1974

Surviving Justice: Prisoners' Rights to Be Free from Physical Assault

Robert Plotkin
A sentence to prison involves much more than simple incarceration and its attendant withdrawal of freedom of movement. Indeed, as recent developments indicate, a sentence to confinement in most penal institutions involves a life and death struggle to avoid attacks, rapes, and brutality—from fellow inmates as well as from correctional authorities.

A report by the Virginia State Crime Commission graphically depicts the situation in that state as recently as 1973—after the Virginia Penal System had already come under a sweeping court order in a landmark decision:¹

In one incident involving the fatal stabbing of one inmate by another in May, 1973, two inmates were called to stop the fight between the inmates. One of the men who helped...told the State Crime Commission consultant that two convicts had been fighting for approximately half an hour by the time he was called. The guard on duty did nothing to stop the fight.... He was stabbed on the arm, and the other man was stabbed through the scrotum. The assailant succeeded in killing his victim.

... . . .

At approximately 9:30 p.m., when the lights were out, three [white inmates] were attacked by a group of about 15 black men. They were beaten badly.... Half an hour later, this same group of black inmates pulled two of the remain-

ing whites from their bunks and beat them up. While the two men were on the floor, defenseless, they were stripped. One of them was raped by at least nine different convicts. The other one was then forced to perform oral sodomy on the group. The two men spent the remainder of the night in the dormitory, although they later told the Commission Consultant that they had yelled and screamed during the attacks.

No official Penitentiary report was ever written of the sexual assaults of these two men. . . . The two victims of the sexual attacks were interviewed a day and a half later by the Consultant. . . . They had not been examined by a doctor. They had been examined by a nurse. The two young men did not look human. They were in tears and totally depressed. All their belongings including eyeglasses had been stolen.²

Unfortunately, the Virginia system is fairly typical of brutality in American corrections, and similar incidents have been regularly documented.³ The National Advisory Commission on Criminal Justice Standards and Goals recognized the problem in recommending a comprehensive model standard which would require correctional officials, the only state authority “in a position to protect inmates,”⁴ to take protective measures on the inmates’ behalf, and to compensate those it failed to protect.⁵ These standards are, however, only recommendations to legislatures and correctional agencies, and although they embody the most current correctional philosophies, they are binding on no jurisdictions.

Consequently, prisoners must continue to be their own protectors, for “[e]xisting law does not clearly establish that the correctional authority is responsible for protecting persons sentenced to incarceration.”⁶ Although danger has always been present, responsibility for preventing and/or redressing injuries has been absent, and court decisions attempting to deal with the problem have been largely equivocal.

³ National Advisory Commission on Criminal Justice Standards & Goals, Corrections, 33 (1973). [Hereinafter cited as National Advisory Commission Report]. The standard for protection against physical abuse is reproduced as Appendix B to this article.
⁴ Id. at 32-33.
⁵ Id. at 32.
⁶ Id. at 32.
Prisoners have been able to invoke tort laws in some states to redress their grievances. Indeed, the *Restatement of Torts* specifically recognizes a common law duty of keepers to exercise "reasonable care" for the safekeeping of their wards, and this duty is buttressed in most states by statutory obligations to "protect" or "care" for prisoners. Although several jurisdictions have held that prisoners' tort actions are cognizable under state laws, others have not been particularly receptive to prisoners' complaints, and still others avoid the question by declaring incarcerated persons to be "civilly dead" and thus unable to file any suit in state courts.

It is no surprise, then, that prisoners have increasingly turned to federal courts, seeking to invoke the protection of the Civil Rights Act, and a growing number of federal courts have recognized a constitutional right to be free from physical harm. These courts have reasoned that when a state denies people their liberty, forces them to live in confined quarters with strangers and without the means for self-defense, all in the name of punishment for a criminal offense, that state thereby assumes a corresponding duty to protect those people from the physical harm inherent in their situations.

It is plain that the State must refrain from imposing cruel and unusual punishments on its convicts. And the Court is convinced that the State owes to those whom it has deprived of their liberty an even more fundamental constitutional duty to use ordinary care to protect their lives and safety while in prison.

---

7 *Restatement (Second) of Torts* §320 (1965).
   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
But in a society that still condones the use of corporal punishment for school children, it is not always "plain" that courts are unduly troubled by inmates attacking fellow inmates.

This article will attempt to explore the difficulties in enforcing the right of state prisoners to be protected from harm by means of remedies available in federal courts. While "harm" can occur in at least fifty-seven varieties, including unsanitary conditions, sensory deprivation, arbitrary disciplinary measures, or sanctioned corporal punishment, we will be concerned here solely with the relatively virgin territory of physical assaults upon inmates by correctional officials or other prisoners, and shall attempt to delineate the constitutional parameters of prison administrators' duties to prevent such harm.

Assaults by Officials

Unprovoked Assaults by Guards

The Hollywood cliche about the sadistic prison guard beating the hapless prisoner senseless, although out of proportion to reality, is not an uncommon occurrence. Correctional officers are human beings who daily are confronted by a dangerous, frustrating job. There is inherent distrust and a palpable tension between inmates and staff, and, just as in the free world, anxieties often surface through violence


19 See, e.g., Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), where an inmate was placed in solitary confinement for over a year as punishment for political and legal activities.

20 Traditionally, courts have allowed corporal punishment of prisoners. See, e.g., State v. Cannon, 55 Del. 587, 190 A.2d 514 (1963); State v. Revis, 193 N.C. 192, 156 S.E. 346 (1927); United States v. Jones, 188 F. Supp. 266, 270 (S.D. Fla. 1952), rev'd on other grounds, 207 F.2d 785 (5th Cir. 1953):

From time immemorial prison officials were vested with the power and authority of imposing corporal punishment upon prisoners as a part of the discipline and restraint . . . . [F]or centuries whipping or corporal punishment has been a recognized method of discipline of convicts.

But cf. Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974) (beating of juvenile inmates of state boys' school with paddles and giving of tranquilizers without specific medical authorization constitutes cruel and unusual punishment); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (use of strap as punishment banned).
and inmates may find themselves confronted by opponents with weapons, clubs, tear gas, and handcuffs. It is one thing for guards to defend themselves or others by use of reasonable force; it is quite another thing for those guards to use force against inmates without the justification of self-defense.

After state authorities regained control of Attica following the tragic incidents at that prison, there was substantial evidence that inmates had been stripped, beaten, and deprived of their personal property.\(^{21}\) Many of the inmates had been forced to "run a gauntlet" naked while correctional officers with clubs rained blows upon them.\(^{22}\)

Some [prisoners] were dragged on the ground, some marked with an "X" on their backs, some spat upon or burned with matches, and others poked in the genitals or arms with sticks. According to the testimony of inmates, bloody or wounded inmates were apparently not spared in this orgy of brutality.\(^{23}\)

Prisoners who have pressed complaints about guard assaults to federal judges have encountered great judicial reluctance to hear such cases. It seems that courts have feared that any contact between guards and inmates will result in a civil action in federal court, "opening the proverbial Pandora's box" and resulting in "even more overburdened" federal court dockets, which will inevitably lead courts into "supervising the day-to-day affairs of State institutions."\(^{24}\) The problem, of course, is that

\[\text{the relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless.}\(^{25}\)

Questions of physical assaults appear to be particularly suited to such "boundless" litigation. Yet it is precisely because prisoners live under the constant eye of state officials that they are in need of careful judicial scrutiny. Their rights are violated in secret, behind walls, and under the dual guise of "rehabilitation" and "expertise."

\(^{22}\) Id. at 433-35.
\(^{23}\) Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 19 (2d Cir. 1971).
The Supreme Court recently discarded this "hands off" attitude in Procunier v. Martinez,\(^{25}\) although noting that such prior judicial reluctance to interfere with internal prison management exhibited a "healthy sense of realism."\(^{27}\) Despite that "realism," however, the Court held, in voiding mail censorship regulations, that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution."\(^{28}\)

The first protections from physical abuse accorded prisoners came in class action cases where judges were chagrined by the "totality" of degrading and dangerous conditions prevailing throughout an institution.\(^{29}\) Where brutality was so pervasive and widespread, federal courts were sufficiently "shocked" to conclude that such conditions violated the eighth amendment ban against inflicting "cruel and unusual punishments."\(^{30}\) When Attica guards took reprisals against rebelling inmates, for example, the Second Circuit termed their actions "wholly beyond any force needed to maintain order,"\(^{31}\) and found that the mass use of force was prohibited by the eighth amendment.\(^{32}\) However, the court, envisioning Pandora's box bursting open, was quick to caution that it was dealing with a "systematic pattern of brutality," and not with a "single or short-lived incident," which was "unlikely to recur . . . .\(^{33}\)

Individual complaints concerning specific incidents of physical abuse by guards generally have not fared as well. The chief problem, ironically, has been the eighth amendment itself. In those cases the plaintiffs have had difficulty convincing the courts that while such an attack was obviously a tort, it did not necessarily "rise" to the level of the eighth amendment violation necessary to confer federal jurisdiction,\(^{34}\) for such assaults were not necessarily "punishment," and

