Columbia Human Rights Law Review
Winter 1995

***273** FARMER V. BRENNAN: SPOTLIGHT ON AN OBVIOUS RISK OF RAPE IN A HIDDEN WORLD

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I. INTRODUCTION

Dee Farmer is a transsexual prisoner serving a twenty-year federal sentence for credit card fraud. At the time of her [FN1] commitment, Farmer was a pre-operative transsexual who had undergone unsuccessful black market surgery to remove her testicles. Moreover, she had noticeably feminine attributes due to silicone breast implants, hormone estrogen treatments, and her attire. Nevertheless, in accordance with the policy of the Federal Bureau of Prisons, she was held in custody in all-male prisons. [FN2]

On April 1, 1989, nine days after her transfer to general population at a maximum security penitentiary, [FN3] Dee Farmer was approached in her cell by a prisoner who demanded that she have sexual intercourse with him. When she refused, the prisoner punched her in the face repeatedly, pushed her and kicked her. Farmer's clothes were torn off as her attacker held her down on the bed and forcibly raped her at knife point, threatening to kill her if she reported him. She reported the incident one week later. As a result of the rape, Farmer suffered "mental anguish, psychological damage, humil(i)ation, ***274** a swollen face, cuts and bruises to her mouth and lips and a cut on her back, as well as some bleeding." [FN4] Farmer's transsexuality was known to the Bureau of Prisons (hereinafter BOP) by virtue of her appearance, documentation in BOP records, and prior litigation. [FN5] BOP staff acknowledged that Farmer "project(ed) feminine characteristics," and a 1986 prison psychologist's report noted the risk of harm she faced in prison, where she "would be subject to a great deal of sexual pressure . . . because of (her) youth and feminine appearance." [FN6] Additional compelling evidence of the BOP's knowledge of the risk of harm facing Farmer in general population arose from another case she filed against the BOP for placing her in administrative segregation at USP- Lewisburg. [FN7] Indeed, the warden of USP-Terre Haute at the time that Farmer was raped was previously on record stating that Farmer's placement in general population at another facility posed a threat to her life. [FN8]

***275** After the rape at USP-Terre Haute, Farmer, acting without counsel, filed a complaint naming as defendants the BOP director and regional director, the wardens of FCI-Oxford and USP-Terre Haute, the regional office administrator who authorized her transfer to USP- Terre Haute, and the case manager who recommended her transfer. She sought an injunctive order that the BOP place her in a co- correctional facility. [FN9] She further sought compensatory and punitive damages. Farmer alleged that each of the respondents knew that due to her "feminine appearance, . . . (she) would be sexually assaulted at USP-Terre Haute . . . ." [FN10] The district court granted the defendants' summary judgment motion and the Court of Appeals for the Seventh Circuit summarily affirmed that decision. Farmer, still acting pro se, petitioned successfully for certiorari.

In June of 1994, the U.S. Supreme Court ruled unanimously and unambiguously in Farmer v. Brennan [FN11] that prison officials have a duty under the Eighth Amendment [FN12] to protect prisoners from harm at the hands of other prisoners. Building on two key prisoners' rights decisions handed down since 1990, [FN13] the Court defined for the first time the Eighth Amendment standard of deliberate indifference that was originally formulated in Estelle v. Gamble [FN14] as the basis for ***276** holding prison officials liable for failing to treat prisoners' serious medical needs. The Court vacated the lower court decision and remanded Dee Farmer's case.

Following the discussion of prison violence in Part II, this Article traces the development of the "deliberate indifference" standard in Part III, and analyzes the significance of the Farmer opinion and discusses the implications for future prisoner-plaintiffs in Part IV.

II. PRISON VIOLENCE

A. The Scope of Sexual Assault in Prison

Unfortunately, Dee Farmer's experience is not unique. Indeed, brutal assault and homosexual rape are facts of daily life in men's prisons. [FN15] Justice Blackmun, concurring in Farmer, recognized the terrors encountered by young, non-violent prisoners who are at the mercy of larger, stronger, and ruthless inmates. [FN16] In an earlier opinion, he noted that "(a) youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or . . . even in the van on the way to jail." [FN17] The nature and extent of victimization, and sexual assaults in particular, remain largely unexposed facets of a closed culture, referred to in one case as "a dark and evil world completely alien to the free world." [FN18] To the extent that prison violence surfaces, the discussion generally revolves around individual cases of brutality, such as Dee Farmer's, that reach the judicial spotlight. [FN19]

***277** Judges and juries from nearly every circuit routinely hear grisly evidence of prisoner violence. [FN20] For example, a jury in the Western District of Louisiana held the county sheriff and other jailers liable and awarded substantial compensatory and punitive damages to Thomas Stokes, a Mississippi college student who was a first offender jailed on a misdemeanor charge. He was brutally and repeatedly sexually assaulted by several sentenced prisoners with long criminal records and sustained multiple injuries. Compelling trial evidence revealed that jail officials had ignored Stokes's screams for help, observed his broken nose, black eyes and head wound, and retrieved his bloodsoaked bedsheets, but refused to reclassify him in order to separate him from his aggressors. [FN21]

A jury in Puerto Rico found prison officials deliberately indifferent for failing to treat William Arenas Cortes's severe psychiatric problems and subjecting him to vicious attacks by other prisoners in general population. These prisoners tortured and ultimately murdered him and dismembered his body in an overcrowded ***278** prison in Puerto Rico. [FN22] And in a case that later reached the Supreme Court, prison officials were aware that "rape was so common and uncontrolled that some potential victims dared not sleep (but) instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station" to avoid the nightly sexual assaults, fights and stabbings committed by "creepers and crawlers" against their fellow inmates. [FN23]

B. Profiles of Likely Victims And Other Risk Factors

Correctional administrators have long recognized that prisoners likely to be victimized are overwhelmingly young first offenders of slight build with passive, soft-spoken personalities. [FN24] Dee Farmer is a case in point. BOP officials admitted that she is a " .non-violent' transsexual who, because of (her) .youth and feminine appearance' is .likely to experience a great deal of sexual pressure' in prison." [FN25] Moreover, institutional "risk" factors, based upon policies or dangerous conditions that affect all prisoners or a group of prisoners, often contribute to a high incidence of prisoner assaults and rapes, and may constitute deliberate indifference. [FN26] These risk factors include the following: [FN27]
. facility overcrowding;
. inadequate facility staffing;
. inadequate supervision of prisoners and staff;
.***279** . inadequate classification system to separate violent prisoners from vulnerable prisoners;
. inadequate systems for reporting and tracking violent incidents;
. failure to train staff to respond to and investigate violent incidents;
. placement of some prisoners in positions of supervisory authority over others;
. overreliance on open dormitory housing; and
. failure to control tools or other material that can be used as weapons.

It would be difficult for prison administrators to argue against taking steps toward correcting these "risk" factors in view of their highly predictive value in addressing increased levels of prison violence. By instituting policies that seek to curb and to monitor violence among prisoners, administrators ultimately gain control of their facilities and, simultaneously, enhance their knowledge of the risk of harm faced by prisoners who may be victimized and thus require special protection. Moreover, the liability of correctional administrators often depends on the quality of management practices used to avert risk factors. [FN28] As the Farmer Court indicated, proof that prison officials know what the risk factors are for prisoner-on-prisoner violence may serve as a basis for imputing knowledge of the risk itself. [FN29]

III. THE DEVELOPMENT OF THE DELIBERATE INDIFFERENCE STANDARD

A. Population Rates Strain Constitutional Standards

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The population of United States prisons reached 1.3 million people in the period 1992-93. [FN30] The 150% surge in U.S. prison ***280** populations during the 1980s was accompanied by a decline in legal standards governing conditions of confinement. [FN31] According to one prisoners' rights advocate and legal scholar, both trends "placed enormous pressure on the facade of constitutionalism as a major guarantor of minimally decent living conditions for prisoners." [FN32] A majority of state prison systems are now subject to court orders mandating that one or more facilities meet minimum conditions of confinement. [FN33] It is against this backdrop that the courts have developed the Eighth Amendment doctrine of deliberate indifference to adjudicate allegations of cruel and unusual punishment.

