"FIGHT OR F . . ." AND CONSTITUTIONAL LIBERTY: AN INMATE'S RIGHT TO SELF-DEFENSE WHEN TARGETED BY AGGRESSORS

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"Many times you have to 'prey' on someone, or you will be 'preyed' on yourself."
Jack H. Abbott, *In the Belly of the Beast*[1]

INTRODUCTION

Incarceration exposes male inmates to a "world of violence"[2] where staff cannot or will not protect them from rape, assault, and other forms of victimization.[3] To make matters worse, retreating in the face of danger is neither normative nor feasible;[4] in prison your back is always against the wall. Most inmates have but two options: to fight in self-defense or become passive victims of a predatory subculture. Indeed, the best defense may be to attack first, thus

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1. JACK H. ABBOTT, IN THE BELLY OF THE BEAST 121 (1981).

2. MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995). Studies of inmate violence infrequently address female-on-female assaults. Aside from possible gender bias, two factors may account for this discrepancy in the penological literature. First, the extant studies indicate that assault rates are much lower in women's prisons than in men's prisons. LEE H. BOWKER, PRISON VICTIMIZATION 49 (1980) [hereinafter PRISON VICTIMIZATION]. Second, female prisoners comprise only a small portion of the total prison population. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 600, tbl. 6.29 (1994) [hereinafter SOURCEBOOK] (847,271 sentenced male prisoners versus 46,595 females in 1992).

3. PRISON VICTIMIZATION, *supra* note 2, at 12-13 (top correctional officials unwilling to commit resources needed to protect vulnerable inmates); Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions, in* THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch, eds., 1982) [hereinafter *Victimizers and Victims*] ("inadequate supervision by staff members" is one of several factors responsible for "controlled war"); Donald R. Cressey, *Foreword* to JOHN IRWIN, PRISONS IN TURMOIL at vii (1980) ("[the guards] have withdrawn to the walls, leaving inmates to intimidate, rape, maim, and kill each other with alarming frequency"); Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Rape and Their Willingness to Respond to Acts of Rape, in* PRISON VIOLENCE IN AMERICA 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994) ("[I]n the prison vernacular, they seem to offer little assistance to inmates except the age-old advice of 'fight or fuck.'"); Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison, in* PRISON VIOLENCE IN AMERICA 27, 28 (Michael C. Braswell et al. eds., 2d ed. 1994) ("Prisons are largely unable to protect the physical safety of their inmates."); CARL WEISS & DAVID J. FRIAR, TERROR IN THE PRISONS 68 (1974) ("The first thing a new inmate learns is that the prison authorities cannot protect his body's privacy. His next discovery is that the inmates actually run the prison.").

4. *See infra* notes 26-32 and accompanying text (discussing inmates' lack of options when confronted with aggressive, exploitive nature of the inmate society).

blurring the line between aggressor and target. As one experienced inmate counseled:

> Well, the first time [a potential sexual aggressor] says something to you or looks wrong at you, have a piece of pipe or a good heavy piece of two-by-four. Don't say a damn thing to him, just get that heavy wasting material and walk right up to him and bash his face in and keep bashing him till he's down and out, and yell loud and clear for all the other cons to hear you, "Mother fucker, I'm a man. I came in here a mother fucking man and I'm going out a mother fucking man. Next time I'll kill you."[5]

Prisoners who fight rather than submit, particularly those who engage in preemptive attacks, are nonetheless in a quandary. While their safety may depend upon their embracing violence, its use could lead to disciplinary sanctions.[6] Inmates readily grasp their "no-win" situation:

> [Inmate] PC 15: As far as the inmate is concerned, you have to prove yourself to other inmates, as a man. Whereas to the [prison disciplinary] adjustment committee . . . you're proving yourself to be a fool. That's where it bounces.
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> [Inmate] Cox C-2 23: Oh, I felt like I wanted to break out when I just looked at the guy. I just wanted to walk up to this guy and say, "You have been bothering me a whole lot." And just smash him in the face. But, you know, there is a lot of things that makes a guy hesitate about fighting in here, and the [disciplinary] record happens to be one of them.[7]

This Article examines the constitutional ramifications of the targeted inmates' dilemma. Part I reviews the demographics and origins of inmate-on-inmate violence. Part II describes the extant law of inmate self-defense. Part III contends that constitutional liberty[8] embraces certain instances of inmate self-defense,

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5. PIRI THOMAS, DOWN THESE MEAN STREETS 256 (1967).

6. Inmates could also face criminal charges under state and federal law. The Fifth Amendment prohibition of double jeopardy is inapplicable in such cases because disciplinary sanctions are not the sorts of punishment envisaged by its drafters. Garrity v. Fiedler, 850 F. Supp. 777, 779 (E.D. Wis. 1994). *See generally* U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). The role of self-defense in criminal cases arising from inmate-on-inmate violence will not be addressed by this Article.

7. HANS TOCH, LIVING IN PRISON 211 (rev. ed. 1992). Toch observed that the targeted inmate is in a "double bind": "He knows that inmates and staff respect a man who fights, but that violence brings punishment and can affect one's chances for parole. Since the positive and negative pressures emanate from the same milieu, they produce confusion, disorientation, and sometimes discomfort . . . ." *Id.* Similarly, Lockwood wrote that "[t]he fear of disciplinary infractions . . . puts some targets in a dilemma. Should they consider their long term welfare or fight to alleviate an aggressor's pressure?" DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 57 (1980).

8. Liberty is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The Fifth Amendment provides in part: "No person . . . [shall] be deprived of life,

thereby precluding the imposition of disciplinary sanctions on targeted inmates. Finally, this Article examines the likely impact on staff and inmates should vulnerable, targeted inmates possess a constitutional right to self-defense.

I. THE WALLED BATTLEFIELD

Among the "pains of imprisonment" delineated in Gresham Sykes' ground breaking study *The Society of Captives*, the most ironic is the loss of security.[9] Founded in the nineteenth century to reform offenders,[10] the American prison has degenerated into a walled battlefield that inflicts upon its male residents unmatched levels of murder and assault. The United States Department of Justice reported that state inmates killed forty of their own and committed 7,397 assaults upon one another in 1993.[11] But official data grossly understates the true level of violence largely because inmate victims are reluctant to come forward.[12] Although

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liberty, or property without due process of law . . . ." U.S. CONST. amend. V. An early ruling of the Supreme Court, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), limited the reach of the Due Process Clause in holding that the Bill of Rights does not constrain state action. *Id.* at 247. The Due Process Clause of the Fourteenth Amendment, however, does speak to the states by proclaiming that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

9. Sykes posited that inmates experienced loss of liberty, goods and services, heterosexual contacts, autonomy, and security. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 63-83 (1958). Regarding the latter, he wrote:

> However, strange it may appear that society has chosen to reduce the criminality of the offender by forcing him to associate with . . . other criminals for years on end, there is one meaning of this involuntary union which is obvious—the individual prisoner is thrown into prolonged intimacy with other men who in many cases have a long history of violent, aggressive behavior. It is a situation which can be anxiety-provoking even for the hardened recidivist and it is in this light that we can understand the comment of an inmate of the New Jersey State Prison who said, "The worse thing about prison is you have to live with other prisoners."

Id. at 76-77.

10. The rise of the American penitentiary in the early nineteenth century is closely linked to social reformers who sought to alleviate criminality by subjecting inmates to regimes of labor, silence, and prayer. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 57-108 (1971). By the 1830s, the penitentiary had taken root; most states revised their criminal codes to provide for imprisonment rather than the traditional corporal punishments. BLAKE MCKELVEY, AMERICAN PRISONS 25 (1977). By the close of the nineteenth century, however, American prisons were a manifest failure: instead of reforming their wards, they functioned as "custodial warehouse[s] for social refuse." ROBERT JOHNSON, HARD TIME 33 (1987). The contemporary prison continues the long tradition of warehousing offenders, but unlike earlier eras, does so as part of a manifest correctional strategy. *See* FRANK SCHMALLEGER, CRIMINAL JUSTICE TODAY 424-28 (1991) (discussing warehousing and overcrowding in contemporary prison).

11. SOURCEBOOK, *supra* note 2, at 665, tbl. 6.106.

12. "Quantifying the level of prison violence is difficult at best. Official incidence reports

estimates vary regarding the actual amount of prison violence, especially sexual assaults,[13] unquestionably the victimization of inmates by inmates is routine and expected[14] and the corresponding fear of violence is indeed great.[15] One commentator tells us:

. . . are so under inclusive as to be almost wholly devoid of meaning." Grubbs v. Bradley, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982). A landmark study of Philadelphia's jail estimated that 1000 assaults occurred annually, but only three percent were reported. Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8, 12 (1968). A survey of federal prisoners also found considerable underreporting of violence. In a three month period, 391 inmates reported 2,265 infractions but there were only 66 official reports. John D. Hewitt et al., *Self-Reported and Observed Rule-Breaking in Prison: A Look at Disciplinary Response*, 1 JUST. Q. 435, 441 (1985).