\(^{27}\) Id. at ___, 94 S.Ct. at 1807.
\(^{28}\) Id.
\(^{29}\) See, e.g., Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971); see also cases cited in note 13, supra.
\(^{30}\) Id.
\(^{31}\) Inmates of Attica Correctional Institution v. Rockefeller, 453 F.2d 12, 22 (2d Cir. 1971).
\(^{32}\) Id. at 23.
\(^{33}\) Id.
PRISONERS’ RIGHTS

were not always “cruel” (and, perhaps, they were not very “unusual”). Added to this skepticism has been the judicial failure to settle on a consistent interpretation of the eighth amendment. At various times the Supreme Court has endorsed such tests for determining eighth amendment violations as: (1) whether the punishment is “disproportionate” to the offense;\(^{35}\) (2) whether the punishment is due to the “status” of the individual;\(^{36}\) and (3) whether the punishment violates some amorphous concept of “evolving standards of decency.”\(^{37}\) That the conflict and confusion still exist is evidenced by the Justices’ nine individual opinions in the recent death penalty decision.\(^{38}\)

A series of cases from the U.S. Court of Appeals for the Ninth Circuit took the first tentative steps in establishing the individual inmate’s right to be free from unprovoked guard assaults. In Brown v. Brown,\(^{39}\) an inmate alleged that FBI agents and prison officials beat him in an effort to obtain information against another inmate. After the district court dismissed his complaint for failure to state a cause of action, the appellate court reversed and remanded, stating simply that the Civil Rights Act created a remedy for violations of constitutional rights, and that prisoners are “within the protection of this Act.”\(^{40}\) The Court implied that the allegations, if true, would constitute a violation of some unspecified provision of the Constitution.

Wiltsie v. California Department of Corrections\(^{41}\) followed the Brown precedent but did not expand its rationale. Still another decision of the Ninth Circuit has reached similar conclusions without analysis, even though the “allegations of physical abuse stretch one’s credulity.”\(^{42}\)

Other courts have followed this lead with respect to arrested persons who were abused by police officers,\(^{43}\) and the Fifth Circuit per-


\(^{36}\) Robinson v. California, 370 U.S. 660 (1962). It is not clear why such punishments would not be disproportionate to the “offense”, see note 35 supra, nor why this would not be a substantive due process violation, see, e.g., Sulton, Recent Judicial Concepts of “Cruel Unusual Punishments”, 10 VILL. L. REV. 257 (1965).


\(^{39}\) 368 F.2d 992 (9th Cir.), cert. denied, 385 U.S. 868 (1966).

\(^{40}\) Id. at 993.

\(^{41}\) 406 F.2d 515 (9th Cir. 1968).

\(^{42}\) Allison v. California Adult Authority, 419 F.2d 822, 823 (9th Cir. 1969).

\(^{43}\) See, e.g., Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970).
emptorily applied it to a jail inmate. In *Bethea v. Crouse*, where a prison inmate alleged that guards stood by while another inmate beat him, and then denied him medical care for the resulting injuries, the court held the allegations sufficient to state a violation of the eighth amendment.

The most enlightening discussion of the relevant constitutional theories occurs in *Johnson v. Glick*. In *Glick*, a pretrial detainee alleged that, without justification, he had been choked, hit, and threatened by a guard, who later refused him medical treatment. The district court dismissed his civil rights action against both the warden and the guard, and an appeal to the Second Circuit ensued.

Judge Friendly, writing for the majority, reversed the district court, holding that due process requirements afford protection against police brutality, and that the "same principle should extend to acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same." In looking beyond the eighth amendment, the Court of Appeals relied upon *Rochin v. California*, where the Supreme Court held that unprovoked police mistreatment is violation of fourteenth amendment due process requirements.

In rejecting the theory of cruel and unusual punishment, Judge Friendly noted that the prior cases "rely on a passing reference to the . . . Eighth Amendment," although "[a] case like this . . . does not lie comfortably within the Eighth Amendment." This is so, he argued, because a "spontaneous attack by a guard . . . does not fit any ordinary concept of 'punishment'." Therefore, he noted, a court must look to the due process clause for constitutional protection against official brutality, while at the same time recognizing that not

---

44 Tolbert v. Bragan, 451 F.2d 1020 (5th Cir. 1971).
45 417 F.2d 504 (10th Cir. 1969).
46 Id. at 509.
48 Id. at 1032-33. The Glick court is not alone in its conclusions. In Anderson v. Nosser, 456 F.2d 835 (5th Cir.) (en banc), cert. denied, 409 U.S. 848 (1972), the Fifth Circuit "pretermitted" a panel decision, 438 F.2d 183 (5th Cir. 1971), which had held that summary punishment of unconvicted persons violated the eighth amendment. The full court held that the complaint "sounds more in the nature of a deprivation of due process . . ." 456 F.2d at 838, but did not further analyze the concept. More recently, a district court held that due process includes a right to be free from bodily harm and injury at the hands of government officials, Reed v. Philadelphia Housing Authority, 372 F. Supp. 686, 690 (E.D. Pa. 1974). See also Fowler v. Vincent, 366 F. Supp. 1224 (S.D. N.Y. 1973).
50 481 F.2d at 1031.
51 Id. at 1032.
"every push or shove . . . violates a prisoner's constitutional rights." In determining whether a constitutional violation has occurred, Judge Friendly suggested that courts consider

such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Applying this reasoning to the allegations made by the inmate, the Glick court held that a claim sufficient to avoid dismissal was made against the attacking correctional officer, but that the dismissal of a similar claim against the prison warden was proper because the warden had had no "personal responsibility" and had not "authorized the officer's conduct," which was only a "single, spontaneous incident, unforeseen and unforeseeable by higher authority."

Glick is illustrative of a judicial intent to prohibit even single acts of guard brutality against individual prisoners by grounding such claims in substantive due process terms and avoiding the cumbersome and confusing applications of the eighth amendment. Thus, a complaint concerning individual guard brutality should focus upon the fact that a state officer has, without provocation or justification, used excessive force resulting in injury upon a person in custody. In the past, complaints have been overly concerned with the type of force used or the seriousness of the resulting injury, when it is the unjustified attack itself which offends the due process clause, the allegation of which states a cause of action sufficient to withstand a motion to dismiss. The other factors become relevant in mitigation or extenuation, or in computing damages, at trial, but primary emphasis on those circumstances in the complaint leads one into the maze of the eighth amendment, in the hope of shocking someone's conscience. The better drafted complaint alleges the existence of an unlawful attack, and shifts the burden of proving justification to the attacker.

Liability of Prison Administrators For Guard Assaults

Although courts are now allowing inmates to recover from guards who assault them, there has been a reluctance to look into the admin-

52 Id. at 1033.
53 Id.
54 Id. at 1034.
55 When a federal court reviews the sufficiency of a complaint, . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is remote and unlikely but that is not the test.

istrative hierarchy and to impose liability upon the superiors of those guards, who have the ultimate duty of care for the prisoners. The concept of vicarious liability has simply not been applied to suits brought under the Civil Rights Act, and those at the top of the hierarchy have generally been allowed broad flexibility, uninhibited by fear of liability. The courts have built a series of obstacles in the path of imposing liability on high executive officials which has created confusion and diverted attention from the lawsuits themselves. At first, courts said that top level administrative officials enjoyed immunity in federal civil rights cases when they are sued in their "official" capacities:

In their official capacities, the [administrators] are extensions of the [government] and are, therefore, not "persons" within the meaning of §1983. Accordingly, damages may not be assessed against the defendants under this section for acting in their official capacities.\(^{56}\)

This conclusion is justified by the language of §1983 itself, they said, which prohibits only a "person" from depriving others of their constitutional rights.\(^{57}\) Since a government body is not a "person" subject to suit under §1983,\(^{48}\) an official acting on behalf of that governmental body is simply a surrogate for the agency itself, and is likewise not subject to a §1983 action. A judgment against administrators in their official capacity would in essence be a judgment against the state, which would not lie under §1983.

This obstacle has been negotiated by pointing out that it has long been the law that when a state officer violates the federal Constitution "he is in that case stripped of his official or representative

\(^{56}\) Bennet v. Gravelle, 323 F. Supp. 203, 211 (D. Md. 1971). Apparently the reason Congress limited §1983 to "persons" was to avoid eleventh amendment problems. That amendment bars suits against states by citizens of a different state or a foreign country, and the Supreme Court has interpreted it to bar federal court suits by a State's own citizens. Cf. Employees v. Dept. of Public Health & Welfare, 411 U.S. 279 (1973); Hans v. Louisiana 134 U.S. 1 (1890). The general rule is that a suit by private individuals to impose a liability which must be paid from the state treasury is forbidden by the eleventh amendment, Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944), but the entire area is one of the more confusing constitutional doctrines. Ex parte Young, 209 U.S. 123 (1908), which allows equitable relief against state officials, and establishes the dichotomy of official — personal capacities, is apparently inconsistent with this rule: "The difference between the type of relief barred by the Eleventh Amendment and that permitted by Ex parte Young will not in many instances be that between day and night." Edelman v. Jordan, _____ U.S. _____, 94 S.Ct. 1354, 1357 (1974). In Edelman, the most recent high court discussion of the eleventh amendment, the Court held that the amendment bars recovery of wrongfully withheld welfare benefits under §1983, even though prospective injunctive relief was afforded.

