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Comment

*165 PRISONS ARE DANGEROUS PLACES: CRIMINAL RECKLESSNESS AS THE EIGHTH AMENDMENT STANDARD OF LIABILITY IN MCGILL v. DUCKWORTH

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Officials at the Indiana State Prison removed Herbert McGill from the general prison population after his fellow prisoners labelled him a "snitch." [FN1] The officials placed McGill in the prison unit which houses inmates on both disciplinary and protective custody status ("IDU"). [FN2] In the IDU facility, disciplinary and protective custody prisoners commingle, for one hour each day, to use the recreational and shower facilities. [FN3] On McGill's third day in IDU, one disciplinary status inmate threatened McGill as he walked to the shower. [FN4] The inmate followed McGill into the shower, gagged him with a washcloth, and raped him while three other inmates stood guard brandishing knives. [FN5]

McGill sued two prison guards and four prison administrators *166 under 42 U.S.C. § 1983 [FN6] for failing to protect him from sexual assault in violation of his Eighth and Fourteenth Amendment rights. [FN7] After a trial, the jury found that three defendants had violated McGill's Eighth Amendment [FN8] right to be free from assault, because they were "deliberately indifferent" to his safety. [FN9] The jury awarded damages against one prison guard, [FN10] the assistant superintendent, and the superintendent. [FN11] The Court of Appeals for the Seventh Circuit reversed and held that the deliberate indifference standard requires McGill to demonstrate that the defendants possessed actual knowledge of a specific threat of assault. [FN12]

The Seventh Circuit's ruling in McGill v. Duckworth raises the issue of whether Eighth Amendment liability of prison staff for failing to protect prisoners from assault should be based upon an objective "should have known" standard, modeled after tort recklessness, or upon a subjective "actual knowledge" standard, grounded in criminal recklessness. Resolution of this issue will determine to what extent the Eighth Amendment's proscription against "cruel and unusual punishments" [FN13] protects *167 prisoners from sexual and physical assaults. [FN14]

This Comment argues that precedent does not support McGill's actual knowledge standard and that the Seventh Circuit developed an unrealistic and unfair framework for evaluating the defendant's state of mind. Part I outlines the Supreme Court's jurisprudence regarding the Eighth Amendment's mental component and analyzes the various federal circuit courts' formulations of the deliberate indifference standard. Part II details the holding and reasoning of McGill. Part III critiques McGill and articulates why an objective state of mind inquiry, grounded in tort recklessness, constitutes a fairer and more practical way to determine whether an official acted with deliberate indifference.

I. KNOWLEDGE OF PRISON ASSAULT RISKS

A. THE MENTAL COMPONENT OF THE EIGHTH AMENDMENT

In the 1960s, federal courts first applied the Eighth Amendment*168 to protect prisoners from cruel and unusual prison conditions. Prior to that time, the "hands-off" doctrine, a judicial policy of non-intervention in the administration of prison affairs, [FN15] limited a court's role to ensuring "proportionality," in other words, that the sentence fits the crime. [FN16] Once courts began applying the guarantees of the Eighth Amendment to prison conditions, [FN17] the state of mind of responsible prison staff became a critical component in determining whether prison officials violated a prisoner's right to be free from cruel and unusual punishment. [FN18]

*169 In Estelle v. Gamble, [FN19] the Supreme Court held that "deliberate indifference to the serious medical needs of prisoners constitutes 'unnecessary and wanton infliction of pain,'" in violation of the Eighth Amendment. [FN20] In Estelle, inmate J.W. Gamble claimed that the prison doctor failed to properly diagnose and treat his back injury. [FN21] The Court

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concluded that Gamble's claim alleged, at most, medical malpractice. [FN22] The Court accordingly dismissed the complaint reasoning that one incident of medical malpractice, or simple negligence, does not rise to the level of wantonness. [FN23]

In *Whitley v. Albers*, [FN24] the Court held that a prison employee's use of force during a prison riot violates the Eighth Amendment only if the employee acts "maliciously and sadistically *170 for the very purpose of causing harm." [FN25] In *Whitley*, inmate Gerald Albers claimed that prison officials inflicted cruel and unusual punishment by shooting him during their efforts to quell a prison riot. [FN26] The Court absolved the official from liability, because the guard shot Albers as part of a good faith effort to restore control over the prison. [FN27] The Court created a more stringent state of mind standard for claims arising from emergency situations, reasoning that during serious prison disturbances officials face competing institutional obligations [FN28] and must necessarily make decisions "in haste, under pressure, and frequently without the luxury of a second chance." [FN29]

Recently, in *Wilson v. Seiter*, [FN30] the Court reversed a Sixth Circuit decision that had applied the malicious and sadistic standard to an Eighth Amendment claim. The plaintiff had alleged that the conditions of an Ohio prison, including overcrowding, excessive noise, and inadequate heating and cooling, [FN31] constituted cruel and unusual punishment. [FN32] Distinguishing *Whitley*, the Court held that the deliberate indifference standard governed the claim. [FN33]

The *Wilson* Court reasoned that, in terms of constraints facing the prison official, offensive nonmedical conditions are materially similar to claims alleging inadequate medical treatment. [FN34] *171 In addition to restricting the scope of the malicious and sadistic standard, the Court imposed a state of mind requirement in all Eighth Amendment claims involving prison conditions, even if the offending condition is long-term or systemic. [FN35] Under the *Wilson* framework, to prove an Eighth Amendment violation a prisoner must show that at least one prison staff member possessed a culpable state of mind, usually deliberate indifference, in depriving the prisoner of an identifiable human need. [FN36]

B. CULPABILITY FOR FAILURE TO PROTECT PRISONERS FROM ASSAULT

1. Developing Standards and Defining Risks of Violence

Well before the Supreme Court decided *Wilson*, every federal circuit court, except the Fourth Circuit, [FN37] applied the deliberate*172 indifference standard to inmate-on-inmate assault cases. [FN38] Also, several circuits had explicitly rejected arguments that the malicious and sadistic standard applies in non-riot assault situations. [FN39] Nevertheless, circuits interpreted the meaning and elements of deliberate indifference in various manners. [FN40] The circuits vary because deliberate indifference is vague, [FN41] even oxymoronic, [FN42] and the Supreme Court clarified its meaning only by advising that it lies somewhere on the wide continuum between intent and negligence. [FN43] To clarify the current state of the law, *173 the remainder of this section contrasts the various approaches used to evaluate the defendant's state of mind and conduct in inmate-on-inmate assault cases. [FN44]

Undoubtedly, the Eighth Amendment does not guarantee prisoners an assault-free environment. [FN45] Some courts reason *174 that absolute liability of prison authorities for injuries sustained by prisoners at the hands of other prisoners would produce unjustified results; prison violence is inevitable given the violent propensities of some inmates. [FN46] Only when prison violence becomes a problem of substantial dimensions does it trigger the Eighth Amendment's prohibition on the infliction of cruel and unusual punishment. [FN47]

Specifically, prisoners must demonstrate that they have been subjected to a pervasive, [FN48] obvious, [FN49] or unreasonable risk of assault or injury. [FN50] Defining the scope of the risk, the particular inmate(s) at risk, and the source of the risk largely depends on how plaintiffs plead and prove their cases. [FN51] Plaintiffs can allege, for instance, that all prisoners face an unreasonably high risk of assault from other prisoners, [FN52] that they belong to an identifiable group of prisoners at risk of sexual or physical assault, [FN53] or in the narrowest context, that a specific prisoner jeopardizes his or her individual safety. [FN54] Demonstrating a pervasive risk of assault requires a rigorous factual showing of either prior episodes of violence [FN55] or an exceedingly high number of assaults in a particular prison facility. [FN56] Showing a pervasive risk of harm serves two functions. First, it demonstrates that the problem of prison assaults deprives inmates of their right to personal security and thus satisfies the deprivation component of the *Wilson* framework. [FN57] Further, it allows a jury to readily infer that prison authorities had notice of the problem due to the frequency with which assaults occurred. [FN58]

*176 For a significant period of time, however, the liability of prison authorities under the Eighth Amendment did not turn on

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their awareness of the assault risk facing the plaintiff. Instead, several circuits applied the elements formulated in the Restatement (Second) of Torts [FN59] as the constitutional standard of liability. [FN60] Under the Restatement, prisoners only need to show the existence of a pervasive risk of harm and that the authorities failed to exercise reasonable care in preventing prisoners from intentionally harming one another. [FN61]

The Restatement's negligence standard, the prevailing standard in inmate-on-inmate assault cases before the Supreme Court decided *Estelle v. Gamble*, became indefensible in light of *Estelle's* holding that medical malpractice does not violate the Eighth Amendment. [FN62] Indeed, deliberate indifference eventually replaced a negligence standard, [FN63] and presently, most circuits equate deliberate indifference with recklessness. [FN64]

*177 2. The Circuit Split: Tort Recklessness v. Criminal Recklessness

Equating deliberate indifference with recklessness does not resolve the dilemma of formulating elements of liability, because recklessness is no less ambiguous a concept than deliberate indifference. [FN65] Generally, recklessness entails examining the defendant's cognizance of a risk as well as the defendant's conduct in relation to that risk. [FN66] Federal courts evaluate the state of mind and conduct of prison officials in Eighth Amendment inmate-on-inmate assault cases differently, because circuits have variously applied tort recklessness and criminal recklessness. [FN67] The difference between tort and criminal recklessness underlies a significant split of opinion between the circuits.

Tort recklessness, the more prevalent of the two standards in inmate assault claims, [FN68] entails an objective inquiry into the defendant's state of mind. A defendant acts recklessly in tort when a reasonable person would have had reason to know that his or her conduct created an unreasonable and substantial risk of physical harm. [FN69] This objective inquiry permits prisoners to introduce evidence that the officials "should have known" that a prisoner or group of prisoners faced an unreasonable risk of assault. [FN70]

In contrast, to satisfy the subjective state of mind requirement of criminal recklessness, the plaintiff must demonstrate *178 that the defendant actually recognized the risk of danger. [FN71] The Seventh Circuit first applied a criminal recklessness standard to evaluate the Eighth Amendment liability of prison officials in *Duckworth v. Franzen*. [FN72] Reasoning that a gross negligence standard eclipses the "deliberate" component of deliberate indifference, [FN73] the *Franzen* court adopted criminal recklessness as the minimum standard of liability. [FN74] Yet, the court's definition of recklessness did not resolve whether a plaintiff must show that the defendant actually knew of the risk or whether the jury may infer such knowledge. [FN75]

Only one other circuit, the Sixth Circuit, has applied criminal recklessness in an inmate-on-inmate assault case. [FN76] In *Marsh v. Arn*, the Sixth Circuit resolved the ambiguity in *Franzen* against the plaintiff by requiring a showing that the defendant actually knew that the plaintiff would be injured and that the defendant consciously refused to protect the plaintiff from assault. [FN77]

*179 In addition to providing a more lenient state of mind inquiry, the tort recklessness standard provides greater likelihood that courts will adjudge a prison official's actions or omissions unconstitutional. Usually, a prison official's failure to act in the face of a pervasive risk satisfies tort recklessness. [FN78] A few circuits applying an objective knowledge standard require the plaintiff to demonstrate, however, a more egregious omission in the defendant's failure to protect prisoners from violence. [FN79] Nevertheless, prisoners face an even more arduous task in proving criminal recklessness. To prove criminal recklessness, prisoners must demonstrate that in light of the defendant's actual knowledge of an assault risk, the defendant "consciously refused *180 to take steps to protect the prisoner from injury." [FN80]

The Third and Tenth Circuits reject criminal recklessness as the standard of liability in inmate-on-inmate assault cases. [FN81] In *Berry v. City of Muskogee*, [FN82] the Tenth Circuit reasoned that criminal recklessness collapses the distinction between the malicious and sadistic standard and the deliberate indifference standard. [FN83] The *Berry* court accordingly adopted a tort recklessness standard. [FN84] Similarly, the Third Circuit, in *Young v. Quinlan*, [FN85] rejected an actual knowledge requirement in Eighth Amendment inmate-on-inmate assault cases. Citing a Ninth Circuit decision that applied an objective knowledge test in a case where a sexually assaulted pre-trial detainee alleged that jail officials deprived him of due process, [FN86] the Third Circuit reasoned that the standards of liability under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment should be congruent. [FN87] Unlike the *Berry* court, however, the *Young* court distinguished the Eighth Amendment objective test from its underpinnings in tort law. [FN88] Under this stricter variant of the "should have known" test, prisoners must prove that a "lay person would easily recognize" the risk of assault and the need

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for preventative action. [FN89]

Apart from the emerging inter-circuit split, the Seventh Circuit *181 sits internally divided between those judges who favor application of a tort recklessness standard and those who favor a criminal recklessness standard in Eighth Amendment cases challenging safety conditions in prison. [FN90] *McGill v. Duckworth* attempts to resolve the intra-circuit division by categorically rejecting the objective state of mind approaches in all inmate-on-inmate assault cases.

II. THE SEVENTH CIRCUIT'S DECISION IN *McGILL*

Soon after his incarceration at the Indiana State Prison, fellow prisoners labelled Herbert McGill a "snitch," because he testified against another inmate who had assaulted a guard. [FN91] McGill requested placement in the protective custody unit after he sustained a minor assault as a consequence of his testimony. [FN92] Because the protective custody unit was full, prison officials placed McGill in IDU, a unit which principally confines inmates on disciplinary segregation status. [FN93] Prisoners in IDU remain locked in their cells 23 hours a day; for one hour a day, however, the prisoners commingle to use recreational and shower facilities. [FN94]

Two disciplinary status inmates in IDU threatened and harassed McGill shortly after his arrival in IDU. [FN95] Later, McGill requested placement in the unit that solely houses prisoners on protective custody status, but he did not inform officials about the harassment. [FN96] Prison officials denied McGill's renewed *182 request for placement in a safer cellblock, because they could accommodate his request only by returning another protective custody inmate to the general population or into IDU. [FN97] Thereafter, a larger, disciplinary status prisoner, who had earlier harassed McGill, followed McGill to the shower. [FN98] The larger inmate gagged and raped him while three other inmates stood guard wielding knives. [FN99]

Following a trial in the Federal District Court for the Northern District of Indiana, the jury found that the prison superintendent, assistant superintendent, and one guard violated McGill's right to be free from cruel and unusual punishment. [FN100] In their post-trial motions, the defendants challenged the jury instruction that allowed the jury to find deliberate indifference based on the defendant's objective knowledge of the risk. [FN101] The *183 defendants also challenged the sufficiency of evidence to hold each defendant deliberately indifferent to McGill's rights. [FN102] The district court rejected the challenge to the jury instructions, because Seventh Circuit precedent supported a standard based on tort recklessness [FN103] and reasoned that a subjective standard might encourage prison officials to avoid learning of impending violence. [FN104] The court also found that the evidence supported the jury's findings that the prison administrators should have known of the risk facing smaller, protective custody prisoners in IDU, [FN105] and that the defendants acted with deliberate indifference through their policy of commingling the two classes of inmates. [FN106]

*184 The Seventh Circuit reversed, repudiating a state of mind inquiry based on objective standards and tort recklessness. [FN107] The court reasoned that the Supreme Court prefers criminal recklessness because the Supreme Court had cited *Duckworth v. Franzen* [FN108] "with approval" in two Eighth Amendment cases. [FN109] In rejecting tort recklessness, the court further reasoned that such a standard approaches absolute liability when applied to prison guards and wardens. [FN110] Specifically, the court found that a tort recklessness standard unfairly holds prison employees personally liable for damages even though the responsibility for conditions which aggravate prison violence, such as overcrowding and inmates' temperament, [FN111] rests in part with the legislature through its control of funding. [FN112]

*185 The court held that McGill could prevail only by showing that each defendant had actual knowledge of the threat posed to him by the specific assailants, that the assault was readily preventable, and that instead of intervening to protect McGill, the defendants allowed the assailants to proceed. [FN113] McGill could prove actual knowledge, the court explained, by demonstrating either that he informed prison officials about the specific threat [FN114] or that the prison officials deliberately avoided learning about the threat. [FN115] By requiring McGill to prove actual knowledge of a specific threat, the court defined the risk much more narrowly than McGill's theory of liability would have defined the risk. [FN116]

*186 In absolving the prison officials from Eighth Amendment liability, the court did not find insufficient evidence of actual knowledge, but instead concluded that the record did not show or even imply that officials placed McGill in IDU "because of, rather than in spite of, the risk to him." [FN117] In effect, the officials' good faith efforts to help McGill, albeit constrained due to limits on space and money, insulated them from Eighth Amendment liability. [FN118]

III. THE UNFAIRNESS AND IMPRACTICALITY OF ACTUAL KNOWLEDGE

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A. LACK OF SUPPORTING PRECEDENT

In *McGill v. Duckworth*, the Seventh Circuit erroneously concluded that the Supreme Court equates deliberate indifference with criminal recklessness from the fact that the Court cited *Duckworth v. Franzen* "with approval" in *Whitley v. Albers* and *Wilson v. Seiter*. [FN119] Neither *Whitley* nor *Wilson* supports the actual knowledge holding derived from criminal recklessness. In *Whitley*, the Court did not define "deliberate indifference," because it rejected that standard in cases involving the use of *187 force during prison riots. [FN120] Moreover, *Whitley* cited *Franzen* as a case which aids the trier of fact in determining whether officials used force maliciously and sadistically. [FN121] Thus, *Franzen's* definition of criminal recklessness, as cited in *Whitley*, informs lower courts of the meaning of maliciousness, not deliberate indifference.

In addition, *McGill* ignores *Whitley's* discussion of an objective standard in evaluating maliciousness. Maliciousness, the *Whitley* Court stated, can usually be determined by examining factors such as the need for force and the extent of the prisoner's injury, and then inferring whether the use of force evinced "wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." [FN122] *McGill's* subjective standard in effect elevates "deliberate indifference" above *Whitley's* malicious and sadistic standard, even though the Supreme Court fashioned maliciousness as a higher standard of culpability.

The *McGill* court similarly misconstrued the Court's citation to *Franzen* in *Wilson*. The *Wilson* Court cited *Franzen* to support the proposition that the Eighth Amendment's mental component applies in every prison conditions case, not to define deliberate indifference. [FN123] In fact, the *Wilson* Court cited two inmate-on-inmate assault cases that evaluated the defendant's state of mind by using an objective "should have known" standard. [FN124] Hence, the citation to these two cases indicates that *Wilson* supports an objective standard in inmate assault cases even though the Supreme Court has not expressly defined the deliberate indifference standard.

In *McGill*, the Seventh Circuit purported to interpret and apply *Estelle's* deliberate indifference standard, but the court's reasoning more closely resembles *Whitley's* test of whether force was applied with malice or good faith. [FN125] For example, the Seventh *188 Circuit concluded that the prison officials showed concern for *McGill's* safety by granting him protective custody. [FN126] Although good faith efforts would preclude a finding of malice, the Supreme Court has never accepted the proposition that good faith efforts negate deliberate indifference. [FN127]

The application of criminal recklessness to inmate-on-inmate assault claims undermines the Supreme Court's effort to distinguish malice from deliberate indifference. [FN128] These Eighth Amendment claims do not warrant a high standard of liability because the responsibility to protect prisoners from assault does not clash with "equally important governmental responsibilities." [FN129] Rather, the goal of maintaining prison security chiefly entails prevention of inmate-on-inmate assaults.

B. STATE OF MIND STANDARDS AND FAIRNESS

1. The Unrealistic Burden of Demonstrating Actual Knowledge

In light of the realities of prison life, proving actual knowledge in court is as difficult as it is impractical. In essence, *McGill v. Duckworth* transfers the duty of monitoring prison safety from prison officials to the very prisoners who are at risk. Moreover, *McGill* shifts that duty without considering the obstacles prisoners face in fulfilling this notification duty.

*189 *McGill* requires a prisoner to specifically identify which prisoner will attack him. [FN130] Because prisoners commonly enlist other prisoners to execute assaults, [FN131] a threatened prisoner does not always know which prisoner will execute the assault, thus rendering a specific notice requirement impractical. [FN132] Although wardens and guards confront similar difficulties in identifying specific assailants, they can and should take safety measures to protect prisoners threatened by certain groups of prisoners or by the prison population as a whole.

Of even greater practical concern, *McGill* adopts an absolute rule compelling "snitching" even though such conduct increased plaintiff's risk of assault initially. [FN133] Snitching, informing and cooperating with authorities, is forbidden by the "inmate code." [FN134] Undeniably, prison informants suffer significant risks of reprisal and retribution for snitching. [FN135] Prisoners who inform authorities about particular threats from another prisoner risk retaliation not only from that prisoner but also from the general inmate population. [FN136] Burdening a prisoner to specifically notify authorities constitutes a delusive guarantee of *190 Eighth Amendment protection and inappropriately shifts the analysis from the defendant's state of

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mind to the plaintiff's conduct. [FN137] McGill blatantly overlooks the fact that prisoners often cannot notify officials about specific threats.

