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Note

*863 RAPE AND AIDS IN PRISON: ON A COLLISION COURSE TO A NEW DEATH PENALTY

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Shawn Medina, a slightly-built seventeen-year-old inmate began serving his prison sentence with a silent stare from his six-foot, two hundred pound cellmate. After suffering a slow process of psychological torture of increasingly irrational threats of violence from his cellmate, Medina told a guard that he feared his cellmate would rape him. The guard replied, "Welcome to prison. Toughen up, punk." Medina's cellmate told him, "You're going to be mine, boy." The cellmate then allegedly held a razor to Medina's neck and anally raped him. After the rape, Medina pleaded with prison officials for protection. In response, officials placed Medina in isolation. Medina's requests for protection violated a strict prison code, winning him a reputation as an informer and a "rat." Subsequently, a 260-pound child rapist allegedly overpowered Medina in the prison's smoking room and raped him.

After the sexual assaults, Medina heard through the prison grapevine that one of his alleged attackers tested positive for HIV. Medina lost thirty pounds and has a persistent cough, exhibiting early symptoms of AIDS. Shawn Medina, welcome to America's second death row. [FN1]

I. INTRODUCTION

In United States' correctional institutions, instances of sexual violence occur at a staggering rate. [FN2] Some researchers estimate that of the forty-six million Americans who will enter the criminal justice system at some point in their lives, ten million will be raped while in custody. [FN3] When prison officials ignore prisoners' cries for protection, many victimized inmates turn to the judiciary for relief under the Eighth Amendment's prohibition against cruel and unusual punishment. [FN4] To state a viable claim ***864** for an Eighth Amendment violation, however, prisoners must overcome daunting and onerous legal barriers imposed by courts that are often unsympathetic to prisoner-plaintiffs. [FN5]

In 1994, the Supreme Court of the United States decided the constitutional claim of an inmate raped by a fellow prisoner. [FN6] The Court upheld the requirement that to demonstrate an Eighth Amendment violation, prisoners must prove that supervising prison officials were "deliberately indifferent" to allegedly unconstitutional conditions or treatment. [FN7] This "deliberate indifference" test imposes an onerous objective and subjective burden upon inmates seeking relief from prison violence. [FN8] Statistics suggest that the rise in our nation's incarceration rate will increase violence inside prison walls--but the judiciary, responsible for imposing such strict standards for relief, may fail to protect the myriad of inmates threatened by prison violence. [FN9]

***865** Deadly killers, HIV and AIDS, have now entered the prison setting. [FN10] Anal intercourse and intravenous drug use, two methods highly conducive to transmitting the HIV virus, are omnipresent throughout

the America's prisons. [FN11] Ultimately every HIV-infected individual will die from the disease unless researcher discover a cure or vaccine for AIDS. [FN12] The rate of HIV infection continues to rapidly increase among our country's incarcerated. [FN13] Some prison systems report that approximately fifty percent of their inmates are HIV-positive. [FN14] When AIDS and rape converge within our prisons, many inmates face an unintended form of capital punishment, a brutal attack by another prisoner and subsequent infection with a terminal and incurable disease. [FN15]

Today, publicized and documented cases exist of inmates being infected with HIV through sexual assault by an infected rapist. [FN16] Judges, elected officials, and scholars have predicted the frightening occurrences of this dilemma. [FN17] The numbers of reportedly raped, HIV-infected inmates will inevitably increase given the lengthy incubation period of HIV, the lack of available HIV testing in prison, and the continual rise of prison populations.***866** [FN18] Although prison administrators have attempted to control HIV transmission by implementing mandatory and voluntary HIV testing, screening prisoners, and segregating AIDS-infected inmates, the infection rate remains on the rise in many systems. [FN19]

Correctional officials have a constitutional duty to protect prisoners from inter-inmate violence and a duty to protect inmates from infectious diseases like HIV. [FN20] These duties, however, have historically evolved as two separate areas of prisoners' rights jurisprudence mainly because a minute number of courts have encountered a case involving the deadly combination of the two evils. [FN21] Courts have inconsistently held that penal administrators' inability to control the transmission of infectious disease violates the Eighth Amendment. [FN22] Further, prisoners face a stiff hurdle to overcome garner judicial protection against the threat of sexual violence. [FN23] Judicial standards are, therefore, inadequately tailored to address ***867** the constitutional ramifications of the deadly combination of rape and AIDS. [FN24]

This Note first discusses the violent nature of prisons and the pervasiveness of inmate rape. [FN25] It then addresses the prevalence of AIDS inside America's prisons and reviews the various responses of legislatures, prison officials and courts to this epidemic. [FN26] Next, this Note presents the history of the Eighth Amendment and discusses the recent evolution of prisoners' rights. [FN27] This Note further outlines the Supreme Court's Eighth Amendment “deliberate indifference” standard from its genesis to its recent application in *Farmer v. Brennan*. [FN28] It then analyzes the deadly combination of HIV transmission through rape under this “deliberate indifference” analytical framework. [FN29]

This Note proposes that courts should grant relief to prisoners who demonstrate clear and convincing evidence of the existence of an unreasonable risk of HIV infection through sexual assault. [FN30] Under the current scheme, however, this relief is extremely difficult for inmates to obtain because they must prove that prison officials acted with the culpable, subjective intent of deliberate indifference. [FN31] As such, courts must modify the current standards of Eighth Amendment jurisprudence to prevent victimized inmates from receiving an unintended sentence to America's second death row. [FN32] Alternatively, it is equally imperative for Congress and state legislatures to approve and mandate sensible preventative measures to decrease prison rape and control the spread of HIV by implementing voluntary***868** HIV testing, condom distribution, AIDS and sexual assault education, and strict behavioral classification procedures to house and monitor violent inmates. [FN33]

II. FACTUAL BACKGROUND

A. The Pervasive Level of Rape and Sexual Assault Behind Prison Walls

Considered the “most closely guarded secret activity of America's prisons,” rape within male correctional

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institutions occurs with frightening regularity and brutality. [FN34] Recently, a *60 Minutes* segment exposed the alarming level and often brutal nature of prison atrocities. [FN35] Although the Supreme Court of the United States, in *Farmer v. Brennan*, [FN36] recently held that prison officials have a duty to protect inmates from sexual assault at the hands of other prisoners, violence ravages many penal systems. [FN37] A 1994 Boston Globe series, which exposed the entrenched culture***869** of sexual violence in prison and the official indifference to it, led the Massachusetts State Department of Correction to enact reforms to decrease prison rape. [FN38] United States Supreme Court Justice Harry Blackmun has acknowledged that " a youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or ... even in the van on the way to jail." [FN39] Other high ranking government officials have also expressed their deep concern at the alarming rate of sexual assault in prison. [FN40]

One need only turn to a federal reporter volume to uncover graphic descriptions of sexual violence that has plagued America's prisons: In Tennessee, a court summarized the testimony of the rape of a 20-year-old first time offender:

> three inmates called him into a cell and made a verbal sexual overture to him. When he tried to walk out, the inmates hit him and pulled his pants down. [The victim] yelled once, but the other inmates hit him and knocked him out....[He] was moved to the second floor due to psychiatric problems ... [where] he was pulled into a cell by another inmate and was bound and gagged. The other inmate struck and raped him.... After [the victim] attempted suicide, he was moved to the suicide tank. [FN41] In Rhode Island, an 18-year-old inmate suffered a nervous breakdown after fellow inmates thrice gang-raped him in the prison's shower room. [FN42] In Missouri, inmate Gleason

> heard ... scratching on his [cell's] lock with a paper-clip. Within a second, the lock was picked and the door was open. Four inmates rushed into his cell and, threatening him with a knife and iron bar, forced him into inmate Mark McCabe's cell. Gleason was placed face down onto a bed, spread-eagled, and sodomized by McCabe. [FN43] In a Chicago jail, a gang of elder inmates dry-shaved a fourteen-year-***870** old prisoner and subsequently gang-raped him. [FN44] Mentally devastated, prison authorities later transported the boy to the psychiatric ward. [FN45] In Massachusetts, a prison guard allegedly told entering inmate Nguyen, "You're on your own." [FN46] Later, Nguyen's cellmate overpowered him and tied him to the bottom bunk with a shirt, then banged his head against the bed's steel bars. [FN47] The aggressor allegedly raped Nguyen for thirty minutes while he covered Nguyen's mouth to prevent him from screaming. [FN48]

Since few victims of prison rape report these offenses in fear of retribution from their attackers, researchers find it extremely difficult to ascertain an accurate estimation of the prevalence of sexual assaults in prison. [FN49] One expert testified that the actual number of rapes in prison may be five to six times greater than the number of reported sexual assaults. [FN50] A recent and comprehensive study of sexual assault in the Nebraska correctional systems reported that 22.3% of respondent inmates had been pressured or forced into sex. [FN51] Stephen Donaldson, former president of Stop Prison Rape, Inc. and a victim of numerous rapes behind bars, estimates that approximately 360,000 male inmates are sexually victimized every year. [FN52] Yet, many correctional administrators attempt to minimize the issue of prison rape and some commentators even suggest that prison officials tacitly ignore the problem as an indirect method to control inmates. [FN53]

***871** Victims of prison rape are usually young, white, slightly-built inmates with minimal criminal records. [FN54] Generally, other prisoners immediately mark a raped inmate as a "punk," forcing the victim into coerced sexual slavery or alternatively subjecting him to repeated sexual assaults on a daily or nightly basis. [FN55] For those victimized "punks" who do not commit suicide, [FN56] the only alternative is to form a sexual

