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***1 CRUEL AND UNUSUAL PUNISHMENT IN UNITED STATES PRISONS: SEXUAL HARASSMENT
AMONG MALE INMATES**

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The minute I walked in[to the prison] there was this uproar. They [inmates] hollered obscenities and all sorts of names. They [officers] told me to walk down the middle of this line like I was on exhibition. I was shaking in my boots. They were screaming things like, "That is for me," and "This one won't take long, he will be easy." And, "Look at her eyes." I had no idea of what to do with that. I was scared. [\[FN1\]](#)

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***2 I. INTRODUCTION**

Sexual harassment is not locked out of prison. Among male inmates it is commonplace and often involves the doing of other inmates. [FN2] Like the sexual harassment of women, [FN3] sexual harassment among male inmates is unwanted, offensive,

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and frequently results in acute fear of sexual assault. [FN4] Consequently, one penal expert states that sexual harassment of inmates "constitute s one of the most crippling aspects of the prison climate." [FN5] Nonetheless, many prison officials *3 are incapable or unwilling to reasonably safeguard targeted inmates. [FN6]

Only in this decade have a few federal courts acknowledged that the sexual harassment of inmates by prison staff constitutes a constitutional tort. [FN7] They have *4 yet to expressly address whether prison staff are constitutionally obligated to safeguard inmates from sexual harassment by other inmates. [FN8] The absence of case law is remarkable given the frequency of sexual harassment among male inmates, [FN9] its harmful consequences, [FN10] and the expansion of inmates' rights. [FN11]

*5 This Article advances the following theses: the Eighth Amendment [FN12] imposes upon prison staff a constitutional duty not to be deliberately indifferent to sexual harassment among male inmates; [FN13] and conditions within many prisons suggest that this duty is frequently ignored. Part II of the Article defines sexual harassment among male inmates, delineates its causes and frequency, and profiles the victims and victimizers. Part III reviews the extant case law on sexual harassment of male inmates, which thus far is factually limited to the targeting of inmates by correctional officers. After describing the constitutional duty to safeguard inmates from harm, Part IV demonstrates the following: sexual harassment among male inmates can inflict the type and degree of injury prohibited by the Eighth Amendment; and prison officials know of and often tolerate pervasive sexual harassment. Part V advances structural remedies for combating sexual harassment in prisons and closes with a summary of the Article.

II. A PORTRAIT OF INMATE SEXUAL HARASSMENT

A. Defining Sexual Harassment in the Prison Setting

1. Title VII and Inmate Sexual Harassment

Title VII of the Civil Rights Act of 1964 defines sexual harassment as follows:

*6 Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when (1) submission to such conduct is made either explicitly or implicitly, a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose ... or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. [FN14]

Title VII solely addresses workplace harassment and thus does not provide a remedy for inmates sexually harassed by other inmates. [FN15] Nonetheless, prisons and the workplace bear certain similarities that invite comparable definitions of sexual harassment.

Like many corporate workplaces, prisons are highly stratified given the immutable distinction between the correctional staff ("the keepers") and the inmate population ("the kept"). [FN16] Thus, prisons readily breed conduct resembling Title VII quid pro quo harassment, in which a superior pressures a subordinate to concede to his or her sexual demands. [FN17] The facts of *Thomas v. District of Columbia* *7 [FN18] illustrate quid pro quo harassment in prison: a correctional officer allegedly sought to coerce the plaintiff-inmate into sexual relations by threatening to label him a "snitch." [FN19]

Prisons, like the workplace, also create environments conducive to same- sex harassment. [FN20] Indeed, the inmate subculture includes sex roles grounded in aggression--such as the "pitcher" and "daddy"--and submission-- such as the "punk" and "fag." [FN21] For inmates assigned to the latter roles, [FN22] prison life resembles the Supreme Court's description of hostile environment harassment--an environment "permeated with discriminatory intimidation, ridicule, and insult." [FN23] The following is illustrative:

*8 Well, the guys [i.e., other inmates], all of them, they have to walk in a single file, and when they go by, it has to be my cell--at least three times a day. And so they would kiss at me and they would tell me they wanted to have me and some of them would really get right down on me and say they want to fuck me and everything like that. [FN24]

2. The Constituent Elements of Inmate Sexual Harassment

Sexual harassment among male inmates consists of uninvited sexual comments or conduct made by and directed at male inmates that would be perceived by reasonable male inmates as offensive and/or coercive. [FN25] Four key elements constitute the above definition. First, target selection is sexual in nature but not necessarily sex-based: while the subject matter is sexual-- such as the overt or implicit references to fellatio and/or anal sex--the victim is usually not selected because of his sex. [FN26] Most sexual aggressors in prison are neither homosexual nor bisexual; they are heterosexuals who define sexual aggression as affirmation of heterosexuality even though their victims are of the same sex. [FN27] It is this component that fundamentally distinguishes sexual harassment among male inmates from opposite-sex harassment. [FN28]

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Second, sexual harassment in prison almost invariably arises from a premeditated desire to humiliate, intimidate, and/or coerce inmates. [FN29] Unlike opposite-sex harassment, it cannot be attributed to miscommunication born from gender socialization. [FN30]

*9 The third distinguishing feature is its non-consensual nature; the victim neither requests nor invites this conduct. [FN31] As unwelcome conduct, sexual harassment among male inmates parallels Title VII sexual harassment. [FN32]

The final element posits that a reasonable male inmate would consider the words or conduct offensive and/or coercive. Because incarceration heightens a man's sensitivity to words and conduct that impugn his masculinity, sexual harassment in prison should not be gauged by a gender-neutral, reasonable person standard. [FN33] Correspondingly, the Ninth Circuit Court of Appeals employed a reasonable woman standard in a Title VII opposite-sex harassment suit because men and women can disagree as to what is offensive. [FN34]

B. Types of Inmate Sexual Harassment

1. Verbal Harassment

a. Statements Which Feminize the Inmate

The first type of sexual harassment consists of comments intended to feminize the target and are thus offensive to most inmates. [FN35] Such comments include: "Guys would whistle at me or say I got a nice ass..." [FN36] and "You are cute." [FN37] Feminization of inmates allows predatory heterosexual inmates to rationalize the sexual victimization of other men. [FN38]

*10 b. Sexual Propositions Most inmates define themselves as heterosexual. [FN39] Consequently, propositions for sex, even if they are politely presented, are likely to be offensive to a reasonable inmate. [FN40] Unless they are forcefully rebutted, propositions can mark the targeted inmate as a homosexual. [FN41]

c. Sexual Extortion

One variation of sexual extortion occurs when an inmate pressures another inmate to pay a debt via a sexual act. As one inmate confided: "I owed this guy gambling losses and he has supplied me with some pot, cigarettes, and other things--now he told me I could settle the account by giving him some head." [FN42] First-time inmates are particularly susceptible to this type of sexual extortion; predatory inmates offer them "loans" upon their arrival and they soon find themselves unable to honor their debts. [FN43] Another variation of sexual extortion *11 involves pressuring an inmate to submit to sexual acts in exchange for protection from other victimizers. In the parlance of the prison, these victims are "kids" or "punks"--heterosexual inmates who become "sex slaves." [FN44]

2. Physical Harassment, i.e., Kissing, Touching, or Fondling Intimate Body Areas

In an atmosphere charged with suspicion and fear of aggression, [FN45] inmates often perceive touching and grabbing as sexual. As one inmate recounted, "He kept putting his hands on me and he was touching my shoulder and arm, patting my hand and constantly around, ridiculous crap. But enough so it would be aggravating." [FN46] Acts such as these are rarely mistaken for expressions of genuine caring or concern: "You can't be sensitive in here. That or being kind is a sign of weakness. When you see someone who is emotional or kind, he is a mark You gotta be hard." [FN47] Furthermore, sexual aggressors sometimes communicate by bodily contact because of limited verbal skills and/or a reluctance to overtly display force. [FN48]

*12 C. Explaining Inmate Sexual Harassment

Sexual harassment among male inmates, like other inmate behavior, can be attributed to the conditions of confinement as well as the cultural and subcultural values that inmates bring with them to prison. [FN49] These two causal factors share a common theme: that sexual harassment among male inmates is an act of sexual aggression born from a need to dominate others. [FN50]

An inmate confined in California's Soledad Prison observed, "Not only is the State of California going to take away your freedom, but also your manhood" [FN51] Imprisonment represents more than the loss of freedom; it also diminishes you as an adult male. As one commentator wrote, "The prisoner's masculinity is in fact besieged from every side...." [FN52]

In his classic study of a maximum security prison, Sykes observed that three "pains of imprisonment" are especially injurious to an inmate's masculine self-image. [FN53] First, imprisonment deprives the great majority of inmates heterosexual relationships, a hardship that imposes symbolic "castration." [FN54] Second, the many prison regulations governing an inmate's life "involve a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood" [FN55] Finally, inmates reside in a subculture *13 without women. [FN56] Of this unisex environment, Sykes wrote:

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A society composed exclusively of men tends to generate anxieties in its members concerning their masculinity The inmate is shut off from the world of women which by its very polarity gives the male world much of its meaning. Like most men, the inmate must search for his identity not simply within himself but also in the picture of himself which he finds reflected in the eyes of others; and since a significant half of his audience is denied him, the inmate's self-image is in danger of becoming half complete, fractured, a monochrome without the hues of reality. [FN57]

In need of affirming their masculinity, some inmates turn to a strategy not denied them by imprisonment--victimizing their fellow inmates. [FN58] They do so as a result of the pre-prison cultural and subcultural values they hold. Western males in general, [FN59] and lower class males in particular, [FN60] the latter largely comprising much *14 of the prison population, [FN61] equate aggression and domination with masculinity. As the premier act of domination, [FN62] prison rape is thus transformed into a statement of one's masculinity and strength:

Rape is not primarily motivated by the frustration of sexual needs. It is more the sexual expression of aggression than the aggressive expression of sexuality The rape of male inmates occurs in correctional settings not because it is a substitute for sex with women, but for the same reasons it occurs in the community: to hurt, to humiliate, to dominate, to control, and to degrade. [FN63]

Within this context, sexual harassment among male inmates performs three functions. First, predatory heterosexual inmates employ sexual harassment as a *15 means of feminizing inmates targeted for sexual exploitation. [FN64] For instance, one aggressor described prospective victims as follows:

We have these young ones and they have still got baby skin and long hair, you know, and they resemble a woman as close as they can get it. The whites, among the younger generation, have got long hair, they have still got baby skin, they are soft, you know--like women. They resemble a woman and you just start to watch. Some of them have feminine ways. [FN65]

Sexual harassment of another inmate also communicates aggressive intentions. As Lockwood observed:

Aggressors, lacking verbal skills and not wanting to incriminate themselves by an overt forceful move, may communicate intentions through touching.... Some aggressors may approach targets by sitting close to them, say, in church, and rubbing their legs against the targets'. When this occurs, the aggressor is protected from accusations of wrongdoing because he can claim the contact was accidental. [FN66]

Finally, sexual harassment among male inmates promotes involuntary identity transformation and role assignment within the inmate social world. By succumbing to pressure to be a "kid" or "punk," [FN67] a victim of sexual harassment acquires the clearly defined, degrading status of "sex slave," [FN68] who can be "bought and sold" for the remainder of his sentence. [FN69]

D. The Frequency of Inmate Sexual Harassment

Anecdotal evidence indicates that sexual harassment among male inmates is widespread. "What is very prevalent in prison," observed Toch, "is the problem of *16 exploitively aggressive sexually tainted overtures with threats of rape." [FN70] Similarly, Buffum found that "jokes, innuendoes, and attempts to seduce or assault are characteristic fare from the time of entry into prison." [FN71] Cotton and Groth flatly asserted, "inmates in both juvenile and adult institutions are subjected to sexual harassment." [FN72]

Four empirical studies confirm that sexual harassment among male inmates is commonplace. Davis' ambitious study of sexual victimization in Philadelphia's jails gained wide attention. [FN73] Davis' staff questioned a significant portion of the inmate population of Philadelphia's jails. [FN74] His report portrayed a harrowing, violent "sexual system." [FN75] "In brief," wrote Davis, "we found that sexual assaults in the Philadelphia prison system are epidemic.... Virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison." [FN76] He extrapolated that nearly 2000 sexual assaults occurred in a twenty-six month period. [FN77] Davis classified about one-third of the sexual incidents as "attempts and coercive solicitations." [FN78]

Lockwood's study remains the premier examination of sexual harassment among male inmates and other forms of prison sexual violence. [FN79] He surveyed inmates residing in two prisons in New York. [FN80] Non-Hispanic white men comprised most of the target population by virtue of their perceived femininity and weakness. [FN81] Lockwood defined sexual victimization to include being "abused by threatening or insulting language, and subjected to sexual propositions ... perceived as threatening." [FN82]

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Twenty-eight percent of the interviewed inmates indicated that they had been sexually targeted. [FN83] Of this group, thirty-three percent had been propositioned; twenty percent experienced "insulting and threatening language;" and seven *17 percent were touched or grabbed. [FN84] Lockwood found sexual assaults to be less frequent than suggested by Davis: only eight percent of the inmates reported that they had been sexually assaulted, but twenty-seven percent indicated that other physical violence had occurred. [FN85] Of the non-Hispanic white inmates between sixteen and twenty-one years of age, seventy-one percent acknowledged some form of sexual victimization. [FN86]

In another relevant empirical study, Nacci and Kane interviewed inmates confined in seventeen federal prisons about sexual activity during their incarceration. [FN87] Of the 330 respondents, twenty-nine percent reported that they had been propositioned. [FN88] Nacci and Kane found rape to be infrequent, with only two of the 330 inmates admitting that they had to perform an undesired sex act. [FN89] Twelve percent stated that they had engaged in sexual acts in their current prison. [FN90] Seven percent reported their "seduction" in exchange for gifts or favors. [FN91] Nacci and Kane qualified their findings by acknowledging that inmates tend to underreport sexual activities [FN92] and federal prisons experience lower rates of sexual aggression than their state counterparts. [FN93]

Finally, Wooden and Parker studied sexual exploitation in a medium security prison in California. [FN94] In a questionnaire they administered to eighty self-identified homosexual inmates, fifty-three percent reported that they had been frequently victimized via "sexual innuendo, sexual harassment, verbal and physical threats." [FN95] Of the non-Hispanic white homosexuals, two out of three encountered frequent pressure to engage in sexual acts. [FN96] Hispanic and black homosexuals were less likely to report sexual harassment. [FN97] The authors stated that "vulnerable youngsters" faced "overwhelming and constant" harassment. [FN98] Wooden and Parker also inquired of the homosexual inmates whether they were "hooked up"(exchanging *18 sex for protection). [FN99] Eighty-eight percent responded affirmatively. [FN100]

E. Victims and Victimizer

In the unisex prison, attributes that mark inmates as effeminate or weak make them likely targets of sexual harassment. [FN101] One victimizer described feminine attributes as follows: "The way he walk. The size of his ass. His facial expressions, his ways and actions. If his face look like a woman, they is going to think that he is a woman." [FN102] Another inmate stated:

Some men look feminine and looks are enough alone for a man behind these walls to attempt to try and get him. It is a hell of a thing to say, but here you are another man and you are behind these walls and before long another man begins to look like a woman to you. [FN103]

Being of slight stature or being a young, non-Hispanic white male also stigmatizes one as both effeminate and weak and thus prime sexual fodder. [FN104] Lockwood found that targets weighed on average seventeen pounds less than non-targets; [FN105] and about half the targets were non-Hispanic and white, with the remainder being Hispanic and black in equal proportions. [FN106] Other studies reached similar conclusions. [FN107]

Lastly, imprisonment renders homosexuals likely victims of harassment. [FN108] Their sexual orientation per se signifies femininity and weakness in the inmate subculture. [FN109] Racial characteristics may also be significant given that non-Hispanic white homosexuals reported a greater frequency of sexual harassment than African-Americans and Hispanics in the Wooden and Parker study. [FN110]

African-American inmates disproportionately comprise the population of sexual *19 harassers. Lockwood found that they constituted seventy-eight percent of the prison's sexually aggressive inmates. [FN111] Davis noted that fifty-six percent of the sexual incidents he studied involved black aggressors and white victims. [FN112] Other researchers similarly found that most victims of prison rape were white and most assailants were black. [FN113]

The causal relationship between race, sexual harassment, and/or prison rape is complex, if not unclear. Lockwood asserted that young, non-Hispanic whites were inviting targets because of their presumed naivete, perceived femininity, and reluctance to retaliate if one of their own were attacked. [FN114] Similarly, Chonco concluded that sexual assault of white inmates is related to their perceived weakness rather than their race per se. [FN115]

III. THE CASE LAW ON SEXUAL HARASSMENT OF MALE INMATES

A. Sexual Harassment Absent Significant Physical Contact

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Case law has long posited that words alone--be they harassing, [FN116] abusive, [FN117] vulgar, [FN118] racially charged, [FN119] or threatening [FN120]--do not violate the Eighth Amendment. As one court observed, "Not every unpleasant experience a prisoner might *20 endure while incarcerated constitutes cruel and unusual punishment" [FN121] Allegations of sexual harassment are not exempted from this rule: "The fact that verbal harassment is gender-specific gives it no greater claim as a constitutional violation than verbal harassment generally," asserted the Tenth Circuit Court of Appeals in a recent decision. [FN122]

Three cases are instructive. In *Ellis v. Meade*, [FN123] a correctional officer allegedly tapped or spanked the plaintiff's buttocks between two and ten times and commented, "How's the little guy doing?" [FN124] The court held that this remark did not violate the inmate's constitutional rights because it was isolated, carried no threat of violence, and may not have been sexual in nature. [FN125]

In *Adkins v. Rodriguez*, [FN126] a jail deputy made comments to a female inmate about "her body, his own sexual prowess, and his sexual conquests" [FN127] on one occasion and later entered her cell, stood over her bed, and remarked as he exited, "By the way, you have nice breasts." [FN128] The court characterized the deputy's conduct as "outrageous and unacceptable" but not tantamount to the "physical intimidation" required by the Eighth Amendment. [FN129]

Lastly, in *McClellan v. Seco*, [FN130] the plaintiff alleged that correctional officers "verbally threatened and abused" him by declaring that he should fear for his *21 safety because of his notoriety as a sex offender. [FN131] In granting a summary judgment for the defendants, the trial court found no reason to depart from the "well established" rule that threats alone do not state a constitutional claim even if the threatened inmate has a particular vulnerability to assault. [FN132]

Meanwhile, a few courts have broken with precedent to hold that some forms of verbal harassment can inflict cruel and unusual punishment. Three decisions involved the threatened use of lethal weapons. [FN133] For instance, in *Burton v. Livingstone*, [FN134] the petitioner alleged that a correctional officer pointed a cocked pistol at him and exclaimed, "Nigger run so I can blow your Goddamn brains out;" "I want you to run so I'll be justified sic" [FN135] In reinstating his cause of action, the court explained that "the day has passed when an inmate must show a court the scars of torture in order to make out a ... constitutional complaint." [FN136]

A fourth case, *Parrish v. Johnson*, [FN137] addressed a guard's mistreatment of paraplegic inmates, including his "paraplegic slurs" directed at one of the plaintiffs. [FN138] In finding an Eighth Amendment violation in the totality of prison conditions, the court characterized the verbal abuse as "strip ping ... the inmate of his dignity" [FN139]

Finally, *Thomas v. District of Columbia* [FN140] concerned allegations that a correctional officer "forcibly touched or attempted to touch plaintiff's penis on at least two occasions, sexually harassed and intimidated plaintiff, and threatened to, and then did, spread rumors that ... the plaintiff is a homosexual and a 'snitch.'" [FN141] The court deemed conduct of this sort "simply not part of the penalty that criminal offenders pay for their offenses against society" and, thus, cruel and unusual punishment. [FN142]

B. Sexual Harassment With Significant Physical Contact

Case law, both old and new, posits that de minimus touching does not violate the *22 Eighth Amendment. [FN143] "Not every push or shove," explained the court in *Johnson v. Glick*, [FN144] "even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." [FN145]

Three decisions speak to the frequency and degree of bodily contact needed to elevate officer-inmate sexual harassment into an Eighth Amendment claim. In *Gilson v. Cox*, [FN146] the plaintiff alleged that a female correctional officer "made various sexual advances toward him and physically abused him by grabbing his genitals and buttocks." [FN147] The court held that these allegations failed to state an Eighth Amendment claim because, if true, they were not "literally shocking to the conscience." [FN148] Nonetheless, the court did find a "right to be free of sexual abuse" and allowed the suit to proceed under a substantive due process claim. [FN149]

