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Inmate Assaults and Section 1983 Damage Claims

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INMATE ASSAULTS AND SECTION 1983 DAMAGE CLAIMS

LITTLE V. WALKER
552 F.2d 193 (7th Cir. 1977) *cert. denied*,
46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121)

In recent years, federal courts have shown an increasing willingness to examine state penal institutions for violations of prisoners' constitutional right to be free from cruel and unusual punishment.[1] With this growing scrutiny, the courts have coupled an expansion of the concept of cruel and unusual punishment.[2] Under certain circumstances, for example, an assault on an inmate by a fellow prisoner has been held to constitute cruel and unusual punishment.[3] The underlying rationale is that prison officials have a duty to protect the inmates from such assaults and failure to do so makes the conditions of confinement so intolerable that it constitutes cruel and unusual punishment.[4]

This duty of protection imposed on prison officials originated in cases where federal court intervention was sought under section 1983[5] to require the upgrading of overall conditions of state prisons.[6] Federal courts often found state prison conditions to be so deplorable that confinement therein subjected the prisoners to cruel and unusual punishment.[7] Inadequate pro-

1. *See* Note, *Recent Applications of the Ban on Cruel and Unusual Punishments*, 23 HASTINGS L.J. 1111 (1972); Note, *Sexual Assaults and Forced Homosexual Relationships in Prison*, 36 ALB. L. REV. 428 (1972).

2. *See* commentaries cited in note 1 *supra*.

3. *E.g.*, Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Penn v. Oliver, 351 F. Supp. 1292 (E.D. Va. 1972).

4. *See, e.g.*, Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); Fore v. Godwin, 407 F. Supp. 1145 (E.D. Va. 1976); Penn v. Oliver, 351 F. Supp. 1292 (E.D. Va. 1972).

5. 42 U.S.C. § 1983 (1970).

6. Section 1983 states in part:

> 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.

42 U.S.C. § 1983 (1970).

7. *See, e.g.*, Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976), *modified*, 561 F.2d 911 (1st Cir. 1976); Martinez-Rodriguez v. Jiminez, 409 F. Supp. 582 (D. P.R. 1976), *aff'd*, 551 F.2d 877 (1st Cir. 1977).

tection of inmates from assaults by fellow prisoners was a primary basis for such a finding.[8] The relief requested and granted in these cases was limited to injunctive and declaratory relief.[9]

This article will discuss the recent development of the concept that prison officials may be liable for monetary damages to an inmate who is assaulted by a fellow prisoner. The article will begin with an overview of the initial class-action cases which established the prison officials' duty of protection and an examination of later cases brought by individual prisoners seeking protection from inmate assaults. In light of this prior case law, the article will examine the recent decision of the Court of Appeals for the Seventh Circuit in *Little v. Walker*.[10] In that case, the Seventh Circuit sustained an inmate's complaint against prison and other state officials which sought damages for assaults by fellow prisoners. The court held that Little was entitled to recover damages if he could prove the assaults he alleged. In reaching this decision, the Seventh Circuit considered the question of inmate assaults as a violation of a prisoner's right to be free from cruel and unusual punishment as well as the related question of whether prison and other state officials were immune from such suits.

THE BEGINNINGS: CLASS ACTION INJUNCTIVE RELIEF DESIGNED TO PROTECT INMATES FROM ASSAULTS BY FELLOW PRISONERS

The idea that a prisoner has a right to be protected from his fellow inmates is not a new one. As early as 1944, the Court of Appeals for the Sixth Circuit recognized the duty of the government to protect prisoners.[11] It was not until the 1970's, however, that under some circumstances the failure of state prison officials to protect inmates from assaults by fellow prisoners came to be viewed as a form of cruel and unusual punishment. Such a constitutional violation gave rise to injunctive relief under section 1983.[12]

In 1971, in the landmark case of *Holt v. Sarver*,[13] conditions in an Arkansas prison were deemed so objectionable and "shocking to the con-

8. Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974); Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971); Nadeau v. Helgemoe, 423 F. Supp. 1250, 1274 (D.N.H. 1976).

9. Section 1983 also provides for damage relief, but these cases were brought for the purpose of upgrading conditions in the prisons primarily through the use of injunctions.

10. 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121).

11. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944). The court stated: "The Government has the absolute right to hold prisoners for offenses against it but it also has the correlative duty to protect them against assault or injury *from any quarter* while so held." *Id.* at 445 (emphasis added).

12. 42 U.S.C. § 1983 (1970). *See* text within note 6 *supra*.