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relationship with a strong or feared prisoner in exchange for protection against further rapes. [FN57] Thus, prison rape is an ongoing form of torture, lasting well after the first incidence of sexual violence. [FN58] To magnify this situation, victimized inmates who "snitch" or "rat" on prison rapists violate a strict prison code, subjecting them to severe and violent retribution by the entire inmate community. [FN59] The victim, now branded an "informer," may even be murdered for reporting his attacker. [FN60]

Prison rape is devastating to the human spirit, and most victims suffer shame, depression, loss of self-esteem, and often develop into sexual aggressors themselves. [FN61] Raped inmates often suffer from Rape Trauma ***872** Syndrome, a complex psychological and physiological disorder. [FN62] The vast majority of correctional institutions, however, do not possess adequate mental health programs to counsel inmates on sexual assault issues. [FN63] Moreover, prison officials continually fail to implement reasonable, common sense safety measures to protect prisoners' physical safety. [FN64] Thus, victims of prison rape often find themselves at the mercy of bigger, stronger, and savage aggressors undeterred by the protection supposedly afforded by prison officials. [FN65]

B. Epidemiology and Transmission of the HIV Virus

In 1983, researchers first identified HIV, Human Immunodeficiency Virus, the virus now internationally recognized as the cause of AIDS, Acquired Immune Deficiency Syndrome. [FN66] Once HIV has entered the bloodstream, the virus progressively destroys special white blood cells, ***873** called CD4, T4 and T-helper cells, that are crucial to the normal functioning of the human immune system. [FN67] T4 or T-helper cells are responsible for recognizing foreign organisms in the human body and organizing the complicated immune reactions necessary to adequately combat infectious diseases. [FN68] As HIV progressively eradicates the crucial CD4 immune cells, the body's ability to fight off foreign bacteria decreases dramatically. [FN69] Consequently, infected individuals are subject to an array of "opportunistic" infections that would not generally be life-threatening to persons with healthy immune systems. [FN70] During the final or crisis stage of HIV infection, generally termed "AIDS," the body eventually succumbs to these opportunistic diseases. [FN71]

HIV is transmitted through intimate contact with infected bodily fluids, and overwhelmingly through two particular methods, sexual contact and needle sharing between intravenous drug users. [FN72] In particular, the mechanics of anal sex frequently generate tears of the rectum's mucous membranes, resulting in the receptive partner's increased exposure to HIV infected blood and semen. [FN73] Accordingly, researchers have found anal sex ***874** to be the riskiest method of HIV transmission. [FN74] Moreover, individuals infected with HIV often transmit the fatal virus to others before manifesting any symptoms of AIDS related diseases. [FN75] The asymptomatic stage of AIDS is quite unpredictable and can often last for years before an infected person displays clear warning signs of the disease. [FN76]

C. HIV and AIDS in America's Prisons

Clearly, HIV and AIDS are significant and imperative health concerns facing the world today. [FN77] These concerns have greatly impacted our nation's correctional institutions. [FN78] Statistics demonstrate that the incidence of HIV in prison continues to surpass the rate of infection in the U.S. population as a whole. [FN79] The National Commission on Acquired Immune Deficiency Syndrome called attention to this alarming quandary when it reported that no other institution in the nation possesses a higher percentage of people at substantial risk of HIV infection. [FN80] Studies suggest that the elevated rate of HIV and AIDS in prison is attributable to the ***875** high number of inmates with histories of high-risk behavior such as intravenous drug use and unprotected sexual conduct. [FN81] Our prisons are now overcrowded with low-income drug offenders who are among those at the highest risk of contracting HIV. [FN82] Commenting on this situation, the National Commission on AIDS

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opined that "by choosing mass imprisonment as the ... governments' response to the use of drugs, we have created a de facto policy of incarcerating more and more individuals with HIV infection." [FN83]

In 1994 HIV infected forty-one out of 100,000 persons in the general population. [FN84] The HIV infection rate in state and federal prisons, however, increased from 362 cases per 100,000 to 518 cases per 100,000 in the same period. [FN85] City and county jails reported a higher incidence rate of 706 cases per 100,000 inmates. [FN86] These rates vary widely depending upon the jurisdiction: larger urban areas have a disproportionate number of HIV-positive inmates; for instance, in 1994, New York City reported that 16.1% of all its male inmates were HIV-positive, Baltimore City, Maryland reported a 48.6% HIV-positive rate among males, and Aladema County, California reported a 22% HIV-positive rate among males. [FN87] Some jurisdictions, however, have recently reported a decline in the rate of infection. [FN88] Because most prison systems do not test all inmates, these ***876** statistics are neither comprehensive nor completely accurate due to the significant level of unknown and unreported cases. [FN89]

Although most inmates are infected with HIV outside prison, HIV transmission inside the cell-block remains a matter of serious concern. [FN90] The most common method of HIV transmission occurs through sexual contact, by way of bodily fluids like semen or blood. [FN91] Studies repeatedly demonstrate that anal sex between males poses the highest risk of transmission. [FN92] As sexual assaults in prison often involve violent anal penetration resulting in severe rectal injury and bleeding, the manner of intercourse occurring in correctional institutions is particularly conducive to HIV transmission. [FN93] Furthermore, numerous assailants often "gang rape" ***877** victims, thereby significantly increasing the risk of infection. [FN94]

Prisons have implemented various policies designed to control the spread of HIV, including mandatory and voluntary testing, segregation of infected inmates, and HIV education and counseling. [FN95] Some systems distribute condoms to inmates while other prisons include information regarding safe intravenous needle injection practices in their inmate educational programs. [FN96] Penal administrators often oppose these two controversial policies, however, arguing that the policies reflect an official acceptance of sex and drug use in prison, two strictly forbidden practices. [FN97] ***878** United States and Canadian prisons that make condoms available to inmates report that this program created few, if any, documented problems. [FN98] Currently, the modern consensus approach to controlling HIV infection in prison is pursuant to the broad-based "universal precautions" guidelines, promulgated by the Centers for Disease Control. [FN99] Under this approach, prison workers treat all inmates as if they are HIV-infected and assume that all body fluids are potentially infected as well. [FN100]

D. The New Death Penalty

Considering the prevalence of HIV in our penal institutions, one can logically deduce that a prison sentence dramatically increases one's risk of contracting the HIV virus. [FN101] Add to this the significant number of inmates who are raped each year and a distressing prospect emerges: an inmate, originally sentenced to a light prison term, now faces the possibility of unintended capital punishment by a slow, debilitating death caused by the world's most deadly disease. [FN102] The ramifications of this new death penalty extend beyond the implication of the Eighth Amendment's ban of cruel and unusual punishment. [FN103] State treasuries will be tapped not only by damage awards for the victims of this new death penalty but also by the incredibly expensive treatment that the law mandates AIDS-inflicted prisoners to receive. [FN104] From a human rights or conservatively ***879** fiscal standpoint, no justification or rationale exists for this involuntary "death penalty."

III. THE LEGAL RAMIFICATIONS OF RAPE AND AIDS IN PRISON: CRUEL AND DEADLY PUNISHMENT

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A. A Brief History of the Eighth Amendment

The Eighth Amendment prohibits the government from imposing cruel and unusual punishment. [FN105] The Supreme Court of the United States did not describe what cruel and unusual punishment encompassed, however, until one hundred years after the Eighth Amendment's inception. [FN106] In 1890, the Court, in *In Re Kemmler*, [FN107] recognized that punishment involving torture or lingering death violated the Eighth Amendment's prohibition against cruel and unusual punishment. [FN108] Subsequently, in *Weems v. United States*, [FN109] the Supreme Court struck down a statutory sentence, ruling that its penal scheme violated the Eighth Amendment because it imposed a grossly disproportionate punishment in relation to the offense. [FN110] During the next sixty years, the Court remained virtually silent on the Eighth Amendment rights of prisoners while occasionally speaking out on other aspects of inmates' constitutional interests. [FN111]

***880** *B. Prisoners' Rights: Judicial Expansion of the Eighth Amendment*

Before the 1970s, the judiciary took a decidedly “hands-off” approach to questions of suspect prison administration and any cruelty that might arise from incarceration practices. [FN112] Conflicts with the doctrines of federalism, separation of powers, and a recognition of the judiciary's lack of expertise in the field of penology contributed to judicial anti-activism. [FN113] Due to the myriad of prisons operating under horrid and inhumane conditions and the growing trend of judicial activism in the 1970s, federal courts took an increased willingness to identify and protect prisoners' Eighth Amendment rights. [FN114]

***881** The vast majority of prisoners asserting constitutional claims bring suits pursuant to 42 U.S.C. § 1983, the Civil Rights Act of 1871. [FN115] Today, ***882** lawsuits brought by prisoners against the responsible correctional administrators or governmental entities consume a significant portion of the federal docket. [FN116] In the last decade, courts have addressed the Eighth Amendment claims of prisoners who have faced inhumane and perilous conditions of confinement such as squalid living conditions, [FN117] sexual violence, [FN118] inadequate medical care, [FN119] guard beatings, [FN120] and even excessive exposure to cigarette smoke. [FN121]

***883** *C. Eighth Amendment Violation: Prison Officials' Deliberate Indifference*

When a prisoner brings a civil rights suit alleging that prison officials have violated his Eighth Amendment rights, the United States Supreme Court has repeatedly mandated that a successful claim include a determination that the supervising prison officials acted with “deliberate indifference.” [FN122] This test of “deliberate indifference” is now used for all prisoners' Eighth Amendment claims challenging the conditions of their confinement. [FN123] The test requires an objective inquiry into the seriousness of the alleged Eighth Amendment violation. [FN124] The test's subjective component further requires a showing of culpable intent, essentially a determination that prison officials were consciously and deliberately indifferent to the aggrieved inmate's constitutional rights. [FN125]