In *Boddie v. Schnieder*, [FN150] the Second Circuit Court of Appeals addressed an inmate's allegations that a female correctional officer made "a pass' at him;" and later "squeezed his hand, touched his penis and said, 'You know your sic sexy black devil, I like you' and on another occasion bumped into him ... 'with her whole body vagina against penis sic'" [FN151] Nonetheless, the court ruled that he failed to state an Eighth Amendment claim because the incidents were few in

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number and no single incident was "sufficiently serious." [FN152] The court did indicate that "severe or repetitive sexual abuse of an inmate" can impose a punishment "objectively, sufficiently serious enough" to breach the Eighth Amendment. [FN153]

Finally, in *Watson v. Jones*, [FN154] the Eighth Circuit Court of Appeals reversed the trial court's summary judgment for a female prison officer accused of engaging in *23 sexually harassing pat-down searches of two male inmates. [FN155] These searches allegedly occurred on a daily basis for two months and represented "ongoing sexual advances...." [FN156] The plaintiffs claimed that the searches included "prolonged rubbing and fondling of the genitals and anus areas." [FN157]

IV. SEXUAL HARASSMENT AS CRUEL AND UNUSUAL PUNISHMENT

A. The Deliberate Indifference Test

The Magna Carta provided the touchstone for a duty to safeguard inmates from harm. Article 39 of the Magna Carta stated in part that no free man shall be "in any way destroyed ... except by the legal judgment of his peers or by the law of the land." [FN158]

Blackstone, writing in 1765, spoke of the "right of personal security" as one of three "primary" categories of absolute rights that imprisonment or other infirmities did not extinguish. [FN159] He defined the right to personal security as "consist[ing] of a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." [FN160]

In the late nineteenth and early twentieth centuries, some American courts articulated a common law duty owed imprisoned persons. [FN161] For instance, in *State of Indiana ex rel. Tyler v. Gobin*, [FN162] a sheriff had permitted a lynch mob to remove an inmate from his jail and murder him. [FN163] Recalling the sheriff's common law obligation to exercise due care for goods and livestock in his custody, the court *24 reasoned that a similar duty ran to his inmates. [FN164] In another lynching case, an Indiana court held that failure to "exercise reasonable and ordinary care to protect the prisoner's life and health" is tortious conduct. [FN165] Similarly, the Georgia Supreme Court observed in its 1909 decision in *Westbrook v. State*, [FN166] "While the law does take his liberty, and imposes a duty of servitude and observance of discipline ..., it does not deny his right to personal security against unlawful invasion." [FN167]

Beginning in 1969 with the landmark decision in *Holt v. Sarver*, [FN168] lower federal courts constitutionalized the common law duty to safeguard inmates. [FN169] The district court in *Holt* told of "a great deal of homosexuality ... , some consensual, a great deal nonconsensual. An inmate who is physically attractive to other men may be, and frequently is, raped in the barracks by other inmates. No *25 one comes to his assistance" [FN170] The sexual exploitation of inmates, along with other highly adverse conditions of confinement, led the court to find a breach of the Eighth Amendment. [FN171] "It is one thing," explained the court, "for the state to send a man to the penitentiary as a punishment for crime. It is another thing for the state to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation." [FN172]

In *Estelle v. Gamble*, [FN173] the Supreme Court acknowledged a constitutional basis for "the common law view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself.'" [FN174] The respondent argued that deficient medical care at the hands of Texas prison officials had violated his civil rights. [FN175] Justice Marshall's majority opinion held that prison staff have a constitutional duty under the Eighth Amendment not to be "deliberately indifferent to serious medical needs" of inmates. [FN176]

In its 1989 ruling in *DeShaney v. Winnebago County*, [FN177] the Court more fully explored why and when personal security is a constitutional duty. Speaking for the Court, Chief Justice Rehnquist stated:

The rationale ... is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him but from the limitation which it has imposed on his freedom to act on his own behalf. [FN178]

In the current decade, the Court has decided two cases, *Wilson v. Seiter* [FN179] and *Farmer v. Brennan*, [FN180] that speak to the duty of prison staff to safeguard inmates from one another. In *Wilson*, the Court posited that all challenges to

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conditions-of-confinement, including "the protection ... to be afforded against other inmates," *26 are to be decided by the following two-part test. [FN181] The first component, which the Court characterized as "objective" in nature, requires that the deprivation be "sufficiently serious." [FN182] Speaking for the Court, Justice Scalia observed that a deprivation of this magnitude "denies 'the minimal civilized measure of life's necessities.'" [FN183] Justice Scalia also articulated a "subjective component" in conditions-of-confinement claims, namely, whether the defendant prison officials were "deliberately indifferent" to this deprivation. [FN184]

In *Farmer v. Brennan*, the Court elaborated upon the deliberate indifference standard advanced in *Wilson*. The petitioner, Dee Farmer, a preoperative transsexual with a feminine appearance, had been transferred to the general population of a high-security federal prison. [FN185] Inmates at this prison beat and raped him, [FN186] and while the Court made no mention of sexual harassment, incarcerated transsexuals are likely targets. [FN187] Because inmate Farmer did not inform prison staff that he feared for his safety, the trial court granted summary judgment for the defendants. [FN188] The Seventh Circuit Court of Appeals affirmed. [FN189]

The Supreme Court in *Farmer* rejected the petitioner's call for an objective ("ought to have known") standard of deliberate indifference. [FN190] Like the trial court, the *Farmer* Court held that deliberate indifference arises when the prison staff fails to take reasonable safeguards despite their "actual knowledge" of an "excessive" or "substantial" risk to the inmate's safety. [FN191] Unlike the trial court, Justice Souter's majority opinion expressly warned prison staff that they would not be permitted to ignore obvious risks to inmates:

Whether a prison official had the requisite knowledge of a substantial risk is ... subject to [proof] in the usual ways, including inference from circumstantial evidence For example, if [a] ... plaintiff presents evidence showing that a *27 substantial risk of inmate attacks was "long-standing, pervasive, well documented, or expressly noticed by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find the defendant-official had actual knowledge of the risk." [FN192]

The *Farmer* Court also indicated that the requisite "substantial" risk of harm can arise from threats specifically addressed to the petitioner as well as from his possessing characteristics common to vulnerable inmates. [FN193] As Justice Souter explained:

The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to substantial "risk of serious damage to his future health," ... and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether the prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk. [FN194]

Lastly, Justice Souter stressed that to be of constitutional dimension "the deprivation [inflicted upon inmate Farmer] must be, objectively, 'sufficiently serious'" [FN195] He did not elaborate on the identifying qualities of such a risk perhaps because the Court had previously spoken to this issue. In *Estelle v. Gamble*, [FN196] the Court had ruled that an Eighth Amendment violation occurs when staff are deliberately indifferent to "serious medical needs." [FN197] More recently, in *Wilson v. Seiter*, [FN198] the Court spoke of a sufficiently severe injury as depriving "a single, identifiable human need such as food, warmth, or exercise" [FN199] Later, in *Hudson v. McMillian*, [FN200] the Court stated that "extreme deprivations are required to make out a conditions-of-confinement claim." [FN201] Finally, in *Helling v. McKinney*, [FN202] the Court held that an injury need not have occurred to state an Eighth Amendment claim as long as the inmate was exposed to "an unreasonable risk of serious damage to his future health." [FN203]

Whether the requisite "serious" harm can be of a mental or psychological nature awaits a definitive answer by the Court. Nothing in the Court's modern pronouncements *28 indicates that such harm falls outside the ban on cruel and unusual punishment. Indeed, the Court in *Rhodes v. Chapman* [FN204] stated that "the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involved the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." [FN205] As Justice Blackmun observed in his concurring opinion in *Hudson v. McMillian*, [FN206] "The Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm." [FN207] Furthermore, psychological harm must have been contemplated by the Court when it stated in *Hudson v. Palmer* [FN208] that "calculated harassment of inmates by prison staff unrelated to prison needs" can violate the Eighth Amendment. [FN209]

The circuit courts of appeal are generally in accord that Eighth Amendment pain includes emotional as well as physical injury if the former is "serious" or "significant." [FN210] For instance, in *Scher v. Engelke*, [FN211] the Eighth Circuit

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addressed whether Eighth Amendment pain can arise from cell searches undertaken to harass an inmate. The defendant correctional officer had searched the plaintiff inmate's *29 cell ten times in nineteen days. [FN212] He did so in retaliation of plaintiff's earlier report of misconduct by another staff member. [FN213] The trial court awarded plaintiff nominal and punitive damages. In affirming the trial court's denial of defendant's motion for judgment notwithstanding the verdict, the court of appeals ruled that "the scope of Eighth Amendment protection is broader than the mere infliction of physical pain ... and evidence of fear, mental anguish, and misery inflicted through frequent retaliatory cell searches ... could suffice as the requisite injury for an Eighth Amendment claim." [FN214]

B. Applying the "Deliberate Indifference" Test

1. The Objective Prong: Does Sexual Harassment Among Male Inmates Result in Eighth Amendment Pain?

a. The Intersection Between Sexual Harassment and Fear

Fear of sexual victimization is the "the dominant metaphor in terms of which almost every other aspect of 'prison reality' is interpreted." [FN215] A new, first-time inmate's foremost fear is rape. [FN216] The rate of prison rapes is unknown. [FN217] Estimates range from as low as one *30 percent of the prison population to as high as twenty-eight percent. [FN218] Inmates perceive rape to be widespread. [FN219] There is judicial support for this perception: "A youthful inmate," wrote Justice Blackmun, "can expect to be subjected to homosexual gang rape his first night in jail" [FN220]

Sexual harassment greatly contributes to the fear of rape. "[I]t is the frequency of sexual harassment (insults and offensive propositions) that may lead some observers to believe that rape is rampant in prisons, a belief that is largely attributable to the level of fear generated." [FN221] Fifty-five percent of the targeted inmates studied by Lockwood reported that they consequently feared for their safety. [FN222] They had good reason to fear for their safety given that harassment invariably precedes sexual assault. [FN223]

The targeted inmate's fear of sexual assault often pervades his daily life. [FN224] As one inmate recalled:

My fear was so heavy that I kept thinking about it. Day and day and day. And I couldn't get this fear out. I kept trying and I couldn't get it out. I couldn't stand it in jail and so I kept the same bad feelings and I went to a psychiatrist. I tried to go see a nurse and I took all the pills they gave me and all of it seemed to *31 make me worse and not better. It was too heavy in here. I've had two keep locks [a form of solitary confinement] in here. And it wasn't the guard's fault, but one time I jumped him. [FN225]

b. Psychological and Physical Injuries Arising from Sexual Harassment

Fear born from sexual harassment results in both psychological and physical injuries. Lockwood described the psychological consequences as "devastating and debilitating," [FN226] causing anxiety and crises in some instances. [FN227] Nearly one-fourth of the targeted inmates experienced anxiety. [FN228] Lockwood's inmates told of "shaking, crying, stuttering, weakness, and inability to sleep or concentrate." [FN229] A targeted inmate described his mental state as follows: I didn't sleep at night, I had to get some sleep sometime during the day. I couldn't sleep very well. Here I can hear and see down the hall and up there I couldn't hear anybody coming. But now I can hear and close my eyes and hear if anybody is approaching. And if somebody is approaching me like that, then I would jump out of bed and look around and see who is coming near me. [FN230]

Lockwood observed that "anxiety from fear can lead to crises, situations which individuals are unable to handle." [FN231] Crises befell nearly one of every four targets of sexual aggression. [FN232] These inmates spoke of "'bugging out,' 'flipping out,' 'not being able to take it,' or 'having a nervous breakdown.'" [FN233] As one targeted inmate said:

*32 I was all torn up inside with nerves. I was sick, sick, sick, constantly, right straight through for two weeks. I didn't want to be put out in the population. I wanted to be put someplace where I could work with no one around me. Then I would be fine, but I know you can't do this. There is no such thing like that in here. [FN234]

Lockwood also found that inmates in crises sometimes injure themselves or commit suicide. [FN235] He attributed this self-destructive behavior to a situation "where one becomes suicidal to avoid victimization which he convinces himself is certain." [FN236]

The more common physical injuries, however, arise from combat between harasser and target. In a sample of 114 violent transactions, Lockwood determined that forty-two began with offensive sexual overtures, while another thirty-six were started by polite propositions. [FN237] Sylvester's study of murder in prison found that sexual approaches constituted the motive in thirty percent of single-assailant killings. [FN238] He recounted several murders, including the following:

The victim and the assailant were in a line in the cell block, waiting to receive medication. The victim had previously pressured the assailant for homosexual favors, which had been refused, and earlier that day had assaulted

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him. When the two met in the medication line, the victim threatened to kill the assailant; striking first, the assailant stabbed the victim with a broken fluorescent light tube. [FN239]

A harassed inmate's willingness to risk the injuries of combat is often a prerequisite for achieving "real man" status. As Robertson wrote, "In addition to fending off predators, it [target violence] can transform the vulnerable inmate's prison identity--from being "unmanly," and thus an appropriate target, to someone "sport[ing] the stigmata of manliness." [FN240] The following incident is illustrative:*33

One of the larger inmates stood in front of him and stated his simple proposition: "fuck or fight." The proper response for the untested inmate was *34 to immediately strike the propositioning con, thereby starting a fight. This spontaneous response assured him that he would not be considered to be a sexual fodder for all the wolves. [FN241] Inmates reluctant to risk combat harassment only enhance their vulnerability to sexual exploitation. They are "fair game" for further harassment as well as rape unless they become "kids," who trade sexual services in exchange for protection. [FN242]

c. The Constitutional Threshold

Several federal courts have held that substantial fear of assault, sexual or otherwise, when coupled with the staff's deliberate indifference, imposes cruel and unusual punishment. [FN243] As one court explained: "Subjecting prisoners to violent *35 attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose. We reject as below any level of decency the theory that sexual or other assaults are a legitimate part of a prisoner's punishment." [FN244]

Fear of prison rape reaches the constitutional threshold when sexual assaults are commonplace either within the general prison population [FN245] or an identifiable subgroup of offenders, such as inmates of slight stature. [FN246] For instance, in *Martin v. White*, [FN247] inmate Martin brought suit after his fellow inmates "sexually threatened" him on three or more occasions. [FN248] The court concluded that prison officials had been appraised of a pervasive risk of harm to inmate White by virtue of the prison's fifty-nine reported assaults as well as some 300 "claimed assaults" during a four-year period. [FN249]

Measuring fear through reported rapes, however, is seriously flawed. [FN250] First, many assaults go unreported. [FN251] Second, some harassed inmates give in to threats of assault by becoming "punks" or "kids," who engage in apparently consensual *37 sexual relations. [FN252] Finally, many harassed inmates fight off would-be rapists. [FN253]

A better gauge of substantial fear is whether the staff, to whom the Supreme Court urges deference, [FN254] believe that harassed inmates reasonably fear being raped. Extensive anecdotal evidence supports an affirmative answer given that correctional officers frequently advise targeted inmates to fight their aggressors. [FN255] Illustrative are the following remarks by targeted inmates:

C2-31: One sergeant told me, "Put a bat across this dude's head"

AR-36: When I went through my orientation, the senior lieutenant told me that if anything like that should happen, "Hit him"

C2-30: I asked Sergeant [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 *38 no more." [FN256] Perhaps the best measure of fear is the frequency of violent encounters between the targeted inmate and his harasser. [FN257] Lockwood found that fifty-seven percent of the sexual overtures that included offensive remarks and gestures led to violence, and one-third of polite sexual propositions erupted into physical confrontations initiated by either the target or the harasser. [FN258] Case law holds that assault rates of this magnitude evidence a pervasive and thus constitutionally unacceptable degree of fear of assault. [FN259]

2. The Subjective Prong: Are Prison Staff Deliberately Indifferent to Sexual Harassment Among Male Inmates?

a. Do Prison Staff Possess Actual Knowledge of Sexual Harassment?

1) First Indicium: Direct Evidence of a Specific Threat

"A prisoner normally proves actual knowledge of impending harm," observed the Seventh Circuit Court of Appeals, "by showing that he complained to prison officials about a specific threat to his safety." [FN260] For example, in *Porm v. White*, [FN261] inmate Porm allegedly informed Officer Tindle but not Officer White that he had *39 been threatened by a group of inmates harassing "young pretty white guys." [FN262] Tindle failed to take protective measures, and one of the harassers subsequently stabbed Porm. [FN263] On appeal, the court ruled that a reasonable jury could find deliberate indifference only on Tindle's part. [FN264]

Most inmates, however, will not report sexual harassment out of fear of being labeled a "snitch." [FN265] The facts of *McGill v. Duckworth* [FN266] are instructive. McGill, an Indiana inmate of slight physical stature, received "suggestive notes and comments" from his fellow prisoners when he entered an Indiana prison for a murder that, according to a prison

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rumor, had "homosexual overtones." [FN267] Later he was verbally harassed by two inmates, who subsequently made sexually suggestive comments and threats as they followed him to the shower room. [FN268] On the way, McGill spoke with two correctional officers about an unrelated matter but did not inform them of the harassment. [FN269] In the shower room one of his harassers raped him. [FN270]

In the resulting failure-to-protect suit, the court in McGill observed that "[o]ther circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage." [FN271] Characterizing this case law as "sound," the court held for the defendants. [FN272]

2) Second Indicum: Inferential Evidence of a Non-Specific Threat The subsequent Supreme Court ruling in Farmer v. Brennan [FN273] spares many sexually harassed inmates the Hobson's choice of "ratting" on their tormentors or forgoing the staff's intervention. While Farmer required a showing of prison officials' actual knowledge of a serious risk of harm, the Court permitted the *40 fact-finder to infer such knowledge when (1) "all prisoners ... or those inmates similarly situated face such a risk" [FN274] and (2) the risk is "long- standing, pervasive, well-documented, or expressly noted by prison officials in the past" [FN275] As documented below, prison officials' actual knowledge of sexual harassment can be readily inferred via the Farmer standards.

First, inmates who are fodder to sexual harassers possess shared attributes: victims tend to be non-Hispanic whites, slightly built, and/or homosexual. [FN276] Knowledge of these risk factors dates back at least to Davis's widely publicized 1968 study of sexual victimization in Philadelphia's jails. [FN277]

Furthermore, the frequency of sexual harassment and the consequent fear of violence are pervasive and adequately documented. Twenty-eight percent of the inmates in the Lockwood [FN278] study and twenty-nine percent of the inmates in the Nacci and Kane [FN279] study experienced some form of sexual victimization. In addition, seventy-one percent [FN280] of non-Hispanic white inmates and fifty-three percent [FN281] of homosexuals were sexually targeted. Also recall that over half the targeted inmates interviewed by Lockwood feared for their safety [FN282] (and wisely so, given the frequency of violence arising from sexual overtures). [FN283]

Lastly, interviews with prison staff suggest their familiarity with sexual harassment of inmates and the resulting dangers. Wooden and Parker found that correctional officers agreed with the following: (1) "forced or pressured sexual encounters are very common;" (2) "homosexual inmates have a more difficult time than heterosexual inmates, due to [sexual] pressure;" and (3) "it is a very common occurrence for young, straight boys to be turned out, or forced into being punks." [FN284]

In turn, Eigenberg's survey of 166 Texas correctional officers revealed that eighty-six percent of them "disagreed" or "strongly disagreed" that prison rape is *41 rare. [FN285] Because sexual harassment "invariably" precedes sexual assault, [FN286] one could extrapolate that an equally high percentage of the officers would disagree that sexual harassment is rare. The officers were most likely to believe young inmates and inmates owing debts who reported being raped. [FN287] Eigenberg found that a smaller majority of officers were willing to believe homosexuals. [FN288]

Finally, Lockwood provided the most conclusive proof of staff's familiarity with sexual harassment. He determined that they knew of two- thirds of the sexual incidents experienced by targeted inmates. [FN289] Most incidents came to their attention through reports filed by the victims, personal observation, or informal channels of information. [FN290]

b. How Do Prison Staff Respond to Sexual Harassment?