In addition to the eleventh amendment's version of "sovereign immunity" for the state itself, courts have also recognized immunity for government officials, see Barr v. Mateo, 360 U.S. 564 (1959); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209 (1963). As will be seen, infra, the Civil Rights Act has somewhat modified the immunity doctrine where state officers are sued in their personal capacity.

\(^{57}\) See note 12, supra.

\(^{68}\) See, e.g., City of Kenosha v. Bruno, 412 U.S. 507 (1973), and cases cited therein.
character and is subjected \textit{in his person} to the consequences of his individual conduct."\textsuperscript{59} The purpose of the Civil Rights Act is to establish this \textit{personal} liability of government officials, so that aggrieved plaintiffs may recover damages from the \textit{personal} accounts of a transgressing officer.\textsuperscript{60} On its face, the Act clearly makes such liability its intended result, and it does not exempt judges, legislators, or prison officials. However, subsequent judicial interpretations of the Act have allowed officials to raise common law immunities as a defense to civil rights actions for, it has been argued, Congress certainly did not intend "to abolish wholesale all common law immunities."\textsuperscript{61} Executive officials have variously been allowed to raise defenses of limited or qualified immunity. But "[t]o hold all state officers immune from suit would largely frustrate the salutary purpose of this provision."\textsuperscript{62}

In these instances federal courts are left "to work out, from case to case, the defenses by way of official privilege which might be appropriate to the particular case."\textsuperscript{63} The Supreme Court, in \textit{Scheuer v. Rhodes},\textsuperscript{64} attempted to provide guidelines for this case by case development in holding that a governor and other high state executive officers were not entitled to absolute immunity from civil rights suits, but ultimately it concluded that "because of the absence of a factual record" the case "presents no occasion for a definitive exploration of the scope of immunity available to state executive officials . . . ."\textsuperscript{65} \textit{Scheuer} does suggest, however, that courts look to

\textsuperscript{59} \textit{Ex parte Young}, 209 U.S. 123, 159-60 (1908) (emphasis in original).

\textsuperscript{60} In \textit{Monroe v. Pape}, 365 U.S. 167, 172 (1961), the Supreme Court stated that the Act was intended "to give a remedy to parties deprived of their constitutional rights . . . by an official's abuse of position." This is so, said the Court, "whether they [the officials who carry a badge of authority of a state and represent it in some capacity] act in accordance with their authority or misuse it."

\textsuperscript{61} \textit{Pierson v. Ray}, 386 U.S. 547, 554 (1967). Indeed, the Court there held that judges must have such immunities to assure "principled and fearless decisionmaking . . . ." In \textit{Tenney v. Brandhove}, 341 U.S. 367, 378 (1951), the Court had already held that state legislators could raise defenses of immunity for "what they do or say in legislative proceedings . . . ."


\begin{quote}
The law of immunities and defenses available to public officials in §1983 suits is complicated. This is so because the legal principles emerge from attempts to strike a balance between two important, but often conflicting public policies. On the one hand there is the public interest in vindicating individual rights sought to be protected by the Civil Rights Act. On the other hand, there exists a strong public policy in promoting spirited service by public servants, a goal thought to be placed in jeopardy by the threat of private damage suits for official actions.
\end{quote}

\textit{Fidler v. Rundle}, . . . . F.2d . . . ., 15 Cr. L. 2219 (3rd Cir. 1974).

\textsuperscript{63} \textit{Cobb v. City of Malden}, 202 F.2d 701, 706 (1st Cir. 1953). \textit{Pierson v. Ray}, 386 U.S. 547 (1967), made it clear that police officers, as agents of the executive branch, could raise "the defense of good faith and probable cause," \textit{Id.} at 557, in an action for unlawful arrests, but that they did not have "absolute or unqualified immunity." \textit{Id.} at 555

\textsuperscript{64} . . . . U.S. . . . , 94 S.Ct. 1683 (1974).

\textit{Id.} at . . . . , 94 S.Ct. at 1693.
the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the
time of the action on which liability is sought to be based.
It is the existence of reasonable grounds for the belief formed
at the time and in light of all circumstances, coupled with
good faith belief, that affords basis for qualified immunity
of executive officers for acts performed in the course of of-
official conduct.66

Although it is now abundantly clear that state prison officials do
not have absolute immunity, there also remains the “necessity” of
establishing limits of personal responsibility for the acts complained
of on the part of executive officials, another court-ordained “pre-
requisite” of §1983:

Premised on personal culpability, these statutes are aimed
at those who subject others to a deprivation of their consti-
tutional rights, rather than at . . . the officials with ultimate
authority over them in the governmental hierarchy.67

This philosophy was evident in Johnson v. Glick68 when Judge
Friendly dismissed the claims against the warden because he had no
“personal responsibility” for a “single, spontaneous incident . . . .”69
In addition to this statutory interpretation, another justification for
the personal involvement requirement is that the ultimate “master”

66 Id. at -------, 94 S.Ct. at 1692. It is important that the Court, in Scheuer, did not distinguish
between “ministerial” and “discretionary” duties of state officers, which should lead to the
conclusion that such distinctions are without value in §1983 suits. Cf. Barr v. Matteo, 360
U.S. 564 (1959), which concerned the scope of executive immunity for federal
officials, and which seems to hold that the degree of immunity available revolves upon the nature
of the action (i.e. ministerial or discretionary).

A line of cases from the U.S. Court of Appeals for the Third Circuit has totally con-
fused the picture. In Johnson v. Aldredge, 488 F.2d 820 (3d Cir. 1973), the court held
a federal prison warden immune (and incidentally reached a strange interpretation of
“ministerial” and “discretionary” duties); in Fidtler v. Rundle, -------, 15 Cr. L.
2219, 2220 (3d Cir. 1974), the court allowed a suit against a state prison warden to go
forward, although the warden could present common law immunities by way of defense
on the merits. The court apparently rationalized the different treatment on the grounds
that federal common law, as reflected by Barr v. Matteo, supra, is different from the com-
mon law rule applied under the Civil Rights Act. For a district court’s efforts to apply

1972); Townes v. Swenson, 349 F. Supp. 1246 (W.D. Mo. 1972); Campbell v. Anderson,
335 F. Supp. 483 (D. Del. 1971). In a recent decision the Third Circuit reaffirmed
the personal responsibility principle in Curtis v. Everett, 489 F.2d 516 (3d Cir. 1973),
cert. denied, ------- U.S. ------- (1974). In Curtis an inmate claimed that he was attacked by
another inmate in front of three officers who took no preventive action. He sued these
officers, the attacker, and the warden and commissioner of corrections, charging the latter
two with failures to train, supervise, inspect, and protect. Id. at 521. The Court allowed
the claims as to the officers, but dismissed as to the higher officials because they had no
knowledge of, or participation in, this particular assault. Id. at 521. But see Holland v.
Connors, 491 F.2d 539 (5th Cir. 1974), and discussion in note 86 infra.

68 481 F.2d 1028 (2d Cir. 1973). See notes 47-54 supra and accompanying text for dis-
cussion.
69 Id. at 1034.
of a public employee is not the supervisory official, but rather it is the governmental body itself, which is not a "person," and therefore is not liable under any theory.\(^7\)

The logic of these conclusions would appear, on their face, inescapable. But, in applying this personal involvement principle to the prison setting, judicial interpretations of prison administrators' responsibilities have been far too narrow. These administrators are chosen for their "expertise," they select their own associates and they delegate their statutory duties. They are responsible for general policies, for supervision and training of personnel, and for seeing that their agency complies with the laws and the Constitution.\(^7\)

The corrections profession itself recognizes the broad powers inherent in the position of a correctional administrator. The American Correctional Association's Manual of Correctional Standards\(^7\) envisions a "professional and responsible correctional leader directing a competent and trained staff in execution of a wide variety of functions in keeping with minimum standards . . . ."\(^7\) It urges that administrators be vested with all powers of appointment within their departments, and that they "should give personal attention to the selection and appointment of all key personnel, even to the second and third echelons of command in the institutions."\(^7\) The personal control exercised by most of these higher officials in selecting and retaining employees goes far in dispelling the notion that there is no employer-employee relationship involved.


\(^7\) In the federal system, for example, 18 U.S.C. §4042, provides that:

The Bureau of Prisons, under the direction of the Attorney General, shall:
1) have charge of the management and regulation of all Federal penal and correctional institutions;
2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States (emphasis added).

Likewise, a number of states impose such duties upon their prison administrators. Alaska requires its Commissioner to provide for safety, subsistence, proper government, and discipline, ALASKA STAT. §33.30.020 (1973); in Arizona the sheriff "is answerable in the courts of the United States for the safekeeping of the prisoner," REV. STAT. ANN. 31-122 (Supp. 1973); Illinois mandates the establishment of rules and regulations for the "protection of person and property," ILL. REV. STAT. Ch. 38 §1003-7-4 (Supp. 1973) Kansas wardens must "examine daily into the state of the penitentiary, and health, conduct, and safekeeping of the prisoners." KAN. STAT. ANN. §76-2406 (4) (Supp. 1973). See chart, Appendix A, for comprehensive listing of state statutes.