D. The Creation and Application of the Deliberate Indifference Framework

In the landmark case of *Estelle v. Gamble*, [FN126] the Supreme Court of the United States recognized for the first time that certain prison conditions may violate the Eighth Amendment. [FN127] The Court further established that a successful claim of cruel and unusual prison conditions must include a determination of “deliberate indifference” on the part of the responsible prison administrators, thereby providing the genesis to the deliberate indifference standard. [FN128] In *Estelle*, a state prisoner alleged that prison officials violated his Eighth Amendment rights by failing to provide adequate medical care. [FN129] The Court held that the prisoner

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could state a ***884** viable claim of medical mistreatment under the Eighth Amendment by demonstrating that the prison officials were "deliberately indifferent" to his serious medical needs. [FN130]

The *Estelle* Court further held that deliberate indifference exists only when the allegedly unconstitutional conditions of confinement result in the "unnecessary and wanton infliction of pain" upon an inmate. [FN131] The Court recognized that prison officials have a constitutional obligation to provide inmates with competent and adequate medical care, reasoning that prisoners rely entirely on prison authorities to treat their medical needs. [FN132] The Court maintained, however, that inadequate medical treatment rises to a level of cruel and unusual punishment only under extremely serious circumstances. [FN133] Medical malpractice, negligence, or an inadvertent failure to provide adequate medical care does not constitute an Eighth Amendment violation unless prison officials manifest deliberate indifference to prisoners' serious medical needs. [FN134]

The Court revisited the issue of prisoners' Eighth Amendment protections in *Rhodes v. Chapman* [FN135] and recognized that a prison's *overall* conditions of confinement can violate the Eighth Amendment. [FN136] The *Rhodes* Court concluded that prison conditions alone or in combination may implicate judicial scrutiny under the Eighth Amendment. [FN137] The ***885** conditions, however, must deprive inmates of their "minimal civilized measure of life's necessities" before courts may deem them unconstitutionally cruel and unusual. [FN138] Although *Rhodes* appeared to expose prisons to increased liability, Justice Powell, writing for the majority, admonished lower federal courts from micro-managing correctional institutions and mandated that judicial deference remain with state legislatures and prison administrators. [FN139]

Five years later, in *Whitley v. Albers*, [FN140] the Court declined to apply the established "deliberate indifference" standard to ensure a prison's fundamental interest and duty to ensure internal security in a suit stemming from a prison riot. [FN141] The Court concluded that, in a prison uprising situation, the imperative concern of internal safety outweighs the competing interests of prisoners' fundamental Eighth Amendment rights. [FN142] Thus, the Court refused to hold prison officials to the deliberate indifference standard in the limited circumstance of a prison uprising. [FN143] Rather, ***886** the Court implemented a heightened inquiry and held that during an uprising, prison officials violate the Eighth Amendment only if they maliciously and sadistically apply force to prisoner participants. [FN144]

In 1991, the Court, in *Wilson v. Seiter*, [FN145] attempted to resolve confusion regarding the proper standard of deliberate indifference. [FN146] Justice Scalia, writing for the majority, promulgated a two-part test of deliberate indifference to address a claim regarding allegedly unconstitutional prison ***887** conditions. [FN147] The first prong required an objective inquiry into the "seriousness" of the conditions and the corresponding deprivation to the prisoner. [FN148] The analysis further required a *subjective* inquiry into whether prison officials were deliberately indifferent to the prisoner's Eighth Amendment rights. [FN149] Thus, a prisoner must demonstrate not only that prison conditions are objectively severe, but also that some prison official's state-of-mind was one of deliberate indifference to his pain and suffering. [FN150] Consequently, numerous commentators have harshly criticized *Wilson*, arguing that inmates, most of whom are *pro se* litigants, do not have the proper resources and skills to demonstrate prison officials' subjective intent. [FN151] Prisoners' rights advocates argue that the *Wilson* decision's added ***888** element of subjective intent has effectively diminished prisoners' Eighth Amendment rights. [FN152]

E. Prison Officials' Duty to Control the Spread of AIDS and Other Infectious Disease

In *Estelle v. Gamble*, the Supreme Court of the United States established the constitutional standard of care required of prison officials, to care for the medical needs of America's incarcerated. [FN153] Lower courts have interpreted *Estelle* to require that prison officials take reasonable steps to control or prevent the spread of

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disease. [FN154] In *Helling v. McKinney*, [FN155] the Supreme Court of the United States reaffirmed prison officials' Eighth Amendment duty to protect inmates from the spread of serious, communicable disease, even if the complaining inmate fails to show apparent symptoms. [FN156] In *Lareau v. Manson*, [FN157] the United States Court of Appeals for the Second Circuit applied this line of reasoning to hold prison officials liable for violating the Eighth Amendment when they made no efforts to screen incoming inmates for contagious diseases, despite significant overcrowding that further heightened the risk of infection. [FN158] The Second Circuit held that aggrieved prisoners need not demonstrate***889** an actual outbreak of infection before obtaining relief. [FN159]

Prisoners have brought a variety of suits challenging the policies of prisons or lack thereof regarding the spread of HIV. [FN160] In *Feigley v. Fulcomer*, [FN161] a federal district court entertained a prisoner's Eighth Amendment claim alleging that prison officials' failure to implement HIV testing and segregation of HIV-positive inmates was a constitutionally inadequate response to the risk of contracting AIDS. [FN162] In rejecting the inmate's claim, the court deferred to the opinion of prison medical experts who testified that HIV testing creates a false sense of security recommending the modern “universal precautions” approach in the alternative to segregation. [FN163] In *Harris v. Thigpen*, [FN164] the United States Court of Appeals for the Eleventh Circuit displayed similar deference in upholding the Alabama Department of Corrections' policies of mandatory HIV testing and forced segregation of HIV infected inmates. [FN165] The Eleventh Circuit held that Alabama's policies were a reasonable infringement of the inmates' privacy rights and that these decisions were best left to the sound judgment of the prison's administration, not the judiciary. [FN166]

***890** Conversely, in *DeGidio v. Perpich*, [FN167] the United States District Court for the District of Minnesota found that prison officials may have been liable for their failure to prevent and control a prison's tuberculosis epidemic. [FN168] In *DeGidio*, inmates in a Minnesota prison filed a class action alleging that prison officials' inadequate screening, follow-up procedures and treatment, and failure to segregate tuberculosis-infected inmates constituted a violation of inmates' Eighth Amendment rights. [FN169] The court found that the prisons' inadequate medical care, specifically their delinquency in screening incoming inmates for disease, may have constituted deliberate indifference to the inmates' serious medical needs. [FN170]

The *DeGidio* decision is distinguishable from the line of decisions upholding prisons' HIV and AIDS policies because tuberculosis is a mildly contagious, air-borne disease that is freely transferred within a cramped prison, whereas HIV only can be transmitted through intimate contact. [FN171] Thus, courts have recognized this difference in epidemiology and have summarily rejected inmates' claims that AIDS may be transmitted through casual and superficial contact between inmates. [FN172] In sum, given the great reluctance of courts to override a prison's HIV policy, prisoners' advocates have achieved reforms and improvements for inmates' HIV and AIDS medical care through complex settlements and consent decrees in cooperation with correctional officials in lieu of litigation. [FN173]

***891** *F. Deliberate Indifference to Prison Rape: Farmer v. Brennan*

Faced with the increasingly frequent occurrence of prison rape, the Supreme Court of the United States, in *Farmer v. Brennan*, [FN174] reformulated the deliberate indifference standard. [FN175] In order to provide lower federal courts with a consistent and uniform framework to analyze prisoners' Eighth Amendment claims, the *Farmer* Court adopted a heightened version of the criminal-law recklessness test as the appropriate subjective standard for deliberate indifference. [FN176] In *Farmer*, a transsexual inmate, allegedly raped by a fellow prisoner, claimed that prison officials demonstrated deliberate indifference by placing her [FN177] in the general population of a maximum security prison for males. [FN178] Farmer alleged that officials knew that the prison had a violent environment with a history of inmate assaults, and that she would be particularly vulnerable

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to attack as a transsexual. [FN179]

Under the *Farmer* deliberate indifference test, prisoners who are subjected to violence by other inmates must satisfy two elements. [FN180] First, ***892** the objective prong requires the inmate to show that the violent conditions within the prison pose a substantial risk of serious harm. [FN181] Secondly, under the newly refined subjective component, the inmate must prove that some prison official actually knew of the excessive risk to the inmate's safety and consciously disregarded this substantial danger. [FN182]

Although the *Farmer* Court unanimously held that prison officials have an Eighth Amendment duty to protect inmates from violence at the hands of other prisoners, some commentators contend that the decision will effectively abridge prisoners' rights and jeopardize their safety. [FN183] The ***893** *Farmer* decision, however, provides prisoners with two significant weapons that may lessen its potentially detrimental effect. [FN184] First, the *Farmer* decision permits inmates to offer circumstantial evidence to establish that officials actually knew of an excessive risk to inmate safety. [FN185] If the circumstantial evidence shows that a substantial risk of inmate assault is “long-standing, pervasive, well-documented or expressly noted” by prison officials, the court will impute actual knowledge to the prison officials. [FN186] The Court stated, however, that officials who reasonably respond to a substantial risk of harm may avoid liability even if they possessed actual knowledge of the risk. [FN187] Secondly, *Farmer* eliminates the requirement that an inmate notify prison officials of an impending assault before obtaining judicial relief. [FN188] The Court ruled that inmates need not inform prison guards of imminent threats to their safety in order to establish deliberate indifference. [FN189]