13. PRISON VICTIMIZATION, *supra* note 2, at 2-3 (estimates of rapes range from 4.7% in the Philadelphia prison system to a much higher rate in a Tennessee prison, where three of four inmates recalled one or more rapes each month); Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. TIMES, Dec. 29, 1993, at A11 (annually, some 290,000 male inmates are sexually assaulted); Eigenberg, *supra* note 3, at 145-47 (0.3% to 14% of male inmates are raped); LOCKWOOD, *supra* note 7, at 18 (of the inmates most at risk—young white males in New York prisons—71% stated that they had been targets of sexual aggression versus 28% of all inmates, but only one or two actual sexual assaults occurred each year); WEISS & FRIAR, *supra* note 3, at 4 ("Homosexual rape is no surprise to any of the inmates. They all know it happens. It is the first thing you hear about when you enter prison. It is the first thing you fear."); Donald J. Cotton & Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982) ("However, any available statistics must be regarded as very conservative at best since discovery and documentation of this behavior are compromised by the nature of prison conditions, inmate codes and subculture, and staff attitudes."). In addition to rape, there are two other forms of non-consensual sexual behavior: (1) sexual harassment, e.g., "Guys would whistle at me and say I got a nice ass"; and (2) sexual extortion, e.g., "I owed this guy gambling losses . . . now he told me I could settle my account by giving him some head." *Id.* at 49.

14. Hadley v. Peters, 841 F. Supp. 850, 858 (C.D. Ill. 1994) (citing Hibma v. Odegoard, 769 F.2d 1147, 1159 (7th Cir. 1985)) ("Violence is unfortunately endemic in American prisons."); STAN STOJKOVIC & RICH LOVELL, CORRECTIONS 340 (1992) ("The prison is a violent place."); Hans Toch, *Studying and Reducing Stress, in* THE PAINS OF IMPRISONMENT 25, 41 (Robert Johnson et al. eds., 1982) (The prison is a "human warehouse with a junglelike underworld."); HANS TOCH, POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE 53 (1977) [hereinafter POLICE, PRISONS] ("Jails and prisons . . . have a climate of violence which has no free world counterpart."); Scharf, *supra* note 3, at 28 ("Rapes, beatings, knifings, and killings are commonplace occurrences in many prisons.").

15. Clearly, the fear of victimization is great. *See* PRISON VICTIMIZATION, *supra* note 2, at 1 ("Even in institutions where the rape rate is relatively low—perhaps averaging no more than a few incidents per year—there is a widespread fear of being raped, and this fear motivates prisoners to defend themselves carefully against the possibility."); James E. Robertson, *Surviving Incarceration: Constitutional Protection From Inmate Violence*, 35 DRAKE L. REV. 101, 106 (1985-86) ("[T]he fear of violence is the *lingua franca* of the contemporary prison."); POLICE, PRISONS, *supra* note 14, at 53 ("Inmates are terrorized by other inmates, and spend years in fear of harm.").

> [A]nyone who reads the evidence accrued in the hundreds of lawsuits brought to the courts by state prisoners in the past few years can only conclude that all too many American prisons - perhaps the majority - are depressing, rat-infested, heavily overcrowded fortresses that have created perverse societies in which violence, homosexual rape, and other assorted cruelties are everyday occurrences.[16]

Men's prisons are violent because they contain people who would be violent in any social setting. The inmate population's propensity for violence is attributable to several factors. Its youthfulness places a resident among the most violent age-cohort.[17] Many inmates, particularly those who are "state-raised,"[18] come from subcultures that embrace violence as an appropriate medium for settling disputes and securing justice.[19] Virtually all offenders partake of a broader, cultural legitimation of defensive violence by males facing threats to their manhood, property, or families.[20]

The prison environment also breeds inmate-on-inmate violence. The inmate subculture equates manliness and status with displays of "toughness" and aggression.[21] Inmate norms legitimate violence as a means of conflict resolution.[22]

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16. KENNETH C. HAAS & GEOFFREY P. ALPERT, THE DILEMMAS OF CORRECTIONS 83 (1991).

17. Persons between 17 and 29 years of age comprised 53.5% of all men confined in state prisons in 1991. SOURCEBOOK, *supra* note 2, at 611, tbl. 6.40. Of the relationship between age and violence, Graemen Newman observes that one of the "universal facts concerning crime . . . [is that] the bulk of crime, especially violent crime, is committed by the young persons of any culture . . . ." His second universality is that males commit most violent crime. GRAEME NEWMAN, UNDERSTANDING VIOLENCE 116 (1979).

18. State-raised inmates are "graduates" of reform schools and other youth prisons. JOHN IRWIN, THE FELON 26-29 (1970).

19. JOHNSON, *supra* note 10, at 89. Johnson described the state-raised inmate as "emotionally stunted, a perpetual, impulsive adolescent," who employs violence to establish his "manly image." *Id.* at 87, 90. John Irwin identified four themes of the state-raised system: 1) a commitment to toughness; 2) a tendency to band together in cliques; 3) prison homosexuality; and 4) a belief that a return to the "streets" is only a temporary vacation. IRWIN, *supra* note 18, at 26-28.

20. SILBERMAN, *supra* note 2, at 69. Silberman observed that American culture also legitimates "self-defense attitudes" in and out of prison:

> The . . . cultural trait, *self-defense attitudes*, involves the legimation of the use of violence in the defense of property ("a man's house is his castle") and the weak and defenseless (women and children). This set of attitudes, which is tied to traditional notions of male dominance, justifies the use of violence in the protection of a man's property, including "his" women and children, on a level that cannot be found in other Western societies.

Id.

21. "[The prison community] is a world in which 'male' no longer simply connotes certain anatomical characteristics. As in many all-male groups, manliness becomes a status continuum. One's place in the continuum is of great importance, and may be determined by demonstrations of

The coerced proximity of whites and blacks breeds "hate and distrust."[23] Prison architecture often minimizes defensible space, making inmate-on-inmate attacks difficult to detect.[24] Finally, victimization itself and the fear thereof breed violence in the form of retaliation or preemptive attacks.[25]

Whereas the deprivation of security exposes inmates to victimization, the deprivation of liberty closes off retreat by restricting freedom of movement within the institution.[26] Most targets will refuse offers of protective custody[27] because it

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'toughness' during the first weeks of confinement." John J. Gibbs, *Violence in Prison: Its Extent, Nature, and Consequences, in* CRITICAL ISSUES IN CORRECTIONS 110, 115 (Roy R. Roberg et al. eds., 1981). Irwin suggests that the value placed on toughness originates in lower-class culture. He implies that toughness was first seen among state-raised youth, who introduced this value to adult prisons upon their subsequent adult convictions. IRWIN, *supra* note 18, at 29-32. *See also* MARK S. FLEISHER, WAREHOUSING VIOLENCE 198 (1989) (aggressors acquired status, prestige and "macho-value").

22. POLICE, PRISONS, *supra* note 14, at 57-61; Lee H. Bowker, *An Essay on Prison Violence, in* PRISON VIOLENCE IN AMERICA 7, 8-9, 159 (Michael C. Braswell et al. eds., 1985).

23. JOHN IRWIN, PRISONS IN TURMOIL 183 (1980). *See* JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 87 (1983) (conflict is a fact of life in prison). Prison rape is often interracial, with African-Americans as aggressors and whites as targets. LOCKWOOD, *supra* note 7, at 29 (80% of aggressors African-American); LEO CARROLL, HACKS, BLACKS, AND CONS 182 (1974) (75% of aggressors African-American); WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 60 (1982) (black aggressors and white victims in a majority of rapes).

24. Edith E. Flynn, *The Ecology of Prison Violence, in* PRISON VIOLENCE 110, 123 (Albert K. Cohen et al. eds., 1976) ("The lack of visibility and the long distances involved often make it impossible to identify those responsible for assault or other deviant behavior . . . . Correctional architecture and environments in this sense become breeding grounds for violence, anti-social, and criminal behavior . . . ."); William G. Nagel, *Prison Architecture and Prison Violence, in* PRISON VIOLENCE 105, 108 (Albert K. Cohen et al. eds., 1976) ("Their designs do not provide the internal security to protect [prisoners] . . . .").

25. TOCH, *supra* note 7, at 64 ("One here buys the assumption that violence is the only way of countering or preventing the violence of others."); *Victimizers and Victims*, *supra* note 3, at 64 ("Prisoners who achieve notoriety as fighters are much less likely to be attacked than those who appear to fear overt conflict.").