1) First Indicum: Staff Attitudes Toward Sexual Harassment

A new correctional officer confronts sexual harassment amid an organizational environment that tolerates, if not legitimates, this behavior. [FN291] He or she quickly learns that many co-workers do little to safeguard inmates from sexual aggression. [FN292]

*42 Greatly outnumbered, [FN293] policing less than "defensible space," [FN294] plagued by structural limitations on their power, [FN295] confronting strong prison gangs, [FN296] yet provided with inadequate resources, [FN297] correctional officers often struggle to maintain simply the semblance of order. " In some contemporary institutions they have withdrawn to the walls, leaving inmates to intimidate, rape, maim, and kill each other with alarming frequency." [FN298]

Indeed, it appears that many prison workers believe that targeted inmates, not the staff, are primarily responsible for warding off sexual aggressors via combat. [FN299] As one inmate recounted:

I went [to the company officer] and said, "Look, this guy is bothering me, man. He keeps coming out with these sexual remarks and I want somebody to do something about this guy--tell him something." He said, "Well, there is nothing that we can do about it, and there is nothing that the brass can do about *43 it, so hit him." He came right out and told me just like that. [FN300]

In some instances, staff will overlook target violence rather than discipline an inmate fighting for his dignity, if not

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his survival. [FN301] In turn, inmates who do not fight are seen by some prison workers as unworthy of protection. [FN302] Lockwood attributed these attitudes to the staff's embrace of lower-class norms equating masculinity with dominance. [FN303]

One empirical study addresses this issue. Nacci and Kane surveyed 500 correctional officers employed by the Federal Bureau of Prisons. [FN304] When queried about their motivation to protect inmates from sexual assaults, the officers averaged just 5.5 on a 7-point scale, with 4.0 being a neutral response. [FN305] Their illingness to deter so-called "consensual" homosexual acts fell to a 5.0 average. [FN306] Furthermore, the officers were inclined to assume consuality in sex acts involving homosexual or bisexual inmates [FN307] (the very individuals likely to be harassed or otherwise sexually exploited). [FN308] Nacci and Kane also found that "something 'switches off'" many officers as their careers progress, leading to their diminished motivation to prevent sexual exploitation. [FN309]

2) Second Indicum: Prison Rules Addressing Sexual Harassment

Three of every four companies possess sexual harassment policies. [FN310] While the presence of a sexual harassment policy does not ensure its enforcement, its *44 absence signifies institutional indifference to sexual exploitation. [FN311] A similar conclusion can be drawn when the prison's code of inmate discipline lacks explicit prohibitions of sexual harassment among male inmates. [FN312]

The disciplinary codes of a mere six departments of corrections--Idaho, Michigan, New Mexico, North Dakota, Oregon, and Tennessee--specifically proscribe sexual harassment among male inmates. Oregon officials drafted the most comprehensive ban:

An inmate commits ... sexual harassment if he/she directs offensive language or gestures towards another person or group, or about another person or group, or subjects another to physical contact, because of the other person's ... sex
....

A. Essential elements

1. Offensive language or gestures; and
2. Directed toward another person or group or about another person or group; or 3. Physical contact motivated because of the other person or groups [sic] ... sex. [FN313]

The remaining five states provide staff and inmates comparatively brief prohibitions. Michigan bars "words or actions of a sexual nature directed at another *45 person in order to harass or degrade that person." [FN314] Similarly, New Mexico punishes "abusive words or gestures to any person that ... constitute ... sexual harassment..." [FN315] North Dakota bans "unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature." [FN316] Idaho, without elaboration, prohibits "sexually harassing another person." [FN317] Lastly, Tennessee forbids "making sexually related comments, gestures or written communication to another person." [FN318]

Four additional states sanction harassing behavior per se. California bars "[h]arassment of another person, group, or entity..." [FN319] Minnesota prohibits "harassment ... with gestures, acts, or remarks." [FN320] Illinois' ban on harassment is subsumed under the offense of insolence, which is defined as "talking, touching, gesturing, or other behavior which harasses, annoys, or shows disrespect." [FN321] Connecticut addresses harassment under the offense of "causing a disruption." [FN322] Several of the remaining forty state departments of corrections prohibit acts that constructively constitute one or more of the four forms of sexual harassment. [FN323] Sixteen states employ an open-ended ban on abusive, degrading, or insulting language. [FN324] Eighteen prison systems sanction sexual propositions. *46 [FN325] The departments of corrections in Arizona [FN326] and Nebraska [FN327] stand alone in punishing inmates for "pressuring" for sex. Finally, twelve states expressly bar kissing, fondling, or other contact of a sexual nature. [FN328]

V. CONCLUSION

A. Recommendations

Presently, sexually harassed inmates are fortunate if they can successfully cope with their perilous situation. Besides resorting to violence, [FN329] they may join with fellow inmates in a protective clique. [FN330] Others simply stay in their cells. [FN331] Some secure a transfer to another institution. [FN332] Lastly, inmates enter protective custody, *47 where they are segregated from the general prison population. [FN333]

Many inmates do not successfully cope. They experience continuing sexual harassment, fall victim to sexual assault, and/or become "kids" or "punks." [FN334] While staff can aid inmates in developing effective coping strategies, such assistance

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ought not to satisfy constitutional minima. Coping strategies ultimately accommodate sexual harassment. As a wholly gratuitous punishment, offensive and/or coercive sexual conduct must be banished rather than accommodated.

The prison environment needs to be "normalized:"

"Normalization" means that the same norms that check homosexual activity in free communities should check homosexual activity in prison A male inmate is not to be accepted as a female surrogate in any sense for to do this is to invite problems associated with sexual aggression. [FN335]

Accordingly, inmate disciplinary codes should directly proscribe the various forms of sexual harassment [FN336] and staff should fairly and consistently enforce these prohibitions. Furthermore, inmates known or predicted to be sexually aggressive should be appropriately classified, housed, counseled, and in some instances removed from the general prison population. [FN337] Conversely, inmates at risk should be confined in protective custody only as a last resort; [FN338] to do otherwise would re-victimize them through the stigma and isolation entailed by this form of segregation. [FN339]

To further counter sexual harassment, prison staff should undertake direct and continuous supervision of inmates. Historically, inmate control has been based on the intermittent surveillance of inmates, an approach that falsely assumes that prison architecture and visual surveillance can control inmates with limited direct supervision by correctional staff. [FN340] The direct supervision model, on the other hand, divides inmates into small, manageable groups and houses them in podular living units where staff work among rather than apart from the residents. [FN341] As one commentator wrote, this approach to inmate management "is predicated on the belief that inmates must be continuously and directly supervised by custodial staff to prevent opportunities for illicit inmate behavior and activities, and to reinforce institutional as opposed to inmate control." [FN342] The direct supervision approach is credited with reducing violence in several penal facilities. [FN343]

While the causes of sexual harassment among male inmates are partly rooted in pre-prison experiences, [FN344] they are exacerbated by the deprivations of prison life. [FN345] Besides enhanced security, a prison regime committed to deterring sexual harassment must provide for the legitimate needs and aspirations of inmates. [FN346] Indeed, responding to sexual harassment simply through tighter control of inmates *49 may be counterproductive because such measures further challenge an inmate's masculinity, making him more likely to engage in sexual harassment as well as other forms of prison violence. [FN347]

Scotland's Barlinnie Special Unit Prison demonstrates that aggressive behavior, sexual or otherwise, can be reduced by treating inmates as "full blooded human beings." [FN348] This prison houses high security, assaultive inmates and operates on the premise that situational factors, such as the "pains of imprisonment," [FN349] shape violent behavior. [FN350] In contrast to the lockdown regime of super-maximum security prisons, [FN351] Barlinnie gives inmates considerable autonomy in order to *50 encourage an ethos of individual responsibility. [FN352] At community meetings inmates verbalize aggressive feelings and create group norms. [FN353] A high ratio of staff to inmates lessens the social distance between the two. [FN354] To counter prisonization, [FN355] prison staff encourage frequent visits between inmates and family and friends. [FN356] In explaining the decrease in inmate violence at Barlinnie, a researcher wrote that "the regime has evolved so that the normal situational determinants of violent behavior are less pervasive, providing a setting where intrinsic changes enable prisoners to break away from their violent subculture." [FN357]

B. Summary

Sexual harassment among male inmates plagues American prisons and constitutes "a major punishment for some prisoners." [FN358] It takes several forms: (1) statements that feminize the targeted inmate; (2) sexual propositions; (3) sexual extortion; (4) and unwanted kissing, touching, or fondling intimate body areas. [FN359] These behaviors arise from the deprivations imposed by incarceration as well as subcultural values that inmates bring with them to prison. [FN360] The impact of sexual harassment on targeted inmates is often profound, with fear being the most common injury. [FN361] The fear experienced by targeted inmates brings sexual harassment into the ambit of the Eighth Amendment: several courts have held that reasonable fear of sexual assault can inflict a constitutional violation. [FN362] Nonetheless, *51 prison staff do little to stop sexual harassment despite their long-standing knowledge of this form of victimization. [FN363] To counter sexual harassment among male inmates, this Article advocates the following: (1) prison rules that explicitly bar the four forms of sexual harassment; (2) consistent enforcement of these rules; (3) segregation of inmates known or predicted to be sexually assaultive; (4) a prison regime that engages in the direct and continuous supervision of inmates under conditions that promote their legitimate needs and aspirations. [FN364]

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[FN1]. DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 20 (1980).

[FN2]. See *infra* notes 70-100 and accompanying text (discussing the frequency of inmate sexual harassment).

[FN3]. Sexual harassment of female inmates by male prison staff has a long, documented history in American penology. Early prisons housed both men and women under the supervision of male guards, who sometimes subjected their female wards to prostitution and rape. See NICOLE HAHN RAFTER, PARTIAL JUSTICE 9 (2d ed. 1990). Prison officials, however, faulted female inmates as the source of "sexual trouble." *Id.* at 12. See also ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS 16 (1984) (documenting the sexual exploitation of female inmates by male prison staff). The sexual exploitation of female prisoners by male staff continues. See, e.g., *Downey v. Denton County, Tex.*, 119 F.3d 381, 389-90 (5th Cir. 1997) (affirming, as amended, the trial court's award of damages arising from jailer's sexual assault of female inmate); *Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 665 (D.D.C. 1994) (finding that "[t]he evidence revealed a level of sexual harassment [of female inmates by staff] which is so malicious that it violates contemporary standards of decency"), *rev'd on other grounds*, 93 F.3d 910 (D.C. Cir. 1996); HUMAN RIGHTS WATCH, WOMEN'S RIGHTS PROJECT: ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996) (finding widespread sexual harassment of female inmates by male correctional staff). But cf. *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (holding that male guards supervising female inmates does not constitute an obvious risk to the female inmates).

[FN4]. See *infra* notes 226-42 and accompanying text (discussing the injuries sexual harassment visits upon male inmates). Because this Article solely addresses the penal experiences and constitutional rights of incarcerated adult males, all non-specific references to sexual harassment address only sexual harassment of male inmates by male inmates. While the sexual harassment of female inmates should be a matter of concern, their victimization is beyond the scope of this Article.

[FN5]. PETER C. BUFFUM, HOMOSEXUALITY IN PRISONS 18 (1972) (quoting sociologist John Irwin, a former inmate and noted author of various prison studies). See Daniel Lockwood, Issues in Prison Sexual Violence, in PRISON VIOLENCE IN AMERICA 97, 97 (Michael Braswell et al., eds., 2d ed. 1994) [hereinafter Issues in Prison Sexual Violence] (describing sexual harassment of inmates as a "major punishment for some prisoners" that injures more inmates than rape).

[FN6]. See *infra* notes 301-09 and accompanying text (discussing the often tolerant response of prison staff to sexual harassment). See also *Martin v. White*, 742 F.2d 469, 470 (8th Cir. 1974) (condemning "the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates" and characterizing their inaction as a "national disgrace"). The court's comments in *Martin* are equally applicable to sexual harassment, which is an instrument of sexual assault. See *infra* notes 64-69 (discussing the functions of sexual harassment among inmates).

[FN7]. See *infra* notes 116-57 and accompanying text (discussing the case law on staff harassment of male inmates). The term "constitutional tort" denotes violations of constitutional rights that are actionable under 42 U.S.C. § 1983. See *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (referring to the constitutional tort as a "species of tort liability"). Shapo first used the term "constitutional tort." Marshall S. Shapo, Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond, 60 NW. U. L. REV. 277, 323-24 (1965) ("It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not 'constitutional law,' but employs a constitutional test.").

Inmate-plaintiffs usually bring their claims against state prison staff under 42 U.S.C. § 1983 (1988). It 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 proceedings 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.

Id. Section 1983 was originally codified in Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1871). The drafters intended to protect former slaves from the Ku Klux Klan. However, the Act became ineffectual after the Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), held that the Privileges and Immunities Clause of the Fourteenth Amendment did not subject the states to the Bill of Rights. See *id.* at 74. See generally U.S. CONST. amend. XIV, § 1 (stating in relevant part that "[n]o [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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States"). As one commentator later wrote:

The decision in the Slaughter-House Cases has never been reversed. The Fourteenth Amendment to this day has never recovered its life blood which the Court there extracted from it. Completely shattered was the privileges and immunities clause upon which rested the intricate pattern of nationally protected civil rights For all practical purposes the privileges and immunities clause passed into the realm of historical oddities.

Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1338 (1952) (footnote omitted).

Nearly 100 years later, the Court in *Monroe v. Pape*, 365 U.S. 167 (1961), revitalized § 1983 by holding that it empowered federal courts to remedy violations of federal statutory or constitutional rights. See *id.* at 171-75. During 1966, the first year in which a tally was kept, federal courts entertained 218 § 1983 suits. See ROGER A. HANSON & HENRY W.K. DALEY, *CHALLENGING THE CONDITIONS OF PRISONS AND JAILS* 2 (1995). Thereafter, the number of § 1983 actions grew quickly and exceeded 56,000 by 1994. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 213 tbl.341 (115th ed. 1995). See generally Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) (arguing that § 1983 actions have not overwhelmed the federal courts).

Eisenberg and Schwab found that only 15% of § 1983 actions brought by inmates in the Central District for California met with success, i.e., winning after trial, settlement, stipulated dismissal, or plaintiff agrees to voluntary dismissal. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 681-82 (1987). Nonetheless, the impact of § 1983 actions on correctional institutions is profound. One commentator concluded:

[I]f the question is one of net assessment, then the impact of judicial intervention into prisons and jails over the last two decades has been positive--a qualified success, but a success just the same. For proponents of judicial restraint, there is no use denying that in most cases levels of order, amenity, and service in prisons and jails have improved as a result of judicial intervention. And in most cases it is equally futile to assert that such improvements would have been made, or made as quickly, in the absence of judicial intervention.

John J. Dilulio, Jr., *Conclusion, What Judges Can Do to Improve Prisons and Jails*, in *COURTS, CORRECTIONS AND THE CONSTITUTION* 287, 291 (John J. Dilulio, Jr. ed. 1990).

[FN8]. There is case law in two related areas. The first addresses the harassment of inmates by staff, which is examined *infra* notes 116-57 and accompanying text. The second concerns the prison staff's failure to protect inmates from the threat of assault, which is examined *infra* notes 158-214 and accompanying text.

[FN9]. See *infra* notes 70-100 and accompanying text (reviewing social science literature on the frequency of sexual harassment among male inmates).

[FN10]. See *infra* notes 226-42 and accompanying text (reviewing social science literature on the harm suffered by the male victims of inmate harassment).

[FN11]. The Supreme Court has held in various rulings that inmates possess a wide range of circumscribed rights. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 484-85 (1995) (holding that procedural safeguards arise when disciplinary sanctions are a "dramatic departure from the basic conditions [of the sentence]" or impose "atypical and significant hardship[s]"); *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (holding that deliberate indifference to inmate safety inflicts cruel and unusual punishment); *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (holding that malicious use of force by staff is cruel and unusual punishment); *Wilson v. Seiter*, 501 U.S. 294, 298-305 (1991) (holding that deliberate indifference to basic inmate needs inflicts cruel and unusual punishment); *Washington v. Harper*, 494 U.S. 210, 227-28 (1990) (holding that psychotropic drugs cannot be administered without an inmate's consent in the absence of certain findings); *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989) (holding that inmates possess a limited right of access to publications); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987) (holding that inmates possess a limited right to religious freedom); *Turner v. Safley*, 482 U.S. 78, 91 (1987) (indicating that inmates possess a limited right to correspond); *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (holding that malicious use of force in quelling a prison riot is cruel and unusual punishment); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (holding that inmates possess limited protection from search and seizure, but such does not extend to one's cell); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1983) (holding that inmates possess procedural safeguards prior to administrative segregation if state-created liberty is threatened); *Vitek v. Jones*, 445 U.S. 480, 488-90 (1980) (holding that procedural safeguards are required before transferring inmates to mental hospitals); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (holding that pretrial detainees cannot be punished in a "constitutional sense"); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (holding that inmates possess a limited right of association); *Bounds v. Smith*,

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430 U.S. 817, 828-29 (1977) (holding that inmates possess a right to reasonable access to courts); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to serious medical needs is cruel and unusual punishment); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that procedural safeguards are triggered by threatened loss of good time); *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) (providing a limited right to correspond); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (holding that inmates enjoy a reasonable opportunity to practice religion); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (holding that writ writers enjoy constitutional protection in absence of other means of access to courts); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam) (holding that racial segregation of inmates is unconstitutional except in emergencies).

In many respects, the lower federal courts drove the expansion of inmates' rights. See, e.g., Daryl R. Fair, *The Lower Federal Courts as Constitution- Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119 (1979); Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 200 (1972); Richard G. Singer, *Prisoners' Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade*, 44 FED. PROBATION 3 (Dec. 1980); Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803 (1977); 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).

Allegations of intrusive judicial intervention and frivolous litigation led Congress to enact the Prison Litigation Reform Act of 1995, Pub. L. No. 104- 134, 110 Stat. 1321-66 to 1321-77 (codified in scattered sections of 11, 18, 28, and 42 U.S.C.A. (West Supp. 1998)). The Act places limitations on equitable relief, frivolous lawsuits, and damages for mental and emotional injuries. See *infra* notes 236, 240 (discussing the implications of the Prison Litigation Reform Act for § 1983 sexual harassment lawsuits).

[FN12]. See U.S. CONST. amend. VIII (prohibiting in relevant part "cruel and unusual punishment"). Because pretrial detainees cannot be punished "in a constitutional sense," prison practices and conditions that would otherwise inflict cruel and unusual punishment are banned by the Fourteenth Amendment's due process clause. *Bell v. Wolfish*, 441 U.S. 520, 535-538 (1979). See U.S. CONST. amend. XIV, sec. 1 (providing that "no State shall ... deprive any person of life, liberty, or property without due process of law ..."). In turn, substantive due process extends fundamental rights, including the prohibition of cruel and unusual punishment, to state prisoners via the Fourteenth Amendment. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner."). Cf., e.g., *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding that due process incorporates the Fifth Amendment right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968) (holding that due process incorporates the Fifth Amendment right to trial by jury); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (holding that due process incorporates the Fifth Amendment right against compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that due process incorporates the Sixth Amendment right to counsel).

[FN13]. See *infra* notes 215-28 (applying the deliberate indifference standard of *Farmer v. Brennan*, 511 U.S. 825, 834-44 (1994), to inmate-on- inmate sexual harassment).

[FN14]. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1989). The Equal Employment Opportunity Commission (EEOC) is the enforcement arm of Title VII of the Civil Rights Act of 1964, which prohibits employers of 15 or more persons from discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West. Supp. 1998).

[FN15]. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998) (stating that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (emphasis added) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citations and internal quotation marks omitted)); *McKensie v. Illinois Dep't of Transp.*, 92 F.3d 473, 479 (7th Cir. 1996) ("Harassment [under Title VII] ... encompasses all forms of conduct that unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive work environment.") (emphasis added).

[FN16]. See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 41 (1958):

The most striking fact about this bureaucracy of custodians is its unparalleled position of power--in formal terms, at least vis-a-vis the body of men which it rules and from which it is supposed to extract compliance. The officials, after all, possess a monopoly over the legitimate means of coercion The custodians have the right not only to issue and administer the orders and regulations which are to guide the life of the prisoner, but also the right to detain, try, and punish any individual accused of disobedience--a merger of the legislative, executive, and judicial functions which has long been regarded as the

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earmark of complete domination.