13. 442 F.2d 304 (8th Cir. 1971).

science" as to require federal court intervention and supervision of the whole prison.[14] A basis for this finding was the frequency of inmate assaults. As the court stated: "Prisoners are frequently attacked and raped in the dormitories and injuries and death have resulted . . . . No adequate means exist to protect the prisoners from assaults."[15] The court's decision to intervene was also based on other facets of prison life such as the trusty system and the isolation cells[16] which, when viewed in conjunction with the inadequate protection of inmates, were held to constitute cruel and unusual punishment.[17] *Holt* was the first case to uphold federal court intervention in the operation of a state prison. The court said that state prison conditions are primarily the concern of the state legislature but stated that they had a duty to intervene when conditions of confinement became so intolerable as to constitute cruel and unusual punishment.[18]

The *Holt* case spawned numerous progeny. These cases also relied in part on the frequency of inmate attacks as a basis for injunctive intervention by federal courts into state prisons. For example, the Mississippi prison farm at Parchman was put under federal court supervision in 1972 in *Gates v. Collier*.[19] This decision was based on the inadequate protection of inmates[20] as part of a totality of circumstances constituting the "infliction of punishment on inmates violative of the Eighth Amendment."[21] Other circumstances considered by the court were racial discrimination, the physical facilities, the medical facilities, the trusty system, mail censorship and the disciplinary rules in the prison.[22]

14. *Id.* at 309.
15. *Id.* at 308.
16. *Id.*
17. The court stated:

> Commissioner Sarver, who also served as superintendent of the Cummins unit, as a witness frankly admitted that the physical facilities at both units were inadequate and in a total state of disrepair that could only be described as deplorable. Additionally, he testified that trusty inmates, some of whom were serving life or long term sentences, constituted 99% of the security force of the prison. For the approximately 1000 inmate population only eight free world (non-inmate) guards were employed and these guards were poorly paid and lacked proper training. One hundred and fifty gun carrying trusties, who control all the weapons at the prison, must be relied upon to guard and protect the prisoners.
>
> The trusties sell desirable jobs and also traffic in food, liquor and drugs. Prisoners frequently become intoxicated and unruly.

Id.

18. *Id.* at 309. The court upheld the district court's remedy which required state officials to move in "good faith and diligence" to upgrade conditions in the prison. *Id.*
19. 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).
20. 349 F. Supp. at 828-29. The court noted that many of the inmates possessed knives or handmade weapons, that at least eighty-five instances were in the record where inmates had been assaulted by other inmates and that twenty-seven of these assaults were armed attacks in which an inmate was either stabbed, cut or shot. *Id.*
21. 501 F.2d at 1309.
22. 349 F. Supp. at 887-92.

In 1975, in *McGray v. Sullivan*,[23] a federal court intervened in the Alabama prison system stating that "the State of Alabama has violated the constitutional rights of the plaintiff class by confining them in overcrowded and understaffed prisons where their lives and safety are constantly in danger."[24] This case also addressed conditions in punitive isolation such as denial of writing materials, but the court focused almost entirely on the inadequate protection of inmates as the basis for its holding. In 1976, both Puerto Rico[25] and New Hampshire[26] prisons were also enjoined on similar bases and were required to provide more adequate protection for inmates.[27]

These cases established that assaults by fellow inmates on a prison-wide scale might constitute violations of the prisoners' eighth amendment rights. This signified a trend toward federal court intervention in state prisons when state officials appeared indifferent to the prisoners' right to tolerable living conditions. The courts stated repeatedly that prison maintenance was a legislative function, but that federal courts could not allow the legislatures to abdicate their responsibilities. The holdings in these class action cases, that inadequate protection of inmates on a prison-wide scale might amount to a constitutional violation by prison officials, became the basis for claims by individual prisoners for such assaults.

Claims By Individual Prisoners Seeking Protection From Fellow Inmates

As early as 1969, a Wisconsin district court held in *Kish v. Milwaukee*[28] that a complaint brought by several prisoners based on allegations of assaults by fellow inmates might state a cause of action under section 1983. The plaintiffs alleged that they were beaten, burned and sexually abused by fellow prisoners due to the defendants' failure to provide them with adequate protection. The plaintiffs claimed that this subjected them to cruel and unusual punishment.[29] Considering the claim on defendants'

23. 399 F. Supp. 271 (S.D. Ala. 1975), *aff'd in part, rev'd in part*, 509 F.2d 1332 (5th Cir. 1975).

24. *Id.* at 274. The court noted that partially as a result of this overcrowding and understaffing, homosexual activity abounded, and had on several occasions resulted in serious injury or death to inmates. *Id.*

25. Martinez-Rodriguez v. Jiminez, 409 F. Supp. 582 (D.P.R. 1976), *aff'd on appeal*, 551 F.2d 877 (1st Cir. 1977).

26. Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976), *modified*, 561 F.2d 911 (1st Cir. 1976).

27. In the *Nadeau* case, the court focused on numerous factors to support its injunction, such as, lack of exercise and showers, access to medical services, religious services, and library, as well as the inadequate protection. 423 F. Supp. at 1266-74. In *Martinez-Rodriguez*, the court was primarily concerned with inmate safety. 409 F. Supp. at 594.

28. 48 F.R.D. 102 (E.D. Wis. 1969), *aff'd*, 441 F.2d 901 (7th Cir. 1971). The original defendants were the County of Milwaukee, the County Board of Supervisors, and the Sheriff.

