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Excessive Force in the New York City Jails: Litigation and Its Lessons

John Boston*

INTRODUCTION

The New York City Legal Aid Society, through its Prisoners' Rights Project (PRP),¹ has fought since PRP's founding in 1971 to protect the human rights of prisoners. In particular, we have wrestled with the problem of excessive force by New York City jail staff through individual and class action litigation² and through investigations and demands for administrative redress on behalf of injured prisoners. Our focus has been on reforming the systems that operate to control force in correctional settings including written policy, training, investigations, discipline, and supervision of staff.

The single most important lesson we have taken from twenty years of litigation is that the controlling force in jails and prisons is a function of correctional leadership. When supervisory staff make a visible, demonstrable commitment to curb misuse of force and hold staff accountable, inmates will not get brutalized. When correction supervisors turn a blind eye toward misconduct by condoning

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1. See generally Criminal Defense Practice, <http://www.legal-aid.org/index.htm> (follow "Practice Areas—The Criminal Defense Practice" hyperlink; then follow "Prisoners' Rights Project" hyperlink).

2. See *Ingles v. Toro* (*Ingles 2006*), 438 F. Supp. 2d 203 (S.D.N.Y. 2006) (approving settlement in a city-wide class action lawsuit challenging the use of excessive force); *Valvano v. McGrath*, 325 F. Supp. 408 (E.D.N.Y. 1970) (prohibiting intimidation of witnesses in a case challenging abuse of prisoners at Queens House of Detention); *Martinez v. Robinson*, No. 99 Civ. 11911, 2002 WL 424680 (S.D.N.Y. Mar. 19, 2002) (addressing procedural and discovery issues in individual damage claims based on jail beatings).

In recent years we have prevailed in four class action lawsuits challenging the use of excessive force in the jail system, and we have recently settled a fifth. See *infra* note 8.

excessive force, overlooking false reports, and imposing inadequate punishment when brutality is identified, they send a signal to line staff that they can control troublesome, disruptive or defiant prisoners simply by beating them.

EXCESSIVE FORCE IN AMERICAN PRISONS AND JAILS

Publicity about the abuses of prisoners at the Abu Ghraib prison in Iraq prompted the obvious question: does it happen in the United States as well? The answer is yes, though usually in less bizarre forms.³ Most incidents of excessive force fall into several familiar patterns, usually related to actual or perceived challenges to staff authority. These include:

- Mass reprisals for a disruption or disturbance in prison activities. The best known incident of such mass reprisals occurred after the violent retaking at Attica Correctional Facility in 1971.⁴ Such incidents are recurrent if not frequent; for example, there has been more than one instance of gauntlet beatings of prisoners—a tool utilized in the Attica reprisals—in the New York City jails,⁵ as well as more localized reprisal incidents.⁶

3. Sometimes, however, the level of physical abuse and degradation is nothing short of stunning. *See, e.g.*, Parrish v. Johnson, 800 F.2d 600, 602–03 (6th Cir. 1986) (officer waved a knife in a paraplegic prisoner's face, extorted cookies and potato chips from him at knife-point, and left him lying in his own waste); Oses v. Fair, 739 F. Supp. 707, 709 (D. Mass. 1990) (correction officer placed a revolver in a prisoner's mouth, cocked it, and made the prisoner kiss his wife's shoes after the prisoner spread a scurrilous rumor about her).

4. *See generally* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (Bantam ed. 1972). *See id.* chs. 18–19 (regarding reprisals).

5. In 1990 corrections officers aggrieved by an inmate assault on an officer and by court-ordered revisions in the city's use of force policy seized and occupied the only access point from land to Rikers Island. *See* N.Y. CITY DEP'T OF INVESTIGATION, REPORT TO THE MAYOR: THE DISTURBANCE AT THE RIKERS ISLAND OTIS BANTUM CORRECTIONAL CENTER, AUGUST 14, 1990: ITS CAUSES AND THE DEPARTMENT OF CORRECTION RESPONSE (1991) [hereinafter OBCC REPORT]. As the occupation ended, there was a disturbance in one of the jails; officers who reported to that jail engaged in gauntlet beatings of prisoners. *Id.* at 205 n.196. A few years earlier, correction officers at Rikers engaged in gauntlet beatings of prisoners transferred from one jail to another after a disturbance. Fisher v. Koehler, 692 F. Supp. 1519, 1536–37 (S.D.N.Y. 1988), *injunction entered*, 718 F. Supp. 1111 (S.D.N.Y. 1989), *aff'd*, 902 F.2d 2 (2d Cir. 1990).

6. An example of a smaller-scale reprisal can be seen in the case of Jamal Butler, a named plaintiff in PRP's recently settled class action lawsuit concerning the use of excessive

- Individualized reprisals against prisoners who are deemed, correctly or not, to have disrupted operations or behaved disrespectfully toward staff.⁷ In some such instances there may have been a need for force *initially*, but at some later time, after the need for force had passed, the prisoner was subjected to retaliatory assault.⁸ In other cases prisoners

force to control prisoners in a New York City jail housing unit who shouted at staff when they were beating a prisoner. A “response team” was dispatched to the unit and sprayed the prisoners indiscriminately with pepper spray and then entered the unit, swinging batons and striking prisoners. Mr. Butler was thrown to the floor and struck with batons, then choked by an officer with a tee-shirt, and beaten further before being taken to the jail intake area. About an hour later, members of the Department of Correction’s Emergency Response Unit entered the cells where Butler and other prisoners who had been removed from the housing unit were being held and punched and kicked them, dragging Butler from under a bench to do so. This second incident went entirely unreported, in violation of the city’s policy that all uses of force must be reported in detail. Following the assault, Mr. Butler was found to have head lacerations, ligature marks (an injury caused by strangling), and multiple contusions with edema; he was sent to a hospital emergency room for suturing. Fourth Amended Complaint at paras. 96–103, *Ingles v. Toro*, No. 01 Civ. 8279 (S.D.N.Y. 2003). Mr. Butler’s claim in *Ingles* was resolved with a monetary settlement. *Ingles 2006*, 438 F. Supp. 2d at 210 n.3 (noting settlement of all damages claims).