Id. See also LEO CARROLL, HACKS, BLACKS, AND CONS 47 (1994) (observing that correctional officers (the "hacks") "stand on one side of a caste line that is the fundamental feature of the prison social structure"); KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 102 (1988) (observing that it is normative among correctional officers to provide "automatic support for each other" in disputes with inmates). In practice, however, the power of staff over inmates is quite limited. See *infra* note 295 (discussing the limits of staff authority over inmates). In addition, the correctional officers have "common, overlapping interests. Such interests generally relate to common goals, such as keeping the peace, avoiding violence, and the smooth operation of the daily routine (meals, visits, exercise, etc)." BARBARA A. OWEN, THE REPRODUCTION OF SOCIAL CONTROL 21 (1988).

[FN17]. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 62 (1986) (defining quid pro quo harassment as "harassment that involves the conditioning of concrete employment benefits on sexual favors"). See also *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2264-65 (1998) (exploring the origins of the term "quid pro quo" sexual harassment and concluding that this form of discrimination "invol[ves] a threat [to adversely change terms of employment] which is carried out") (emphasis added).

[FN18]. 887 F. Supp. 1 (D.D.C. 1995).

[FN19]. See *id.* at 6. Sykes defined a "rat," i.e., a "snitch," as follows:

[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 at 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.

SKYES, *supra* note 16, at 87.

[FN20]. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998, 1002 (1998) (holding that Title VII protections include male-on-male sexual harassment in the workplace). Unlike the workplace, however, incarcerated males cannot retreat at the end of the workday. Prisons resemble "total institutions":

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 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, with one activity leading at a prearranged time into the next, the whole sequence of activities being imposed from above by a system of explicit formal rulings and a body of officials. Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

ERVING GOFFMAN, ASYLUMS 6 (1961).

[FN21]. One's place in the stratified inmate subculture is partly sex-based. The following inmate sex roles are listed hierarchically: Pitcher--a heterosexual inmate who is the aggressor in instances of sexual victimization and thus occupies the masculine role. Daddy--a heterosexual inmate who "courts, befriends, or patronizes weaker, inexperienced inmates into sexual gratification." Kid--a heterosexual or bisexual inmate, sometimes referred to as a "sex slave," who provides sexual gratification often in exchange for protection. Punk--a heterosexual or bisexual inmate who initially resists sexual approaches but eventually submits. Fag--a so-called "natural homosexual." Queen--a homosexual or transsexual inmate who adopts effeminate behavior and typically plays a submissive role in sexual acts. Skinner--a sex offender. Diddler--a child molester. Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. SOCIOLOGY L. 135, 139 tbl.2 (1992).

[FN22]. See *infra* notes 67-69 and accompanying text (discussing how predatory inmates employ sexual harassment as a means of identity transformation and role assignment).

[FN23]. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993) (stating that hostile environment harassments occurs when the workplace is so "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" and further stating that the environment must be both objectively offensive as well as perceived by the victim as offensive) (citations omitted). See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (defining a hostile environment as "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" (citation omitted)). See also

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[Burlington Industries, Inc. v. Ellerth](#), 118 S.Ct. 2257, 2264-65 (1998) (exploring the origins of the term "hostile work environment" and concluding that when sexual harassment "involves only unfulfilled threats, it should be regarded as a hostile work environment claim" in contradistinction to a quid pro quo claim).

[FN24]. Daniel Lockwood, *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, in *COPING WITH IMPRISONMENT* 45, 53 (Nicolette Parisi ed., 1982) [hereinafter *The Contribution of Sexual Harassment to Stress and Coping in Confinement*].

[FN25]. See *Issues in Prison Sexual Violence*, supra note 5, at 98 (defining inmate sexual harassment as "sexual approaches perceived as offensive by their targets"). This Article's definition of sexual harassment among inmates differs from Lockwood's in two respects. First, it includes coercive as well as offensive sexual approaches. Second, this Article's definition of sexual harassment embraces the concept of the reasonable inmate, who will find objectionable any coercive act or threatening statement.

[FN26]. See infra notes 101-10 (describing the characteristics of sexually harassed inmates).

[FN27]. See infra notes 50-63 and accompanying text (discussing the causes of sexual harassment among inmates). See also CLEMENS BARTOLLAS ET AL., *JUVENILE VICTIMIZATION* 73 (1976) ("[O]nly victims are labeled as homosexuals.").

[FN28]. See generally CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 89 (1987) (arguing that gender is in itself a source of unequal power).

[FN29]. See infra notes 59-63 and accompanying text (positing that heterosexual inmates engage in sexual harassment as a means of affirming their masculinity and enhancing their status in the inmate subculture).

[FN30]. See Elizabeth Grauerholz, *Gender Socialization and Communication: The Inscription of Sexual Harassment in Social Life*, in *CONCEPTUALIZING SEXUAL HARASSMENT AS A DISCURSIVE PRACTICE* 22 (Shereen C. Bingham ed. 1994) (discussing how gender socialization impacts communication between males and females).

[FN31]. Distinguishing between consensual and coerced sexual activity in prison is difficult because inmates exchange sex for protection from assaultive inmates or as repayment of a prison debt. See infra notes 67-69 and accompanying text (discussing sexual harassment as a means of role assignment in the inmate subculture). See also Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 *PRISON J.* 413, 418 (1995) (stating that "some sexual activity may appear consensual although an inmate may actually be coerced....").

[FN32]. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1997) (defining sexual harassment under Title VII as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature....").

[FN33]. See infra notes 49-57 and accompanying text (discussing the impact of prison life on the inmates' perception of masculinity). Cf. [Oncale v. Sundowner Offshore Servs., Inc.](#), 118 S.Ct. 998, 1003 (1998) (explaining that "the objective severity of harassment [for Title VII purposes] should be judged from the perspective of a reasonable person in the plaintiff's position...") (emphasis added).

[FN34]. See [Ellison v. Brady](#), 924 F.2d 872, 878-79 (9th Cir. 1991). See also Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 *AM. PSYCHOLOGIST* 497, 498 (1991) (observing that "a reasonable woman and a reasonable man are likely to differ on what is offensive"). Cf. Gilliam G. Hadfield, [Rational Women: A Test for Sex-Based Harassment](#), 83 *CALIF. L. REV.* 1151, 1157 (1995) (arguing that sex-based harassment should be defined in terms of "conduct that would lead a rational woman to alter her workplace behavior").

[FN35]. See LOCKWOOD, supra note 1, at 20 ("Men who have customarily viewed themselves as heterosexual find these remarks predictably dismaying.").

[FN36]. Donald J. Cotton & A. Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 *J. PRISON & JAIL HEALTH* 47, 49 (1982).

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[FN37]. LOCKWOOD, *supra* note 1, at 20.

[FN38]. See *infra* notes 64-65 and accompanying text (discussing sexual harassment as a means of feminizing inmates).

[FN39]. Estimates of the number of men engaging in homosexual acts during their incarceration vary greatly. Buffum found them to cluster between 30-45% among state prisoners. See BUFFUM, *supra* note 5, at 13. Similarly, Williams and Fish place the number between 30-40%. See VERGIL L. WILLIAMS & MARY FISH, *CONVICTS, CODES, AND CONTRABAND* 59 (1974). A survey of Ohio inmates by Tewksbury found that 19% acknowledged their participation in a homosexual act during the preceding year. Richard Tewksbury, *Measures of Sexual Behavior in a Ohio Prison*, 74 *SOCIOLOGY & SOC. RES.* 34, 35 (1989). Kane and Nacci, in a study of federal prisons, found rates of homosexual contacts to be just 12%. See PETER L. NACCI & THOMAS R. KANE, *SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS* 8 (1982). Accurate estimates are hindered by several factors, including inmates' fear that knowledge of their homosexual acts will lead to disciplinary sanctions and/or diminish their chances for parole; also, staff "suppress or repress what knowledge they have [of homosexuality]." BUFFUM, *supra* note 5, at 12. The commission of a homosexual act does not necessarily indicate a homosexual gender orientation. Sexually aggressive or controlling participants in such acts perceive their conduct as an affirmation of their heterosexual, "real men" status. See *id.* at 15. Indeed, one study estimates that only between five and ten percent of those having a prison homosexual experience had an extensive homosexual commitment when residing outside the prison. See *id.* at 13. Another placed the number at 30%. See *id.* Tewksbury's survey of Ohio inmates revealed that 77.6% of inmates considered themselves "[e]ntirely heterosexual" when they entered prison and 76.5% presently classified themselves as heterosexual. Tewksbury, *supra*, at 37 tbl.1.

[FN40]. See LOCKWOOD, *supra* note 1, at 33 ("The values of the mainstream prison culture call for a violent response to an unsolicited sexual approach.").

[FN41]. Lockwood recounted the experience of one propositioned inmate:

The first night that I was there two chair boys came down to my cell and said that the practice while you were in prison was to go with a homosexual. And do things for other people and then other people would do things back for you. And I told him I couldn't do that. So they said that you're in trouble now [A]nd they started spreading rumors about that I was a homosexual and that I did do something for them.

The Contribution of Sexual Harassment to Stress and Coping in Confinement, *supra* note 24, at 56. See also CLEMENS BARTOLLAS ET AL., *supra* note 27, at 73 (observing that boys in juvenile institutions experience "great [sexual] pressure" from other boys if they are labeled as homosexuals).

[FN42]. Cotton & Groth, *supra* note 36, at 49. See also VICTOR HASSINE, *LIFE WITHOUT PAROLE* 72 (Thomas J. Bernard & Richard McCleary eds., 1996) ("I was playing chess for money and lost several times, and it became like a 20- or 30- dollar debt. I couldn't immediately cover it. I was given a choice, either borrow it or have sex with him.").

[FN43]. See Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers' Attitudes Toward Rape in Prison*, 69 *PRISON J.* 39, 51 (1989) (describing how new inmates become indebted). Author-inmate Piri Thomas provided the following illustration:

He kept on looking at the concrete walk and his face grew red and the corners of his mouth got a little too white. "Piri I've been hit on already," he said "Well, I got friendly with this guy name Rube." Rube was a muscle bound degenerate whose sole ambition in life was to cop young kids' behinds.

"Yeah," I said, "and so..."

"Well, this cat has come through with smokes and food and candy and, well, he's a spic like me and he talked about the street outside and about guys we know outside and he helped me out with favors.... "My God," I thought, "what can I tell him? Tico had to show man or he was finished. Rube would use that first time to hold him by threatening to tell everybody that he screwed him. And if anybody found out, every wolf in the joint would want to cop. The hacks [i.e., correctional officers] would hear about it and they would put Tico... where all the faggots were, and he'd be a jailhouse punk."

PIRI THOMAS, *DOWN THESE MEAN STREETS* 265-66 (1967).

[FN44]. Dumond, *supra* note 21, at 139.

[FN45]. See, e.g., MATTHEW SILBERMAN, *A WORLD OF VIOLENCE: CORRECTIONS IN AMERICA* 2 (1995) (describing contemporary prison life as a "world of violence in which weakness is shunned and strength is worshiped [sic]"); HANS TOCH, *POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE* 53 (1977) (observing that "[i]nmates are

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terrorized by other inmates, and spend years in fear of harm"); James E. Robertson, *Surviving Incarceration: Constitutional Protection From Inmate Violence*, 35 DRAKE L. REV. 101, 106 (1985-86) (positing that "the fear of violence is the lingua franca of the contemporary prison"); Hans Toch, *Studying and Reducing Stress*, in THE PAINS OF IMPRISONMENT 25, 41 (Robert Johnson & Hans Toch eds., 1982) (describing the prison as a "human warehouse with a junglelike underworld"); 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) (observing that "[r]apes, beatings, knifings, and killings are common occurrences in many prisons").

[FN46]. LOCKWOOD, *supra* note 1, at 19.

[FN47]. Norman E. Smith & Mary Ellen Batiuk, *Sexual Victimization and Inmate Social Interaction*, 69 PRISON J. 29, 34 (1989).

[FN48]. See LOCKWOOD, *supra* note 1, at 19.

[FN49]. See John Irwin & Donald Cressey, *Thieves, Convicts, and the Inmate Culture*, in THE SOCIOLOGY OF CORRECTIONS 133, 138-45 (Robert G. Leger & John R. Stratton eds., 1977). Irwin and Cressey posited that the inmate culture is largely shaped by the importation of subcultural values from three groups: the professional thieves; the convicts, i.e., persons from the lower class and reform schools; and the "do rights," i.e., persons with conventional, working and middle class values. The thieves and convicts exercise the greatest influence over the inmate culture, but convicts are more likely to seek out positions of influence. Previous to Irwin and Cressey's influential article, originally published in 1962, the origins and content of the inmate subculture were attributed to the deprivations of prison life. See SYKES, *supra* note 16, at 65-78 (delineating the deprivations of imprisonment, their impact, and the adaptation of inmates to them). Preprison experiences were seen as having little impact. See GOFFMAN, *supra* note 20, at 14 (arguing that prisons and other "total institutions" strip their residents of pre-confinement social roles and values).

[FN50]. See MICHAEL WELCH, CORRECTIONS 341 (1996) (discussing the causes of sexual harassment).

[FN51]. Jim Terra, *25,000 Eunuchs*, in INSIDE PRISON AMERICAN STYLE 120, 121 (Robert J. Minton, Jr. ed., 1971).

[FN52]. Carolyn Newton, *Gender Theory and Prison Sociology: Using Theories of Masculinities to Interpret the Sociology of Prisons for Men*, 33 HOWARD J. CRIM. JUST. 193, 197 (1993). See also Kevin N. Wright, *The Violent and Victimized in the Male Prison*, in PRISON VIOLENCE IN AMERICA 103, 119 (Michael Braswell et al. eds., 1994) ("The literature suggests that prison violence is related to the threat incarceration poses to the individual's identity and particularly his sense of masculinity.").

[FN53]. SYKES, *supra* note 16, at 64-79 (delineating the following "pains of imprisonment:" liberty, goods and services, heterosexual relationships, autonomy, and security).

[FN54]. *Id.* at 70. See generally Bonnie E. Carlson, *Conjugal Visits*, in ENCYCLOPEDIA OF AMERICAN PRISONS 105, 105-106 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (stating that only nine states allow conjugal visits and most states restrict the privilege to low security risk inmates).

[FN55]. SYKES, *supra* note 16, at 75. In theory, prison officials control the activities of inmates by internal, authoritarian rules of conduct. Some of these prohibitions mirror criminal offenses by punishing murder, rape, etc. Many other prohibited behaviors, such as lying, disobeying orders, disrupting count, dirty quarters, and poor grooming, are unique to the prison and other "total institutions" charged with round-the-clock care and supervision of their wards. See, e.g., ARIZ. DEPT OF CORRECTIONS, RULES OF DISCIPLINE 20-30 (March 1986) (listing seventy-eight prohibited acts); ARK. DEPT OF CORRECTION, ADMIN. REG., SEC. 831, DISCIPLINARY RULES AND REGULATIONS, at 3-12 (March 30, 1990) (listing 72 prohibitions); KAN. DEPT OF CORRECTIONS, INMATE RULE BOOK 10-21 (July 11, 1994) (detailing 61 prohibited acts); NEV. DEPT OF PRISONS, CODE OF PENAL DISCIPLINE 28-37 (May 1, 1993) (identifying 84 prohibited acts); N.H. DEPT OF CORRECTIONS, MANUAL FOR THE GUIDANCE OF INMATES 68-72 (1994) (listing 75 prohibited acts); TENN. DEPT OF CORRECTION, INMATE RULES AND REGULATIONS 5- 9 (March 1997) (detailing 73 prohibited acts); W. VA. DEPT OF MILITARY AFFAIRS & PUBLIC SAFETY, DIVISION OF CORRECTIONS, POLICY DIRECTIVE 670.00, at 3-14 (April 15, 1996) (identifying 68 prohibited acts).

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[FN56]. See SYKES, *supra* note 16, at 71-72. Traditionally, only males guarded males. See WELCH, *supra* note 50, at 143. In 1996, the number of adult correctional officers exceeded 224,000 including 22,479 white females; 16,698 black females; 2,632 Hispanic females; and 764 classified as "other." See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS--1996, at 88 tbl.1.101 (1997).

[FN57]. SYKES, *supra* note 16, at 71-72. See also John J. Gibbs, Violence in Prison: Its Extent, Nature, and Consequences, in CRITICAL ISSUES IN CORRECTIONS 110, 115 (Roy R. Roberg & Vincent J. Webb eds., 1981). Gibbs finds that 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 displays of 'toughness' during the first weeks of confinement." *Id.*

[FN58]. See, e.g., ANTHONY M. SCACCO, JR., RAPE IN PRISON 3 (1975) (defining sexual victimization as "an act whereby one male (or group of males) seeks testimony to what he considers is an outward validation of his masculinity"). See also WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 22(1982) ("Sexual behavior in men's prisons remains one of exploitation because the prison sexual code condones sexual aggression but rarely condones sexual affection."); Lee H. Bowker, Victimization and Victims in American Correctional Institutions, in THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch eds., 1988) ("[V]ictories in the field of battle reassure the winners of their competence as human beings in the face of the passivity enforced by institutional regulations. This is particularly important for prisoners whose masculinity is threatened by the conditions of confinement.").

[FN59]. See JEAN LIPMAN-BLUMEN, GENDER ROLES AND POWER 55 (1984):

Even as small boys, males are trained for a world of independent aggressive action Males learn that society's goals are best met by aggression, by actively wresting their accomplishments from the environment. Force, power, competition, and aggression are the means. Achievement, males are taught, is measured in productivity, resources, and control--all the result of direct action. In the Western world, the importance of self-reliant, individual action is systematically inculcated in males. To be masculine requires not only self-reliance and self-control, but control over other people and resources.

Id. See also Newton, *supra* note 52, at 198 ("[T]he ideal of dominance and power...are part of the definition of masculinity....").

[FN60]. See, e.g., LOCKWOOD, *supra* note 1, at 105 (attributing prison sexual violence in large part to a lower class subculture of violence, which is dominated by blacks who equate masculinity with power and domination); WILLIAMS & FISH, *supra* note 39, at 64 (asserting that lower class machismo emphasizes "aggressiveness and conquest"); MARVIN WOLGANG & FRANCO FERRACUTI, THE SUBCULTURE OF VIOLENCE 261 (1967) ("Studies reported since 1958 and in many other languages consistently report the same observation: namely, that the overwhelming majority of homicides and other assaultive crimes are committed by persons from the lowest stratum of a social organization."); Walter B. Miller, Lower Class Culture as a Generating Milieu of Gang Delinquency, 14 J. SOC. ISSUES 5, 7 (1958) (asserting the existence of a subculture of violence amongst the white underclass). See also WOODEN & PARKER, *supra* note 58, at 14-15 ("The value structure of the lower-class subcultures found in prison, regardless of their ethnic background, places extreme emphasis on maintaining and safeguarding the inmate's manhood and manliness--his machismo.").

[FN61]. Educational attainment is a significant indicator of inmates' socio-economic status. In 1992, the median education of inmates in thirty-eight states was the eleventh grade. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS--1995, at 567 tbl.6.31 (1996) [hereinafter SOURCEBOOK - 1995]. Just over 40% of inmates attained less than 12 years of schooling. See U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES--1995, at 217 tbl.350 (1995). See also WILLIAMS & FISH, *supra* note 39, at 63 (observing that lower class males comprise a majority of the inmate population and that the "strong machismo values" of the inmate subculture "are most likely a carryover" from their lower class origins).

[FN62]. When asked to rank order the forms of exploitation, juvenile offenders--whose subcultural values dominate prison life--placed various homosexual acts, which were often preceded by harassment, at the top of their list. Ranked inversely to their relative value, the goals of exploitation are: institutional desserts, institutional favorite foods, parents' pop and candy, institutional clothing, toilet items, cigarettes, personal clothing, radios, physical beatings, anal sodomy, masturbation of others, and oral sodomy. See BARTOLLAS ET AL., *supra* note 27, at 75 tbl.5.1. In the inmate subculture, one can engage in situational homosexuality and reaffirm his manhood by acting as the dominant sexual party, that is, by being the "inserter"--by annually penetrating the submissive sexual party or by being orally copulated. WOODEN & PARKER, *supra* note 58, at 15. The submissive party, on the other hand, becomes a surrogate woman. *Id.* at 16.