***894** *1. Injunctive Relief Under Farmer*

When a prisoner requests injunctive relief, the *Farmer* decision requires the court to determine the subjective component of deliberate indifference by considering prison officials' current attitudes and policies when the complaint is filed and continuing throughout the litigation. [FN190] In order to survive summary judgment and establish eligibility for an injunction, a prisoner must demonstrate that prison officials are currently deliberately indifferent to an unreasonable risk of harm and prove the continuance of this disregard throughout the action and into the future. [FN191] In a footnote, however, the Court acknowledged that if an aggrieved prisoner produces evidence that he faces an objectively unbearable risk of serious violence, courts will estop the defendant officials from asserting lack of awareness as an affirmative defense. [FN192]

The Court also invited lower courts to consider whether a complainant prisoner pursued or exhausted appropriate administrative procedures in fashioning injunctive relief. [FN193] If an inmate needlessly circumvents proper institutional grievance proceedings, courts may deny injunctive relief and mandate that the aggrieved prisoner properly pursue administrative remedies. [FN194] The Court reasoned that prisoners were better off taking advantage of internal prison remedies because internal remedies generate expeditious***895** results more often than typical lawsuits. [FN195]

G. Aftermath of Farmer v. Brennan: Current State of the Deliberate Indifference Test

The *Farmer* decision has become a greater asset to prisoners' rights advocates than commentators originally predicted. [FN196] Prisoners have realized greater success at surviving prison officials' motions for dismissal and summary judgment. [FN197] Courts have found prison officials deliberately indifferent to prisoners' safety for utilizing open dormitory or barracks-style housing that heightens the risk of violent assaults, [FN198] for failing to ***896** isolate prisoners who are obvious victims, [FN199] and for placing an inmate in a dangerous situation with other inmates known to be aggressive and violent. [FN200]

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For instance, one court has relied upon *Farmer* to hold prison officials liable for exposing inmates to excessive violence where the officials double-celled prisoners without considering behavioral classification information normally used to ensure housing compatibility. [FN201] Moreover, an Arkansas federal judge entered an injunction to modify penal administrators' insufficient supervision of an overcrowded dormitory-style barracks that resulted in a high frequency of assaults and rapes. [FN202] Also, relying on *Farmer*, the Sixth Circuit declared that prison officials may violate the Eighth Amendment by authorizing the transfer of a vulnerable inmate to a dangerous prison camp. [FN203] Similarly, in *Hale v. Tallapoosa City*, [FN204] prison officials randomly placed inmate Hale in an overcrowded day cell where fellow inmates severely assaulted him. [FN205] The court reversed summary judgment in favor of the defendant sheriff and county because inmate Hale introduced sufficient evidence of the prisons' pervasive level of violence to support a finding, under *Farmer*, that jail officials knew that a substantial risk of serious harm existed. [FN206] Furthermore, the court opined that the sheriff's failure to implement a classification system, whereby non-violent and violent inmates are housed separately, demonstrated his ***897** deliberate indifference to the jail's violent atmosphere. [FN207]

In *Billman v. Indiana Department of Corrections*, [FN208] the United States Court of Appeals for the Seventh Circuit applied the *Farmer* deliberate indifference standard and overturned the dismissal of a prisoner's claim that a known HIV-positive and violent inmate raped him. [FN209] The *Billman* decision is not especially instructive as to how a court would analyze the rape and AIDS combination because the issue on appeal was whether the district court properly dismissed Billman's allegedly frivolous complaint. [FN210] Citing *Billman*, however, the Seventh Circuit has declared that the knowing failure of prison officials to protect prisoners from HIV-positive prisoners, who have a propensity to rape, violates the Eighth Amendment. [FN211]

III. ANALYSIS

A. The Deliberate Indifference Standard Fails to Afford Prisoners with Sufficient Protection Against the Deadly Combination of Rape and AIDS

When a prisoner faces impending rape and petitions the court for injunctive relief, the *Farmer* decision provides a naive and unrealistic outlook concerning the realities of prison culture and procedure. [FN212] First, complaints of threats to prisoners' physical safety are almost always handled through direct communication with line staff as opposed to formal complaint procedures. [FN213] Prisoners avoid formal grievance processes for a number of reasons. [FN214] For example, victims who “snitch” and report their aggressors to high level officials break the unwritten prison code of silence which rewards “informers” with additional extortive violence to ensure non-disclosure. [FN215] Since *Farmer* requires prisoners to exhaust institutional***898** remedies before becoming eligible for equitable relief, the Court has failed to recognize this “catch-22” situation where complaining inmates risk additional violence and extortive threats from their attackers. [FN216] As such, many prisoners choose a less conspicuous method of grievance, a hand-written, *pro se* complaint addressed to the nearest federal district court. [FN217] The *Farmer* decision, however, discourages this practice and fails to adequately protect victimized inmates from future harm by creating a formidable barrier to obtaining injunctive relief. [FN218]

When HIV is added to this scenario, creating a potentially deadly mixture, the shortcomings of the deliberate indifference standard metamorphasize into a fatal flaw. [FN219] By requiring a showing of prison officials' subjective, culpable intent, the *Farmer* decision prevents courts from fashioning relief to prevent the deadly occurrence of AIDS infection via sexual assault. [FN220] By analyzing a prisoner's prayer for injunctive relief under traditional equitable standards, the inmate would be allowed to demonstrate a risk of “irreparable harm.” [FN221] Although a violent threat by an HIV-positive rapist would surely support such preliminary relief under ***899** the “irreparable harm” test, the same victim would fail to surpass the *Farmer* subjective prong if officials

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lack deliberate indifference to a substantial risk of assault. [FN222] As a result, victims will remain continually exposed to rape and the threat of contracting AIDS. [FN223]

B. Courts Should Apply a Justifiably Lower Objective Standard

Courts should analyze the deadly combination of HIV transmission through prison rape by borrowing from precedents analyzing prison officials' duty to control infectious disease. [FN224] In the “disease” line of cases, courts have determined that prison officials who fail to segregate or screen incoming inmates for communicable diseases may violate the Eighth Amendment. [FN225] Moreover, the Second and Fifth Circuits only require plaintiffs to demonstrate a relatively low level of risk of actually contracting an infectious disease. [FN226] One judge has commented that a prisoner need only show that he is “at risk” of contracting HIV through an infected aggressor. [FN227] Furthermore, the United States Supreme Court, in *Helling v. McKinney*, [FN228] only required an inmate to show that he is exposed to *unreasonably* high levels of possible harm in order to sustain an Eighth Amendment violation. [FN229]

***900** In cases involving prison officials' duty to ensure inmate safety, *Farmer* requires the risk of harm, i.e. assault or rape, to be “long-standing, pervasive, well-documented or expressly noted in the past.” [FN230] Thus, by definition, the *Farmer* deliberate indifference standard forces victims to wait until the prison's violence level reaches near-epidemic levels, however, when AIDS is factored into this equation, a delay means death. [FN231] Recognizing that anal rape in prison poses an extremely high risk of transmitting HIV under the Eighth Amendment's objective prong, courts should employ the lower “disease” standards and uphold inmates' claims based on an *unreasonable* risk of being exposed to HIV through rape, a justifiably lower threshold. [FN232] Although a prison's level of violence may not rise to an unconstitutionally substantial level, a prisoner who faces rape by an HIV-infected aggressor remains exposed to an unreasonable and substantial risk of contracting the disease. [FN233] Hence, it is both imperative and appropriate for courts to apply lower objective standards in order to prevent innocent victims from being sentenced to die from AIDS while incarcerated. [FN234]

C. A Proposed Standard: Protecting Prisoners from America's Second Death Row

This Note therefore proposes that if a prisoner demonstrates *clear and convincing* evidence of the existence of an *unreasonable* risk of HIV infection through sexual assault, a court should grant him relief. [FN235] This ***901** standard will adequately protect threatened prisoners and will honor the spirit of the *Wilson* and *Farmer* strict subjective frameworks by implementing a comparably high evidentiary standard of proof, the “clear and convincing” burden. [FN236] This proposed standard, however, will bypass a typical *Farmer* subjective intent analysis in favor of a broader, objective standard that assumes the actual threat of being raped by an HIV-positive aggressor entitles a potential victim to equitable relief. [FN237] Courts may have considerable latitude within the heightened “clear and convincing” criterion to weigh the credibility and sufficiency of the prisoner's evidence that the risk of HIV infection through rape is indeed a clear and present danger. [FN238] Unless courts modify the *Farmer* standard, the epitome of cruel and unusual punishment-contracting AIDS from being violently raped in prison-“will go unredressed due to an unnecessary and meaningless search for ‘deliberate indifference.’” [FN239]

D. Preventative Action Is Also Warranted From Penal Administrators and Lawmakers

Along with expanded judicial remedies, Congress, state legislatures, and correctional administrators should approve and implement the following cost-effective practices that will contribute to ending or minimizing rape and the spread of HIV. Already successful in Vermont, education programs for incoming inmates, warning them of the risk of sexual assault, ***902** will prepare prisoners for the realities of prison life. [FN240] Increased staff

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training and supervision will assist officials in recognizing early warning signs of victimization and will promote increased investigation and prosecution of incidents of sexual assault. [FN241] Congress and state legislatures should mandate that prison systems implement strict behavioral classification procedures to aid in identifying, housing, and monitoring violent inmates. [FN242] Voluntary HIV testing, condom distribution, and comprehensive HIV education should be available in all systems at the very minimum. [FN243] Prisons executing these types of programs report a decrease in inmate violence and report the successful control of the rate of HIV infection. [FN244]

IV. CONCLUSION

"The degree of civilization in a society can be judged by entering its prisons." Dostoevsky

***903** Few aspects of incarceration are more terrifying to a first-time inmate than the prospect of being forcibly raped and coerced into a sexual relationship in exchange for protection. As one judge put it, "rape is one of the most degrading events, short of death, that can occur in prison." [FN245] Society, however, reacts to prison rape with denial, disgust, and a merciless rationale that rape is "part of the punishment." In light of the staggering reported frequency of sexual assault behind the steel curtain of our correctional institutions, rape is indeed rampant within America's prisons. Equally shocking is the escalating rate of HIV-positive prisoners in jail. As such, a myriad of incoming prisoners now face the grim prospect of contracting AIDS from inmates with a propensity to rape.