\(^7\) MANUAL OF CORRECTIONAL STANDARDS (3d ed. 1966). See also NATIONAL ADVISORY COMMISSION REPORT, supra note 4, Standard 16.6 and Commentary, at 565-6.

\(^7\) Id. at 149.

\(^7\) Id. at 164.
At the institutional level, the Manual suggests that lines of authority and responsibility should be direct, clear-cut, and well understood. . . . [N]o supervisor shall be responsible for more employees than he can effectively direct.\textsuperscript{75}

Moreover, "personnel management is an essential function in the operation of governmental . . . organizations."\textsuperscript{76} The administrator's responsibilities include employee recruitment, selection, job assignments, performance evaluation, and providing sufficient training, training aids, equipment, and technical guidance.\textsuperscript{77} When viewed in this context, the role of administrators (particularly those charged with responsibility for the particular institutions where incidents of guard assaults have occurred) is vastly broader than has been envisioned by the courts.

Several courts, faced with what they perceived to be unjust results, have adopted a concept of "personal liability" so broad that it comes very close to recognizing a notion of imputed knowledge commensurate with the scope of the administrators' responsibilities. In \textit{Wright v. McMann},\textsuperscript{78} for instance, the court imputed personal knowledge of conditions in solitary confinement to the warden, and argued that "he was charged with having such knowledge. Ultimate responsibility for the operation of the segregation cells was his . . . ."\textsuperscript{79} It concluded that the warden "knew or should have known" that the inmate was living under "foul" and "inhumane" conditions.\textsuperscript{80} The dissent hastily pointed out that such an argument "advances a theory of vicarious liability which is inappropriate in civil rights cases."\textsuperscript{81}

In \textit{Landman v. Royster},\textsuperscript{82} the court noted that the Director of Corrections had "actual knowledge" of unconstitutional activities, but the specifics it provides consist mostly of the Director's "approval" of certain policies and of his awareness "of the conditions of confinement of the disciplinary quarters."\textsuperscript{83} While \textit{Landman} took much greater care than \textit{Wright} to detail personal involvement, a theory of imputed knowledge seems to be lurking beneath the factual "findings" in both cases.

\footnotesize
\textsuperscript{75} Id. at 165.
\textsuperscript{76} Id. at 171.
\textsuperscript{77} Id. at 171-2.
\textsuperscript{78} 460 F.2d 126 (2d Cir. 1972).
\textsuperscript{79} Id. at 134-5.
\textsuperscript{80} Id. at 135.
\textsuperscript{81} Id. at 137.
\textsuperscript{83} Id. at 1317. Other courts have used the rubric of imputed knowledge to sustain liability. In \textit{Roberts v. Williams}, 456 F.2d 819 (5th Cir. 1972), a warden was found negligent for entrusting an untrained inmate-trusty with a weapon, when the trusty accidentally

(Continued on next page)
However, aside from the practical application of imputed knowledge theories, there is available a more fundamental basis for establishing vicarious liability — the language of the Civil Rights Act itself. It imposes liability not only upon a person who “subjects” another to deprivation of rights, but also upon a person who “causes” another “to be subjected” to such deprivation. Given this language, and the Supreme Court’s command that the act “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,” there is no reason to assume that vicarious liability was meant to have been excluded from §1983. “[T]he concept of blameworthiness and the doctrine of respondeat superior co-exist harmoniously at common law,” and there is no reason why they cannot do so under the Civil Rights Act as well.

In generally asserting the doctrine of vicarious liability or respondeat superior, one should not look to the third person’s personal blame. The risk involved may be typical or “broadly incidental to the

(Continued from preceding page)

shot another inmate. An inmate suing under the Federal Tort Claims act recovered from a warden who should have known the dangerous propensities of the inmate’s assailant. Cohen v. United States, 252 F.2d 689 (N.D. Ga. 1966), rev’d on other grounds, 389 F.2d 689 (5th Cir. 1967). A federal marshall who turned over his prisoner to “incompetent deputies” faced with “the known hostility” of a mob neglected his duty. Asher v. Cabell, 50 F. 818, 827 (5th Cir. 1892). See also Bracey v. Greenoble, 494 F.2d 566 (3d Cir. 1974), rev’d, 356 F. Supp. 673 (E.D. Pa. 1973). In Bracey, the lower court imposed liability on a supervisor who was in the general vicinity of guards’ assault on the plaintiff inmate, on the grounds that the supervisor’s acquiescence in the action constituted personal involvement. The Court of Appeals reversed because it concluded that there was insufficient evidence that the supervisor had acquiesced. 494 F.2d at 570-1.

84 See the language of §1983, supra note 12. The difference between using an “imputed negligence” theory and vicarious liability is substantial. The former adheres to the notion of personal responsibility and achieves that responsibility by assigning it under the rubric that the party “should have known” of the danger. See, e.g., Wright v. McMann, 460 F.2d 126 (2d Cir. 1972); and text accompanying notes 78-81 supra. Under a vicarious liability or respondeat superior theory, there is no doubt but that the party to be charged is not personally responsible; his or her liability arises from the special relationship with, or control over, the actual tortfeasor. The defenses afforded the actual tortfeasor, and the opportunity to show that the tortfeasor was not in the third party’s control, i.e. was on a “frolic” or a “detour,” are available to the third party. Cf. United States v. Romitti, 363 F.2d 662, 665-66 (9th Cir. 1966).


86 Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970). The Hill case is the only reported decision which has held respondeat superior applicable to a §1983 action. In that case the plaintiff sued a bailbond company for the illegal actions of its agent. After concluding that the bonding agency was operating “under color of law,” id. at 187, Judge Lord made the following observations:
1) the statute itself did not expressly forbid respondeat superior’s application;
2) if the act is read against a background of tort liability, the doctrine is firmly entrenched in common law, citing Monroe v. Pape, 365 U.S. 167, 188 (1961);
3) the legislative history and Supreme Court decisions are silent as to respondeat superior; and

(Continued on next page)
enterprise he has undertaken."87 A private business cannot disclaim responsibility for acts which are "characteristic of its activities,"88 or for making it possible for its employees to be in a position to commit a wrong;89 and, likewise, prison officials under a statutory and constitutional duty to protect their "clients" should not be allowed to escape similar responsibilities. In looking to those who are in the best position to "share the risks," who is better qualified than those very public officials society has entrusted to personally discharge these duties?90

Moreover, in terms of deterring future instances of guard assaults, the threat of imposing liability upon superior officers can do much to assure that guards will be carefully screened, retained, and trained. In other words, compliance with constitutional and statutory duties will be enhanced in furtherance of the §1983 remedy created "against those who, representing a State in some capacity, were unable or unwilling to enforce a state law."91

(Continued from preceding page)

4) the purpose of the doctrine, a "deep pocket" for collecting damages and spreading risks, is equally applicable in §1983 actions.


The argument regarding the "background of tort liability" which relies on language from Monroe v. Pape, [citation omitted] is of no merit; the rest of the sentence to which plaintiffs refer states that tort liability "makes a man responsible for the natural consequences of his actions." [citations omitted] This Court interprets that language to mean that civil rights actions may be brought on negligence principles but not on the basis of respondeat superior.

The Fifth Circuit has intimated its potential receptivity tovicarious liability. Holland v. Connors, 491 F.2d 539 (5th Cir. 1974). The inmate in Holland alleged that he was terrorized by guards into making a false confession concerning violation of prison rules, and sued the warden for commonly allowing such interrogations. The court said that "fundamental tenents of tort law of negligence and vicarious liability . . . are sufficiently broad to support such relief against [the warden] . . . ." Id. at 541. Despite the Warden's lack of personal involvement, the court reversed a dismissal of the complaint.

87 United States v. Romitti, 363 F.2d 662, 666 (9th Cir. 1966).
88 Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).
90 In recognition of the "sharing of risks" concept, a number of states have provided indemnity and insurance for their employees. A 1969 Missouri statute established a Tort Defense Fund which indemnifies officials and employees of the Divisions of Corrections and Mental Diseases up to $100,000 for liability arising out of official duties, MO. REV. STAT. §105.710 (Vernon Cum. Supp. 1974). Massachusetts, MASS. GEN. LAWS ANN. Ch. 12, §3D (1973) and Vermont, VT. REV. STAT. ANN. tit. 3, §1103 (Cum. Supp. 1973), provide for payments of judgments or settlements up to $10,000.

In the wake of Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), Virginia became the first state to purchase private liability policies which cover the 8,000 employees in the Department of Corrections. Washington Post, Feb. 22, 1974, at C1, col. 8. The policies, which provide for a $300,000 limit on a single occurrence, were an effort to retain good employees and keep up morale, and assure that they do not "freeze up in different situations." Id. at C3, col. 3. Apparently the high cost of such policies has, in the past, discouraged other states from obtaining such insurance. Id.

In the final analysis there is simply no good reason why wardens or directors of corrections should not be liable under the civil rights statute for the unconstitutional acts of their subordinates. The statute by its own terms is not limited to direct personal involvement, and no underlying social policy demands the rejection of imputed liability or respondeat superior. To the contrary, public policy demands vindication of constitutional rights from those charged with the duty of protection, and society at large benefits when officials are deterred from failing to exercise their statutory powers to prevent constitutional violations. But until both prison guards and their "masters" are faced with the threat of reaching into their own pockets to redress assaulted inmates, there is no real assurance that effective administrative actions to prevent those assaults will be taken.