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[FN63]. Cotton & Groth, *supra* note 36, at 50. See also SUSAN BROWNMILLER, *AGAINST OUR WILL* 265 (1975) (stating that "[h]omosexual rape in the Philadelphia prisons turned out to be a microcosm of the female experience with heterosexual rape"); NACCI & KANE, *supra* note 39, at 13 (asserting that through rape "the rapist communicates he is powerful"); SCACCO, *supra* note 58, at 87 (observing that "in the attacker's mind, [prison rape] reduces the victim to the political role of a female, submission to a greater power"); WOODEN & PARKER, *supra* note 58, at 14 (explaining that in the inmate subculture "eroticism has come to be associated with aggression"); WELCH, *supra* note 50, at 341 (explaining that "homosexual rape in prison is an expression of dominance rooted in exaggerated images of masculinity and status"). Accordingly, a majority of sexual aggressors see themselves as heterosexual. See LOCKWOOD, *supra* note 1, at 124 ("Virtually all observers of prison find that aggressors consider themselves to be masculine."). See generally A. NICHOLAS GROTH, *MEN WHO RAPE* 13 (1979) ("In every act of rape, both aggression and sexuality are involved, but it is clear that sexuality becomes the means of expressing the aggressive needs and feelings that operate in the offender and underlie his assault.").

[FN64]. See NACCI & KANE, *supra* note 39, at 12 (observing that "the target must be perceived as one who is (or may be) willing to play passive female roles"); SCACCO, *supra* note 58, at 79 (stating that "ultimately the sexual aggressor defines his victim in female terms"). See also John Gagnon & William Simon, *The Social Meaning of Prison Homosexuality*, in *CORRECTIONS: PROBLEMS AND PERSPECTIVES* 114, 119 (David M. Petersen & Charles W. Thomas eds., 1975) (describing sexual acts in prison as "partly a parody of heterosexuality, with the very sexual activity suggesting masculine and feminine role components").

[FN65]. LOCKWOOD, *supra* note 1, at 124.

[FN66]. *Id.* at 19.

[FN67]. See *supra* text accompanying note 21 (defining the roles of "kid" and "punk" in the inmate hierarchy).

[FN68]. See Newton, *supra* note 52, at 197 (stating that "[t]he details of the roles and the rigidity of hierarchies [of power within the inmate subculture] differ between prisons over time, but the structural rigidity is consistent: "right guys--representing tough but dignified masculinity--at the top; 'fags'--embodying weakness and exploited homosexuality--at the bottom").

[FN69]. See *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988) (describing incident in which a victim of prison rape was informed that his assailant "had 'sold' him" to another inmate, who subsequently raped him); WOODEN & PARKER, *supra* note 58, at 16 (concluding that in prison "[s]ubmissive men are often treated as commodities, to be used and then discarded").

[FN70]. Hans Toch, *A Psychological View of Prison Violence*, in *PRISON VIOLENCE* 43, 44 (Albert K. Cohen et al. eds., 1976).

[FN71]. BUFFUM, *supra* note 5, at 18.

[FN72]. Cotton & Groth, *supra* note 36, at 47.

[FN73]. See Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 *TRANS-ACTION* 8 (1968).

[FN74]. See *id.* at 9 (stating that 3,304 out of an estimated 60,000 inmates were interviewed).

[FN75]. *Id.*

[FN76]. *Id.*

[FN77]. See *id.* at 11 (interviewing 1/20th of the inmates uncovered 94 assaults, therefore 20 times 94 equals 1880).

[FN78]. *Id.* at 10 (counting 55 of 156 sexual assaults during a 26 month period).

[FN79]. Lockwood reported his findings in several publications. See LOCKWOOD, *supra* note 1; *The Contribution of*

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Sexual Harassment to Stress and Coping in Confinement, *supra* note 24; Issues in Prison Sexual Violence, *supra* note 5.

[FN80]. See The Contribution of Sexual Harassment to Stress and Coping in Confinement, *supra* note 24, at 53 (surveying Attica and Coxsackie).

[FN81]. See *id.* (stating that "[t]he subgroup most likely to be targets were young whites"). See also WOODEN & PARKER, *supra* note 58, at 22 (observing that "anybody young, passive or feminine" is subject to sexual harassment).

[FN82]. LOCKWOOD, *supra* note 1, at 2.

[FN83]. See *id.* at 18.

[FN84]. *Id.* at 18 tbl.2.1.

[FN85]. See *id.*

[FN86]. See *id.* at 18.

[FN87]. See NACCI & KANE, *supra* note 39.

[FN88]. See *id.* at 8-9.

[FN89]. See *id.* at 9 tbl.1.

[FN90]. See *id.* at 8.

[FN91]. *Id.* at 8.

[FN92]. See *id.* at 8 n.3. See also Saum et al., *supra* note 31, at 418 (stating that inmates may underestimate the frequency of consensual and coerced sexual activity in prison for several reasons: (1) "possible repercussions from inmates and correctional officers;" (2) "for fear of being labeled weak or gay, and ... the possibility of punitive measures;" and (3) admission of rape would transgress inmate norms of "domination and gratification").

[FN93]. See Peter Nacci & Thomas R. Kane, Inmate Sexual Aggression: Some Evolving Propositions, Empirical Findings, and Mitigating Counter-Forces, 9 J. OFFENDER COUNSELING, SERV. & REHAB. 1, 10 (1984) [hereinafter Inmate Sexual Aggression].

[FN94]. See WOODEN & PARKER, *supra* note 58.

[FN95]. *Id.* at 134.

[FN96]. See *id.*

[FN97]. See *id.*

[FN98]. *Id.* at 107.

[FN99]. *Id.* at 254 tbl. 19.

[FN100]. See *id.*

[FN101]. See The Contribution of Sexual Harassment to Stress and Coping in Confinement, *supra* note 24, at 54.

[FN102]. LOCKWOOD, *supra* note 1, at 32.

[FN103]. The Contribution of Sexual Harassment to Stress and Coping in Confinement, *supra* note 24, at 54.

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[FN104]. See *id.*

[FN105]. See LOCKWOOD, *supra* note 1, at 31.

[FN106]. See *id.* at 28-29.

[FN107]. See WOODEN & PARKER, *supra* note 58, at 134-35 (observing that both heterosexual and homosexual non-Hispanic whites "are much more likely to be 'hit-on' "than other ethnic groups); Davis, *supra* note 73, at 14 (observing that aggressors weighed about 17 pounds more than victims and tended to be older); *id.* at 15 (observing that whites were victims in 71% of the incidents). See also *Jones v. Banks*, 878 F. Supp. 107, 110 (N.D. Ill. 1995) (concluding that a known homosexual inmate in protective custody "has produced sufficient evidence of serious risks to his safety to avoid summary judgment").

[FN108]. Compare *supra* notes 95-100 and accompanying text (discussing vulnerability of homosexual inmates), with *supra* notes 83-91 and accompanying text (discussing vulnerability of general inmate population).

[FN109]. See WOODEN & PARKER, *supra* note 58, at 145 (observing that inmate subculture assigns homosexuals stereotypes of "submissive, dependant, passive, and weak female[s]").

[FN110]. See *id.* at 134 (stating that white, non-Hispanic homosexuals were twice as likely as black or Chicano homosexuals to experience sexual pressure).

[FN111]. See LOCKWOOD, *supra* note 1, at 104-05.

[FN112]. See Davis, *supra* note 73, at 15.

[FN113]. See Richard Tewksbury, Fear of Sexual Assault in Prison Inmates, 69 PRISON J. 62, 63 (1989) (citing studies showing a high frequency of black aggressors and white victims).

[FN114]. See LOCKWOOD, *supra* note 1, at 29-32. See also Leo Carroll, Humanitarian Reform and Biracial Sexual Assault in a Maximum Security Prison, 5 URB. LIFE 417, 422 (Jan. 1977) (questioning why rape of whites by black inmates does not result in retaliation by whites).

[FN115]. See Nobuhle R. Chonco, Sexual Assaults Among Male Inmates: A Descriptive Study, 69 PRISON J. 72, 73 (1989). See also Tewksbury, *supra* note 113, at 68-69 (finding height and weight, not race, to be the only significant attributes in predicting fear of prison sexual assault). But see SCACCO, *supra* note 58, at 48 (observing that some black sexual aggressors justify targeting whites in terms of "now it is their turn") (footnote and internal quotation marks omitted).

[FN116]. See, e.g., *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979); *Wilson v. Horn*, 971 F. Supp. 943, 948 (E.D. Pa. 1997); *Ellis v. Meade*, 887 F. Supp. 324, 329 (D. Me. 1995); *Meadows v. Gibson*, 855 F. Supp. 223, 225 (W.D. Tenn. 1994); *Huffman v. Fiola*, 850 F. Supp. 833, 837 (N.D. Cal. 1994), vacated and remanded sub nom. *Huffman v. Monterey County*, 1997 U.S. App. LEXIS 5905 (9th Cir. Mar. 24, 1997); *Prisoners' Legal Ass'n v. Roberson*, 822 F. Supp. 185, 189 (D.N.J. 1993); *Murray v. Woodburn*, 809 F. Supp. 383, 384 (E.D. Pa. 1993).

[FN117]. See, e.g., *Zeno v. Cropper*, 650 F. Supp. 138, 141 (S.D.N.Y. 1986); *Keyes v. City of Albany*, 594 F. Supp. 1147, 1155 (N.D.N.Y. 1984); *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okla. 1977).

[FN118]. See, e.g., *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987); *Collins v. Haga*, 373 F. Supp. 923, 925 (W. Va. 1974).

[FN119]. See, e.g., *Haussman v. Fergus*, 894 F. Supp. 142, 149 (S.D.N.Y. 1995); *Wright v. Santoro*, 714 F. Supp. 665, 667-68 (S.D.N.Y.), *aff'd*, 891 F.2d 278 (2d Cir. 1989); *Morgan v. Ward*, 699 F. Supp. 1025, 1055 (N.D.N.Y. 1988).

[FN120]. See, e.g., *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993); *Pittsley v. Warish*, 927 F.2d 3, 7 (1st Cir. 1991); *Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990); *Ivey v. Wilson*, 832 F.2d 950, 952-55 (6th Cir. 1987); *Martin v. Sargent*, 780 F.2d 1834, 1838-39 (8th Cir. 1985); *Collins v. Cundy*, 603 F.2d 825, 826 (10th Cir. 1979); *Macleane v. Secor*, 876 F. Supp. 695, 698 (E.D. Pa. 1995); *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okla. 1977); *Bolden v. Mandel*, 385 F.

Supp. 761, 764 (D. Md. 1974).

[FN121]. *Ivey*, 832 F.2d at 954. In *Bolden*, 385 F. Supp. at 763, the court advanced two explanations for shielding threats from § 1983 accountability. A black inmate had entered a staff during area and was approached by the defendant correctional officer who allegedly brandished a knife and warned, "Nigger, get out of here before I cut your mother-f---ing black a--." *Id.* In granting the defendant's motion to dismiss, the court posited the following: the prison atmosphere is "tense and hostile," inevitably resulting in many altercations between staff and inmates, and the judiciary would be unduly burdened if it entertained such suits. *Id.* at 764.

A comparable rule is found in the law of torts. It provides that mere words do not in themselves constitute an assault. One leading hornbook delineated the origins and rationale for this rule:

Apparently the origin of this rule lay in nothing more than the fact that in the early days the King's courts had their hands full when they intervened at the first threatening gesture, or in other words, when the fight was about to start; and taking cognizance of all of the belligerent language which the foul mouths of merrie England could dispense was simply beyond their capacity.

W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § cm;1 10, at 45 (5th ed. Hornbook Series Lawyer's Edition, 1984).

[FN122]. *Abeyta ex rel. Martinez v. Chama Valley Independent School District*, 77 F.3d 1253, 1256 (10th Cir. 1996). As of April 26, 1996, inmates seeking damages under § 1983 for mental or emotional injuries must make "a prior showing of physical injury" under 42 U.S.C.A. § 1997e(e) (West Supp. 1998). See *infra* notes 236, 240 (discussing the implications of 42 U.S.C.A. § 1997e(e) (West Supp. 1998) for § 1983 sexual harassment suits). As discussed in *infra* note 240, § 1997e(e) does not preclude equitable relief.

[FN123]. 887 F. Supp. 324 (D. Me. 1995).

[FN124]. *Id.* at 328.

[FN125]. See *id.* at 329. The court treated the spanking incident as a distinct basis for relief, ruling that spanking an inmate could be a rational means of promoting a penal objective and noting that the spanking was isolated and not painful. See *id.* at 330.

[FN126]. 59 F.3d 1034 (10th Cir. 1995).

[FN127]. *Id.* at 1035.

[FN128]. *Id.* at 1036.

[FN129]. *Id.* at 1037.

[FN130]. 876 F. Supp. 695 (E.D. Pa. 1995).

[FN131]. *Id.* at 698-99.

[FN132]. *Id.*

[FN133]. See *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992) (involving a handgun held to the head of a prison inmate); *Burton v. Livingstone*, 791 F.2d 97, 99 (8th Cir. 1986) (concerning a revolver pistol cocked at an inmate); *Douglas v. Marino*, 684 F. Supp. 395, 397-98 (D.N.J. 1988) (involving the brandishing of a butcher knife at close proximity to an inmate).

[FN134]. 791 F.2d 97 (8th Cir. 1986).

[FN135]. *Id.* at 99.

[FN136]. *Id.* at 100. The court carefully emphasized that this threat was not made during the normal course of prison life but had occurred without provocation in a courthouse holding cell following a judicial hearing on a lawsuit initiated by the inmate against prison staff. See *id.* at 100-01.

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[FN137]. 800 F.2d 600 (6th Cir. 1986).

[FN138]. *Id.* at 605.

[FN139]. *Id.*

[FN140]. 887 F. Supp. 1 (D.D.C. 1995).

[FN141]. *Id.* at 3.

[FN142]. *Id.* at 4 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

[FN143]. See, e.g., *Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998) (observing that "not every malevolent touch by a prison guard ... gives rise to a federal cause of action") (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (stating the de minimus touching rule); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (same); *Bolden v. Mandel*, 385 F. Supp. 761, 764 (D. Md. 1974) (same).

[FN144]. 481 F.2d 1028 (2d Cir. 1973), overruled on other grounds by *Graham v. Conner*, 490 U.S. 386 (1989).

[FN145]. *Id.* at 1033 (emphasis added).

[FN146]. 711 F. Supp. 354 (E.D. Mich. 1989).

[FN147]. *Id.* at 355.

[FN148]. *Id.* (granting defendant motion for summary judgment with regard to Eighth Amendment claims but denying defendant motion for summary judgment for substantive due process claims) (citation and internal quotation marks omitted). See also *Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998) (affirming summary judgment for the defendants, in which civilian maintenance workers briefly grabbed an inmate's buttocks and "no objectively serious injury (either physical or psychological) was shown").

[FN149]. *Gilson*, 711 F. Supp. at 356 (internal quotation marks omitted) (quoting *Stoneking v. Bradford Area School District*, 856 F.2d 594, 599 (3d Cir. 1988)).

[FN150]. 105 F.3d 857 (2d Cir. 1997).

[FN151]. *Id.* at 859-60.

[FN152]. *Id.* at 861 (internal quotation marks omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833-834 (1994)).

[FN153]. *Id.* (internal quotation marks omitted) (quoting *Farmer*, 511 U.S. at 861). See also *Freitas v. Ault*, 109 F.3d 1335, 1336-38 (8th Cir. 1997) (ruling that allegations of romantic relationship between the plaintiff-inmate and the defendant-officer, during which they would "kiss, hug, and talk," did not state a constitutional claim; but "abuse can, in certain circumstances, constitute the 'unnecessary and wanton infliction of pain,'" (citations omitted).

[FN154]. 980 F.2d 1165 (8th Cir. 1992).

[FN155]. See *id.* at 1165.

[FN156]. *Id.* at 1166 (internal quotation marks omitted).

[FN157]. *Id.* (internal quotation marks omitted). See also *Seltzer-Bey v. Delwo*, 66 F.3d 961, 963 (8th Cir. 1995) (ruling that allegations of daily strip searches, during which the plaintiff-officer commented about the inmate's penis and buttocks, stated a constitutional claim).

[FN158]. *Magna Carta*, in *SOURCES OF OUR LIBERTIES* 17 (Richard L. Perry & John C. Cooper eds., rev. ed. 1959).

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[FN159]. 1 EHRlich'S BLACKSTONE 46 (J.W. Ehrlich ed., 1959). The remaining primary rights were "personal liberty" and "private property." *Id.*

[FN160]. *Id.*

[FN161]. See, e.g., *State of Indiana ex rel. Tyler v. Gobin*, 94 F. 48, 51 (C.C.D. Ind. 1899) (ruling that defendant-sheriff had a legal duty to safeguard inmate from lynching); *Appeal of Jenkins*, 58 N.E. 560, 561 (Ind. App. 1900) (ruling that sheriff owed a duty of due care to a lynched inmate); *Shields v. Durham*, 24 S.E. 794, 795 (N.C. 1896) (faulting keepers for not providing conditions where a prisoner could be "reasonably comfortable"); *City of Topeka v. Boutwell*, 35 F. 819, 822 (Kan. 1894) (holding that keepers must treat inmates "humanely"). Because imprisonment renders one dependent on his or her keepers for the basic necessities of life, a special relationship exists between inmates and their keepers. See, e.g., *Wilson v. City of Kotzebue*, 627 P.2d 623, 628 (Alaska 1981) (stating that "prisoners like passengers [transported by common carriers] are confined and cannot avail themselves of normal opportunities for self-protection"). The duty to due care for inmates is firmly entrenched in contemporary tort law. See RESTATEMENT (SECOND) OF TORTS § 314A (1965) (stating that jailers owe to inmates the duty required of common carriers and innkeepers: "(a) [T]o protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others").

[FN162]. 94 F. 48 (1899).

[FN163]. See *id.* at 51.

[FN164]. See *id.* at 49.

[FN165]. *Jenkins*, 58 N.E. at 561.

[FN166]. 133 Ga. 578 (1909).

[FN167]. *Id.* at 585.

[FN168]. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[FN169]. See, e.g., *Curtis v. Everette*, 489 F.2d 516, 518 (3d Cir. 1973) (reinstating a suit based on the "right to be secure in his [i.e., the inmate's] person"); *Parker v. McKeithen*, 488 F.2d 553, 556 (5th Cir. 1974) (ruling that an inmate states a § 1983 claim when alleging prison officials failed to protect him from assaultive inmates); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (ruling that prison officials have a duty of reasonable care when inmates face a pervasive risk of assault); *Van Horn v. Lukhard*, 392 F. Supp. 384, 386-87 (E.D. Va. 1975) (ruling that allegations of a gang rape of an inmate stated a § 1983 cause of action); *Hamilton v. Schiro*, 338 F. Supp. 1016, 1018-19 (E.D. La. 1970) (ruling that constant fear of assault violated inmates' constitutional rights); *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) (stating that detainees ought to be free from assault, abuse, and molestation); *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (ruling that staff cannot abandon inmates to the exploitation of fellow inmates), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Cf. *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) ("[I]t is fair to conclude that the interests of prisoners shielded by the ban on "cruel and unusual punishment" correspond reasonably closely to the interests protected by analogous common-law tort rules.") (footnote omitted).

Prior to the late 1960's virtually all federal courts adhered to the hands-off doctrine, which proscribed judicial intervention in the nation's prisons. 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"); *Douglas v. Sigler*, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management, and disciplinary control of this type of institution except in extreme circumstances."); *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951) ("[C]ourts 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."). Several commentators have examined the hands-off doctrine. Among the several reasons given for the hands-off doctrine were that judicial intervention would undermine the authority of prison staff, give rise to a tidal wave of inmate law suits, and interject the courts into an area where they lacked expertise. See, e.g., Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-off" Doctrine*, 4 DET. C.L. REV. 794 (1977); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

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Various factors accounted for the demise of the hands-off doctrine. These included: (1) the growing assertiveness of inmates, (2) lawyers committed to expanding civil liberties, (3) abuses by prison staff; and (4) the Supreme Court's commitment to individual rights under the leadership of Chief Justice Warren. See SHELDON KRANTZ & LYNN S. BRANHAM, *THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS* 267 (4th ed. 1991).

[FN170]. *Holt*, 309 F. Supp. at 377.

[FN171]. See *id.* at 381.

[FN172]. *Id.*

[FN173]. 429 U.S. 97 (1976).

[FN174]. *Id.* at 103-04 (footnote omitted).

[FN175]. See *id.* at 102.

[FN176]. *Id.* at 104.

[FN177]. 489 U.S. 189 (1989).

[FN178]. *Id.* at 200 (emphasis added) (citation omitted).

[FN179]. 501 U.S. 294 (1991).

[FN180]. 511 U.S. 825 (1994).

[FN181]. *Wilson*, 501 U.S. at 303:

[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.

[FN182]. *Id.* at 298.