29. *Id.* at 103.

motion for summary judgment, the district court noted that by placing prisoners in a cell with inmates who abused them physically, prison officials and the county might have violated the prisoners' right to be free from cruel and unusual punishment.[30] On appeal, the Court of Appeals for the Seventh Circuit dismissed the claim without affirming or denying the idea that inmate assaults could amount to a constitutional violation.[31] The Seventh Circuit held that the cause of the assaults was the physical conditions of the jail facility, such as overcrowding, rather than any acts or omissions by the sheriff. The court distinguished *Holt* as involving only injunctive relief and held the sheriff not liable for damages.[32]

One of the first cases delineating what an individual prisoner must prove to sustain a claim for protection under section 1983 based on an assault by a fellow inmate was *Penn v. Oliver*.[33] The court in *Penn* cited the *Holt* case in support of the proposition that "there exists a constitutional right of inmates to be afforded at least some degree of protection from attacks by fellow inmates."[34] In this case Penn was involved in an altercation which also involved an inmate named Huff. Following the fight, Huff was placed in maximum security for over a year. When he was returned to the general inmate population he engaged in another fight with Penn. It was not clear who was the aggressor. Penn alleged that prison officials failed to protect him adequately.[35] While dismissing the complaint the court set out the proof required to sustain a section 1983 claim against prison officials based on their failure to protect a prisoner from assault by fellow inmates. The court stated: "there must be a showing either of a pattern of undisputed or unchecked violence or, on a different level of an egregious failure to provide security to a particular inmate, before a deprivation of constitutional rights is stated."[36]

The requirement of showing a pattern of violence on a prison-wide level seems to flow from the analysis used in finding an eighth amendment violation in the earlier injunction cases such as *Holt*. The second of the

30. *Id.* The court held that the County Board could not be sued under section 1983. However, they refused to dismiss the claim against the Sheriff who had actual control of the premises. *Id.*

31. Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971).

32. *Id.* at 905. This reasoning does not really distinguish *Holt*. In *Holt*, the officials were held responsible for conditions such as overcrowding and the violence which resulted from such conditions. The failure to adequately protect the inmate was the constitutional violation, regardless of the actual cause of the assault. The fact that the court granted injunctive relief only does not change the fact that it found inadequate protection could amount to a constitutional violation.

33. 351 F. Supp. 1292 (E.D. Va. 1972). The court never specified the type of relief Penn sought.

34. *Id.* at 1294.

35. *Id.*

36. *Id.*

court's tests was new, however. This would allow a cause of action for an individual inmate even wthout allegations as to general prison conditions. The court, however, found that Penn had not satisfied either test.[37] In doing so, the court noted that he had alleged only an isolated incident of violence and, therefore, there was no constitutional violation. The court explained that due to the violent nature of the men who inhabit prisons, officials could never prevent all acts of violence. This reasoning seems to underlie the requirement that general conditions be alleged or, on the other hand, that something more than a merely negligent failure to protect an individual inmate be alleged.

In *Breeden v. Jackson*,[38] the prisoner Breeden was voluntarily placed in protective segregation because he feared for his safety due to threats of harm from other inmates. In his section 1983 suit for damages, Breeden alleged that the deprivation of normal prison privileges[39] while so confined constituted cruel and unusual punishment.[40] There were no allegations of assaults by other inmates. The Court of Appeals for the Fourth Circuit dismissed his claim, focusing only on the loss of privileges issue and finding that the losses alleged did not amount to a constitutional deprivation.[41] Judge J. Braxton Craven dissented,[42] stating that prison administrators have a responsibility to protect life, and that "they may not condition such protection on relinquishment of earned prison privileges."[43] He stated that requiring an inmate to give up his prison privileges in order to be assured of protection from fellow inmates violated the prisoner's constitutional right to protection. He said that the state must provide a reasonably safe place of imprisonment.[44]

Only a year later, the Fourth Circuit ruled directly on a claim of failure to protect an individual inmate from assaults. In *Woodhous v. Virginia*,[45]

37. *Id.*

38. 457 F.2d 578 (4th Cir. 1972). Although not as important as other cases in the development of the duty of prison officials to protect inmates, this case played an important role in the decision of the district court in *Little v. Walker*. For this reason, the case is discussed in some detail. Judge Craven's dissent was adopted by the majority in the Fourth Circuit in *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973). It is important to note that these cases were decided in 1972 and 1973, respectively, because those dates relate to the time period involved in Little's claim.

39. The Virginia prison in question did not differentiate between those segregated voluntarily and involuntarily with regard to loss of privileges. Thus, inmates in segregation out of fear for their safety were subjected to the same restrictions as those in segregation for disciplinary purposes.

40. 457 F.2d at 579.

41. *Id.* at 581.

42. *Id.* (Craven, J., dissenting).

43. *Id.*

44. *Id.* at 581-82.

45. 487 F.2d 889 (4th Cir. 1973).

the plaintiff alleged that he was not adequately protected from assaults by other inmates.[46] Woodhous was afraid of reprisals since he had gone to the aid of a young prisoner who was being sexually assaulted. The district court found that he had not been attacked and dismissed his claim.[47] The court of appeals reversed,[48] reasoning that a prisoner has a right "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."[49] The court cited the *Holt* case in support of this proposition, but that case seems inapposite since *Holt* was a class action where many of the inmates had actually been subjected to assaults. The court seems to have followed Judge Craven's dissent in *Breeden* in imposing upon prison officials a duty to provide a reasonably safe place of imprisonment, a duty which the federal courts will enforce.