Liability of Prison Officials for Assaults by Other Inmates

The very nature of the prison climate encourages inmates to attack one another. Large numbers of people, many "prone" to violence or anger, are locked in close quarters hour after hour, usually without adequate recreation and diversion. As in any society, there are warring factions, personal enemies, grudges, thefts of personal property, and the like, but in prisons such tensions are ubiquitous and magnified.

At times deadly feuds arise between particular inmates, and if one of them can catch his enemy asleep it is easy to crawl over and stab him . . . . The undisputed evidence is to the effect that within the last 18 months there have been 17 stabbings . . . four of them producing fatal results.92

Sexual tensions and frustrations obviously contribute to the volatile conditions with which correctional authorities are faced,93 as does racial prejudice.94

It is inherently difficult to protect inmates (or any persons) from themselves. Administrators do not "select" their populations in the same sense that they select their staff. They obviously cannot expect the cooperation of the inmate population, nor can they be expected to have knowledge about clandestine inmate activities. Simply stated, officials do not have the same degree of control over inmates as they have over their own staff.

Yet the differences in the degree of control do not change the fact that prison administrators nevertheless have a constitutional duty to protect their prisoners from personal harm. The differences may change the nature and extent of that duty by making it more difficult to establish liability for violation of that duty, but the duty itself is constant.

It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. It is the fact of incarceration which is the punishment for the crime, not the manner in which such incarceration is carried out. The state has created prisons where it herds together its criminals, forcing citizens into associations with others who may be likely to harm them, while at the same time depriving them of their normal powers of self-defense or escape. Therefore the state, through its appropriate officials, is duty-bound to provide the protection it has supplanted.

A growing number of courts have recognized this duty, aptly summarized by the Fourth Circuit in *Woodhous v. Virginia*: A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

The administrators' duty, in these cases, is not one of an absolute insurer who is responsible for every cut and scrape, but rather the duty is to exercise "reasonable" care under all the prevailing circumstances.

Beyond stating this general proposition, however, the courts have not as yet provided necessary dimension to the right. As is too often the case, it is one thing to state a principle; it is quite another thing to establish guidelines which apply the principle in specific circumstances to assure its enforcement.

Tort law imposes upon a custodian "a duty of exercising reasonable care so as to prevent [others] from intentionally harming [one who is in another's custody] or so conducting themselves as to create

---

96 487 F.2d 889 (4th Cir. 1973).
97 Id. at 890 (emphasis added). A Michigan state court, in just recently holding that a prisoner charged with escape could raise the defense of duress from homosexual assaults to the jury, said, "The time has come when we can no longer close our eyes to the growing problem of institutional gang rapes in our prison system." Michigan v. Harmon, 43 U.S.L. W. 2062 (Ct. App., Division 3, May 30, 1974) (in *dicta* the court indicated that the state has an affirmative duty to assure inmate safety.

https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss3/4
an unreasonable risk of harm . . . ."98 Since the constitutional principle borrows much from the tort standard, it requires little imagination to suggest that federal courts, in looking to develop the right to protection from physical harm, likewise look to the tort law's general guidelines for assistance.99

The Restatement of Torts provides that custodians may be held liable only if they have some reason to know or that they "should know" that a particular danger exists.100 Further, the custodian must have some ability to control or prevent the danger.101 In other words, a prison administrator who knows of a dangerous situation and who fails to take necessary measures to alleviate that danger, has not exercised reasonable care.

While these tort law guidelines are of general value, federal courts have been reluctant to strictly apply them. The tort law would redress every attack which meets its test, but federal courts operating under the Civil Rights Act can only redress those attacks which amount to violations of constitutional rights.

An isolated act or omission by a prison official that allows an attack to occur and which involves only simple negligence does not, absent special circumstances, create a constitutional deprivation over which this Court has jurisdiction.102

The reasoning behind this limitation again rises from the limitations of the eighth amendment language. Just as in isolated assaults,103 there is substantial doubt that "mere" negligence and "simple" assaults by fellow prisoners are either "cruel" or "unusual." In attacks by guards we have seen that this eighth amendment problem can be avoided by alternatively relying upon due process prohibitions against official brutality.104 That same option is not as readily available where the assailant is not an official, but an inmate.

98 The Restatement (Second) of Torts §320 (1965) provides, in part:

[O]ne who is required by law to take . . . the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him if the actor

a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

b) knows or should know of the necessity and opportunity for exercising such control.


100 Restatement (Second) of Torts §320, supra note 98.

101 Id.


103 See note 34 supra, and accompanying text.

104 See note 47-53 supra, and accompanying text.
However, the tort law guidelines may be applicable in these situations as well. For the Restatement requires that before liability is imposed upon a custodian, he or she must have known, or should have known, that a particular danger existed which they had the means to control or prevent. This amounts to a failure to act when known dangers are present and appears to constitute a *prima facie* violation of due process. Thus, an inmate’s complaint should allege facts which show that an official knew or should have known of the particular danger complained of, that the official had means available to protect the inmate from the danger, and that the official failed to exercise those means. The due process violation occurs when the knowledgeable official fails to act, and this should constitute the “special” or “egregious” circumstances contemplated by *Penn v. Oliver*.

So, while the right to protection from harm is a recognized legal principal which imposes a duty upon institutional officials to take necessary measures to alleviate known dangers, its scope has been unreasonably limited to situations where prisoners can show that “a pattern of undisputed violence exists,” or that they are faced with a “constant threat of violence and sexual assault . . . .” Use of this standard does reduce the need for complaining groups of prisoners to prove that authorities had knowledge of particular dangers. All they need show in a class action is that the dangers are pervasive throughout the institution, or in one particular area of the institution.

Because administrators are required to protect inmates, and thus they should know about dangerous conditions, the law will impute the necessary knowledge of conditions to them. As we have already seen, correctional authorities are presumed to have been selected for their professional expertise. They are responsible for overall policies and for assuring compliance with the laws. Indeed, in most states they are statutorily charged with a duty of safekeeping. A denial

---

105 See note 98 *supra*, and accompanying text. In Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), cert. denied, Smith v. Curtis, ....., U.S. ......., 94 S.Ct. 2409 (1974), the court held that failure of guards, who were present during the attack, to take remedial action could violate an inmate’s due process right to be “secure in his person.” 489 F.2d at 518, citing Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

106 See Bethea v. Couse, 417 F.2d 504 (10th Cir. 1969), where an inmate alleged that he had been set upon by another inmate, in the presence of a deputy warden and guards who simply stood by and did not stop the assault. The court held that this allegation, if true, stated an eighth amendment violation. Id. at 509.


109 See notes 71-77 *supra*, and accompanying text.

110 See note 71 *supra*, and accompanying text. Many states provide a specific duty to protect inmates from assaults by other inmates. CAL. PENAL CODE ANN. §2652 (West 1970), creates a penal sanction for a “failure to protect.” ILL. ANN. STAT. ch. 38 §1003-6-4 (Smith-Hurd 1973), protects against violence from officers, employees, and “other committed persons.” Michigan imposes a duty to use “all suitable means” to protect inmates

(Continued on next page)
of knowledge about patterns of violence is an admission that they have not properly performed these duties, and in either case there should be no problem in concluding that there actually is, or should have been, sufficient knowledge of the existing dangers. Thus, in *Woodhous v. Virginia*, the Fourth Circuit remanded the case with orders for the district court not to look for knowledge on the part of the administrators, but rather to ascertain "(1) whether there is a pervasive risk of harm to inmates from other prisoners and, if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm."

While establishing the presence of the dangers should not prove too difficult, the harder task will be to show that these correctional "experts" have not done all they could reasonably be expected to do to protect the inmates. In *Kish v. County of Milwaukee,* the named plaintiffs complained that they had been subjected to physical and homosexual assaults by other prisoners while confined in the Milwaukee County Jail, and established that the jail "had long standing problems, including instances of physical and homosexual abuse." The sheriff did not dispute this evidence. Rather, he testified that the jail was overcrowded, making proper segregation of classes of prisoners impossible. He could not improperly release prisoners and, although he personally had lobbied for new facilities and increased appropriations, he had no power to expand his budget.

The court held that the sheriff had acted reasonably in attempting to correct the situation, and therefore was not personally liable to the injured inmates. The problems, said the court, stemmed from a poor physical layout and outmoded facilities rather than from negligence by the sheriff.