B. Estelle v. Gamble

In Estelle v. Gamble, [FN34] the Supreme Court first utilized the "deliberate indifference" standard for Eighth Amendment liability on the part of prison officials who failed to provide treatment for prisoners' serious medical needs. Writing for the majority of the Court, Justice Marshall noted that deliberate indifference constitutes cruel and unusual punishment when prison officials' conduct is incompatible with "the evolving standards of decency that mark the progress of a maturing society," [FN35] and results in the "unnecessary and wanton infliction of pain." [FN36] Moreover, the Court referred to prisoners' reliance on prison authorities to treat their medical conditions, and the corresponding duty of care bestowed on public officials in keeping with ***281** society's "contemporary standards of decency." [FN37] The term deliberate indifference was not defined or elaborated further in Estelle. Four years after Estelle, the Supreme Court referred to violence among inmates as cruel and unusual punishment. [FN38]

As the Supreme Court noted in Farmer v. Brennan, deliberate indifference has appeared in both tort law and criminal law, which ultimately led the Court to define it in Farmer in order to resolve a conflict among the circuit courts. [FN39]

C. City of Canton, Ohio v. Harris

In City of Canton, Ohio v. Harris, [FN40] the Court defined deliberate indifference in the context of municipal liability as the failure of governmental officials or entities to respond to substantial risks of constitutional deprivation when they have actual or constructive knowledge of the risks or the risks are obvious. [FN41] In Canton, a case brought under 42 U.S.C. S 1983, the Court held that a municipality's failure to train employees to recognize risks could be construed as against governmental policy and thus subject to a finding of liability if the municipality was found deliberately indifferent to constitutional rights. [FN42]

D. Wilson v. Seiter

In Wilson v. Seiter, [FN43] a divided Supreme Court held that the "deliberate indifference" standard applies to all Eighth Amendment claims that challenge conditions of confinement in prisons. [FN44] Following the pronouncement in Rhodes v. Chapman, the Court specifically included prisoner safety among the essential conditions of confinement governed by the "deliberate indifference" standard:
***282** (T)he 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. . . . Thus . . . it is appropriate to apply the deliberate indifference standard articulated in Estelle. [FN45]

Having expanded the breadth of deliberate indifference, however, Justice Scalia proceeded to read into the Eighth Amendment cruel and unusual punishment clause a state of mind requirement without which even the most egregious objective harm would evade constitutional liability. [FN46] The "deliberate indifference" standard thus subdivided into two component parts: a subjective component, relating to the state of mind of prison officials, and an objective component, relating to the seriousness of the deprivation resulting from the officials' "wanton" conduct. The Wilson Court required prisoner- plaintiffs to prove both subjective and objective components in order to establish deliberate indifference and thereby hold prison administrators liable for constitutional violations. Wilson's version of deliberate indifference -- again in the absence of precise definition -- equated deliberate indifference with "wantonness" and placed it on a culpability scale above "mere negligence" [FN47] and below "malicious and sadistically for the very purpose of causing harm." [FN48]

***283** Justice White, joined by Justices Marshall, Blackmun and Stevens, concurred in the Wilson decision because the subjective "intent" requirement was inconsistent with established doctrine that "conditions (of confinement) are themselves part of the punishment even though not specifically .meted out' by a statute or judge." [FN49] Moreover, Justice White sought to distinguish cases involving harm to individual prisoners from those involving collective harm to all prisoners,

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noting that "inhumane prison conditions are often the result of cumulative actions and inactions of numerous officials . . . sometimes over a long period of time." [FN50]

E. Helling v. McKinney

Prisoners' rights advocates won a surprising victory in Helling v. McKinney. [FN51] Justice White, writing for the majority, held that the Eighth Amendment protects prisoners from unreasonable risks of serious damage to their future health. [FN52] The Court thus chose an expansive definition of the objective component of deliberate indifference expressed in Wilson by encompassing within it the notion of unreasonable risk that exposure to environmental tobacco smoke posed to the prisoner-plaintiff's future health. However, the Helling Court erected an additional hurdle for prisoner-plaintiffs by requiring proof that the particular risk at issue is not one that "today's society chooses to tolerate." [FN53] The Court cited examples of serious risks to prisoners' future health and safety in Helling to illustrate the point ***284** that one need not await serious injury before seeking relief in the courts. [FN54] Although the Helling decision addressed only the objective component of deliberate indifference, it had considerable significance in the Farmer case.

F. The Seventh Circuit Standard

The Seventh Circuit standard required Dee Farmer, among others, to notify prison officials of threats to her safety and to prove the officials had actual knowledge of "impending harm" that was "easily preventable" in order to establish their liability. [FN55] As stated in an early Seventh Circuit case:
Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it. [FN56]

According to the Seventh Circuit, deliberate indifference could be established only with proof that a prison official actually knew of an unreasonable risk and deliberately chose to ignore it. In one case, Judge Easterbrook noted the inevitability of prison violence given what he presumed to be the universally dangerous nature of prisoners. [FN57] He equated criminal recklessness on the part of prison officials with their intent to injure. [FN58] In recognition of the premium this standard places on avoidance of knowledge, the Seventh Circuit noted that "(g)oing out of (prison officials') way to avoid acquiring unwelcome knowledge is a species of intent. Being an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent." [FN59]

***285** Counsel for Farmer argued that this criminal recklessness standard would inappropriately shield prison officials from responsibility in a variety of circumstances. For example, it would immunize prison officials' failure to adopt adequate fire safety measures or procedures to identify prisoners with tuberculosis if it was found that they did not actually know that their failure would lead to harm. Moreover, in refuting the Seventh Circuit's requirement of actual knowledge of preventable impending harm, counsel for Farmer argued that such a requirement would be inconsistent with Helling's determination that deliberate indifference includes the unreasonable risk of future harm. [FN60] The Seventh Circuit standard would also undermine the incentive for prophylactic efforts by prison officials to prevent future prisoner injury and avert findings of deliberate indifference, because it addresses only "impending harm easily preventable," which is closer to the point of actual injury. [FN61]

IV. ANALYSIS OF THE FARMER DECISION

A. The Price of Punishment

In view of the rising prevalence of HIV and AIDS in prison, sexual violence can literally mean a death sentence for rape victims. [FN62] Yet, when the reality of prison violence reaches the public eye, the question may arise whether prison violence is accepted as part of the punishment imposed in criminal sentencing. Despite the public's current thrust toward law enforcement and more draconian sentencing regimes, to the extent that our society's contemporary standards of decency are dictated by a majority of Supreme Court justices, "(b)eing violently assaulted in prison is simply not .part of the penalty that ***286** criminal offenders pay for their offenses against society.' " [FN63] Prison officials, then, are not in a position to determine the "acceptable" level of violence in a particular facility. Instead, as discussed infra, they are charged with a duty of care for prisoner health and safety.

B. The Duty to Protect Prisoners

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Underlying the Farmer concept of deliberate indifference is the principle that under the Eighth Amendment, prison officials are obligated to protect prisoners from harm based upon the recognition that

(h)aving incarcerated the individuals, stripped them of all means of self- protection, and foreclosed access to private aid, the state is constitutionally required to provide prisoners with some protection from the dangers to which they are exposed. [FN64]

As the Farmer Court further pointed out, "the government and its officials are not free to let the state of nature take its course." [FN65] The duty to protect prisoners is the first pronouncement of the newly- configured Supreme Court with Justices Ginsberg, Kennedy, Souter and Thomas. Noteworthy for its symbolic value in jurisprudential and societal terms, this perspective may also signal the Court's rulings in ***287** future prisoner cases. Contrary to the Seventh Circuit's reasoning, [FN66] the duty to provide reasonable safety and to protect prisoners from harm places the burden on prison officials, rather than prisoner- victims, to take steps to avert violence. This has significant bearing on the actual knowledge standard adopted by the Court, because officials' inaction in the face of inferential evidence of knowledge may result in a finding of deliberate indifference. Overall, the Farmer decision is accurately summarized by Justice Blackmun's statement in his concurring opinion that the Farmer decision "creates no new obstacles for prison inmates to overcome, and it sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly." [FN67]

C. Civil Versus Criminal Recklessness

In its Farmer ruling, the Supreme Court resolved the circuit courts' dispute over the test for deliberate indifference. [FN68] The Farmer Court synthesized the dispute into a determination of which form of ***288** "recklessness" -- civil or criminal -- typified the Eighth Amendment "deliberate indifference" standard. Farmer sought adoption of the civil law "should have known" form of recklessness followed in the Third and Ninth Circuits, while the government promoted a distinctively milder form of the "actual knowledge" criminal recklessness formulation employed by the Seventh Circuit. [FN69] The Court resolved the conflict by adopting a "subjective recklessness" standard to establish prison officials' deliberate indifference based upon their knowledge and disregard of substantial risks to prisoner health or safety: [FN70]

We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [FN71]

Justice Souter rejected definitively the notions that prisoner- plaintiffs must: i) notify prison officials of the risk of harm; ii) wait to be injured before seeking relief in the courts; or iii) prove that prison staff's conduct was designed to result in harm to them. [FN72] He noted that neither deliberate indifference nor recklessness are self-defining terms. [FN73] In order to give meaning to these concepts, the Court drew from the Estelle, Wilson and Helling opinions. As discussed below, the Farmer decision reflects the sort of trade-offs that typify consensus- building among Supreme Court justices. For example, in an effort to develop a majority of the Court, Justice Souter specifically rejected Farmer's argument seeking adoption of the Canton standard for deliberate indifference based on the obviousness of risks. At the end of the day, however, he incorporated the obviousness of risks by allowing inferential proof of knowledge. Justice Thomas wrote a separate ***289** concurring opinion in Farmer that reiterated his Helling diatribe that cruel and unusual punishment is only meted out by statute or by judges, and does not encompass conditions of confinement. In Farmer, however, Justice Thomas was not joined by Justice Scalia, his partner in the Helling dissent.

Using the criminal law definition of recklessness, the Court ruled that the term is comprised of both knowledge and disregard of the risk of serious harm faced by prisoners. While subjective recklessness is closer to the criminal law recklessness standard than to the civil law definition, the Court has blurred this distinction by incorporating circumstantial evidence into the formulation. As discussed below, Justice Souter devoted nearly as much attention to describing what subjective recklessness does not mean as he did to stating affirmatively what it does mean.

