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Staff Use of Force Against Prisoners--Part I: Legal Standard and Individual Liability

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Introduction

Correctional facilities are almost inevitably subject to some incidents of violence, which is not surprising, given that many persons confined in them have been convicted of violent crimes, including murder, rape, armed robbery, or assault. Additionally, confinement, by its very nature, is unpleasant and gives rise to conflicts, resentments, arguments, and altercations.

A prior article in this publication covered the subject of [Civil Liability for Prisoner Assault by Inmates](#), 2007 (5) AELE Mo. L.J. 301 (May 2007), and focused on liability of correctional agencies or employees for failure to protect prisoners from violence inflicted on them by other inmates.

The focus of this, the first in a multi-part series on the use of force by correctional staff members against prisoners, will be on the legal standard for permissible use of such force, and individual liability for excessive use of force. Subsequent articles in the series will include discussion of governmental and supervisory liability, use of deadly force, use of chemical weapons, use of Tasers, stun guns and other electronic control devices, and use of dogs.

At the conclusion of this article, and each article in the series, a number of useful resources, including policies, articles, and other materials will be listed, along with on-line links to the source documents whenever available. The listing of an item does not necessarily imply any endorsement or agreement with the views expressed therein.

Important U.S. Supreme Court Decisions

In [Graham v. Conner](#), #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court held that all claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other “seizure” of a free person are properly analyzed under the Fourth Amendment's “objective reasonableness” standard. The right to make an arrest or investigatory stop, the Court stated, necessarily carries with it “the right to use some degree of physical coercion or threat thereof to effect it.” All the law requires is that it be a reasonable amount of force.

A different set of rules apply to the use of force by correctional staff members against convicted prisoners, based on an analysis of the legality of such force not under the Fourth Amendment's prohibition on “unreasonable” searches and seizures, but instead on the Eighth Amendment's prohibition of “cruel and unusual punishment.” Two major U.S. Supreme Court cases spell out the broad strokes of the parameters of what is permissible in the use of force by correctional personnel.

In [Whitley v. Albers](#), #84-1077, 475 U.S. 312 (1986), a correctional officer at the Oregon State Penitentiary was taken hostage during a prisoner riot. He was placed in a cell on the upper-tier of a two-tier cellblock.

Prison officials, trying to free the hostage officer, developed a plan requiring a prisoner security manager to enter the cellblock unarmed, followed by a number of officers carrying shotguns.

When this occurred, the security manager issued orders to one of the officers to fire a warning shot, and also to shoot low at any inmates climbing the stairs to the upper tier, since he would be climbing the stairs to free the hostage.

An officer, after firing the desired warning shot, then shot one of the prisoners, Gerald Albers, in the left knee when he began to go up the stairs. Albers, who suffered serious injuries, filed a federal civil rights lawsuit against various prison officials, claiming that they had violated his rights under the Eighth and Fourteenth Amendments. The trial court directed a verdict for the defendants, while a federal appeals court reversed and ordered a new trial on the prisoner's Eighth Amendment claim.

The U.S. Supreme Court, while agreeing that the appropriate legal standard to be applied was the Eighth Amendment's prohibition on “cruel and unusual punishment,” found that the shooting of the prisoner, under these circumstances, did not violate his Eighth Amendment rights. (The Court stated that the Fourteenth Amendment's due process clause offered the prisoner “no greater protection” in

the prison security context than the Eighth Amendment's cruel and unusual punishment clause).

The conduct prohibited by the Eighth Amendment's "cruel and unusual punishment" clause, the Court stated, was not mere "inadvertence or error in good faith," but rather "obduracy and wantonness." This was true, the Court reasoned, whether the conduct at issue occurs while establishing conditions of confinement, providing medical treatment, or "restoring control over a tumultuous cellblock."

The mere fact that pain was inflicted in the course of instituting a prison security measure, therefore, did not amount to cruel and unusual punishment, standing alone, even if it might be said, with the benefit of hindsight, that the degree of force authorized or used was "unreasonable" and unnecessary "in the strict sense."