In addition, the actual knowledge requirement imposes unfair evidentiary burdens on prisoners. In particular, prisoners will experience great difficulty in meeting their burden when defendants testify that they neither realized the risk facing the prisoner nor were apprised of the prisoner's notification. [FN138] In trials where the question of actual knowledge hinges on weighing the credibility of the testimony, judges and juries will more likely believe the state employee than a prisoner. [FN139]

Due to this evidentiary burden, prisoners need the full gamut of circumstantial evidence in order to prove a defendant's recklessness. According to McGill, however, prisoners can only use circumstantial evidence to show either that the inmate notified officials or that the officials deliberately avoided learning unwelcome knowledge. [FN140] This restriction is unfair because plaintiffs generally prove recklessness, even in the criminal sense, by drawing general inferences from the totality of circumstances. [FN141] McGill burdens prisoners with an actual knowledge standard, while substantially limiting their ability to meet that standard.

2. The Illusory Policy Objections to Tort Recklessness

The Sixth and Seventh Circuits raised four principal policy objections to applying a "should have known" standard in inmate assault cases. In McGill, the Seventh Circuit presented two policy objections: objective standards, applied to prison officials and prison guards, create absolute liability and unfairness. [FN142] The Sixth Circuit has concluded that a lower standard of liability also impinges on a state's ability to retain qualified prison staff and fails to accord due deference to the security decisions of prison officials. [FN143]

These objections provide insufficient bases for adopting the extremely demanding standard of criminal recklessness. The McGill court distorts the nature of the objective standard by equating "should have known" with absolute liability. [FN144] Prisoners cannot prevail on their Eighth Amendment claims, no matter how lenient the standard, simply by showing that they sustained an injurious attack from another prisoner. Tort recklessness obligates prisoners to demonstrate an unreasonable risk of assault and, at a minimum, an unreasonable failure by officials or guards to respond to that risk. [FN145] Jurors need not and will not always find that a defendant "should have known" the plaintiff faced a threat of assault. The objective standard, however, at least allows a jury to determine at which point the defendant's ignorance of assault risks constitutes reckless behavior. [FN146]

The McGill court most strenuously objects to applying tort recklessness when prison staff face personal liability for "circumstances beyond their control." [FN147] According to the McGill court, prison employees should not bear the costs, in the form of compensatory damages, of violence precipitated by overcrowded and underfunded prison facilities. [FN148] The McGill decision fails, however, to distinguish the issue of constitutional violations from the issue of appropriate relief. Moreover, McGill's concept of "responsibility" implicitly sanctions the "cost defense" as an effective way to negate a finding of deliberate indifference. The Supreme Court, however, has never sanctioned a "cost defense." [FN149]

Furthermore, prison employees should be held personally liable when overcrowding and other systemic deficiencies produce *192 conditions conducive to violent behavior. Normally, state lawyers represent corrections personnel when prisoners sue them in their personal capacities. [FN150] Moreover, states generally indemnify individual defendants from liability for damages. [FN151] Hence, tort recklessness does not unfairly burden prison employees. Rather, indemnity forces the state's treasury to bear the cost of constitutional violations and provides states with a financial incentive to reduce overcrowding and remedy other systemic deficiencies. [FN152] Safer prisons ultimately serve the state's interests in prisoner rehabilitation and in lessening the risk of full scale riots. [FN153]

Nor can the McGill court justify its higher liability threshold by arguing that it promotes other, equally important state interests. Because prison employees generally do not personally pay damages, [FN154] personal liability does not impede state efforts to recruit and retain qualified personnel. In fact, conscientious prison administrators may even welcome liability as a means of pressuring the state legislature to provide adequate funding for security measures.

The principle that courts should defer to the considered choices of prison officials does not apply in the context of protecting prisoners from assault and that principle certainly does not justify imposing an extremely high standard of liability. Concededly, deference may promote the exercise of administrative discretion to ameliorate security problems. Courts cannot,

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however, practicably defer to the defendants' state of mind or knowledge because, unlike policy choices, monitoring safety risks and investigating potential threats do not entail considered choices between alternatives. [FN155] The state of mind issue in Eighth Amendment inmate-on-inmate assault claims does not center *193 upon policy choices but upon whether the defendant has taken constitutionally adequate steps to become apprised of and respond to risks of physical and sexual assault.

3. The Soundness of Tort Recklessness

Criminal recklessness simply does not "hold the balance true" [FN156] between the Eighth Amendment rights of prisoners and state interests. In contrast to the unfairness and impracticality of criminal recklessness, tort recklessness preserves the jurisprudence developed to protect an identifiably vulnerable prisoner from physical and sexual assault. Similarly, tort recklessness encourages vigilance on the part of prison officials and guards in recognizing and responding to assault risks. Further, the tort standard maintains congruence with Fourteenth Amendment due process standards and the qualified immunity doctrine. Moreover, it promotes the evolution of the Eighth Amendment by allowing jurors to evaluate claims based in part upon the "standards of decency that mark the progress of a maturing society." [FN157]

As applied in McGill, criminal recklessness contradicts Eighth Amendment jurisprudence that was designed to protect vulnerable prisoners. Younger, smaller prisoners generally encounter the constant threat of sexual assault by other inmates; [FN158] for them, prisons are indeed "dangerous places." [FN159] A pervasive risk of sexual assault, demonstrated by past incidents of rape, gives prison officials notice of a security problem and the need for remedial measures. A prisoner's Eighth Amendment right to be free from a pervasive risk of sexual assault should not vest only when officials know which specific prisoner will attack.

Tort recklessness realistically estimates prison officials' and guards' ability to reduce incidents of violence between prisoners. [FN160] Officials may enact policies which improve inmate classification *194 and separate inmates into compatible categories. [FN161] Wardens can ensure that employees report incidents of violence for prosecution. [FN162] As the "primary 'agents of influence'" on prison behavior, [FN163] prison guards also can reduce the number of assaults committed by prisoners under their charge. Holding prison guards liable when they "should have known" of the risk encourages guards to maintain the highest possible level of surveillance. [FN164]

The objective state of mind inquiry of tort recklessness maintains appropriate consistency between the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the doctrine of qualified immunity. Under the Eighth Amendment, convicted prisoners should receive the same degree of protection from assault and bear no greater burden in constitutional litigation than pre-trial detainees. [FN165] Also, congruence between the Eighth Amendment standard of liability and the objective *195 qualified immunity defense allows greater simplicity in the complex practice of section 1983 claims. [FN166]

The Supreme Court has established that the meaning of cruel and unusual punishment evolves and "acquires meaning as public opinion becomes enlightened with humane justice." [FN167] Unlike criminal recklessness, an objective standard allows jurors to determine what level of surveillance and protection guards and officials must provide in order to conform to "American conceptions of decency." [FN168]

CONCLUSION

The Supreme Court has indirectly compelled the lower courts to apply the "deliberate indifference" standard when evaluating a prison official's state of mind in Eighth Amendment prison assault cases. Most federal circuit courts equate "deliberate indifference" with tort recklessness and allow prisoners to demonstrate that the officials "should have known" of the general risk of assault. The Seventh Circuit's decision in McGill v. Duckworth, however, imposes a subjective actual knowledge standard based on criminal recklessness. This standard effectively limits constitutional protection to rare cases in which a prisoner notifies officials about a specific threat of harm.

Supreme Court precedent does not support application of a subjective state of mind standard in Eighth Amendment inmate assault claims. Moreover, the Seventh Circuit's concern that an objective standard unfairly holds prison employees personally liable for circumstances beyond their control underestimates the power of wardens and guards to reduce inmate assaults and ignores the fact that states generally indemnify such individuals against damage awards. Ultimately, in terms of rehabilitative goals and prison security, McGill's high threshold of liability works against state interests. Most important, unlike the law applied in McGill, an objective "should have known" standard preserves prisoners' constitutional rights to personal security

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and protection from pervasive risks of sexual and physical assault.

[FN1]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). Prisoners labelled McGill a snitch after he testified against an inmate who had assaulted a prison guard. *Id.* McGill's problems began even before he testified against the inmate. When he arrived at the prison, McGill received sexually suggestive comments and notes from other inmates. *Id.* McGill consequently requested a transfer to another institution. *Id.* Officials denied his request but moved him closer to a guard's station. *Id.*

[FN2]. *Id.* One unit of the prison solely houses prisoners on protective custody status. *Id.* When this unit is full, prisoners in need of protective custody are placed in the IDU unit which principally holds prisoners on disciplinary status. *Id.* When the prison officials addressed McGill's request for protective custody, the protective custody unit was filled to capacity. *Id.* Thus, officials placed McGill in IDU. *Id.*

[FN3]. *Id.* IDU prisoners may choose to remain in their cells all day or, alternatively, may arrange for a particular time to leave their cells. *Id.*

[FN4]. *Id.* Earlier, this inmate, Ausley, and another disciplinary status inmate, Halliburton, approached McGill in his cell and threatened him. *Id.* Although McGill asked prison officials to remove him from IDU, he did not inform them of this harassment. *Id.*

[FN5]. *Id.*

[FN6]. 42 U.S.C. § 1983 (1988).

[FN7]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). McGill also brought a pendent claim of negligence under Indiana law. *Id.*

[FN8]. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[FN9]. *McGill v. Duckworth*, 726 F. Supp. 1144, 1156 (N.D. Ind. 1989), aff'd in part, rev'd in part, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). The jury returned a verdict in favor of McGill and awarded damages in the amount of \$10,000. *McGill*, 944 F.2d at 347.

[FN10]. The district court denied prison guard Brian Webb's motion for judgment notwithstanding the verdict and sustained the jury verdict against Webb on the grounds that a jury could have reasonably found that Webb acted with deliberate indifference in patrolling the IDU before and after the attack. *McGill*, 726 F. Supp. at 1156.

[FN11]. The district court similarly denied motions by the prison superintendent and assistant superintendent for judgment notwithstanding the verdict on the grounds that they knew "young white boys" in IDU were at physical risk from disciplinary segregation inmates, yet they continued the policy of commingling the two classes within the IDU. *Id.*

[FN12]. *McGill*, 944 F.2d at 349. In addition, the Seventh Circuit overturned the negligence verdict because McGill knew that Ausley and Halliburton were following him to the shower and, yet, he failed to avoid the problem by returning to his cell and closing the door. *Id.* at 352-53. For a detailed discussion of the Seventh Circuit's reasoning, see *infra* notes 107-118 and accompanying text.

[FN13]. In terms of constitutional protection, the Due Process Clause of the Fourteenth Amendment provides another basis of relief for prisoners; insofar as prison officials cannot intentionally deny prisoners their right to personal security without procedural due process. Cf. *Davidson v. Cannon*, 474 U.S. 344 (1986) (stating that due process is not implicated by mere negligence of state official). The Eighth Amendment, however, "serves as the primary source of substantive protection to convicted prisoners," *Whitley v. Albers*, 475 U.S. 312, 327 (1986), whereas the Fourteenth Amendment's Due Process Clause protects pre-trial detainees from punishment. See *Bell v. Wolfish*, 441 U.S. 520, 536-40 (1979). Accordingly, most convicted prisoners challenge the conduct of prison officials and their staff under the Eighth Amendment. In addition to constitutional bases of relief, inmates in state prisons may seek relief in state courts under general tort theories of recovery. See Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison*

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Condition Law, 41 AM. U. L. REV. 1339, 1342 n.15 (1992).

[FN14]. McGill is far from alone in being subjected to assault while incarcerated. Prisoners physically and sexually assault other prisoners with alarming frequency. See generally [United States v. Bailey](#), 444 U.S. 394, 421 (Blackmun, J., dissenting) (discussing abuse of prisoners by other prisoners and by correctional officers); CARL WEISS & DAVID J. FRIAR, *TERROR IN THE PRISONS* (1974) (reviewing prevalence of homosexual rape in prison); James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 104-05 (1985) (discussing rates of homicide, assault, and rape in prison); 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, 1544-45 (1992) (addressing frequency of homosexual rape among male prisoners).

Indisputably, inmate violence presents a serious societal problem. Many commentators assert that victimized prisoners are likely to assault other people when released. See Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L. J. SOC. LAW 135, 144-48 (1992); Steve Lerner, *Rule of the Cruel*, THE NEW REPUBLIC, Oct. 15, 1984, at 17. Further, sexual assaults in prison pose public health problems, particularly the risk of spreading the AIDS virus. See Siegal, *supra*, at 1547-51.

[FN15]. Robertson, *supra* note 14, at 103. The hands-off doctrine operated as a jurisdictional bar to prisoners' claims. Ronald L. Goldfarb & Linda Singer, *Redressing Prisoner's Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970). Three distinct rationales supported the hands-off doctrine: that judicial oversight is inconsistent with separation of powers; that courts lack expertise in penology; and that judicial oversight would subvert prison discipline. *Id.* at 181. Principles of federalism provided an additional rationale for restraining federal courts from reviewing the complaints of state prisoners. See Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515 (1963) (discussing "quasi-separation of powers argument").

[FN16]. See, e.g., [Trop v. Dulles](#), 356 U.S. 86 (1958) (overturning sentence which revoked defendant's American citizenship for deserting the army during wartime); [Weems v. United States](#), 217 U.S. 349 (1910) (overturning sentence imprisoning defendant for 15 years, in chains, at hard labor for falsifying a public document).

[FN17]. In 1974, the Court dramatically renounced the hands-off doctrine stating: "There is no iron curtain drawn between the Constitution and the prisons of this country." [Wolff v. McDonnell](#), 418 U.S. 539, 555-56 (1974). Accordingly, the Court applied the principles of Eighth Amendment law developed during the hands-off era to prison condition cases. See [Estelle v. Gamble](#), 429 U.S. 97, 102-03 (1976).

Most significantly, the Supreme Court established the flexible and dynamic nature of the Cruel and Unusual Punishment Clause in cases challenging the severity or proportionality of sentences. For instance, the Court stated that the meaning of the Eighth Amendment evolves with the "standards of decency that mark the progress of a maturing society." [Trop](#), 356 U.S. at 101; see, e.g., [Weems](#), 217 U.S. at 378 (The Eighth Amendment "may therefore be progressive, and is not fastened to the absolute but may acquire meaning as public opinion becomes enlightened by a humane justice."); see also Michael C. Friedman, Note, [Cruel and Unusual Punishment in the Provision of Medical Care: Challenging the Deliberate Indifference Standard](#), 45 VAND. L. REV. 921, 926 (1992) (stating that Eighth Amendment analysis is "not static").

[FN18]. The Supreme Court recently held that prisoners must show a culpable state of mind in all prison condition cases, in addition to showing that the conditions deprive prisoners of a "single identifiable human need." [Wilson v. Seiter](#), 111 S. Ct. 2321, 2327 (1991). Before *Wilson*, the Court applied a state of mind requirement only in cases involving the treatment of one or a few prisoners, and not in cases involving prison conditions which affected the prison population as a whole. *Id.* at 2323-25. The *Wilson* court abolished this distinction. *Id.* at 2326. See *infra* note 35.

[FN19]. 429 U.S. 97 (1976).

[FN20]. *Id.* at 104 (quoting [Gregg v. Georgia](#), 428 U.S. 153, 173 (1976)). In the seminal case of *Estelle*, the Supreme Court extended the reach of the Eighth Amendment to prison conditions. [Helling v. McKinney](#), 113 S. Ct. 2475, 2484 (1993) (Thomas, J., dissenting). The Court recognized that a prisoner has a constitutional right to adequate medical care because prisoners must rely on prison authorities for treatment. [Estelle](#), 429 U.S. at 103. The Court reasoned that, in severe cases, denial of adequate medical care produces "physical 'torture or lingering death,'" and that such denial produces pain and suffering without any penological purpose. *Id.* at 103 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)). In addition to the logical obligation of authorities to assume responsibility for the medical care of prisoners, the Court stated that unnecessary suffering is inconsistent with "contemporary standards of decency" reflected in state legislation affirming the public's

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obligation to provide medical care to prisoners who, due to their incarceration, are stripped of their own ability to arrange for medical services. *Estelle*, 429 U.S. at 103-04.

[FN21]. *Estelle*, 429 U.S. at 107. Gamble injured his back when a bale of cotton fell on him while he unloaded a truck at the prison. *Id.* at 99. Prison authorities provided some medical care, however, for Gamble's back condition, high blood pressure, and heart problem. *Id.* at 107.

[FN22]. *Id.* According to the Court, the decision whether to X-ray or provide additional diagnostic techniques "is a classic example of a matter of medical judgment." *Id.*

[FN23]. *Id.* at 105-06. The Court cited *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947), to support its conclusion that negligent acts by prison officials do not rise to the level of constitutional violations. *Estelle*, 429 U.S. at 105. In *Resweber*, the Court concluded that subjecting a prisoner to a second electrocution attempt does not violate the Due Process Clause because the first attempt had been the result of an "innocent misadventure." 329 U.S. at 470. Noting that Gamble could pursue his claim under the Texas Tort Claims Act, the Court concluded that negligence simply does not have constitutional stature. *Estelle*, 429 U.S. at 105-07. Hence, to state a cognizable Eighth Amendment claim for the denial of medical care, a prisoner "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106.

[FN24]. 475 U.S. 312 (1986).

[FN25]. *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. *Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973)).

[FN26]. *Whitley*, 475 U.S. at 314-17. On January 27, 1980, prison guards attempted to move some intoxicated prisoners. *Id.* at 314. Other prisoners became agitated when they thought the guards used unnecessary force. *Id.* Several inmates confronted two guards and took one guard hostage. *Id.* Inmates began to break furniture and assault another prisoner. *Id.* at 315. Captain Whitley assembled an assault squad and, in his attempt to rescue the captured prison guard, members of the squad shot two inmates. *Id.* at 316.

[FN27]. *Id.* at 325.

[FN28]. Specifically, during a prison riot, officials must balance "the very real threats the unrest presents to inmates and prison officials alike" with "the possible harms to inmates against whom force might be used." *Id.* at 320.

[FN29]. *Id.* The Court distinguished *Estelle*, reasoning that "deliberate indifference to a prisoner's serious illness or injury . . . can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates." *Id.*

[FN30]. 111 S. Ct. 2321 (1991).

[FN31]. *Id.* at 2323. The plaintiff, incarcerated at the Hocking Correctional Facility in Nelsonville, Ohio, also alleged insufficient locker storage space, improper ventilation, unclean and inadequate rest rooms, unsanitary dining facilities and food preparation, and inadequate segregation of mentally and physically ill inmates. *Id.*

[FN32]. *Id.* at 2322-23.

[FN33]. *Id.* at 2326-27.

[FN34]. *Id.* The Court stated that "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Id.* The Court also reasoned that the responsibility of prison officials to ensure humane living conditions does not clash with competing institutional responsibilities. *Id.* at 2326.

[FN35]. *Id.* at 2325. The Court justified imposing a state of mind requirement in all prison condition cases on the ground that the word "punishment" in the Cruel and Unusual Punishment Clause implies a deliberate act to chastise or deter. *Id.* (citing

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[Duckworth v. Franzen](#), 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986)).

The United States, as amicus curiae, suggested that a state of mind requirement in cases challenging the general conditions of confinement would allow "officials to interpose the defense that, despite good faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions." *Id.* at 2326. Since the parties did not address the "cost defense," the court did not resolve this issue. The Court noted, however, that there is no "indication that other officials have sought to use such a defense to avoid the holding of *Estelle v. Gamble*." *Id.*

The four dissenting justices believed that a state of mind requirement is not necessary when the claim challenges conditions affecting the prison population generally. *Id.* at 2330. Rather, the dissenters argued that a violation of the Eighth Amendment turns solely on the objective severity of the conditions. *Id.*

[FN36]. *Id.* at 2327.

[FN37]. See [Moore v. Winebrenner](#), 927 F.2d 1312, 1316 (4th Cir.), cert. denied, 112 S. Ct. 97 (1991) (holding that Eighth Amendment liability attaches only if the defendant acted wantonly and obdurately). The Moore court's unrefined wantonness standard seems inconsistent with the Supreme Court's decision in *Wilson*. The *Wilson* decision explicitly states that the meaning of wantonness varies according to the context in which the claim arises. [Wilson](#), 111 S. Ct. 2321, 2326 (1991). For example, maliciousness embodies wantonness when prison authorities apply force to quell a prison disturbance. *Id.* (stating that "Whitley makes clear . . . that . . . wantonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged'").