D. Subjective Recklessness Defined

1. What It Is Not

Subjective recklessness is a state of mind rather than a "state of facts." [FN74] On the culpability scale, it falls considerably below intentional conduct and malicious or sadistic conduct designed for the purpose of causing harm. In this regard, the

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Farmer Court underscored the distinction drawn in Wilson between claims relating to prisoner health and safety (governed by the "deliberate indifference" standard) and cases involving use of force by prison guards (governed by the "malicious and sadistic" state of mind standard). [FN75] Justice Souter noted the Estelle proposition that the Eighth Amendment "requires more than ordinary lack of due care for the prisoner's interests or safety" and ruled that neither malpractice nor inadvertence are thus mental states as culpable as recklessness. [FN76]

Rejecting Farmer's argument, the Court refused to adopt a civil law recklessness standard of action or inaction "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known," [FN77] because that standard lacked a state of mind ***290** component: "failure to alleviate a significant risk that (prison officials) should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." [FN78] In an effort to garner enough votes to comprise a majority of justices, Justice Souter rejected Farmer's argument that deliberate indifference is tied to obviousness of risk. The reason for the rejection was its inconsistency with Wilson's state of mind requirement for deliberate indifference. However, the Court ultimately incorporated the notion of obviousness of risk into the subjective recklessness test by allowing prisoner-plaintiffs to prove knowledge through circumstantial evidence. [FN79]

2. What It Is

According to the Farmer decision, subjective recklessness is akin to criminal recklessness, defined as conscious disregard of a risk of harm. Justice Souter made reference to the commentary in the Model Penal Code on criminal recklessness, which casts the definition of recklessness in terms of what the jury must evaluate in order to establish culpability. [FN80] As envisioned in the Model Penal Code, in order for the jury to evaluate the level of risk, the factors relevant to the extent of the risk must be considered. Then, in order to determine if a defendant is reckless, the jury must assess the defendant's justification for taking the risk. The drafters of the Model Penal Code section on recklessness sought to downplay the distinction between ***291** knowledge as it relates to an actor's conduct and the attendant circumstances surrounding the risk of harm. Thus, a prison official who confronts obvious risk factors and acts to increase the risk of harm is treated no differently from one who fails to prevent harm. Culpability may lie due to the attendant circumstances and the actor's conduct in the face of the risk.

Justice Souter framed the "deliberate indifference" standard as knowledge of a "substantial risk of serious harm." In light of Helling's proposition that actual injury need not occur in order to establish that prison officials are deliberately indifferent, the objective component of deliberate indifference is tied to the degree of the risk of harm, an issue that was not raised in Farmer. [FN81] One commentator noted that the Farmer requirement of "serious harm" overlooked Hudson v. McMillian, which had rejected squarely this objective test for Eighth Amendment liability. [FN82] The courts will inevitably address the "substantial" risk and "serious" harm elements of deliberate indifference in future cases that turn on prisoners' physical conditions which are both feared and experienced. The post hoc approach taken by judges in Eighth Amendment cases suggests that the level of harm will inevitably factor into the proof of prison officials' knowledge. This proof of knowledge will, in turn, be further revealed by the facts underlying the risk of harm facing the prisoner-victims.

E. The Recklessness Standard After Farmer

By adopting subjective recklessness to define the state of mind component of deliberate indifference, the Farmer Court adhered closely to Wilson's subjective state of mind requirement. [FN83] By rejecting the ***292** Canton definition of deliberate indifference, the Farmer ruling created a second distinct "deliberate indifference" standard for constitutional claims. [FN84] As a result, despite the preference expressed in Wilson for a single "deliberate indifference" standard, [FN85] two separate "deliberate indifference" standards now govern constitutional and statutory claims. [FN86]

While the constitutional version of deliberate indifference has objective and subjective components, questions remain after Farmer as to the relative weight assigned to each element needed in the liability equation. The greater weight is apparently placed on the subjective component in "failure to protect" cases. However, as discussed below, the seriousness of the risk of harm may indeed be an important factor in the deliberate indifference analysis.

F. Plaintiffs' Burden of Proof After Farmer

1. Prior Notification Not Required

The Farmer decision made clear that prisoners need not inform correctional officers of threats to their safety in order to

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establish deliberate indifference and hold officials liable. Both the government in its brief and the Court declined to adopt this Seventh Circuit requirement. Dee Farmer's experience in the lower courts illustrates the significance of this point. Relying on McGill v. Duckworth, [FN87] the ***293** district court granted the BOP defendants' summary judgment motion due to Farmer's failure to inform prison officials before the rape that she faced a serious risk of harm. Based upon the lack of notice, the district court apparently presumed no knowledge on the part of the defendants, and thereby disregarded Farmer's allegations. Justice Souter vacated the lower court's grant of summary judgment on the ground that Farmer's failure to notify BOP officials was not dispositive. [FN88]

2. Proof of Knowledge Through Circumstantial Evidence

The Farmer Court ruled:
Whether a prison official had the requisite knowledge () if (sic) a question of fact subject to demonstration in the usual ways . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. [FN89]

The Court stated that if prisoner-plaintiffs present evidence that "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 that the defendant-official had actual knowledge of the risk." [FN90] These statements are key to understanding the standard articulated in Farmer and a cause for celebration by prisoners' rights advocates. By allowing circumstantial evidence of knowledge and not requiring prisoner notification, the Court eviscerated the Seventh Circuit's notion of criminal recklessness. The impact of this development, particularly for pro se litigants, is very significant. [FN91] More failure-to-protect cases are likely to reach the jury because prisoner-plaintiffs alleging an obvious risk of harm may raise a ***294** reasonable inference of prison officials' knowledge, which will be considered sufficient to create a triable issue of fact and thus survive a motion of summary judgment.

Dee Farmer's case reveals the significance of the Court's ruling on circumstantial evidence. In her complaint, Farmer alleged that -- based on her feminine appearance and the more violent atmosphere at USP-Terre Haute -- each of the named BOP officials knew that she would be sexually assaulted at USP- Terre Haute. With the exception of the BOP official who took credit for signing Farmer's transfer order to USP-Terre Haute, the BOP defendants filed declarations with their summary judgment motion denying actual knowledge of the risk of sexual assault facing Farmer.

Farmer's cross-claim for summary judgment and affidavit in opposition to defendants' summary judgment motion alleged that the BOP knew about her transsexuality by virtue of her appearance, prior litigation, and documentation in BOP records. Farmer also filed a motion pursuant to Federal Rule of Civil Procedure 56(f), requesting an extension of time due to the BOP's failure to produce discovery material that would enable her to establish that they should have known of the risk she faced at USP-Terre Haute. The district court denied Farmer's Rule 56(f) motion and granted summary judgment to the BOP officials, finding that, based on Farmer's failure to notify them, the officials had no "actual knowledge of impending harm easily preventable so that a conscious, culpable refusal to prevent the harm can be inferred from (their) failure to prevent it." [FN92] The Seventh Circuit summarily affirmed the district court's order.

The Supreme Court in Farmer created a method by which prisoner-plaintiffs can survive opposing summary judgment motions by presenting evidence "from which it can be inferred" that prison officials "knowingly and unreasonably disregard(ed) an objectively intolerable risk of harm . . . ." [FN93] Application of this method in Farmer may lead to the district court's denial of the summary judgment motion made by the BOP officials. By alleging the defendants' knowledge of the unreasonable risk of harm she faced as a transsexual in a maximum security penitentiary, Farmer created a triable issue of fact. Moreover, once the complaint was filed, officials were on actual notice of Farmer's ***295** claims and the ongoing risk of harm she faced in the general population.

On remand, Farmer will have an opportunity to demonstrate, using direct evidence from institutional records and inferential evidence of the involvement of several of the defendants in her classification before and after the rape, that BOP officials knew of the risk of harm she faced and were personally responsible for the injury she suffered. [FN94] Farmer will be entitled to injunctive relief if she establishes the defendants' knowledge of the risk of harm she faced at USP-Terre Haute. [FN95] The court, on remand, will analyze the personal involvement of each named defendant.

3. Post-Farmer Cases

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Within three months, the Farmer decision was cited by district and circuit courts in approximately three dozen cases across the country. As discussed below, many of these cases underscore the significance of the Supreme Court's adoption of circumstantial evidence into the Eighth Amendment actual knowledge standard. Indeed, it appears that following Farmer, prisoner-plaintiffs' claims against line prison staff may be more "trial-worthy," i.e., more likely to survive defendants' dismissal and summary judgment motions. [FN96]

***296** In one such case with facts remarkably similar to Dee Farmer's situation, [FN97] a homosexual Delaware prisoner was transferred to protective custody where, threatened by a razor, he was raped and sodomized in the shower by an inmate with a record of sexual offenses. Relying on the Farmer standard, the district court denied a defendant- supervisory correctional officer's motion to dismiss:
(I)t can reasonably be inferred from . . . (plaintiff's) complaint that the . . . correctional officer on duty at the time of the attack allowed . . . (plaintiff's) attacker to be in unsupervised contact with . . . (plaintiff), even though he knew the attacker to be dangerous, and thus knowingly subjected (plaintiff) to "a substantial risk of serious harm." [FN98]

Citing Farmer, the Northern District Court of California recently denied one defendant-correctional officer's summary judgment motion where a Federal prisoner was sexually assaulted by her cellmates and BOP officials ignored her verbal request for a cell change and tore up her written complaint. [FN99] The Court ruled that the plaintiff's allegations were sufficient to raise a material factual dispute about her housing assignment. If taken as true, the allegations would prove that the prison guard "knew there was a substantial (risk) of serious harm to Hudson and disregarded that risk," and this constitutes an Eighth Amendment violation. [FN100] In another recent case, a district court denied defendant-prison officials' motion to ***297** dismiss. [FN101] The prisoner's pro se allegations were held sufficient to implicate prison officials who transferred him back to Attica despite prior threats there, knowing that he would be subjected to "life- threatening conditions." [FN102]