To show a violation of the Eighth Amendment, in the context of attempting to quell a prison disturbance, such as occurred in this case, a situation posing a significant risk to the safety of both prison staff and inmates, the Court stated, the key question of whether the measures taken "inflicted unnecessary and wanton pain and suffering" turns on whether the force was applied in a "good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm."

In the case of the shooting of Albers, the Court found, even viewing the evidence in the light most favorable to him, the evidence did not show that the defendants acted wantonly in inflicting pain. While it was arguable that the evidence supported a conclusion that the defendants made a mistake in judgment in deciding on a plan that employed potentially deadly force, this fell short of a finding that there was "no plausible basis" for their belief that this sort of force was necessary.

Even assuming that the officer shot Albers specifically rather than at the inmates as a group did not establish that the officer shot knowing that it was unnecessary to do so. The shooting, in conclusion, was "part and parcel" of a good-faith effort to restore prison security in a situation in which an officer's life was at risk because he was a hostage.

The leader of the prisoners, in the incident at issue, had been armed, and many other prisoners were in possession of homemade clubs, and the officers were entering a cellblock that was under the control of the prisoners in circumstances where discussion with the prisoners had not worked and the prisoners had engaged in a lot of property destruction. A prisoner like Albers going up the stairs at that

time could easily interfere with an attempt to rescue the hostage officer and harm could come to the hostage or others, justifying the force that was used.

The U.S. Supreme Court followed that decision up a number of years later with [Hudson v. McMillian](#), #90-6531, 503 U.S. 1 (1992), which further refined the applicable legal standard. In that case, Keith Hudson, a Louisiana prisoner, testified that he suffered a cracked dental plate, loosened teeth, facial swelling, and minor bruises as a result of a beating from two prison guards. The beating allegedly took place while he was handcuffed and shackled following an argument with one of them, and he further claimed that a supervisor on duty watched the beating, and merely told the two officers “not to have too much fun.”

The trial judge in the prisoner’s federal civil rights lawsuit found that the beating was an unnecessary use of force by the two prison guards, and that the supervisor essentially condoned their actions, ruling that these actions violated the prisoner’s Eighth Amendment right not to be subjected to cruel and unusual punishment, awarding damages to Hudson. A federal appeals court reversed, arguing that a prisoner seeking to recover damages for a violation of the Eighth Amendment must prove that he suffered a “significant injury,” further ruling that Hudson’s injuries were “minor,” and required no medical attention.

The U.S. Supreme Court rejected this additional requirement of “significant injury,” reemphasizing the rule in [Whitley v. Albers](#) that the question is whether force is applied in a “good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” This test, the Court stated, would apply regardless of whether the force was used in the context of a major prison disturbance, such as a riot, or a “lesser disruption.”

It is true, the Court acknowledged, that the extent of the injury a prisoner suffers because of the use of force is one factor to be considered in deciding whether the force used was wanton and unnecessary, but there is no requirement to show a significant injury in order to assert a valid Eighth Amendment claim. Contemporary standards of decency, the Court reasoned, are always violated in the excessive force context when prison officials or employees maliciously and sadistically use force to cause harm, regardless of whether significant injury occurs.

The Court further acknowledged that the Eighth Amendment does not cover “de minimis” (minimal or trivial) uses of physical force in most instances, while finding that the sort of blows directed by the defendant guards at Hudson did not fall into that category.

Both Whitley v. Albers and Hudson v. McMillian involved the use of force by prison staff members against convicted prisoners. What about the use of such force against pre-trial detainees in detention facilities, jails, or prisons? Such detainees are not protected by the Eighth Amendment prohibition on cruel and unusual punishment. Since they have not been convicted of any offense, they may not be subjected to any punishment at all without receiving due process of law. They are protected in the custodial context against the excessive use of force by the due process clause of the Fourteenth Amendment.

In a footnote in Graham v. Connor, the U.S. Supreme Court stated that the “due process clause protects a pre-trial detainee from the use of excessive force that amounts to punishment. After conviction, the Eighth Amendment serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified. Any protection that substantive due process affords convicted prisoners against excessive force is, we have held, at least redundant, of that provided by the Eighth Amendment.” Any real distinction between the protection provided to pre-trial detainees and convicted prisoners has been largely “blurred” over the years by the courts, and the legal standard, technical pleading aside, is essentially the same.