The court's analysis in *Woodhous* mirrored *Penn*. In *Woodhous*, the court stated: "While occasional isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, confinement in a prison where violence and terror reign is actionable."[50] Thus, under the *Woodhous* analysis, a prisoner could state a cause of action under section 1983 without having been personally victimized by an assault, provided conditions in the prison in general created an unreasonable risk of harm. This analysis seems to follow from the class action injunction cases which also required intolerable general conditions as a prerequisite to federal court intervention.

In the 1976 case of *Fore v. Godwin*,[51] plaintiffs Fore and Harrison alleged that they were inadequately protected from violence and sexual assault when housed in a city jail. They did not allege that they had personally been attacked but rather that such attacks did occur. The court stated that the claim was actionable because it was based on general conditions rather than isolated attacks.[52] The court held that since the plaintiffs did not allege attacks personally, their claims would be limited to injunctive relief.[53] The court then noted that the two prisoners had been transferred to other facilities and that, therefore, any claim they had for injunctive relief had been mooted. The court dismissed their claim.

46. *Id.* As in the *Penn* case, the court was unclear as to what type of relief the plaintiff sought. *See* note 33 *supra*.

47. 487 F.2d at 890.

48. *Id.* at 889.

49. *Id.* at 890.

50. *Id.* The court did not mention the second *Penn* test, "the egregious failure to provide security to a particular inmate." *See* text accompanying note 36 *supra*.

51. 407 F. Supp. 1145 (E.D. Va. 1976).

52. *Id.* at 1147. The court did not elaborate as to what the plaintiff alleged regarding general conditions.

53. *Id.* This expresses what seemed implicit in the *Woodhous* case. *See* text accompanying notes 45-50 *supra*.

The *Penn, Woodhous* and *Godwin* cases stand for the proposition that if something approaching a "reign of terror" due to inmate assaults exists in the prison, an individual prisoner may sustain a section 1983 injunctive claim for relief on the basis of a constitutional deprivation, even without being attacked. Dicta in *Penn* also indicated that an egregious failure to protect a particular inmate might be actionable.[54] The courts appear to be concerned with general conditions of prison life as opposed to relief to an individual inmate. The purpose of the decisions was to require that inmates subjected to the threat or actuality of inmate violence on a regular basis be adequately protected by prison officials. Court intervention in these instances where the prison officials and the legislature failed to act seems necessary to stimulate corrective action. The courts repeatedly emphasize the impossibility of federal courts actually managing state prisons but also emphasize that no longer will that consideration prevent them from acting to protect prisoners being forced to live in constant fear of attack.

None of the foregoing cases actually upheld a damage award; they either granted injunctive relief or held that a cause of action might be stated, given proper facts. Both of the courts in *Penn* and *Godwin* dismissed the prisoners' claims. The court in *Woodhous* remanded, but since Woodhous did not allege that he was actually attacked, it seems clear relief would be limited to an injunction ordering protection.[55] Other courts have dismissed claims for damages against prison officials based on inadequate protection from inmate assaults.[56] These claims have been denied for failure to allege a sufficient deprivation of the right to protection[57] and on the grounds of immunity of state officials.[58] These were precisely the issues faced by the Court of Appeals for the Seventh Circuit in *Little v. Walker*,[59] which involved a claim for money damages based on inmate assaults.

54. 351 F. Supp. 1292, 1294 (E.D. Va. 1972).

55. In *Godwin*, the court expressly held that without any actual attack a prisoner would be limited to injunctive relief. 407 F. Supp. at 1147.

56. *See, e.g.*, Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Williams v. Field, 416 F.2d 483 (9th Cir. 1969), *cert. denied*, 397 U.S. 1016 (1970); Grillo v. Sielaff, 414 F. Supp. 272 (N.D. Ill. 1976); Parker v. McKeithen, 330 F. Supp. 435 (E.D. La. 1971).

57. *E.g.*, Grillo v. Sielaff, 414 F. Supp. 272 (N.D. Ill. 1976). The court found that Grillo's allegations regarding a fight with another inmate only constituted an isolated incident which did not give rise to an action under section 1983. *Id.* at 275.

58. *E.g.*, Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976) (the court held that plaintiff failed to allege the intentional conduct or deliberate indifference by prison officials necessary to state a claim); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1970) (the court required intentional action by officials to sustain a section 1983 claim). *See also* Bogard v. Cook, 405 F. Supp. 1202 (N.D. Miss. 1975).

59. 552 F.2d 193 (7th Cir. 1977).

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Prior to *Little*, courts in the Seventh Circuit, like those in other jurisdictions, had dismissed such damage claims.[60] In fact, the sole case from any jurisdiction upholding a damage award against prison officials based on inmate assaults was *Roberts v. Williams*.[61] In that case, Roberts was blinded when an untrained inmate who was being used as a guard unintentionally discharged a shotgun in his face. The prison officials' liability was based on a Mississippi common law negligence rule in addition to constitutional grounds.[62] In *Little*, the Seventh Circuit became the first court to sustain a damage claim solely on constitutional grounds against prison officials under section 1983 based on a failure to adequately protect an inmate from assaults by fellow prisoners.