This incident is similar to one documented in an earlier Rikers Island use of force trial in which a squad of officers came to a housing unit where prisoners had been making noise after lights out and threw numerous prisoners out of bed. Prisoner Rory Hartley, who was not even present during the disruptions that had occurred earlier in the day, was beaten and kicked by several officers and sustained a facial fracture. *Fisher*, 692 F. Supp. at 1533–34.

7. A recent example is *Jackson v. Austin*, 241 F. Supp. 2d 1313 (D. Kan. 2003), in which a sixty-year-old prisoner with a knee injury was sitting in the prison clinic rather than standing in the medication line as required by prison policy. *Id.* at 1316. An officer told the prisoner to stand up, refused to look at his medical excuse, and then (with other officers) took the prisoner to the floor, reinjuring the prisoner’s knee in the take down. *Id.* at 1317. The officers dragged the prisoner by his arms about fifty yards and handcuffed him so tightly his hands swelled. *Id.*; see also *United States v. Serrata*, 425 F.3d 886, 890–91, 895–96 (10th Cir. 2005) (affirming criminal civil rights conviction of an officer where a prisoner behaved disruptively and disobediently in the prison dining hall, and was removed from the area and beaten while in handcuffs by several officers; also noting evidence that a superior officer orchestrated a cover-up by directing officers to file false reports and directing one officer to punch himself in the face to support a claim that the prisoner had assaulted him).

8. The Supreme Court’s leading case on excessive force in prisons, *Hudson v. McMillian*, 503 U.S. 1 (1992), is instructive. In that case the prisoner stated that he had an argument with a staff member. *Id.* at 4. As he was being escorted, handcuffed and shackled, the officer punched him in “the mouth, eyes, chest, and stomach” while another officer held him from behind and “kicked and punched him.” *Id.* A supervisor watched the beating and told the officers “not to have too much fun.” *Id.* Mr. Hudson suffered bruises and swelling of the face, mouth, and lip; loosened teeth; and cracked his partial dental plate. *Id.* After trial, a federal court found that force had been used unnecessarily and awarded damages. *Id.*

An even more horrifying example is *Estate of Moreland v. Dieter*, 395 F.3d 747, 751–53

were beaten simply for complaining about conditions or denial of services.⁹ We have received many complaints from prisoners in New York City jails who have been taken to holding pens after disputes with staff members and have later been subjected to retaliatory beating in the holding pen area. Prisoners with mental illnesses are especially at risk for such treatment if their illnesses lead them to act aggressively or offensively.¹⁰

- Excessive force in controlling violent conduct by prisoners.¹¹

(7th Cir. 2005), *cert. denied*, 125 S. Ct. 2915 (2005), in which a recently arrested detainee who had provoked a confrontation through verbal abuse while in a jail's "drunk tank" was pepper sprayed, had his head smashed against walls (first in his cell and later in a shower room), and was then shackled in a restraint chair where he was further beaten and pepper sprayed. *Id.* at 751–53. He was found unconscious by staff on the next shift and was returned to the drunk tank, where he died of a subdural hematoma. *Id.* at 753.

9. For example, in *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), a diabetic traffic offender persisted in complaining that he needed food to avoid illness; as a result of his persistence he stated that he was thrown to the ground and kicked, punched, poked with batons, and pepper sprayed. *Id.* at 412. This behavior continued after he was taken to a medical observation cell. *Id.* The officers denied kicking him or striking him with batons, alleging they only used enough force to curb his violent resistance. *Id.* at 413. However, he was later found to have a variety of injuries including a perforated eardrum and three fractured ribs. *Id.* at 412.

Similarly, Thomas Pizzuto, a misdemeanant held in the Nassau County Correctional Center in Long Island, was brutally beaten in his cell by several officers, while others looked on, after he loudly demanded his court-ordered methadone treatment. *Pizzuto v. County of Nassau*, 239 F. Supp. 2d 301, 306 (E.D.N.Y. 2003). A supervisor prepared a report saying he had fallen in the shower. *Id.* at 307. Five days later he died of a ruptured spleen. *Id.*

10. For example, Shawn Davis, a named plaintiff in PRP's recently settled class action lawsuit about systemwide excessive force, alleged that in May 2002 he became upset because he was not provided his psychiatric medication and threw a plastic chair on his housing unit. He was subdued and handcuffed by correctional staff. He was then taken to a receiving room cell where officers repeatedly struck him in the face and body, knocking him to the floor, and an officer gratuitously kicked him in the eye, rupturing his eyeball. Fourth Amended Complaint, *supra* note 6, paras. 58–64. The Department of Correction commenced an investigation, which the Department of Investigation then took over. However, the investigation remains pending more than three years later. Mr. Davis's claim was resolved with a monetary settlement. *Ingles 2006*, 438 F. Supp. 2d at 210 n.3. Similarly, in *United States v. Donnelly*, 370 F.3d 87 (1st Cir. 2004), a corrections officer pleaded guilty to criminal charges of violating the civil rights of prisoners by beating a prisoner who engaged in verbal misconduct stemming from his Tourette's syndrome, among other unconstitutional acts. *Id.* at 89.