26. Sykes spoke of the deprivation of liberty as "the most obvious" pain of imprisonment and a "double one" in that an inmate is neither free to leave prison nor to move about within prison. SYKES, *supra* note 9, at 65.

27. Protective custody is a "form of segregated confinement intended to provide enhanced safety for likely targets of inmate violence." James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 91 (1987). Some prisons do not permit inmates to enter protective custody at will because demand outstrips available space and the stigma attached to inmates housed in protective custody hampers their reintegration into the general population at a future date. *Id.* at 92-93. Prison staff may require inmates wanting protective custody housing to name their putative assailants as a condition of admission. *See* WEISS & FRIAR, *supra* note 3, at 5:

Green is asked to name his rapists. Apologetically, he refuses, frightened for his life.

results in their round-the-clock segregation[28] and accords them "non-men" status.[29] In the face of danger, some will instead choose to become "kids" or "punks," exchanging protection for sex.[30] Most inmates, however, will arm themselves with "shanks" in preparation for battle.[31] To "make it" in prison—to be a "standup guy"—requires one to embrace intimidation and violence as operative principles of everyday life.[32]

Targeted inmates often initiate physical violence as a preemptive measure. Daniel Lockwood found that they attacked first in about half of all sexual approaches.[33] He provided the following illustration:

> Cornered, his back against the wall, the target starts the fight (i.e., by shoving the aggressor) - only after his antagonist has repeatedly propositioned him, threatened him, and attempted to whisper

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> He is curtly told that if he doesn't give names nothing can be done for him. They plan to send him back to the same cell. While still in the hospital, Green spends hours of agonized thought over whether to release the names. The guards must realize what will happen to him if he does . . . . No names, he decides.

Staff also discourage inmates from entering protective custody by telling them that parole boards question whether inmates who cannot cope with the general prison population can successfully live in the free community. TOCH, *supra* note 7, at 221.

28. Conditions in protective custody often resemble those of disciplinary segregation, such as isolation, lack of programming, and limited visitation and recreation opportunities. Robertson, *supra* note 27, at 125 & n.219.

29. TOCH, *supra* note 7, at 223 ("'weak' persons (nonmen)"). Furthermore, some inmates presume that anyone in protective custody may be an informer, i.e., a "rat" or "snitch." WEISS & FRIAR, *supra* note 3, at 23 (After being advised to enter protective custody, a raped inmate "gasps at this proposal . . . . It will brand him a rat and informer. His life will become virtually worthless."). *See generally* RICHARD A. MCGEE ET AL., THE SPECIAL MANAGEMENT INMATE 31-52 (1985) (discussing approaches for protecting the growing number of vulnerable inmates).

30. In the prison caste system, a "kid" or a "punk" is a heterosexual prisoner who has been "turned out," that is, coerced into homosexual behavior. WOODEN & PARKER, *supra* note 23, at 3; Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. SOC. L. 135, 139 (1992). Unlike the "punk," a "pitcher" is a sexual aggressor who plays the masculine role in prison sexual relationships. *Id.* at 139. Homosexuality in prison is often a ritualized form of heterosexual acts, with a dominant member assuming a "male" role and a submissive inmate placed in the "female" role. WOODEN & PARKER, *supra* note 23, at 14-18.

31. "Shanks" are knives fashioned by inmates. A network of inmates is involved in the making, smuggling, and buying of weapons. Assignment to a work crew gives inmates access to lawnmower and hacksaw blades, pipes, and other weapons-grade materials, which are passed on to other inmates for transportation to cellblocks for use on fellow inmates. FLEISHER, *supra* note 21, at 143.

32. A "standup guy" is an inmate who is at the top of the prison caste system by virtue of his ability to successfully cope with the hardships of imprisonment. Increasingly, this requires a willingness to use violence. Dumond, *supra* note 30, at 139.

33. LOCKWOOD, *supra* note 7, at 40.

> endearments in his ear. Because the prison restricts movement, the transaction escalates to violence, even though one of the participants wants to retreat.[34]

Indeed, target-initiated violence is the normative response among inmates to homosexual propositions. Not only does it announce your masculinity to a prison community that associates a willingness to fight with manliness, but it also demonstrates adherence to an inmate code that equates private justice with displays of force.[35]

Correctional officers also view target-initiated violence as a legitimate form of self-defense.[36] One inmate recounted:

> I asked Sergent [sic] Brown. And he told me to go ahead, "Pick up the nearest thing around you and hit him in the head with it. He won't bother you no more." I went over to another sergeant and I asked him and he said, "Pick up the nearest damn thing to you and just hit him with it, that is all." I looked at him and I said, "All right. If I do this I ain't going to get locked up for it, am I?" He looks at me and he says, "No." Because I am using self-defense.[37]

Furthermore, target violence is an efficacious survival strategy. In addition to fending off predators,[38] it can transform the vulnerable inmate's prison identity—from being "unmanly," and thus an appropriate target, to someone "sport[ing] the stigmata of manliness."[39]

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34. *Id.* at 42.

35. *Id.* at 52 ("The target's violent response is an explicit normative expectation of the prison community. This is passed on to new men by experienced inmates as part of the process of 'prisonization.'"); TOCH, *supra* note 7, at 207 ("The prevailing norm calls for displays of weapons or preemptive strikes.").

36. PRISON VICTIMIZATION, *supra* note 2, at 13 (some officers "just tell them to fight it out"); LOCKWOOD, *supra* note 7, at 55 ("Prison records show staff pleased with such advice, convinced of it effectiveness."); SILBERMAN, *supra* note 2, at 19 ("correctional officers frequently lend support to such aggressive responses"); TOCH, *supra* note 7, at 208 ("Custodial officers may advise inmates of the advantages of using violence when one is threatened."); WEISS & FRIAR, *supra* note 3, at 25 (Another inmate is advised by a staff member to "Go back . . . and fight it out.").

37. LOCKWOOD, *supra* note 7, at 55-56.

38. In the sole published study of the effectiveness of target violence, Lockwood concluded: "In concrete incidents, some men have found violence to be a satisfactory ploy. Targets can report violent responses that have curbed aggressive approaches, and some men who try reasoning with aggressors find them unresponsive until these targets project a more aggressive stance." *Id.* at 50. Threats by targets are also effective. Lockwood noted that target threats ended half the confrontations he studied, whereas passive responses led to aggressor violence or aggressor threats. *Id.* at 43.

39. TOCH, *supra* note 7, at 214; LOCKWOOD, *supra* note 7, at 43.

II. The Extant Law of Self-Defense in Prison

A. An Overview of Prison Discipline

Inmates are subject to a plethora of prison rules designed to regulate virtually every aspect of daily life.[40] For instance, Wisconsin's disciplinary code is divided into the following categories of prohibited behavior: 1) bodily security (e.g., assault); 2) institutional security (e.g., inciting a riot); 3) institutional order (e.g., disrespect); 4) property (e.g., theft); 5) contraband (e.g., possession of money); 6) movement (e.g., loitering); 7) safety and health (e.g., dirty quarters); and 8) miscellaneous (e.g., refusal to work).[41] Some of these prohibitions are *malum in se* and mirror criminal offenses.[42] But the great bulk of prohibitions have no counterpart in the criminal law[43] and are peculiar to life in "total institutions," where prisoners are stripped of their autonomy and subjected to round-the-clock surveillance.[44]

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40. The median number of prison rules is 56. New York lists the most (105 rules) while Massachusetts possesses the fewest (33 rules). James E. Robertson, *"Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 St. Louis U. Pub. L. Rev. 153, 169-70 (1994).

41. Wis. Admin. Code § DOC 303 (June 1994).

42. *See, e.g.*, Arkansas Dep't of Correction, Admin. Reg. § 831, at 6-8 (May 17, 1990) (battery, rape, assault); Georgia Dep't of Corrections, Inmate Disciplinary Code, at 1-2 (March 1, 1992) (intentional killing of officer; intentional bodily injury to prison employee; threatening person with weapon; assault without a weapon); Kentucky Dep't of Corrections, Policies and Procedures 15.2, at 6 (Sept. 1, 1992) (assaulting inmate, extortion or blackmail, destroying property, bribery); Maryland Div. of Correction, DCD No. 105-1, at 2-3 (Nov. 1, 1992) (wrongful killing, battery, extortion, bribery, stealing); State of New York Dep't of Correctional Services, Standards of Inmate Behavior, All Institutions 9 (rev. Feb. 1992) (inflicting bodily harm upon inmate, making threats, extortion); North Carolina Dep't of Corrections, Rules and Policies 20 (Dec. 1988) (murder, assault, kidnaping, arson, stealing); Wash. Admin. Code § 137-28-030 (1990) (homicide, assault, extortion, stealing).