Farmer has also had an impact on prisoner-plaintiffs who allege constitutionally inadequate medical care and conditions of confinement. "Reasoning in the same vein as Farmer v. Brennan," the Seventh Circuit, in Raine v. Williford, [FN103] recently reversed the lower court's grant of defendant-prison officials' summary judgment motion where the plaintiff alleged that he was subjected to freezing cell temperatures without blankets or clothes at USP-Marion:
We conclude . . . that plaintiff is entitled to have the trier of fact determine whether the conditions of his administrative confinement, principally with regard to the cell temperature and the provision of hygiene items, violated the minimal standards required by the Eighth Amendment. [FN104]

***298** In remanding the case, the Raine court noted the district court's failure to take into consideration the material factual dispute regarding the subjective component of the "deliberate indifference" standard. [FN105]

In another case, a disabled prisoner who suffered a fractured ankle at the hands of prison officials had a better outcome at the summary judgment phase due to the Farmer standard of circumstantial evidence of supervisory liability. [FN106] Although the plaintiff failed to establish by direct evidence that defendants actually knew he was under a doctor's orders to stay off his feet, the court inferred from circumstantial evidence that defendants knew that an obvious and substantial risk of permanent harm existed. [FN107]

The majority of post-Farmer cases which have granted summary judgment to defendant-prison officials have not reached the ***299** point of inquiry into prison officials' state of mind. [FN108] The Sixth Circuit, in Thompson v. City of Medina, Ohio, [FN109] recently affirmed a grant of summary judgment for defendants because the plaintiff- pretrial detainees alleged generally that violence existed in the facility, but did "not even me(e)t the minimal burden of showing a sufficient inferential connection between the classification system and inmate violence to justify a reasonable fear for personal safety." [FN110] The Medina court distinguished Farmer and did not reach the subjective state of mind inquiry. [FN111] The Western District Court of Tennessee recently acknowledged that a prisoner-plaintiff who had been assaulted repeatedly by the same inmates could establish Eighth Amendment liability against the sheriff and several jail officials "if he (could) show a serious risk that they would again attack him." [FN112]

4. Implications for Institutional Reform Litigation

The Farmer Court ruled that individual prisoner claims based upon specific risks of harm should be treated in the same way as claims involving the general risk of harm to all prisoners. [FN113] The implications for proving deliberate indifference in these types of cases, ***300** however, are different in terms of both establishing evidence of systemic constitutional violations

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and assigning liability to specific individuals or entities. In this regard, Justice Blackmun, in his Farmer concurrence, challenged Wilson's state of mind standard in the context of systemic claims and injected a touch of reality:
Wilson failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level." . . . The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature. [FN114]

The question, then, is how will post-Farmer plaintiffs prove that an institution or governmental entity has the requisite state of mind to warrant Eighth Amendment liability? Although the Farmer Court did not address the issue squarely, because the case involved an individual prisoner's "failure to protect" claim, the Court acknowledged "considerable conceptual difficulty . . . (in the) search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." [FN115] In injunctive actions, however, the courts have traditionally held upper-level officials accountable for constitutional violations committed by line staff, and ultimately treated an "official capacity suit . . . , in all respects other than name, . . . as a suit against the entity." [FN116] For example, in a discussion of entity liability under 42 U.S.C. S 1983, the Ninth Circuit, sitting en banc, held the County of San Diego liable because an established policy, regulation or decision, rather than individual staff conduct, led to the ***301** constitutional deprivation at issue. [FN117] The Farmer Court's refusal to adopt the Canton S 1983 standard for constitutional deliberate indifference claims may impact cases that raise systemic claims linked to policies and procedures, and individual claims involving supervisory liability. [FN118]

The Farmer Court's reference to the plaintiff's proof of prison officials' state of mind "in the usual ways" implies that statistics, institutional and municipal reporting of assaults, and the existence of systemic predictive factors, among other indicia of "institutional knowledge" of prison violence, are encompassed within the circumstantial evidence that plaintiffs may introduce to establish knowledge of risk of harm. If the plaintiff proves that the risk of harm is
longstanding, pervasive, well-documented, or expressly noted 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 that the defendant-official had actual knowledge of the risk. [FN119]

Evidence in prison litigation generally follows the "chain of command," as in military and bureaucratic organizations where "marching orders" are carried out through policies, procedures and directives governing the conduct of both prisoners and guards. Through the hierarchical reporting structure, staff at increasingly higher levels bear responsibility for line prison staff's actions or inaction. Moreover, in cases involving proof of a pervasive risk of harm, plaintiffs seek to establish deliberate indifference by reference to statistics that reveal the level and nature of assaults. This scenario is evident in cases involving system-wide problems. In Fisher v. Koehler, [FN120] following a ***302** trial on plaintiffs' motion for a permanent injunction, a district court in New York found a pattern of violence rooted in systemic deficiencies in a New York City prison. The following deficiencies resulted in routine physical abuse by inmates and staff: overcrowding; over- reliance on open dormitories; and inadequate classification, staffing, supervision, and systems for the control, investigation, and discipline of excessive force. [FN121] The court noted that even when assaultive prisoners were known to the defendants, they remained in general population dormitories after only a short period of time in administrative segregation. Citing "institutional failure that cannot be wholly attributed to individual officials" at the prison as the cause of the pervasive risk of harm, the Fisher court ruled that defendants ranging from the facility warden and his deputies to various municipal agency heads, and finally to Mayor Edward Koch, were liable for Eighth Amendment violations. [FN122]

G. Anticipating Defendants' Arguments

The Farmer recklessness standard opens the door to four main defenses that prison officials may assert to avoid liability. The Farmer Court discussed two ways in which defendants mightinvoke the "ostrich" syndrome, whereby prison officials assert that they had no knowledge or awareness of the risk of harm facing prisoner-plaintiffs. Defendants may claim that they were unaware of facts underlying the risk of harm or that they were aware of the underlying facts but believed the risk was insubstantial. Justice Souter cast doubt on Farmer's argument that a subjective recklessness standard would encourage defendants "to take refuge in the zone between .ignorance of obvious risks' and .actual knowledge of substantial risks.' " [FN123] He noted that a prison official will not escape liability if evidence showed that "he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist . . . ." [FN124] This means that defendants will not be rewarded for avoiding knowledge of the risk of harm to prisoners by, for example, not maintaining documentary records of ***303** assaults or threats of violence in order to avert liability. Moreover, the Court rejected the defense tactic of allowing a prison official to escape liability because he did not know that a

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specific prisoner-plaintiff would be assaulted by a particular inmate. [FN125] This defense may be raised by high level governmental officials, such as governors, more successfully in cases involving individual prisoner "failure to protect" claims than in cases involving pervasive risk of harm.

The second defense invited by the Farmer Court is evidence that prison officials "responded reasonably to the risk, even if harm ultimately was not averted." [FN126] This follows the Supreme Court's statement in Hudson v. Palmer, [FN127] that prison administrators "are under an obligation to take reasonable measures to guarantee the safety of the inmates . . . ." The measure for determining the "reasonableness" of defendants' actions remains ambiguous. For example, defendants may claim that the timing of their response to prisoner threats was affected by the pressure of institutional concerns such as available bed space. This assertion would then color the judgment of how reasonable prison officials' preventive measures were, despite existing doctrine that prisoner safety should not be compromised by competing institutional concerns. [FN128] Seeking to avert liability, correctional officers may attempt to take minimal, ineffective steps such as transferring cellmates within the same housing areas where prisoners would continue to have contact with one another, or, alternatively, subjecting prisoners in need of protection to lock-down conditions in isolation cells. In these examples, the defendants' "reasonable response" defense would fail in light of other available, more effective management tools that would be more palatable to prisoner-victims.

***304** The third defense is qualified immunity, which remains unchanged by the Farmer decision. At least one lower court after Farmer denied defendants' claim of supervisory immunity because the defendants failed to controvert allegations that they knew of the risk of harm to the prisoner-plaintiff. [FN129]

Mootness, the fourth defense to allegations of recklessness, is discussed by the Farmer Court in the context of injunctive relief available to plaintiffs, and is in keeping with existing doctrine. [FN130] Justice Souter indicated that in order to obtain injunctive relief, prisoner-plaintiffs must establish an ongoing deprivation of their right to reasonable safety, spanning from the outset of the filing of a complaint to the end of litigation proceedings. In its elaboration of the mootness doctrine, the Court noted that defendants could not escape liability by asserting that remedial steps were taken to prevent harm to prisoner-plaintiffs after the case was filed, but might avert issuance of an injunction.