[FN183]. *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[FN184]. *Id.* at 298, 303.

[FN185]. See *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

[FN186]. See *id.*

[FN187]. See *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997) (referring to a transsexual inmate as a "sexual plaything" for other inmates). See generally Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 *TEMPLE POLIT. & CIV. RTS. L. REV.* 27, 46-47 (1995) (recommending that transsexual prisoners be housed in female prisons).

[FN188]. See *Farmer v. Carlson*, 685 F. Supp. 1335, 1338 (M.D. Pa. 1988), *aff'd sub nom. Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), vacated and remanded, 511 U.S. 825 (1994).

[FN189]. *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), vacated and remanded, 511 U.S. 825 (1994).

[FN190]. See *Farmer v. Brennan*, 511 U.S. 825, 840 (1994).

[FN191]. *Id.* at 837.

[FN192]. *Id.* at 842-843 (citation omitted).

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[FN193]. See *id.* at 843.

[FN194]. *Id.* (citation omitted) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

[FN195]. *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

[FN196]. 429 U.S. 97 (1976).

[FN197]. *Id.* at 104.

[FN198]. 501 U.S. 294 (1991).

[FN199]. *Id.* at 304.

[FN200]. 503 U.S. 1 (1992).

[FN201]. *Id.* at 9.

[FN202]. 509 U.S. 25 (1993).

[FN203]. *Id.* at 35.

[FN204]. 452 U.S. 337 (1981).

[FN205]. *Id.* at 346 (citations and footnote omitted) (emphasis added).

[FN206]. 503 U.S. 1 (1992) (Blackmun, J., concurring). See also *id.* at 26 (Thomas, J., dissenting) ("That is not to say that the injury must be, or always will be physical."). Cf. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (ruling that denationalization as punishment for wartime desertion was "more primitive than torture" and inflicted cruel and unusual punishment).

[FN207]. *Id.* at 16. See also *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (stating that the Eighth Amendment ought to be read "in a flexible and dynamic manner").

[FN208]. 468 U.S. 517 (1984).

[FN209]. *Id.* at 530. Cf. *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) (searching a prisoner's cell 10 times in 19 days "could suffice as the requisite injury for an [E]ighth [A]mendment claim ... [because] it evidences a pattern of calculated harassment unrelated to prison needs from which the U.S. Supreme Court has stated that prisoners are protected").

[FN210]. See, e.g., *Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998) (referring to "objectively serious [Eighth Amendment] injury" as "either physical or psychological"); *Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996) (asserting that "[p]ain" in its ordinary meaning surely includes a notion of psychological harm") (quoting *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring)); *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (explaining that "to demonstrate that a deprivation is extreme enough to satisfy the objective component of an Eighth Amendment claim, a prisoner must produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions") (citation and internal quotation marks omitted); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (observing that "psychological injury may constitute pain under the Eighth Amendment"); *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) (ruling that "evidence of fear, mental anguish, and misery ... could suffice as the requisite injury for an eighth amendment claim"); *White v. Napoleon*, 897 F.2d 103, 111 (3d Cir. 1990) (finding that "allegations [of mental anxiety] are sufficient to state a claim under the Eighth Amendment"); *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (finding "significant mental anguish" in the defendant prison officer's unconstitutional treatment of a paraplegic inmate); *Shrader v. White*, 761 F.2d 975, 977 (4th Cir. 1985) (stating that fear of constitutional dimension involves "significant mental pain"). But cf. *Baumann v. Arizona Dep't of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985) (ruling that "emotional trauma and financial injury caused by the denial of anticipated work release" does not violate the Eighth Amendment).

[FN211]. 943 F.2d 921 (8th Cir. 1991).

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[FN212]. See *id.* at 922.

[FN213]. See *id.*

[FN214]. *Id.* at 924.

[FN215]. Smith & Batiuk, *supra* note 47, at 30.

[FN216]. See CARL WEISS & DAVID JAMES FRIAR, *TERROR IN THE PRISONS* 4 (1974) (declaring that prison rape "is the first thing you fear" as an inmate); Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 *PRISON J.* 53, 55 (1990) (observing that "perhaps more than anything else, [an inmate] is afraid of being sexually assaulted"). See also LEE H. BOWKER, *PRISON VICTIMIZATION* 1 (1980) ("Even in institutions where the rape rate is relatively low--perhaps averaging no more than a few incidents per year--there is widespread fear of being raped, and this fear motivates prisoners to defend themselves carefully against the possibility."). Inmate- authors Wilbert Rideau and Ron Wikberg described one prison rape:

Stepping into the darkened cell, he was swept into a whirlwind of violent movement that flung him hard against the wall, knocking the wind from him. A rough, callused hand encircled his throat, the fingers digging painfully into his neck, cutting off the scream rushing to his lips. "Holler, whore, and you die," a hoarse voice warned, the threat emphasized by the knife point at his throat.... He was thrown on the floor, his pants pulled off him. As a hand profanely squeezed his buttocks, he felt a flush of embarrassment and anger, more because of his basic weakness--which prevented his doing anything to stop what was happening--than because of what was actually going on. His throat grunted painful noises, an awful pleading whine that went ignored as he felt his buttocks spread roughly apart. A searing pain raced through his body as the hardness of one of his attackers tore roughly into his rectum A sense of helplessness overwhelmed him and he began to cry, and even after the last penis was pulled out of his abused and bleeding body, he still cried, overwhelmed by the knowledge that it was not over, that this was only the beginning of a nightmare that would only end with violence, death, or release from prison.

WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES* 73 (1992).

[FN217]. See Eigenberg, *supra* note 43, at 39:

Empirically, there is far too little data to conclude that rape is a rare occurrence. And while it is conceivable that male rape in prison occurs infrequently, current estimates must be evaluated with caution for two reasons: (1) researchers have failed to acknowledge the degree to which data are affected by reporting patterns of stigmatized victims and (2) research has failed to clearly distinguish between consensual homosexual acts and acts of rape.

Id. See also Cotton & Groth, *supra* note 36, at 48 (observing that data on prison rapes "must be regarded as very conservative at best").

[FN218]. See Daniel Lockwood, *Sexual Exploitation in Prison*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 440, 440 (Marilyn D. McShane & Frank D. Williams III eds., 1996) [hereinafter *Sexual Exploitation in Prison*]. Compare WELCH, *supra* note 50, at 340 ("[R]ape in correctional institutions is not a common occurrence.") with Donald M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 *STAN. L. REV.* 1541, 1547 (1992) ("Rape is 'rampant' in our country's prison system."); Stephen Donaldson, *The Rape Crisis Behind Bars*, *N.Y. TIMES*, Dec. 29, 1993, at A11 (asserting that more than 290,000 rapes occur annually in penal institutions for men).

[FN219]. See Saum et al., *supra* note 31, at 427 (finding that "inmates themselves perceive the myth of pervasive sex in prison" and that "[f]ully 59.5% felt that attempted rapes occur at least once a month, and 13.9% maintained that attempted rapes occur every day"); Tewksbury, *supra* note 39, at 39 tbl.3 (finding that inmates estimated that 14.24% of their own had been raped in prison and 29.34% had been "forced or threatened for sex while in prison").

[FN220]. *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting). See *Webb v. Lawrence County*, 950 F. Supp. 960, 965 (D.S.D. 1996) (stating that "[i]n general, inmate rape and assault is pervasive in this country's penal system") (quoting *Martin v. White*, 742 F.2d 469, 472 (8th Cir. 1984)). See also *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991) (observing that prisons are dangerous because they confine aggressive persons in close quarters).

[FN221]. WELCH, *supra* note 50, at 341.

[FN222]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, *supra* note 24, at 57 tbl.3.1. Lockwood would later write that he "suspect[ed] underreporting [of fear] because men in prison do not readily admit to

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feeling fearful." *Issues in Prison Sexual Violence*, supra note 5, at 100.

[FN223]. See LOCKWOOD, supra note 1, at 91 (observing that "[v]ictims of sexual assault are invariably targets of aggressive sexual approaches [i.e., harassment] before they are assaulted").

[FN224]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, supra note 24, at 57 tbl.3.1.

[FN225]. *Id.* at 57. See also *Issues in Prison Sexual Violence*, supra note 5, at 92:

ARE 4: I would live in apprehension [of sexual assault]. Every time I would unlock that door or lock out till the time I went back in it was constant pressure of watch out for this man. ARE 36: Whenever I see him [i.e., a prospective assailant] around I am consciously aware of it. No matter what I am doing I have to keep in the back of my mind where he is. Not that he would try anything out there in the yard or anything, but the thing is, you never know ... I have always got it in my mind whenever he is around to be well aware.

[FN226]. *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, supra note 24, at 57. Lockwood's findings are consistent with Huffman's study of 334 imprisoned young offenders 14 to 17 years of age. See Arthur V. Huffman, *Problems Precipitated by Homosexual Approaches on Youthful First Offenders*, 7 J. SOC. THERAPY 217, 220 (1961). Huffman found that sexual advances and other sexual incidences led to the transfer of 62 of the young inmates to a hospital for psychiatric observation. See *id.* at 221. Aside from the 19 found to be mentally ill, 27 of the boys were deemed in need of mental treatment. See *id.* They had experienced "extreme anxiety, confusion, and tension," including "feigning suicide," as a consequence of homosexual advances. *Id.*

[FN227]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, supra note 24, at 57 tbl.3.1.

[FN228]. See *id.*

[FN229]. LOCKWOOD, supra note 1, at 64.

[FN230]. *Id.* at 65.

[FN231]. *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, supra note 24, at 59.

[FN232]. See *id.* at 57 tbl.3.1 (stating that 24% experienced crises).

[FN233]. LOCKWOOD, supra note 1, at 60-61.

[FN234]. *Id.* at 67. Other inmates experiencing crises stated:

C2-14: Well, sometimes when I am in my cell, I feel that this problem is coming. I try to avoid it and I feel like I want to jump up and just break everything--everything in my cell but I try to keep my head and calm myself down or do something. Really, I feel like trying to do something--break a wall or something.

AC-10: I was really an emergency case the second day that I was here. I had so many fears and so many worries going in my head. I felt really such a broken spirit. I guess you might say that all I could do was crawl under the concrete.

Id.

[FN235]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, supra note 24, at 59.

[FN236]. *Id.* at 59. The Prison Litigation Reform Act of 1995, Pub. L. No. 104--34 (April 16, 1996), rewards and encourages harassed inmates to injure themselves physically by requiring "a prior showing of physical injury" in actions "for mental or emotional injury suffered while in custody...." 42 U.S.C.A. § 1997e(e) (West Supp. 1998). See *infra* note 240 (discussing in greater detail the consequences of the Prison Litigation Reform Act).

[FN237]. See LOCKWOOD, supra note 1, at 40.

[FN238]. See SAWYER S. SYLVESTER ET AL., *PRISON HOMICIDE* 48 tbl.II (1977).

[FN239]. *Id.* at 42.

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[FN240]. James E. Robertson, "Fight or F...." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors, 29 IND. L. REV. 339, 346 (1995) (footnote omitted). Consequently, harassed inmates are as likely as their assailants to strike the first blow. See LOCKWOOD, *supra* note 1, at 40. Their preemptive action is consistent with both inmate and staff norms. See NACCI & KANE, *supra* note 39, at 14; LOCKWOOD, *supra* note 1, at 52; HANS TOCH, LIVING IN PRISON 207 (rev. ed. 1992). Target threats are effective as well: Lockwood found that they ended half the confrontations he studied. See LOCKWOOD, *supra* note 1, at 43.

Ironically, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34 (April 16, 1996), encourages harassed inmates to risk the physical injuries of combat with their harassers. In relevant part, the Act provides that inmates may not bring a § 1983 action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C.A. § 1997e(e) (West Supp. 1998). To satisfy this provision, the inmate's injury must be more than de minimus but not necessarily serious. See *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (ruling that given the absence of a statutory definition of "physical injury" for § 1997e(e) purposes, Eighth Amendment standards will apply; and holding "a sore, bruised ear lasting for three days" is de minimus and thus not § 1997e(e) punishment, but indicating that an injury need not be "significant" to impose the requisite physical injury). See also *Evans v. Allen*, 981 F. Supp. 1102, 1109 (N.D. Ill. 1997) (ruling that having "bodily fluids thrown on him [i.e., the plaintiff-inmate]" did not constitute a § 1997e(e) physical injury).

It is important to stress that § 1997e(e) does not preclude equitable relief in the absence of a physical injury. In *Zehner v. Trigg*, 952 F. Supp. 1318, 1331 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997), the court observed:

Other remedies--especially injunctive relief backed up with meaningful sanctions for contempt--are available to courts to vindicate constitutional rights even where damages may not be available [because of § 1997e(e)]. There is a point beyond which Congress may not restrict the availability of judicial remedies for the violation of constitutional rights without in essence taking away the rights themselves by rendering them utterly hollow promises.

Id. at 1331. See also *Clarke v. Stalder*, 121 F.3d 222, 227 n.8 (5th Cir. 1997) (implying that § 1997e(e) does not bar injunctive relief). Cf. *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred....Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.") (footnote omitted).

Furthermore, failure to secure compensatory damages under § 1997e(e) does not necessarily preclude a punitive damage award in a constitutional tort action. In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court addressed the legal standard for awarding punitive damages in a § 1983 suit brought by an inmate claiming that prison staff permitted fellow inmates to harass and sexually assault him. First, the Court rejected the contention that the threshold for punitive damages must exceed the threshold for compensatory damages. *Id.* at 53. Second, the Court embraced the common law rule that punitive damages are appropriate when the "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56. Cf., e.g., *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) (stating that "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"); *King v. Macri*, 993 F.2d 294, 297 (2d Cir. 1993) (observing that "most courts of appeals" permit solely punitive damages to be awarded § 1983 actions); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991) (affirming an award limited to punitive damages to an inmate dropped head-first from a prison truck following his attempted escape).

Section 1997e(e) does not apply retroactively. See *Harris v. Lord*, 957 F. Supp. 471, 474 (S.D.N.Y. 1997). It is unclear whether § 1997e(e) applies to lawsuits brought against federal prison staff in Bivens actions. See *Zehner*, 952 F. Supp. at 1334 (finding support in the statutory language for applying § 1997e(e) to Bivens actions, but also observing that "some statements in the debates over the PLRA (Prison Litigation Reform Act) indicate that § 1997e(e) applies only to claims brought pursuant to § 1983"). Cf. *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997) (finding that 42 U.S.C.A. § 1997e(a), which requires inmates to exhaust administrative remedies, applies to Bivens actions. See generally *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (ruling that the Bill of Rights implicitly authorizes actions against federal prison staff to vindicate constitutional rights despite the absence of any statute to that effect). Inmates have unsuccessfully challenged the constitutionality of § 1997e(e). See *Zehner*, 952 F. Supp. at 1327-33 (finding that § 1997e(e) does not violate the constitutional separation of powers, impermissibly burden access to the courts, or deny equal protection). Requiring physical injury as a prerequisite to compensatory damages for mental or emotional injury flies in the face of the distinctive harms inflicted by imprisonment, namely, significant limitations on liberty, personal goods and services, heterosexual relationships, autonomy, and safety. See SYKES, *supra* note 16, at 64 (concluding that these deprivations "can be just as painful as the physical maltreatment which they have replaced..." *Id.* at 64 (emphasis added)). See generally James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUSTON L. REV. 1003, 1008-15 (1997) (juxtaposing "body-suffering" associated with corporal punishment and "personhood-suffering" born from imprisonment).

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[FN241]. WILLIAMS & FISH, *supra* note 39, at 60.

[FN242]. WOODEN & PARKER, *supra* note 58, at 22 (concluding that in "prison, any ... vulnerable 'marked' heterosexual who is not hooked-up [under the protection of another inmate] is 'fair game.'" See also Dumond, *supra* note 21, at 139 tbl.2 (delineating the role of the punk in the prison sexual hierarchy).

[FN243]. See, e.g., *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993) (concluding that "unnecessary pain and suffering" occurs when inmates experience "unjustified constant and unreasonable exposure to violence"); *Mooreman v. Sargent*, 991 F.2d 472, 474 (8th Cir. 1993) (stating that plaintiff must show that sexual attacks occur with sufficient frequency to place inmates in "reasonable fear") (citation omitted); *Elliot v. Byers*, 975 F.2d 1375, 1376 (8th Cir. 1992) (ruling that inmates "may show a pervasive risk of harm from frequent assaults that place a prisoner or group of prisoners in reasonable fear for their safety"); *Andrews v. Siegel*, 929 F.2d 1326, 1330 (8th Cir. 1991) (stating that a constitutional violation occurs when "sexual assaults occur ... with sufficient frequency that prisoners ... are put in reasonable fear for their safety"); *Vosburg v. Solem*, 845 F.2d 763, 766 (8th Cir. 1988) (ruling that confinement plagued by violence and fear of violence inflicts an Eighth Amendment violation; "[i]t is enough that violence and sexual assaults occur with sufficient frequency that prisoners are put in reasonable fear for their safety"); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (stating that "constant fear" inflicts a constitutional injury); *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980) (ruling that the "[s]tate has failed to reasonably protect inmates from constant threats of violence and assaults from other inmates and that this failure violates ... the Eighth Amendment"); *Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir. 1981) (stating that "[a] prisoner has a right to be protected from the constant threat of violence and from sexual assault"); *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980) (placing inmates in "reasonable fear for their safety" can impose an Eighth Amendment violation); *Jones v. Banks*, 878 F. Supp. 107, 111 (N.D. Ill. 1995) (holding that "fear and alarm at being attacked" inflicts an injury of constitutional dimension). Cf., e.g., *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991) (positing that "a prisoner need not wait to be assaulted to obtain relief"); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (observing that "[v]iolence and sexual assault among inmates may rise to a level rendering conditions cruel and unusual"); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (holding that the inmate's allegations that staff labeled him a "snitch" and thus exposed him to the threat of assault stated a § 1983 cause of action). See generally *Helling v. McKinney*, 509 U.S. 25, 32-36 (1993) (ruling that the Eighth Amendment bars those conditions of confinement that present a serious, imminent danger of future harm transgressing standards of decency); *Parrish v. Johnson*, 800 F.2d 600, 611 n.15 (6th Cir. 1986) (observing that "lasting and severe" injuries are not a prerequisite to recovery for Eighth Amendment claims).

Recovery of damages arising from a substantial risk of assault, in contradistinction to an assault per se, may be problematic. In *Babcock v. White*, 102 F.3d 267 (7th Cir. 1996), the court denied a damage award to an inmate complaining that prison officials violated the Eighth Amendment by incarcerating him in a prison containing members of the Mexican Mafia, an ethnic gang active both in and out of prison. *Id.* at 270. Rejecting his claim for damages, the Court of Appeals for the Seventh Circuit wrote: "However legitimate Babcock's fears may have been, we nevertheless believe that it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment." *Id.* at 272. See also *supra* note 240 (examining the impact of 42 U.S.C.A. § 1997e(e) on recovery of damages in inmate lawsuits brought under § 1983). But the court in *Babcock* stressed that its decision did not preclude equitable relief. *Babcock*, 102 F.2d at 273 (indicating that under appropriate circumstances the courts would "enjoin the continuing disregard for prisoners' safety") (emphasis added). The court also observed that the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), did not "require prisoners to suffer physical injury before obtaining court-ordered correction of objectively inhumane prison conditions. *Babcock*, 102 F.2d at 272 (quoting *Farmer*, 511 U.S. at 845) (internal quotation marks omitted). Hence, the court in *Babcock* refused to "preclude suits by prisoners under the Eighth Amendment grounded solely on claims of psychological injury." *Id.* at 273.

[FN244]. *Martin*, 742 F.2d at 474 (emphasis added).

