

Staff Use of Force in United States Confinement Settings

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*Pleasure in cruelty is really not extinct today; only, given our greater delicacy, that pleasure has had to undergo a certain sublimation. It has to be translated into imaginative and psychological terms in order to pass muster before even the tenderest hypocritical conscience.*¹

The use of physical force to control prisoners is a lamentable but necessary and common-place event in the day-to-day administration of American prisons and jails.² Correctional staff are permitted by law “to use force in many circumstances, including protecting themselves or others, protecting property, enforcing orders, [preventing crimes and escapes,] and maintaining . . . [the] safety and security” of their facilities.³ These circumstances undeniably occur with some frequency in prisons and jails.

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1. FRIEDRICH NIETZCHE, *THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 200 (F. Golffing trans., Doubleday 1956) (1887).

2. The Texas prison system in 2001 recorded over 6,089 major applications of force with a system-wide population of 145,000 prisoners. TEX. DEP’T OF CRIMINAL JUSTICE, *SELECT STATISTICS: APRIL 2002*, at 1 (2002). The New York City Department of Corrections in 2002 recorded 1,135 use of force incidents with a system-wide population of over 14,000 prisoners. N.Y. CITY DEP’T OF CORR., *BUREAU CHIEF OF SECURITY STATISTICAL YEARLY REPORT*, at tbl.1 (2003).

3. William C. Collins, *Jail Design and Operation and the Constitution*, NAT’L INST. OF CORRECTIONS, 1998, at 34, <http://www.nicic.org> (type “Jail Design” in the “Search the Library” text box and click “Go”; then scroll down and follow “Jail Design and Operation and the Constitution” hyperlink).

Because staff use of force is inherently dangerous, both to prisoners and staff due to the high risk of injury, especially when non-lethal weaponry such as batons, chemical agents, and projectiles are employed,⁴ both nationally recognized standards and the courts place limitations on when force is appropriate, the amount of force employed, and when force must cease. Judicial standards prohibit the wanton infliction of pain.⁵ Professional standards clearly limit staff use of force to that which is necessary to control prisoner disorder. They do not permit the use of force to control and punish, control and retaliate, control and deter, or control and inflict pain or injury (unless that pain and injury is a necessary result of lawfully applied control tactics). Moreover, it is not appropriate, even where force is justified for purposes of order and safety, to use tactics that needlessly involve a greater likelihood of physical injury and pain than necessary to achieve control of the prisoner.

Corporal punishment is illegal in American corrections. It was effectively banned in 1968 as a result of *Jackson v. Bishop*,⁶ in which Eighth Circuit Judge (later Supreme Court Justice) Harry Blackmun said that the practice, in Arkansas prisons, of whipping prisoners with a leather strap “offends contemporary concepts of decency and human dignity.”⁷ The American Correctional Association, in its Manual of Correctional Standards,⁸ had earlier recommended that “[c]orporal punishment should never be used under any circumstances.”⁹

This paper does not focus on staff use of force employed for the singular purpose of punishment, reprisal, or retaliation. It is an unfortunate reality of confinement operations that rogue officers, rogue shifts, and rogue commands sometimes dispense outright corporal punishment on their charges. When such indefensible

4. In one large metropolitan jail system the author monitored, for over two years, injuries to either staff or inmates from use of force incidents, which occurred in approximately 40% of the total number of incidents reported.

5. See *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986).

6. 404 F.2d 571 (8th Cir. 1968).

7. *Id.* at 579.

8. COMM. FOR REVISION OF 1954 MANUAL, AM. CORR. ASSOC., MANUAL OF CORRECTIONAL STANDARDS (1966).

9. *Id.* at 251.

incidents come to light they speak for themselves and hopefully trigger a series of remedial and disciplinary actions that prospectively eliminate or minimize such unlawful staff action.

What this paper does focus on is the more insidious pattern or practice of unlawful staff use of force that is cloaked with or protected by an air of legitimacy or facial validity. It is not uncommon for ostensibly lawful applications of physical force to mask the intentional infliction of punishment, retaliation or reprisal on prisoners. Manufacturing or exaggerating the need to physically control a prisoner is one means by which staff pretextually use force for inflicting punishment on a prisoner. An application of force that is legitimately initiated but which escalates to a level of force disproportionate to the objective risks presented by the inmate can likewise be used pretextually by correctional personnel to punish prisoners. On those occasions in which unnecessary or disproportionate force is applied for the primary purpose of inflicting punishment, retaliation, or reprisal, rather than control, such application of force constitutes *de facto* corporal punishment regardless of its ostensible justification. Often times the subjects of such force are mentally ill offenders whose behavior, as viewed by inadequately trained officers, is to be punished rather than treated.