43. Arkansas Dep't of Correction Admin. Reg. § 831, at 3-5 (May 17, 1990) (writing petition that poses threat to prison security, getting fired, interfering with count, breaking into inmate line); Colorado Dep't of Corrections, Code of Penal Discipline 15-19 (rev. 1984) (abuse of medication, refusal, bartering, unauthorized absence); Hawaii Dep't of Social Services and Housing, Inmate Handbook 8 (Oct. 1983) (engaging in sexual acts, wearing mask, loaning of property for profit, refusing to obey an order); Kansas Dep't of Corrections, Inmate Rule Book 14-15 (April 20, 1992) (insubordination, avoiding an officer, improper use of food, misconduct in dining room); Maryland Div. of Correction, DCD No. 105-1, at 2-3 (Nov. 1, 1991) (consensual sexual act, possession of money, giving false information about institutional matters, refusal to work); Wash. Admin. Code § 137-28-025 (1990) (loaning for profit, refusal to obey, unexpected absence from work, lying to staff, tattooing).

44. Erving Goffman, Asylums 6 (1961):

> The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life. First, all aspects of life are conducted

A Bureau of Criminal Justice Statistics survey of state prison inmates found that 52.7% were accused of disciplinary offenses during the course of their confinement.[45] Male inmates averaged two violations per year.[46] A greater percentage of non-Hispanic blacks (57%) faced disciplinary charges than non-Hispanic whites (51%) and Hispanics (47%).[47] Younger inmates had the most disciplinary violations.[48]

The actual rate of misconduct is much higher. Many targets do not report their victimization out of fear of being labeled a "rat" by their fellow inmates.[49] Furthermore, correctional officers frequently overlook violations, even serious ones.[50] Whether they "write-up" an inmate for a rule violation is influenced by several factors, including the nature and severity of the infraction[51] as well as the race and disciplinary record of the offender.[52]

The Supreme Court has held that accused inmates are entitled to a hearing and several attendant procedural safeguards:

1) Prison staff must provide them written notification of the alleged offense and a summary of the factual basis of the accusation no later than twenty-four hours before the hearing.[53]

2) Inmates who are illiterate or facing complex charges are entitled to a "counsel substitute," who is typically a member of the prison staff.[54]

3) While there is no right of cross-examination, inmates may advance their

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> in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled. . . . Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

45. JAMES STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RULE VIOLATORS 1, tbl. 1 (1989).

46. *Id.*

47. *Id.* at 2-3.

48. *Id.* at 2.

49. SYKES, *supra* note 9, at 87, noting that:

> [I]n the prison the word *rat* or *squealer* carries an emotional significance far greater than that usually encountered in the free community. The name is never applied lightly as a joking insult . . . . Instead, it represents the most serious accusation that one inmate can level against another, for it implies a betrayal that transcends the specific act of disclosure. The *rat* is a man who has betrayed not just one inmate or several; he has betrayed inmates in general . . . .

50. Hewitt et al., *supra* note 12, at 445.

51. *Id.*

52. Erick D. Poole & Robert M. Regoli, *Race, Institutional Rule-Breaking, and Institutional Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC'Y REV. 931, 942-46 (1980).

53. Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974).

54. *Id.* at 570.

case through the testimony of relevant witnesses unless their presence would be "unduly hazardous to institutional safety or correctional goals."[55]

4) The hearing body must provide the accused inmate with a written explanation of its verdict.[56]

All but ten percent of disciplinary cases end with guilty findings.[57] The hearing body can impose a variety of sanctions upon the guilty. Solitary confinement is the most common sanction (31% of rule violators), followed by forfeiture of good conduct time (25%), denial of entertainment and recreational opportunities (15%), and loss of commissary privileges (13%).[58] The hearing body possesses extensive discretion in choosing the nature and severity of disciplinary sanctions.[59]

B. A Survey of the State Practices

Targeted inmates who engage in self-defense may find themselves charged with disciplinary infractions such as assault, battery, and/or possession of weapons. John Rowe, an inmate at the Indiana Reformatory at Pendleton, bears witness to the ensuing hardships. He hit inmate Michael Evans over the head with a hot pot after Evans had entered his cell and allegedly attempted to rape him.[60] Earlier, Evans had threatened to harm Rowe unless he submitted to sexual acts.[61] Charged with violating a prison rule that prohibited battery, Rowe asserted his innocence on the grounds that he acted in self-defense.[62] The disciplinary committee found Rowe guilty of battery after concluding that the Indiana Department of Corrections recognizes self-defense as a mitigating factor but not

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55. *Id.* at 566.

56. *Id.* at 564.

57. STEPHAN, *supra* note 45, at 1.

58. *Id.* at 6-7.

59. The penalty schedule adopted by Maine is illustrative. There are four levels of offense severity. The most severe level, Class A Disposition, provides:

1. Disciplinary segregation or cell restriction or both, up to a total of 30 days.
2. Housing or room/dorm restriction or both, up to a total of 30 days.
3. Loss of good time, up to 30 days.
4. Loss of privileges for no more than 30 days.
5. Recommend changes in program to Classification Committee to include, but not be limited to, school/housing, work/community programs.
6. Restitution.
7. Counseling/verbal reprimand/warning.
8. Any combination of the above.

MAINE DEP'T OF CORRECTIONS POLICY, CLIENT DISCIPLINARY PROCEDURES ch. 15.1, at 14 (March 1, 1991).

60. Rowe v. DeBruyn, 117 F.3d 1047, 1048 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 508 (1994).

61. *Id.* at 1049.

62. *Id.*

as a complete defense in disciplinary matters.[63]

Although Rowe's actions were normative among inmates and guards, the departments of corrections of only twelve states have written policies acknowledging self-defense as grounds for acquittal of certain disciplinary charges.[64] Seven of the twelve states stipulate that self-defense excuses only instances of fighting and/or assault.[65] None of these seven states provide inmates and/or hearing officers with an operational definition of self-defense. Five states, Michigan, Ohio, Wisconsin, Utah, and New Mexico, delineate by statute or administrative regulation the elements of self-defense and excuse any offense embraced by their operational definitions.[66] Michigan's *Hearings Handbook*

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63. *Id.*

64. ALABAMA DEP'T OF CORRECTIONS, ADMIN. REG. NO. 403, DISCIPLINARY HEARING PROCEDURES FOR MAJOR AND MINOR VIOLATIONS 18 (June 17, 1992) (fighting defined as mutual combat); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 9, 14 (rev. ed. 1984); KAN. ADMIN. REGS. 44-12-301 (Supp. 1992); LOUISIANA DEP'T OF PUBLIC SAFETY AND CORRECTIONS, DISCIPLINARY RULES AND PROCEDURES FOR ADULT PRISONERS 14 (Feb. 5, 1986); MICHIGAN DEPT. OF CORRECTION, HEARINGS HANDBOOK 33 (1994) (a copy of page 33 was enclosed in letter from Richard B. Stapleton, Hearings Administrator, Office of Policy and Hearings, Mich. Dep't of Corrections, to the author (Dec. 21, 1994)); MISSISSIPPI DEP'T OF CORRECTIONS, INMATE HANDBOOK 13 (1992); Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995) (enclosed with the letter were New Mexico's inmate discipline procedures, including offenses and sanctions); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995) (enclosed in letter from Jack Ford, Director, Constituent Services, Utah Dep't of Corrections, to the author (June 21, 1995)); VIRGINIA DEPT. OF CORRECTIONS, DIVISION OPERATING PROCEDURE 861, INMATE DISCIPLINE 4 (April 1, 1992); WASH. ADMIN. CODE § 137-28-030 (1990); WIS. ADMIN. CODE § DOC 303.05 (June 1994).

65. ALABAMA DEP'T OF CORRECTIONS ADMIN. REG. NO. 403, DISCIPLINARY HEARING PROCEDURES FOR MAJOR AND MINOR VIOLATIONS 18 (June 17, 1992) (fighting defined as mutual combat); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 9, 14 (rev. ed. 1984) ("Self-defense shall be a defense to the charge of assault."); KAN. ADMIN. REGS. 44-12-301 (Supp. 1992) ("unless such activity [fighting] is in self-defense"); LOUISIANA DEP'T OF PUBLIC SAFETY AND CORRECTIONS, DISCIPLINARY RULES AND PROCEDURES FOR ADULT PRISONERS 14 (Feb. 5, 1986) ("Self-defense is a complete defense [to aggravated fighting] and can be established to the Board by demonstrating that his actions did not exceed those necessary to protect himself from injury."); MISSISSIPPI DEP'T OF CORRECTIONS, INMATE HANDBOOK 13 (1992) ("Fighting with another person except in self-defense."); VIRGINIA DEPT. OF CORRECTIONS, DIVISION OPERATING PROCEDURE 861, INMATE DISCIPLINE 4 (April 1, 1992) ("[T]his offense [assault] shall apply only to the inmate who attacks or initiates the actual physical combat."); WASH. ADMIN. CODE § 137-28-030 (1990) ("[f]ighting with any person except in self-defense").