11. *See, e.g., Sikes v. Gaytan*, 218 F.3d 491, 492 (5th Cir. 2000) (in which a prisoner proved to a jury that after an altercation in which he spit in a guard's face, the guard took him to the ground, punched him in the face five or six times, and jumped up and down on his arm causing a dislocated left shoulder, injuries to his left elbow, conjunctival hemorrhaging to his

- Excessive or unnecessary force in suppressing disobedient but nonviolent conduct.¹²

A closely related phenomenon is the abuse of restraining devices for punitive purposes or in a punitive manner. Examples include the Alabama “hitching post” practice recently held unconstitutional by the Supreme Court¹³ and the New York City restraint policy, recently modified in the face of pending litigation.¹⁴

left eye, loss of vision in his left eye, and severe bruising and lacerations to his face); *see also* Orwat v. Maloney, 360 F. Supp. 2d 146, 151, 154 (D. Mass. 2005) (rejecting the claims of the defendant officer who stated that he had acted in self-defense by breaking a prisoner’s jaw, which required surgery and several weeks in the prison infirmary, because the plaintiff had thrust his finger in the officer’s face).

12. *See* Jackson v. Johnson, 118 F. Supp. 2d 278 (N.D.N.Y. 2000), *aff’d in part and appeal dismissed in part*, 13 F. App’x 51 (2d Cir. 2001). In *Jackson*, an incarcerated juvenile delinquent went to the bathroom without an escort and was then confronted by staff; after he “balled his fists and glared,” several of them “initiated a physical restraint technique” and continued it for twenty minutes after he lost consciousness. *Id.* at 283. Staff utilized this technique a second time when the prisoner seemed to be disobeying instructions about clearing a food tray. *Id.* at 285. Because of these attacks he was permanently mentally and physically injured. *Id.*; *see also* Bozeman v. Orum, 422 F.3d 1265, 1268–72 (11th Cir. 2005) (holding a factual question of unconstitutional force was presented by evidence that the seventeen-year-old plaintiff, who engaged in deranged behavior including drinking toilet water and spitting it at officers, was subdued in his cell by officers who continued to place their weight on his back after he was subdued, asphyxiating him).

In the New York City jails, there are recurrent incidents in which “force [is] used as a first resort in reaction to any inmate behavior that might possibly be interpreted as aggressive. . . .” *Fisher v. Koehler*, 692 F. Supp. 1519, 1538 (S.D.N.Y. 1988), *injunction entered*, 718 F. Supp. 1111 (S.D.N.Y. 1989), *aff’d*, 902 F.2d 2 (2d Cir. 1990). Recent examples, cited in the recently concluded *Ingles* litigation, include:

- an inmate “took a couple of steps” toward an officer “in a threatening manner” and the officer punched him;
- a mentally impaired prisoner tried to “push past” an officer to use the clinic bathroom; the officer responded by striking the inmate multiple times in the face and body;
- a prisoner was “taunting” a correctional officer, who responded by delivering multiple blows to the prisoner’s face;
- a prisoner was observed striking his head against a bathroom stall door; an officer entered the holding pen and told him to stop; the inmate advanced towards the officer who then “delivered several punches to the inmate’s head and body.”

Report of Plaintiff’s Expert, Steve J. Martin at 18–26, *Ingles v. Toro*, No. 01 Civ. 8279 (S.D.N.Y. Sept. 27, 2004).

13. *Hope v. Pelzer*, 536 U.S. 730 (2002), *remanded by* 304 F.3d 1331 (11th Cir. 2002).

14. New York jail officials began in the mid-1990s to require any prisoner with a record of the use or possession of a weapon in jail to wear leg irons, handcuffs affixed to a waist chain,

EXCESSIVE FORCE AND THE CONSTITUTION

The constitutional standards for use of force in prisons and jails grant wide latitude to corrections officers. It has long been acknowledged that “not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.”¹⁵ More recently, the Supreme Court has held that excessive or unnecessary force by prison staff only violates the Eighth Amendment’s prohibition on cruel and unusual punishment¹⁶ “[w]hen prison officials maliciously and sadistically use force to cause harm.”¹⁷ *De minimis* force, therefore, does not violate the Eighth Amendment.¹⁸ However, if malicious and sadistic intent¹⁹ is established serious injury need not be shown to constitute a violation of the Eighth Amendment.²⁰

and “security mitts” (flexible tubes that covered the hands and prevented the prisoner from picking up or manipulating objects). Such prisoners were also to be handcuffed behind the back when transported outside the jail (mostly to court). Prisoners routinely remained in those restraints for as many as twelve to fourteen hours, and many reported excruciating pain and sometimes injury from the protracted rear-cuffing. The city refused to modify the restraint procedures so the prisoners could be handcuffed in front or at their sides despite the lack of any apparent security need to rear-cuff. In addition, these restraint rules were applied to prisoners whose records of weapons use or possession were trivial (for example, an infirmary prisoner who defended himself with his crutch) or ancient (as long as eleven years in the past). PRP obtained several orders limiting the practice. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001); Benjamin v. Fraser, No. 75 Civ. 3073, 2002 WL 31845111 (S.D.N.Y. Dec. 16, 2002). While our appeal of the 2002 decision was pending, the city modified the procedure to eliminate rear-cuffing.

15. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

16. U.S. CONST. amend. VIII.

17. Hudson v. McMillian, 503 U.S. 1, 9 (1992).

18. *Id.* at 9–10.