Defendants may also assert insufficient funding in an effort to defend themselves against allegations of reckless conduct. Although the Farmer majority opinion is silent on the "cost defense," the Supreme Court has held that "(f)inancial constraints may not be used to justify the creation or perpetuation of constitutional violations." [FN131] Moreover, Justice Blackmun pointed out in his concurring opinion that legislative inaction and refusal to fund improvements should not be immune from constitutional scrutiny. [FN132]

H. Remedies After Farmer

The Farmer Court did not dramatically alter the remedies available to plaintiffs who establish deliberate indifference on the part of prison officials. In keeping with Helling, plaintiffs who seek injunctive relief to prevent a substantial risk of serious harm will be afforded prospective relief if they demonstrate the defendants' continuing disregard for their safety throughout litigation and into the future. [FN133] Once defendants are on notice by virtue of a lawsuit, they cannot claim they lack awareness of an ongoing risk of harm.

In fashioning relief, the Farmer Court invited lower courts to take into account whether plaintiffs pursued administrative or institutional remedies. [FN134] This demonstrates the Court's unrealistic view concerning both the extent of due process afforded prisoners and the state of prison life and violence. [FN135] Moreover, the Court disregarded S 1983 doctrine, which specifically does not require federal ***306** prisoners to exhaust institutional remedies before seeking relief on their federal statutory and constitutional claims. [FN136]

The Wilson Court established one "deliberate indifference" standard to govern claims for damages and injunctive relief. [FN137] In Farmer's case, the Court indicated that damages are available to prisoner-plaintiffs who establish that criminally reckless defendants have a personal responsibility to protect prisoners from risk of harm. In effect, the "personal involvement" requirement for damages complements the recklessness standard for liability, in that one's knowledge of risk and (in)action presupposes one's personal involvement in failing to protect a prisoner-plaintiff. While the Court left the issue of damages to the district court's discretion, Justice Souter noted that in her Rule 56(f) motion, Farmer had alleged defendants' personal responsibility for subjecting her to harm at USP- Terre Haute based on the defendants' knowledge of the violence there and her feminine appearance. Moreover, Justice Souter questioned the government's argument that the named

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BOP officials lacked the authority to bar Farmer's transfer to USP-Terre Haute, pointing to the record where the warden of USP-Terre Haute stated that Farmer was placed in administrative segregation following the rape "pursuant to directive from the North Central Regional Office" and a "request . . . ***307** by staff at FCI- Oxford." [FN138] Whether Dee Farmer will prevail on remand remains to be seen. Whatever the result, her case has marked a significant new chapter in Eighth Amendment law.

[FNa]. Staff Attorney, National Prison Project, American Civil Liberties Union Foundation; B.A., Hunter College (1980); M.S., Hunter College (1980); J.D., Columbia University (1990). As Staff Attorney at the National Prison Project, the author co- authored the brief and second-chaired the oral argument in Farmer v. Brennan in the Supreme Court. The author thanks Elizabeth Alexander and Jenni Gainsborough for their helpful comments, and Stephanie Morris for her research assistance.

[FN1]. Dee Farmer was born a male but, due to her transsexual status and in accordance with her preference, she will be referred to by feminine pronouns. In crafting its opinion, the Supreme Court artfully avoided the need to refer to the petitioner's gender.

[FN2]. The Bureau of Prisons no longer operates "co-correctional" facilities that mix male and female prisoners. Consequently, the policy is to incarcerate male homosexual and transsexual prisoners in all-male prisons.

[FN3]. On March 9, 1989, Farmer was transferred from the Federal Correctional Institution (FCI) at Oxford, Wisconsin, to the maximum security United States Penitentiary (USP) at Terre Haute, Indiana. Her case manager at FCI-Oxford recommended Farmer's transfer to the higher security penitentiary after she was found guilty of ordering fruit baskets and flowers by credit card over the prison telephone. She was initially placed in administrative segregation at USP-Terre Haute but released to general population on March 23, 1989.

[FN4]. Petitioner's Opening Brief at 5 & n.15, Farmer v. Brennan, 114 S. Ct. 1970 (1994) (No. 92-7247).

[FN5]. In a prior, separate action, Farmer had challenged the BOP's failure to provide medical treatment for her transsexualism. Farmer v. Haas, Brennan and DuBois, No. 90-1088, 1991 U.S. App. WL 26456 (7th Cir. Feb. 14, 1991). In reversing the district court's grant of summary judgment for defendants, the Court of Appeals noted that defendants Brennan and DuBois "conceded that they were well aware of Farmer's condition," id. at *2, based upon her treatment history and medical diagnosis.

[FN6]. Petitioner's Opening Brief at 7, Farmer (No. 92-7247).

[FN7]. See Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988).

[FN8]. Id. The district court in Carlson stated that the warden (then superintendent at USP-Lewisburg) adopted the following position in the staff report to Farmer, which justified her placement in administrative segregation at USP-Lewisburg:
Where a threat to security exists, staff may take reasonable steps to alleviate a threat. In your case, institutional staff finds that a situation exists which may endanger your life in the general population. While steps are being taken to move you to a facility where extra security will not be necessary, it is appropriate to keep you separated from anyone who may harm you.
Id.
The former superintendent at USP-Lewisburg was named as a defendant by Farmer in the Supreme Court case in his capacity as warden at USP-Terre Haute. Farmer maintains that she has consistently sought safe housing, but not necessarily in segregation. Contrary to the government's argument, at the time of her challenge to segregation placement at USP-Lewisburg, Dee Farmer was not aware that the risk she faced in general population there may have required special housing such as protective custody. Id.

[FN9]. At the time of Farmer's complaint, the BOP operated co-correctional facilities, a practice that subsequently has been discontinued.

[FN10]. Petitioner's Opening Brief at 5 n.15, Farmer (No. 92-7247).

[FN11]. 114 S. Ct. 1970 (1994).

[FN12]. The Eighth Amendment provides as follows:

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Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
U.S. Const. amend. VIII.
In a different context, the Court had previously articulated the government's duty to ensure the "reasonable" safety of prisoners in its custody. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989) (rejecting argument that state social services department has an affirmative duty to protect child who was in the custody of his natural father, while reiterating the duty of the state to protect and care for prisoners).

[FN13]. See Wilson v. Seiter, 501 U.S. 294 (1991); Helling v. McKinney, 113 S. Ct. 2475 (1993). The Farmer Court distinguished two other recent prisoner cases, which involved violence committed against inmates by prison staff and were governed by the "malicious and sadistic" standard, rather than deliberate indifference. See Hudson v. McMillian, 503 U.S. 1 (1992) (handcuffed and shackled inmate beaten by guards); Whitley v. Albers, 475 U.S. 312 (1986) (inmate shot by a guard during prison riot).

[FN14]. 429 U.S. 97 (1976).

[FN15]. Stephen Donaldson, The Rape Crisis Behind Bars, N.Y. Times, Dec. 29, 1993, at A11 (estimating that 290,000 men are sexually assaulted in prison every year; rape victims are targets for ongoing gang rapes); W. Wooden & J. Parker, Men Behind Bars: Sexual Exploitation in Prison (1982); Dan Lockwood, Prison Sexual Violence (1980); Carl Weiss & David James Friar, Terror in the Prisons (1974). Assaults in women's prisons are not considered as commonplace as those in men's facilities.

[FN16]. Farmer, 114 S. Ct. at 1987 (Blackmun, J., concurring).

[FN17]. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

[FN18]. Hutto v. Finney, 437 U.S. 678, 681 (1978) (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

[FN19]. For example, the Boston Globe published a three-part series on prison rape that coincided with the Court's decision in Farmer. Charles M. Sennott, Prison's Hidden Horror: Rape Behind Bars, Boston Globe, May 1, 1994, at B1; May 2, 1994, at A1; May 3, 1994, at B1; see also Scott Rauser, Comment, Prisons are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in McGill v. Duckworth, 78 Minn. L. Rev. 165, 188-90 (1993) (detailing the dangers of "snitching" on aggressive prisoners); David M. Siegal, Note, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1544 (1992) (focusing on the rights of prisoners threatened with HIV infection resulting from rape).

[FN20]. E.g., Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 2395 (1993) (upholding jury verdict of liability and awarding nominal damages for claims of pervasive sexual assaults against young, first-offender plaintiffs who were repeatedly raped and threatened; prison officials' knowledge of the general risk of harm was established by their familiarity with 100 assault cases which they failed to record or investigate); Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992) (holding San Diego County, its sheriff and jail officials liable for violating an 18-year-old pretrial detainee's right to personal safety by transferring him to general population, where he was raped repeatedly by his cellmate, known by officials as an "aggressive homosexual" serving time for a sexual offense, and by two other prisoners with extensive records; following the first incident, Redman's family had notified jail officials that he had been threatened with sexual assault, but prison officials took no action to ensure his safety); Lamarca v. Turner, 662 F.Supp. 647, 663 (S.D. Fla. 1987), aff'd in relevant part, 995 F.2d 1526 (11th Cir. 1993) (in class action case, prison officials were found liable for their callous indifference to prisoners' right to protection from constant violent assaults including gang rapes by other inmates, where the prevalence of assaults was evident from the overwhelming number of requests for protective custody and from facility inspector reports).

[FN21]. Stokes v. Delcambre, 710 F.2d 1120, 1129 (5th Cir. 1983) (The court upheld a jury verdict that found defendants had "placed (plaintiff) in a life-threatening setting and then ignored (him). While so trapped, he was brutally beaten, raped and humiliated.").

[FN22]. Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) (In an opinion by Judge (now Supreme Court Justice) Stephen Breyer, the First Circuit upheld the jury finding that defendants were deliberately indifferent to Cortes's need for treatment and personal safety by failing to segregate him from the general

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population, and affirmed the damage award.).