Prisoners, however, should not have to wait until they contract a fatal disease before obtaining judicial relief. Being violently raped and subsequently infected with a fatal disease is a form of cruel and unusual punishment that is grossly disproportionate to any sentence the offender has received and completely repugnant to modern standards of humanity and decency. The current Eighth Amendment standard, however, requires victimized inmates to demonstrate that prison officials acted with a culpable subjective intent of deliberate indifference in the face of a substantial risk of violence. Proving malicious, subjective intent is virtually impossible for *pro se* inmates who must themselves litigate against their guardians while incarcerated. Courts must therefore adopt slightly broader, more objective standards to enable threatened inmates secure prospective relief. If unwilling, however, the burden falls on Congress and state lawmakers to implement penal reforms that will prevent sexual assaults and decrease the spread of HIV in our correctional institutions.

[FN1]. *See* Charles M. Sennott, *Prison's Hidden Horror-Rape Behind Bars*, BOSTON GLOBE, May 1, 1994, at 1 (reporting Medina's tale in three-part series documenting AIDS and sexual violence crisis in America's prisons). Mr. Sennott, the author of Medina's story, did not confirm whether Medina actually received HIV through his alleged rapists. *Id.*

[FN2]. *See* Gary Marx, *Lonely Mission-Stephen Donaldson Wants to Stop the Sexual Abuse Of Inmates by Inmates*, CHI. TRIB.., June 23, 1995, at 1 (Tempo section) (reporting various studies of prison violence estimating over 300,000 inmates raped every year).

[FN3]. CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS 61 (1974).

[FN4]. *See* U.S. CONST. amend. VIII (prohibiting government's imposition of cruel and unusual punishment); *see e.g.*, Farmer v. Brennan, 511 U.S. 825, 829-31 (1994) (adjudicating raped inmate's Eighth Amendment claim against prison officials); Jensen v. Clarke, 73 F.3d 808, 809-10 (8th Cir. 1996) (discussing prisoners' class action challenging excessive violence caused by open barrack housing and minimal supervision); Jones v. Vasquez, No. C-91-2376 MHP, 1995 WL 352938, at *1-3 (N.D. Cal. June 8, 1995) (denying summary judgment when prisoner attacked in retaliation during ongoing inter-inmate war).

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The Eighth Amendment applies only to convicted prisoners, while the Fourteenth Amendment protects pre-trial detainees who are incarcerated in jails, awaiting trial. *See* Bell v. Wolfish, 441 U.S. 520, 535-36 (1979) (holding that constitutionality of pre-trial detainees' jail conditions implicate Due Process Clause of Fourteenth Amendment). Thus, under a Fourteenth Amendment analysis, the government may confine pre-trial detainees only to ensure their presence at trial. *Id*. at 536-37. If, however, these restrictions amount to "punishment," the government has violated a detainee's due process rights. *Id*. Since a pre-trial detainee retains the presumption of innocence, some courts have held that detainees are entitled to a higher level of protection than the amount of protection afforded to convicted prisoners under the Eighth Amendment. *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973) (mandating pre-trial detention conditions superior to those of convicted prisoners), *aff'd*, 494 F.2d 1196 (1st Cir. 1974). Nevertheless, many courts often look to the Eighth Amendment's analytical frameworks when addressing civil rights claims of pre-trial detainees. *See e.g.*, Redman v. County of San Diego, 942 F.2d 1435, 1440-43 (9th Cir. 1991) (using Eighth Amendment standard of deliberate indifference to govern pre-trial detainee's constitutional claim); Adams v. Drew, 906 F. Supp. 1050, 1058-59 (E.D. Va. 1995) (utilizing Eighth Amendment standard to pre-trial detainee's claim that officials failed to protect against violence); Westmoreland v. Brown, 883 F. Supp. 67, 73-74 (E.D. Va. 1995) (adopting Eighth Amendment analytical framework to detainee's suit alleging guards arranged beating of prisoner).

[FN5]. *See, e.g.*, Breland v. Abate, 917 F. Supp. 220, 221-23 (S.D.N.Y. 1996) (finding guard merely negligent and thus no constitutional violation where guard slept through inmate's vicious beating); Torrence v. Musilek, 899 F. Supp. 380, 382-84 (N.D. Ill. 1995) (holding assaulted prisoner failed to establish guard's deliberate indifference to sustain Eighth Amendment claim); Westmoreland v. Brown, 883 F. Supp. 67, 69-70, 79-80 (E.D. Va. 1995) (refusing to hold prison guard constitutionally liable for arranging inmate's beating in retaliation of inmate's complaints). *See also infra* notes 123-126 and accompanying text (discussing strict Eighth Amendment standards).

[FN6]. *See* Farmer v. Brennan, 511 U.S. 825, 829-31, 851 (1994) (allowing raped inmate's Eighth Amendment claim to proceed); *infra* notes 175-196 and accompanying text (explaining *Farmer* decision).

[FN7]. *Farmer*, 511 U.S. at 833-34.

[FN8]. *See infra* notes 184, 213-219 and accompanying text (discussing shortcomings of *Farmer* decision's two-part "deliberate indifference" test).

[FN9]. *See* Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 404 (1995) (noting that prison overcrowding positively correlated to increased levels of violence); Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REVV. 273, 285 (1995) (prophesizing HIV prevalence and violence in prison can equal "death sentence" for rape victims).

[FN10]. *See infra* notes 78-91 and accompanying text (considering rise of HIV and AIDS cases inside United States prisons).

[FN11]. *See* Helena Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, in AIDS LAW TODAY, A NEW GUIDE FOR THE PUBLIC 18, 25-27 (Scott Burris et al. eds., 1993) [hereinafter HIV TRANSMISSION AND TREATMENT] (recounting extremely high risk of HIV infection in prisons demonstrated by anal sex participants and needle sharers); *infra* notes 34-37, 92 and accompanying text (discussing widespread prevalence of anal rape and intravenous drug use within America's prisons).

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[FN12]. *See infra* notes 67-77 and accompanying text (discussing epidemiology of HIV virus).

[FN13]. *See infra* notes 78-91 and accompanying text (outlining prevalence of HIV and AIDS within America's prisons).

[FN14]. *See* THEODORE M. HAMMETT, ET. AL., U.S. DEP'T OF JUSTICE, 1994 UPDATE: HIV/AIDS AND STDS IN CORRECTIONAL FACILITIESS 17 (1995) (reporting 48.6% HIV-positive rate in Baltimore City, Maryland penal system).

[FN15]. *See infra* notes 102-105 and accompanying text (considering deadly ramifications of HIV transmission through sexual assault within prisons).

[FN16]. *See* Joyce Price, *Inmate's Lawsuit Points Up HIV Infection by Prison Rapes*, WASH. TIMESS, June 4, 1995, at A3 (reporting Illinois inmate Michael Blucker allegedly contracted HIV from prison rape by infected rapist); *60 Minutes: Profile: Prison Rape; Gang Rape Victims Advocate More Protection for Inmates* (CBS television broadcast, March 3, 1996) (interviewing former inmate Chris Clugston who purportedly received HIV from repeated prison gang rapes).

[FN17]. *See* Harris v. Thigpen, 941 F.2d 1495, 1520 n.36 (11th Cir. 1991) (hypothesizing legal ramifications when prisoner's punishment results in death by HIV transmission through rape); Gutterman, *supra* note 9, at 404 (acknowledging that combination of rape and AIDS in prison poses special dilemma); Charles M. Sennott, *Officials Recoil at Culture of Rape in Prisons-Decrying Reports About Widespread Sex Assaults, Lawmakers Urge Reforms*, BOSTON GLOBE, May 4, 1994, at 1 (quoting former Massachusetts Governor William Weld describing “horrifying” problem of prison rape and AIDS). In Massachusetts, state legislators held an emergency hearing to implement immediate reforms in order to prevent the spread of AIDS through prison rape. *Id*. Even a lawmaker who supports capital punishment stated that the combination of rape and AIDS was “barbaric,” and inmates “don't deserve the death penalty” just for being sentenced to prison. *Id*.

[FN18]. *See* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, DOJ 95-027A, THE NATION'S JAILS HOLD RECORD 490,442 INMATES (Press Release, April 30, 1995) (reporting nation's incarceration rate doubled in last decade to almost 1.5 million in 1995); Hammett, *supra* note 14, at 41 (announcing that only sixteen states and federal prisons employ mandatory HIV testing); HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 33-34 (summarizing reasons for protracted incubation, latency and asymptomatic stages of HIV infection).

[FN19]. *See infra* notes 96-101 and accompanying text (reviewing various correctional responses to HIV epidemic); *infra* notes 78-90 and accompanying text (discussing rising level of HIV-positive inmates within many prison systems).

[FN20]. *See infra* notes 154-174, 184 and accompanying text (reviewing prison officials' legal duties of care to protect inmates from violence and disease).