19. Malicious and sadistic intent generally must be inferred from the circumstances and the actions of staff members. Skrtich v. Thornton, 280 F.3d 1295, 1301–02 (11th Cir. 2002) (citing *Hudson*, 503 U.S. at 708; *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000), *aff’d in part, rev’d in part, and remanded* by 103 F. App’x 434 (2004); *Miller v. Leathers*, 913 F.2d 1085, 1088 (4th Cir. 1990) (en banc)) (holding that courts should consider the need for force, the relation between the need and the force used, the threat reasonably perceived, and efforts to temper the severity of response).

20. *Harris v. Chapman*, 97 F.3d 499, 505–06 (11th Cir. 1996) (holding that more than *de minimis* force was used where an officer snapped the plaintiff’s head back in a towel, kicked him, and subjected him to racial abuse).

USE OF FORCE AND THE FEDERAL COURTS IN NEW YORK CITY

Use of force in the New York City jails has been scrutinized in a series of class action lawsuits that we have brought challenging excessive force at particular jails or units. We have prevailed in all of those lawsuits, and staff violence has been significantly reduced in the jails subject to the resulting federal court orders. This experience conveys three significant lessons: the widespread use of violence is unnecessary to keep order in prison; prison force policies can be remedied without compromising prison safety and security; and that, even in light of these facts, it has taken external pressure, in the form of litigation, to achieve even localized reform in this large jail system.

Our first challenge to excessive force concerned conditions in the “prison wards” of the New York City hospitals, where prisoners are housed when jails cannot meet their medical or mental health needs.²¹ The case was settled with a consent judgment which resolved issues concerning the use of force, living conditions, and mental health and medical treatment within the wards.²² The consent judgment addressed the use of force problem for the population of prisoners afflicted with mental illness by restricting the correctional staff to security duties and removing them from their service and escort responsibilities within the wards.²³ Additionally, the consent judgment required officers to be screened personally by the respective wards’ commanding officer before assignment and excluded officers with pending disciplinary charges or recent administrative discipline related to the use of force.²⁴ Complaints of excessive force from the prison wards declined drastically as a result of this consent judgment.

A subsequent challenge, in *Fisher v. Koehler*, addressed both excessive force by staff and violence among inmates at the jail for sentenced misdemeanants on Rikers Island.²⁵ Despite the low-

21. *Reynolds v. Sielaff*, No. 81 Civ. 101 (S.D.N.Y. 1990).

22. Order and Consent Judgment Approving Class Action Settlement, *Reynolds v. Sielaff*, No. 81 Civ. 101 (S.D.N.Y. Oct. 1, 1990).

23. *Id.* paras. 43–44.

24. *Id.* paras. 43–48.

25. *Fisher v. Koehler*, 692 F. Supp. 1519 (S.D.N.Y. 1988), *injunction entered*, 718 F.

security population, violence was so prevalent that the court found that it constituted cruel and unusual punishment in violation of the Eighth Amendment: “Systematic deficiencies in the operation of CIFM . . . have led to a world where inmates suffer physical abuse, both by other inmates and by staff, in a chillingly routine and random fashion.”²⁶ The court found a recurrent pattern of

- 1) use of force out of frustration in response to offensive but non-dangerous inmate goading; 2) officers’ use of excessive force as a means of obtaining obedience and keeping order; 3) force used as a *first* resort in reaction to any inmate behavior that might possibly be interpreted as aggressive; and 4) serious examples of excessive force by emergency response teams.²⁷

It concluded that the jail’s “failure to guide and train its officers in the correct use of force and its failure to monitor, investigate and discipline misuse of force have allowed—and indeed even made inevitable—an unacceptably high rate of misuse of force by staff on inmates.”²⁸ The court ordered the agency to reform their written policies regarding use of force, training, investigation of uses of force, and discipline of staff members found to have used excessive or unnecessary force.²⁹ Several years later, jail records showed that uses of force by staff had declined to about one-third of the per capita level demonstrated at the time of trial.³⁰

During the same period as *Fisher*, we brought a challenge against the use of excessive force in the Brooklyn House of Detention in *Jackson v. Freckleton*.³¹ After *Fisher* was resolved, *Jackson* was settled on terms similar to *Fisher* with the added requirement of installing video cameras in the jail’s intake area, where the brutality

Supp. 1111 (S.D.N.Y. 1989), *aff’d*, 902 F.2d 2 (2d Cir. 1990).

26. *Id.* at 1521.

27. *Id.* at 1538.

28. *Id.* at 1558.

29. *See Fisher*, 718 F. Supp. at 1113.

30. This analysis, performed under my supervision and on file with the Prisoners’ Rights Project, reviewed jail records produced pursuant to the court’s injunction as compared to the records admitted in evidence at trial to show the prevalence of use of force.

31. *Jackson v. Freckleton*, CV 85-2384 (E.D.N.Y. Nov. 26, 1991).

had been concentrated.³² Following *Jackson*, complaints of misuse of force to PRP also diminished drastically.

These three cases proved the feasibility and effectiveness of specific measures that could reduce staff violence. Unfortunately, the Department of Correction did not roll out system-wide reform; it quarantined it. At the other jails, the Department failed to hold supervisors accountable unlike those under court scrutiny. They ignored the obvious proposition that where cameras were installed prisoners rarely were beaten. They refused to reform their system of investigating and reporting even after a court had found it contributed to a pattern of unconstitutional misuse of force.³³ Most significantly, the Department turned a blind eye and a deaf ear to the fact that scores of prisoners were being severely injured in “use of force applications” in which the necessity of such force was questionable at best.