[FN38]. See, e.g., [Marsh v. Arn](#), 937 F.2d 1056, 1060 (6th Cir. 1991); [Berry v. City of Muskogee](#), 900 F.2d 1489, 1495 (10th Cir. 1990); [Cortes- Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); [Campbell v. Greer](#), 831 F.2d 700, 702-03 (7th Cir. 1987); [Berg v. Kincheloe](#), 794 F.2d 457, 459 (9th Cir. 1986); [Ayers v. Coughlin](#), 780 F.2d 205, 209 (2d Cir. 1985) (per curiam); [Riley v. Jeffes](#), 777 F.2d 143, 147 (3d Cir. 1985); [Martin v. White](#), 742 F.2d 469, 474 (8th Cir. 1984); [Murphy v. United States](#), 653 F.2d 637, 644-45 (D.C. Cir. 1981); [Jones v. Diamond](#), 636 F.2d 1364, 1378 (5th Cir. 1981) (en banc), overruled by [International Woodworkers v. Champion Int'l Corp.](#), 790 F.2d 1174 (5th Cir. 1986).

[FN39]. See [Alberti v. Sheriff of Harris County](#), 978 F.2d 893, 895 (5th Cir. 1992) (per curiam), cert. denied, 113 S. Ct. 2996 (1993); [Berry](#), 900 F.2d at 1494-95; [Hendricks v. Coughlin](#), 942 F.2d 109, 112-13 (2d Cir. 1991); [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057-58 (D.C. Cir. 1987). In these cases, the courts of appeal reasoned that the concerns justifying the higher malicious and sadistic standard are not salient in non- riot assault situations. See, e.g., [Berry](#), 900 F.2d at 1495.

Further, the *Berry* court held that, in a case where prisoners fatally attacked another prisoner, deliberate indifference embodies a sufficiently high level of culpability to "capture" the importance of . . . competing obligations" of prison officials and does not lead to an inappropriate hindsight critique of "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* (quoting [Whitley v. Albers](#), 475 U.S. 312, 327 (1986)); see also [Alberti](#), 978 F.2d at 895 (confining *Wilson*'s malice standard to situations of an emergency or an immediate nature); [Hendricks](#), 942 F.2d at 113 (reasoning that the duty to protect prisoners from violence ordinarily involves no competing penological policies); [Morgan](#), 824 F.2d at 1057-58 (stating that inmate assaults precipitated by overcrowding do not raise legitimate concerns that courts will critique, in hindsight, decisions made in haste).

[FN40]. See *infra* notes 48-90 and accompanying text.

[FN41]. See [Marsh](#), 937 F.2d at 1066 (noting that the standard is not easily defined); [Berry](#), 900 F.2d at 1495 (observing that the term is not self-defining and courts struggle to give the term a practical meaning); see also *Gray*, *supra* note 13, at 1367.

[FN42]. [Duckworth v. Franzen](#), 780 F.2d 645, 652 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986) (observing that the term "evades rather than expresses meaning").

[FN43]. See [Whitley](#), 475 U.S. at 319 (declaring, in reference to [Estelle v. Gamble](#), 429 U.S. 97 (1976), that a person need not show that the defendants expressly intended to inflict unnecessary pain but must show more than inadvertent conduct to state an Eighth Amendment claim). The Supreme Court has not yet decided an Eighth Amendment inmate-on-inmate assault claim and therefore has not directly addressed the meaning of deliberate indifference in this context. In [Davidson v. Cannon](#), however, the Court decided an inmate assault claim based on the Due Process Clause. 474 U.S. 344 (1986). The Court rejected a prisoner's claim that officials abridged his Fourteenth Amendment due process rights by inadequately protecting him from assault. *Id.* at 347-48. The Court held that the prison officials, at most, negligently failed to protect the plaintiff

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from assault, and the officials' negligence did not constitute "abuse of governmental power" that the Due Process Clause protects against. *Id.* Yet, the Court did not define whether alternative degrees of intent, such as recklessness, violate the Due Process Clause. See [Whitley v. Albers](#), 475 U.S. 312, 327 (1986).

[FN44]. The defendant's mental state and conduct comprise the two principal elements of an Eighth Amendment claim. Since prisoners bring their Eighth Amendment claims via 42 U.S.C. § 1983, however, prisoner-plaintiffs encounter additional burdens and limitations. For instance, § 1983 requires proof of a causal connection between the defendant's acts or omissions and the alleged constitutional deprivation. [Zatler v. Wainwright](#), 802 F.2d 397, 400 (11th Cir. 1986) (per curiam). Proving the liability of supervisors and other officials thus requires prisoners to show the defendant's personal involvement in the alleged deficient conduct. See [Ayers v. Coughlin](#), 780 F.2d 205, 210 (2d Cir. 1985). A supervisor's liability cannot be predicated on the principles of respondeat superior. See [Bailey v. Wood](#), 909 F.2d 1197, 1201 (8th Cir. 1990).

Moreover, various types of immunity constitute the most significant limitation on Eighth Amendment suits under § 1983. Significantly, state governments and employees in their official capacities enjoy sovereign immunity, see [Will v. Michigan Dept. of State Police](#), 491 U.S. 58, 63 (1989), and officials sued in their personal capacities possess qualified immunity from constitutional suits. For a more detailed discussion of 42 U.S.C. § 1983 and relevant procedural issues, see generally [Twenty-First Annual Review of Criminal Procedure: Prisoners' Rights: Procedural Means of Enforcement under Section 1983](#), 80 GEO. L.J 1710 (1992).

[FN45]. See, e.g., [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057 (D.C. Cir. 1987); [Feigley v. Fulcomer](#), 720 F. Supp. 475, 478 (M.D. Pa. 1989); [Fisher v. Koehler](#), 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988).

The Eighth Amendment duty of prison officials and guards, indeed all state actors, to protect prisoners from violence at the hands of other prisoners, is likewise well-established. [Marsh v. Arn](#), 937 F.2d 1056, 1069 (6th Cir. 1991); [Zatler](#), 802 F.2d at 400 (citing [Gullate v. Potts](#), 654 F.2d 1007, 1012 (5th Cir. 1981)). The basis of the prison official's constitutional duty rests on logic similar to that employed by the Court in [Estelle v. Gamble](#), 429 U.S. 97, 104 (1976). See supra note 20. Incarceration deprives prisoners of the means of self-protection just as it deprives prisoners of the means to arrange for medical care. See [Davidson v. Cannon](#), 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting). In addition, without relief from prison officials, victims of inmate assault would remain uncompensated because the prisoner who attacked them is most likely indigent. [Marsh](#), 937 F.2d at 1069.

Several states have voluntarily assumed the duty to protect prisoners by enacting statutes charging prison officials with the responsibility of protecting inmates. See, e.g., [Fla. Stat. Ann. § 20.315\(1\)\(c\)](#) (West 1985) (directing employees of the Department of Corrections to protect "the offender from victimization within the institution").

[FN46]. See [Marsh](#), 937 F.2d at 1070; [Shrader v. White](#), 761 F.2d 975, 980 (4th Cir. 1985).

[FN47]. See [Woodhouse v. Virginia](#), 487 F.2d 889 (4th Cir. 1973) (per curiam). In [Woodhouse](#), the Fourth Circuit held that "confinement in a prison where violence and terror reign is actionable." *Id.* at 890. Later, the Fourth Circuit explained that "a reign of violence and terror," or conditions "approaching anarchy," are not the minimum standard of liability. [Withers v. Levine](#), 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980). The [Withers](#) court explained that the duty to protect prisoners arises if assaults occur with sufficient frequency to place an identifiable group of prisoners in "reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures." *Id.* Therefore, prisoners who fear assault can state an Eighth Amendment claim for relief. [Woodhouse](#), 487 F.2d at 890; see also [Siegal](#), supra note 14, at 1559 n.136 (citing cases).

[FN48]. See, e.g., [Doe v. Sullivan County](#), 956 F.2d 545, 555 (6th Cir.), cert. denied, 113 S. Ct. 187 (1992); [Riley v. Jeffes](#), 777 F.2d 143, 147 (3d Cir. 1985); [Martin v. White](#), 742 F.2d 469, 474 (8th Cir. 1984); [Woodhouse](#), 487 F.2d at 890.

[FN49]. [Morgan v. District of Columbia](#), 824 F.2d 1049, 1058 (D.C. Cir. 1987).

[FN50]. See [Purvis v. Ponte](#), 929 F.2d 822, 826 (1st Cir. 1991) (per curiam); [Berry v. City of Muskogee](#), 900 F.2d 1489, 1498 (10th Cir. 1990).

[FN51]. Occasionally, courts define the risk more narrowly than the plaintiff's theory. See, e.g., [Porm v. White](#), 762 F.2d 635 (8th Cir. 1985). In [Porm](#), the plaintiff alleged that white inmates who worked in the cafeteria faced a risk of attack from black inmates. *Id.* at 637. Although the plaintiff defined the risk broadly, the court absolved a supervisor because the plaintiff failed to show that he faced a peculiar risk to himself. *Id.*; see also [Siegal](#), supra note 14, at 1572 (arguing that courts have shown the ability to "define the risk narrowly when they are inclined to deny relief, and, conversely, define [the risk] broadly when

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they are inclined to extend relief.").

[FN52]. See, e.g., *Shrader v. White*, 761 F.2d 975, 977-78 (4th Cir. 1985); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam).

[FN53]. The most common "identifiable group of vulnerable inmates" appears to be young, white, male prisoners of slight physical stature. See *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980); see also, Robertson, supra note 14, at 115. Courts have recognized other types of "identifiable groups of vulnerable inmates." See *Walsh v. Mellas*, 837 F.2d 789, 797 (7th Cir. 1988) (inmates targeted by gangs); *Martin v. White*, 742 F.2d 469, 475 n.6 (8th Cir. 1984) (new entrants to a prison facility); *Gullate v. Potts*, 654 F.2d 1007, 1013 (5th Cir. 1981) ("snitches"); *Blizzard v. Quillen*, 579 F. Supp. 1446, 1450 (D. De. 1984) (same).

[FN54]. See, e.g., *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992); *Bailey v. Wood*, 909 F.2d 1197, 1199-1200 (8th Cir. 1990); *Wilks v. Young*, 897 F.2d 896, 897 (7th Cir. 1990); *Ayers v. Coughlin*, 780 F.2d 205, 207 (2d Cir. 1985).

[FN55]. See *Withers*, 615 F.2d at 161 (stating that "a pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents" of violence); see, e.g., *Purvis v. Ponte*, 929 F.2d 822, 827 (1st Cir. 1991) (per curiam) (holding prisoner's allegation that he faced gaybashing insufficient to establish pervasive risk of harm); *Murphy v. United States*, 653 F.2d 637, 655 (D.C. Cir. 1981) (concluding that 20 assaults during a one year period did not establish a pervasive risk of harm within an institution incarcerating 344 prisoners). But see *Goka v. Bobbit*, 862 F.2d 646, 652 (7th Cir. 1988) (holding that 13 attacks with broomsticks within a two year period created an issue of material fact regarding the existence of a pervasive risk of attack); *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir.), cert. denied, 488 U.S. 928 (1988) (finding that evidence demonstrating that prisoners raped plaintiff four times and that prisoners routinely raped other young inmates established a pervasive risk of assault).

Prisoners usually demonstrate the pervasiveness of assaults by introducing evidence on the high number of assaults reported to authorities and the requests for protective custody. See Robertson, supra note 14, at 116-17. Relying on reported assaults is problematic because in most prison facilities the number of assaults vastly exceeds the number of reported assaults. Id.

[FN56]. See *Shrader v. White*, 761 F.2d 975, 981 (4th Cir. 1985) (absolving officials from liability because assaults occurred less frequently in their facility than in other facilities); *Murphy*, 653 F.2d at 645 (same).

[FN57]. See *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992); Siegal, supra note 13, at 1558.

[FN58]. See *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). In *Wilson*, the Court stated that the "long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent." Id. at 2325.

In *Withers v. Levine*, the standard of liability directly incorporates a notice requirement: violence and sexual assaults must occur with sufficient frequency to "reasonably apprise prison officials of the existence of the problem and the need for protective measures." 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980); see also *Falls v. Nesbitt*, 966 F.2d 375, 378 (8th Cir. 1992); *Murphy v. United States*, 653 F.2d 637, 644 (D.C. Cir. 1981); *Redmond v. Baxley*, 475 F. Supp. 1111, 1117 (E.D. Mich. 1979).

[FN59]. RESTATEMENT (SECOND) OF TORTS § 320 (1965).

[FN60]. The Fourth Circuit initially adopted the Restatement's formula in *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam). Several other circuits followed the Fourth Circuit's decision in *Woodhous*. See *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991) (per curiam); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984); *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984).

[FN61]. RESTATEMENT (SECOND) OF TORTS § 320 (1965). Because "failure to exercise reasonable care" states a negligence standard, according to which inadvertent surveillance of prisoners constitutes actionable conduct, prisoners were not burdened with showing that the defendants knew or had reason to know of a risk of assault.

[FN62]. See supra notes 22-23 and accompanying text.

[FN63]. See, e.g., *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985) (modifying *Withers v. Levine*, insofar as that decision seemed to define a negligence standard, in light of the holding of *Rhodes v. Chapman*, 452 U.S. 337 (1981)).

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[FN64]. See, e.g., *Marsh v. Arn*, 937 F.2d 1056, 1068-70 (6th Cir. 1991); *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); *Richardson v. Penfold*, 839 F.2d 392, 395 (7th Cir. 1988); *Zatler v. Wainwright*, 802 F.2d 397, 401-02 (11th Cir. 1986); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986); *Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985); see also Gray, *supra* note 13, at 1372.

[FN65]. See Gray, *supra* note 13, at 1372-73 (commenting that recklessness is an amorphous concept because it is comprised of varying levels and degrees).

[FN66]. WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW*, § 3.7, at 239 (2d ed. 1986).

[FN67]. Only the Sixth and Seventh Circuits have applied a recklessness standard derived from the criminal law in inmate-upon-inmate assault cases. See *Marsh*, 937 F.2d at 1061; *Campbell v. Greer*, 831 F.2d 700, 702 (7th Cir. 1987).

[FN68]. See *supra* note 67.

[FN69]. *RESTATEMENT (SECOND) OF TORTS* § 500 (1965).

[FN70]. See, e.g., *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-60 (1st Cir.), cert. denied, 488 U.S. 823 (1988) (holding that plaintiff presented sufficient evidence for jury to conclude that Puerto Rican prison officials should have known that commingling psychologically disturbed prisoners with the general population jeopardized the safety of the disturbed prisoner); *Richardson v. Penfold*, 839 F.2d 392, 396 (7th Cir. 1988) (holding summary judgment improper when prisoner introduced evidence alleging defendants knew or should have known that plaintiff's assailant raped other inmates); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058-59 (D.C. Cir. 1987) (holding that plaintiff presented sufficient evidence for jury to conclude that government employees should have known that plaintiff's assailant posed a serious danger to other inmates given his criminal history, prior prison fights, prior threats of assault, and psychiatric problems).

[FN71]. See Ira P. Robbins, *The Ostrich Instruction: Deliberate Indifference as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 220-21 (Summer 1990).

[FN72]. 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986). In *Franzen*, one prisoner died and several prisoners suffered serious injuries when the bus in which they were riding caught fire. *Id.* at 648. The prisoners were unable to exit the bus because authorities had chained them together and all but the front exits of the bus were sealed for security reasons. *Id.* The prisoners sued three Illinois prison officials and three guards, charging that they failed to take adequate precautions against the consequences of a bus fire. *Id.*

[FN73]. *Id.* at 653.

[FN74]. *Id.* at 652-53. The *Franzen* court stated that second degree murder provides a classic example of criminal recklessness, such as where a "defendant chokes his victim, intending to injure him seriously but not to kill him, but death results." *Id.* at 652. Committing an act that is "socially costless to avoid" and "highly dangerous" also exemplifies criminal recklessness. *Id.*

[FN75]. The *Franzen* court stated that "recklessness in criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred." *Id.* Later in its opinion, however, the court states that "[p]unishment 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." *Id.* at 653. Thus, the court failed to clarify whether a finder of fact may infer knowledge, and if knowledge of a substantial risk is inferred, whether a finder of fact must also infer a "conscious, culpable refusal to prevent the harm."

[FN76]. See *Marsh v. Arn*, 937 F.2d 1056, 1061 (6th Cir. 1991).

[FN77]. *Id.* In *Marsh*, an inmate with a violent criminal history and record of fighting in prison beat her cellmate with a padlock causing her serious injury. *Id.* at 1059. The court of appeals absolved all defendants of liability. *Id.* The court overturned jury verdicts against two defendants on the grounds that the plaintiff failed to prove that the defendants knew that the assailant posed a specific risk of harm to the plaintiff. *Id.* at 1061, 1063-64.

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The Marsh court expressed a strong reluctance to award damages against prison employees in their personal capacity. *Id.* at 1070. According to the court, absent a high standard of liability, states and municipalities will have difficulty recruiting qualified prison staff. *Id.* Judge Kennedy, concurring separately, stressed that judges must extend deference to a prison administrator's security decisions. *Id.* at 1072.

[FN78]. See, e.g., *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir.) (upholding liability of warden for failing to develop adequate administrative policies to protect plaintiff and similarly situated prisoners from risk of sexual assault in high risk prison areas), cert. denied, 488 U.S. 928 (1988); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-60 (1st Cir.) (finding that prison officials' failure to segregate psychiatrically disturbed prisoners from the general population constituted sufficient evidence of deliberate indifference), cert. denied, 488 U.S. 823 (1988); *Martin v. White*, 742 F.2d 469, 475 (8th Cir. 1984) (concluding that warden's failure to report felony assaults to prosecutors, to develop a policy for the detection of ineffective cell locks, and to station guards where they could provide protection supported a prisoner's verdict).

[FN79]. See, e.g., *Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986).

In *Berry*, the court held that in addition to showing a failure to take reasonable measures to avert the risk of attack, prisoners must prove that the failure, in light of the defendants' knowledge of the risk, justifies liability for the consequences of their unintended conduct. 900 F.2d at 1498.

In *Morgan*, the court upheld a trial court's jury instruction compelling the plaintiff to prove that the defendants were "outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm." 824 F.2d at 1058. In applying this standard, the *Morgan* court held that the prisoner presented sufficient evidence showing that the government employees flagrantly deviated from a reasonable standard of care, specifically by failing to place the assailant in a higher security unit and failing to devise adequate classification procedures. *Id.* at 1059-60.

In *Berg*, the Ninth Circuit outlined three factors for evaluating whether prison authorities acted with deliberate indifference. 794 F.2d at 462. Juries should consider whether the defendants were guided by concerns for the safety of other inmates, whether the defendants took preventative measures to protect the prisoner, and whether less dangerous alternatives existed. *Id.* These factors compel a heavy measure of deference to the actions of prison officials. *Id.*

[FN80]. See *Marsh*, 937 F.2d at 1061; see also *Santiago v. Lane*, 894 F.2d 218, 221 n.6 (7th Cir. 1990) (citing MODEL PENAL CODE § 2.20(2)(c) which states that "a person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk").

[FN81]. *Young v. Quinlan*, 960 F.2d 351, 360 (3d Cir. 1992); *Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990).

[FN82]. 900 F.2d 1489 (10th Cir. 1990).

[FN83]. *Id.* at 1495.

[FN84]. *Id.* at 1496.

[FN85]. 960 F.2d 351 (3d Cir. 1992).

[FN86]. *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992). The *Redman* court stated that the deliberate indifference standard is met "if . . . officials know or should know of the particular vulnerability [to suicide of an inmate], then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." *Id.* (quoting *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989)).

[FN87]. 960 F.2d at 360.

[FN88]. *Id.* at 361 (stating "[w]e stress, however, that in constitutional context 'should have known' is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts.").

[FN89]. *Id.* (citing *Monmouth County Correctional Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988)). This standard essentially discounts the training and experience prison staff possess in recognizing

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danger by adopting a "lay custodian" baseline for measuring the defendant's state of mind.

[FN90]. Several Seventh Circuit cases apply an objective "should have known" test, more closely aligned with tort recklessness. *Wilks v. Young*, 897 F.2d 896 (7th Cir. 1990); *Richardson v. Penfold*, 839 F.2d 392 (7th Cir. 1988); *Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985), cert. denied, 475 U.S. 1085 (1986); *Benson v. Cady*, 761 F.2d 335 (7th Cir. 1985). Other Seventh Circuit cases apply a subjective actual knowledge test, closely aligned with criminal recklessness. *Santiago v. Lane*, 894 F.2d 218 (7th Cir. 1990); *Goka v. Bobbitt*, 862 F.2d 646 (7th Cir. 1988); *Walsh v. Mellas*, 837 F.2d 789 (7th Cir.), cert. denied, 486 U.S. 1061 (1988); *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987).

[FN91]. See supra note 1 and accompanying text.

[FN92]. *Id.* McGill is slightly built, weighing between 116 and 122 pounds and his height is five feet, seven inches. Appellee/Cross Appellant's Brief at 36, *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991) (No. 85-C-70), cert. denied, 112 S. Ct. 1265 (1992).