[FN23]. Hutto v. Finney, 437 U.S. 678, 682 (1978).

[FN24]. E.g., Butler, 979 F.2d 661, 667 ("Plaintiffs exhibit generally passive personalities."); Redman, 942 F.2d 1435, 1437 ("(Plaintiff) was 5'6" tall and weighed approximately 130 pounds."); Stokes, 710 F.2d 1120 (plaintiff was a 21-year-old college student who had never been in jail).

[FN25]. App. at 50-51, 73-74, Farmer (No. 92-7247).

[FN26]. E.g., Fisher v. Koehler, 692 F. Supp. 1519, 1561-62 (S.D.N.Y. 1988) (court found that systemic deficiencies such as overcrowding, overreliance on open dorms and inadequate classification resulted in a pattern of violence and routine physical abuse by inmates and staff); see generally John Boston & Daniel E. Manville, Prisoners' Self-Help Litigation Manual (3d ed. forthcoming 1995) (manuscript at ch. II, S G.1.c. & nn. 468-69).

[FN27]. Id.

[FN28]. However, as Justice White noted in his Wilson concurrence, the government argued that conscientious prison managers should not be immune from constitutional liability where seriously inhumane, perversive conditions exist. Wilson v. Seiter, 501 U.S. 294, 311 (1991).

[FN29]. See discussion infra Part IV.E.4.

[FN30]. Marc Mauer, The Sentencing Project, Americans Behind Bars: The International Use of Incarceration, 1992-1993, at 1 (1994). The United States incarcerates people at a rate that is "five to eight times the rate of Canada and most European nations," despite a significantly lower rate of victimization in the United States. Id. at 15.

[FN31]. Id. at 15. The rate of incarceration in the U.S. rose 22% from 426 per 100,000 in 1989 to 519 per 100,000 in 1992-93. Id. at 6.

[FN32]. Elizabeth Alexander, The New Turn of the Screw: Why Good News About Controlling Incarceration Rates Safely May Not Be Welcome, 66 S. Cal. L. Rev. 209, 213 (1992).

[FN33]. Forty-two states, Puerto Rico and the U.S. Virgin Islands are currently under federal court order to improve conditions of confinement. See generally National Prison Project, Status Report: State Prisons and the Courts (Jan. 1994).

[FN34]. 429 U.S. 97 (1976).

[FN35]. Id. at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[FN36]. Id. at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 172-73 (1976)). Prison guards or doctors may be deliberately indifferent and thus cause "unnecessary or wanton infliction of pain" by "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Id. at 112 (footnote omitted). This reference to intentional conduct was considered a "placeholder" for the "sufficiently culpable state of mind" requirement formulated in Wilson v. Seiter, 501 U.S. 294, 300 (1991).

[FN37]. Estelle, 429 U.S. at 103-04 & n.9 (citing Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

[FN38]. Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (endorsing the practice of double- celling).

[FN39]. Farmer v. Brennan, 114 S. Ct. 1970, 1978-79 & n.4 (1994) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts S 34, at 213-14 (6th ed. 1988); Restatement (Second) of Torts S 500 (1965)). See discussion infra Part IV.B.

[FN40]. 489 U.S. 378 (1989).

[FN41]. Id. at 389.

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[FN42]. Id. at 391-92.

[FN43]. 501 U.S. 294 (1991).

[FN44]. Id. at 303.

[FN45]. Id. (emphasis added), cited in LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987).

[FN46]. Wilson v. Seiter, 501 U.S. 294, 300 (1991) (citing Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), cert. denied, 479 U.S. 816 (Posner, J.)) ("The infliction of punishment is a deliberate act intended to chastise or deter.") (citation omitted). The Farmer decision reiterated this distinction between conditions of confinement and punishment. ("The Eighth Amendment does not outlaw cruel and unusual .conditions.' "). Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994).

[FN47]. Wilson, 501 U.S. at 305.

[FN48]. Id. at 305. The Wilson Court thus distinguished the "deliberate indifference" standard from the "malicious and sadistic" state of mind articulated in Whitley v. Albers, 475 U.S. 312 (1986), a case involving the shooting of a prisoner during a riot. The Court also distinguished the "malicious and sadistic" state of mind necessary to establish liability in use of force cases. See Hudson v. McMillian, 503 U.S. 1 (1992), an excessive use of force case, in which the "malicious and sadistic" standard applied, distinguishing the Wilson/Estelle "deliberate indifference" standard. In both Hudson and Whitley, the Court deferred to prison officials' actions in emergency or crisis situations, when they must often act in haste. Absent the prison riot situation, prison administrators have no other competing institutional interests that clash with the need to ensure prisoner health and safety.

[FN49]. Wilson, 501 U.S. at 306 (White, J., concurring) (citing Hutto v. Finney, 475 U.S. 678 (1978); Rhodes v. Chapman, 452 U.S. 337 (1981); Gregg v. Georgia, 428 U.S. 153 (1976); Trop v. Dulles, 356 U.S. 86 (1958)). In all these cases, the Court relied on objective severity, not the subjective intent of governmental officials, to establish liability under the Eighth Amendment.

[FN50]. Wilson, 501 U.S. at 310 (White, J., concurring).

[FN51]. 113 S. Ct. 2475 (1993). For an in-depth analysis of Helling, see Elizabeth Alexander & David Fathi, Smoking, the Perception of Risk, and the Eighth Amendment, 13 St. Louis Univ. Pub. L. Rev. 691, 691-704 (1994).

[FN52]. Helling, 113 S. Ct. at 2481.

[FN53]. Id. at 2482. In earlier cases, Eighth Amendment claims had been guided generally by "current" or "contemporary" standards of decency, with analysis of the constitutional deprivation conducted on a parallel track. See, e.g., Trop v. Dulles, 356 U.S. 86, 101 (1958); Estelle v. Gamble, 429 U.S. 97, 103 (1976). After Helling, however, societal tolerance for health risks may apparently "trump" the objectively harmful conditions resulting from prison officials' deliberate indifference. Alexander & Fathi, supra note 51, at 699 n.47.

[FN54]. For example, prisoners exposed to contagious disease due to infected blankets or contaminated drinking water could raise the unreasonable risk to their health before actually contracting an illness. Helling, 113 S. Ct. at 2480.

[FN55]. See also Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986).

[FN56]. Franzen, 780 F.2d at 653.

[FN57]. McGill, 944 F.2d at 348.

[FN58]. Id. at 353; see also id. at 348 (actions taken because of the likelihood of resulting harm are done with deliberate indifference, whereas those taken in spite of the harm are not).

[FN59]. Id. at 351 (citations omitted).

[FN60]. The distinction between the risk of impending harm and the risk of future harm is illustrated by the Helling scenario where the plaintiff alleged that his exposure to secondhand environmental tobacco smoke, while not an imminent or impending harm, posed a threat to his future health.

[FN61]. See discussion infra Part IV.D.

[FN62]. The most recent national statistics on the prevalence of AIDS in prisons revealed a total of 11,565 cases reported among inmates in U.S. federal, state and "larger city and county correctional systems as of November 1992 - March 1993." T. Hammett, et al., U.S. Dep't of Justice, 1992 Update: HIV/AIDS in Correctional Facilities -- Issues and Options (1994); see also Siegal, supra note 19.

[FN63]. Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); see also Gregg v. Georgia, 428 U.S. 153, 183 (1976); United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting); Farmer, 114 S. Ct. at 1986-87. But see id. at 1990, wherein Justice Thomas indicated in his concurring opinion:
Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "(s)ome level of brutality and sexual aggression among (prisoners) is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated."
(quoting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992)).

[FN64]. Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987); see also Farmer, 114 S. Ct. at 1977; DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989).

[FN65]. Farmer, 114 S. Ct. at 1977.

[FN66]. E.g., McGill v. Duckworth, 944 F. 2d 344, 353 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992) (holding that prison officials are "entitled to assume that prisoners will exercise care for their own safety . . ." and thus are not liable for injuries sustained by prisoners assaulted by one another).

[FN67]. Farmer, 114 S. Ct. at 1986. Justice Blackmun issued a warning that prison officials face "a serious risk of" liability if they fail to prevent inmate assaults and rapes. Id. at 1989.

[FN68]. The Seventh Circuit's view of deliberate indifference was shared by the Fourth Circuit in Ruefly v. Landon, 825 F.2d 792 (4th Cir. 1987); the Eleventh Circuit in Lamarca v. Turner, 995 F.2d 1526 (11th Cir. 1993), cert. denied, 114 S. Ct. 1189 (1994); and the First Circuit in Desrosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) (prisoner failed to show that defendants knowingly denied him proper medical care). But see Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) (evidence sufficient to support finding that prison officials were deliberately indifferent to health and safety needs of psychiatrically disturbed prisoner held in overcrowded jail). Contrary to the Seventh Circuit standard, the Third and Ninth Circuits, among others, characterized prison officials as deliberately indifferent if they knew or should have known that prisoners faced a "sufficiently serious danger" of assault. Young v. Quinlan, 960 F.2d 351, 360-61 (3d Cir. 1992); Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992). Other cases in which the circuit courts adopted the lesser standard for deliberate indifference were Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984); Stewart v. Love, 696 F.2d 43 (6th Cir. 1982); Wade v. Haynes, 663 F.2d 778, 786 (8th Cir. 1981), aff'd. sub nom. Smith v. Wade, 461 U.S. 30 (1983); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

[FN69]. The government incorporated circumstantial evidence into the actual knowledge formulation, as compared to the Seventh Circuit standard which required prisoner-plaintiffs to prove actual knowledge through direct evidence. Compare Respondents' Brief at 24, Farmer (No. 92-7247) with McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN70]. Farmer, 114 S. Ct. at 1979.