66. MICHIGAN DEP'T OF CORRECTIONS, HEARINGS HANDBOOK 33 (1994); Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995); WIS. ADMIN. CODE § DOC 303.05 (June 1994).

operationalizes self-defense by specifying six elements that the hearing officer must consider before excusing the defendant's conduct:

> 1. The resident must have had physical force used against him/her, or reasonably believed that the use of physical force against him/her was imminent.
> 2. The resident claiming the defense was not the original aggressor.
> 3. The resident did not provoke the attacker.
> 4. The use of force was not by mutual agreement.
> 5. The resident had no reasonable alternative to the use of force in defending his/her physical well-being (e.g., retreat was not a possible alternative).
> 6. The resident did not use more force than was reasonably necessary to defend self (if [the] resident fought back harder than necessary, s/he should be found guilty of fighting).[67]

The *Hearings Handbook* also stipulates that "this defense is not available to protect property or 'honor,' but only the physical well being of residents."[68] Ohio's treatment of self-defense is quite similar to that of Michigan.[69] Wisconsin's self-defense provisions are distinguished by the requirement that the target not use a weapon.[70] Utah is alone in applying a statutory provision for self-

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67. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994).

68. *Id.*

69. OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993):

> Self defense: An inmate acting in self-defense does not have the required intent to be found guilty of a fighting charge (77-17, 85-43). Where self-defense is asserted, the RIB must closely examine the incident to determine whether the force used by the inmate in defending himself was reasonable (76-39, 85-43). Reasonable force is limited to that force necessary to defend against or repel a physical attack to avoid injury; any force that goes beyond this amount constitutes supporting or perpetuating a fight (80-2, 85-43, 88-8). An inmate is entitled to continue to defend himself as long as the circumstances justify, but if possible he must retreat (77-6).

70. WIS. ADMIN. CODE § DOC 303.05 (4) (June 1994):

> An inmate may use the minimum amount of force necessary to prevent death or bodily injury to himself or herself. An inmate may never use force which may cause death to another in exercising the privilege of self-defense. An inmate may never use a weapon in exercising the privilege of self-defense. An inmate may not continue to exercise the privilege of self-defense after an order to stop. In determining whether the minimum amount of force was used in exercising the privilege of self-defense, staff should consider:
>
> (a) Whether a weapon was used by the aggressor;
> (b) The size of the inmates;
> (c) The opportunity of an inmate who claims self-defense to flee or get assistance from a staff member; and
> (d) Whether staff members were nearby.

defense.[71] New Mexico, on the other hand, considers self-defense to be a species of duress, which constitutes a defense to disciplinary charges.[72]

In twenty-one additional states, hearing officers as a matter of customary practice can acquit targeted inmates on the grounds of self-defense.[73] For instance,

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71. UTAH CODE ANN. § 76-2-402 (1995), which provides in part:

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified in Subsection (1) if he or she:

(a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(c)(i) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person threatens to continue the use of unlawful force.

72. Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995) ("Facts establishing that a prisoner committed an offense while acting under duress may be raised by a prisoner and shall be considered where appropriate as a defense to, or in mitigation of any sanctions for, any offense . . . .").

73. Letter from J.C. Kenney, Assistant Director, Adult Institutions, Ariz. Dep't of Corrections, to the author (Jan. 4, 1995) (self-defense permitted when in immediate physical danger and minimal amount of force used); Letter from Steve Crawford, Program Administrator, Institution Services Unit, Cal. Dep't of Corrections, to the author (July 11, 1995) (California Code of Regulations and Department Operations Manual do not address self-defense, but inmate can provide evidence, including self-defense and may secure dismissal or reduction of offense severity if there is a belief in the inmate's innocence); Letter from Barry Faticoni, Administrator, Standards and Policy Unit, Conn. Dep't of Correction, to the author (Dec. 20, 1994) (self-defense could lead to an acquittal); Letter from Perri King Dale, Fla. Dep't of Corrections, to the author (July 17, 1995) (self-defense can result in dismissal or mitigation); Letter from Karen M. Kirk, Senior Public Information Specialist, Ga. Dep't of Corrections, to the author (June 26, 1995) (no written procedures, but self-defense considered in hearings); ILLINOIS DEP'T OF CORRECTIONS RULES, ch. 20, pt. 504A, § 504.80, at 9 (The inmate can make a "relevant statement . . . in his defense.") (attachment to letter from David M. Boots, Manager, Planning and Research Unit, Ill. Dep't of Corrections, to the author (Dec. 16, 1994)); Letter from Sally Chandler Halford, Director, Iowa Dep't of Corrections, to the author (Aug. 28, 1995) (no specific self-defense policy, but can be considered in disciplinary hearing); Letter from Susan Alley, Staff Attorney, Ky. Dep't of Corrections, to the author (Dec. 15, 1994) (policies do not specifically address defenses, but may raise self-defense as an excuse or in mitigation); Telephone interview with Audrey Brown, Office

although the Arizona Department of Corrections lacks a written self-defense policy, a spokesperson recounted that:

> We believe that self-defense is justified when a person is in immediate physical danger and uses only a minimal amount of force to protect himself. In essence, we apply the same standard used in the community. It is my experience that many times we find one inmate guilty of fighting and the other not guilty due to self-defense.[74]

No fewer than nine of the aforementioned states extend hearing officers the

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of the Commissioner, Md. Dep't of Corrections (Aug. 10, 1995) (no written policy but hearing officers will hear pleas of self-defense on a case-by-case basis); Letter from Joanne M. Sollecito, Legal Counsel, Mass. Dep't of Correction, to the author (July 13, 1995) (regulations do not address self-defense but in practice is considered on a case-by-case basis); Letter from Mark D. Thielen, Assistant to Deputy Commissioner, Institutions Division, Minn. Dep't of Corrections, to the author (Dec. 28, 1994) (supervisor of hearing officers stated that no specific policies address what defenses may be raised and can pretty much raise what you want; not uncommon to raise self-defense in cases of inmate-on-inmate violence and once in great while is justified and is sometimes used to mitigate a penalty); Letter from Bonita G. Morrow, Administrative Analyst, Mo. Dep't of Corrections, to the author (June 22, 1995) (procedures do not specifically provide for self-defense but is an important consideration in fights and violence); Letter from David L. Ohler, Legal Counsel, Mont. Dep't of Corrections and Human Services, to the author (July 6, 1995) (policy does not speak to self-defense, but may be raised as an excuse; accepted only when evidence is clear and convincing); Letter from George Green, General Counsel, Neb. Dep't of Correctional Services, to the author (Dec. 21, 1994) (regulations do not provide for self-defense to be excuse or complete defense, but as a practical matter, self-defense is frequently raised and "I am reluctant to assign total blame," and if record does not show that inmate voluntarily engaged in each element of offense as required by regulations, my inclination is to dismiss charges); Letter from B.J. Urbaniak, Special Assistant to the Commissioner, N.J. Dep't of Corrections, to the author (Dec. 29, 1994) ("disciplinary charge can be downgraded or dismissed"); Letter from Philip Coombe, Jr., Acting Commissioner, N.Y. Dep't of Correctional Services, to the author (Dec. 29, 1994) (no specific policy regarding self-defense, but we believe that the inmate may raise that defense); Letter from Don Redman, Director of Training and Accreditation, N.D. State Penitentiary, to the author (Jan. 24, 1995) (no formal policy but do accept self-defense as "legitimate factor in the hearing process"); Letter from John S. Foote, Inspector General, Or. Dep't of Corrections, to the author (June 20, 1995) (self-defense constitutes a complete defense but agency lacks a definition of self-defense); Letter from Darwin Weeldreyer, Policy Analyst, S.D. Dep't of Corrections, to the author (July 7, 1995) (the hearing officer has discretion to accept a plea of self-defense); Letter from Wayne Scott, Director, Tex. Dep't of Criminal Justice-Institutional Division, to the author (Dec. 16, 1994) (no written policy regarding self-defense, but "[w]e maintain that every person has a right to protect themself [sic] from harm; however, the zealousness of one's defense can also become an issue"); Letter from Robert G. Casto, Staff Assistant, W. Va. Div. of Corrections, to the author (June 27, 1995) (no written policy but may raise self-defense when fight or assault occurs).