Little brought suit alleging constitutional deprivations suffered while he was a prisoner at the Illinois State Penitentiary at Stateville, Illinois. He sought damages from various prison and state officials under section 1983.[63] The basis of Little's claim was that while part of the general inmate population he was not reasonably protected by prison officials from repeated "acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates."[64] Little also alleged that he was ordered to work in certain areas of the penitentiary which were controlled by gang-affiliated inmates. Fearing for his safety, plaintiff accepted placement in "Segregation Safekeeping" status, which resulted in the denial of numerous privileges because defendants did not differentiate between disciplinary and protective segregatees.[65] While in this status, ostensibly for his protection, plaintiff alleged that further indignities were inflicted upon him. He claimed that gang-affiliated inmates refused to serve him meals unless he performed unnatural sex acts through the bars of his cell.[66] Plaintiff also alleged that his

60. Claims were denied in at least four instances. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Grillo v. Sielaff, 414 F. Supp. 272 (N.D. Ill. 1976); Schyska v. Shifflet, 364 F. Supp. 116 (N.D. Ill. 1973).

61. 456 F.2d 819 (5th Cir. 1972).

62. The fact that Roberts was fourteen years old when the incident occurred and in jail on a charge of petty larceny may have been emotional factors in the court's granting relief.

63. 42 U.S.C. § 1983 (1970). The defendants included the Illinois Department of Corrections, its director and former director, the Governor of Illinois, the warden of the Stateville Penetentiary and his predecessor, the Superintendent of the Stateville Prison, the administrative assistant to the warden, the chairman of the Stateville Institutional Assignment Committee, and six members of the Disciplinary Committee of the Stateville Prison. 552 F.2d at 195.

64. 552 F.2d 193, 194 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121).

65. This is similar to the situation in *Breeden v. Jackson*, 457 F.2d 578 (4th Cir. 1972). *See* notes 38-39 and text accompanying notes 38-44 *supra*.

66 552 F.2d at 195.

cell block was seized by rebellious inmates, during which time homosexual gang rapes were inflicted upon inmates, and much of plaintiff's personal property was destroyed.[67] Nonetheless, the prison officials continued to house plaintiff in the same area. Little asserted that defendants knew or should have known of the deprivations he suffered and that failure to protect him from these deprivations amounted to the imposition of cruel and unusual punishment.

The district court granted defendants' motion to dismiss.[68] That court focused on the issue of plaintiff's subjection, while in protective segregation, to the same loss of privileges as inmates in segregation for disciplinary reasons. The court stated that defendants, as state officials, could be liable for damages under section 1983 if "they acted with such disregard of plaintiff's clearly established constitutional rights that their actions could not reasonably be characterized as being in good faith"[69] or if they were motivated by actual malice.[70] The deprivations for which Little sought damages occurred between May, 1972, and September, 1974, when Little was transferred to another institution. Thus, the district court held that Little had to allege a constitutional right which was "clearly established" during that period. Citing *Breeden v. Jackson*,[71] the district court found that defendants had not failed to apply the law as it existed at that time. Therefore, defendants had not acted with disregard of any "clearly established" constitutional rights of the plaintiff. The court also held that the defendants were not motivated by actual malice. The defendants were found to be immune from damages under section 1983 for these reasons.

The Court of Appeals for the Seventh Circuit chose not to focus on plaintiff's loss of privileges, but rather on his alleged mistreatment at the hands of his fellow inmates.[72] They found that even the *Breeden* majority would have held that plaintiff's alleged treatment amounted to a constitutional deprivation.[73] Therefore, his constitutional right to protection from assault by fellow inmates was "clearly established" by the time in question

67. Little did not directly allege that he was a victim of these rapes but rather that he was subjected to "acts and threats of physical violence" during the seizure. Brief for Appellant at 11-12, Little v. Walker, 552 F.2d 193 (7th Cir. 1977).

68. *See* 552 F.2d at 196 for a discussion of the district court decision.

69. *Id.*

70. *Id.* The district court was applying the test for establishing the immunity of state officials enunciated in *Wood v. Strickland*, 420 U.S. 308 (1975). *See* text accompanying notes 91-97 *infra*.

71. 457 F.2d 578 (4th Cir. 1972). The *Breeden* majority had held that loss of privileges by voluntary protective segregatees did not amount to a constitutional violation. *See* text accompanying notes 38-44 *supra*.

72. 552 F.2d at 193.

73. *See* text accompanying notes 38-44 for a discussion of *Breeden*.

and that if on remand Little could prove that he was "deliberately deprived" of this constitutional right, his damage claim would be sustained.[74]

The Little Court's Approach To Inmate Assaults

The Seventh Circuit's requirements in *Little* for stating a claim for damages against prison officials for an inmate assault differ from the approach taken by courts in earlier cases. The court's approach focused on two interrelated issues. First, when do assaults by fellow inmates constitute cruel and unusual punishment; and second, what is the scope of a prison official's immunity from damage liability for such assaults.[75]

In its response to the first issue, the Seventh Circuit in *Little* expanded the concept of inmate assaults as cruel and unusual punishment. The court did not specifically require that Little allege either general conditions or even an egregious failure to protect a particular inmate.[76] The court indicated clearly that under the alleged facts, Little would be entitled to damages. The court said that "Little's alleged treatment was so unreasonable as to be characterized as vindictive, cruel or inhuman as to be intolerable in fundamental fairness."[77] The court defined what constituted this mistreatment by stating that "Violent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are manifestly 'inconsistent with contemporary standards of decency.' Deliberate indifference to these happenings constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment."[78]

The court relied on *Holt* as support for the proposition that "under the Eighth Amendment prisoners are entitled to protection from the assaults of other prisoners."[79] Rather than requiring the allegations that *Penn* and *Woodhous* sought from individual inmate plaintiffs, the court propounded its test based on "contemporary standards of decency" and "fundamental fairness."[80] Further, the court stated positively that if Little proved his allegations concerning abuse by fellow inmates, he would have stated sufficiently the deprivation of a constitutional right.[81]

74. 552 F.2d at 197-98. The deliberate deprivation of constitutional rights is a requirement for finding a state official not to be immune from damage liability under *Wood v. Strickland*, 420 U.S. 308 (1975).