We continued to receive numerous complaints of staff assaults by staff, many involving serious injuries. These complaints were especially prevalent at the Central Punitive Segregation Unit (CPSU) on Rikers Island, this site of our next class action, *Sheppard v. Phoenix*.³⁴ That unit, created in 1988 to house all adult male prisoners subject to discipline, was staffed by officers who were recruited directly from the Training Academy without any prior jail experience.³⁵ We documented a well-organized culture of systematic staff violence and intimidation in the unit, which was fostered by years of supervisory neglect and encouragement.³⁶ Both the pattern of brutality and many of the individual complaints were so extreme³⁷

32. Order Approving Stipulation of Settlement and Entry as Consent Judgment at para. 16, *Jackson v. Freckleton*, CV 85-2384 (E.D.N.Y. Nov. 26, 1991).

33. See *Fisher*, 692 F. Supp. at 1558.

34. 210 F. Supp. 2d 450 (S.D.N.Y. 2002).

35. We later learned that officers were selected for the unit based on their imposing size. Declaration of Plaintiff’s Counsel, Jonathan S. Chasan at para. 24, *Sheppard v. Phoenix*, No. 91 Civ. 4148 (S.D.N.Y. June 26, 1998).

36. See *id.*

37. The brutal, out of control behavior of CPSU staff at this time is illustrated by evidence of “greeting beatings,” administered on intake to prisoners being disciplined for altercations with staff; the use of “throw down” weapons by some corrections staff to help fabricate justifications for their uses of force; officers striking each other in the face to create visible minor injuries that would support their cover stories of being attacked by prisoners; the practice of taking prisoners to isolated areas such as stairwells so they could be beaten without witnesses

that the United States Attorney for the Southern District of New York, in cooperation with the Bronx District Attorney's Office and the city's Department of Investigation, brought a number of criminal prosecutions against officers, some resulting in prison sentences.³⁸ Unfortunately, the pattern of abuse we exposed and then helped to reform in the CPSU was far from unique.³⁹

In *Sheppard* we reached an agreement on how to curb violence in the CPSU by entering into a consent judgment, on the eve of trial, addressing the city's use of force policies regarding training, supervision, investigation, and staff discipline, as well as the administration of the segregation unit.⁴⁰ The widespread installation of recording video cameras in the unit was a critical part of these reforms. Initially, there was considerable resistance to the implementation of the reforms, stemming largely from lack of supervisory diligence. A four-year process of judicial supervision with the assistance of two "joint expert consultants" was necessary in

(sometimes after calling an activity such as recreation and letting the target prisoner out of his cell last so he could be isolated easily); holding inmates' heads in toilet bowls and flushing the toilets; making prisoners who entered the unit with tobacco, which was contraband, eat their cigarettes; and fights between inmates staged by staff members and referred to as "cockfights." Chasan, *supra* note 36, paras. 31–33, 39, 42.

When some video cameras were installed, they were repeatedly turned away to face walls and ceilings. *Id.* para. 71. The warden overseeing the CPSU admitted that staff brutality was "ingrained in the culture" of the Department of Correction and was "part of the overall operations of the jail." *Id.* para. 47.

38. *Ex-Guard Is Sentenced in Beating at Rikers*, N.Y. TIMES, Apr. 5, 1997, at 27 (noting two officers sent to prison); Dan Janison, *Rikers Guards Are Acquitted*, NEWSDAY, May 7, 1998, at A32 (noting five convictions and seven acquittals).

39. For example, in *United States v. Donnelly*, 370 F.3d 87 (1st Cir. 2004), in which a correction officer was sentenced to prison for crimes including conspiracy to violate the civil rights of detainees, it was documented that he and other officers and supervisors "had an unwritten agreement to use unjustified, excessive force to punish detainees who 'disrespected' the officers, 'put hands' on the officers, or otherwise misbehaved. The agreement led to the use of excessive force in order 'to teach the inmates a lesson.'" *Id.* at 89. Similarly, in the federal prison at Florence, Colorado, a gang of prison staff members who called themselves "the Cowboys" operated for several years, assaulting prisoners they considered to be disciplinary problems and fabricating cover stories to justify their actions. See *Turner v. Schultz*, 187 F. Supp. 2d 1288, 1290 (D. Colo. 2002) (noting several indictments and two guilty pleas arising from the activities of the Cowboys); see also Jennifer Hamilton, *Three Former Federal Prison Guards in Colorado Convicted in Inmate Beatings*, ASSOCIATED PRESS, June 25, 2003 (noting subsequent convictions at trial).

40. Stipulation of Settlement, *Sheppard v. Phoenix*, No. 91 Civ. 4148 (S.D.N.Y. July 10, 1998); see also *Sheppard v. Phoenix*, No. 91 Civ. 4148, 1998 WL 397846 (S.D.N.Y. July 16, 1998).

order to ensure that the settlement was carried out.⁴¹ When this agreement was implemented, the use of injurious force against prisoners plummeted, as did the frequency of injuries to correctional staff.⁴² The court terminated its involvement on the ground that it was no longer necessary.⁴³

Once more, despite the success of the settlement and the extensive experience gained from its implementation, the Department of Correction did not extend the newly implemented remedial measures—the use of video cameras, investigative protocols, training of investigators, and greater supervisory diligence—beyond the segregation unit. Complaints to PRP of serious physical abuse of prisoners by staff continued unabated. As a result, PRP, in conjunction with the law firms of Emery Celli Brinckerhoff & Abady LLP and Sullivan & Cromwell, P.C., filed a new lawsuit addressing the continued excessive force in all the New York City jails which had not already been the subject of court orders.⁴⁴ This case sought damages for the twenty-two named plaintiffs (who sustained injuries at the hands of correctional staff, including broken bones, facial lacerations, internal injuries, and a ruptured eyeball) and injunctive relief for the class of jail prisoners.⁴⁵

41. Sheppard v. Phoenix, 210 F. Supp. 2d 450, 460 (S.D.N.Y. 2002). The joint expert consultants—Norman Carlson, former director of the federal Bureau of Prisons, and Steve J. Martin, a former official of the Texas Department of Corrections—served a function comparable to that of a special master or court monitor. *Id.* at 452–53.