[FN93]. See supra note 2 and accompanying text. Generally, inmates on disciplinary status have violated one or more prison regulations, including fighting and serious felonies. JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 59 (3d ed. 1985).

[FN94]. See supra note 3 and accompanying text.

[FN95]. See supra note 4 and accompanying text.

[FN96]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN97]. *Id.*

[FN98]. *Id.*

[FN99]. The Seventh Circuit summarized the circumstances of McGill's rape as follows. McGill left his cell for the shower when Ausley approached him and made sexually suggestive comments. *Id.* McGill continued walking and Ausley and Halliburton threatened him. *Id.* While walking, McGill spoke to two guards about some lost property but did not ask for help. *Id.* As McGill shampooed his hair, Ausley gagged and sodomized him while three other inmates guarded the area and brandished improvised knives. *Id.*

[FN100]. *Id.* The jury also returned a verdict in favor of McGill on a state negligence claim. *Id.* The jury absolved one guard on all claims, and the trial judge granted a directed verdict in favor of two prison administrators. *Id.*

[FN101]. *McGill v. Duckworth*, 726 F. Supp. 1144, 1148-49 (N.D. Ind. 1989), aff'd in part, rev'd in part, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). On the issue of defendant's knowledge, the district court provided the jury with an extensive set of instructions. *Id.* The first instruction stated that prison officials are liable for failing to protect a prisoner only if they act with deliberate indifference. *Id.* at 1148. The instruction explained that to prove deliberate indifference, McGill must show that the defendants "intentionally or recklessly disregarded a substantial risk of danger that was known to him or would have been readily apparent to a reasonable person in his [sic] position." *Id.* at 1148-49.

The next instruction explained that a defendant acts with deliberate indifference when he knows of the danger or when the threat of violence is so pervasive that knowledge can be inferred and he fails to enforce a policy or take reasonable steps to protect a prisoner. *Id.* at 1149. The court also instructed the jury that the plaintiff must prove that the defendants "knew, or should have known, that the plaintiff had been threatened with violence or sexual assault and that it was highly foreseeable that the plaintiff would be physically or sexually assaulted by another inmate" *Id.* In order to prove his claim, McGill also had to show reckless disregard for or intentional deprivation of his right to be free from assault, and that the conduct proximately caused his injury. *Id.*

The defendants objected most strenuously to the final instruction. This instruction stated that if the defendants had information which would lead a reasonably prudent person to investigate the situation, the jury could equate the information the defendants would have learned through such an investigation with actual knowledge. *Id.* The court instructed the jury that it could infer knowledge from circumstantial evidence. *Id.* For instance, the instruction stated that knowledge can be inferred when a dangerous condition exists for a substantial period of time and the defendants had regular opportunities to observe the

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condition. *Id.*

[FN102]. *Id.* at 1152. The defendants argued five points to support their claim that McGill failed to show "deliberate indifference." They noted that they took action each time McGill requested a move and that McGill did not show that his move to IDU placed him in any particular danger from his assailant. *Id.* Moreover, McGill did not inform anyone that he feared his assailant. *Id.* Further, neither McGill nor Ausley were members of identifiable groups that would put defendants on notice of heightened risk. *Id.* Finally, the defendants argued that McGill failed to prove that administrators placed him in an institution where violence and terror reign. *Id.*

[FN103]. *Id.* at 1151. The defendants relied on [Duckworth v. Franzen](#), 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986), a case involving protection from fire hazards rather than inmate assaults, to support their argument that an objective standard is inappropriate for Eighth Amendment purposes. 726 F. Supp. at 1149-51. See *supra* notes 72-75 and accompanying text (detailing the Franzen decision and reasoning). The court held that a post-Franzen inmate assault case, [Richardson v. Penfold](#), 839 F.2d 392 (7th Cir. 1988), applied tort recklessness. 726 F. Supp. at 1151.

[FN104]. 726 F. Supp. at 1151.

[FN105]. See *id.* at 1153-56. The district court surveyed previous inmate assault cases within the circuit and concluded that the threat posed to smaller, protective custody inmates like McGill by inmates on disciplinary segregation was less identifiable than the risks in other cases. *Id.* at 1153-55. The court held, however, that the previous cases do not "state a constitutional baseline or factual minimum" to establish deliberate indifference. *Id.* at 1155.

The district court held that the jury could have found that other inmates harassed McGill and that a higher rate of violence and sexual assault exists in IDU than in the prison as a whole. *Id.* The evidence at trial showed that McGill was of slight stature and that weaker inmates were vulnerable to attack in IDU. *Id.* These facts, the court reasoned, were sufficient to impute to all defendants knowledge that smaller protective custody inmates were at physical risk from disciplinary segregation inmates in IDU. *Id.* at 1156.

[FN106]. *Id.* The court noted that the superintendents issued no policy directive for separating the two classes of inmates and thereby placed McGill in danger. *Id.* Although the prison guard exercised no control over policy, the court sustained the verdict against him because the jury could have reasonably found that he was deliberately indifferent; McGill testified that the guard shouted "[p]liss on you" just prior to the time of the rape, which supports the inference that the guard precluded McGill from informing him of the threat. *Id.*

[FN107]. 944 F.2d at 349. The McGill court stated that in order to implicate the Eighth Amendment's prohibition against cruel and unusual punishment, officials must intend to punish a prisoner. *Id.* at 347. The court noted, however, that courts treat both deliberate indifference and recklessness as the functional equivalent of intent. *Id.* In other words, an official's "total unconcern for a prisoner's welfare--coupled with serious risks . . ." violates the Eighth Amendment. *Id.* The court reasoned that the precise definition of recklessness must separate "punishment" from the "unwelcome injuries that occur when so may violent persons are locked up together." *Id.*

[FN108]. 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986).

[FN109]. McGill, 944 F.2d at 348-49 (citing [Wilson v. Seiter](#), 111 S. Ct. 2321 (1991) and [Whitley v. Albers](#), 475 U.S. 312 (1986)). The McGill court read Wilson to resolve the "conflict between the objective and subjective understandings of recklessness in favor of Franzen's subjective standard." *Id.* at 349. Further, the McGill court stated that "Wilson's understanding of intent tracks our own in Archie which explicitly adopted the subjective (criminal law) sense of recklessness." *Id.* (citing [Archie v. City of Racine](#), 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989)). The court concluded that criminal recklessness represents the law in the Seventh Circuit and that cases applying tort recklessness do not survive Wilson. McGill, 944 F.2d at 349.

[FN110]. *Id.* at 348-49. The court based its conclusion on the assumption that "[s]ome level of brutality and sexual aggression" is inevitable in prison given that many prisoners are confined because they are dangerous. *Id.* at 348. Given the inevitability of violence, "it will always be possible to say that the guards 'should have known' of the risk. Indeed they should, and do." *Id.* According to the court, the "should have known" approach leads to absolute liability contrary to Supreme Court precedent derived from [Estelle v. Gamble](#), 429 U.S. 97 (1976). *Id.*

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[FN111]. In McGill, the constraint chiefly consisted of a shortage of space in the cellblock which solely houses inmates on protective custody status. 944 F.2d at 350.

[FN112]. *Id.* at 348-49. "The 'should have known' approach allows plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control." *Id.* at 349. With respect to prison guards, the court referred to their inability to control the temperament of inmates, design of the prison, placement of the prisoners, and ratio of staff to inmates. *Id.* at 348. With respect to prison administrators, the court reasoned that the epidemic of overcrowded prisons effectively eliminates their ability to confine each inmate only with those of similar status. *Id.* at 349. Moreover, a prisoner like McGill, "small, young, labelled as a snitch," will face high risks regardless of where prison officials place him. *Id.*

[FN113]. *Id.*

[FN114]. *Id.* The court stated that other circuits have found that the failure to inform prison officials about threats destroys prisoner assault claims at the pleading stage. *Id.* (citing *Bell v. Stigers*, 937 F.2d 1340 (8th Cir. 1991) (applying the same principle to suicide)); *Blankenship v. Meachum*, 840 F.2d 741 (10th Cir. 1988); *Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987)).

[FN115]. *Id.* at 351. Although McGill did not argue that the defendants deliberately avoided knowledge, the court suggested that the "ostrich" instruction of criminal law is an appropriate alternative standard of liability because, as a "species of intent," it honors both the "deliberate" and "indifference" aspects of the intent requirement imposed by *Estelle* and related cases. *Id.* The court further stated that since behaving like an ostrich suffices for criminal liability, it suffices for liability under the Eighth Amendment. *Id.*

[FN116]. *Id.* at 350. On appeal, McGill attempted to show that he belonged to three identifiable groups of prisoners who face a higher risk of assault. *Id.*; Appellee/Cross-Appellant's Brief at 27-37, *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). McGill argued that the defendants knew he faced a constant threat of violence because of his small stature and physical weakness relative to other inmates. McGill noted that he had informed officials of earlier threats he had received while housed in the general population. Appellee/Cross-Appellant's Brief at 27-28. McGill also argued that the defendants knew that protective custody inmates in IDU faced risks from disciplinary segregation inmates because disciplinary inmates often comprise the most violent prisoners. *Id.* at 27-29. Further, McGill argued that in spite of this general knowledge, the administrators failed to enact or enforce a policy providing special surveillance for smaller inmates, on protective custody status, commingled with inmates who have violated prison rules. *Id.* at 36. Last, McGill argued that officials knew that "snitches" face increased risk of attack. *Id.* at 28.

The McGill court explicitly rejected theories of liability predicated on the notion that the plaintiff faced a general risk of harm as a "species of the 'should have known' approach." *McGill*, 944 F.2d at 350.

[FN117]. *Id.* (emphasis in original omitted). The court noted that McGill failed to introduce evidence showing an alternative strategy the wardens could have followed, within their budget, to reduce the risk of violence. *Id.* Moreover, the court observed that McGill did not contest the defendants' submission that they would have liked to separate all of the protective custody inmates from all disciplinary inmates but were unable to do so because the legislature failed to provide sufficient funding or prison space. *Id.* The court also indicated that if officials had placed McGill in a unit housing only protective custody inmates at the expense of another similarly situated inmate, the risk of harm would have simply shifted to the evicted protective custody inmate, and thus the risk to vulnerable inmates as a group would remain the same. *Id.*

[FN118]. *Id.* The court implied that McGill could have prevailed only by squaring the warden's decision of placing him in IDU with the Supreme Court's holding in the equal protection case, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). *Id.* at 348. The court reasoned that the administrator's decision to remove McGill from the general population because he complained of threats after being labelled a snitch disproves the notions that they wanted him humiliated or that they "didn't give a fig for his welfare" *Id.* at 350.

The Seventh Circuit reversed the verdict against the prison guard because McGill failed to show that the guard knew of McGill's impending rape. *Id.* at 350-51. The court noted that McGill did not inform the guard that he feared an attack when McGill passed him while walking to the shower. *Id.* at 351. The court stated rhetorically: "Is [the guard] to be held liable on the ground that he was supposed to know McGill's danger better than McGill himself?" *Id.*

[FN119]. See *supra* notes 108-109 and accompanying text.

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[FN120]. [Whitley v. Albers](#), 475 U.S. 312, 320 (1986) ("In [the setting of a prison riot], a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.").

[FN121]. *Id.* at 321.

[FN122]. *Id.* (emphasis added).

[FN123]. See *supra* note 35 and accompanying text.

[FN124]. The Court cited [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988), and [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057-58 (D.C. Cir. 1987). [Wilson v. Seiter](#), 111 S. Ct. 2321, 2327 (1991).

[FN125]. See *supra* notes 43, 110, 111, & 112 and accompanying text. McGill's repeated citation to *Personnel Adm'r of Mass. v. Feeney* represents another departure from the deliberate indifference standard. [McGill](#), 944 F.2d at 348. Although the McGill court held that something less than an express intent to harm is necessary to impose liability, the citation to Feeney's "because of, rather than in spite of" formulation reveals that the court applied an intent standard in lieu of a recklessness standard.

[FN126]. See *supra* note 118 and accompanying text.

[FN127]. See *supra* note 35 (discussing Wilson's failure to recognize the good faith cost defense). Good faith efforts should not preclude a finding of deliberate indifference. The fact that officials took some action does not automatically render their other acts or omissions constitutionally adequate. [Moore v. Winebrenner](#), 927 F.2d 1312, 1321 (4th Cir. 1991) (Murnaghan J., dissenting) ("To excuse what has not been done, although required, because of other things that have been done, is wrong."). For example, although administrators put McGill on "protective custody" status, McGill's safety was not enhanced by his placement in a unit containing inmates on disciplinary status. The administrators were not deliberately indifferent because they withheld protective custody status, but because they operated a dangerous and inadequate system of protective custody.

[FN128]. See *supra* note 83 and accompanying text.

[FN129]. See [Whitley v. Albers](#), 475 U.S. 312, 320 (1986) (finding deliberate indifference an appropriate standard in claims of inadequate medical care because the duty to provide medical care does not clash with "equally important governmental responsibilities").

[FN130]. See *supra* note 113 and accompanying text.

[FN131]. See [Stachelek v. Fairman](#), 1989 WL 18227, at *1 (N.D. Ill. 1989); see also Robertson, *supra* note 14, at 104 ("Life in many prisons is cheap: a 'hit,' or murder, can be purchased for a few cartons of cigarettes.").

[FN132]. The specific notice requirement is also unreasonable because threats of assault do not invariably precede the assault itself. Absent a threat, McGill holds a prisoner's claim per se insufficient. No prison official can be charged with knowledge of a specific threat in this circumstance, and the strict application of a specific notice rule precludes liability even when prison officials place an obviously vulnerable inmate in a position where he is subject to assault from various prisoners.

[FN133]. See *supra* note 1 and accompanying text.

[FN134]. [Grubbs v. Bradley](#), 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982).

Life behind [prison] walls is to a large extent governed by the "inmate code," one tenet of which strictly prohibits prisoners from "snitching" on fellow inmates. The consequences of becoming a snitch may include physical retaliation, including threats of death, the fear of which helps to persuade even well intending inmates to abide by the code.

Id.

[FN135]. See [Fisher v. Koehler](#), 692 F. Supp. 1519, 1528 (S.D.N.Y. 1988) ("[M] any inmates referred to the phrase 'snitches

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get stitches' as a slogan frequently used by assaultive inmates to threaten inmates who complain to the authorities."); [Martino v. Carey](#), 563 F. Supp. 984, 988-89 (D. Or. 1983) ("If inmates complain to officials, they are labelled 'snitches' and will 'pay' later, when assistance is not available."); see also Robertson, *supra* note 14, at 108 ("Snitching invites the most severe retribution."); Mary Wilcox, Note, The Sexually Assaulted Prisoner: His Rights Under the Eighth Amendment, 12 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 349, 353 (1986) ("Ratting' on another prisoner is a sure way to subject oneself to further physical abuse.").

[FN136]. [Gullatte v. Potts](#), 654 F.2d 1007, 1010 (5th Cir. 1981).

[FN137]. The Seventh Circuit has held that contributory negligence is not a defense to reckless conduct. [Santiago v. Lane](#), 894 F.2d 218, 224 (7th Cir. 1990) (citations omitted).

[FN138]. See [LAFAVE & SCOTT](#), *supra* note 66, at 238.

[FN139]. Christina Whitman, Constitutional Torts, 79 MICH. L. REV. 5, 49 (1980). "[T]he plaintiff (particularly if he is a convicted criminal claiming prison or police abuse) may face a jury that finds his credibility suspect, his appearance distasteful, and his claim weak." *Id.*

[FN140]. See *supra* note 115 and accompanying text.

[FN141]. See [LAFAVE & SCOTT](#), *supra* note 66, at 238 (A defendant's "subjective realization of risk . . . must generally be inferred from his words and conduct in the light of the circumstances."); see also [WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS](#) § 34, at 213-14 (5th ed. 1984) ("Since [conscious indifference] is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied.").

[FN142]. See *supra* notes 110 & 112.

[FN143]. See *supra* note 77.

[FN144]. See *supra* note 110.

[FN145]. See *supra* notes 70 & 78 and accompanying text.

[FN146]. The outcome of [McGill](#) demonstrates that the actual knowledge requirement effectively subordinates the jury's role as factfinder. Under a criminal recklessness standard, defendants will very often prevail at pre-trial stages of litigation as well as on appeal when courts consider the sufficiency of evidence.

[FN147]. See *supra* note 112.

[FN148]. See *supra* notes 111-112 and accompanying text.

[FN149]. See *supra* note 35.

[FN150]. See [Ward v. Johnson](#), 690 F.2d 1098, 1108 (4th Cir. 1982).

[FN151]. See, e.g., [Ind. Code Ann. § 34-4-16.7-1](#) (West 1993); [Mass. Gen. Laws Ann. ch. 258, § 9](#) (West 1993); [Tex. Rev. Civ. Stat. Ann. § 104.002](#) (West 1993); see also Phillip E. Hassman, [Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee for Liability Arising Out of Performance of Public Duties](#), 71 A.L.R.3d 90 (1976).

[FN152]. See [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 562 (1st Cir.), cert. denied, 488 U.S. 823 (1988). Even [McGill](#) recognizes the utility of tort recklessness in encouraging the state to consider the costs of inmate violence when deciding "how many prisons to build and whether to increase the sentence for crimes." 944 F.2d at 349.

[FN153]. See [Gray](#), *supra* note 13, at 1343.

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[FN154]. See supra note 151 and accompanying text.

[FN155]. Moreover, *Estelle v. Gamble* already confers sufficient deference by holding that negligent conduct does not violate the Eighth Amendment. See supra notes 22-23 and accompanying text.

[FN156]. See *Illinois v. Gates*, 462 U.S. 213, 241 (1983) (stating that "[f]idelity" to the commands of the Constitution suggests balanced judgment rather than exhortation").

[FN157]. See supra note 17.

[FN158]. See supra note 53.

[FN159]. *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN160]. See *Dumond*, supra note 14, at 148. In cases where a prisoner cannot prove actual knowledge, *McGill* preempts inquiry into whether the defendant had the power to prevent the plaintiff's injury. This high threshold of liability insulates prison officials from liability even where the assault is attributable to their own discrete acts or omissions. Cf. *Cortes-Quinones v. Jimenez-Nettle-ship*, 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988). In *Cortes-Quinones*, the First Circuit held that the plaintiff produced sufficient evidence to find that the Director of Puerto Rico's Penal Institutions, the Corrections Administrator, and the Superintendent and Chairman of the Treatment and Classification Committee acted with deliberate indifference toward a psychiatrically disturbed prisoner who was killed by his cellmates. *Id.* at 558-61. The court held that although the conditions in Puerto Rico's prisons were appallingly bad and severely overcrowded, each defendant could have taken steps to protect the deceased prisoner. *Id.* For example, the officials could have segregated the psychiatric prisoner from the general prison population. *Id.* at 560-61. The court found that the defendants were deliberately indifferent based on their own actions, not based on factors beyond their control. *Id.*

[FN161]. *Dumond*, supra note 14, at 149.

[FN162]. *Id.*

[FN163]. *Id.* at 148 (citing Peter L. Nacci & Thomas R. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROBATION 31, 32 (1983)).

[FN164]. Prison guards are well-positioned to know both the character of their facility and the prisoners confined to their care. They not only learn through experience which prisoners are dangerous, but they also have the freedom to investigate and discover potential conflicts between prisoners.

[FN165]. Proponents of a high threshold for Eighth Amendment liability note that pre-trial detainees, whose rights are guaranteed under the Due Process Clause of the Fourteenth Amendment, cannot be punished at all, see *Bell v. Wolfish*, 441 U.S. 520, 536-40 (1979), whereas convicted prisoners cannot be subjected to cruel and unusual punishment. In the Eighth Amendment context, however, the state of mind inquiry does not address whether the deprivation constituted cruelty and arbitrariness, but whether the defendants intended to punish the plaintiff. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) ("An intent requirement is either implicit in the word 'punishment' or [it] is not."). Hence, the Fourteenth Amendment's definition of "punishment," as embodied in a state of mind standard, should not vary with the Eighth Amendment's state of mind standard and definition of punishment.

[FN166]. Given that most prisoners must proceed pro se, at least initially and past the motion to dismiss stage, a strong case exists for greater simplicity in § 1983 Eighth Amendment claims.

[FN167]. See supra note 17.

[FN168]. See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975 n.1 (1989) (emphasis in original omitted).