74. Letter from J.C. Kenney, Assistant Director, Adult Institutions, Ariz. Dep't of Corrections, to the author (Jan. 4, 1995).

authority to mitigate disciplinary sanctions when self-defense is at issue.[75] The corrections departments of six additional states treat self-defense solely as a mitigating circumstance when imposing punishment.[76] The remaining states give no indication via their administrative rules or in response to the author's queries whether they consider self-defense to be either a complete defense or a mitigating factor in passing sentence.[77] Given that hearing officers have considerable

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75. Letter from Steve Crawford, Program Administrator, Institution Services Unit, Cal. Dep't of Corrections, to the author (July 11, 1995) (self-defense can result in dismissal or reduced penalty); Letter from Barry Faticoni, Administrator, Standards and Policy Unit, Conn. Dep't of Correction, to the author (Dec. 10, 1994) (administrative directive provides for mitigation of penalty, but does not preclude dismissal on grounds of self-defense); Letter from Perri King Dale, Fla. Dep't of Corrections, to the author (July 17, 1995) (self-defense can result in dismissal or mitigation); Letter from Joanne M. Sollecito, Legal Counsel, Mass. Dep't of Correction, to the author (July 13, 1995) (although no written policies address self-defense, it can be considered a viable defense or a mitigating factor on a case-by-case basis); Letter from Mark D. Thielen, Assistant to Deputy Commissioner, Institutions Division, Minn. Dep't of Corrections, to the author (Dec. 28, 1994) (no specific policies addressing what defenses may be raised, but self-defense on rare occasion can excuse or mitigate a penalty); Letter from B.J. Urbaniak, Special Assistant to the Commissioner, N.J. Dep't of Corrections, to the author (Dec. 29, 1994) ("disciplinary charge could be downgraded or dismissed"); Letter from Celedonio Vigil, Acting Director, Adult Prisons Divisions, N.M. Corrections Dep't., to the author (Jan. 4, 1995) ("duress [which includes self-defense] . . . shall be considered where appropriate as a defense to, or in mitigation of any sanctions . . . ."); Letter from Philip Coombe, Jr., Acting Commissioner, N.Y. Dep't of Correctional Services, to the author (Dec. 29, 1994) (no specific policy regarding self-defense, but hearing officer has responsibility for determining whether to dismiss charges or mitigate the penalty); Letter from Wayne Scott, Director, Tex. Dep't of Criminal Justice—Institutional Division, to the author (Dec. 16, 1994) (self-defense is a "valid defense" and "is valid in the mitigation phase"). It appears that hearing officers in the departments cited above have extensive discretion in choosing when to mitigate sanctions as opposed to an outright dismissal of the charges.

76. Letter from Eric Penarosa, Deputy Director for Corrections, Haw. Dep't of Public Safety, to the author (Dec. 16, 1994) (no formal policy but department has rules prohibiting fighting; adjustment committee does not consider self-defense to be an excuse but can mitigate the sanction); Letter from James D. Dimitri, Staff Counsel, Ind. Dep't of Corrections, to the author (Jan. 9, 1995) (The department does not permit self-defense to be complete defense but can be mitigating concern. For example, if one pleads self-defense, s/he may receive 10 days of segregation as opposed to the normal 30 days.); Letter from Hattie B. Pinpong, Chief Disciplinary Hearing Officer, N.C. Dep't of Correction, to the author (Jan. 20, 1995) ("Self-defense can be a mitigating factor."); Letter from Office of the Commissioner, N.H. Dep't of Corrections, to the author (July 19, 1995) (no department rules but can only be a mitigating factor); Letter from Robert S. Bitner, Chief Hearing Examiner, Pa. Dep't of Corrections, to the author (Jan. 18, 1995) (self-defense not an absolute defense, but can be considered a mitigating factor); Letter from William R. Anderson, Hearings Administrator, Vt. Dep't of Corrections, to the author (Sept. 6, 1995) (no self-defense doctrine in the states' disciplinary rules, but officers can consider it a mitigating factor in assault or fighting cases).

77. ALASKA ADMIN. CODE tit. 22, §§ 05.400 - 05.480 (Jan. 1990) (attached to Letter from

discretion in selecting disciplinary punishments,[78] it would seem likely that self-defense arguments affect their verdicts and/or choice of sanctions despite the absence of relevant policy or acknowledged custom.

C. Rowe v. DeBruyn

Prior to the late 1960s, federal courts adhered to the "hands-off" doctrine, which precluded their involvement in disputes between inmates and staff.[79] Prison

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D.W. Carothers, Superintendent, Alaska Dep't of Corrections, to the author (Feb. 26, 1993)) (no provision for self-defense); ARKANSAS DEP'T OF CORRECTIONS, ADMIN. REG. § 831, at 6-8 (May 17, 1990) (no provision for self-defense); DELAWARE DEP'T OF CORRECTION, BUREAU OF PRISONS, POLICY NO. 4.2 (Feb. 1, 1991) (no provision for self-defense); IDAHO DEP'T OF CORRECTION, POLICY AND PROCEDURE MANUAL § 318-C (Sept. 25, 1990) (no provision for self-defense); Letter from Francis J. Westrack, Director of Classification, Me. Dep't of Corrections, to the author (June 26, 1995) (no policy regarding self-defense that permits prisoners to be excused); NEVADA DEP'T OF PRISONS, CODE OF PENAL DISCIPLINE (May 1, 1993); Letter from Debbie Boyer, Administrator, Office of Technology and Procedures, Okla. Dep't of Corrections, to the author (Dec. 15, 1994) (self-defense not specifically addressed in Policy and Operations Manual); RHODE ISLAND DEP'T OF CORRECTIONS, PETTINE RULES (1972) (no provisions for self-defense); SOUTH CAROLINA DEP'T OF CORRECTIONS, INMATE DISCIPLINARY HEARINGS (July 29, 1994) (no provisions for self-defense); TENNESSEE DEP'T OF CORRECTION, UNIFORM DISCIPLINARY PROCEDURES (July 15, 1993) (no provision for self-defense); WYOMING STATE PENITENTIARY, INMATE RULES HANDBOOK, ch. 30 (1990) (no provisions for self-defense).

78. *See supra* note 59 (illustrating discretionary powers given hearing officers in selecting sanctions). *See also* Steven Gifis, *Decision-Making in a Prison Community, in* THE INVISIBLE JUSTICE SYSTEM 317, 326 (Burton Atkins & Mark Pogrebin eds., 1978) (sanctioning influenced by circumstances surrounding the infraction, the attitude of the accused, and disciplinary records).

79. *See, e.g.,* Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in . . . discipline [and other matters] . . . ."); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("courts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases."); United States v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) ("Except under exceptional circumstances, internal matters, in state penitentiaries, are the sole concerns of the state, and federal courts will not inquire concerning them."); Kostal v. Tinsley, 337 F.2d 845, 846 (10th Cir. 1964) ("The discretion of the prison officials on matters purely of discipline . . . is not open to review."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("courts have no supervisory jurisdiction over the conduct of the various institutions"); Sarshik v. Sanford, 142 F.2d 676, 676 (5th Cir. 1944) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."); United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("it is unthinkable that the judiciary should take over the operation of . . . prisons"); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 507 (1963) ("hands-off" doctrine left inmates "without enforceable rights"); Martin W. Spector, Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962) ("courts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the

discipline was often arbitrary and capricious, yet inmates had no effective judicial recourse.[80] Since the demise of the "hands-off" doctrine, inmates have initiated lawsuits on scores of subjects,[81] but until the 1994 decision in *Rowe v. DeBruyn*[82] federal courts had yet to explicitly address the constitutional status of self-defense as an answer to disciplinary charges.[83]

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extreme situation").

80. TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 385 (2d ed. 1990) ("[P]unishment was at the full discretion of the warden and inmates had no opportunity to challenge the charges."); Bruce R. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227, 244 (1970) ("[t]he almost complete absence of meaningful procedural protections . . . [in some prisons]"); William D. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. REV. 309, 314 (1973). ("Even if procedures exist, and even if they are followed, the prisoner's chances of receiving a fair hearing are extremely poor. In many instances, a hearing is never held and punishment is imposed by an individual guard.").