42. *Id.* at 458.

43. *Id.* at 460. From 1997 (the last year before the settlement) to 2001 the number of more serious and injurious use of force incidents decreased from 177 to 15. *Id.* at 458. While we believe that this decrease was exaggerated to some degree by inconsistent classification practices, the reduction in injurious force was nonetheless enormous. (The overall number of reported uses of force increased rather than declining, which we believe reflects an improvement in record-keeping; before the settlement, many less serious uses of force were not reported at all despite the jail system's rules.) The drastic drop in injurious force is reflected in the fact that the number of prisoners taken to hospitals from the CPSU decreased from 136 in 1997 to 26 in 2001, and the number of workers' compensation claims by CPSU staff fell from 341 in 1998 to 129 in 2001. *Id.* at 459.

44. Ingles v. Toro, No. 01 Civ. 8279, 2003 WL 402565 (S.D.N.Y. Feb. 20, 2003).

45. See *id.* (certifying case as a class action); Fourth Amended Complaint, *supra* note 6. After these remarks were delivered, the City elected to settle the case in an agreement that provides, *inter alia*, for the installation of recording video cameras in numerous locations; revisions in the City's written use of force policy; changes in use of force training; changes in training and in instructions to the staff who investigate use of force incidents; photographs of prisoners' injuries taken shortly after use of force incidents; and a system for tracking officers'

In the new litigation the plaintiffs' expert consultant, Steve J. Martin, submitted a report, based on an extensive review of use of force reports and other documentation from the jails, and concluded that:

The number, extent and seriousness of inmate injuries, and the manner in which those injuries are sustained in individual applications of force by staff assigned to the commands that are the subject of this lawsuit, reflect a stark and obvious pattern of unnecessary and excessive force deliberately applied to inflict physical harm and pain rather than to immobilize, restrain or control non-compliant, disorderly, assaultive or fleeing inmates.⁴⁶

Similarly, a second plaintiffs' expert consultant, Vincent M. Nathan, who had been involved in prior New York City use of force litigation (as had Mr. Martin), concluded:

As I reviewed investigation files and other materials, I had a sense of bleak sameness to the practices I saw in earlier cases involving Rikers Island facilities.

. . . .

. . . The scenarios I have observed are best described as fistfights between inmates and staff, sometimes initiated by inmates but often started by staff. These unprofessional brawls are not effective responses to aggression and they do not have the effect of controlling inmates' behavior or of protecting staff or others.

. . . [U]se of force by staff in the jails at issue here often results in exceptionally serious injuries to inmates: significant facial bruising, broken bones (including broken noses and

use of force. There are monitoring provisions that allow plaintiffs' counsel to review relevant documents during the term of the agreement and to tour the jails to observe the placement and operation of the video cameras. The named plaintiffs' damages claims were separately settled for amounts ranging from \$15,000 to \$575,000, totaling \$2,213,000. *Ingles v. Toro* (*Ingles 2006*), 438 F. Supp. 2d 203, 210 n.3 (S.D.N.Y. 2006).

46. Report of Plaintiff's Expert, Steve J. Martin at 9, *Ingles v. Toro*, No. 01 Civ. 8279 (S.D.N.Y. Sept. 27, 2004).

jaw), perforated eardrums, facial lacerations requiring sutures, abrasions, bruises, and broken teeth. . . . [T]he nature of injuries to inmates and staff is not consistent with the use of physical force as a legitimate control measure in limited and dangerous circumstances.⁴⁷

KEEPING THE USE OF FORCE WITHIN LAWFUL BOUNDS

The use of force can never be eliminated entirely, but prisons and jails can be managed with a minimal amount of physical force. We know that because we have seen it. Injury from staff violence has plummeted with no loss of administrative control in jails where we have brought and completed litigation, both in the low-security jail for misdemeanants and in the Rikers Island disciplinary unit, said by its managers to house “the worst of the worst.”

Power tends to corrupt, and that tendency is extraordinarily strong when power is exercised behind prison walls and outside public scrutiny, and against people who are powerless and stigmatized, and who will generally not be listened to or believed when they complain. Controlling the use of force in jails and prisons therefore requires not only lawful policies on paper, but ongoing vigilance by correctional leadership to ensure that policies are followed. In controlling the misuse of force against prisoners there is no substitute for a genuine and attentive commitment by correctional administrators to operating the institutions with as little violence as possible. “Nod and wink” oversight by correctional managers (often “laundered” with a fake paper trail of *pro forma* staff reports and blind-eye supervisory review) is probably the deadliest enemy of efforts to control excessive force.

Beyond the need for committed leadership there are specific and identifiable measures that can make a significant difference in controlling staff violence.

47. Report of Plaintiff’s Expert, Vincent M. Nathan at 7, 9–10, *Ingles v. Toro*, No. 01 Civ. 8279 (S.D.N.Y. Sept. 27, 2004). Mr. Nathan added: “In my 30 years of experience in the field of corrections, I have never seen a system in the 50 states more resistant to constitutional reform than the New York City Department of Correction.” *Id.* at 256.