75. *See* text accompanying notes 91-97 *infra*.

76. These were the required allegations in the *Penn-Woodhous* line of cases. *See* text accompanying notes 33-54 *supra*. It is arguable that Little alleged such a failure to protect him, but the court never makes any mention of a need to so allege.

77. 552 F.2d at 197 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121).

78. *Id.*

79. *Id.*

80. *Id.* (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

81. *Id.* at 197.

Little, therefore, is the first case to hold directly that an individual inmate might be denied the constitutional right to be free from cruel and unusual punishment by being subjected to inmate assaults. The court concluded that attacks and sexual assaults upon inmates, particularly those in protective segregation, are constitutionally repugnant and inmates have a constitutional right to be protected from such assaults.[82] Once an inmate has sufficiently alleged the deprivation of this right, the remaining burden he has in order to establish damage liability will be to show deliberate indifference on the part of prison officials to overcome their qualified immunity.[83]

Official Immunity

Official immunity was the second problem faced by the court in *Little*. Although the court held that Little had sufficiently alleged a deprivation of a constitutional right, that alone was not enough to establish damage liability against prison officials under section 1983. The court also required that plaintiff prove deliberate indifference to his plight by the prison officials.[84] This is because under section 1983, state officials have a qualified immunity from damage liability for actions taken within the scope of their official duties.[85] The limits of this immunity have been the subject of much litigation in recent years.

In *Pierson v. Ray*,[86] the Supreme Court found that in enacting section 1983 the Congress did not intend to abolish all common law immunities. Therefore, the Court concluded that the common law absolute immunity for judicial officers still existed under section 1983.[87] The Court also held that a policeman had a qualified immunity. If he made an arrest in good faith based on probable cause and the person was later proved innocent he would be immune from damages. Similarly, if he made an arrest based on a statute which he reasonably believed to be valid but which was later found unconstitutional, he would also be immune from damages.[88] Thus, the policeman's immunity under section 1983 is based on his good faith and the reasonableness of his actions.

82. The "intolerable in fundamental fairness" test encapsulates a feeling of moral outrage, but it does not clearly define the extent of the attacks which will amount to a constitutional deprivation.

83. This is the second part of the immunity test enunciated in *Wood v. Strickland*, 420 U.S. 308 (1975). Without clearly stating so, the court was applying the *Wood* test to Little's damage claim. *See* text accompanying notes 91-97 *infra*.

84. 552 F.2d at 197.

85. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).

86. 386 U.S. 547 (1967).

87. *Id.* at 557.

88. *Id.* at 555.

In *Scheuer v. Rhodes*,[89] the Supreme Court again confronted the issue of immunity of state officials from damage claims. The Court held that the governor, officers in the state's national guard, and a state university president were not absolutely immune from liability, but they were immune if they acted in good faith. The Court defined good faith as "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances."[90] This good faith belief affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. The Court reasoned that this immunity was necessary to avoid discouraging effective action by state officials charged with a wide range of responsibility and discretion.

Most recently, in *Wood v. Strickland*,[91] the Supreme Court considered the scope of the immunity of school board members. The Court held that liability for damages for any action which is found to have been violative of a student's constitutional rights would "unfairly impose upon the school decision-maker the burden of mistakes made in good faith in the course of exercising his discretion in the scope of his official duties."[92] Therefore, the Court held that school board members, like other state officials, were entitled to a qualified immunity from damage liability under section 1983.

The *Wood* case enunciated a test for determining the immunity of a state official. The Court stated that the official is not immune from liability for damages under section 1983 if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights."[93] As noted in the dissent, this standard seemed to impose a higher standard of care than was previously imposed under section 1983.[94]

The *Wood* standards were made applicable to prison officials by the Court of Appeals for the Seventh Circuit in *Knell v. Bensinger*.[95] The court in *Little* followed *Knell* and applied the *Wood* immunity test to the officials involved. Under this test, as applied in *Little*, recognition that an inmate has

89. 416 U.S. 232 (1974).
90. *Id.* at 247-48.
91. 420 U.S. 308 (1975).
92. *Id.* at 319.
93. *Id.* at 322.
94. *Id.* at 327. (Powell, J., dissenting). Justice Powell felt that the proper standard for determining the qualified immunity of a government official was "whether in light of the discretions and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith." *Id.* at 330.
95. 522 F.2d 720 (7th Cir. 1975). The Supreme Court also recently used the *Wood* standards in discussing a prison official's immunity in *Procunier v. Navarette*, 98 S. Ct. 855 (1978).

some constitutional right to protection from other prisoners does not mean that an official will be liable for any inmate attack. First, the inmate must show that the attacks amounted to a constitutional deprivation under the fundamental fairness standard enunciated in *Little*.[96] The Seventh Circuit relying on *Woodhous, Holt* and *Kish*, held that Little had a clearly established right to protection from fellow inmates. As noted, the court found that the attacks and sexual assaults which Little alleged were sufficient to state a violation of this right to protection.