[FN71]. Id. at 1979.

[FN72]. Id. at 1984, 1982 (citing Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993)).

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[FN73]. Id. at 1978.

[FN74]. Telephone Interview with John Boston, an experienced prisoners' rights attorney who has written extensively on the subject.

[FN75]. See discussion supra Part III.D.

[FN76]. Farmer, 114 S. Ct. at 1978 (citations omitted).

[FN77]. Id. at 1978.

[FN78]. Id. at 1979.

[FN79]. See discussion infra Part IV.F.

[FN80]. Farmer, 114 S. Ct. at 1979 (citing Model Penal Code S 2.02(2)(c) & cmt. 3 (1985)). The Model Penal Code provides:
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature anddegree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
Model Penal Code S 2.02(2)(c) (1985). The Court's reference to the "conscious disregard" and "substantial risk" facets of this definition was apparently promoted by Justice O'Connor, who questioned counsel during oral argument as to how their respective standards for deliberate indifference compared to the Model Penal Code definition.

[FN81]. Id. at 1977 n.3.

[FN82]. See Fred Cohen, Farmer v. Brennan: Ruminations and Speculations on Deliberate Indifference, 6 Correctional L. Rep., Aug. 1994, at 30; Hudson v. McMillian, 503 U.S. 1, 5-6 (1992) (absence of serious injury does not foreclose Eighth Amendment inquiry).

[FN83]. To underscore the subjective test, Justice Souter echoed Justice Scalia's emphasis in Wilson on the plain meaning of the Eighth Amendment term "punishments":
The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis.
Farmer, 114 S. Ct. at 1979.

[FN84]. Id. at 1980. Justice Souter distinguished the test for deliberate indifference adopted in Canton, "(b)ecause .deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute," and because deliberate indifference served a different purpose in Canton by erecting the threshold test for municipal liability.

[FN85]. Wilson endorsed the notion that a uniform deliberate indifference test governs complaints seeking both injunctive relief and damages. 501 U.S. 294, 300-01 (1991).

[FN86]. John Boston also notes that this dual standard may have an impact when plaintiffs allege that their due process rights were violated and name individual police officers as defendants or raise municipal supervisory liability issues. In addition, Boston raises the point that different standards may confuse factfinders. See John Boston, Case Law Report, 9 National Prison Project J. 8, 8-9 (Summer 1994). See also discussion infra Part IV.F.

[FN87]. 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). The McGill court, in turn, relied on Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985). See discussion supra Part III.F.

[FN88]. Farmer, 114 S. Ct. at 1984.

[FN89]. Id. at 1981 (emphasis added).

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[FN90]. Id. at 1981-82 (quoting Brief for Respondents at 22).

[FN91]. Pro se pleadings are theoretically held to "less stringent standards than formal pleadings drafted by lawyers" and are subject to dismissal for failure to state a claim if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim." Haines v. Kerner, 404 U.S. 519, 520- 21 (1972) (citation omitted). The reality of court calendars clogged with prisoner filings and the number of early case dismissals, however, belies this rule. Dee Farmer's pleadings in the lower courts reveal the reality of the judicial process in pro se prisoner cases.

[FN92]. Order Granting Motion for Protective Order and Defendants' Motion for Summary Judgment, Farmer (No. 91-C-716-S) (quoting Duckworth v. Franzen, 780 F.2d at 653); accord McGill, 944 F.2d at 348.

[FN93]. Farmer, 114 S. Ct. at 1983.

[FN94]. Justice Souter noted that in their affidavits, defendants admitted that they were involved in her transfer from FCI-Oxford to USP-Terre Haute, and that BOP staff at Oxford and the North Central Regional Office influenced Farmer's placement in administrative segregation following the rape at USP- Terre Haute. Id. at 1985.

[FN95]. See discussion infra Part IV.H.

[FN96]. Fed. R. Civ. P. 12(b)(6) allows dismissal of an action for "failure to state a claim upon which relief can be granted." Motions to dismiss are denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). For the purposes of reviewing motions to dismiss, courts accept plaintiffs' factual allegations as true.
Fed. R. Civ. P. 56 permits parties to move for summary judgment when there is "no genuine issue of material fact and . . . (the party) is entitled to prevail as a matter of law." "In effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action . . . ." 10 C. Wright & A. Miller, Federal Practice and Procedure S 2711, at 555-56 (2d ed. 1983). Courts view inferences in a light most favorable to the party opposing a summary judgment motion.

[FN97]. Patterson v. Walrath & John Doe Correction Officer, No. 94-2451, 1994 WL 328353 (E.D. Pa. July 11, 1994).

[FN98]. Id. at *2.

[FN99]. Hudson v. United States Bureau of Prisons, No. VC-92-1360, 1994 U.S. Dist. LEXIS 11664, (N.D. Cal. Aug. 4, 1994).

[FN100]. Id. at *8. But see Griffin v. Robinson, No. 93-7179, 1994 U.S. App. LEXIS 20151 (4th Cir. Aug. 3, 1994) (summary judgment for defendants upheld where prisoner- plaintiff was stabbed repeatedly after prison officials not named as defendants failed to act on his requests for protective custody); Gurry v. States, No. 94-15127, 1994 U.S. App. LEXIS 22112 (9th Cir. Aug. 15, 1994) (defendant's motion to dismiss upheld where plaintiff failed to allege any facts that the defendant-prison guard knew he would be attacked when the guard left his post temporarily). In Griffin and Gurry, the courts read into the actual knowledge standard a requirement that plaintiffs prove the threats they encountered could be predicted by prison officials.

[FN101]. Jones v. Kelly, No. 94-CV-0185E(H), 1994 WL 325432 (W.D.N.Y. July 1, 1994). In two recent cases, the courts of the eastern and western divisions of the Northern District of Illinois denied defendant-prison officials' motions to dismiss prisoner "failure to protect" claims. In Lane v. Randall, No. 93-C-2331, 1994 U.S. Dist. LEXIS 10806 (N.D. Ill. Aug. 4, 1994), the court held two prison officials liable for denying there were repeated pleas for protective custody ("Please remove me before I get hurt!") of a prisoner-plaintiff who was severely beaten by gang members in the dayroom, where he was forced to spend time pursuant to institutional policy. In Young v. Beattie, No. 93- CV-20146, 1994 U.S. Dist. LEXIS 10716 (N.D. Ill. July 26, 1994), prison officials failed to transfer a prisoner-plaintiff who feared threats by gang members and was stabbed three weeks later; one defendant had overheard the threats, and the second knew of prior attacks on the plaintiff. Interestingly, the defendant who was present during the attack was not alleged to have observed it and thus the court dismissed plaintiff's claim against him, but upheld the claim against the other defendant.

[FN102]. Jones, 1994 WL 325432; see also Candelaria v. Coughlin, No. 93-C-3212, 1994 WL 267950 (S.D.N.Y. June 13,

1994) (absent factual allegations by defendants, district court presumed pro se plaintiff's allegations were true and "need not, and indeed cannot, delve into the question of the prison officials' subjective .intent' "; the Candelaria court thus placed the burden of proof on defendants following the Farmer principle that they owed a duty of reasonable protection to the prisoner-plaintiff.)

[FN103]. No. 92-1542, 1994 U.S. App. LEXIS 21237 (7th Cir. Aug. 9, 1994).

[FN104]. Id. at *28.

[FN105]. Id. at *35; see also Myers v. County of Lake, No. 93-2469, 1994 U.S. App. LEXIS 19076 (7th Cir. July 22, 1994) (upholding jury verdict of liability and damage award to juvenile detainee who attempted suicide and suffered brain damage where defendants were notified of plaintiff's suicidal tendency and defendants failed to do required mental health screening to identify treatment needs); Rollins v. Fauver, No. 93- 5763, 1994 U.S. Dist. LEXIS 10412 (D.N.J. July 22, 1994) (denied defendants' motion to dismiss where plaintiff underwent leg surgery and, despite his request, was then placed in cold, damp cell by defendants where he contracted an infection).

[FN106]. Husband v. Fair, No. 86-1276-WAG, 1994 U.S. Dist. LEXIS 8796 (D. Mass. June 23, 1994).

[FN107]. Id. at *16-17 ("The defendants were aware of the possibility that a prisoner could require crutches and, in fact, had a general policy in place to address the situation." Moreover, a "reasonable juror could find that the supervisory officials exhibited deliberate indifference to the implementation of rules designed to protect prisoners' safety and bodily integrity. The risk of injury here could be found to be .so obvious and substantial that the officials must have known about it.' ") Id. at 17 (quoting Farmer v. Brennan, 114 S. Ct. 1970, 1986 (1994) (citation omitted)); see also Ford v. Frame, No. 92-7049, 1994 WL 323750 (E.D. Pa. June 28, 1994) (handicapped plaintiff defeated defendants' summary judgment motion on one of three claims in which he alleged that prison officials restricted his access to religious services; court cited the Farmer "deliberate indifference" standard requiring proof of prison officials' actual knowledge, not what they should have known); Maziarz v. Nye, No. 94-1468, 1994 U.S. Dist. LEXIS 10200 (E.D. Pa. July 22, 1994) (court denied defendants' summary judgment motions in S 1983 action where the plaintiff offered sufficient facts to demonstrate the defendants' deliberate indifference due to their discontinuance of medications needed by disabled prisoner who made repeated requests and had a noticeable limp and tremors). But see Reeves v. Collins, 27 F.3d 174 (5th Cir. 1994) (upheld district court's dismissal of prisoner-plaintiff's claim that his work assignment exacerbated his medical condition, resulting in hernia surgery).