Although not every prison administrator is as vigorous a reformer as was the sheriff in *Kish*, even the most lax administrator is bound to have made some efforts at protection with which they will attempt to persuade a court that they "were doing what they could with the money at their disposal." But it is not sufficient for author-
ities to simply show that they have done something; rather, they must show that they have done all those things reasonable under the particular circumstances.\footnote{A favorite ploy of prison officials is to place inmates in "protective segregation" for their "own protection." It is well settled that administrators may constitutionally do so.} Thus, for example in \textit{Kish}, it was too facile to simply allow the sheriff to plead poor facilities, overcrowding, and lack of money. He should have been required to show that, \textit{given those factors}, he took measures to alleviate the dangers. This is so because the simple assertion of lack of funds has never been considered an adequate defense to constitutional violations:

\begin{quote}
[T]he obligation ... to eliminate existing unconstitutional-ities does not depend upon what the Legislature may do, or upon what the Governor may do ... If [the State] is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.\footnote{Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970). Other courts have agreed in the prison context, \textit{e.g.}, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1192-94 (E.D. Ark. 1971); and the Supreme Court has not recognized lack of resources to be an absolute defense in integration suits. \textit{Cf.} Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Griffin v. County School Bd. of Prince Edwards County, 377 U.S. 218, 232-34 (1964); Watson v. City of Memphis, 373 U.S. 526, 537 (1963).}
\end{quote}

Furthermore, it may be possible to demonstrate that \textit{additional} funds are unnecessary — perhaps the jailor could \textit{reallocate} funds and reorder priorities within the institution to assure greater safety.\footnote{For example, in \textit{Wyatt} v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), testimony established that budget revisions would help remedy critical staff shortages and allow for repairs in woefully inadequate mental institutions. A similar tack has been successful in a jail case, Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971).}

In this manner, then, the court is required to focus on the particular situation with which the administrator is faced, and thereby determine whether everything reasonable was done in that situation. In such cases it is useful to seek guidance from other correctional people, from experiences in similar institutions, and from professional manuals and standards.\footnote{For example, the \textit{National Advisory Commission Report}, \textit{supra} note 4, has developed extensive standards and commentary, and there are a number of professional correctional associations which develop such standards, \textit{e.g.}, \textit{American Correctional Association}, \textit{(Continued on next page)}}
If the problem of a shortage of guards is urged, for example, it is important to know whether the people actually on duty were properly trained and deployed, whether persons from the day shift could be reassigned to night duty, and whether the guards who were on duty were properly supervised to assure that their assignments were carried out properly. In one case a court was convinced that a "shortage" could be remedied by redeploying personnel so that there will be at all times not less than two (2) guards on duty on each floor, at least one of whom shall at all times be on patrol of the cell blocks. There shall be a sufficient number of supervisory and relief personnel provided to insure that the required number of guards are on duty and their patrolling activities are carried out.\[120\]

Often security problems are the direct result of the physical plant with which an administrator must deal. Thus, for example, some prisons house offenders in large dormitories, rather than single or double cells, which offer unique opportunities for inmate attacks.\[121\] Officials may assert that such opportunities are impossible to eliminate, and they may ultimately be correct. But that does not satisfy their duty to take all reasonable precautions. Dormitories have traditionally been "protected" in unique fashion. Guards rarely enter and patrol them; rather, they sit in a room at one end of the dormitory, "able to observe but not to control the living units."\[122\] There has been an overreliance on electronic devices such as closed circuit television cameras, which have a limited range, "poor pictures and unreliable performance."\[123\] It should not be enough to allow officials to simply cite the poor construction and the traditional safeguards being taken. They should be required to affirmatively demonstrate why guards do not patrol the dormitories and that the electronic surveillance is in working order and providing prison personnel with a clear picture of the rooms.

In sum, in order for prison protection to be meaningful courts must look behind these so-called justifications and consider reasonable alternatives that could have been tried in order to determine why such measures were not implemented. Ultimately, it may be true in a given case that there was nothing more the administrator could

---

(Continued from preceding page)


\[122\] Id.

\[123\] Id.
have done to protect inmates from one another, and unfortunately, such monuments to the futility of modern corrections are all too common.

Conclusion

Because state courts, despite statutory authorization, have not always afforded protection for their prisoners, inmates have had to seek protection from physical assaults under constitutional principles in federal courts. The federal judiciary, concerned with burgeoning dockets, federal-state comity, and inconsistent interpretations of the eighth amendment, has grafted limitations onto the Civil Rights Act which make any recovery for these prisoners difficult.

The Constitution, however, affords persons the due process right to be free from physical harm at the hands of state officials, and this right is violated by unprovoked guard assaults and failures by prison officials to protect inmates from other prisoners. Where such assaults occur within the scope of an administrator’s responsibility, courts should be increasingly open to imposing liability upon those officials, as well, for in the final analysis, “the soundest and safest security measure of all is the existence of a positive program of inmate activities,”124 which may never occur without the threat of judicial liability.

In the long run, correctional systems must strive for reduced populations, humane environments, and public awareness. By reducing violence in the state institutions, we may also hope to succeed in helping to reduce violence in the streets.

Appendices

To fully comprehend the vacillation facing prisoners with regard to protection from physical harm Appendix A, a state by state survey of pertinent statutes, is presented. The survey, prepared by members of the Cleveland State Law Review staff, is broad in its scope and, while comprehensive, is intended as a representative overview and not a catalogue of every statute in every state. It conveys the absence of any coherent statutory pattern or scheme and thereby stresses the need for careful legislative consideration.

The conflicts between states are obvious. Some states specifically allow corporal punishment, others specifically forbid it. Many of the older codes simply fail to consider administrators’ duties to protect from harm, while more recently drafted provisions, such as in Illinois and Ohio, make limited attempts to fix administrative responsibility.

In fairness to administrators, many have promulgated departmental rules, pursuant to their general authorizing statutes, which attempt to provide responsibilities for personal security. Aside from obvious difficulties in obtaining such internal information there may be questions of enforcing these rules, and rules are often subject to change without notice. Therefore, such regulations are not reflected in this compilation.

Appendix B is simply the proposed standard offered by the National Advisory Commission on Criminal Justice Standards and Goals. The Standard can serve as a model for legislatures attempting to draft meaningful statutes to protect inmates.

These appendices, directed toward legislation for prisoner protection, are recognition that, in the long run, federal courts cannot adequately oversee state prisons in fifty jurisdictions. They can, however, create the constitutional parameters with which future legislation must comply.

APPENDIX A

The following is a survey of state statutes concerning the use of force against prisoners.*

Alabama: ALA. CODE tit. 45 — (1958)

§ 107 — forbids superintendents, officers, and guards from overworking or maltreating any convict or inflicting "any other or

* [Ed. Note]: That portion of each statute dealing with this topic area has either been paraphrased or has been described in a short explanatory note following each citation.
greater punishment than he is authorized by law” to inflict, and establishes a penalty.

§ 110 — fixes the maximum penalty for neglect of duty in regard to treatment of prisoners.

§ 121 — requires separation of prisoners by sex, except husband and wife, and where feasible by race. (A note in the supplement to ALA. CODE tit. 45 § 121 points out that separation by race is now unconstitutional.)

§ 122 — makes it unlawful for a sheriff or jailer to confine white and negro prisoners, or men and women prisoners, except husband and wife, together.

Alaska: ALASKA STAT. — (1962)

§ 33.30.101-080 — establishes control over state prison facilities in the Commissioner of the Department of Health and Welfare and enumerates his duties and powers.

§ 11.05.060 — states that the manner of confinement, treatment and employment of a person sentenced shall be regulated and governed by the law in force prescribing the discipline for the penitentiary to which he is confined.

Arizona: ARIZ. REV. STAT. ANN. — (1956)

§ 31-123 — points out that a person committed shall be actually confined until legally released.

§ 31-64 — establishes penalty for violations of this article. (Article 4 deals with protection of prison labor.)

§ 31-124A — requires the separation of men and women except husband and wife. § 31-124B requires the separation of persons under 18 years of age from adults charged with crime.

§ 31-226 — requires the superintendent of any prison to contact the nearest coroner, who shall conduct an inquest, when a prisoner dies without apparent cause or when a prisoner is killed by accident or while trying to escape.

Arkansas: ARK. STAT. ANN. — (1947)

§ 46-118 — allows the Commissioner to take any necessary steps, including the use of force and arms, to restore order in the event of riot or other violent conduct by any inmate or group of inmates.

California: CAL. PENAL CODE — (West 1970)

§ 2650 — protects prisoners from any injury not authorized by law and authorizes punishment in the same manner as if they were not convicted or sentenced.

§ 2652 — bars cruel, corporal, or unusual punishment and establishes a penalty for violations.

§ 2653 — establishes a penalty for willful inhumanity toward prisoners.
Colorado: COLO. REV. STAT. ANN. — (1963)
§ 105-4-23 — allows the use of force including killing to suppress insurrection by prisoners and to prevent their escape.

Delaware: DEL. CODE ANN. tit. 11 — (1953)
§ 6535 — establishes authority in the Department of Finance to promulgate rules of discipline for institutions.
§ 6517(a)(4) — forbids corporal punishment for violations of rules of institutions.
§ 6505 — gives the Department of Finance exclusive jurisdiction over offenders and persons in custody (among other powers and duties).

Florida: FLA. STAT. ANN. — (1973)
§ 944.34 — allows the use of all necessary means, except punishment injurious to the mind or the body and except cruel and unusual punishment, to maintain order; forbids punishment injurious to the mind or body, cruel and inhuman punishment, and compelling labor without food.
§ 944.36 — establishes cruel treatment of prisoners by prison employees as a felony in the third degree.
§ 944.42 — establishes the use of force by one prisoner serving less than a life sentence against any other prisoner as a second-degree felony if not an assault with intent to commit a felony.

