forever; it need not even reach this level within two years necessarily.[58] This order was given because overcrowding in California's prison system had become the primary cause of the violations against the plaintiffs and would continue to violate the rights of more prisoners every day.[59] The three-judge court remains open to modifying or terminating its order if circumstances change.[60]

This order effectively shifts the burden from the plaintiffs—who already have proven a constitutional violation and met all the requirements under the PLRA—to California, which now must prove that its mental and medical health care system is constitutionally adequate. Until then, it

51. Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *1, *24, *66, *98 (E.D. Cal. Aug. 4, 2009).

52. *See* Transcript of Oral Argument, *supra* note 41, at 10–13, 29.

53. *Plata*, 131 S. Ct. at 1931 (majority opinion).

54. *See* Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(a)(3)(E)(i), (ii).

55. *See Plata*, 131 S. Ct. at 1917.

56. *Id.* at 1942. Indeed, many experts believed that overcrowding increased recidivism and that its reduction may even increase public safety. *Coleman*, 2009 WL 2430820, at *98.

57. *See Plata* at 1920, 1942–43.

58. *See* Transcript of Oral Argument, *supra* note 41, at 13.

59. *Plata*, 131 S. Ct. at 1923.

60. *Id.*; *see also* Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b)(1) (2006).

must reduce its prison population to 137.5% of design capacity within two years.[61] California has not shown that its compliance will adversely affect public safety. A trial on the merits already took place; thus, more than a mere conclusory statement[62] is needed before the court modifies the order. Though it may appear to be a tough pill to swallow, the Constitution demands this result.

Significantly, this case will not likely throw open the flood gates to other substantial prisoner reduction orders. This case spanned over twenty years before culminating in such a far-reaching order. One does not simply fast-track a prisoner reduction order. Courts must consider a wide array of remedies, the defendant must have had a reasonable amount of time to comply with all remedial orders, and relief must have failed before a three-judge court may even be convened. The *Coleman* court alone considered "well over seventy orders" before sending the case to a three-judge court to determine if a prisoner reduction order would be appropriate.[63] This case has set the bar high for developing a factual record, attempting several relief plans, and affording a long time period before addressing a prisoner reduction order. Moreover, California was in a unique position due to its fiscal crisis and the low priority that its legislature gave prison reform. For these reasons, it seems unlikely that a prisoner reduction order of this magnitude will ever again be ordered.

61. *See Plata*, 131 S. Ct. at 1928.
62. *See id.* at 1966 (Alito, J., dissenting).
63. Coleman v. Schwarzenegger, No. CIV 5-90-0520 LKK JFM P, 2009 WL 2430820, at *12 (E.D. Cal. Aug. 4, 2009).

TITLE IX—SEXUAL HARASSMENT—EIGHTH CIRCUIT ASSERTS HARASSER'S "MOTIVATION" IS REQUIRED TO PROVE DISCRIMINATION ON THE BASIS OF SEX

*Molly E. Whitman**

IN *Wolfe v. Fayetteville, Arkansas School District*, the Eighth Circuit Court of Appeals read into a Title IX hostile environment sexual harassment claim the requirement that a plaintiff must prove the harasser's motivation to prevail.[1] In so doing, the court established, as a matter of first impression, that the statutory language prohibiting acts of discrimination "on the basis of sex" implies a "requirement of underlying intent," such that the burden of proving the harasser's intent falls squarely on the plaintiff's shoulders.[2] By adding this additional requirement, the court has expanded the meaning of the Title IX sexual harassment provision beyond congressional intent, creating a nearly insurmountable barrier for victims of same-sex, student-on-student sexual harassment to seek relief for their injuries in court.

For at least five years, William Wolfe was the subject of unrelenting physical and emotional abuse at the hands of his classmates.[3] Students frequently pelted Wolfe, who was not homosexual, with anti-homosexual epithets, including "faggot," "queer bait," "homo," "pussy," and "bitch."[4] The harassment was not limited to mere "boys will be boys" name-calling or teasing: While on the school bus, two students attacked Wolfe, "punch[ing] and . . . slam[ming] [his head] into a window."[5] Another incident occurred when he was walking home from school and was assaulted by a classmate who jumped out of a car and began punching him.[6] In perhaps the worst attack, Wolfe was involved in an altercation in the