The temptation to engage in *de facto* corporal punishment is reinforced by the wide range of high-tech, non-lethal weaponry available to correctional personnel: electronic stunning devices (some of which are capable of delivering 50,000 volts and can be used with shields, darts and probes),¹⁰ sting-shot rubber bullets, stun guns (canvas bags filled with lead shot or canisters filled with wood blocks or rubber pellets fired from a thirty-seven millimeter (37mm) gas gun), “pepper spray” (a type of tear gas made from cayenne peppers developed in Canada to control bears), and a variety of restraint devices such as the restraint chair and the “Body Guard” (advertised as a “revolutionary new design that allows police officers to safely restrain and immobilize combative subjects—without facing the complications and dangers associated with the traditional restraint

10. Compare the modern electronic taser device with the “Tucker Telephone,” a hand-cranked device used as late as the 1960s that generated electric shocks to sensitive body parts such as the genitalia.

methods like hogtying”¹¹). Much of this high-tech weaponry is subject to abuse by correctional staff. Ironically, such weaponry is purportedly employed as a means to minimize injuries to both staff and inmates. Use of this weaponry often results in no detectable injuries, even when it is misused by personnel. However, it almost always causes significant pain to the prisoner on whom it is employed. In my experience, all too often in American corrections such weaponry is used as a “first strike” response, before other less painful and injurious tactics are exhausted or thoughtfully considered. Moreover, I have too often observed confinement operations that either fail to develop policies that properly limit weaponry to very narrow circumstances, or, if such policies are in place, supervisory staff fail to properly enforce them.

The use of such weaponry in American corrections has come into vogue with the advent of “super” or “ultra” maximum security prisons in which to house “super-predators.”¹² It is these demonized super-predators that are very often the recipients of this high-tech weaponry, and it is the rhetoric about them that provides an ideological justification for unprecedented levels of force, even though hard-core troublemakers requiring maximum security confinement are hardly a new phenomenon in corrections.

The contribution of high-tech (and some low-tech) weaponry to patterns of de facto corporal punishment is illustrated by a federal district court decision rendered in 1995 involving one of the nation’s most modern supermax facilities operated by the California Department of Corrections, the Pelican Bay State Prison, located in the remote northeast corner of the state.¹³ This facility, built to house “the worst of the worst” of California’s offenders, was touted as the prison of the future, employing cutting-edge technology with state-

11. Advertisement: The Body Guard Restraining Systems (on file with the author). Hogtying is a restraint procedure in which the subject’s handcuffs are tied or connected to his/her ankle restraints.

12. For a discussion of supermax prisons see Chase Riveland, *Supermax Prisons: Overview and General Considerations*, NAT’L INST. OF CORRECTIONS, January 1999, <http://www.nicic.org/Library/016993>. For a discussion of super-predators, see WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996).

13. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *rev’d and remanded*, 150 F.3d 1030 (9th Cir. 1998).

of-the-art security devices. The Pelican Bay State Prison security force had at their disposal a wide array of non-lethal weaponry such as tasers (both hand-held and with projectile darts), hand-held aerosols dispensing pepper spray, and tear gas canisters (filled with wood block or rubber pellet projectiles) fired at high velocity from a 37mm gas gun. Among the conditions of confinement challenged by the prisoners at Pelican Bay State Prison in *Madrid v. Gomez*¹⁴ was that staff routinely engaged in the unnecessary and wanton infliction of pain and the use of excessive force.¹⁵ The *Madrid* court found:

[T]hat the extent to which force is misused at Pelican Bay, combined with the flagrant and pervasive failures in defendants' systems for controlling the use of force reveal more than just deliberate indifference: they reveal an affirmative management strategy to permit the use of excessive force for the purposes of punishment and deterrence.¹⁶

Excessive and unnecessary force at Pelican Bay was used in a variety of circumstances and settings, and staff employed both their bare hands and a variety of instruments. Prisoners were left naked in outdoor holding cages during inclement weather.¹⁷ Fetal restraints and "hogtying" were commonplace.¹⁸ Prisoners were routinely shot with rubber pellets discharged with high velocity from 37mm gas guns.¹⁹ Other prisoners were shot with high-powered rifles for fist fights.²⁰ One mentally ill prisoner suffered second- and third-degree burns over one-third of his body when he was given a bath in scalding water in the prison infirmary one week after biting a guard.²¹ Injuries sustained by prisoners ranged from lost teeth and bone fractures²² to fatal gunshot wounds.²³ In addressing the Eighth Amendment prohibition against unnecessary and wanton infliction of

14. *Id.*

15. *Id.* at 1156.