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Comment

*165 PRISONS ARE DANGEROUS PLACES: CRIMINAL RECKLESSNESS AS THE EIGHTH AMENDMENT STANDARD OF LIABILITY IN MCGILL v. DUCKWORTH

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Officials at the Indiana State Prison removed Herbert McGill from the general prison population after his fellow prisoners labelled him a "snitch." [FN1] The officials placed McGill in the prison unit which houses inmates on both disciplinary and protective custody status ("IDU"). [FN2] In the IDU facility, disciplinary and protective custody prisoners commingle, for one hour each day, to use the recreational and shower facilities. [FN3] On McGill's third day in IDU, one disciplinary status inmate threatened McGill as he walked to the shower. [FN4] The inmate followed McGill into the shower, gagged him with a washcloth, and raped him while three other inmates stood guard brandishing knives. [FN5]

McGill sued two prison guards and four prison administrators *166 under 42 U.S.C. § 1983 [FN6] for failing to protect him from sexual assault in violation of his Eighth and Fourteenth Amendment rights. [FN7] After a trial, the jury found that three defendants had violated McGill's Eighth Amendment [FN8] right to be free from assault, because they were "deliberately indifferent" to his safety. [FN9] The jury awarded damages against one prison guard, [FN10] the assistant superintendent, and the superintendent. [FN11] The Court of Appeals for the Seventh Circuit reversed and held that the deliberate indifference standard requires McGill to demonstrate that the defendants possessed actual knowledge of a specific threat of assault. [FN12]

The Seventh Circuit's ruling in McGill v. Duckworth raises the issue of whether Eighth Amendment liability of prison staff for failing to protect prisoners from assault should be based upon an objective "should have known" standard, modeled after tort recklessness, or upon a subjective "actual knowledge" standard, grounded in criminal recklessness. Resolution of this issue will determine to what extent the Eighth Amendment's proscription against "cruel and unusual punishments" [FN13] protects *167 prisoners from sexual and physical assaults. [FN14]

This Comment argues that precedent does not support McGill's actual knowledge standard and that the Seventh Circuit developed an unrealistic and unfair framework for evaluating the defendant's state of mind. Part I outlines the Supreme Court's jurisprudence regarding the Eighth Amendment's mental component and analyzes the various federal circuit courts' formulations of the deliberate indifference standard. Part II details the holding and reasoning of McGill. Part III critiques McGill and articulates why an objective state of mind inquiry, grounded in tort recklessness, constitutes a fairer and more practical way to determine whether an official acted with deliberate indifference.

I. KNOWLEDGE OF PRISON ASSAULT RISKS

A. THE MENTAL COMPONENT OF THE EIGHTH AMENDMENT

In the 1960s, federal courts first applied the Eighth Amendment*168 to protect prisoners from cruel and unusual prison conditions. Prior to that time, the "hands-off" doctrine, a judicial policy of non-intervention in the administration of prison affairs, [FN15] limited a court's role to ensuring "proportionality," in other words, that the sentence fits the crime. [FN16] Once courts began applying the guarantees of the Eighth Amendment to prison conditions, [FN17] the state of mind of responsible prison staff became a critical component in determining whether prison officials violated a prisoner's right to be free from cruel and unusual punishment. [FN18]

*169 In Estelle v. Gamble, [FN19] the Supreme Court held that "deliberate indifference to the serious medical needs of prisoners constitutes 'unnecessary and wanton infliction of pain,'" in violation of the Eighth Amendment. [FN20] In Estelle, inmate J.W. Gamble claimed that the prison doctor failed to properly diagnose and treat his back injury. [FN21] The Court

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concluded that Gamble's claim alleged, at most, medical malpractice. [FN22] The Court accordingly dismissed the complaint reasoning that one incident of medical malpractice, or simple negligence, does not rise to the level of wantonness. [FN23]

In *Whitley v. Albers*, [FN24] the Court held that a prison employee's use of force during a prison riot violates the Eighth Amendment only if the employee acts "maliciously and sadistically *170 for the very purpose of causing harm." [FN25] In *Whitley*, inmate Gerald Albers claimed that prison officials inflicted cruel and unusual punishment by shooting him during their efforts to quell a prison riot. [FN26] The Court absolved the official from liability, because the guard shot Albers as part of a good faith effort to restore control over the prison. [FN27] The Court created a more stringent state of mind standard for claims arising from emergency situations, reasoning that during serious prison disturbances officials face competing institutional obligations [FN28] and must necessarily make decisions "in haste, under pressure, and frequently without the luxury of a second chance." [FN29]

Recently, in *Wilson v. Seiter*, [FN30] the Court reversed a Sixth Circuit decision that had applied the malicious and sadistic standard to an Eighth Amendment claim. The plaintiff had alleged that the conditions of an Ohio prison, including overcrowding, excessive noise, and inadequate heating and cooling, [FN31] constituted cruel and unusual punishment. [FN32] Distinguishing *Whitley*, the Court held that the deliberate indifference standard governed the claim. [FN33]

The *Wilson* Court reasoned that, in terms of constraints facing the prison official, offensive nonmedical conditions are materially similar to claims alleging inadequate medical treatment. [FN34] *171 In addition to restricting the scope of the malicious and sadistic standard, the Court imposed a state of mind requirement in all Eighth Amendment claims involving prison conditions, even if the offending condition is long-term or systemic. [FN35] Under the *Wilson* framework, to prove an Eighth Amendment violation a prisoner must show that at least one prison staff member possessed a culpable state of mind, usually deliberate indifference, in depriving the prisoner of an identifiable human need. [FN36]

B. CULPABILITY FOR FAILURE TO PROTECT PRISONERS FROM ASSAULT

1. Developing Standards and Defining Risks of Violence

Well before the Supreme Court decided *Wilson*, every federal circuit court, except the Fourth Circuit, [FN37] applied the deliberate*172 indifference standard to inmate-on-inmate assault cases. [FN38] Also, several circuits had explicitly rejected arguments that the malicious and sadistic standard applies in non-riot assault situations. [FN39] Nevertheless, circuits interpreted the meaning and elements of deliberate indifference in various manners. [FN40] The circuits vary because deliberate indifference is vague, [FN41] even oxymoronic, [FN42] and the Supreme Court clarified its meaning only by advising that it lies somewhere on the wide continuum between intent and negligence. [FN43] To clarify the current state of the law, *173 the remainder of this section contrasts the various approaches used to evaluate the defendant's state of mind and conduct in inmate-on-inmate assault cases. [FN44]

Undoubtedly, the Eighth Amendment does not guarantee prisoners an assault-free environment. [FN45] Some courts reason *174 that absolute liability of prison authorities for injuries sustained by prisoners at the hands of other prisoners would produce unjustified results; prison violence is inevitable given the violent propensities of some inmates. [FN46] Only when prison violence becomes a problem of substantial dimensions does it trigger the Eighth Amendment's prohibition on the infliction of cruel and unusual punishment. [FN47]

Specifically, prisoners must demonstrate that they have been subjected to a pervasive, [FN48] obvious, [FN49] or unreasonable risk of assault or injury. [FN50] Defining the scope of the risk, the particular inmate(s) at risk, and the source of the risk largely depends on how plaintiffs plead and prove their cases. [FN51] Plaintiffs can allege, for instance, that all prisoners face an unreasonably high risk of assault from other prisoners, [FN52] that they belong to an identifiable group of prisoners at risk of sexual or physical assault, [FN53] or in the narrowest context, that a specific prisoner jeopardizes his or her individual safety. [FN54] Demonstrating a pervasive risk of assault requires a rigorous factual showing of either prior episodes of violence [FN55] or an exceedingly high number of assaults in a particular prison facility. [FN56] Showing a pervasive risk of harm serves two functions. First, it demonstrates that the problem of prison assaults deprives inmates of their right to personal security and thus satisfies the deprivation component of the *Wilson* framework. [FN57] Further, it allows a jury to readily infer that prison authorities had notice of the problem due to the frequency with which assaults occurred. [FN58]

*176 For a significant period of time, however, the liability of prison authorities under the Eighth Amendment did not turn on

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their awareness of the assault risk facing the plaintiff. Instead, several circuits applied the elements formulated in the Restatement (Second) of Torts [FN59] as the constitutional standard of liability. [FN60] Under the Restatement, prisoners only need to show the existence of a pervasive risk of harm and that the authorities failed to exercise reasonable care in preventing prisoners from intentionally harming one another. [FN61]

The Restatement's negligence standard, the prevailing standard in inmate-on-inmate assault cases before the Supreme Court decided *Estelle v. Gamble*, became indefensible in light of *Estelle's* holding that medical malpractice does not violate the Eighth Amendment. [FN62] Indeed, deliberate indifference eventually replaced a negligence standard, [FN63] and presently, most circuits equate deliberate indifference with recklessness. [FN64]

*177 2. The Circuit Split: Tort Recklessness v. Criminal Recklessness

Equating deliberate indifference with recklessness does not resolve the dilemma of formulating elements of liability, because recklessness is no less ambiguous a concept than deliberate indifference. [FN65] Generally, recklessness entails examining the defendant's cognizance of a risk as well as the defendant's conduct in relation to that risk. [FN66] Federal courts evaluate the state of mind and conduct of prison officials in Eighth Amendment inmate-on-inmate assault cases differently, because circuits have variously applied tort recklessness and criminal recklessness. [FN67] The difference between tort and criminal recklessness underlies a significant split of opinion between the circuits.

Tort recklessness, the more prevalent of the two standards in inmate assault claims, [FN68] entails an objective inquiry into the defendant's state of mind. A defendant acts recklessly in tort when a reasonable person would have had reason to know that his or her conduct created an unreasonable and substantial risk of physical harm. [FN69] This objective inquiry permits prisoners to introduce evidence that the officials "should have known" that a prisoner or group of prisoners faced an unreasonable risk of assault. [FN70]

In contrast, to satisfy the subjective state of mind requirement of criminal recklessness, the plaintiff must demonstrate *178 that the defendant actually recognized the risk of danger. [FN71] The Seventh Circuit first applied a criminal recklessness standard to evaluate the Eighth Amendment liability of prison officials in *Duckworth v. Franzen*. [FN72] Reasoning that a gross negligence standard eclipses the "deliberate" component of deliberate indifference, [FN73] the *Franzen* court adopted criminal recklessness as the minimum standard of liability. [FN74] Yet, the court's definition of recklessness did not resolve whether a plaintiff must show that the defendant actually knew of the risk or whether the jury may infer such knowledge. [FN75]

Only one other circuit, the Sixth Circuit, has applied criminal recklessness in an inmate-on-inmate assault case. [FN76] In *Marsh v. Arn*, the Sixth Circuit resolved the ambiguity in *Franzen* against the plaintiff by requiring a showing that the defendant actually knew that the plaintiff would be injured and that the defendant consciously refused to protect the plaintiff from assault. [FN77]

*179 In addition to providing a more lenient state of mind inquiry, the tort recklessness standard provides greater likelihood that courts will adjudge a prison official's actions or omissions unconstitutional. Usually, a prison official's failure to act in the face of a pervasive risk satisfies tort recklessness. [FN78] A few circuits applying an objective knowledge standard require the plaintiff to demonstrate, however, a more egregious omission in the defendant's failure to protect prisoners from violence. [FN79] Nevertheless, prisoners face an even more arduous task in proving criminal recklessness. To prove criminal recklessness, prisoners must demonstrate that in light of the defendant's actual knowledge of an assault risk, the defendant "consciously refused *180 to take steps to protect the prisoner from injury." [FN80]

The Third and Tenth Circuits reject criminal recklessness as the standard of liability in inmate-on-inmate assault cases. [FN81] In *Berry v. City of Muskogee*, [FN82] the Tenth Circuit reasoned that criminal recklessness collapses the distinction between the malicious and sadistic standard and the deliberate indifference standard. [FN83] The *Berry* court accordingly adopted a tort recklessness standard. [FN84] Similarly, the Third Circuit, in *Young v. Quinlan*, [FN85] rejected an actual knowledge requirement in Eighth Amendment inmate-on-inmate assault cases. Citing a Ninth Circuit decision that applied an objective knowledge test in a case where a sexually assaulted pre-trial detainee alleged that jail officials deprived him of due process, [FN86] the Third Circuit reasoned that the standards of liability under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment should be congruent. [FN87] Unlike the *Berry* court, however, the *Young* court distinguished the Eighth Amendment objective test from its underpinnings in tort law. [FN88] Under this stricter variant of the "should have known" test, prisoners must prove that a "lay person would easily recognize" the risk of assault and the need

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for preventative action. [FN89]

Apart from the emerging inter-circuit split, the Seventh Circuit *181 sits internally divided between those judges who favor application of a tort recklessness standard and those who favor a criminal recklessness standard in Eighth Amendment cases challenging safety conditions in prison. [FN90] McGill v. Duckworth attempts to resolve the intra-circuit division by categorically rejecting the objective state of mind approaches in all inmate- on-inmate assault cases.

II. THE SEVENTH CIRCUIT'S DECISION IN MCGILL

Soon after his incarceration at the Indiana State Prison, fellow prisoners labelled Herbert McGill a "snitch," because he testified against another inmate who had assaulted a guard. [FN91] McGill requested placement in the protective custody unit after he sustained a minor assault as a consequence of his testimony. [FN92] Because the protective custody unit was full, prison officials placed McGill in IDU, a unit which principally confines inmates on disciplinary segregation status. [FN93] Prisoners in IDU remain locked in their cells 23 hours a day; for one hour a day, however, the prisoners commingle to use recreational and shower facilities. [FN94]

Two disciplinary status inmates in IDU threatened and harassed McGill shortly after his arrival in IDU. [FN95] Later, McGill requested placement in the unit that solely houses prisoners on protective custody status, but he did not inform officials about the harassment. [FN96] Prison officials denied McGill's renewed *182 request for placement in a safer cellblock, because they could accommodate his request only by returning another protective custody inmate to the general population or into IDU. [FN97] Thereafter, a larger, disciplinary status prisoner, who had earlier harassed McGill, followed McGill to the shower. [FN98] The larger inmate gagged and raped him while three other inmates stood guard wielding knives. [FN99]

Following a trial in the Federal District Court for the Northern District of Indiana, the jury found that the prison superintendent, assistant superintendent, and one guard violated McGill's right to be free from cruel and unusual punishment. [FN100] In their post-trial motions, the defendants challenged the jury instruction that allowed the jury to find deliberate indifference based on the defendant's objective knowledge of the risk. [FN101] The *183 defendants also challenged the sufficiency of evidence to hold each defendant deliberately indifferent to McGill's rights. [FN102] The district court rejected the challenge to the jury instructions, because Seventh Circuit precedent supported a standard based on tort recklessness [FN103] and reasoned that a subjective standard might encourage prison officials to avoid learning of impending violence. [FN104] The court also found that the evidence supported the jury's findings that the prison administrators should have known of the risk facing smaller, protective custody prisoners in IDU, [FN105] and that the defendants acted with deliberate indifference through their policy of commingling the two classes of inmates. [FN106]

*184 The Seventh Circuit reversed, repudiating a state of mind inquiry based on objective standards and tort recklessness. [FN107] The court reasoned that the Supreme Court prefers criminal recklessness because the Supreme Court had cited Duckworth v. Franzen [FN108] "with approval" in two Eighth Amendment cases. [FN109] In rejecting tort recklessness, the court further reasoned that such a standard approaches absolute liability when applied to prison guards and wardens. [FN110] Specifically, the court found that a tort recklessness standard unfairly holds prison employees personally liable for damages even though the responsibility for conditions which aggravate prison violence, such as overcrowding and inmates' temperament, [FN111] rests in part with the legislature through its control of funding. [FN112]

*185 The court held that McGill could prevail only by showing that each defendant had actual knowledge of the threat posed to him by the specific assailants, that the assault was readily preventable, and that instead of intervening to protect McGill, the defendants allowed the assailants to proceed. [FN113] McGill could prove actual knowledge, the court explained, by demonstrating either that he informed prison officials about the specific threat [FN114] or that the prison officials deliberately avoided learning about the threat. [FN115] By requiring McGill to prove actual knowledge of a specific threat, the court defined the risk much more narrowly than McGill's theory of liability would have defined the risk. [FN116]

*186 In absolving the prison officials from Eighth Amendment liability, the court did not find insufficient evidence of actual knowledge, but instead concluded that the record did not show or even imply that officials placed McGill in IDU "because of, rather than in spite of, the risk to him." [FN117] In effect, the officials' good faith efforts to help McGill, albeit constrained due to limits on space and money, insulated them from Eighth Amendment liability. [FN118]

III. THE UNFAIRNESS AND IMPRACTICALITY OF ACTUAL KNOWLEDGE

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A. LACK OF SUPPORTING PRECEDENT

In *McGill v. Duckworth*, the Seventh Circuit erroneously concluded that the Supreme Court equates deliberate indifference with criminal recklessness from the fact that the Court cited *Duckworth v. Franzen* "with approval" in *Whitley v. Albers* and *Wilson v. Seiter*. [FN119] Neither *Whitley* nor *Wilson* supports the actual knowledge holding derived from criminal recklessness. In *Whitley*, the Court did not define "deliberate indifference," because it rejected that standard in cases involving the use of *187 force during prison riots. [FN120] Moreover, *Whitley* cited *Franzen* as a case which aids the trier of fact in determining whether officials used force maliciously and sadistically. [FN121] Thus, *Franzen's* definition of criminal recklessness, as cited in *Whitley*, informs lower courts of the meaning of maliciousness, not deliberate indifference.

In addition, *McGill* ignores *Whitley's* discussion of an objective standard in evaluating maliciousness. Maliciousness, the *Whitley* Court stated, can usually be determined by examining factors such as the need for force and the extent of the prisoner's injury, and then inferring whether the use of force evinced "wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." [FN122] *McGill's* subjective standard in effect elevates "deliberate indifference" above *Whitley's* malicious and sadistic standard, even though the Supreme Court fashioned maliciousness as a higher standard of culpability.

The *McGill* court similarly misconstrued the Court's citation to *Franzen* in *Wilson*. The *Wilson* Court cited *Franzen* to support the proposition that the Eighth Amendment's mental component applies in every prison conditions case, not to define deliberate indifference. [FN123] In fact, the *Wilson* Court cited two inmate-on-inmate assault cases that evaluated the defendant's state of mind by using an objective "should have known" standard. [FN124] Hence, the citation to these two cases indicates that *Wilson* supports an objective standard in inmate assault cases even though the Supreme Court has not expressly defined the deliberate indifference standard.

In *McGill*, the Seventh Circuit purported to interpret and apply *Estelle's* deliberate indifference standard, but the court's reasoning more closely resembles *Whitley's* test of whether force was applied with malice or good faith. [FN125] For example, the Seventh *188 Circuit concluded that the prison officials showed concern for *McGill's* safety by granting him protective custody. [FN126] Although good faith efforts would preclude a finding of malice, the Supreme Court has never accepted the proposition that good faith efforts negate deliberate indifference. [FN127]

The application of criminal recklessness to inmate-on-inmate assault claims undermines the Supreme Court's effort to distinguish malice from deliberate indifference. [FN128] These Eighth Amendment claims do not warrant a high standard of liability because the responsibility to protect prisoners from assault does not clash with "equally important governmental responsibilities." [FN129] Rather, the goal of maintaining prison security chiefly entails prevention of inmate-on-inmate assaults.

B. STATE OF MIND STANDARDS AND FAIRNESS

1. The Unrealistic Burden of Demonstrating Actual Knowledge

In light of the realities of prison life, proving actual knowledge in court is as difficult as it is impractical. In essence, *McGill v. Duckworth* transfers the duty of monitoring prison safety from prison officials to the very prisoners who are at risk. Moreover, *McGill* shifts that duty without considering the obstacles prisoners face in fulfilling this notification duty.

*189 *McGill* requires a prisoner to specifically identify which prisoner will attack him. [FN130] Because prisoners commonly enlist other prisoners to execute assaults, [FN131] a threatened prisoner does not always know which prisoner will execute the assault, thus rendering a specific notice requirement impractical. [FN132] Although wardens and guards confront similar difficulties in identifying specific assailants, they can and should take safety measures to protect prisoners threatened by certain groups of prisoners or by the prison population as a whole.

Of even greater practical concern, *McGill* adopts an absolute rule compelling "snitching" even though such conduct increased plaintiff's risk of assault initially. [FN133] Snitching, informing and cooperating with authorities, is forbidden by the "inmate code." [FN134] Undeniably, prison informants suffer significant risks of reprisal and retribution for snitching. [FN135] Prisoners who inform authorities about particular threats from another prisoner risk retaliation not only from that prisoner but also from the general inmate population. [FN136] Burdening a prisoner to specifically notify authorities constitutes a delusive guarantee of *190 Eighth Amendment protection and inappropriately shifts the analysis from the defendant's state of

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mind to the plaintiff's conduct. [FN137] McGill blatantly overlooks the fact that prisoners often cannot notify officials about specific threats.