[FN108]. E.g., Martin v. Murphy, No. 92-12538-2, 1994 U.S. Dist. LEXIS 8814 (D. Mass. June 10, 1994) (summary judgment granted to defendants where plaintiff failed to establish that his medical condition resulting from an assault and exposure to cellmate's contagious disease was serious, or that his treatment was so inadequate as to constitute a denial of all treatment); Heimermann v. McCaughtry, No. 92-C-1097, 1994 U.S. Dist. LEXIS 8454 (E.D. Wis. June 16, 1994) (defendants' summary judgment motion granted where court found prison officials acted reasonably in response to reported threats against plaintiff by transferring him to a different cell block and keeping the prisoner who threatened him in temporary lock-down).

[FN109]. 29 F.3d 238 (6th Cir. 1994).

[FN110]. Id. at 243.

[FN111]. Id.

[FN112]. Redd v. Gilless, 857 F.Supp 601, 604 (W.D. Tenn. 1994). In pronouncing this requirement, the Gilless court misconstrued Helling with a "cf." cite to mean that plaintiffs must prove future harm instead of present harm. Id. at 603. The court then ordered plaintiff to establish that his complaint was timely filed.

[FN113]. Farmer v. Brennan, 114 S. Ct. 1970, 1982 (1994) (immaterial to the determination of deliberate indifference whether prisoner(s) face harm from a single or multiple sources or for personal reasons or reasons common to all prisoners). Moreover, Justice Souter noted that plaintiffs need not prove that prison officials knew that a particular prisoner first threatened, then assaulted the plaintiff. Id. This refutes the concept raised in the government's brief and the amicus filed by the National Association of Attorneys General arguing that prison officials should not be held liable for assaults, because they are inevitable in some prisons.

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[FN114]. Id. at 1988 (Blackmun, J., concurring) (internal citations omitted).

[FN115]. Id. at 1981. As Farmer did not involve systemic or general risk of harm to all prisoners, the Court did not elaborate on the problems plaintiffs engaged in institutional reform litigation could expect to encounter.

[FN116]. Kentucky v. Graham, 473 U.S. 159, 166 (1985); LaMarca v. Turner, 662 F. Supp. 647 (S.D. Fla. 1987), aff'd in relevant part, 995 F.2d 1526, 1542 (11th Cir. 1993); Alberti v. Sheriff of Harris County, Tex., 978 F.2d 893, 894-95 (acknowledging liability of the entity due to knowledge of high-level official); Hoptowit v. Spellman, 753 F.2d 779, 782 (9th Cir. 1985) (court declined to re-open the case on defendants' motion due to the promotion of principally responsible defendants, where the evidence did not relate to the personal involvement of the named defendants but to institutional practices and conditions of confinement). But see Mayor of Phila. v. Educational Equality League, 415 U.S. 605, 622 (1974) (no injunctive relief due to conduct of official no longer in office).

[FN117]. Redman v. County of San Diego, 942 F.2d 1435, 1443-45 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992).

[FN118]. Due to the dual standard for deliberate indifference, prisoner- plaintiffs may be more inclined to plead their S 1983 claims under statutory or due process provisions rather than the Eighth Amendment, so that they may take advantage of the more lenient "threshold" standard that allows liability based on actual or constructive notice of obvious risk. However, the extent to which sentenced prisoners might circumvent the Eighth Amendment is questionable.

[FN119]. Farmer, 114 S.Ct, at 1981-82 (quoting Brief for Respondents at 22).

[FN120]. 692 F. Supp. 1519 (S.D.N.Y. 1988), aff'd, 902 F.2d 2 (2d Cir. 1988).

[FN121]. Id. at 1561-62.

[FN122]. Id. See also Grubbs v. Bradley, 552 F. Supp. 1052, 1079 (M.D. Tenn. 1982) (inadequate protection of prisoners due to "deficiencies . . . endemic to the system . . . have roots much deeper than the conduct of individual officers").

[FN123]. Farmer, 114 S. Ct. at 1981 (quoting Brief for Petitioner at 27).

[FN124]. Id. at 1982 n.8.

[FN125]. Id. at 1982.

[FN126]. Id. at 1982-83; see also Heimermann v. McGauhtry, No. 92-C- 1097, 855 F. Supp. 1077, 1994 U.S. Dist. LEXIS 8454 (E.D. Wis. June 16, 1994) (there is no liability where prison officials took reasonable steps to protect prisoner by transferring him to a different cellblock following threats from another inmate who was temporarily locked down to ensure plaintiff's safety).

[FN127]. 468 U.S. 517, 526-27 (1984) (holding that prisoners have no Fourth Amendment protection against unreasonable cell searches).

[FN128]. Whitley v. Albers, 475 U.S. 312, 320 (1986) (distinguishing the Estelle "deliberate indifference" standard from the standard governing use of force during prison riot, "because the State's responsibility to attend to the medical needs (and reasonable safety) of prisoners does not ordinarily clash with other equally important governmental responsibilities").

[FN129]. Candelaria v. Coughlin, No. 93-C-3212, 1994 WL 267950, at *5 n.4 (S.D.N.Y. June 13, 1994) (denying defendants' motion to dismiss and to reargue their claim of supervisory immunity where the defendants failed to demonstrate that they had no "personal or constructive knowledge" of inadequate prisoner medical care).

[FN130]. Farmer v. Brennan, 114 S. Ct. 1970, 1983 & n.9 (1994); see also United States v. Oregon Medical Soc., 343 U.S. 326, 333 (1952) (warning courts to "beware of efforts to defeat injunctive relief by protestations of repentance and reform"); United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave .(t)he defendant . . . free to return to his old ways.' "); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988).

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[FN131]. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992). In a post- judgment case, the Rufo decision thus settled the question raised in dicta by the Wilson Court about the possibility that prison officials could successfully assert lack of funds as a defense to constitutional claims. Wilson v. Seiter, 501 U.S. 294, 301-02 (1991). The lower courts have overwhelmingly rejected the cost defense in prison reform litigation. E.g., Stone v. City & County of S.F., 968 F.2d 850, 858 (9th Cir. 1992) (en banc) ("federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights"); Monmouth County Correctional Inst. Inmates v. Lanzano, 834 F.2d 326, 336-37 (3d Cir. 1987), cert. denied, 486 U.S. 1066 (1987); Duran v. Anaya, 642 F.Supp. 510, 525 (D.N.M. 1986). Cf. Alberti v. Sheriff of Harris County, Tex., 978 F.2d at 895 (leaving open the possibility of a cost defense after Wilson).

[FN132]. Farmer, 114 S. Ct. at 1988.

[FN133]. Farmer, 114 S. Ct. at 1983 & n.9 (indicating that both plaintiffs and defendants may rely on developments that postdate the pleadings to determinethe propriety of injunctive relief). Justice Souter stated that even prison officials who are criminally reckless at the outset of a plaintiff's case may avert the issuance of an injunction "by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy" after the conclusion of litigation. Id. at n.9.
In this regard, the Court questioned the government's position that Dee Farmer was not under a "present threat" to her safety and pointed to the government's contradictory position that Farmer was foreclosed from injunctive relief. According to the government's brief, she was subsequently assigned to administrative detention and failed to allege any continuing threat of injury. However, in oral argument, the Deputy Solicitor General stated that Farmer was no longer in administrative detention.

[FN134]. Id. at 1984 ("When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them." Id.).

[FN135]. In addition to delays in institutional responses, violent repercussions often result when prisoners who pursue administrative institutional remedies are labelled "snitches." Rauser, supra note 20, at 188- 90; cf. Redman v. County of San Diego, 942 F.2d 1435, 1438 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992) (after receiving information about threats, staff questioned plaintiff in presence of prisoner who had raped him).

[FN136]. Justice Souter noted a "cf." cite to 42 U.S.C. S 1997e, the Civil Rights of Institutionalized Persons Act (CRIPA), which calls for certification of state prison grievance procedures and provides as follows:
(a)(1) . . . in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available.
42 U.S.C. S 1997e (emphasis added). The ninety-day exhaustion period has been extended to 180 days pursuant to a provision of the crime bill passed by Congress in August 1994. The Supreme Court has previously held that federal prisoners need not exhaust BOP grievance procedures prior to filing Bivens actions. McCarthy v. Madigan, 503 U.S. 140, 148 (1992); Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982) (only limited circumstances require exhaustion of administrative remedies such as CRIPA actions and statutory actions). See generally Martin A. Schwartz & John E. Kirklin, 1 Section 1983 Litigation: Claims, Defenses, and Fees SS 10.3-.4 (2d ed. 1986 & Cum. Supp. 1993) at 233-34.

[FN137]. Wilson v. Seiter, 501 U.S. 294, 299-300 (1991).

[FN138]. Farmer, 114 S. Ct. at 1985 (citations omitted).

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