16. *Id.* at 1199.

17. *Id.* at 1171.

18. *Id.* at 1168.

19. *Id.* at 1175.

20. *Id.* at 1179 n.54.

21. *Id.* at 1166.

22. *Id.* at 1189 n.78.

23. *Id.* at 1180 n.55.

pain,²⁴ the court observed that “while this simple phrase articulates the legal standard, dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery that defendants’ unconstitutional practices leave in their wake.”²⁵

Unlawful cell extractions at Pelican Bay illustrate how de facto corporal punishment is often cloaked with an air of legitimacy or facial validity. They were almost always initiated to address appropriate security goals such as recovering contraband or enforcing a lawful order.²⁶ However, the court observed that certain processes, even when properly performed for legitimate security concerns, can be “undeniably violent maneuver[s] which can involve several weapons, including [37] millimeter gas guns, tasers, short metal batons, and mace.”²⁷ Examination of the prison’s practice shows that force used in this nominally security-driven practice was often vastly disproportionate to the actual need or risk that prison staff faced.²⁸ In one instance, for example, a prisoner had refused to relinquish his dinner tray. He was unarmed, locked securely in his cell and weighed some 130 pounds.²⁹ A cell extraction team of five officers and a sergeant, prior to entering the cell, discharged two multiple baton rounds fired from a 37mm gun, hitting the prisoner in the groin, dispensed two bursts of mace, and then fired two taser cartridges.³⁰ The team then entered the cell and “restrained [the prisoner] after a brief struggle.”³¹ The prisoner, as reported by staff, sustained “minor abrasions and bruises” that included bruising to the head, neck, and back with swelling to both eyes and large bruises to the legs and ankles.³² The notion that this level of force, firepower, and infliction of injury was necessary because a small man locked in a high-security cell would not return his dinner tray is beyond all reason and can only be characterized as de facto corporal punishment.

24. See U.S. CONST. amend. VIII (forbidding the use of cruel and unusual punishment).

25. *Madrid*, 889 F. Supp. at 1280.

26. See *id.* at 1172.

27. *Id.* at 1172. Throughout its opinion the court refers to this gun as a 38mm gun. In fact, it is a 37mm gun.

28. *Id.* at 1178.

29. *Id.* at 1176–77.

30. *Id.*

31. *Id.* at 1177.

32. *Id.*

While we certainly must be circumspect in generalizing too much from the Pelican Bay litigation, this high-profile prison was opened with trained staff supported by experienced corrections managers, an arsenal of high-tech weaponry and an uncrowded state-of-the-art facility. Notwithstanding these advantages, which many American confinement operations do not have, the facility staff routinely employed extreme levels of force justified under the rubric of achieving legitimate security objectives.

A more recent example took place in a large metropolitan jail system in the South and involved the routine use of pepper spray in passive resistance situations in which the mere refusal to obey a lawful order—unaccompanied by an immediate physical threat—prompted such action. In other words, pepper spray was routinely and immediately employed as a “first strike” tactic regardless of the level of threat to the safety or security of staff. Such incidents involved the use of this chemical agent on a pregnant detainee locked securely in her cell, on a detainee who was simply requesting the return of a leg brace, on a detainee on suicide watch who was observed picking at a wound on his arm, on a detainee observed masturbating in his cell, and on cuffed detainees who posed no immediate threat of physical harm to staff. A pattern clearly emerged indicating that the chemical agent had become a means to immediately impose *de facto* corporal punishment on prisoners violating any facility rule, regardless of the threat to security or staff safety.