In addition, the actual knowledge requirement imposes unfair evidentiary burdens on prisoners. In particular, prisoners will experience great difficulty in meeting their burden when defendants testify that they neither realized the risk facing the prisoner nor were apprised of the prisoner's notification. [FN138] In trials where the question of actual knowledge hinges on weighing the credibility of the testimony, judges and juries will more likely believe the state employee than a prisoner. [FN139]

Due to this evidentiary burden, prisoners need the full gamut of circumstantial evidence in order to prove a defendant's recklessness. According to McGill, however, prisoners can only use circumstantial evidence to show either that the inmate notified officials or that the officials deliberately avoided learning unwelcome knowledge. [FN140] This restriction is unfair because plaintiffs generally prove recklessness, even in the criminal sense, by drawing general inferences from the totality of circumstances. [FN141] McGill burdens prisoners with an actual knowledge standard, while substantially limiting their ability to meet that standard.

2. The Illusory Policy Objections to Tort Recklessness

The Sixth and Seventh Circuits raised four principal policy objections to applying a "should have known" standard in inmate assault cases. In McGill, the Seventh Circuit presented two policy objections: objective standards, applied to prison officials and prison guards, create absolute liability and unfairness. [FN142] The Sixth Circuit has concluded that a lower standard of liability also impinges on a state's ability to retain qualified prison staff and fails to accord due deference to the security decisions of prison officials. [FN143]

These objections provide insufficient bases for adopting the extremely demanding standard of criminal recklessness. The McGill court distorts the nature of the objective standard by equating "should have known" with absolute liability. [FN144] Prisoners cannot prevail on their Eighth Amendment claims, no matter how lenient the standard, simply by showing that they sustained an injurious attack from another prisoner. Tort recklessness obligates prisoners to demonstrate an unreasonable risk of assault and, at a minimum, an unreasonable failure by officials or guards to respond to that risk. [FN145] Jurors need not and will not always find that a defendant "should have known" the plaintiff faced a threat of assault. The objective standard, however, at least allows a jury to determine at which point the defendant's ignorance of assault risks constitutes reckless behavior. [FN146]

The McGill court most strenuously objects to applying tort recklessness when prison staff face personal liability for "circumstances beyond their control." [FN147] According to the McGill court, prison employees should not bear the costs, in the form of compensatory damages, of violence precipitated by overcrowded and underfunded prison facilities. [FN148] The McGill decision fails, however, to distinguish the issue of constitutional violations from the issue of appropriate relief. Moreover, McGill's concept of "responsibility" implicitly sanctions the "cost defense" as an effective way to negate a finding of deliberate indifference. The Supreme Court, however, has never sanctioned a "cost defense." [FN149]

Furthermore, prison employees should be held personally liable when overcrowding and other systemic deficiencies produce *192 conditions conducive to violent behavior. Normally, state lawyers represent corrections personnel when prisoners sue them in their personal capacities. [FN150] Moreover, states generally indemnify individual defendants from liability for damages. [FN151] Hence, tort recklessness does not unfairly burden prison employees. Rather, indemnity forces the state's treasury to bear the cost of constitutional violations and provides states with a financial incentive to reduce overcrowding and remedy other systemic deficiencies. [FN152] Safer prisons ultimately serve the state's interests in prisoner rehabilitation and in lessening the risk of full scale riots. [FN153]

Nor can the McGill court justify its higher liability threshold by arguing that it promotes other, equally important state interests. Because prison employees generally do not personally pay damages, [FN154] personal liability does not impede state efforts to recruit and retain qualified personnel. In fact, conscientious prison administrators may even welcome liability as a means of pressuring the state legislature to provide adequate funding for security measures.

The principle that courts should defer to the considered choices of prison officials does not apply in the context of protecting prisoners from assault and that principle certainly does not justify imposing an extremely high standard of liability. Concededly, deference may promote the exercise of administrative discretion to ameliorate security problems. Courts cannot,

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however, practicably defer to the defendants' state of mind or knowledge because, unlike policy choices, monitoring safety risks and investigating potential threats do not entail considered choices between alternatives. [FN155] The state of mind issue in Eighth Amendment inmate-on-inmate assault claims does not center *193 upon policy choices but upon whether the defendant has taken constitutionally adequate steps to become apprised of and respond to risks of physical and sexual assault.

3. The Soundness of Tort Recklessness

Criminal recklessness simply does not "hold the balance true" [FN156] between the Eighth Amendment rights of prisoners and state interests. In contrast to the unfairness and impracticality of criminal recklessness, tort recklessness preserves the jurisprudence developed to protect an identifiably vulnerable prisoner from physical and sexual assault. Similarly, tort recklessness encourages vigilance on the part of prison officials and guards in recognizing and responding to assault risks. Further, the tort standard maintains congruence with Fourteenth Amendment due process standards and the qualified immunity doctrine. Moreover, it promotes the evolution of the Eighth Amendment by allowing jurors to evaluate claims based in part upon the "standards of decency that mark the progress of a maturing society." [FN157]

As applied in McGill, criminal recklessness contradicts Eighth Amendment jurisprudence that was designed to protect vulnerable prisoners. Younger, smaller prisoners generally encounter the constant threat of sexual assault by other inmates; [FN158] for them, prisons are indeed "dangerous places." [FN159] A pervasive risk of sexual assault, demonstrated by past incidents of rape, gives prison officials notice of a security problem and the need for remedial measures. A prisoner's Eighth Amendment right to be free from a pervasive risk of sexual assault should not vest only when officials know which specific prisoner will attack.

Tort recklessness realistically estimates prison officials' and guards' ability to reduce incidents of violence between prisoners. [FN160] Officials may enact policies which improve inmate classification *194 and separate inmates into compatible categories. [FN161] Wardens can ensure that employees report incidents of violence for prosecution. [FN162] As the "primary 'agents of influence'" on prison behavior, [FN163] prison guards also can reduce the number of assaults committed by prisoners under their charge. Holding prison guards liable when they "should have known" of the risk encourages guards to maintain the highest possible level of surveillance. [FN164]

The objective state of mind inquiry of tort recklessness maintains appropriate consistency between the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the doctrine of qualified immunity. Under the Eighth Amendment, convicted prisoners should receive the same degree of protection from assault and bear no greater burden in constitutional litigation than pre-trial detainees. [FN165] Also, congruence between the Eighth Amendment standard of liability and the objective *195 qualified immunity defense allows greater simplicity in the complex practice of section 1983 claims. [FN166]

The Supreme Court has established that the meaning of cruel and unusual punishment evolves and "acquires meaning as public opinion becomes enlightened with humane justice." [FN167] Unlike criminal recklessness, an objective standard allows jurors to determine what level of surveillance and protection guards and officials must provide in order to conform to "American conceptions of decency." [FN168]

CONCLUSION

The Supreme Court has indirectly compelled the lower courts to apply the "deliberate indifference" standard when evaluating a prison official's state of mind in Eighth Amendment prison assault cases. Most federal circuit courts equate "deliberate indifference" with tort recklessness and allow prisoners to demonstrate that the officials "should have known" of the general risk of assault. The Seventh Circuit's decision in McGill v. Duckworth, however, imposes a subjective actual knowledge standard based on criminal recklessness. This standard effectively limits constitutional protection to rare cases in which a prisoner notifies officials about a specific threat of harm.

Supreme Court precedent does not support application of a subjective state of mind standard in Eighth Amendment inmate assault claims. Moreover, the Seventh Circuit's concern that an objective standard unfairly holds prison employees personally liable for circumstances beyond their control underestimates the power of wardens and guards to reduce inmate assaults and ignores the fact that states generally indemnify such individuals against damage awards. Ultimately, in terms of rehabilitative goals and prison security, McGill's high threshold of liability works against state interests. Most important, unlike the law applied in McGill, an objective "should have known" standard preserves prisoners' constitutional rights to personal security

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and protection from pervasive risks of sexual and physical assault.

[FN1]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). Prisoners labelled McGill a snitch after he testified against an inmate who had assaulted a prison guard. *Id.* McGill's problems began even before he testified against the inmate. When he arrived at the prison, McGill received sexually suggestive comments and notes from other inmates. *Id.* McGill consequently requested a transfer to another institution. *Id.* Officials denied his request but moved him closer to a guard's station. *Id.*

[FN2]. *Id.* One unit of the prison solely houses prisoners on protective custody status. *Id.* When this unit is full, prisoners in need of protective custody are placed in the IDU unit which principally holds prisoners on disciplinary status. *Id.* When the prison officials addressed McGill's request for protective custody, the protective custody unit was filled to capacity. *Id.* Thus, officials placed McGill in IDU. *Id.*

[FN3]. *Id.* IDU prisoners may choose to remain in their cells all day or, alternatively, may arrange for a particular time to leave their cells. *Id.*

[FN4]. *Id.* Earlier, this inmate, Ausley, and another disciplinary status inmate, Halliburton, approached McGill in his cell and threatened him. *Id.* Although McGill asked prison officials to remove him from IDU, he did not inform them of this harassment. *Id.*

[FN5]. *Id.*

[FN6]. 42 U.S.C. § 1983 (1988).

[FN7]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). McGill also brought a pendent claim of negligence under Indiana law. *Id.*

[FN8]. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[FN9]. *McGill v. Duckworth*, 726 F. Supp. 1144, 1156 (N.D. Ind. 1989), aff'd in part, rev'd in part, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). The jury returned a verdict in favor of McGill and awarded damages in the amount of \$10,000. *McGill*, 944 F.2d at 347.

[FN10]. The district court denied prison guard Brian Webb's motion for judgment notwithstanding the verdict and sustained the jury verdict against Webb on the grounds that a jury could have reasonably found that Webb acted with deliberate indifference in patrolling the IDU before and after the attack. *McGill*, 726 F. Supp. at 1156.

[FN11]. The district court similarly denied motions by the prison superintendent and assistant superintendent for judgment notwithstanding the verdict on the grounds that they knew "young white boys" in IDU were at physical risk from disciplinary segregation inmates, yet they continued the policy of commingling the two classes within the IDU. *Id.*

[FN12]. *McGill*, 944 F.2d at 349. In addition, the Seventh Circuit overturned the negligence verdict because McGill knew that Ausley and Halliburton were following him to the shower and, yet, he failed to avoid the problem by returning to his cell and closing the door. *Id.* at 352-53. For a detailed discussion of the Seventh Circuit's reasoning, see *infra* notes 107-118 and accompanying text.

[FN13]. In terms of constitutional protection, the Due Process Clause of the Fourteenth Amendment provides another basis of relief for prisoners; insofar as prison officials cannot intentionally deny prisoners their right to personal security without procedural due process. Cf. *Davidson v. Cannon*, 474 U.S. 344 (1986) (stating that due process is not implicated by mere negligence of state official). The Eighth Amendment, however, "serves as the primary source of substantive protection to convicted prisoners," *Whitley v. Albers*, 475 U.S. 312, 327 (1986), whereas the Fourteenth Amendment's Due Process Clause protects pre-trial detainees from punishment. See *Bell v. Wolfish*, 441 U.S. 520, 536-40 (1979). Accordingly, most convicted prisoners challenge the conduct of prison officials and their staff under the Eighth Amendment. In addition to constitutional bases of relief, inmates in state prisons may seek relief in state courts under general tort theories of recovery. See Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison*

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[Condition Law, 41 AM. U. L. REV. 1339, 1342 n.15 \(1992\).](#)

[FN14]. McGill is far from alone in being subjected to assault while incarcerated. Prisoners physically and sexually assault other prisoners with alarming frequency. See generally [United States v. Bailey, 444 U.S. 394, 421](#) (Blackmun, J., dissenting) (discussing abuse of prisoners by other prisoners and by correctional officers); CARL WEISS & DAVID J. FRIAR, *TERROR IN THE PRISONS* (1974) (reviewing prevalence of homosexual rape in prison); James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 *DRAKE L. REV.* 101, 104-05 (1985) (discussing rates of homicide, assault, and rape in prison); 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, 1544-45 (1992) (addressing frequency of homosexual rape among male prisoners).

Indisputably, inmate violence presents a serious societal problem. Many commentators assert that victimized prisoners are likely to assault other people when released. See Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 *INT'L. J. SOC. LAW* 135, 144-48 (1992); Steve Lerner, *Rule of the Cruel*, *THE NEW REPUBLIC*, Oct. 15, 1984, at 17. Further, sexual assaults in prison pose public health problems, particularly the risk of spreading the AIDS virus. See Siegal, *supra*, at 1547-51.

[FN15]. Robertson, *supra* note 14, at 103. The hands-off doctrine operated as a jurisdictional bar to prisoners' claims. Ronald L. Goldfarb & Linda Singer, *Redressing Prisoner's Grievances*, 39 *GEO. WASH. L. REV.* 175, 181 (1970). Three distinct rationales supported the hands-off doctrine: that judicial oversight is inconsistent with separation of powers; that courts lack expertise in penology; and that judicial oversight would subvert prison discipline. *Id.* at 181. Principles of federalism provided an additional rationale for restraining federal courts from reviewing the complaints of state prisoners. See Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506, 515 (1963) (discussing "quasi-separation of powers argument").

[FN16]. See, e.g., [Trop v. Dulles, 356 U.S. 86 \(1958\)](#) (overturning sentence which revoked defendant's American citizenship for deserting the army during wartime); [Weems v. United States, 217 U.S. 349 \(1910\)](#) (overturning sentence imprisoning defendant for 15 years, in chains, at hard labor for falsifying a public document).

[FN17]. In 1974, the Court dramatically renounced the hands-off doctrine stating: "There is no iron curtain drawn between the Constitution and the prisons of this country." [Wolff v. McDonnell, 418 U.S. 539, 555-56 \(1974\)](#). Accordingly, the Court applied the principles of Eighth Amendment law developed during the hands-off era to prison condition cases. See [Estelle v. Gamble, 429 U.S. 97, 102-03 \(1976\)](#).

Most significantly, the Supreme Court established the flexible and dynamic nature of the Cruel and Unusual Punishment Clause in cases challenging the severity or proportionality of sentences. For instance, the Court stated that the meaning of the Eighth Amendment evolves with the "standards of decency that mark the progress of a maturing society." [Trop, 356 U.S. at 101](#); see, e.g., [Weems, 217 U.S. at 378](#) (The Eighth Amendment "may therefore be progressive, and is not fastened to the absolute but may acquire meaning as public opinion becomes enlightened by a humane justice."); see also Michael C. Friedman, Note, [Cruel and Unusual Punishment in the Provision of Medical Care: Challenging the Deliberate Indifference Standard](#), 45 *VAND. L. REV.* 921, 926 (1992) (stating that Eighth Amendment analysis is "not static").

[FN18]. The Supreme Court recently held that prisoners must show a culpable state of mind in all prison condition cases, in addition to showing that the conditions deprive prisoners of a "single identifiable human need." [Wilson v. Seiter, 111 S. Ct. 2321, 2327 \(1991\)](#). Before *Wilson*, the Court applied a state of mind requirement only in cases involving the treatment of one or a few prisoners, and not in cases involving prison conditions which affected the prison population as a whole. *Id.* at 2323-25. The *Wilson* court abolished this distinction. *Id.* at 2326. See *infra* note 35.

[FN19]. [429 U.S. 97 \(1976\)](#).

[FN20]. *Id.* at 104 (quoting [Gregg v. Georgia, 428 U.S. 153, 173 \(1976\)](#)). In the seminal case of *Estelle*, the Supreme Court extended the reach of the Eighth Amendment to prison conditions. [Helling v. McKinney, 113 S. Ct. 2475, 2484 \(1993\)](#) (Thomas, J., dissenting). The Court recognized that a prisoner has a constitutional right to adequate medical care because prisoners must rely on prison authorities for treatment. [Estelle, 429 U.S. at 103](#). The Court reasoned that, in severe cases, denial of adequate medical care produces "physical 'torture or lingering death,'" and that such denial produces pain and suffering without any penological purpose. *Id.* at 103 (citing *In re Kemmler, 136 U.S. 436, 447 (1890)*). In addition to the logical obligation of authorities to assume responsibility for the medical care of prisoners, the Court stated that unnecessary suffering is inconsistent with "contemporary standards of decency" reflected in state legislation affirming the public's

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obligation to provide medical care to prisoners who, due to their incarceration, are stripped of their own ability to arrange for medical services. *Estelle*, 429 U.S. at 103-04.

[FN21]. *Estelle*, 429 U.S. at 107. Gamble injured his back when a bale of cotton fell on him while he unloaded a truck at the prison. *Id.* at 99. Prison authorities provided some medical care, however, for Gamble's back condition, high blood pressure, and heart problem. *Id.* at 107.

[FN22]. *Id.* According to the Court, the decision whether to X-ray or provide additional diagnostic techniques "is a classic example of a matter of medical judgment." *Id.*

[FN23]. *Id.* at 105-06. The Court cited *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947), to support its conclusion that negligent acts by prison officials do not rise to the level of constitutional violations. *Estelle*, 429 U.S. at 105. In *Resweber*, the Court concluded that subjecting a prisoner to a second electrocution attempt does not violate the Due Process Clause because the first attempt had been the result of an "innocent misadventure." 329 U.S. at 470. Noting that Gamble could pursue his claim under the Texas Tort Claims Act, the Court concluded that negligence simply does not have constitutional stature. *Estelle*, 429 U.S. at 105-07. Hence, to state a cognizable Eighth Amendment claim for the denial of medical care, a prisoner "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106.

[FN24]. 475 U.S. 312 (1986).

[FN25]. *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. *Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973)).

[FN26]. *Whitley*, 475 U.S. at 314-17. On January 27, 1980, prison guards attempted to move some intoxicated prisoners. *Id.* at 314. Other prisoners became agitated when they thought the guards used unnecessary force. *Id.* Several inmates confronted two guards and took one guard hostage. *Id.* Inmates began to break furniture and assault another prisoner. *Id.* at 315. Captain Whitley assembled an assault squad and, in his attempt to rescue the captured prison guard, members of the squad shot two inmates. *Id.* at 316.

[FN27]. *Id.* at 325.

[FN28]. Specifically, during a prison riot, officials must balance "the very real threats the unrest presents to inmates and prison officials alike" with "the possible harms to inmates against whom force might be used." *Id.* at 320.

[FN29]. *Id.* The Court distinguished *Estelle*, reasoning that "deliberate indifference to a prisoner's serious illness or injury . . . can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates." *Id.*

[FN30]. 111 S. Ct. 2321 (1991).

[FN31]. *Id.* at 2323. The plaintiff, incarcerated at the Hocking Correctional Facility in Nelsonville, Ohio, also alleged insufficient locker storage space, improper ventilation, unclean and inadequate rest rooms, unsanitary dining facilities and food preparation, and inadequate segregation of mentally and physically ill inmates. *Id.*

[FN32]. *Id.* at 2322-23.

[FN33]. *Id.* at 2326-27.

[FN34]. *Id.* The Court stated that "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Id.* The Court also reasoned that the responsibility of prison officials to ensure humane living conditions does not clash with competing institutional responsibilities. *Id.* at 2326.

[FN35]. *Id.* at 2325. The Court justified imposing a state of mind requirement in all prison condition cases on the ground that the word "punishment" in the Cruel and Unusual Punishment Clause implies a deliberate act to chastise or deter. *Id.* (citing

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[Duckworth v. Franzen](#), 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986)).

The United States, as amicus curiae, suggested that a state of mind requirement in cases challenging the general conditions of confinement would allow "officials to interpose the defense that, despite good faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions." *Id.* at 2326. Since the parties did not address the "cost defense," the court did not resolve this issue. The Court noted, however, that there is no "indication that other officials have sought to use such a defense to avoid the holding of *Estelle v. Gamble*." *Id.*

The four dissenting justices believed that a state of mind requirement is not necessary when the claim challenges conditions affecting the prison population generally. *Id.* at 2330. Rather, the dissenters argued that a violation of the Eighth Amendment turns solely on the objective severity of the conditions. *Id.*

[FN36]. *Id.* at 2327.

[FN37]. See [Moore v. Winebrenner](#), 927 F.2d 1312, 1316 (4th Cir.), cert. denied, 112 S. Ct. 97 (1991) (holding that Eighth Amendment liability attaches only if the defendant acted wantonly and obdurately). The Moore court's unrefined wantonness standard seems inconsistent with the Supreme Court's decision in *Wilson*. The *Wilson* decision explicitly states that the meaning of wantonness varies according to the context in which the claim arises. [Wilson](#), 111 S. Ct. 2321, 2326 (1991). For example, maliciousness embodies wantonness when prison authorities apply force to quell a prison disturbance. *Id.* (stating that "Whitley makes clear . . . that . . . wantonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged'").