Once this is established, the *Wood* immunity standards raise the issue of what constitutes such disregard of this constitutional right to protection that the defendant cannot be characterized as acting in good faith.[97] According to the Seventh Circuit, "deliberate indifference" to the attacks on Little would be enough to meet the *Wood* standard.[98] The facts alleged were plaintiff's repeated complaints to the prison officials and their knowledge of the attacks he suffered. Defendants forced plaintiff to remain in an area where an inmate seizure had occurred during which inmates were attacked.[99] Plaintiff also alleged that defendants were aware he was forced to perform unnatural sex acts to receive meals from the inmates who served them.[100] The court held that since under the facts alleged defendants should have known that their actions would violate Little's established constitutional right to protection, they did act with such disregard of that right as to not be reasonably characterized as acting in good faith. Therefore, they would not be immune from liability. This is a reasonable application of the *Wood* test because if defendants were aware of Little's plight and did nothing, they were by definition "deliberately indifferent" to his right to protection and they should not be allowed to escape liability.

ANALYSIS

The problem of inmate assaults, particularly sexual assaults, on fellow prisoners is one of the largest facing our prison system.[101] Many weak or nonviolent inmates are forced to suffer brutal indignities by other inmates and live in constant fear of assault.[102] Often the victims are in such fear of

96. The treatment must be "so unreasonable as to be characterized as vindictive, cruel or inhuman as to be intolerable in fundamental fairness" or "manifestly inconsistent with contemporary standards of decency." 552 F.2d at 197.

97. Wood v. Strickland, 420 U.S. 308 (1975).

98. 552 F.2d at 197.

99. Brief for Appellant at 11-12, Little v. Walker, 552 F.2d 193 (7th Cir. 1977).

100. *Id.* at 11.

101. *See* Note, *Sexual Assaults and Forced Homosexual Relationships in Prison*, 36 ALB. L. REV. 428 (1972).

102. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). In *Holt*, the court stated that some of the inmates were in such fear of assault that they came to the front of the barracks and clung to the bars all night. *Id.* at 377.

retaliation that they will not complain, or if they do they are placed in protective segregation as was Little. There, they must relinquish most prison privileges with no real guarantee of safety. These are the conditions to which the courts are responding in supporting the prisoners' right to protection.

The growth in judicial concern for prisoner rights, and the right to protection in particular, reflects the growing belief that citizens do not surrender all their constitutional rights merely because they happen to be incarcerated. The prisoner's welfare is completely in the hands of the state, represented by its prison officials. The state is clearly responsible for prison conditions and prisoner management. The *Little* court indicates that the state's responsibility extends to protecting inmates from other prisoners. The court reasoned that punishment administered by the state is cruel and unusual if the conditions of confinement include attacks by other inmates. State officials have a duty to protect prisoners from such attacks. There are problems, however, with the federal courts' intervention in state prisons in an attempt to act as a guarantor of prisoner safety.

The most obvious problem is one of scale. The court in the usual case is presented with a claim from one institution[103] or from an individual inmate.[104] Even if the court is successful in fashioning relief for an entire prison or single inmate, the problem of assaults remain in all the other institutions and for all the other inmates. Also, the courts are not equipped to supervise the operation of entire state prison systems, let alone *all* state prison systems, to prevent constitutional abuses. Rather, the courts' function seems to be to act as a prod for prison administrators and the legislature. Hopefully, judicial recognition of the prisoners' right to protection will force the legislatures to move to ensure that protection.

The decision in *Little v. Walker* puts the Court of Appeals for the Seventh Circuit in the forefront of this move for prisoner protection and also raises some questions. As noted, the court has announced that the right to protection is a clearly established constitutional right and that it is violated if the inmate's treatment by other inmates is "intolerable in fundamental fairness."[105] While such a broad standard is easy for the courts to enunciate, it does not really put prisoners or officials on notice of what treatment will amount to a constitutional deprivation. The many attacks and sexual assaults Little alleged were sufficient. The question remains, however, how frequent and of what nature such assaults must be. The court's use of the fundamental

103. *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

104. *See, e.g.*, Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978) (77-121).

105. 552 F.2d at 197.

fairness test is clearly a correct application of the law.[106] However, the Seventh Circuit might have defined the test more clearly rather than merely using language from a recent Supreme Court opinion. The *Penn* approach of requiring either prison-wide conditions approaching a reign of terror or an egregious failure to protect a particular inmate to establish a constitutional deprivation was more certain and would guarantee more regularity in application. The Seventh Circuit's standard may allow for more flexibility, but it can only lead to more litigation to define its boundaries.