Of course, such abuses are not limited to only those systems that employ non-lethal weaponry. I have been involved in numerous cases in which staff members’ fists and feet were employed either prematurely or needlessly to vulnerable areas of the body such as the head, groin and kidneys when other, less injurious control tactics could have been more effectively employed to control, neutralize or immobilize a disruptive prisoner. The routine use of needlessly injurious, hard-impact strikes to the head of a prisoner in those instances in which some level of control is necessary is no less an abuse of use of force standards or legal constraints than when they are employed solely for punishment. In other words, if a self-defense tactic such as non-blunt force can effectively neutralize a disruptive prisoner, it is not appropriate to strike the prisoner with blunt force to the head, especially when such strikes often do not actually neutralize

the aggressing inmate. In fact, such tactics often create a purely retaliatory cycle of violence in which both the officer and prisoner sustain injuries and the degree of injuries sustained is more serious.

It should be noted that, in these aforementioned cases, the typical refrain by defendants in response to systemic allegations of unlawful force was their claim that each use of force incident must be evaluated individually, based on the officer's subjective assessment of the need and amount of force employed. While this is certainly relevant to a review or investigation of a particular use of force incident, this should not preclude the use of vitally important aggregate or cumulative use of force data in evaluating patterns and practices of staff use of force.

Having conducted countless investigations and inquiries into systemic use of force in confinement operations, in addition to monitoring use of force compliance in both large and small facilities and systems across the country, it would be a dereliction of my duties in those cases to have ignored trends, patterns and cumulative data. If one has identified, through that data, that a particular system or facility experiences a notably higher rate of serious injuries caused from an equally high rate of hard-impact strikes to vulnerable areas of the body, and, further, that these rates are aberrational when compared to other confinement operations, regardless of "the perception" of individual officers in individual cases, any competent manager would affirmatively seek alternative, but no less effective, control mechanisms.

Objective use of force data is sorely lacking in American corrections and makes comparative analysis difficult. For instance, if one system is able to effectively and safely use force techniques that rarely involve hard-impact strikes or weaponry, other correctional managers could seek to replicate their success and thereby significantly reduce costly injuries to both inmates and staff. Very few confinement operations with which I am familiar use a standardized and comprehensive data collection system in evaluating use of force patterns or practice.

As we are now fully ensconced in the age of the "super max prison" where "super predators" are confined in a "no frills" environment after they have had "three strikes," use of force appears to be more easily sanctioned and justified than it otherwise would be.

However, the basic rule of law that governs the use of excessive or unnecessary force in prisons and jails is no less applicable to the “worst of the worst” than any other confined person. Moreover, while the courts should remain reluctant to superintend the day-to-day operation of corrections facilities, they must also remain steadfast in their refusal to embrace the logic that allows corrections professionals to modify the rule of law governing use of force in such a way that it can be used to punish prisoners rather than control them. As so eloquently suggested by the prisoners’ attorney in her opening statement in *Madrid* “we, the people, are [not] free to act lawlessly because the people that we brutalize have themselves violated the law.”³³

On a final note, I want to address a disturbing pattern that has emerged during the course of my work in the past five to seven years. During this time, I have been involved with more than twenty in-custody death cases resulting from staff use of force, more often than not involving mentally ill prisoners. Often times these deaths are the result of positional, compression or restraint asphyxiation. It is difficult to know how often this happens in American corrections as there is no central repository for specific reporting on such deaths. However, the cases in which I have direct knowledge fall into a very distinct and disturbing pattern: once you are into the actual application of force, you have a “death escalation cycle”; as the mentally ill inmate is subject to a greater level of force, he develops a greater level of anxiety and his resistance escalates accordingly, which, in turn, requires a greater escalation of force.³⁴

The normally high risks associated with any major use of force increase exponentially when it is used prematurely or needlessly on a mentally ill prisoner. I would urge the Commission to place this phenomenon on its agenda so that further study can be made to better inform the American corrections community on how to more effectively and safely employ force when it involves a mentally ill

33. *From Opening Statement by Susan Creighton, Attorney for Plaintiffs*, PRISON FOCUS (Cal. Prison Focus, S.F., Cal.), Winter 2002, at 10 (reproducing a portion of Ms. Creighton’s opening statement in *Madrid*).

34. See SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (Joseph Saunders & James Ross eds., 2003).

prisoner. Any standards that may emerge from such a study should require mental health care intervention, if at all possible, prior to the actual application of force for any prisoner with a history of mental illness or any prisoner exhibiting behaviors commonly associated with mental illness or impairments.