Georgia: GA. CODE ANN. — (1973)
§ 77-110 — lists the duties of the sheriff generally.
§ 77-309 — gives jurisdiction over those sentenced to serve time to the Director of Corrections and enumerates exceptions.
§ 77-9901 — prohibits jailers from inducing a prisoner to become an approver; or from accusing and giving evidence against another by duress; from oppressing any prisoner under his care; and sets a penalty for violations.
§ 77-310 — provides for the classification and segregation of prisoners. It allows separation of juveniles, women, mentally diseased, tubercular, and first-offenders from other prisoners.
§ 77-802 — establishes that there must be a full-time jailer on duty at all times and makes it unlawful to incarcerate a person in a facility without a full-time jailer.

Hawaii: HAWAII REV. STAT. — (1968)
§ 363-4 — describes special powers and duties of the director of social services and housing regarding prisons and jails.

Idaho: IDAHO CODE — (1948)
§ 20-111 — justifies the use of force by penitentiary officers, keepers, and guards to enforce obedience if a convict threatens per-
sonal injury or acts in such manner as to create the reasonable belief that his life or the life of any convict is in danger, or that the convict is attempting to escape; and allows wounding or killing.

§ 20-209 (B) — establishes in the state director of corrections or his designee the responsibility to prevent, control, and suppress riots.

§ 20-501 — authorizes the state board of corrections to contract with another state to detain women convicted of felonies in Idaho.


§ 1005-7-4 — allows the department of corrections to establish rules and regulations for the protection of the persons and property of employees and committed persons.

§ 1003-6-4 — authorizes the use of all suitable means to enforce discipline.


§ 246.8 — authorizes infliction of such penalties as provided by law and rules of the institution [case cited authorizes solitary confinement].

§ 246.32 — allows officers of institutions and their assistants to enforce immediate obedience to lawful authority or lawful command by use of such weapons or other aids as may be effectual, and justifies wounding or killing in the course of enforcing obedience.

§ 246.33 — authorizes killing or wounding in the course of suppressing insurrections and to prevent escapes of prisoners.


§ 21-3425 — defines maltreatment as the intentional abuse, neglect, or ill-treatment of any person whose confinement is involuntary (among others), and classifies maltreatment as a Class A misdemeanor.

§ 75-5252 — establishes general duties of the directors of correctional institutions.

§ 75-5251 — describes the duties of the secretary of corrections.


Const. § 254 — establishes that the Commonwealth has the duty to maintain control of the discipline of convicts.

§ 197.020 — requires regulations to be made by Department of Corrections.

§ 197.065 — provides for classification and segregation of prisoners in penal institutions and transfer between institutions.

§ 197.110 — establishes rules as to classification, work, and pay of prisoners.
Louisiana: **LA. REV. STAT. ANN. — (West 1967)**

§ 15.828 — provides that prisoners are to be treated humanely.
§ 15.029 — establishes rules and regulations for maintenance of good order and discipline; outlaws use of corporal punishment; and provides for classification of prisoners.
§ 15.851 — separates young, first offenders from second offenders.
§ 15.854 — establishes general rules and regulations.

Maine: **ME. REV. STAT. ANN. tit. 34 — (1964)**

§ 7 — establishes rules and regulations for government and discipline of inmates.
§ 552 — requires wardens to keep records of all punishments to prisoners.
§ 595 — authorizes officers to carry and use weapons to enforce obedience.
§ 710 — punishes prisoners for assault on officer or attempt to escape.
§ 808A — allows felons to be transferred from men's reformatory to state prison for reasons of security, interest of the public or other inmates, or because of overcrowding.

Maryland: **MD. ANN. CODE art. 27 — (1971)**

Const. § 6 — imposes duty to hold sheriff harmless against claims by prisoners for injuries.
§ 676 — establishes general rules and regulations.
§ 691 — requires classification of prisoners.
§ 692 — provides that punishment is prescribed and administered by direction of warden or superintendent.

Massachusetts: **MASS. ANN. LAWS ch.127 — (1972)**

§ 1A — requires minimum standards of custody.
§ 20 — requires classification of prisoners.
§ 21 — establishes that prisoners are to be classified considering age, sex, character, conditions, and offenses to promote reformation and safe custody.
§ 22 — requires that prisoners are to be given a single room if possible and minors and persons who have committed infamous crimes are to be separated.
§ 32 — provides that the prisoners are to be treated with the kindness which their obedience, industry, and good conduct merit.
§ 33 — establishes that all means necessary to maintain order and discipline may be used.
§ 38 — establishes that guards may not use gags in maintaining discipline of prisoners.
Michigan: MICH. COMP. LAWS ANN. — (1972)
§ 791.206 — provides for general rules and regulations.
§ 791.264 — establishes that the prisoners shall be classified.
§ 800.41 — allows the use of force to enforce discipline.

Minnesota: MINN. STAT. ANN. — (1972)
§ 243.40 — provides for general rules and regulations.
§ 243.52 — allows officers to use whatever force necessary under the circumstances, including wounding and killing.
§ 243.53 — provides that prisoners are to be given separate cells if possible.
§ 631.471 — imposes a punishment on anyone who inflicts unauthorized injuries on prisoners.

Mississippi: MISS. CODE ANN. — (1972)
§ 47:1-23 — requires classification in county and municipal prisons.
§ 47:1-27 — forbids maltreatment in county and municipal prisons.
§ 47:1-29 — requires that the complaints of prisoners in county and municipal prisons are to be investigated.
§ 47:5-103 — provides that classification is to be made considering age, offense, surrounding circumstances, family background, education, employment experience, and interests and abilities.
§ 47:5-121 — requires that sexes are to be separated.
§ 57:5-145 — establishes general rules and regulations; discourages corporal punishment which must be authorized by the superintendent; any employee violating this section is guilty of a felony and subject to dismissal.
§ 47:5-157 — provides that it is the duty of the corner to conduct an inquest into the death of a prisoner.

Missouri: Mo. ANN. STAT. — (Vernon 1972)
§ 216.090 — requires youthful offenders to be kept separate.
§ 216.205 et seq. — establishes general classification rules.
§ 216.215 — establishes general rules and regulations.
§ 216.325 — requires individual cells to be given to prisoners whenever possible.
§ 216.405 — provides that necessary and proper rules are to be made.
§ 216.450 — prohibits cruel and unusual punishment.
§ 216.455 — provides that incorrigibles are to be separated and disciplined.
§ 94-3917 — provides that officers are to be removed from office and fined for willful inhumanity or oppression towards prisoners.

§ 47-101 — establishes general rules and regulations; describes punishments; and provides that rules are to be made in regard to classification of prisoners considering sex, age, crime, and insanity.
§ 47-115 — establishes that the sheriff is liable for any misconduct of jailers, including negligence.

§ 209.270 — establishes general rules and regulations; and rules and regulations to change prisoners from one grade to another.
§ 209.070 — prohibits cruel and unusual punishment.
§ 209.260 — provides that prisoners are to be graded as to corrigible and incorrigible.
§ 212.010 — imposes punishment for unauthorized injury.
§ 212.020 — establishes that willful inhumanity by guards is prohibited and punishable by fine and imprisonment.

§ 619:9 — explains duties in jails.
§ 619:10 — provides that a jailer is liable for neglect of his duty.
§ 620:7 — provides that prisoners who violate discipline are to be placed in close confinement (House of Correction).
§ 622:14 — establishes that violators of discipline are to be solitary confined or given such other reasonable mode of punishment; prisoners may be segregated.

§ 30:4-6 — establishes a duty to safely keep prisoners.
§ 30:8-6 — provides that damages are recoverable against officers who violate duty imposed by §30:8-5.
§ 30:4-5 — establishes that the chief executive officer of each institution is responsible for the conduct of all employees appointed by him.
§ 30:8-5 — requires that debtors are to be separated from criminals.
§ 30:8-7 — requires that youthful offenders are to be kept separate from other prisoners.
§ 30:4-6 — establishes a duty to receive and safely keep prisoners.

§ 41-1-251 — provides that the employees of the penitentiary, in
conformity with the rules and regulations of the penitentiary, have the duties of custody, government, employment and discipline of the convicts.

§ 42-1-1.1 — provides for the adoption of rules concerning prisoners that “shall best accomplish their rehabilitation.”

§ 42-1-51, 42-1-52 — authorizes the use of force and, limited by exigencies, allows wounding and killing.

§ 40A-22-14 — establishes that male and female prisoners are to be kept in separate cells or rooms, unless such prisoners are man and wife.

§ 40A-22-16 — provides that assault by prisoners on officer or employee is a third degree felony.


Correc. § 46(7-a) — authorizes establishment of rules and regulations for minimum standards of care.

Correc. § 137 — allows the use of all suitable means to enforce discipline.

Correc. § 137 — provides that no employee or officer may “inflict any blows” on a prisoner except in self-defense, “or to suppress a revolt or insurrection.”

Civ. Rights § 79-C — establishes that convicts are under the protection of the law and have the right to injunctive relief for improper treatment when it amounts to a violation of constitutional rights.


§ 148-46 — provides that an officer, overseer or guard shall use any means necessary to enforce discipline.

North Dakota: N.D. CENT. CODE — (1960)

§ 12-47-12 — establishes that, subject to the board of administration and the laws of the state, the warden shall make the rules and regulations.