[FN21]. *See infra* notes 154-174, 184 and accompanying text (discussing different legal standards for prison officials' duties to protect inmates from violence and disease). *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 788 (7th Cir. 1995), represents one of the few recent cases involving the deadly combination of HIV and rape in prison. In that case, Inmate Billman's handwritten *pro se* complaint alleged that his HIV-positive cellmate raped him and that prison guards failed to protect him from the assault. *Id*. Billman contended that the prison guards knew that his alleged rapist had a documented propensity to sexually assault fellow inmates. *Id*. Although the lower court dismissed Billman's complaint with prejudice as frivolous pursuant to 28 U.S.C. §

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1915(d), Judge Posner of the United States Court of Appeals for the Seventh Circuit reversed and reinstated Billman's complaint. *Id.* at 787-90. The court assumed that Billman had not contracted the HIV virus because he consistently tested negative for over six months after the alleged attack. *Id.* at 787. The court noted, however, that Billman's allegations were meritorious because the damages caused by the actual rape itself and the additional fear of contracting AIDS were legitimate claims. *Id.* Although the Seventh Circuit did not fully analyze the prison's liability because the lower court dismissed the suit at the initial stage of litigation, the court of appeals suggested that the prison officials would demonstrate deliberate indifference in violation of the Eighth Amendment if all Billman's allegations were taken as true. *Id.* at 788-89.

[FN22]. *See, e.g.*, Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988) (refusing to hold prison liable for not instituting preventative HIV testing and segregation); Feigley v. Fulcomer, 720 F. Supp. 475, 476-77, 485 (M.D. Pa. 1989) (determining absence of prison's HIV prevention policy not deliberately indifferent to inmates' constitutional rights); DeGidio v. Perpich, 612 F. Supp. 1383, 1390 (D. Minn. 1985) (denying summary judgment where officials failed to control prison's tuberculosis epidemic), *dismissed sub. nom.*, DeGidio v. Pung, 704 F. Supp. 922 (D. Minn. 1989), *reconsidered*, 723 F. Supp. 135 (D. Minn. 1989), *aff'd*, 920 F.2d 525 (8th Cir. 1990).

[FN23]. *See infra* notes 175-183 and accompanying text (outlining demanding standards governing claims that prison officials failed to protect inmates from violence).

[FN24]. *See infra* notes 213-224 and accompanying text (criticizing unrealistic approach of constitutional framework applied to rape and AIDS combination); *see also* Kathy J. Gardner, Comment, *Sentenced to Prison, Sentenced to AIDS: The Eighth Amendment Right to be Protected from Prison's Second Death Row*, 92 DICK. L. REVV. 863, 872 (1988) (arguing prisoners have constitutional right of protection against HIV infection through battery).

[FN25]. *See infra* notes 34-66 and accompanying text (summarizing rape victims' testimony, statistics of sexual assault, penal officials' response, and reasons behind rampant violence).

[FN26]. *See infra* notes 78-90 and accompanying text (discussing prisons' rapidly increasing HIV infection rates and reactions of officials to epidemic).

[FN27]. *See infra* notes 106-122 and accompanying text (explaining early underpinnings of Cruel and Unusual Punishment Clause and recent prisoner's rights constitutional jurisprudence).

[FN28]. See Farmer v. Brennan, 511 U.S. 825, 828-29, 835-37, (1994) (defining state-of-mind requirement of Eighth Amendment prison jurisprudence's deliberate indifference standard); *infra* notes 127-153 and accompanying text (considering evolution of deliberate indifference analytical framework); *infra* notes 175-189 and accompanying text (discussing *Farmer* decision's deliberate indifference test).

[FN29]. *See infra* notes 213-224 and accompanying text (applying deliberate indifference test to rape and AIDS scenario and considering actual effect on prisoners' lawsuits).

[FN30]. *See infra* notes 236-240 and accompanying text (proposing legal standard to adequately protect inmates from contracting HIV through sexual assault).

[FN31]. *See infra* notes 152-49, 213-219 and accompanying text (discussing practical burdens facing prisoners who must demonstrate prison officials' subjective awareness and intent).

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[FN32]. *See infra* note 235 and accompanying text (asserting dire need to amend current judicial scheme to prevent unnecessary death from rape and AIDS).

[FN33]. *See infra* notes 241-245 and accompanying text (advocating alternative solutions from internal correctional perspective).

[FN34]. *See* Weiss & Friar, *supra* note 3, at x. *See also* Young v. Quinlan, 960 F.2d 351, 353-54 (3d Cir. 1992) (recounting ordeal where cellmate coerced plaintiff-prisoner with razor to perform oral sex); McGill v. Duckworth, 944 F.2d 344, 346 (7th Cir. 1991) (describing shower-room gang rape of wash-cloth-gagged plaintiff by three armed assailants); Tillery v. Owens, 719 F. Supp. 1256, 1274-75 (W.D. Pa. 1989) (discussing assaults, stabbings, rapes, and gang fights that occur frequently in Pittsburgh prison), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Michael Leven, Note, *Fight, Flee, Submit, Sue: Alternatives for Sexually Assaulted Prisoners*, 18 COLUM. J.L. & SOC. PROBS. 505, 506 (1985) (describing sexual violence as common as iron bars in American prison).

[FN35]. *60 Minutes: Profile: Prison Rape; Gang Rape Victims Advocate More Protection for Inmates* (CBS television broadcast, Mar. 3, 1996). Stephen Donaldson, president of Stop Prisoner Rape, Inc., testified of being gang-raped in a Washington, D.C. jail after the police arrested him a 1973 Vietnam War protest:

> *Mr. Stephen Donaldson*: And a bunch of guys grabbed me. And about eight of them squeezed into this little two-man cell, and, you know, they told me to strip my clothes off. And I refused to do that. And they grabbed me and started banging my head against the iron railing on the top bunk until I was-I was dizzy. And then they started slapping me and hitting me in the face until I agreed to give into them. They put a pillow over my head so that nobody could hear me screaming.
>
> *Mike Wallace*: How many guys?
>
> *Mr. Donaldson:* It was about 45.
>
> *Mr. Wallace:* What?
>
> *Mr. Donaldson*: About 45 guys the first night, yeah. It started about 7 PM and about every five guys, they would move me on, from one cell to the next. And I went down the whole tier. From-from the furthest away from the guard post, all the way down the tier.

Id.

[FN36]. 511 U.S. 825 (1994).

[FN37]. *See* Josh Getlin, '*I'm Still Fighting*', L.A. TIMES, May 20, 1994, at 1 (citing study finding over quarter-million sexual assaults on prisoners each year). Senator Arlen Spector contends that society pays a heavy price for prison rapes because many of the victims will become violent criminals. *Id*. As a Philadelphia District Attorney in the early 1970s, Senator Spector conducted extensive investigations of rapes in Philadelphia's prisons and concluded that sexual assaults were occurring at a frenzied rate not only in his jurisdiction but also throughout the United States. Weiss & Friar, *supra* note 3, at ix.

[FN38]. *See* Charles M. Sennott, *Prison System Enacts Reforms to Stop Inmate Rape*, BOSTON GLOBE, November 9, 1994, at 37 (discussing state prison officials' reactive measures taken in response to Boston Globe's prison rape articles).

[FN39]. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

[FN40]. *See* Sennott, *supra* note 17, at 1 (reporting Massachusetts Senator Kennedy and Governor Weld's disdain of widespread prison rape). Senator Edward Kennedy, a member of the Senate Judiciary Committee that

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oversees the federal prison system, called the problem of sexual assault in prison a "disgrace" and said that "nobody deserves to be placed in institutions where they are routinely subjected to brutality and the risk of disease." *Id.*

[FN41]. Gilland v. Owens, 718 F. Supp. 665, 675-76 (W.D. Tenn. 1989).

[FN42]. Palmigiano v. Garrahy, 443 F. Supp. 956, 967 (D.R.I. 1977).

[FN43]. Martin v. White, 742 F.2d 469, 471 (8th Cir. 1984). The *Martin* court called the subject matter of this case a "national disgrace." *Id.* at 470.

[FN44]. Weiss & Friar, *supra* note 3, at 47.

[FN45]. *Id.*

[FN46]. *See* Charles M. Sennott, *supra* note 1, at 1 (interviewing prison rape victims and recounting their stories).

[FN47]. *Id.*

[FN48]. *Id.*

[FN49]. *See* David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REVV. 1541, 1545 (1992) (noting difficulty assessing number of prison rapes).

[FN50]. *See* Alberti v. Heard, 600 F. Supp. 443, 450 (S.D. Tex. 1984), *aff'd sub. nom.*, Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986).

[FN51]. *Prison Studies Are Few, But Point to 'Targets' of Sexual Assault*, SEATTLE TIMES, April 23, 1995, at A16.

[FN52]. *See id.* (reporting statistics regarding prevalence of rape inside America's prisons). Mr. Donaldson based his results upon extrapolations of the few studies that have attempted to measure violence within America's prisons. *See* Stephen Donaldson, *Rape of Incarcerated Americans: A Preliminary Statistical Look* (7th ed. unpublished) (visited Mar. 5, 1997) <http:// www.igc.apc.org/spr/docs/stats.html/> (reporting current rates of violence within American correctional institutions).