First, staff must be held accountable. When force is misused the appropriate prison administrators must act to ensure that the offending staff members do not repeat their conduct and that other staff members understand that such conduct will not be tolerated.

1. All uses of force must be reported and investigated. It is essential that prison administrators know the conduct of their staff with respect to the use of force. Unfortunately, there is a widespread pattern of failing to report uses of force or failing to report them accurately. Correction staff should be required to report and explain all instances in which they use force or are witnesses to the use of force. Supervisory staff should review such reports and investigate them independently by interviewing prisoners as well as staff members and by examining medical records and other available evidence to ensure that staff accounts are accurate.

Ensuring the integrity of use of force investigations is easier said than done. There is a persistent tendency in jails and prisons to make excuses and to cover up for internal misconduct. The “blue wall of silence” is even thicker and higher in corrections than in police work.⁴⁸ In our litigation, we have seen this tendency manifest in the

48. The existence of a code of silence among law enforcement personnel about their colleagues’ misconduct, long known informally to their critics, has been formally acknowledged with greater frequency in recent years. *See, e.g.*, *Baron v. Suffolk County Sheriff’s Dep’t*, 402 F.3d 225, 237–43 (1st Cir. 2005) (affirming jury finding of municipal custom of condoning harassment to enforce the code of silence at the Suffolk County jail, noting that an official commission has urged “an aggressive attack on the code of silence”); *Blair v. City of Pomona*, 223 F.3d 1074, 1079–81 (9th Cir. 2000) (noting evidence about code of silence in Christopher Commission report about Los Angeles police practices); *Jeffes v. Barnes*, 208 F.3d 49, 62–64 (2d Cir. 2000) (holding, similar to *Blair*, that evidence of widespread adherence to code of silence, the Sheriff’s embrace of it, and his encouragement of harassment of officers who violated it could support a finding of municipal policy); *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1215–16 (D. Wyo. 2002) (holding that a code of silence concerning staff misconduct in connection with prison violence amounted to an unconstitutional, deliberate indifference to prisoners’ safety); *Madrid v. Gomez*, 889 F. Supp. 1146, 1156 (N.D. Cal. 1995), *rev’d and remanded by*, 150 F.3d 828 (9th Cir. 1998) (noting “the undeniable presence of a ‘code of silence’ at [the] Pelican Bay [prison facility]. . . designed to encourage prison employees to remain silent regarding the improper behavior of their fellow employees, particularly where excessive force has been alleged. Those who defy the code risk retaliation and harassment.”); *Klipfel v. Gonzales*, No. 94 Civ. 6415, 2006 WL 1697009, at *11 (N.D. Ill. June 8, 2006) (summarizing evidence of a code of silence within the Chicago Police Department); *cf. Diesel v. Town of Lewisboro*, 232 F.3d 92, 104 (2d Cir. 2000) (affirming dismissal of suit by police officer complaining he was denied the benefit of the “blue wall of silence”).

investigative process in numerous ways. Investigators ignore discrepancies and implausibilities in staff statements while emphasizing and exaggerating those in prisoners' statements. They apply a similar double standard to medical evidence depending on whether it supports or undermines staff accounts. They engage in speculation to make excuses for officers' injurious actions or to discredit the statements of prisoners. They avoid resolving what is often thought of as the crucial issue: whether it was reasonable for the staff member to apply injurious force rather than restraining force or non-violent measures.

2. Recording video cameras should be widely used in areas and on occasions where the use of force tends to occur. Videotaping uses of force is an enormously beneficial practice. It protects prisoners against misuse of force *and* staff members against false accusations of excessive force.⁴⁹ It assists in resolving difficult factual disputes. The only losers are those who wish to break the rules and get away with it. It is our view that the widespread installation of video cameras in the Rikers Island Central Punitive Segregation Unit has done as much as any other measure to curb the extreme pattern of excessive force that used to exist in that unit.

3. Meaningful disciplinary action must be taken against staff who misuse force, without exception. Over the years we have noted an extraordinary reluctance by supervisors to take significant disciplinary action, even when staff have been identified as engaging in excessive force. Some disciplinary prosecutions have been inexplicably delayed. They are often dismissed ("administratively filed" in New York City jargon) for any available reason (sometimes because of the inexplicable delays), or they are settled for trivial disciplinary sanctions. Convincing the Department of Correction to promulgate a "penalty grid" of appropriate sanctions was the most difficult and long-delayed aspect of implementing the settlement in the *Sheppard* case, discussed above.

4. Misconduct related to misuse of force by staff must be investigated and, if warranted, meaningful disciplinary action must be

49. See *Skinner v. Cunningham*, 430 F.3d 483 (1st Cir. 2005) (absolving officers of constitutional violations based largely on the court's review of videotape of the use of force incident).

taken. The misuse of force is frequently associated with other forms of staff misconduct. If an officer uses excessive force and reports the incident falsely, it is likely that other staff members who witnessed the event have also submitted false reports. Strong disciplinary action for false reporting by staff witnesses is absolutely essential to curb excessive force; it is reliance on the code of silence, complicity, and outright dishonesty that embolden staff members to engage in physical abuse. Similarly, in some instances, especially those involving after-the-fact reprisals against prisoners whom staff believe have acted disruptively or disrespectfully, officers leave their assigned posts to participate in physical abuse and do not report their unauthorized presence. In other cases, officers fail to arrange for medical examinations of prisoners involved in uses of force or even intimidate them and other prisoner-witnesses from reporting the events. Prison authorities must be as intolerant of this collateral misconduct as it is a direct abuse of prisoners.