Individual Liability

The flip side of the issue presented in Hudson v. McMillian, is that officers can sometimes inflict significant injury indeed on a prisoner, as long as the force used is justified under the circumstances by a good faith attempt to maintain or restore order. In Muhammad v. McCarrell, No. 07-2235, 2008 U.S. App. Lexis 16682 (8th Cir.), for example, a federal appeals court upheld a jury verdict for defendant corrections officers in a lawsuit brought by a prisoner allegedly injured by them when they used force to extract him from his cell. The plaintiff prisoner in this case admitted that he had a weapon in his pocket at the time of the incident.

The evidence showed that he had been belligerent and uncooperative, and that he had created a disturbance in his cellblock, taunted an officer, and that pepper spray and a 15 OC Stinger grenade used against the prisoner, as well as tear gas, had little effect and failed to subdue him. The officers then shot a 37MM Ferret OC powder round, designed to break through a barricade, at the cell wall, but he still allegedly refused to comply. They then dispensed a 28b Stinger 37 MM 60 Cal. rubber-ball round into the cell, and again failed to subdue the prisoner. Another Ferret OC powder round fired into the cell then went through a mattress that the prisoner used to barricade his cell door, and hit him in the groin area, finally subduing him, but inflicting significant injuries in the process. The force used was justified by the prisoner’s own actions.

Similarly, in [Johnson v. Hamilton](#), No. 05-1453, 452 F.3d 967 (8th Cir. 2006), a federal appeals court found that no reasonable jury could find that correctional employees used excessive force against an inmate during the incident that led to injuries, including a fractured finger, when he continued to assault the officers even after he was restrained, and was subsequently criminally convicted for his actions.

In contrast, in [Johnson v. Blaukat](#), No. 05-3866, 453 F.3d 1108 (8th Cir. 2006), the court ruled that two correctional officers were not entitled to summary judgment in a female prisoner's excessive force lawsuit when there were factual issues about whether they used unnecessary force and pepper spray against her at a time when she was allegedly not actively resisting them. The prisoner had previously been involved in a disturbance along with other prisoners, but had returned to her cell, and claimed that she did nothing at the time that the officers entered her cell other than step in front of one of them to speak to him.

She was subsequently allegedly tackled to the floor, and an attempt to handcuff her was made, during which a number of officers allegedly piled on top of her. While she says she attempted to explain that her hand was stuck, an officer allegedly placed an Orcutt Police Nunchaku (OPN) around her neck and choked her, twisting the device until it broke. She also claimed that her head was slammed down on the floor, that her hair was pulled, and that an officer sprayed mace on her face and eyes. It was disputed whether she had stopped resisting at the time, or whether, as the officers claimed, she had "lunged" at them.

If the officers used force in a defensive manner, as they claimed, their actions might have been justified, but if they were instead "motivated by anger" and unnecessary, they would have violated the prisoner's rights.

In [Estate of Moreland v. Dieter](#), No. 03-3734, 395 F.3d 747 (7th Cir. 2005), cert. denied, sub nom., [Estate of Moreland v. Speybroeck](#), 545 U.S. 1115 (2005), a federal appeals court upheld a jury's award of \$29 million in compensatory and \$27.5 million in punitive damages against two deputy sheriffs for causing a pre-trial detainee's death through use of excessive force. The facts recited in the court's opinion are a clear illustration of what is meant by the unnecessary use of force to inflict pain.

The prisoner had been arrested in the early morning hours for driving under the influence of alcohol, and allegedly behaved "erratically" during the arrest, doing things like hitting himself in the face. After two hours at the police department, he was transferred to the county jail. While he was still "obviously" intoxicated, he entered the jail on his own power and was placed in a "drunk tank" with two other detainees. He immediately provoked a confrontation by directing racial slurs at one of the other detainees in the tank.

The shift supervisor on duty that night responded by entering the tank with another officer. They grabbed the detainee by the neck or shoulders, threw him to the floor, removed a canister of OC-10 pepper spray and sprayed the detainee's face from a distance of roughly four or five inches.