Another problem with this case is the upholding of the concept of a damage award against prison and other state officials based on inmate assaults.[107] Should a prison official be held liable if he knows assaults are committed and yet due to lack of funds he is unable to adequately protect those in his charge?[108] The problem of assaults in prisons seems solvable, if at all, only by legislative action in the form of increased appropriations to hire more and better trained guards and to upgrade facilities to improve the quality of life in the prisons. A more immediate source of relief may be for the state to make a more determined effort to prosecute the inmates who perpetrate the assaults.[109] The court in *Little* was performing its function and applying the law, but its damage approach is like throwing grains of sand into the ocean in the vain hope of filling it up. The actual effect on prisons will be small, unless the court spurs legislative action.

On the other side, the *Wood* standards applied in *Little* leave it up to the plaintiff to prove that the officials were "deliberately indifferent" to the violations of his right to protection. Actually proving this indifference and the assaults alleged may be practically impossible for the individual prisoner, particularly if his own testimony is his only evidence, as is likely. The making of such claims may also provoke retaliation by other inmates or unscrupulous administrators.

One hopeful possibility arising from the *Little* decision is injunctive relief for individual prisoners, requiring officials to protect them more adequately. For such relief, an inmate will have only to prove that he was

106. This is the test for cruel and unusual punishment applied by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976).

107. The court left it up to the district court on remand to determine which defendants, including the Governor, would be liable. In a footnote, they seem to indicate that only those defendants with actual or constructive knowledge of the events should be liable. 552 F.2d at 198 n.10.

108. For example, should the Governor be liable if he vetoes a bill, on valid fiscal grounds, which would appropriate more money for guards and better prison facilities, since he *knows* that attacks occur and that his vetoing of the bill will allow those attacks to continue. The *Wood* "good faith" test would seem to militate against such a result.

109. *See* Chicago Tribune, Feb. 10, 1978, § 4, at 1, col. 2, where the foreman of a grand jury investigating conditions in Cook County Jail said that the lack of prosecution of offenders was a principal problem in inmate assaults. *Id.*

deprived of his constitutional right to protection under the "fundamental fairness" standard.[110] If he is not seeking damages, there is no need to prove the deliberate indifference of the officials.[111] This of course raises the problems of the court's assuming an essentially legislative function, prison operation, and opens the door for a flood of complaints of this nature. However, it assures prisoners of a forum where they may seek protection and, hopefully, stimulate legislative action. The bottom line is that the court will no longer allow the state to treat its prisoners as less than human beings deserving human dignity.

Finally, the Seventh Circuit in *Little* has provided and applied a straightforward approach to the problem of section 1983 suits seeking damages from state officials. This approach will have impact beyond the area of prisoner rights. The plaintiff in any section 1983 damage suit must now prove that: (1) he was deprived of a clearly established constitutional right; and (2) that the official acted with either bad motive or with such disregard of the plaintiff's clearly established constitutional right that his action cannot reasonably be characterized as being in good faith. This will clearly be the framework for the court's analysis of all section 1983 damage claims and the *Little* case provided an excellent opportunity for the court to apply it.

CONCLUSION

The Court of Appeals for the Seventh Circuit has provided a very rational approach to the difficult question presented in *Little v. Walker*. The court's approach firmly incorporated the Supreme Court's immunity test from *Wood v. Strickland* as the standard to be used in the analysis of a prisoner's claim for damages against prison officials. By clearly defining the framework for its analysis, the court demonstrated the approach it will take to all damage claims against state officials.

The court has also modified the concept of a prisoner's constitutional right to protection from other inmates. The court has enunciated clearly that a prisoner *does* have a constitutional right to protection. Under the Seventh Circuit's analysis, the prisoner has been deprived of this right if his treatment at the hands of fellow prisoners has been "fundamentally unfair" or "manifestly inconsistent with contemporary standards of decency." This approach switches the focus from general conditions in the prison to the

110. This opens the door to spurious claims by prisoners who are only too aware of the developing law and have little to do but draft new complaints.

111. If a prisoner brought suit seeking injunctive relief and prison officials continued to allow him to remain under conditions where his right to protection was denied, this in itself might be deemed sufficient under *Little* to support a claim for damages, as the officials would clearly have notice of the inmate's plight. Therefore, the mere filing of suit might be enough to spur action.

treatment received by the individual inmate. This seems only logical because he is claiming damages based on his mistreatment rather than general prison conditions.

The *Wood* test as applied in *Little* requires that the prison officials must have been "deliberately indifferent" to the violations to be liable for damages. The inmate has a cause of action if the official disregards his being assaulted by other inmates. Yet, the official is protected if he acts in good faith to protect the prisoner. This is a logical and appropriate balance.

Obviously, the problem of inmate mistreatment of fellow inmates will not be solved by a solitary award of damages from a prison official to an inmate. However, the *Little* case opens up the possibility of injunctive relief for individual inmates or on an institution-wide scale in the Seventh Circuit. The inquiry in such cases will be solely whether the inmate's treatment at the hands of fellow inmates was so intolerable as to violate principles of fundamental fairness.

The ultimate solution to the underlying causes of inmate violence, such as overcrowding, clearly can only be left to the legislature. The *Little* case merely serves notice that the federal bench will no longer allow prison officials to sit passively by and allow inmates to terrorize their fellow inmates. This is clearly a step in the right direction, toward a more just and humane prison system.

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