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1. Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 866 (8th Cir. 2011).
2. *Id.*; Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006).
3. *Wolfe*, 648 F.3d at 860, 862.
4. *Id.*; Brief for Appellant at *3, Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860 (8th Cir. 2011) (No. 10-2570), 2010 WL 4471171.
5. Brief for Appellant, *supra* note 4, at *3.
6. *Id.*

school's hallway, during school hours, where he was knocked unconscious by a student's blow to his head.[7] Furthermore, students created a Facebook page titled "Every One [sic] That Hates Billy Wolfe," which featured a photo-shopped picture of a green fairy with Wolfe's face on it and the word "HOMOSEXUAL" displayed across the top of the photo.[8] On a weekly basis, students filled bathroom walls and classroom textbooks with "highly offensive, homosexual accusations" directed toward Wolfe.[9] Although Wolfe and his family reported all of these incidents to school authorities, the school treated them as incidents of bullying, not sexual harassment.[10] Wolfe eventually left school because he felt unsafe and subsequently filed a lawsuit, which included a Title IX sex discrimination claim, against the Fayetteville School District (FSD).[11]

The District Court for the Western District of Arkansas denied FSD's motion to dismiss Wolfe's Title IX claim.[12] The case went to trial, and a twelve-member jury returned a verdict in favor of the school district.[13] The district court denied Wolfe's motion for a new trial.[14] Taking issue with the twelve-person jury and the district court's jury instructions, which included the element of motivation, Wolfe appealed to the Eighth Circuit Court of Appeals.[15] Finding no error, the court of appeals affirmed the district court's ruling.[16]

While Title IX does not prohibit discrimination because of sexual orientation, it provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[17] The courts understand this provision to include "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature," and which creates a hostile environment for the victim.[18] The U.S. Supreme Court first recognized same-sex sexual harassment in the Title VII context in *Oncale v.*

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7. *Wolfe*, 648 F.3d at 862; Brief for Appellant, *supra* note 4, at *4, *7.

8. *Wolfe*, 648 F.3d at 862.

9. *Id.* While the Court of Appeals does not dwell on these facts, Wolfe's brief reveals that the bathroom graffiti was so pervasive that the school custodian had to remove it "as often as three or four times a week." Brief for Appellant, *supra* note 4, at *10, *11.

10. *Wolfe*, 648 F.3d at 863.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 869.

17. Title IX § 1681(a).

18. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034-01, 12039 (Mar. 13, 1997); *see, e.g.*, Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 65–67, 73 (1986) (Title VII claim for gender-based sexual harassment creating hostile work environment). Title VII jurisprudence has long been applied to analyze Title IX sexual harassment claims. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 73 (1992).

Sundowner Offshore Services, Inc.[19] The Court later extended this concept in *Davis v. Monroe County Board of Education*, where it held that a school could be liable for discrimination under Title IX when it responded with deliberate indifference to student-on-student, same-sex harassment, but only where the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[20] The harassment may include "gender-based, but non-sexual, harassment."[21]

The court of appeals in *Wolfe*, as a matter of first impression, held that "proof of [the harasser's] sex-based motivation is required for a Title IX deliberate indifference claim."[22] Surprisingly, although neither the *Davis* Court nor any other federal appellate court ever stated that motivation was a requirement for a deliberate indifference claim, the Eighth Circuit upheld the district court's decision and jury instruction and denied Wolfe's appeal.[23]

The court began its analysis with *Oncale*, which held that same-sex sexual harassment is actionable under Title VII as long as the plaintiff proves that the "conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.'"[24] Notably, the male victim was not gay, but was called names suggesting he was homosexual, was "subjected to sex-related humiliating actions" by his male co-workers, and was physically assaulted on at least one occasion.[25] The Eighth Circuit also relied heavily on *Davis*, claiming that the Supreme Court had "alluded" to the idea that "a plaintiff . . . [must] prove a gender-based motive" by stating that harassment is "more than 'simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender.'"[26]

Relying on *Oncale* and *Davis*, the *Wolfe* district court crafted the following jury instruction:

> To constitute sex-based harassment under Title IX, *the harasser must be motivated by Wolfe's gender or his failure to conform to stereotypical male characteristics.* If you find that the harassers were so motivated, then you may conclude that the harassment was based on his gender. If you find that the harassers were not so motivated, then you may not conclude the harassment was based on his gender.[27]

Wolfe alleged that the district court's definition of "sex-based harassment" was in error because Title IX does not require a showing of moti-

19. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (holding harassment by a member of the victim's sex was actionable under Title VII).
20. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).
21. Sexual Harassment Guidance, 62 Fed. Reg. at 12042.
22. Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 865 (8th Cir. 2011).
23. *Id.* at 867; *see Davis*, 526 U.S. at 633.
24. *Wolfe*, 648 F.3d at 865–66 (quoting *Oncale*, 523 U.S. at 80–81 (emphasis omitted)).
25. *Oncale*, 523 U.S. at 77.
26. *Wolfe*, 648 F.3d at 866 (quoting *Davis*, 526 U.S. at 651–52).
27. *Id.* at 864–65 (emphasis in original).

vation.[28] Using somewhat circular logic, the circuit court determined that harassment "on the basis of sex" implied that the harasser must be motivated to harass the victim specifically by "hostility toward the person's gender."[29] The court also relied, rather shakily, on the minimally persuasive authority of an Eastern District of Michigan case that instructed the jury to find "the offending student's actions [to be] motivated by [the plaintiff's] sex or gender."[30] Finally, the court cited a recent Fifth Circuit case that affirmed summary judgment for a school district defendant where the record failed to show that the harasser "was motivated by anything other than personal animus."[31]

By requiring evidence of motivation, the Eighth Circuit read language into the statute that simply is not there and interpreted case law to say things it simply does not say. Although the statute itself does not expound upon the definition of "on the basis of sex," legislative history reveals that Congress intended the statute to be interpreted broadly.[32] A broad interpretation of harassment on the basis of sex would indicate that the attacks simply need to *focus* on the victim's sex, as in *Oncale*.[33] Like the victim in *Oncale*, Wolfe was not homosexual, yet the attackers' abuse centered on his apparent lack of masculinity, thus implicating his gender.[34] In fact, the Supreme Court seems to have declined to provide a categorical definition of what constitutes sex-based harassment, opting instead for an interpretation that "must extend to sexual harassment of any kind that meets the statutory requirements."[35] Emphasizing that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex," the Court appeared to focus less on the harasser's underlying motivation than on the fundamental notion that the victim would not have been harassed in such a way had he or she not been of a particular sex.[36]

Gender-based harassment is common in same-sex harassment cases, where courts focus on the status of the victim rather than on the harasser's motivation. For instance, where a girl was called "bitch," "dyke," "lesbian," and other derogatory names, the court noted that "[i]f not for her *status* as a female, a reasonable trier of fact could conclude that [she]

28. *Id.* at 865.

29. *Id.* at 867.

30. *Id.* (quoting Patterson v. Hudson Area Schs., 724 F. Supp. 2d 682, 691 (E.D. Mich. 2010)).

31. *Id.* (quoting Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011)).

32. S. REP. NO. 100–64, at 5 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 7 (noting that "Congress also intended that Title IX, the first of several discrimination statutes to be modeled on Title VI, also be broadly interpreted.").

33. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

34. Brief for Appellant, *supra* note 4, at *3, *5.

35. *Oncale*, 523 U.S. at 80.

36. *Id.* (It should be noted that although "sex" and "gender" are two different concepts, the courts seem to use these terms interchangeably, and this Note does not attempt to distinguish them.)

would not have been called the offending slurs."[37] The court did not require the plaintiff to provide evidence of her harasser's motivation.[38] Furthermore, the Department of Education, Office for Civil Rights, has produced a guidance document that clarifies gender-based sexual harassment, but makes no mention of motivation.[39] The concept of motivation appears nowhere in the legislation.[40] Moreover, the *Wolfe* court made no attempt to explain how the words "on the basis of sex" must mean motivation; rather, it made conclusory statements that it was "convinced," although it could only "glean" the "implication" of motivation from *Oncale*, *Davis*, and *Kalich*, a Michigan district court case that stated, "the plaintiff must show that but for his sex, he would not have been the object of harassment."[41] But this conclusion does not follow. These explanations simply show that it would be illogical, as it would be useless, for a bully to call his male victim a "dyke," for example. The arrow of this insult would have a dull point. It seems, then, that the Eighth Circuit made a baseless—and overly reaching—proclamation that impedes victims of same-sex, gender-based harassment from proving their Title IX discrimination claims.