[FN53]. *See 60 Minutes: Profile: Prison Rape; Gang Rape Victims Advocate More Protection for Inmates* (CBS television broadcast, Mar. 3, 1996) (interviewing prison superintendent who stated all correctional officers would refute prisoners' allegations of excessive rapes). Two prison violence experts claim that prison officials do not discourage rapes because rapes facilitate greater control over the prisoners, divides them, and makes them fear and hate each other. Weiss & Friar, *supra* note 3, at 27. When asked for his reaction to an inmate being brutally raped in his prison, an official replied, in typical fashion, "Well, that's prison." Sennott, *supra* note 1, at 1. Moreover, despite statistics to the contrary, Federal Bureau of Prisons spokesman Dan Dunne stated that rape is "relatively low" in federal facilities. Getlin, *supra* note 37, at 1.

[FN54]. *See* Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 82 (6th Cir. 1995) (recounting warden's testimony that small, young prisoners especially vulnerable to sexual assault); Redman v. County of San Diego, 942 F.2d 1435, 1437 (9th Cir. 1991) (describing rape of young victim who was 5 6 tall and weighed 130 pounds); Rifkin, *supra* note 9, at 278 (stating prison administrators recognize rape victims predominately young,

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slightly-built, passive first-time offenders); Leven, *supra* note 34, at 509 (commenting that victims of prison rape usually white, slightly-built).

[FN55]. *See* Brief of Stop Prisoner Rape, Inc. at 8-11, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) (describing dynamics of prison rape cycle).

[FN56]. *See id.* at 10 (citing correctional study concluding raped prisoners are at high risk of suicide).

[FN57]. *See id.* at 10-11 (describing protective pairing phenomenon by raped inmates and dominant "jocker" prisoners). One former "punk" has published a pamphlet for male prisoners, advising them about the institution of "hooking up" with a protective senior partner. Stephen Donaldson, *Hooking Up: Protective Pairing for Punks, reprinted as, The Deal Behind Bars, in* HARPER'S, Aug. 1996, at 17-20. Donaldson morbidly counsels entering inmates that "[m]any prisoners who have been raped by fellow inmates or who have been threatened with rape decide to become 'hooked up' with another prisoner. However distasteful the idea may seem, they believe it to be the least damaging way to survive in custody." *Id.* at 17. Donaldson further recommends threatened inmates to "[s]pend as much time as you can with the jockers who want to hook up with you....Check out how serious the guy is. Discuss what he expects from you in detail and try to work out the most favorable agreement." *Id.*

[FN58]. *See supra* notes 56-58 and accompanying text (commenting on vicious cycle of rape, survival driven, coerced sexual relationships in jail).

[FN59]. *See* Alberti v. Klevenhagen, 790 F.2d 1220, 1226 (5th Cir. 1986) (describing prison's unwritten code of silence that deters victims' complaints); Gilland v. Owens, 718 F. Supp. 665, 687 (W.D. Tenn. 1989) (noting inmate victims often refuse to identify attackers and report rapes).

[FN60]. *See* Gullatte v. Potts, 654 F.2d 1007, 1010 (5th Cir. 1981) (recounting prison rapist's deadly revenge upon complaining victim).

[FN61]. *See* Getlin, *supra* note 37, at 1 (quoting Senator Spector's observation that victims possess great potential to commit worse crimes after prison). A 1994 Los Angeles Times article described the psychological trauma that a prison rape victim suffers and reported that "many victims are pressured into believing they have been turned into women, that their masculinity is gone. They frequently go into shock and some attempt suicide." *Id.* One psychiatrist has commented that prison rape victims usually remain in close physical proximity to their attackers resulting in a constant cycle of victimization that frequently leads them to commit serious violence to regain their self-respect upon release. Sennott, *supra* note 1, at 1; *see generally* Weiss & Friar, *supra* note 3 (recounting testimony of prison rape victims who suffered extreme mental distress).

[FN62]. *See* Brief of Stop Prisoner Rape, Inc. at 14, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) (citing study which established that prison rape results in Rape Trauma Syndrome); *see also* LaMarca v. Turner, 662 F. Supp. 647, 688-89 (S.D. Fla. 1987) (reviewing prison doctor's testimony that raped inmate suffered from post traumatic stress disorder), *appeal dismissed*, 861 F.2d 724 (11th Cir. 1988).

[FN63]. *See* Brief of Stop Prisoner Rape, Inc. at 16-17, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) (stating that only one Florida jail has comprehensive sexual assault counseling program available); *see also* LaMarca v. Turner, 995 F.2d 1526, 1534, 1544 (11th Cir. 1993) (finding constitutional violation where prison failed to provide psychological counseling to rape victims).

Conversely, the Federal Bureau of Prisons has implemented a comprehensive sexual assault prevention and intervention program that includes a screening and classification system for inmate placement, staff training,

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inmate education, counseling services, investigation and prosecution coordinators, and a tracking system to monitor violent prisoners. *See* FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. 5324.02, SEXUAL ASSAULT PREVENTION/INTERVENTION PROGRAMS (eff. May 1, 1995).

[FN64]. *See* Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 77 (6th Cir. 1995) (holding raped inmate furnished sufficient evidence to demonstrate officials knew youthful inmate susceptible to sexual assault); *LaMarca*, 995 F.2d at 1538-39 (finding constitutional violation where officials' failed to supervise jail, investigate rapes, transfer known aggressors); El Tabech v. Gunter, 922 F. Supp. 244, 264 (D. Neb.) (finding officials responsible for prison's violence by randomly housing inmates without considering inmate compatibility information), *aff'd*, Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).

[FN65]. *See* Farmer v. Brennan, 511 U.S. 825, 853 (1994) (Blackmun, J., concurring); *see also* Sennott, *supra* note 1, at 1 (stating prison guards consider prison rape consensual sex and ignore victims). Victimized inmates avoid placement in protective custody because in most systems inmates experience the same conditions of confinement as those housed in punitive disciplinary segregation. *See* James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 91 (1987) (remarking inmates in protective custody subject to punitive measures designed for disciplinary purposes).

[FN66]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 21; *see* Robert Gallo, et al., *Isolation of Human T-Cell Leukemia Virus in Acquired Immune Deficiency (AIDS)*, 220 SCIENCE 865 (1983) (detailing discovery of virus that causes AIDS).

[FN67]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 21 (describing dynamics of HIV infection within bloodstream); Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENTT 45, 49 (1995) (commenting that HIV attacks T-lymphocytes of white blood cell family).

[FN68]. *See* Robert R. Redfield & Donald S. Burke, *HIV Infection: The Clinical Picture*, 259 SCI. AMM. 90, 90-93 (1988) (analogizing T4 cell as "quarterback" of immune system responsible for recognizing viruses and activating response). The human immune system comprises many cells and tissues. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 22. The most important types of immune cells, termed "white blood cells" when present in the bloodstream, move freely between blood and body tissue. *Id*. White blood cells are comprised of a family of subtype cells, including the major groups of lymphocytes, monocytes and neutrophils-each of which performs a different function in protecting the body from infection. *Id*. Lymphocytes, which concentrate in lymph nodes, are further divided into two subsets, "B" cells that originate from bone marrow, and "T" cells that originate from the thymus. *Id*. Each lymphocyte carries specific protein markers on its surfaces which are used to identify them. *Id*. The "T4" lymphocyte carries the CD4 protein. *Id*. Researchers label these lymphocytes "CD4" cells. *Id*. CD4 cells perform the extremely important function of generating and stimulating immune system processes. *Id*. The HIV virus' primary target is the CD4 cell whereby the virus reproduces inside the cells and destroys them. *Id*.

[FN69]. *See* NATIONAL RESEARCH COUNCIL, AIDS: THE SECOND DECADE 39 (Heather G. Miller, et. al. eds., 1990).

[FN70]. *See* D. Baltimore & M. Feinberg, *HIV Revealed: Toward a Natural History of the Infection*, 321 NEW ENG. J. MEDD. 1673, 1673-75 (1989). The most common opportunistic infections that AIDS victims contract which eventually leads to death is a form of pneumonia called *Pneumocystis carinii* and Kaposi's Sarcoma, a

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rare blood cancer. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 36.

[FN71]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 36. The medical community now conceptualizes HIV infection generally as a continuum of disease ranging from asymptomatic infection to full-blown AIDS. *See* SARA MOINI & THOMAS HAMMETT, NAT'L INST. OF JUST., 1989 UPDATE: AIDS IN CORRECTIONAL FACILITIES 1 (1990).

[FN72]. *See* Hammett, *supra* note 14, at 2-3 (recounting 83% of AIDS cases among males through 1993 attributable to anal intercourse and IV drug use).

[FN73]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 24-25.

[FN74]. *See id*. While anal sex remains the riskiest method for HIV transmission, the percentage attributable to injection drug use has increased considerably, accounting for 24% of the total AIDS cases in 1993. Hammett, *supra* note 14, at 2. Researchers have also identified regular crack use as a high risk factor associated with HIV infection. *Id*. at 3. A recent study of young urbanites in New York City, Miami, and San Francisco found that regular crack users were 2.4 times more likely to be HIV-positive than non-smokers. *Id*; *see also* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 26 (noting crack use recognized as independent HIV risk factor).

[FN75]. *See* Siegal, *supra* note 50, at 1548. Within weeks to months after exposure, common symptoms of HIV infection include fever, malaise, swollen lymph glands, rash, and sore throats. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 31. An infected person is highly contagious during this first period of "viremia," when the virus reproduces rapidly and becomes highly concentrated in the bloodstream. *Id*. The immune system responds quickly and effectively to this initial burst of infection and the infected individual enters a latency period becoming virtually asymptomatic again, while remaining infectious through sex and blood contact. *Id*. at 33.

[FN76]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 33 (commenting that individuals may remain asymptomatic for long periods).

[FN77]. *See id*. at 19 (observing ten million adults and one million children worldwide infected with HIV).