81. Several developments led to the demise of the "hands-off" doctrine and the expansion of prisoners' rights: 1) inmates vigorously sought recognition of their rights; 2) the emergence of a prisoners' rights bar; 3) prison disturbances focused public attention on prison problems; and 4) courts became more committed to protecting the rights of disfavored groups. SHELDON KRANTZ & LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 267 (4th ed. 1991). The expansion of prisoners' rights has been documented by several commentators. *See, e.g.*, Note, *Eighth Amendment Challenges to Conditions of Confinement: State Prison Reform by Judicial Decree*, 18 WASHBURN L.J. 288 (1979); Michael S. Feldberg, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

Beginning in the early 1980s, the Supreme Court brought an end to the expansion of prisoners' rights. *See, e.g.*, Farmer v. Brennan, 114 S. Ct. 1970, 1979-80 (1994) (deliberate indifference represents subjective recklessness on the part of prison officials); Wilson v. Seiter, 501 U.S. 294, 294-300 (1991) (deliberate indifference and deprivation of basic human needs required for Eighth Amendment violations in prisons); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (non-legal publications can be restricted if reasonable basis exists); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987) (religious practices can be restricted if reasonable basis exists); Turner v. Safley, 482 U.S. 78, 91 (1987) (reasonable to ban mail between inmates); Whitley v. Albers, 475 U.S. 312, 320 (1986) (use of force in quelling prison riot not cruel and unusual punishment unless unnecessary and wanton); Block v. Rutherford, 468 U.S. 576, 589 (1984) (no right to contact visits); Hudson v. Palmer, 468 U.S. 517, 527-28 (1984) (no right of privacy in papers and property in prison cell); Rhodes v. Chapman, 452 U.S. 337, 349-50 (1981) (double-celling not inherently unconstitutional).

82. 17 F.3d 1047 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 508 (1994).

83. Two decisions previous to the *Rowe* case tangentially addressed self-defense in prison. In Ward v. Johnson, 667 F.2d 1126 (4th Cir. 1981), the court found that prison officials had erred in not producing inmate witnesses expected to support the plaintiff's assertion that he acted in self-defense in kicking a fellow inmate. *Id.* at 1130-31. In Ivey v. Wilson, 577 F. Supp. 169 (W.D. Ky. 1983), the district court held that an inmate charged with a disciplinary violation stemming from

In *Rowe*, the inmate was found guilty of battery in a disciplinary hearing after Indiana prison officials ruled that self-defense did not excuse disciplinary violations.[84] Inmate Rowe sued under 42 U.S.C. § 1983.[85] The trial court granted prison officials' motion for summary judgment.[86] In his appeal before the United States Court of Appeals for the Seventh Circuit, Rowe averred violations of his substantive and procedural due process rights under the Fourteenth Amendment.

Rowe first contended that inmates accused of disciplinary charges possess a substantive right to be acquitted on grounds of self-defense.[87] The court of appeals responded by finding no basis for such a right. It roundly rejected Rowe's argument that statutory provisions for self-defense in criminal cases somehow created a substantive right protected by the Fourteenth Amendment.[88] Turning to the alternative argument that self-defense is one of those unenumerated fundamental constitutional rights, such as the right to marry[89] and procreate,[90] the court looked for supporting precedent in the criminal law and could find none.[91] The court added that even if there existed a fundamental right to self-defense in criminal cases, the facts of this case concerned prison discipline—"[which is] not part of a criminal prosecution, and the full panoply of rights due a defendant in such a proceeding does not apply."[92]

The court then turned to whether Indiana prison officials had violated Rowe's procedural due process rights by rejecting self-defense as grounds for acquittal. While the court acknowledged that Rowe's right to be heard had been thus limited, prison officials had "accommodated" Rowe by allowing him to raise self-defense as a mitigating factor.[93] "This accommodation of Rowe," wrote the court, "weighed against the . . . [state's] interest in refusing to recognize self-defense as

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an altercation with other inmates was entitled to the production of hospital records to demonstrate that his injuries were consistent with his claim of self-defense. *Id.* at 173. Neither decision, however, addressed whether an inmate has a right of self-defense.

84. *Rowe*, 17 F.3d at 1049.

85. 42 U.S.C. § 1983 (1988). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

86. *Rowe*, 17 F.3d at 1049.

87. *Id.* at 1050-51.

88. *Id.* at 1051-52.

89. Loving v. Virginia, 388 U.S. 1, 12 (1967).

90. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

91. *Rowe*, 17 F.3d at 1052.

92. *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).

93. *Id.* at 1054.

a complete defense in order to discourage prison violence, allows the self-defense policy to survive constitutional scrutiny."[94]

III. Target Self-Defense as a Constitutional Right

A. Self-Help Measures in a State of Nature

While the court in *Rowe v. DeBruyn* considered self-defense to merit the mitigation of disciplinary sanctions, it nonetheless failed to extricate targeted inmates from the dilemma they face in too many states: if they are to prove their manhood in prison and fend off aggressors, targets must resort to self-help measures which transgress prison rules.[95] The court's error came about because it assumed that the constitutional status of self-defense must be diminished by one's imprisonment. Just the opposite is true—the contemporary, Hobbesian prison makes target violence an imperative more worthy of constitutional protection than the exercise of self-defense in civil society. Consequently, this Article argues that certain instances of target violence are constitutionally immune from disciplinary sanctions in those prisons plagued by the routine victimization of inmates by inmates.

Inmates and other residents of "total institutions" possess a "historic liberty interest . . . [in] be[ing] free from . . . unjustified intrusions on personal security,"[96] which the Supreme Court has clothed in terms of the state's obligation to inmates and other institutionalized persons. For instance, in the 1989 decision *DeShaney v. Winnebago County Department of Social Services,*[97] the Court spoke of a duty to provide "reasonable safety [whenever] the . . . [s]tate by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself."[98] Most recently, in its 1994 decision *Farmer v. Brennan,*[99] the Court addressed the application of the Eighth Amendment to a transsexual inmate beaten and raped by other inmates.[100] Writing for the majority, Justice Souter declared that "having stripped . . . [inmates] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[101]

Despite Justice Souter's admonishment, many prisons have been allowed to degenerate into a world of hate, fear, distrust, and aggression. As one commentator writes, "[Prisons are] a barely controlled jungle where the aggressive

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94. *Id.*

95. *See supra* notes 6, 7 and accompanying text (discussing targeted inmate's dilemma).

96. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

97. 489 U.S. 189 (1989).

98. *Id.* at 200.

99. 114 S. Ct. 1970 (1994).

100. *Id.* at 1975. The Eighth Amendment prohibits, in relevant part, "cruel and unusual punishment." U.S. CONST. amend. VIII.

101. *Farmer*, 114 S. Ct. at 1977.

and strong will exploit the weak, and the weak are dreadfully aware of it."[102] In a civil prison, defensive violence may be unworthy of constitutional protection, but not so in the contemporary prison where predatory inmates dominate institutional life.[103] Because the American prison bears a striking resemblance to a state of nature, target violence becomes a necessary self-help measure for protecting the vulnerable inmate's "historic liberty interest" in bodily integrity.[104] As one commentator observed:

> In the outside world, a person who is verbally or physically harassed can call the police or seek assistance to deter the harasser. In prison, there is no one to call. Consequently, there is little choice but to engage in self-help in the settling of disputes. In prison, self-help is expressed as verbal or physical aggression, threatened or real, in order to maintain "respect."[105]

The foregoing analysis seeks to reconcile constitutional principles with prison folkways regarding self-defense. As we previously observed, both staff and inmates view defensive violence as legitimate and expected when one is targeted for rape or other forms of aggression.[106] Jack Abbott, state-raised inmate, noted author, and convicted murderer, articulated this normative arrangement in declaring: "This is the way it is done. If you are a man, you must either kill or turn the tables on anyone who propositions you with threats of force. It is the *custom* . . . ."[107] While prison folkways are not per se worthy of constitutional protection, when they advance a recognized liberty interest in bodily integrity they ought to find expression in constitutional order as it is applied to prison.

B. An Operational Definition of Self-Defense

Self-defense in prison ought to excuse inmates from disciplinary charges when targets can make a clear and convincing case that their actions were essential. In evaluating such claims, disciplinary hearing officers must utilize an operational definition of self-defense that incorporates established and tested principles which distinguish legitimate defensive force from other species of violent conduct.

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102. PAUL KEVE, PRISON LIFE AND HUMAN WORTH 47 (1974). *See also supra* notes 2-3, 9-25 and accompanying text (examining inmate-on-inmate violence).

103. John Irwin observed that until the 1960s the prevailing prison norms were "tolerance, mutual aid, and loyalty [to other inmates]." IRWIN, *supra* note 23, at 192. Thereafter, these norms gave way to warfare amongst inmates and a "new hero" emerged: "Today the respected public prison figure—the convict or hog—stands ready to kill to protect himself, maintains strong loyalties to some small group of other convicts (invariably of his own race), and will rob and attack or at least tolerate his friends' robbing and attacking . . . ." *Id.* at 195.

104. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

105. SILBERMAN, *supra* note 2, at 75.

106. *See supra* notes 35-37 and accompanying text (discussing normative basis of target violence).

107. ABBOTT, *supra* note 1, at 79.

Three principles—proportionality, necessity, and fault—have traditionally resolved self-defense issues in criminal cases.[108] Their application to the prison's disciplinary system should be informed by the normative arrangements of the contemporary prison and, more importantly, should promote target safety in a manner that minimizes adverse consequences for prison discipline.