One of the other detainees in the tank subsequently said that, while he had taken cover under a blanket, he heard the struggle and the “sound of a basket-ball bouncing off concrete.” The other inmate in the tank stated that it sounded like “a melon popping, like dropping a watermelon,” and the two inmates surmised that this was the sound of the detainee's head hitting the concrete floor.

The detainee was handcuffed behind his back and dragged out of the tank to a nearby elevator, and then taken to a shower on the fourth floor to wash off the pepper spray. Once on the fourth floor, an officer pushed the detainee into the shower, allegedly with such force that he hit his head into the far wall. One officer allegedly turned on the hot water, which allegedly aggravates the pain of pepper spray. One of the officers allegedly said “hey guys, do you want to see something funny?” and then threw a five-gallon bucket of cold water over the detainee, and officers allegedly gathered outside the shower, watching and laughing as the detainee, still handcuffed, “lay with his head in a shallow puddle of water, spit, and mucus, trying to wash the pepper spray off his face.”

Two deputies allegedly then dragged the detainee from the shower and strapped him into a “restraint chair” designed to control an aggressive inmate who may endanger others. The chair enables officers to shackle and tie down an inmate while keeping him in a seated, upright position.

The detainee remained handcuffed while in the chair. One of the officers allegedly kept telling the detainee to shut up as he yelled and cursed. This officer then went to the guard tower and came out with an OC-10 canister, discharging it into the detainee's face while he was still strapped into the chair. Some witnesses also stated that they heard sounds of the detainee being beaten during this time.

The two deputies allegedly forcibly put the detainee back into the shower again, after which they placed him again in the restraint chair. A jail medication aide allegedly told the officers that the detainee, who was bleeding profusely from a cut over his left eyebrow, should be taken to the hospital, and they allegedly did not want to do this because their shift was ending and transferring him to the hospital would require them to remain at work.

The detainee remained in the restraint chair, where he was found unconscious that morning by two day shift officers. They noted a large lump on the back of his head, injuries to the front of his face, and a bandage over the cut above his left eye. They took him, still unconscious, to the first floor, changed his clothing, and

placed him in the drunk tank. He was later found there blue, cold, and lifeless and was pronounced dead from an acute subdural hematoma.

In rejecting the defendants' attack on the award of punitive damages, the appeals court noted that the defendants did not argue that the evidence was insufficient to sustain an award of punitive damages under the "reckless or callous indifference" standard as set forth in [Smith v. Wade](#), #81-1196, 461 U.S. 30 (1983), but instead challenged the size of the awards as unconstitutionally excessive.

The appeals court found that the defendants' conduct in the immediate case qualified as "truly reprehensible" and could be interpreted as showing a clear intent to cause the detainee great pain and suffering.

To throw a man's head against concrete when he is handcuffed and presents no threat is clearly excessive and malicious. To discharge a canister of pepper spray into the face of a fully restrained, incapacitated individual is vicious and unconscionable. Moreland [the detainee] was roughed up repeatedly before the defendants ultimately ceased abusing him. In the end, the defendants placed Moreland in the [a] room, shackled and strapped into the restraint chair, leaving his medical needs unattended. The defendants' assault on Moreland was sustained rather than momentary, and involved a series of wrongful acts, not just a single blow; and Moreland died from the injuries inflicted by the defendants.

Under the circumstances, the appeals court found that the ratio between the awards of compensatory and punitive damages did not test the limits of constitutionality, even though both awards were "very large."

Other cases of interest include:

* [McReynolds v. Ala. Dept. of Youth Services](#), No. 2:04-cv-850, 2008 U.S. Dist. Lexis 35070 (M.D. Ala.), ruling that correctional officers were not entitled to qualified immunity in a lawsuit claiming that three of them beat a detainee at a juvenile detention facility with nightsticks about his head and face after he refused orders to remove his clothes. A fourth officer allegedly watched and failed to intervene. The beating was allegedly severe enough that the detainee required eleven stitches and a doctor at the hospital believed that he might have bled to death without medical attention. The court found that there was evidence from which a reasonable fact finder could find that the force employed was used in a malicious and sadistic manner, rather than in a good faith effort to maintain or restore discipline.