[FN245]. See, e.g., *Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 645 (8th Cir. 1996) (upholding trial court's finding of "substantial risk of serious harm" based on evidence that "violence, robbery, rape, gambling, and [the] use of weapons by inmates are prevalent"); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995) (concluding that "substantial risk of serious harm" was demonstrated by evidence of "inmate-on-inmate violence occur[ing] regularly" which was severe enough to require medical attention); *Elliot*, 975 F.2d at 1376 (ruling that inmates "may show a pervasive risk of harm from frequent assaults that place a prisoner or group of prisoners in reasonable fear for their safety"); *Purvis*, 929 F.2d at 825 (concluding that "[a]n unreasonable risk of harm is established where a plaintiff shows that there was a 'strong likelihood' that violence would occur") (quoting *Bensen v. Cady*, 761 F.2d 335, 339-40 (7th Cir. 1985)); *Andrews*, 929 F.2d at 1330 (stating that

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plaintiff must demonstrate that "sexual assaults occur ... with sufficient frequency that prisoners ... are put in reasonable fear for their safety") (quoting *Martin*, 742 F.2d at 474); *Vosburg*, 845 F.2d at 766 (finding "over 140 instances of fighting and assaults" over four-year period sufficiently high for jury to find pervasive risk of harm); *Withers*, 615 F.2d at 161 (stating that inmates acquire reasonable fear of assault when violence is pervasive); *Woodhous*, 487 F.2d at 890 (ruling that inmates are entitled to reasonable protection from "constant threat of violence and sexual assault"). Cf., e.g., *Farmer*, 511 U.S. at 834 (ruling that "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm" in failure-to-protect cases); *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (observing that "[p]rison authorities must protect not only against current threats, but also must guard against 'sufficiently imminent dangers'") (footnote and citation omitted); *Heisler v. Kralik*, 981 F. Supp. 830, 837 (S.D.N.Y. 1997) (observing that "prison officials have a constitutional duty to act reasonably to ensure a safe environment for a prisoner when they are aware that there is a significant risk of serious injury to that prisoner"); *Pierce v. King*, 918 F. Supp. 932, 943-44 (E.D.N.C. 1996) (explaining that "a prisoner must ... demonstrate a substantial risk of such serious harm resulting from the prisoner's unwilling exposure to the challenged conditions") (citation omitted).

[FN246]. See, e.g., *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether the prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."); *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997) (stating that deliberate indifference can be inferred "where prison officials fail to protect an inmate who belongs to an identifiable group of prisoners for whom the risk of assault is a serious problem of substantial dimensions, including prisoners targeted by gangs"); *Vosburg*, 845 F.2d at 766 (finding pervasive risk of harm present when complainant is member of "an identifiable group of prisoners" facing such risk); *Walsh v. Mellas*, 837 F.2d 789, 796 (7th Cir. 1988) (faulting defendants for their failure to protect inmates from "general risk of gang-related violence against individuals targeted by gangs"); *Martin*, 742 F.2d at 475 n.6 (stating that "new entrants to the prison system may be an 'identifiable group of prisoners' more prone to the risk of harm"); *Walsh v. Brewer*, 733 F.2d at 476 (explaining that Eighth Amendment pain is shown when complainant "belong[s] to an 'identifiable group of prisoners' for whom 'risk of ... assault [was] a serious problem of substantial dimensions'") (quoting *Withers*, 615 F.2d at 161); *Murphy v. United States*, 653 F.2d 637, 645 (D.C. Cir. 1981) (stating that "'it is enough that an identifiable group of prisoners'" fear for their safety) (quoting *Withers*, 615 F.2d at 161); *Withers*, 615 F.2d at 161 (concluding that pervasive risk of harm is present when "violence and sexual assaults occur on the idle tier ... with sufficient frequency that the younger prisoners, particularly those slightly built, are put in reasonable fear for their safety").

[FN247]. 742 F.2d 469 (8th Cir. 1984).

[FN248]. *Id.* at 471.

[FN249]. *Id.* at 471-72.

[FN250]. See Saum et al., *supra* note 31, at 428 ("Measuring the nature and frequency of sex in prison proves to be a difficult endeavor.").

[FN251]. See, e.g., *United States v. Bailey*, 444 U.S. 394, 426 n.6 (1980) (Blackmun, J., dissenting) (explaining that inmate's life "isn't worth a nickel" if he reports his rape) (quoting R. GOLDFARB, *JAILS: THE ULTIMATE GHETTO*, 325-326 (1975)); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980) (stating that "[t]here was evidence, however, that many more such [prison sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported"); *LaMarca v. Turner*, 662 F. Supp. 647, 686 (S.D. Fla. 1987) (observing that plaintiff's experts showed that underreporting rape in prison is "even higher" than 50%; and identifying two reasons for underreporting rape: (1) the reporting process is in itself "degrading and humiliating" and (2) reporting "may dramatically increase rather than decrease the risks that they will be seen to be vulnerable people to be raped again") (citation and internal quotation marks omitted); *Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex. 1984) (writing that "it is apparent that the inmates have an unwritten code of silence which results in most acts of violence going undetected"); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982) (finding that "the evidence is absolutely clear that the inmate code exists and that it prevents the reporting of a great many episodes of actual or threatened violence;" "[o]fficial incidence reports ... are so underinclusive as to be almost wholly devoid of meaning"); *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976) (noting that "[a] cardinal precept of the convict culture is that no inmate should report another inmate to officials"), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 483 U.S. 781 (1978); *Cotton & Groth*, *supra* note 36, at 49 (explaining that "[t]he most serious problem associated with coerced sex in prison is the 'no-win' situation it creates for the victim, which is the primary issue that prevents inmate victims from reporting the offense"); *Eigenberg*,

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supra note 43, at 47 (finding that 72.9% of correctional officers believed that raped inmates will not report their victimization); Siegal, supra note 218, at 1546 (explaining that "[p]rison 'etiquette' is such that any prisoner who 'squeals' on a fellow inmate risks severe retribution from other prisoners") (footnotes omitted). One survey of inmates confined in a Canadian prison found that they reported only nine percent of all incidents of victimization. See Dennis Cooley, Criminal Victimization in Male Federal Prisons, 35 CANADIAN J. CRIM. 479, 490 (1993).

[FN252]. See Saum et al., supra note 31, at 418 (observing that some sexual acts that may appear consensual are in fact the product of coercion). A "punk" or "kid" is a heterosexual prisoner who has been "turned out," that is, coerced into homosexual behavior, often in order to acquire protection from other inmates or from his sexual partner. See WOODEN & PARKER, supra note 58, at 3; Dumond, supra note 21, at 139. The punk typically plays a passive, "female" role, whereas the "pitcher" plays the "male" role in these coercive sexual relationships. See Dumond, supra note 21, at 139.

[FN253]. See supra notes 237-41 and accompanying text (addressing the nexus between sexually aggressive incidents and defensive, target violence).

[FN254]. See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (embracing a deferential attitude toward the actions of prison staff because "such a standard is necessary if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations'") (quoting *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (chastising the trial court for substituting its notions of proper jail administration for that of "experienced administrators"); *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979) (stating that "courts must heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of correctional officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters'") (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)); *N.C. Prisoners' Labor Union*, 433 U.S. at 126 (evoking policy of "wide-ranging deference [to] the decisions of prison administrators").

[FN255]. See, e.g., BOWKER, supra note 216, at 13 (observing that some correctional staff "tell them to fight it out"); LOCKWOOD, supra note 1, at 55 (observing that staff encourage targets to fight their tormentors); SILBERMAN, supra note 45, at 19 (recounting that "correctional officers frequently lend support to such aggressive responses"); TOCH, supra note 240, at 208 (observing that prison staff "advise inmates of the advantages of using violence when one is threatened"); WEISS & FRIAR, supra note 216, at 25 (stating that an officer advised an inmate, "Go back ... and fight it out"); WOODEN & PARKER, supra note 58, at 203 (interviewing a correctional officer, who states that "[t]he guy has to be willing to get a pipe or shank and defend himself"); 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. 2d ed. 1994) (observing that prison staff "in the prison vernacular, ... seem to offer little assistance to inmates except the age-old advice of 'fight or fuck'"). See also TOCH, supra note 240, at 64 ("One here buys the assumption that violence is the only way of countering or preventing the violence of others."); Robertson, supra note 240, at 339 ("Most inmates have but two options: to fight in self-defense or become passive victims of a predatory subculture.").

Should the targeted inmate act on this advice, he 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." TOCH, supra note 240, at 248.

[FN256]. LOCKWOOD, supra note 1, at 55.

[FN257]. Cf. *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 555-56 (6th Cir. 1992) (rejecting defendant's claim that jury ought to have been instructed to determine if a "pervasive risk of homosexual attack" rather than "pervasive risk of harm" existed).

[FN258]. See LOCKWOOD, supra note 1, at 40; see also NACCI & KANE, supra note 39, at 14 (observing that many targeted inmates "believe that in prison, the best and expected response when pressured for sex is violence"); Sexual Exploitation in Prison, supra note 218, at 440 (stating that "sexual harassment and sexual advances are also major causes of stress and violence," and that one expert asserts "they are potentially the most dangerous type of conflict in prison").

[FN259]. See, e.g., *Smith v. Ark. Dep't of Correction*, 103 F.3d 637, 645 (8th Cir. 1996) (upholding trial court's finding of "substantial risk of serious harm" based on evidence that "violence, robbery, rape, gambling, and use of weapons by inmates are prevalent"); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583-84 (11th Cir. 1995) (concluding that "substantial risk of

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serious harm" was demonstrated by evidence of "inmate-on-inmate violence occur [ing] regularly"); *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir. 1988) (finding "over 140 instances of fighting" over four-year period constituted pervasive risk of harm); *Martin v. White*, 742 F.2d 469, 471-72, 474 (8th Cir. 1984) (finding that assaults occurring "on a 'fairly regular basis,'" i.e., 59 reported assaults and some 300 "claimed assaults" over the course of four years, in combination with other evidence of violence, established pervasive risk); *Miller v. Carson*, 401 F. Supp. 835, 883, 890-91 (M.D. Fla. 1975) (finding pervasive risk of assault at Florida jail, where inmates committed 150 assaults upon 600 inmates during the course of 11 months); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 967 (D.R.I. 1977) (finding pervasive risk of assault at Rhode Island Correctional Institution, where inmates committed 155 assaults upon 650 prisoners in course of a year); *Grubbs v. Bradley*, 552 F. Supp. 1052, 107-79 (M.D. Tenn. 1982) (finding pervasive risk of assault in Tennessee State Prison, where inmates committed 492 assaults over 32 month period upon prison population of approximately 1,300).

[FN260]. *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991).

[FN261]. 762 F.2d 635 (8th Cir. 1985).

[FN262]. *Id.* at 637 n.1.

[FN263]. See *id.* at 635-38.

[FN264]. See *id.* at 638.

[FN265]. See WEISS & FRIAR, *supra* note 216, at 5:

Green [a rape victim] is asked to name his rapists. Apologetically, he refuses, frightened for his life. 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 name. The guards must realize what will happen to him if he does.... No names, he decides.

See also *supra* note 92 (discussing several reasons why inmates underreport sexual activity in prison).

[FN266]. 944 F.2d 344 (7th Cir. 1991).

[FN267]. *Id.* at 346.

[FN268]. See *id.*

[FN269]. See *id.*

[FN270]. See *id.*

[FN271]. *Id.* at 349-350 (citations omitted). But see *Richardson v. Penfold*, 839 F.2d 392, 396 (7th Cir. 1988) (ruling that inmate's failure to reveal names of his assailants was not fatal to his action because of his confinement in cellblock containing inmates known to rape other inmates).

[FN272]. *McGill*, 944 F.2d at 350.

[FN273]. 511 U.S. 825 (1994).

[FN274]. *Id.* at 843.

[FN275]. *Id.* at 842 (quoting Respondent's Brief).

[FN276]. See *supra* notes 70-100 (discussing the frequency of sexual harassment) and 101-110 (discussing the characteristics of its victims). See also *Jones v. Banks*, 878 F. Supp. 107, 110 (N.D. Ill. 1995) (concluding that a known homosexual inmate in protective custody "has produced sufficient evidence of serious risks to his safety to avoid summary judgment").

[FN277]. See Davis, *supra* note 73, at 14-16 (identifying victims as "look [ing] young for their age;" of smaller stature; "better looking;" and typically white). See also Note, Sexual Assaults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punishment, 36 ALB. L. REV. 428, 438 (1972) (observing that "these sexual practices are well known and

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common throughout United States prisons") [hereinafter Sexual Assaults and Forced Homosexual Relationships in Prison].

[FN278]. See LOCKWOOD, *supra* note 1, at 2.

[FN279]. See NACCI & KANE, *supra* note 39, at 8.

[FN280]. See LOCKWOOD, *supra* note 1, at 18.

[FN281]. See WOODEN & PARKER, *supra* note 58, at 134.

[FN282]. See The Contribution of Sexual Harassment to Stress and Coping in Confinement, *supra* note 24, at 57 tbl.3.1. See also Issues in Prison Sexual Violence, *supra* note 5, at 100 (suspecting that inmates underreport their fear of assault).

[FN283]. See LOCKWOOD, *supra* note 1, at 43 (finding that 57% of sexual overtures led to violence).

[FN284]. WOODEN & PARKER, *supra* note 58, at 189-204.

[FN285]. Eigenberg, *supra* note 43, at 47 tbl.3 (stating that 50% "disagreed" that rape is rare and another 35.5% of officers "strongly disagreed").

[FN286]. LOCKWOOD, *supra* note 1, at 91.

[FN287]. See Eigenberg, *supra* note 43, at 48 (observing that only 4.8% and 10.8% of the officers would not believe young white inmates and young inmates, respectively, who claimed that they had been raped). Eigenberg also found that officers were less likely to believe inmate prostitutes, homosexuals, muscular inmates, gang members, and inmate leaders. See *id.* at 48-49.

[FN288]. See *id.* at 49 (finding that 27.1% of officers "would have difficulty believing homosexual rape victims").

[FN289]. See LOCKWOOD, *supra* note 1, at 130.

[FN290]. See *id.* at 130-32.

[FN291]. See generally ROSEMARY SKAINE, POWER AND GENDER 377 (1996) (observing that sexual harassment occurring in workplace arises in part from organizational environment).

[FN292]. See, e.g., *Martin v. White*, 742 F.2d 469, 470 (8th Cir. 1984) (condemning "the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates"); BUFFUM, *supra* note 5, at 6 (observing that "[i]n some institutions there is nearly total inmate control of the daily life of the inmate population and the custodial staff merely controls the walls"); SCACCO, *supra* note 58, at 30 (stating that "[t]he shocking fact is that there is both overt and covert implication of officers in the [sexual] attacks that take place in penal institutions"); WEISS & FRIAR, *supra* note 216, at 68 (explaining that "[t]he first thing a new inmate learns is that prison authorities cannot protect his body's privacy"); Davis, *supra* note 73, at 11 (observing a "lack of supervision by guards and the inadequate facilities to provide security"); Robertson, *supra* note 239, at 339 (writing that "[i]ncarceration exposes male inmates to a 'world of violence' where staff cannot or will not protect them from rape, assault, and other forms of victimization") (footnotes omitted); Scharf, *supra* note 45, at 28 (concluding that "[p]risons are largely unable to protect the physical safety of their inmates"); Sexual Assaults and Forced Homosexual Relationships in Prison, *supra* note 277, at 438 (stating that "[v]ictims are at the mercy of their aggressors and receive little protection from prison authorities who are in charge of their safe keeping"). One group of inmate-authors went so far as to argue that "[i]t [i.e., rape] seems to flourish in direct proportion to the permissiveness of the administration. I mean 'permissiveness' in the sense of allowing this to happen" H. JACK GRISWOLD, ET AL., AN EYE FOR AN EYE 142 (1971).

[FN293]. See Robert B. Blair & Peter C. Kratoski, III, Career Opportunities, in ENCYCLOPEDIA OF AMERICAN PRISONS 122, 123 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (stating that there are about 500,000 correctional employees and 1.5 million inmates).

[FN294]. See Edith E. Flynn, The Ecology of Prison Violence, in PRISON VIOLENCE 115, 123 (Albert K. Cohen et al.

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eds., 1976):

[Prisons are not] particularly designed to facilitate effective staff intervention, whenever the life and safety of inmates or fellow staff are endangered Violence and destructive behavior occurring in dormitories, bullpens, or at the end of long corridors can be observed but not stopped by staff, without unduly endangering the observing officer. By the time assistance is summoned, it is frequently too late to prevent injuries or save lives. The lack of visibility and the long distances involved often make it impossible to identify those responsible for assault or other deviant behavior.

Id.

[FN295]. In his seminal work, *The Society of Captives*, Gresham Sykes observed a chasm between the appearance of "almost infinite power" held by the staff and the numerous constraints on the exercise of that power. SYKES, *supra* note 16, at 41. These constraints are several. First, staff have little legitimate authority over inmates because inmates lack a "sense of duty" to obey them. While staff could resort to coercive power, Sykes contends that coercion used on a routine basis is "grossly inefficient." Finally, power grounded on rewards and punishments is of limited value due to the fact that confinement precludes significant improvements or additional deprivations. See *id.* at 48-52.

[FN296]. Inmate gangs are of two types. Some are the product of street gangs. Other inmate gangs have no outside affiliations. See Mary E. (Beth) Pelz, *Gangs*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 213, 213 (Marilyn D. McShane & Frank P. Williams III eds., 1996). Gangs are a major source of prison violence, with one commentator asserting that they are "five times more likely to be involved in institutional violence than are other inmates." See *id.* Gangs are found in every prison system. See *id.* There are five major gangs: Aryan Brotherhood; Mexican Mafia; LaNuestra Familia; Texas Syndicate; and Black Guerilla Family. See *id.* at 215-16. Aside from their criminal activities, gangs "offer [their members] an unconditionally supportive context in which a man's 'machismo' rests assured." ROBERT JOHNSON, *HARD TIME* 168 (2d ed. 1996).

[FN297]. See BOWKER, *supra* note 216, at 12 (asserting that "systemwide administrators are generally unwilling to spend the time and effort as well as the money necessary to protect easily victimized prisoners").

[FN298]. Donald R. Cressey, Foreword to JOHN IRWIN, *PRISONS IN TURMOIL* vii, vii (1980).

[FN299]. See *supra* note 255 (citing various commentators' observations regarding prison staff members). See also *LaMarca v. Turner*, 662 F. Supp. 647, 695 (S.D. Fla. 1987) (observing that when an inmate complained of harassment by inmates, "[t]he officers took the approach that [he] should be a man, should deal with his problems and should hit [his tormentors]").

[FN300]. LOCKWOOD, *supra* note 1, at 54.

[FN301]. See *id.* at 55 (finding that prison staff may encourage violence against aggressors rather than follow formal disciplinary procedures). While most states do not formally address the role of self-defense as an answer to disciplinary charges for assault, correctional staff as a matter of customary practice will consider it as a complete defense or as a mitigating factor. Robertson found that 12 state departments of corrections employed formal, written policies acknowledging self-defense to be a complete defense against disciplinary charges. See Robertson, *supra* note 240, at 350. Twenty-one additional state departments of corrections indicated that hearing officers as a matter of customary practice could acquit inmates on grounds of self-defense. See *id.* at 352. Six more states permitted self-defense solely in mitigation of disciplinary sanctions. See *id.* at 354.

[FN302]. Cf. WOODEN & PARKER, *supra* note 58, at 2 ("In response to [an inmate's] claim of sexual assault and harassment, one of the staff members stated: 'I don't feel sorry for you. You're getting what you deserve.'").

[FN303]. See LOCKWOOD, *supra* note 1, at 53.

[FN304]. See NACCI & KANE, *supra* note 39, at 15.

[FN305]. See *id.*

[FN306]. See *id.*

[FN307]. See *id.* at 16.

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[FN308]. See WOODEN & PARKER, *supra* note 58, at 127 (stating that two of every three homosexual inmates reported experiencing sexual pressure).

[FN309]. NACCI AND KANE, *supra* note 39, at 16. For example, an inmate imprisoned in California observed: The staff seem to turn away from the problem [of inmate sexual practices]. They are not able to put a stop to it so they just tolerate what they do not want to go looking for. Some of the staff think the various sexual problems of the prison inmates are funny, and just laugh at the predicaments of those that are caught in the webs of homosexuality. Victor Dillon, *Love in Prison*, in *INSIDE: PRISON AMERICAN STYLE* 117-18 (Robert J. Minton, Jr. ed., 1971).

[FN310]. See SKAINE, *supra* note 291, at 381-82.

[FN311]. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 71 (1986) (stating that existence of employer sexual harassment policy is relevant in fixing liability for sexual harassment under Title VII).

[FN312]. See generally 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, 160-72 (1994) (discussing the judicial deference given to prison officials in their authorship of prison rules, many of which are vague).

Like police officers, prison staff exercise considerable discretion in deciding when to enforce disciplinary rules. See Robert Freeman, *Correctional Officers: Understood and Misunderstood*, in *PRISONS* 306, 316 (Joycelyn M. Pollack ed., 1997) (stating that "[r]ule enforcement in the prison by the correctional officer is analogous to enforcement of the law in the community by the police officer"). Many violations are ignored. See John D. Hewitt et al., *Self-Reported and Observed Rule Breaking in Prison: A Look at Disciplinary Response*, 3 *JUST. Q.* 435, 445 (1984).