1. Proportionality.—The law of self-defense in criminal cases requires that defensive force be proportionate to the interest in jeopardy.[109] The same standard ought to apply when disciplinary charges are at issue because any force beyond that reasonably required by the circumstances fails to advance the target's liberty interest in personal safety. A proportionality requirement is common among the states that delineate the elements of a successful plea of inmate self-defense.[110] Ohio, for instance, stipulates that reasonable force is "limited to that force necessary to defend against or repel a physical attack to avoid injury . . . ."[111]

The first of two pertinent issues is whether reasonable force can include the target's use of a contraband weapon. Although Wisconsin's prison regulations stipulate that a weapon is never justified,[112] the other departments of corrections are silent on this matter. Given the likelihood that a determined aggressor would be armed with a "shank" or some other crude weapon,[113] the proportionality requirement should not bar the target's use of a weapon per se. In much the same way, the criminal law does not disqualify armed persons from excusing their actions on the grounds of self-defense.[114] In determining which circumstances justify the use of a weapon, hearing officers should consider whether the aggressor was armed, the comparative size of the combatants, and the availability of staff members to rescue the target.[115]

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108. Richard A. Rosen, *On Self-Defense, Imminence, and the Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 378 (1993).

109. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 392-94 (1977); ROLLIN M. PERKINS, CRIMINAL LAW 996 (2d ed. 1969).

110. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995); WIS. ADMIN. CODE § DOC 303.05(4) (June 1994).

111. OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993).

112. WIS. ADMIN. CODE § DOC 303.05(4) (June 1994).

113. Inmates possess a wide array of weapons made from bedframes, razor blades, spoons, wire, and rope. Robertson, *supra* note 15, at 106. Weapons crafted from the inmate's physical environment are "endemic." PRISON VICTIMIZATION, *supra* note 2, at 30.

114. PERKINS, *supra* note 109, at 1007.

115. Similar considerations are found in the self-defense provisions published by the Wisconsin Department of Corrections. WIS. ADMIN. CODE § DOC 303.05(4) (June 1994):

(a) Whether a weapon was used by the aggressor;

(b) The size of the inmates;

(c) The opportunity of an inmate who claims self-defense to flee or get assistance from a staff member; and

(d) Whether staff members were nearby.

The second issue concerns whether injury to an inmate's honor justifies the use of force. At common law, only the threat of physical harm or unlawful arrest could be met with defensive force.[116] Among state correctional agencies, four expressly limit self-defense to situations endangering bodily safety.[117] Although prison norms legitimate violence when one's honor is verbally assailed,[118] shielding such conduct from disciplinary measures would extend the right of self-defense beyond the liberty interest from which it emanates.

2. *Necessity.*—Self-defense excuses otherwise criminal conduct only when protective force is truly necessary.[119] This is often read to mean that the target cannot defend himself until a reasonable person in his situation would apprehend an imminent threat of harm.[120] Some jurisdictions also require retreat, if possible, before resorting to defensive violence.[121] But in the unique, closed prison environment, where vulnerable inmates cannot run from predators, necessity can sometimes justify preemptive force.

It is for good reason that many targeted inmates initiate combat in anticipation of a forthcoming but not yet imminent attack.[122] Because targets are frequently of smaller stature than their aggressors,[123] a preemptive strike can be a necessary and thus legitimate means of leveling the playing field. One commentator's insights are apropos:

> The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively.[124]

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116. PERKINS, *supra* note 109, at 995-97.

117. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994) ("The resident must have had physical force used against him . . . ."); OHIO DEPT. OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 26 (June 1993) ("defend against or repel a physical attack"); UTAH CODE ANN. § 76-2-402 (1994) ("defend . . . against such other's imminent use of unlawful force"); WIS. ADMIN. CODE § DOC 303.05(4) (June 1994) ("prevent death or bodily injury").

118. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994).

119. Rosen, *supra* note 108, at 42.

120. *Id.* "Taken literally, the *imminent* requirement would prevent D from using deadly force in self-defense until A is Standing over him with a knife . . . ." 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1), at 78 (1984) (footnote omitted).

121. 2 ROBINSON, *supra* note 120, § 131(d)(3), at 84-87.

122. LOCKWOOD, *supra* note 7, at 42.

123. Professor Lockwood found targets to be physically different from aggressors in the following ways: first, targets are much more likely to be white; second, they weigh fifteen pounds less than aggressors; and third, to aggressors, targets, especially slender white males, are perceived as attractive. *Id.* at 31-33.

124. 2 ROBINSON, *supra* note 120, § 131(c)(1), at 78. The departments of only two states condition excusable force on the imminence of aggression. MICHIGAN DEP'T OF CORRECTIONS

Normative considerations can also validate preemptive measures. In the inmate subculture a "real man" stands his ground when threatened with injury, "answer[ing] threat with threat,"[125] which may require him to land the first blow. Less drastic action might diminish the target's stature, placing him in even greater danger.

3. Fault.—Aggressors and persons engaged in mutual combat cannot employ self-defense as an excuse to criminal charges.[126] They must withdraw from the confrontation before their status can be altered to that of targets.[127] Similarly, predatory inmates who meet their match should not be allowed to claim self-defense when accused of prison misconduct.[128] It is important to emphasize that preemptive attacks by vulnerable inmates do not render them at fault.[129] For their part, putative targets will bear the burden of establishing that, regardless of who initiated the combat, they had a reasonable apprehension their adversaries would soon harm them. Once staff intervene, targeted inmates must withdraw or be subject to disciplinary sanctions.[130]

CONCLUSION

Humane imprisonment requires freedom from the constant threat of victimization, be it at the hands of staff or inmates. By this standard, American prisons fail more often than they succeed. In those prisons that resemble a state of nature, where the strong are allowed to prevail over the weak, self-defense becomes a moral imperative that is worthy of constitutional protection.

A right to self-defense will likely impact prison life favorably. Three considerations suggest that the overall level of inmate-on-inmate violence will not rise as a consequence. First, numerous states presently excuse some instances of

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HEARINGS HANDBOOK 33 (1994) ("The resident must have had physical force used against him/her, or reasonably believed that the use of physical force against him/her was imminent."); UTAH CODE ANN. § 76-2-402 (1995) ("defend . . . against such other's imminent use of unlawful force").

125. LOCKWOOD, *supra* note 7, at 47 ("Those identifying with the convict code feel they must answer threat with threat."). The same considerations of honor and dignity underly the "true man" rule in criminal cases, which permits the use of defensive force without the necessity of retreating. Philip E. Mischke, *Criminal Law—Homicide—Self-Defense—Duty to Retreat*, 48 TENN. L. REV. 1000, 1001-02 (1981).

126. PERKINS, *supra* note 109, at 1006.

127. *Id.*

128. The inmate self-defense rules in Michigan and Utah do not excuse the original aggressor or inmates who provoke attacks or engage in mutual combat. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994); UTAH CODE ANN. § 76-2-402 (1995).

129. *See supra* notes 35-39 and accompanying text (discussing target-initiated violence, which is both normative and utilitarian amongst inmates seeking to protect themselves from predators).

130. *See generally* WIS. ADMIN. CODE § DOC 303.05(4) (June 1994) ("An inmate may not continue to exercise the privilege of self-defense after an order to stop.").

target violence.[131] Second, even in those states that do not excuse target violence, it already receives wide normative support from inmates and staff alike.[132] Third, disciplinary hearing officers will not side with inmates claiming self-defense unless they offer compelling documentation of their vulnerability.[133] On the other side of the ledger, constitutional recognition of inmate self-defense will deter some potential aggressors. Indeed, by conferring de jure legitimacy on target violence, vulnerable inmates will be encouraged to fight for their honor, dignity, and physical well being, which perhaps more than any other measure will safeguard them until such time as correctional authorities win back prisons from their predatory residents.

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131. Twelve states formally recognize inmate self-defense, twenty-one states permit it as a matter of custom, and six states consider self-defense only in the mitigation of disciplinary offenses. *See supra* notes 64-76 and accompanying text.

132. *See supra* notes 35-37 and accompanying text (discussing inmate and staff attitudes toward self-defense).

133. Disciplinary tribunals, especially those composed of correctional officers who otherwise work alongside the accusing officer, are very much inclined to side with the accusing officer. As Justice Blackmun observed in Cleavinger v. Saxner, 474 U.S. 193 (1985):

> [T]he members of the [disciplinary] committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality . . . . They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties . . . . They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee . . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Id. at 203-04 (footnotes omitted). *See, e.g.*, Wick, *supra* note 80, at 313 ("[insiders] naturally tend to accept the word of the guard, a fellow-official"); Karla M. Gray, *The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners*, 26 HASTINGS L.J. 1277, 1295 (1975) ("officials naturally tend to accept the word of the accusing guard") (footnote omitted).