* [Payne v. Parnell](#), No. 05-20687, 246 Fed Appx. 884, 2007 U.S. App. Lexis 21227 (Unpub. 5th Cir.), in which the court ruled that a correctional officer who

allegedly used a cattle prod against an inmate who was merely working at his prison job was not entitled to summary judgment. If it was true that the prisoner was not causing any disruption or violating any prison rule, a reasonable jury could find that there was no need to use any level of force.

* [McBride v. Hilton](#), No. 06-30146, 223 Fed. Appx. 303, 2007 U.S. App. Lexis 2505 (Unpub. 5th Cir.), finding that a deputy used reasonable force against inmate in light of prisoner's history of violence and his violent response to requests to step outside, including his scuffle with deputies.

* [Johnson v. Moody](#), No. 06-12422, 206 Fed. Appx. 880, 2006 U.S. App. Lexis 26988 (Unpub. 11th Cir.), in which the court found that an Alabama prisoner who sued correctional officer who allegedly injured his finger by kicking a metal tray door failed to show that he suffered a serious injury or that the officer acted maliciously or sadistically, barring a federal civil rights claim. The officer argued that the incident was an accident, and that it occurred because the prisoner refused to remove his hand from a slot in the door through which food was passed.

* [Corpus v. Bennett](#), No. 04-2603, 430 F.3d 917 (8th Cir. 2005), a case in which the trial court was found to have properly reduced jury's award of \$75,000 in “nominal” damages to \$1 in pre-trial detainee's lawsuit, when jury specifically found that jailer used excessive force against the detainee but did not cause any substantial injury.

* [Atwell v. Hart County, Kentucky](#), No. 03-6421, 122 Fed. Appx. 215, 2005 U.S. App. Lexis 1771 (Unpub. 6th Cir. 2005), in which jail personnel were found not to have used excessive force in using pepper spray to subdue a detainee suffering from paranoid schizophrenia, acute psychosis, impulse-control disorder, and “polysubstance abuse” who actively resisted his transfer to a hospital to receive treatment.

* [Cain v. Ambriz](#), No. 04-40632, 114 Fed. Appx. 600, 2004 U.S. App. Lexis 2075 (Unpub. 5th Cir. 2004), a case in which a prisoner admitted that he refused to comply with an officer's requests. Under these circumstances, the officer's pushing against the prisoner's face with his hand for the purpose of forcing him into his cell was not an excessive use of force.

* [Wooten v. Law](#), No. 04-1159, 118 Fed. Appx. 66, 2004 U.S. App. Lexis 24221 (Unpub. 7th Cir. 2004), in which the court ruled that a prisoner's federal civil rights lawsuit against prison guards, claiming that they used excessive force against him, was barred by his prior disciplinary conviction of assault and resisting the guards arising out of the same incident. An award of damages in the prisoner's lawsuit, which was based on the assertion that he had not physically resisted the

guards, would necessarily call into question his disciplinary conviction, which had not been set aside, so his lawsuit was barred under the rule stated in *Heck v. Humphrey*, 512 U.S. 477 (1994).

Resources

The following are a few useful resources on the use of force by correctional personnel. Further listings will appear in subsequent articles in this series.

- [Use of Force and Application of Restraints on Inmates. Program Statement](#) from the Federal Bureau of Prisons. (November 30, 2005).
- Federal regulations governing the use of force and restraints against prisoners. [28 C.F.R. Secs. 552.20-552.27](#), covering principles governing the use of force and application of restraints, confrontation avoidance procedures, use of four-point restraints, use of chemical agents or non-lethal weapons, medical attention in use of force and application of restraints incidents, and documentation of use of force and application of restraints incidents.
- Minnesota Department of Corrections [Policy on Use of Force and Restraints](#).
- [Staff Use of Force in United States Confinement Settings](#), by Steve J. Martin, 22 *Journal of Law & Policy* 145 (2006).
- California Independent Review Panel Section of 2004 report concerning [Use of Force in California correctional facilities](#).
- [Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons](#) by Jamie Fellner and Keramet Reiter, Human Rights Watch, New York. 2006.

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