5. The adequacy of disciplinary prosecutions must be ensured. In most jurisdictions staff accused of misconduct have procedural protections under civil service law and/or union contracts, as they should. Correctional administrators who wish to discipline staff for misuse of force must be prepared to prove their cases and must devote the necessary resources and attention to do so competently.⁵⁰ This is a core law enforcement function, and it should be staffed and organized as such.

Second, correctional staff must be protected. Some prison staff use excessive or unnecessary force because they are not confident that they can maintain order and protect themselves in any other way. It is the job of prison administrators and the governments that employ them to give their line staff the confidence and tools they need to ensure that their jobs are manageable.

1. Overcrowding must be avoided. Crowding in prisons increases the levels of stress and tension, and overloads basic services and facilities (like food, medical care, and access to showers and

50. There has been a recurrent failure to do so in New York City. In one recent case, where PRP was consulted because we had made the initial complaint and subsequently brought suit on behalf of the prisoner, the administrative prosecutor did not interview the affected prisoner or his witnesses until the day before the hearing.

toilets), causing increased prisoner stress. In that situation officers may become the targets of prisoner hostility and, in turn, may perceive a necessity to use force to maintain order. Additionally, prisons and housing units holding prisoners above their respective capacities are much more difficult to monitor, manage, and keep orderly, and officers themselves may become excessively stressed and simply lose control in overcrowded settings.

2. Prisoners must be classified effectively. Some prisoners are simply more difficult to manage than others, and it is generally not hard to determine who they are from their prison disciplinary histories as well as, to some degree, from their criminal records. Separating more aggressive prisoners from more passive prisoners and housing the former in areas which are designed for more stringent control and supervision will give staff a more manageable job to do and better tools for maintaining control.

3. Reliable services must be provided. Many staff-prisoner disputes arise from failures of the services necessary in institutional life such as food, medical care, delivery of mail, escorts, and visits. Often these events are beyond the control of line staff. In others, line staff purposefully interfere with the delivery of services as a covert disciplinary measure, often referred to as putting prisoners "on the burn." In either case, such failures unnecessarily increase tensions and multiply confrontations. This danger is particularly great in segregation units, where prisoners are confined to their cells almost all day. During the implementation of the consent judgment in our CPSU litigation, we found that interruptions of necessary services accounted for a large share of staff-officer confrontations, and that intervention by higher departmental authority to end those interruptions went a long way toward bringing peace to that troubled unit.

4. Staff must be trained adequately. We have been struck by how frequently officers say that they remember little or nothing about their use of force training. In particular, they express little confidence in the non-injurious use of force techniques taught in training. In the CPSU litigation, at Legal Aid's request, the consent judgment required that officers be required to re-qualify in non-injurious

techniques on an annual basis,⁵¹ just as they are required annually to demonstrate proficiency in the use of firearms.

5. Supervisory back-up must be readily available to defuse staff-prisoner confrontations. Many use of force incidents arise from arguments in which prisoners or staff, or both, lose their tempers and self-control. Such confrontations can often be defused by intervention of a supervisory officer. Supervisors should not have a span of control so large that they cannot respond promptly to requests for such intervention, and it should be clear that it is part of their job to do so.

Third, there must be effective external oversight. Prisons and jails rarely reform themselves. Law enforcement agencies expend immense effort to rationalize, justify, or cover up misdeeds. The code of silence is even more difficult to defeat in prisons than in police agencies, since the actions of prison staff take place behind walls and bars out of the view of neutral civilian witnesses. There is little political support for actions that may be viewed as coddling criminals and there are many obstacles to taking effective action against law enforcement personnel who abuse their powers, making reform a difficult task. Usually the impetus for reform comes from outside the institution, often as a result of bloody and widely publicized disasters on a large or small scale. Frequently, as in New York, external intervention comes in the form of litigation, which (as even we who make our living at it agree) is an extremely blunt instrument for reforming complex institutions.

What is needed to control excessive force in prisons and jails is an ongoing review of the treatment of prisoners by independent agencies, both structurally and in fact; of the prison chain of command,⁵² with full access to information and testimony; and the

51. Stipulation of Settlement at para. 29, *Sheppard v. Phoenix*, No. 91 Civ. 4148 (S.D.N.Y. July 10, 1998). A similar requirement appears in the more recent settlement agreement in Legal Aid's city-wide use of force class action *Ingles v. Toro*, 438 F. Supp. 2d 203, 209 (S.D.N.Y. 2006) (summarizing this settlement).

52. I make this point advisedly, since there are agencies of New York State and the New York City government that are nominally independent but engage in no meaningful review of prisoners' complaints of abuse. For instance, the New York State Commission of Correction does not entertain complaints by prisoners or about prisoners' treatment; it merely refers the prisoners back to prison authorities. The sole exception is that the Commission of Correction reviews the circumstances surrounding prison deaths when they occur, which is valuable,

power of independent fact-finding and action. If this discussion sounds familiar, it is. It is the same argument that has been made, against bitter resistance, for civilian review of citizen complaints against the police. The need for such review is even greater for complaints of abuse committed out of sight and out of the public mind in prisons and jails.

though these reviews are not released publicly in their entirety, and the Commission has no power to enforce any recommendations it may make. The New York City Board of Correction, which nominally has regulatory power over the city jails, sometimes intervenes informally to call egregious incidents to the attention of higher authorities in the jail system, but has played no formal role in investigating and fact-finding with respect to claims of physical abuse of prisoners.