Inmates accused of rule violations are usually entitled to some procedural safeguards. See *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974) (holding that loss of good time as disciplinary sanction must be preceded by (1) notification of the charges no later than 24 hours before their adjudication; (2) assistance by a staff member, inmate or some other "counsel substitute" for illiterate defendants or for persons facing complex accusations; (3) production of witnesses for the accused unless their presence would be "unduly hazardous to institutional safety or correctional goals;" and (4) explanation of a guilty verdict).

Nine of ten disciplinary hearings end in a finding against the accused inmate. See JAMES STEPHAN, *PRISON RULE VIOLATORS* 1 (1989). The burden of proof is low: usually it amounts to a preponderance of the evidence. See Charles H. Jones Jr. & Edward Rhine, *Due Process and Prison Disciplinary: From Wolff to Hewitt*, 11 *N. ENG. J. ON CRIM. & CIV. CONFINEMENT* 44, 90 (1985). Prisoners often doubt the fairness of such proceedings and refer to them as "kangaroo courts." See WILLIAM K. BENTLEY & JAMES M. CORBETT, *PRISON SLANG* 11 (1992) (explaining that "[t]he name [kangaroo court] implies an inmate is quickly in and out without any real justice taking place"). See also James E. Robertson, *Impartiality and Prison Disciplinary Tribunals*, 17 *N. ENG. J. CRIM. & CIV. CONFINEMENT* 301, 320-26 (1991) (asserting that disciplinary bodies composed of institutional staff are subject to various forms of bias).

[FN313]. OR. DEPT OF CORRECTIONS, *HANDBOOK FOR RULES OF PROHIBITED CONDUCT* 21 (Apr. 15, 1992).

[FN314]. MICH. DEPT OF CORRECTIONS, *POL'Y DIRECTIVE 03.03.105, PRISONER DISCIPLINE, ATTACH. B*, at 5 (June 6, 1994).

[FN315]. N.M. CORRECTIONS DEPT, *POLICY STATEMENT, EXHIBIT I, OFFENSES AND SANCTIONS* 229 (n.d.).

[FN316]. N.D. DEPT OF CORRECTIONS AND REHABILITATION, *ACTS PROHIBITED FOR INMATES AND PENALTIES FOR SUCH ACTION* 14 (n.d.).

[FN317]. *ACTS CONSTITUTING RULE VIOLATIONS* (attached to letter from Mark Carnopis, Public Information Officer, Idaho Dep't of Correction, to James E. Robertson (Jan. 7, 1998)).

[FN318]. TENN. DEPT OF CORRECTION, *INMATE RULES AND REGS.* 9 (Mar. 1997).

[FN319]. CAL. CODE REGS. tit. 15, § cm;1 3315 (1997).

[FN320]. MINN. DEPT OF CORRECTIONS, *INMATE DISCIPLINE REGS. FOR MINN. CORRECTIONAL FACILITIES* 22 (Dec. 15, 1988).

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[FN321]. ILL. ADMIN. CODE tit. 20, § cm;1 504 (1997).

[FN322]. CONN. DEPT OF CORRECTION, ADMIN. DIRECTIVE 9.5, CODE OF PENAL DISCIPLINE 8 (Jan. 12, 1998).

[FN323]. See supra notes 35-48 and accompanying text (delineating the following forms of sexual harassment among inmates: (1) statements that feminize; (2) sexual propositions; (3) sexual extortion; and (4) kissing, touching, or fondling intimate body parts).

[FN324]. See ARIZ. DEPT OF CORRECTIONS, RULES OF DISCIPLINE 21 (Mar. 1986); COLO. DEPT OF CORRECTIONS, CODE OF PENAL DISCIPLINE 20 (July 1, 1981) (rev. June 1984); CONN. DEPT OF CORRECTION, ADMIN. DIRECTIVE 9.5, CODE OF PENAL DISCIPLINE 9 (Jan. 12, 1998); GA. DEPT OF CORRECTIONS STANDARD OPERATING PROCS., ref. no. IIB02-0001, Attach. 4, at 2 (Mar. 1, 1992); IND. DEPT OF CORRECTIONS, ADULT DISCIPLINARY POL'Y PROCS. 43 (1995); KY. CORRECTIONS, POLICIES AND PROCS., POL'Y NO. 15.2, OFFENSES AND PENALTIES 4 (Nov. 1, 1996); MD. DIV. OF CORRECTION, DCR No. 105-1, RULES AND PENALTIES (Dec. 1, 1988); MASS. DEPT OF CORRECTIONS, 103 CMR 430.00: DISCIPLINARY PROCS. 141 (April 10, 1992); MISS. DEPT OF CORRECTIONS INMATE HANDBOOK 15 (Dec. 1992); MO. DEPT OF CORRECTIONS, INSTITUTIONAL SERVICES, POL'Y AND PROC. MANUAL, PROC. NO. IS19- 1.1, CONDUCT RULES AND SANCTIONS 4 (June 1, 1994); NEB. DEPT OF CORRECTIONAL SERVICES, RULES AND REGS. 17 (Dec. 20, 1994); NEV. DEPT OF PRISONS, CODE OF PENAL DISCIPLINE 30 (May 1, 1993); N.H. DEPT OF CORRECTIONS, MANUAL FOR THE GUIDANCE OF INMATES 69 (1994); OKLA. DEPT OF CORRECTIONS, POL'Y AND OPERATIONS MANUAL, DISCIPLINARY PROCS., ATTACH. A: ACTS CONSTITUTING RULE VIOLATIONS 5 (March 4, 1992); R.I. DEPT OF CORRECTIONS, REG. GOVERNING DISCIPLINARY AND CLASSIFICATION PROCS. AT A.C.I. STATE OF R.I., MORRIS RULES 17 (May 14, 1986); VT. DEPT OF CORRECTIONS, DIRECTIVE 410.01: DISCIPLINE, APP. 1, at 6 (Mar. 18, 1996) (rev. June 3, 1996).

[FN325]. See ALA. DEPT OF CORRECTIONS, ADMIN. REG. No. 403, ANNEX B, VIOLATIONS TABLE AND PUNISHMENT, at 5 (Oct. 3, 1996); ARIZ. DEPT OF CORRECTIONS, RULES OF DISCIPLINE 21 (Mar. 1986); ARK. DEPT OF CORRECTION, ADMIN. REG. SEC. 831, DISCIPLINARY RULES AND REGS. 10 (May 18, 1990); GA. DEPT OF CORRECTIONS STANDARD OPERATING PROCS., ref. no. IIB02-0001, Attach. 4, at 2 (Mar. 1, 1992); HAW. DEPT OF SOC. SERV. AND HOUS., TIT. 17, ADMIN. RULES OF THE CORRECTIONS DIV., INMATE HANDBOOK, at 201-8 (Oct. 1983); IND. DEPT OF CORRECTION, ADULT DISCIPLINARY POL'Y PROCS. 39 (1995); KAN. DEPT OF CORRECTIONS, INMATE RULE BOOK 16 (July 11, 1994); MONT. DEPT OF CORRECTIONS, POLICIES AND PROCS., POL'Y No. DOC 3.4.2, at 2 (Jan. 4, 1996); N.H. DEPT OF CORRECTIONS, MANUAL FOR THE GUIDANCE OF INMATES 69 (1994); N.J. ADMIN. CODE 10A: 4-4.1, PROHIBITED ACTS (attached to letter from Kathleen C. Wiechnik, Special Asst. to Comm. of Corrections, to James E. Robertson (Jan. 2, 1998)); N.Y. DEPT OF CORRECTIONAL SERV., STANDARDS OF INMATE BEHAVIOR--ALL INSTITUTIONS 10 (rev. Feb. 1994); N.C. DEPT OF CORRECTION, NCDOP 2B.0202 DISCIPLINARY OFFENSES B(6) (Jan. 1, 1995); OKLA. DEPT OF CORRECTIONS, POL'Y & OPERATIONS MANUAL, DISCIPLINARY PROCS., ATTACH. A: ACTS CONSTITUTING RULE VIOLATION, at 5 (Mar. 4, 1992); S.C. DEPT OF CORRECTIONS, DISCIPLINARY RULES AND PROCS. FOR INMATES (n.d.); TEX. DEPT OF CRIMINAL JUSTICE, INSTITUTIONAL DIV., DISCIPLINARY RULES AND PROCS. FOR INMATES 19 (Feb. 1995); UTAH DEPT OF CORRECTIONS, INSTITUTIONAL OPERATIONS DIV. MANUAL, FACILITIES OPERATION: INMATE MANAGEMENT, Ch. FDr01/09.03, at B2W (rev. Mar. 1, 1996); VT. DEPT OF CORRECTIONS, DIRECTIVE 410.01 DISCIPLINE, APPENDIX 1, at 3 (Mar. 18, 1996) (rev. June 3, 1996); WIS. DEPT OF CORRECTIONS, DISCIPLINE, CH. DOC 303.15, at 30 (June 1994).

[FN326]. ARIZ. DEPT OF CORRECTIONS, RULES OF DISCIPLINE 21 (Mar. 1986).

[FN327]. NEB. DEPT OF CORRECTIONAL SERV., RULES AND REGS. 15 (Dec. 20, 1994).

[FN328]. See CONN. DEPT OF CORRECTION, ADMIN. DIRECTIVE 9.5, CODE OF PENAL DISCIPLINE 8 (Jan. 12, 1998); DEL. DEPT OF CORRECTIONS, BUREAU OF PRISONS, RULES OF CONDUCT, PROCEDURE No. 4.2, at 13 (Jan. 1, 1998); FLA. DEPT OF CORRECTIONS, RULES OF THE DEPT OF CORRECTIONS, CH. 33-22, INMATE DISCIPLINE 167c (n.d.); IOWA DEPT OF CORRECTIONS, 5120-9-06, INMATE RULES OF CONDUCT AND STATEMENT OF POL'Y OF INSTITUTIONAL RULES 2 (n.d.); KAN. DEPT OF CORRECTIONS, INMATE RULE BOOK 17 (July 11, 1994); NEV. DEPT OF PRISONS, CODE OF PENAL DISCIPLINE 35 (May 1, 1993); N.H. DEPT OF

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CORRECTIONS, MANUAL FOR THE GUIDANCE OF INMATES 69 (1994); N.Y. DEPT OF CORRECTIONAL SERVS., STANDARDS OF INMATE BEHAVIOR--ALL INSTITUTIONS 10 (rev. Feb. 1994); N.C. DEP'T OF CORRECTION, NCDOP 2B.0202 DISCIPLINARY OFFENSES B(6) (Jan. 1, 1995); OHIO ADMIN. RULE 5120-9-06, RULES OF CONDUCT 2 (Jan. 4, 1993); W. VA. DEP'T OF MIL. AFF. & PUB. SAFETY, DIV. OF CORRECTIONS, POL'Y DIRECTIVE 670.00, at 8 (Apr. 15, 1996); WIS. DEP'T OF CORRECTIONS, DISCIPLINE, CH. DOC 303.15, at 30 (June 1994).

[FN329]. See Robertson, *supra* note 240 and accompanying text (stating that fighting one's tormentor is efficacious defensive strategy).

[FN330]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, *supra* note 24, at 60.

[FN331]. See *id.*

[FN332]. See *id.* No constitutional amendment entitles inmates to confinement in a particular facility. See *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (ruling that transferring inmate to more secure facility does not implicate liberty interest arising from Due Process Clause).

[FN333]. See *The Contribution of Sexual Harassment to Stress and Coping in Confinement*, *supra* note 24, at 61. See generally Charles B. Fields, *Protective Custody*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 373, 373 (Marilyn D. McShane & Frank D. Williams III eds., 1996):

The use of protective custody (PC) is one of the ways prison administrators attempt to isolate and protect those inmates most likely to be victimized. Protective custody is a restricted housing area that usually is made up of maximum security cells located within the larger prison setting. In most cases, there are only a limited number of cells available. PC is often referred to as a "prison within a prison."

[FN334]. See Dumond, *supra* note 21 (defining the terms "kids" and "punks").

[FN335]. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 *FED. PROBATION* 46, 51 (March 1984). See also NACCI & KANE, *supra* note 39, at 20 (advocating normalization); *Inmate Sexual Aggression*, *supra* note 93, at 9-10 (advocating normalization).

[FN336]. Oregon's sexual harassment rules provide an excellent model by virtue of their clarity and comprehensiveness. See *OR. DEP'T OF CORRECTIONS*, *supra* note 313, at 21. See also text accompanying note 313.

[FN337]. See RICHARD A. MCGEE ET AL., *THE SPECIAL MANAGEMENT INMATE* 53-74 (Mar. 1985) (discussing various approaches for dealing with inmates who threaten institutional order); Marilyn D. McShane, *Violence*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 471, 474 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (discussing the use of "maximum super-security units" for controlling assaultive inmates).

[FN338]. See BOWKER, *supra* note 216, at 12:

If prisoners with certain characteristics have a notably high risk of suffering sexual assaults, then there is no reason why these prisoners cannot be identified at the point of entry into a correctional system. These men could then be placed in institutions that do not include potential rapists and that are more intensively supervised than other correctional institutions.

See also MCGEE ET AL., *supra* note 337, at 34-35 (recommending sanctuaries in prison and sanctuary prisons for the vulnerable inmate).

[FN339]. See James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 *U. CIN. L. REV.* 91, 137-39 (1987) (describing use of protective custody segregation for vulnerable inmates as form of re-victimization in that they reside under conditions more restrictive than those found in general prison population).

[FN340]. See LINDA L. ZUPAN, *JAILS: REFORM AND THE NEW GENERATION PHILOSOPHY* 4-5 (1991).

[FN341]. See *id.* at 5; Byron Johnson, *Inmate Supervision: The New Generation Philosophy*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 261, 262 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

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[FN342]. ZUPAN, *supra* note 340, at 5.

[FN343]. See, e.g., TODD R. CLEAR & GEORGE F. COLE, *AMERICAN CORRECTIONS* 289 (4th ed. 1997) (writing that direct supervision "approach to violence reduction has proved successful in a number of state and federal institutions"); JOHNSON, *supra* note 296, at 262-63 (writing about "[s]pecific success stories in which the use of unit management [i.e., direct supervision] resulted in dramatic drops in violence and equally dramatic improvements in social climate"). Cf. Susan Sturm, *The Legacy and Future of Corrections Litigation*, in *INCARCERATING CRIMINALS* 47, 51 (Timothy J. Flanagan et al. eds., 1998) (observing that "experience suggests that a move to unit management eliminates many of the problems prompting judicial intervention").

[FN344]. See *supra* notes 59-63 and accompanying text (discussing the cultural origins of sexual harassment among inmates).

[FN345]. See *supra* notes 53-57 and accompanying text (discussing the origins of sexual harassment in the "pains of imprisonment").

[FN346]. Hans Toch identified the following concerns of inmates:

- * Privacy: A concern about social and physical overstimulation; a preference for isolation, peace and quiet, absence of environmental irritants, such as noise and crowding.
 - * Safety: A concern about one's physical safety; a preference for social and physical settings that provide protection and that minimize the chances of being attacked.
 - * Structure: A concern about environmental stability and predictability; a preference for consistency, clear-cut rules, orderly and scheduled events and imprints.
 - * Support: A concern about reliable, tangible assistance from persons and settings, and about services that facilitate self-advancement and self-improvement.
 - * Emotional Feedback: A concern about being loved, appreciated, and cared for; a desire for intimate relationships that provide emotional sustenance and empathy.
 - * Social Stimulation: A concern with congeniality, and a preference for settings that provide an opportunity for social interaction, companionship, and gregariousness.
 - * Activity: A concern about understimulation; a need for maximizing the opportunity to be occupied and to fill time; a need for distraction.
 - * Freedom: A concern about circumscription of one's autonomy; a need for minimal restriction and for maximum opportunity to govern one's own conduct.
- TOCH, *supra* note 240, at 21-22.

[FN347]. See Wright, *supra* note 52, at 119 (speculating that tighter security compounds prison violence by further threatening the inmate's identity and especially his "sense of masculinity"). Cf. WELCH, *supra* note 50, at 188- 89 (stating that "[i]ndividuals tend to engage in violence and misconduct when their critical needs (such as safety, privacy, personal space, activity, familial contact, social relations, and dignity) are not met").

[FN348]. JOHNSON, *supra* note 296, at 192.

[FN349]. See SYKES, *supra* note 16, at 65-79 (delineating the following "pains of imprisonment:" liberty, goods and services, heterosexual relationships, autonomy, and security).

[FN350]. See David J. Cooke, *Containing Violent Prisoners: An Analysis of the Barlinnie Special Unit*, 29 *BRIT. J. CRIMINOLOGY* 129, 137 (1989).

[FN351]. See David A. Ward & Norman A. Carlson, *Super-Maximum Custody Prisons in the United States*, 97 *PRISON SERVICE J.* 27, 29-30 (1995):

[A] "lockdown regime" in the Federal Bureau of Prisons:

1. Each inmate is housed in a single cell.
2. No congregate activity is allowed
3. Inmates spend 23 hours of each day in their cells, emerging only in handcuffs and leg restraints to be escorted, one at a time, to an enclosed exercise area or to a locked, barred shower stall.
4. Educational (correspondence courses), religious, and case work activities are conducted by staff through the bars of each inmate's cell, inmates do not go to their offices.

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5. No contact visiting is permitted, except with attorneys.

6. No commissary is allowed; cell activities are limited to watching a . . . TV, listening to a radio (with earphones), reading, and writing letters and legal briefs.

7. Inmates do have access to books and articles from a basic law library, to paralegal assistance, and to their attorneys."

See *id.* at 1023-24 (footnotes omitted):

Residents of [the federal prison at] Marion[, Illinois] and most super-max prisons are "locked down," that is, confined to their cells for all but an hour a day reserved for exercise. Opportunities for work, study, or other forms of programming are minimal. Inmates are placed under mechanical restraints when they leave their cells. Body and cell searches are commonplace. The rural location of many super-max prisons impedes visitation by family members.

Id.

[FN352]. See Cooke, *supra* note 350, at 140.

[FN353]. See *id.*

[FN354]. See *id.*

[FN355]. See DONALD CLEMMER, *THE PRISON COMMUNITY* 299 (1958) (defining the term prisonization as "the taking on in greater or less degree the folkways, mores, and customs, and general culture of the penitentiary"), reprinted in 3 *THE CRIMINAL IN CONFINEMENT* 92 (Leon Radzinowicz & Marvin E. Wolfgang, eds., 1971).

[FN356]. See Cooke, *supra* note 350, at 140-41.

[FN357]. *Id.* at 141. See also David J. Cooke, *Prison Violence: A Scottish Perspective*, in *INCARCERATING CRIMINALS* 106, 114 (Timothy J. Flanagan et al. eds., 1998):

Regimes that are properly managed, which reduce uncertainty and population change; regimes which are not repressive but ensure the safety of prisoners; regimes that contain prisoners in clean and sanitary conditions, where meaningful contact with the outside world is facilitated; regimes that are administered by well-trained prison officers who have pride in their occupation; regimes with these qualities are likely to have a positive effect on prison violence.

Id. Cf. Richard Sparks, *Out of the Digger*, *PRISON SERVICE J.* 2, 6 (Sept. 1994) (characterizing Barlinnie Special Unit as attentive to the needs of inmates).

[FN358]. *Issues in Prison Sexual Violence*, *supra* note 5, at 97.

[FN359]. See *supra* notes 35-48 and accompanying text (delineating the four types of sexual harassment among inmates).

[FN360]. See *supra* notes 49-63 and accompanying text (delineating the causes of sexual harassment among inmates).

[FN361]. See generally *supra* notes 226-42 and accompanying text (delineating the injuries inflicted by sexual harassment among inmates).

[FN362]. See *supra* notes 243-59 and accompanying text (positing that inmate sexual harassment inflicts injury cognizable under the deliberate indifference test).

[FN363]. See *supra* notes 291-328 and accompanying text (positing that staff norms and the general absence of harassment-specific disciplinary rules are indicative of prison workers knowledge of sexual harassment among inmates and, in many instances, their failure to take reasonable countermeasures).

[FN364]. See *supra* notes 335-57 and accompanying text (positing recommendations for addressing sexual harassment among inmates).

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