[FN38]. See, e.g., [Marsh v. Arn](#), 937 F.2d 1056, 1060 (6th Cir. 1991); [Berry v. City of Muskogee](#), 900 F.2d 1489, 1495 (10th Cir. 1990); [Cortes- Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); [Campbell v. Greer](#), 831 F.2d 700, 702-03 (7th Cir. 1987); [Berg v. Kincheloe](#), 794 F.2d 457, 459 (9th Cir. 1986); [Ayers v. Coughlin](#), 780 F.2d 205, 209 (2d Cir. 1985) (per curiam); [Riley v. Jeffes](#), 777 F.2d 143, 147 (3d Cir. 1985); [Martin v. White](#), 742 F.2d 469, 474 (8th Cir. 1984); [Murphy v. United States](#), 653 F.2d 637, 644-45 (D.C. Cir. 1981); [Jones v. Diamond](#), 636 F.2d 1364, 1378 (5th Cir. 1981) (en banc), overruled by [International Woodworkers v. Champion Int'l Corp.](#), 790 F.2d 1174 (5th Cir. 1986).

[FN39]. See [Alberti v. Sheriff of Harris County](#), 978 F.2d 893, 895 (5th Cir. 1992) (per curiam), cert. denied, 113 S. Ct. 2996 (1993); [Berry](#), 900 F.2d at 1494-95; [Hendricks v. Coughlin](#), 942 F.2d 109, 112-13 (2d Cir. 1991); [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057-58 (D.C. Cir. 1987). In these cases, the courts of appeal reasoned that the concerns justifying the higher malicious and sadistic standard are not salient in non- riot assault situations. See, e.g., [Berry](#), 900 F.2d at 1495.

Further, the *Berry* court held that, in a case where prisoners fatally attacked another prisoner, deliberate indifference embodies a sufficiently high level of culpability to "capture" the importance of . . . competing obligations" of prison officials and does not lead to an inappropriate hindsight critique of "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* (quoting [Whitley v. Albers](#), 475 U.S. 312, 327 (1986)); see also [Alberti](#), 978 F.2d at 895 (confining *Wilson*'s malice standard to situations of an emergency or an immediate nature); [Hendricks](#), 942 F.2d at 113 (reasoning that the duty to protect prisoners from violence ordinarily involves no competing penological policies); [Morgan](#), 824 F.2d at 1057-58 (stating that inmate assaults precipitated by overcrowding do not raise legitimate concerns that courts will critique, in hindsight, decisions made in haste).

[FN40]. See *infra* notes 48-90 and accompanying text.

[FN41]. See [Marsh](#), 937 F.2d at 1066 (noting that the standard is not easily defined); [Berry](#), 900 F.2d at 1495 (observing that the term is not self-defining and courts struggle to give the term a practical meaning); see also *Gray*, *supra* note 13, at 1367.

[FN42]. [Duckworth v. Franzen](#), 780 F.2d 645, 652 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986) (observing that the term "evades rather than expresses meaning").

[FN43]. See [Whitley](#), 475 U.S. at 319 (declaring, in reference to [Estelle v. Gamble](#), 429 U.S. 97 (1976), that a person need not show that the defendants expressly intended to inflict unnecessary pain but must show more than inadvertent conduct to state an Eighth Amendment claim). The Supreme Court has not yet decided an Eighth Amendment inmate-on-inmate assault claim and therefore has not directly addressed the meaning of deliberate indifference in this context. In [Davidson v. Cannon](#), however, the Court decided an inmate assault claim based on the Due Process Clause. 474 U.S. 344 (1986). The Court rejected a prisoner's claim that officials abridged his Fourteenth Amendment due process rights by inadequately protecting him from assault. *Id.* at 347-48. The Court held that the prison officials, at most, negligently failed to protect the plaintiff

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from assault, and the officials' negligence did not constitute "abuse of governmental power" that the Due Process Clause protects against. *Id.* Yet, the Court did not define whether alternative degrees of intent, such as recklessness, violate the Due Process Clause. See [Whitley v. Albers](#), 475 U.S. 312, 327 (1986).

[FN44]. The defendant's mental state and conduct comprise the two principal elements of an Eighth Amendment claim. Since prisoners bring their Eighth Amendment claims via 42 U.S.C. § 1983, however, prisoner-plaintiffs encounter additional burdens and limitations. For instance, § 1983 requires proof of a causal connection between the defendant's acts or omissions and the alleged constitutional deprivation. [Zatler v. Wainwright](#), 802 F.2d 397, 400 (11th Cir. 1986) (per curiam). Proving the liability of supervisors and other officials thus requires prisoners to show the defendant's personal involvement in the alleged deficient conduct. See [Ayers v. Coughlin](#), 780 F.2d 205, 210 (2d Cir. 1985). A supervisor's liability cannot be predicated on the principles of respondeat superior. See [Bailey v. Wood](#), 909 F.2d 1197, 1201 (8th Cir. 1990).

Moreover, various types of immunity constitute the most significant limitation on Eighth Amendment suits under § 1983. Significantly, state governments and employees in their official capacities enjoy sovereign immunity, see [Will v. Michigan Dept. of State Police](#), 491 U.S. 58, 63 (1989), and officials sued in their personal capacities possess qualified immunity from constitutional suits. For a more detailed discussion of 42 U.S.C. § 1983 and relevant procedural issues, see generally [Twenty-First Annual Review of Criminal Procedure: Prisoners' Rights: Procedural Means of Enforcement under Section 1983](#), 80 GEO. L.J 1710 (1992).

[FN45]. See, e.g., [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057 (D.C. Cir. 1987); [Feigley v. Fulcomer](#), 720 F. Supp. 475, 478 (M.D. Pa. 1989); [Fisher v. Koehler](#), 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988).

The Eighth Amendment duty of prison officials and guards, indeed all state actors, to protect prisoners from violence at the hands of other prisoners, is likewise well-established. [Marsh v. Arn](#), 937 F.2d 1056, 1069 (6th Cir. 1991); [Zatler](#), 802 F.2d at 400 (citing [Gullate v. Potts](#), 654 F.2d 1007, 1012 (5th Cir. 1981)). The basis of the prison official's constitutional duty rests on logic similar to that employed by the Court in [Estelle v. Gamble](#), 429 U.S. 97, 104 (1976). See *supra* note 20. Incarceration deprives prisoners of the means of self-protection just as it deprives prisoners of the means to arrange for medical care. See [Davidson v. Cannon](#), 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting). In addition, without relief from prison officials, victims of inmate assault would remain uncompensated because the prisoner who attacked them is most likely indigent. [Marsh](#), 937 F.2d at 1069.

Several states have voluntarily assumed the duty to protect prisoners by enacting statutes charging prison officials with the responsibility of protecting inmates. See, e.g., [Fla. Stat. Ann. § 20.315\(1\)\(c\)](#) (West 1985) (directing employees of the Department of Corrections to protect "the offender from victimization within the institution").

[FN46]. See [Marsh](#), 937 F.2d at 1070; [Shrader v. White](#), 761 F.2d 975, 980 (4th Cir. 1985).

[FN47]. See [Woodhouse v. Virginia](#), 487 F.2d 889 (4th Cir. 1973) (per curiam). In [Woodhouse](#), the Fourth Circuit held that "confinement in a prison where violence and terror reign is actionable." *Id.* at 890. Later, the Fourth Circuit explained that "a reign of violence and terror," or conditions "approaching anarchy," are not the minimum standard of liability. [Withers v. Levine](#), 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980). The [Withers](#) court explained that the duty to protect prisoners arises if assaults occur with sufficient frequency to place an identifiable group of prisoners in "reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures." *Id.* Therefore, prisoners who fear assault can state an Eighth Amendment claim for relief. [Woodhouse](#), 487 F.2d at 890; see also [Siegal](#), *supra* note 14, at 1559 n.136 (citing cases).

[FN48]. See, e.g., [Doe v. Sullivan County](#), 956 F.2d 545, 555 (6th Cir.), cert. denied, 113 S. Ct. 187 (1992); [Riley v. Jeffes](#), 777 F.2d 143, 147 (3d Cir. 1985); [Martin v. White](#), 742 F.2d 469, 474 (8th Cir. 1984); [Woodhouse](#), 487 F.2d at 890.

[FN49]. [Morgan v. District of Columbia](#), 824 F.2d 1049, 1058 (D.C. Cir. 1987).

[FN50]. See [Purvis v. Ponte](#), 929 F.2d 822, 826 (1st Cir. 1991) (per curiam); [Berry v. City of Muskogee](#), 900 F.2d 1489, 1498 (10th Cir. 1990).

[FN51]. Occasionally, courts define the risk more narrowly than the plaintiff's theory. See, e.g., [Porm v. White](#), 762 F.2d 635 (8th Cir. 1985). In [Porm](#), the plaintiff alleged that white inmates who worked in the cafeteria faced a risk of attack from black inmates. *Id.* at 637. Although the plaintiff defined the risk broadly, the court absolved a supervisor because the plaintiff failed to show that he faced a peculiar risk to himself. *Id.*; see also [Siegal](#), *supra* note 14, at 1572 (arguing that courts have shown the ability to "define the risk narrowly when they are inclined to deny relief, and, conversely, define [the risk] broadly when

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they are inclined to extend relief.").

[FN52]. See, e.g., *Shrader v. White*, 761 F.2d 975, 977-78 (4th Cir. 1985); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam).

[FN53]. The most common "identifiable group of vulnerable inmates" appears to be young, white, male prisoners of slight physical stature. See *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980); see also, Robertson, supra note 14, at 115. Courts have recognized other types of "identifiable groups of vulnerable inmates." See *Walsh v. Mellas*, 837 F.2d 789, 797 (7th Cir. 1988) (inmates targeted by gangs); *Martin v. White*, 742 F.2d 469, 475 n.6 (8th Cir. 1984) (new entrants to a prison facility); *Gullate v. Potts*, 654 F.2d 1007, 1013 (5th Cir. 1981) ("snitches"); *Blizzard v. Quillen*, 579 F. Supp. 1446, 1450 (D. De. 1984) (same).

[FN54]. See, e.g., *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992); *Bailey v. Wood*, 909 F.2d 1197, 1199-1200 (8th Cir. 1990); *Wilks v. Young*, 897 F.2d 896, 897 (7th Cir. 1990); *Ayers v. Coughlin*, 780 F.2d 205, 207 (2d Cir. 1985).

[FN55]. See *Withers*, 615 F.2d at 161 (stating that "a pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents" of violence); see, e.g., *Purvis v. Ponte*, 929 F.2d 822, 827 (1st Cir. 1991) (per curiam) (holding prisoner's allegation that he faced gaybashing insufficient to establish pervasive risk of harm); *Murphy v. United States*, 653 F.2d 637, 655 (D.C. Cir. 1981) (concluding that 20 assaults during a one year period did not establish a pervasive risk of harm within an institution incarcerating 344 prisoners). But see *Goka v. Bobbit*, 862 F.2d 646, 652 (7th Cir. 1988) (holding that 13 attacks with broomsticks within a two year period created an issue of material fact regarding the existence of a pervasive risk of attack); *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir.), cert. denied, 488 U.S. 928 (1988) (finding that evidence demonstrating that prisoners raped plaintiff four times and that prisoners routinely raped other young inmates established a pervasive risk of assault).

Prisoners usually demonstrate the pervasiveness of assaults by introducing evidence on the high number of assaults reported to authorities and the requests for protective custody. See Robertson, supra note 14, at 116-17. Relying on reported assaults is problematic because in most prison facilities the number of assaults vastly exceeds the number of reported assaults. Id.

[FN56]. See *Shrader v. White*, 761 F.2d 975, 981 (4th Cir. 1985) (absolving officials from liability because assaults occurred less frequently in their facility than in other facilities); *Murphy*, 653 F.2d at 645 (same).

[FN57]. See *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992); Siegal, supra note 13, at 1558.

[FN58]. See *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). In *Wilson*, the Court stated that the "long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent." Id. at 2325.

In *Withers v. Levine*, the standard of liability directly incorporates a notice requirement: violence and sexual assaults must occur with sufficient frequency to "reasonably apprise prison officials of the existence of the problem and the need for protective measures." 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980); see also *Falls v. Nesbitt*, 966 F.2d 375, 378 (8th Cir. 1992); *Murphy v. United States*, 653 F.2d 637, 644 (D.C. Cir. 1981); *Redmond v. Baxley*, 475 F. Supp. 1111, 1117 (E.D. Mich. 1979).

[FN59]. RESTATEMENT (SECOND) OF TORTS § 320 (1965).

[FN60]. The Fourth Circuit initially adopted the Restatement's formula in *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam). Several other circuits followed the Fourth Circuit's decision in *Woodhous*. See *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991) (per curiam); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984); *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984).

[FN61]. RESTATEMENT (SECOND) OF TORTS § 320 (1965). Because "failure to exercise reasonable care" states a negligence standard, according to which inadvertent surveillance of prisoners constitutes actionable conduct, prisoners were not burdened with showing that the defendants knew or had reason to know of a risk of assault.

[FN62]. See supra notes 22-23 and accompanying text.

[FN63]. See, e.g., *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985) (modifying *Withers v. Levine*, insofar as that decision seemed to define a negligence standard, in light of the holding of *Rhodes v. Chapman*, 452 U.S. 337 (1981)).

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[FN64]. See, e.g., [Marsh v. Arn](#), 937 F.2d 1056, 1068-70 (6th Cir. 1991); [Berry v. City of Muskogee](#), 900 F.2d 1489, 1499 (10th Cir. 1990); [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); [Richardson v. Penfold](#), 839 F.2d 392, 395 (7th Cir. 1988); [Zatler v. Wainwright](#), 802 F.2d 397, 401-02 (11th Cir. 1986); [Berg v. Kincheloe](#), 794 F.2d 457, 460 (9th Cir. 1986); [Ayers v. Coughlin](#), 780 F.2d 205, 209 (2d Cir. 1985); see also Gray, *supra* note 13, at 1372.

[FN65]. See Gray, *supra* note 13, at 1372-73 (commenting that recklessness is an amorphous concept because it is comprised of varying levels and degrees).

[FN66]. WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW*, § 3.7, at 239 (2d ed. 1986).

[FN67]. Only the Sixth and Seventh Circuits have applied a recklessness standard derived from the criminal law in inmate-upon-inmate assault cases. See [Marsh](#), 937 F.2d at 1061; [Campbell v. Greer](#), 831 F.2d 700, 702 (7th Cir. 1987).

[FN68]. See *supra* note 67.

[FN69]. *RESTATEMENT (SECOND) OF TORTS* § 500 (1965).

[FN70]. See, e.g., [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 559-60 (1st Cir.), cert. denied, 488 U.S. 823 (1988) (holding that plaintiff presented sufficient evidence for jury to conclude that Puerto Rican prison officials should have known that commingling psychologically disturbed prisoners with the general population jeopardized the safety of the disturbed prisoner); [Richardson v. Penfold](#), 839 F.2d 392, 396 (7th Cir. 1988) (holding summary judgment improper when prisoner introduced evidence alleging defendants knew or should have known that plaintiff's assailant raped other inmates); [Morgan v. District of Columbia](#), 824 F.2d 1049, 1058-59 (D.C. Cir. 1987) (holding that plaintiff presented sufficient evidence for jury to conclude that government employees should have known that plaintiff's assailant posed a serious danger to other inmates given his criminal history, prior prison fights, prior threats of assault, and psychiatric problems).

[FN71]. See Ira P. Robbins, [The Ostrich Instruction: Deliberate Indifference as a Criminal Mens Rea](#), 81 J. CRIM. L. & CRIMINOLOGY 191, 220-21 (Summer 1990).

[FN72]. 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986). In *Franzen*, one prisoner died and several prisoners suffered serious injuries when the bus in which they were riding caught fire. *Id.* at 648. The prisoners were unable to exit the bus because authorities had chained them together and all but the front exits of the bus were sealed for security reasons. *Id.* The prisoners sued three Illinois prison officials and three guards, charging that they failed to take adequate precautions against the consequences of a bus fire. *Id.*

[FN73]. *Id.* at 653.

[FN74]. *Id.* at 652-53. The *Franzen* court stated that second degree murder provides a classic example of criminal recklessness, such as where a "defendant chokes his victim, intending to injure him seriously but not to kill him, but death results." *Id.* at 652. Committing an act that is "socially costless to avoid" and "highly dangerous" also exemplifies criminal recklessness. *Id.*

[FN75]. The *Franzen* court stated that "recklessness in criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred." *Id.* Later in its opinion, however, the court states that "[p]unishment 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." *Id.* at 653. Thus, the court failed to clarify whether a finder of fact may infer knowledge, and if knowledge of a substantial risk is inferred, whether a finder of fact must also infer a "conscious, culpable refusal to prevent the harm."

[FN76]. See [Marsh v. Arn](#), 937 F.2d 1056, 1061 (6th Cir. 1991).

[FN77]. *Id.* In *Marsh*, an inmate with a violent criminal history and record of fighting in prison beat her cellmate with a padlock causing her serious injury. *Id.* at 1059. The court of appeals absolved all defendants of liability. *Id.* The court overturned jury verdicts against two defendants on the grounds that the plaintiff failed to prove that the defendants knew that the assailant posed a specific risk of harm to the plaintiff. *Id.* at 1061, 1063-64.

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The Marsh court expressed a strong reluctance to award damages against prison employees in their personal capacity. *Id.* at 1070. According to the court, absent a high standard of liability, states and municipalities will have difficulty recruiting qualified prison staff. *Id.* Judge Kennedy, concurring separately, stressed that judges must extend deference to a prison administrator's security decisions. *Id.* at 1072.

[FN78]. See, e.g., *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir.) (upholding liability of warden for failing to develop adequate administrative policies to protect plaintiff and similarly situated prisoners from risk of sexual assault in high risk prison areas), cert. denied, 488 U.S. 928 (1988); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-60 (1st Cir.) (finding that prison officials' failure to segregate psychiatrically disturbed prisoners from the general population constituted sufficient evidence of deliberate indifference), cert. denied, 488 U.S. 823 (1988); *Martin v. White*, 742 F.2d 469, 475 (8th Cir. 1984) (concluding that warden's failure to report felony assaults to prosecutors, to develop a policy for the detection of ineffective cell locks, and to station guards where they could provide protection supported a prisoner's verdict).

[FN79]. See, e.g., *Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986).

In *Berry*, the court held that in addition to showing a failure to take reasonable measures to avert the risk of attack, prisoners must prove that the failure, in light of the defendants' knowledge of the risk, justifies liability for the consequences of their unintended conduct. 900 F.2d at 1498.

In *Morgan*, the court upheld a trial court's jury instruction compelling the plaintiff to prove that the defendants were "outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm." 824 F.2d at 1058. In applying this standard, the *Morgan* court held that the prisoner presented sufficient evidence showing that the government employees flagrantly deviated from a reasonable standard of care, specifically by failing to place the assailant in a higher security unit and failing to devise adequate classification procedures. *Id.* at 1059-60.

In *Berg*, the Ninth Circuit outlined three factors for evaluating whether prison authorities acted with deliberate indifference. 794 F.2d at 462. Juries should consider whether the defendants were guided by concerns for the safety of other inmates, whether the defendants took preventative measures to protect the prisoner, and whether less dangerous alternatives existed. *Id.* These factors compel a heavy measure of deference to the actions of prison officials. *Id.*

[FN80]. See *Marsh*, 937 F.2d at 1061; see also *Santiago v. Lane*, 894 F.2d 218, 221 n.6 (7th Cir. 1990) (citing MODEL PENAL CODE § 2.20(2)(c) which states that "a person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk").

[FN81]. *Young v. Quinlan*, 960 F.2d 351, 360 (3d Cir. 1992); *Berry v. City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990).

[FN82]. 900 F.2d 1489 (10th Cir. 1990).

[FN83]. *Id.* at 1495.

[FN84]. *Id.* at 1496.

[FN85]. 960 F.2d 351 (3d Cir. 1992).

[FN86]. *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992). The *Redman* court stated that the deliberate indifference standard is met "if . . . officials know or should know of the particular vulnerability [to suicide of an inmate], then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." *Id.* (quoting *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989)).

[FN87]. 960 F.2d at 360.

[FN88]. *Id.* at 361 (stating "[w]e stress, however, that in constitutional context 'should have known' is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts.").

[FN89]. *Id.* (citing *Monmouth County Correctional Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988)). This standard essentially discounts the training and experience prison staff possess in recognizing

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danger by adopting a "lay custodian" baseline for measuring the defendant's state of mind.

[FN90]. Several Seventh Circuit cases apply an objective "should have known" test, more closely aligned with tort recklessness. *Wilks v. Young*, 897 F.2d 896 (7th Cir. 1990); *Richardson v. Penfold*, 839 F.2d 392 (7th Cir. 1988); *Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985), cert. denied, 475 U.S. 1085 (1986); *Benson v. Cady*, 761 F.2d 335 (7th Cir. 1985). Other Seventh Circuit cases apply a subjective actual knowledge test, closely aligned with criminal recklessness. *Santiago v. Lane*, 894 F.2d 218 (7th Cir. 1990); *Goka v. Bobbitt*, 862 F.2d 646 (7th Cir. 1988); *Walsh v. Mellas*, 837 F.2d 789 (7th Cir.), cert. denied, 486 U.S. 1061 (1988); *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987).