Requiring proof of motivation to support this type of Title IX claim is particularly disturbing, given that it may be incredibly difficult to articulate the motivations behind student-on-student harassment, even for the children who are doing the harassing. Even worse, the Eighth Circuit seemed to suggest that if the defendant provided *any* evidence of motivation not stemming precisely from the plaintiff's sex, the plaintiff's claim would fail.[42] The court accepted as true the school district's explanation that Wolfe was harassed because "he had previously bullied a . . . [classmate] suffering from cerebral palsy" and that "most of the classmates who engaged in altercations with Wolfe lacked any prior disciplinary history other than their confrontations with Wolfe."[43] The district court seemingly ignored the fact that some of the bullying classmates had lied about their involvement in altercations with Wolfe, impugning their statements that they bullied Wolfe for reasons other than his sex.[44] In fact, testimony from Wolfe's teachers revealed that he was "attractive, slender,

37. Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 222, 226 (D. Conn. 2006) (emphasis added); *see also* Pratt v. Indian River Cent. Sch. Dist., No. 7:09 CV 0411 (GTS/GHL), 2011 WL 1204804, at *11 (N.D.N.Y. Mar. 29, 2011) (same-sex harassment where a boy was mocked for being effeminate and displaying homosexual traits); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (same-sex harassment could be considered "on the basis of sex" where a boy was labeled homosexual).

38. *Riccio*, 467 F. Supp. 2d at 226.

39. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed Reg. 12034-01, 12042 (Mar. 13, 1997).

40. Title IX § 1681(a).

41. Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 865 (8th Cir. 2011) (quoting Kalich v. AT&T Mobility, LLC, 748 F. Supp. 2d 712, 718–19 (E.D. Mich. 2010)).

42. *Wolfe*, 648 F.3d at 867.

43. *Id.* at 863.

44. Brief for Appellant, *supra* note 4, at *7.

almost effeminate looking, and very vulnerable," and although he was not homosexual, "[h]e did not conform to the jock stereotype, did not pick on girls, did not roughhouse, and did not like sports. He 'just wasn't like the other guys.'"[45] It is at least plausible, therefore, that Wolfe was bullied on the basis of sex—since he did not conform to gender stereotypes—but introducing the element of motivation prevented the jury from appropriately evaluating Wolfe's claims.[46]

The potential impact of the Eighth Circuit's decision threatens to leave victims of same-sex, gender-based harassment with no possible outlet for recourse. Students like Wolfe, who diligently report harassment, yet reasonably have no insight into their attackers' motivation, may nevertheless be unable to sustain their claims in court.[47] Because these claims often focus on adolescent behavior, it may be nearly impossible for a jury to adequately determine a child's true motivation for harassing a fellow classmate, especially in hindsight. And because motivation is not mentioned anywhere in the statute, victims and their parents will not know that they should investigate motivation when reporting harassment to the school.[48] Moreover, it is unlikely that the school, which may be guilty of reacting to the harassment with deliberate indifference, would have conducted any investigation into the harasser's motivation at the time of the report.

Notably, on more than one occasion, Wolfe's school principal inquired about his sexual orientation in response to reports of the harassment.[49] Whether or not a student is actually homosexual, which he or she may not even understand yet, should not determine the student's eligibility for statutory protection from harassment. After all, the statute protects against harassment on the basis of sex, not on the basis of sexual orientation, so this inquiry should have no place in a school's Title IX investigation.[50] Likewise, a plaintiff should not have to prove *why* he or she has been subjected to gender-based harassment; the fact that it occurred at all, and has significantly impaired the student's educational environment, should be enough to afford relief under the law.[51] It seems unlikely that a court considering discrimination based on racist remarks, for example, would place such a difficult burden on its victim-plaintiffs.

The *Wolfe* decision, holding that a plaintiff must prove motivation to have a cognizable same-sex, gender-based harassment claim, threatens to undermine Title IX jurisprudence and sets a new standard that goes beyond congressional intent.[52] One of the statute's main focuses is the

45. *Id.* at *3, *5.
46. *Wolfe*, 648 F.3d at 867.
47. *Id.*
48. *See* Title IX § 1681(a).
49. Wolfe v. Fayetteville, Ark. Sch. Dist., 600 F. Supp. 2d 1011, 1016 (W.D. Ark. 2009).
50. *See* Title IX § 1681(a).
51. *See Wolfe*, 648 F.3d at 863 (Wolfe left school to pursue a GED after years of harassment, strongly indicating that a hostile environment had been created).
52. *Id.* at 867.

eradication of schools acting with deliberate indifference to reports of student-on-student harassment; it is therefore enough that the harassment focuses on the victim's sex, a protected class under the statute, and creates an unbearably hostile environment that limits the victim's equal access to educational opportunities. The Eighth Circuit clearly read language into Supreme Court cases and into the statute that was not present, overstepping its authority to enforce the law as it exists today.[53] The court's holding will likely influence all sexual harassment claims under Title IX, making it more difficult for victims to recover under a statute that was intended to be broad so as to afford sufficient protection for those who need it most.

53. *Id.*