§ 12-47-23 — provides that all necessary means shall be used to maintain order.

§ 12-47-22 — prohibits communication between male and female inmates.

§ 12-47-26 — requires that the warden and officers shall treat inmates with kindness; prohibits corporal punishment for the violation of rules and regulations.


§ 5145.04 — establishes that it is the duty of the department of corrections to prevent the prisoners from committing crimes and to accomplish the “reformation” of the prisoners.
§ 2921.44(C) — imposes criminal liability for negligence in failure to control an unruly prisoner or failure to prevent physical harm to a prisoner from another prisoner.

§ 2921.45 — provides that no public servant shall knowingly deprive any person of a constitutional or statutory right.

**Oklahoma:** OKLA. STAT. ANN. — (1969)

tit. 57, § 11 — establishes that a prisoner who is refractory or disorderly may be chained or placed in solitary confinement.

tit. 57, § 10 — requires an officer in charge to protect a prisoner from annoyances and insults while he is at labor.

**Oregon:** ORE. REV. STAT. — (1973)

§ 161.205 (2) — provides that an officer may use physical force to the extent he reasonably thinks necessary to maintain discipline.

**Pennsylvania:** PA. STAT. ANN — (1964)

tit. 61, § 4 — requires habitual criminals and evil-inclined prisoners to be segregated.

tit. 61, § 384 — provides that the warden may search anyone suspected of having a weapon.

**Rhode Island:** R.I. GEN. LAWS ANN. — (Supp. 1973)

§ 13-2-6 — establishes that the warden and employees shall perform such duties required by law and prescribed by the department of corrections.

**South Carolina:** S.C. CODE ANN — (1962)

§ 16-234 — provides that negligence by an officer in allowing a prisoner to be taken by a mob is a misdemeanor.

**South Dakota:** S.D. COMPIL ED LAWS ANN. — (1967)

§ 24-2-6 — provides that all necessary means may be used to maintain order and enforce obedience.

§ 24-2-10 — establishes that prisoners are under the protection of the law and the infliction of any injury unauthorized by law is punishable.

**Tennessee:** TENN. CODE ANN. — (Supp. 1973)

§ 41-341 — requires that the warden is to make known to incoming prisoners regulations concerning the police and government of the prison and the state law as it relates to escapes.

§ 41-1804 — establishes that the director of rehabilitation services is to prepare rules and regulations governing the rehabilitation program.

§ 41-301 — provides that the warden has the duty of treating the prisoners with humanity and kindness and protecting them from harsh treatment.

§ 41-1804 — provides that first offenders receive special rehabilitation services.
  art. 6166a — establishes that the policy of the department of corrections is to make the prison system self-sustaining.
  art. 6166a — requires that the prisoners receive humane treatment.

Vermont: VT. STAT. ANN. — (Supp. 1973)
  tit. 28, § 149 — establishes that the warden shall make regulations with the approval of the commissioner.
  tit. 28, § 852 — requires prisoners to be brought before a disciplinary committee before punishment is inflicted.
  tit. 28, § 853 — provides that no cruel or inhuman punishment may be used on any person.

Utah: UTAH CODE ANN. — (1953)
  § 64-9-39 — allows corporal punishment, but not brutal or inhuman punishment.
  § 64-9-40 — provides that officers may use all suitable means to maintain discipline.
  § 76-7-11 — establishes that a convict who commits an assault on any person is guilty of a felony.

Virginia: VA. CODE ANN. — (1972)
  § 53-55 — prohibits whipping or any similar corporal punishment.
  § 53-42 — requires youthful prisoners to be separated from hardened criminals in sleeping quarters if possible.

  § 72.08.120 — establishes that the director shall make the rules and regulations.
  § 9.33.020 — provides that no violence or intimidation may be used to extort a confession.
  § 9.92.110 — provides that convicts are to be afforded the protection of the law as if they were not prisoners.

West Virginia: W. VA. CODE ANN. — (1971)
  § 25-1-5 — establishes that the state commissioner of public institutions has the power to adopt rules and regulations.
  § 28-5-3 — provides that the warden shall be in charge of the internal police and management of the penitentiary.
  § 28-5-5 — requires that the guards are to maintain order and enforce discipline.

Wisconsin: WIS. STAT. ANN. — (1971)
  § 46.05 — provides that the warden and those employees to whom he delegates the power have the power of constables upon the grounds of the institution.
§ 53.08 — establishes that prisoners are to be treated with kindness and prohibits corporal punishment.
§ 940.29 — imposes a fine or imprisonment for mistreatment of prisoners.

**Wyoming**: WYO. STAT. ANN. — (1971)

§ 6-80 — establishes that treating an inmate with unnecessary severity, hardness or cruelty is punishable by a fine and imprisonment.

**APPENDIX B**

National Advisory Commission on
Criminal Justice Standards and Goals

**STANDARD 2.4 — Protection Against Personal Abuse**

Each correctional agency should establish immediately policies and procedures to fulfill the right of offenders to be free from personal abuse by correctional staff or other offenders. The following should be prohibited:

1. Corporal punishment.
2. The use of physical force by correctional staff except as necessary for self-defense, protection of another person from imminent physical attack, or prevention of riot or escape.
3. Solitary or segregated confinement as a disciplinary or punitive measure except as a last resort and then not extending beyond 10 days' duration.
4. Any deprivation of clothing, bed and bedding, light, ventilation, heat, exercise, balanced diet, or hygienic necessities.
5. Any act or lack of care, whether by willful act or neglect, that injures or significantly impairs the health of any offender.
6. Infliction of mental distress, degradation, or humiliation.

Correctional authorities should:

1. Evaluate their staff periodically to identify persons who may constitute a threat to offenders and where such individuals are identified, reassign or discharge them.
2. Develop institution classification procedures that will identify violence-prone offenders and where such offenders are identified, insure greater supervision.
3. Implement supervision procedures and other techniques that will provide a reasonable measure of safety for offenders from the attacks of other offenders. Technological devices such as closed circuit television should not be exclusively relied upon for such purposes.

Correctional agencies should compensate offenders for injuries suffered because of the intentional or negligent acts or omissions of correctional staff.
# APPENDIX C

**VIOLENCE STATISTICS FOR 1972 AND 1973**

Results of the American Correctional Association Survey

**July 17, 1974**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>7 10</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Alaska</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Arizona</td>
<td>0 4</td>
<td>0 1</td>
<td>0 0</td>
<td>2 0</td>
<td>0 0</td>
<td>0 0</td>
<td>2 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Arkansas</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>California</td>
<td>19 35</td>
<td>18 9</td>
<td>0 0</td>
<td>1 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Colorado</td>
<td>1 3</td>
<td>3 3</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>2 1</td>
<td>0 0</td>
</tr>
<tr>
<td>Connecticut</td>
<td>0 0</td>
<td>2 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
</tr>
<tr>
<td>Delaware</td>
<td>0 4</td>
<td>1 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>D.C.</td>
<td>8 4</td>
<td>0 2</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Florida</td>
<td>6 9</td>
<td>1 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Georgia</td>
<td>1 3</td>
<td>1 2</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Idaho</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Illinois</td>
<td>1 0</td>
<td>4 1</td>
<td>0 2</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Indiana</td>
<td>2 2</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Iowa</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Kansas</td>
<td>1 4</td>
<td>3 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
</tr>
<tr>
<td>Kentucky</td>
<td>7 4</td>
<td>1 2</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>1 1</td>
</tr>
<tr>
<td>Louisiana</td>
<td>12 8</td>
<td>1 1</td>
<td>0 0</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>4 0</td>
</tr>
<tr>
<td>Maine</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Maryland</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Massachusetts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>1 3</td>
<td>1 1</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Minnesota</td>
<td>0 1</td>
<td>4 2</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Mississippi</td>
<td>0 2</td>
<td>0 0</td>
<td>0 0</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 1</td>
</tr>
<tr>
<td>Missouri</td>
<td>6 5</td>
<td>0 4</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Montana</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>1 0</td>
</tr>
<tr>
<td>Nevada</td>
<td>3 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1 1</td>
<td>2 2</td>
<td>0 0</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>New Mexico</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>0 0</td>
<td>19 11</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>North Carolina</td>
<td>0 3</td>
<td>3 2</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>North Dakota</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Ohio</td>
<td>3 4</td>
<td>1 2</td>
<td>0 0</td>
<td>2 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>3 4</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>4 4</td>
<td>3 2</td>
<td>3 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Oregon</td>
<td>0 0</td>
<td>1 1</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1 1</td>
<td>3 0</td>
<td>0 0</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>South Carolina</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>South Dakota</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Tennessee</td>
<td>5 3</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Texas</td>
<td>1 0</td>
<td>5 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Utah</td>
<td>1 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Vermont</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Virginia</td>
<td>8 2</td>
<td>0 1</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
</tr>
<tr>
<td>Washington</td>
<td>5 4</td>
<td>6 6</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>7 5</td>
</tr>
<tr>
<td>West Virginia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>0 0</td>
<td>3 3</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>0 0</td>
<td>10 5</td>
</tr>
<tr>
<td>Wyoming</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: "—" no figures reported