[FN91]. See supra note 1 and accompanying text.

[FN92]. *Id.* McGill is slightly built, weighing between 116 and 122 pounds and his height is five feet, seven inches. Appellee/Cross Appellant's Brief at 36, *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991) (No. 85-C-70), cert. denied, 112 S. Ct. 1265 (1992).

[FN93]. See supra note 2 and accompanying text. Generally, inmates on disciplinary status have violated one or more prison regulations, including fighting and serious felonies. JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 59 (3d ed. 1985).

[FN94]. See supra note 3 and accompanying text.

[FN95]. See supra note 4 and accompanying text.

[FN96]. *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN97]. *Id.*

[FN98]. *Id.*

[FN99]. The Seventh Circuit summarized the circumstances of McGill's rape as follows. McGill left his cell for the shower when Ausley approached him and made sexually suggestive comments. *Id.* McGill continued walking and Ausley and Halliburton threatened him. *Id.* While walking, McGill spoke to two guards about some lost property but did not ask for help. *Id.* As McGill shampooed his hair, Ausley gagged and sodomized him while three other inmates guarded the area and brandished improvised knives. *Id.*

[FN100]. *Id.* The jury also returned a verdict in favor of McGill on a state negligence claim. *Id.* The jury absolved one guard on all claims, and the trial judge granted a directed verdict in favor of two prison administrators. *Id.*

[FN101]. *McGill v. Duckworth*, 726 F. Supp. 1144, 1148-49 (N.D. Ind. 1989), aff'd in part, rev'd in part, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). On the issue of defendant's knowledge, the district court provided the jury with an extensive set of instructions. *Id.* The first instruction stated that prison officials are liable for failing to protect a prisoner only if they act with deliberate indifference. *Id.* at 1148. The instruction explained that to prove deliberate indifference, McGill must show that the defendants "intentionally or recklessly disregarded a substantial risk of danger that was known to him or would have been readily apparent to a reasonable person in his [sic] position." *Id.* at 1148-49.

The next instruction explained that a defendant acts with deliberate indifference when he knows of the danger or when the threat of violence is so pervasive that knowledge can be inferred and he fails to enforce a policy or take reasonable steps to protect a prisoner. *Id.* at 1149. The court also instructed the jury that the plaintiff must prove that the defendants "knew, or should have known, that the plaintiff had been threatened with violence or sexual assault and that it was highly foreseeable that the plaintiff would be physically or sexually assaulted by another inmate" *Id.* In order to prove his claim, McGill also had to show reckless disregard for or intentional deprivation of his right to be free from assault, and that the conduct proximately caused his injury. *Id.*

The defendants objected most strenuously to the final instruction. This instruction stated that if the defendants had information which would lead a reasonably prudent person to investigate the situation, the jury could equate the information the defendants would have learned through such an investigation with actual knowledge. *Id.* The court instructed the jury that it could infer knowledge from circumstantial evidence. *Id.* For instance, the instruction stated that knowledge can be inferred when a dangerous condition exists for a substantial period of time and the defendants had regular opportunities to observe the

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condition. *Id.*

[FN102]. *Id.* at 1152. The defendants argued five points to support their claim that McGill failed to show "deliberate indifference." They noted that they took action each time McGill requested a move and that McGill did not show that his move to IDU placed him in any particular danger from his assailant. *Id.* Moreover, McGill did not inform anyone that he feared his assailant. *Id.* Further, neither McGill nor Ausley were members of identifiable groups that would put defendants on notice of heightened risk. *Id.* Finally, the defendants argued that McGill failed to prove that administrators placed him in an institution where violence and terror reign. *Id.*

[FN103]. *Id.* at 1151. The defendants relied on [Duckworth v. Franzen](#), 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986), a case involving protection from fire hazards rather than inmate assaults, to support their argument that an objective standard is inappropriate for Eighth Amendment purposes. 726 F. Supp. at 1149-51. See *supra* notes 72-75 and accompanying text (detailing the Franzen decision and reasoning). The court held that a post-Franzen inmate assault case, [Richardson v. Penfold](#), 839 F.2d 392 (7th Cir. 1988), applied tort recklessness. 726 F. Supp. at 1151.

[FN104]. 726 F. Supp. at 1151.

[FN105]. See *id.* at 1153-56. The district court surveyed previous inmate assault cases within the circuit and concluded that the threat posed to smaller, protective custody inmates like McGill by inmates on disciplinary segregation was less identifiable than the risks in other cases. *Id.* at 1153-55. The court held, however, that the previous cases do not "state a constitutional baseline or factual minimum" to establish deliberate indifference. *Id.* at 1155.

The district court held that the jury could have found that other inmates harassed McGill and that a higher rate of violence and sexual assault exists in IDU than in the prison as a whole. *Id.* The evidence at trial showed that McGill was of slight stature and that weaker inmates were vulnerable to attack in IDU. *Id.* These facts, the court reasoned, were sufficient to impute to all defendants knowledge that smaller protective custody inmates were at physical risk from disciplinary segregation inmates in IDU. *Id.* at 1156.

[FN106]. *Id.* The court noted that the superintendents issued no policy directive for separating the two classes of inmates and thereby placed McGill in danger. *Id.* Although the prison guard exercised no control over policy, the court sustained the verdict against him because the jury could have reasonably found that he was deliberately indifferent; McGill testified that the guard shouted "[p]liss on you" just prior to the time of the rape, which supports the inference that the guard precluded McGill from informing him of the threat. *Id.*

[FN107]. 944 F.2d at 349. The McGill court stated that in order to implicate the Eighth Amendment's prohibition against cruel and unusual punishment, officials must intend to punish a prisoner. *Id.* at 347. The court noted, however, that courts treat both deliberate indifference and recklessness as the functional equivalent of intent. *Id.* In other words, an official's "total unconcern for a prisoner's welfare--coupled with serious risks . . ." violates the Eighth Amendment. *Id.* The court reasoned that the precise definition of recklessness must separate "punishment" from the "unwelcome injuries that occur when so may violent persons are locked up together." *Id.*

[FN108]. 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986).

[FN109]. McGill, 944 F.2d at 348-49 (citing [Wilson v. Seiter](#), 111 S. Ct. 2321 (1991) and [Whitley v. Albers](#), 475 U.S. 312 (1986)). The McGill court read Wilson to resolve the "conflict between the objective and subjective understandings of recklessness in favor of Franzen's subjective standard." *Id.* at 349. Further, the McGill court stated that "Wilson's understanding of intent tracks our own in Archie which explicitly adopted the subjective (criminal law) sense of recklessness." *Id.* (citing [Archie v. City of Racine](#), 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989)). The court concluded that criminal recklessness represents the law in the Seventh Circuit and that cases applying tort recklessness do not survive Wilson. McGill, 944 F.2d at 349.

[FN110]. *Id.* at 348-49. The court based its conclusion on the assumption that "[s]ome level of brutality and sexual aggression" is inevitable in prison given that many prisoners are confined because they are dangerous. *Id.* at 348. Given the inevitability of violence, "it will always be possible to say that the guards 'should have known' of the risk. Indeed they should, and do." *Id.* According to the court, the "should have known" approach leads to absolute liability contrary to Supreme Court precedent derived from [Estelle v. Gamble](#), 429 U.S. 97 (1976). *Id.*

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[FN111]. In McGill, the constraint chiefly consisted of a shortage of space in the cellblock which solely houses inmates on protective custody status. 944 F.2d at 350.

[FN112]. *Id.* at 348-49. "The 'should have known' approach allows plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control." *Id.* at 349. With respect to prison guards, the court referred to their inability to control the temperament of inmates, design of the prison, placement of the prisoners, and ratio of staff to inmates. *Id.* at 348. With respect to prison administrators, the court reasoned that the epidemic of overcrowded prisons effectively eliminates their ability to confine each inmate only with those of similar status. *Id.* at 349. Moreover, a prisoner like McGill, "small, young, labelled as a snitch," will face high risks regardless of where prison officials place him. *Id.*

[FN113]. *Id.*

[FN114]. *Id.* The court stated that other circuits have found that the failure to inform prison officials about threats destroys prisoner assault claims at the pleading stage. *Id.* (citing *Bell v. Stigers*, 937 F.2d 1340 (8th Cir. 1991) (applying the same principle to suicide)); *Blankenship v. Meachum*, 840 F.2d 741 (10th Cir. 1988); *Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987)).

[FN115]. *Id.* at 351. Although McGill did not argue that the defendants deliberately avoided knowledge, the court suggested that the "ostrich" instruction of criminal law is an appropriate alternative standard of liability because, as a "species of intent," it honors both the "deliberate" and "indifference" aspects of the intent requirement imposed by *Estelle* and related cases. *Id.* The court further stated that since behaving like an ostrich suffices for criminal liability, it suffices for liability under the Eighth Amendment. *Id.*

[FN116]. *Id.* at 350. On appeal, McGill attempted to show that he belonged to three identifiable groups of prisoners who face a higher risk of assault. *Id.*; Appellee/Cross-Appellant's Brief at 27-37, *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992). McGill argued that the defendants knew he faced a constant threat of violence because of his small stature and physical weakness relative to other inmates. McGill noted that he had informed officials of earlier threats he had received while housed in the general population. Appellee/Cross-Appellant's Brief at 27-28. McGill also argued that the defendants knew that protective custody inmates in IDU faced risks from disciplinary segregation inmates because disciplinary inmates often comprise the most violent prisoners. *Id.* at 27-29. Further, McGill argued that in spite of this general knowledge, the administrators failed to enact or enforce a policy providing special surveillance for smaller inmates, on protective custody status, commingled with inmates who have violated prison rules. *Id.* at 36. Last, McGill argued that officials knew that "snitches" face increased risk of attack. *Id.* at 28.

The McGill court explicitly rejected theories of liability predicated on the notion that the plaintiff faced a general risk of harm as a "species of the 'should have known' approach." *McGill*, 944 F.2d at 350.

[FN117]. *Id.* (emphasis in original omitted). The court noted that McGill failed to introduce evidence showing an alternative strategy the wardens could have followed, within their budget, to reduce the risk of violence. *Id.* Moreover, the court observed that McGill did not contest the defendants' submission that they would have liked to separate all of the protective custody inmates from all disciplinary inmates but were unable to do so because the legislature failed to provide sufficient funding or prison space. *Id.* The court also indicated that if officials had placed McGill in a unit housing only protective custody inmates at the expense of another similarly situated inmate, the risk of harm would have simply shifted to the evicted protective custody inmate, and thus the risk to vulnerable inmates as a group would remain the same. *Id.*

[FN118]. *Id.* The court implied that McGill could have prevailed only by squaring the warden's decision of placing him in IDU with the Supreme Court's holding in the equal protection case, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). *Id.* at 348. The court reasoned that the administrator's decision to remove McGill from the general population because he complained of threats after being labelled a snitch disproves the notions that they wanted him humiliated or that they "didn't give a fig for his welfare" *Id.* at 350.

The Seventh Circuit reversed the verdict against the prison guard because McGill failed to show that the guard knew of McGill's impending rape. *Id.* at 350-51. The court noted that McGill did not inform the guard that he feared an attack when McGill passed him while walking to the shower. *Id.* at 351. The court stated rhetorically: "Is [the guard] to be held liable on the ground that he was supposed to know McGill's danger better than McGill himself?" *Id.*

[FN119]. See *supra* notes 108-109 and accompanying text.

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[FN120]. [Whitley v. Albers](#), 475 U.S. 312, 320 (1986) ("In [the setting of a prison riot], a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.").

[FN121]. *Id.* at 321.

[FN122]. *Id.* (emphasis added).

[FN123]. See *supra* note 35 and accompanying text.

[FN124]. The Court cited [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988), and [Morgan v. District of Columbia](#), 824 F.2d 1049, 1057-58 (D.C. Cir. 1987). [Wilson v. Seiter](#), 111 S. Ct. 2321, 2327 (1991).

[FN125]. See *supra* notes 43, 110, 111, & 112 and accompanying text. McGill's repeated citation to *Personnel Adm'r of Mass. v. Feeney* represents another departure from the deliberate indifference standard. [McGill](#), 944 F.2d at 348. Although the McGill court held that something less than an express intent to harm is necessary to impose liability, the citation to Feeney's "because of, rather than in spite of" formulation reveals that the court applied an intent standard in lieu of a recklessness standard.

[FN126]. See *supra* note 118 and accompanying text.

[FN127]. See *supra* note 35 (discussing Wilson's failure to recognize the good faith cost defense). Good faith efforts should not preclude a finding of deliberate indifference. The fact that officials took some action does not automatically render their other acts or omissions constitutionally adequate. [Moore v. Winebrenner](#), 927 F.2d 1312, 1321 (4th Cir. 1991) (Murnaghan J., dissenting) ("To excuse what has not been done, although required, because of other things that have been done, is wrong."). For example, although administrators put McGill on "protective custody" status, McGill's safety was not enhanced by his placement in a unit containing inmates on disciplinary status. The administrators were not deliberately indifferent because they withheld protective custody status, but because they operated a dangerous and inadequate system of protective custody.

[FN128]. See *supra* note 83 and accompanying text.

[FN129]. See [Whitley v. Albers](#), 475 U.S. 312, 320 (1986) (finding deliberate indifference an appropriate standard in claims of inadequate medical care because the duty to provide medical care does not clash with "equally important governmental responsibilities").

[FN130]. See *supra* note 113 and accompanying text.

[FN131]. See [Stachelek v. Fairman](#), 1989 WL 18227, at *1 (N.D. Ill. 1989); see also Robertson, *supra* note 14, at 104 ("Life in many prisons is cheap: a 'hit,' or murder, can be purchased for a few cartons of cigarettes.").

[FN132]. The specific notice requirement is also unreasonable because threats of assault do not invariably precede the assault itself. Absent a threat, McGill holds a prisoner's claim per se insufficient. No prison official can be charged with knowledge of a specific threat in this circumstance, and the strict application of a specific notice rule precludes liability even when prison officials place an obviously vulnerable inmate in a position where he is subject to assault from various prisoners.

[FN133]. See *supra* note 1 and accompanying text.

[FN134]. [Grubbs v. Bradley](#), 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982).

Life behind [prison] walls is to a large extent governed by the "inmate code," one tenet of which strictly prohibits prisoners from "snitching" on fellow inmates. The consequences of becoming a snitch may include physical retaliation, including threats of death, the fear of which helps to persuade even well intending inmates to abide by the code.

Id.

[FN135]. See [Fisher v. Koehler](#), 692 F. Supp. 1519, 1528 (S.D.N.Y. 1988) ("[M] any inmates referred to the phrase 'snitches

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get stitches' as a slogan frequently used by assaultive inmates to threaten inmates who complain to the authorities."); [Martino v. Carey](#), 563 F. Supp. 984, 988-89 (D. Or. 1983) ("If inmates complain to officials, they are labelled 'snitches' and will 'pay' later, when assistance is not available."); see also Robertson, *supra* note 14, at 108 ("Snitching invites the most severe retribution."); Mary Wilcox, Note, The Sexually Assaulted Prisoner: His Rights Under the Eighth Amendment, 12 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 349, 353 (1986) ("Ratting' on another prisoner is a sure way to subject oneself to further physical abuse.").

[FN136]. [Gullatte v. Potts](#), 654 F.2d 1007, 1010 (5th Cir. 1981).

[FN137]. The Seventh Circuit has held that contributory negligence is not a defense to reckless conduct. [Santiago v. Lane](#), 894 F.2d 218, 224 (7th Cir. 1990) (citations omitted).

[FN138]. See LAFAVE & SCOTT, *supra* note 66, at 238.

[FN139]. Christina Whitman, Constitutional Torts, 79 MICH. L. REV. 5, 49 (1980). "[T]he plaintiff (particularly if he is a convicted criminal claiming prison or police abuse) may face a jury that finds his credibility suspect, his appearance distasteful, and his claim weak." *Id.*

[FN140]. See *supra* note 115 and accompanying text.

[FN141]. See LAFAVE & SCOTT, *supra* note 66, at 238 (A defendant's "subjective realization of risk . . . must generally be inferred from his words and conduct in the light of the circumstances."); see also WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 34, at 213-14 (5th ed. 1984) ("Since [conscious indifference] is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied.").

[FN142]. See *supra* notes 110 & 112.

[FN143]. See *supra* note 77.

[FN144]. See *supra* note 110.

[FN145]. See *supra* notes 70 & 78 and accompanying text.

[FN146]. The outcome of McGill demonstrates that the actual knowledge requirement effectively subordinates the jury's role as factfinder. Under a criminal recklessness standard, defendants will very often prevail at pre-trial stages of litigation as well as on appeal when courts consider the sufficiency of evidence.

[FN147]. See *supra* note 112.

[FN148]. See *supra* notes 111-112 and accompanying text.

[FN149]. See *supra* note 35.

[FN150]. See [Ward v. Johnson](#), 690 F.2d 1098, 1108 (4th Cir. 1982).

[FN151]. See, e.g., [Ind. Code Ann. § 34-4-16.7-1](#) (West 1993); [Mass. Gen. Laws Ann. ch. 258, § 9](#) (West 1993); [Tex. Rev. Civ. Stat. Ann. § 104.002](#) (West 1993); see also Phillip E. Hassman, [Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee for Liability Arising Out of Performance of Public Duties](#), 71 A.L.R.3d 90 (1976).

[FN152]. See [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 562 (1st Cir.), cert. denied, 488 U.S. 823 (1988). Even McGill recognizes the utility of tort recklessness in encouraging the state to consider the costs of inmate violence when deciding "how many prisons to build and whether to increase the sentence for crimes." 944 F.2d at 349.

[FN153]. See Gray, *supra* note 13, at 1343.

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[FN154]. See supra note 151 and accompanying text.

[FN155]. Moreover, *Estelle v. Gamble* already confers sufficient deference by holding that negligent conduct does not violate the Eighth Amendment. See supra notes 22-23 and accompanying text.

[FN156]. See *Illinois v. Gates*, 462 U.S. 213, 241 (1983) (stating that "[f]idelity" to the commands of the Constitution suggests balanced judgment rather than exhortation").

[FN157]. See supra note 17.

[FN158]. See supra note 53.

[FN159]. *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN160]. See *Dumond*, supra note 14, at 148. In cases where a prisoner cannot prove actual knowledge, *McGill* preempts inquiry into whether the defendant had the power to prevent the plaintiff's injury. This high threshold of liability insulates prison officials from liability even where the assault is attributable to their own discrete acts or omissions. Cf. *Cortes-Quinones v. Jimenez-Nettle-ship*, 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988). In *Cortes-Quinones*, the First Circuit held that the plaintiff produced sufficient evidence to find that the Director of Puerto Rico's Penal Institutions, the Corrections Administrator, and the Superintendent and Chairman of the Treatment and Classification Committee acted with deliberate indifference toward a psychiatrically disturbed prisoner who was killed by his cellmates. *Id.* at 558-61. The court held that although the conditions in Puerto Rico's prisons were appallingly bad and severely overcrowded, each defendant could have taken steps to protect the deceased prisoner. *Id.* For example, the officials could have segregated the psychiatric prisoner from the general prison population. *Id.* at 560-61. The court found that the defendants were deliberately indifferent based on their own actions, not based on factors beyond their control. *Id.*

[FN161]. *Dumond*, supra note 14, at 149.

[FN162]. *Id.*

[FN163]. *Id.* at 148 (citing Peter L. Nacci & Thomas R. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROBATION 31, 32 (1983)).

[FN164]. Prison guards are well-positioned to know both the character of their facility and the prisoners confined to their care. They not only learn through experience which prisoners are dangerous, but they also have the freedom to investigate and discover potential conflicts between prisoners.

[FN165]. Proponents of a high threshold for Eighth Amendment liability note that pre-trial detainees, whose rights are guaranteed under the Due Process Clause of the Fourteenth Amendment, cannot be punished at all, see *Bell v. Wolfish*, 441 U.S. 520, 536-40 (1979), whereas convicted prisoners cannot be subjected to cruel and unusual punishment. In the Eighth Amendment context, however, the state of mind inquiry does not address whether the deprivation constituted cruelty and arbitrariness, but whether the defendants intended to punish the plaintiff. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) ("An intent requirement is either implicit in the word 'punishment' or [it] is not."). Hence, the Fourteenth Amendment's definition of "punishment," as embodied in a state of mind standard, should not vary with the Eighth Amendment's state of mind standard and definition of punishment.

[FN166]. Given that most prisoners must proceed pro se, at least initially and past the motion to dismiss stage, a strong case exists for greater simplicity in § 1983 Eighth Amendment claims.

[FN167]. See supra note 17.

[FN168]. See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975 n.1 (1989) (emphasis in original omitted).

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