[FN78]. *See* John Hanchette, *Crime and the Cost of Punishment: AIDS Spreading Rapidly in Prisons*, GANNETT NEWS SERVICE, June 27, 1993, at 1993 WL 7331533 (remarking prisons have highest HIV infection rate of any public institution); *infra* notes 86-87 and accompanying text (discussing rising HIV infection in prison).

[FN79]. *See* Hammett, *supra* note 14, at 9 (comparing HIV infection rate in America's prisons and within general population). A 1995 U.S. Department of Justice study of HIV and AIDS in our nation's correctional facilities reported that forty-seven state and federal prison systems imprisoned 4,827 HIV-positive inmates, an increase of 59% in a three-year span. *Id*. at 8. The AIDS rate in the total United States population was 41 cases per 100,000 in 1993 compared to 516 cases per 100,000 in state and federal prisons and 706 cases per 100,000 in city and local jails-a significant disparity. *Id.*; *see also* Curtis Krueger, *AIDS: The Killer Behind Bars*, ST. PETERSBURG TIMES, May 22, 1994, at 1B (reporting that HIV rate in Florida prisons twenty times higher than general population).

[FN80]. *See* U.S. NAT'L COMM'N ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, HIV DISEASE IN CORRECTIONAL FACILITIES 1, 18 (1991).

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[FN81]. *See* Harris v. Thigpen, 941 F.2d 1495, 1503 n. 12 (11th Cir. 1991) (acknowledging that high-risk intravenous drug users overrepresented in prison); Hammett, *supra* note 14, at 9 (declaring AIDS prevalent in prison because high concentrations of inmates with risk factors for HIV infection).

[FN82]. *See* Alexa, Freeman, *in* AIDS LAW TODAY, A NEW GUIDE FOR THE PUBLIC 263, 264 (Scott Burris et al. eds., 1993).

[FN83]. Ralf Jürgens, *Sentenced to Prison, Sentenced to Death?: HIV and AIDS in Prisons*, CRIM. L. FORUM 763, 765 (1994) (citing UNITED STATES NAT'L COMM'N ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, HIV DISEASE IN CORRECTIONAL FACILITIES 10 (1991)); *see* Freeman, *supra* note 83, at 263 (recounting New York City study demonstrating that 95% of HIV-positive inmates intravenous drug users).

[FN84]. *See* Hammett, *supra* note 14, at 8.

[FN85]. *See* Hammett, *supra* note 14, at 9. In this study, AIDS researchers calculated the HIV infection rate, also termed seropositive prevalence, based upon the total number of cases reported in proportion to the total inmate population in each jurisdiction. *Id*. at 9, 21 & n.19.

[FN86]. *See* Hammett, *supra* note 14, at 9.

[FN87]. *See* Hammett, *supra* note 14, at 12-17. Although the vast majority of HIV infected prisoners are men, the HIV seroprevalence rate is significantly higher among female inmates. *Id*. at 14. In 1994, there were 705 AIDS cases per 100,000 female inmates compared to 518 cases per 100,000 male inmates in the state and federal systems. *Id*. Women are becoming infected with HIV at a greater rate than men, and the rate of incarceration for women over the last decade has surpassed that for men. *See* Freeman, *supra* note 83, at 265 (discussing increasing incarceration and HIV rates among females). A comprehensive discussion regarding the unique combination of HIV and rape among female inmates, however, is beyond the scope of this Note.

States with rates of male inmate HIV seropositivity over 5% include New Jersey, Massachusetts, Florida, Illinois, New York, Connecticut, and Texas. *See* Hammett, *supra* note 14, at 12-17. Urban jurisdictions with rates over 5% include Cook County, Chicago, San Francisco, California, Atlanta, Georgia, Philadelphia, Pennsylvania, and Houston, Texas. *Id*. Systems with rates between 2% and 5% include California, Georgia, North Carolina, Rhode Island, and Illinois. *Id*.

[FN88]. *See* Hammett, *supra* note 14, at 9-16 (reporting 5.5% decline in New York State and approximately 7% decline in Massachusetts from 1987 to 1994).

[FN89]. *See* Hammett, *supra* note 14, at 41 (noting sixteen state correctional systems and Federal Bureau of Prisons employ mandatory HIV testing). States that test all entering inmates for the HIV virus include: Alabama, Colorado, Georgia, Idaho, Iowa, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, Utah, and Wyoming. *See* PETER M. BRIEN & CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BULLETIN, HIV IN PRISONS AND JAILS, 1993 5 (1995). Rhode Island and Wyoming also test all inmates currently in custody. *Id*. Four systems, Alabama, Missouri, Nevada, and the Federal Bureau of Prisons, test all inmates upon their release. *Id*. Twenty jurisdictions test inmates who belong to designated high-risk groups. *Id*. Thirty-nine states test inmates upon their voluntary request or upon a clinical indication of need. *Id*. Twenty-three systems test inmates upon involvement of an incident likely to result in exposure to the virus, such as needle sharing or sexual intercourse. *Id*.

Nancy Mahon, Director of the Correctional Association of New York's AIDS in Prison Project, has commented that official statistics regarding HIV infection in prison are understated. *See* Hanchette, *supra* note

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79, at 1993 WL 7331533. Ms. Mahon believes that approximately 25-50% of all New York City inmates are HIV positive. *Id.*; *cf*. Hammett, *supra* note 14, at 12-17 (finding 16.1% HIV infection rate among males in New York City jails).

[FN90]. *See* CAL. PENAL CODE § 7500 (1995) (finding AIDS transmission within prison poses compelling dilemma with serious ramifications to inmates and society); D. Stuart Sowder, Note, *AIDS in Prison: Judicial Indifference to the AIDS Epidemic in Correctional Facilities Threatens the Constitutionality of Incarceration*, 37 N.Y.L. SCH. L. REV. 663, 666-67 (1992) (arguing prison sentence substantially increases risk of contracting HIV); Art Golab, *State Lacks AIDS Policy for Prisons, Lawmaker Says*, CHI. SUN-TIMES, December 24, 1995, at 9 (quoting Illinois state representative Skinner's criticisms of correctional official's inability to control AIDS transmission).

[FN91]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 24-25. Recently, HIV transmission through intravenous drug use and needle sharing has increased steadily both inside and outside prisons. *See* Hammett, *supra* note 14, at 2. A federal study reported that 24% of total AIDS cases in the United States resulted from injection drug use. *Id*. at 3. Research suggests that intravenous drug use in prison is considerably more risky than outside prison because the illegal nature of this practice behind prison walls results in a shortage of clean needles and an increase in contaminated needle sharing. *Id*. at 15; *see also* Harris v. Thigpen, 941 F.2d 1495, 1520 n.36 (11th Cir. 1991) (stating IV drug use commonplace in prison and impossible to completely eliminate).

[FN92]. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 25; *see* Hammett, *supra* note 14, at 3 (reporting 54% of total AIDS cases attributable to anal intercourse between males).

[FN93]. *See Rape and HIV/AIDS in Prisons: Distinct Problems Requiring Different Policy Responses: Hearings Before the Joint Committee on Public Safety*, General Court of Massachusetts, May 23, 1994 (testimony of Theodore M. Hammett) (urging Massachusetts lawmakers' immediate response to high risk of prison HIV infection through widespread rape); *see also* Joyce Price, *Inmate's Lawsuit Points Up HIV Infection by Prison Rapes*, WASH. TIMESS, June 4, 1995, at A3 (discussing prisoner's suit alleging HIV infection from violent anal rape by HIV-positive aggressor). Rape also occurs within women's prisons, and several published cases of HIV transmission have been attributed to lesbian sex. *See* HIV TRANSMISSION AND TREATMENT, *supra* note 11, at 25 (discussing studies finding HIV transmission through female oral sex); *see also* Ralf Jürgens, *Sentenced to Prison, Sentenced to Death? HIV and AIDS in Prisons*, CRIM. L. F. 763, 775 (commenting that Canadian prisons distribute dental dams to female inmates to prevent AIDS transmission). This Note, however, does not attempt to address that problem.

[FN94]. *See* Siegal, *supra* note 50, at 1549 (asserting chance of HIV infection increased due to frequent prison gang rape); Joyce Price, *Inmate's Lawsuit Points Up HIV Infection by Prison Rapes*, WASHINGTON TIMES, June 4, 1995, at A3 (reporting gang rape not uncommon in prisons and especially risky for HIV transmission); *see also* Redman v. County of San Diego, 942 F.2d 1435, 1438-39 (9th Cir. 1991) (describing repeated rapes of new prisoner by three older, larger inmates); Weiss & Friar, *supra* note 3, at 71-72 (recounting eyewitness' story of gang rape involving twelve assailants in Philadelphia jail).

[FN95]. *See* Hammett, *supra* note 14, at 41-49 (describing prison's policies regarding AIDS and HIV). Currently, sixteen state prison systems and the Federal Bureau of Prisons report mandatory HIV testing of inmates, either upon entering or exiting prison. *Id*. at 41. In 1994, forty state systems and twenty-eight city and county systems made voluntary HIV testing available to inmates. *Id*. at 42.

Only two states, Alabama and Mississippi, currently segregate HIV-infected inmates from the general

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population. *Id.* at 41. The medical community and prisoners rights advocates strongly criticize segregation for unduly stigmatizing infected inmates, violating their privacy rights, and undermining HIV prevention efforts. *See, e.g.*, Harris, 941 F.2d at 1500-05 (challenging constitutionality of Alabama's mandatory segregation policy of AIDS-infected inmates); Freeman, *supra* note 83, at 276 (condemning prisons' segregation policies and noting decrease in practice); Knepper, *supra* note 68, at 93 (maintaining segregation has questionable utility and raises significant constitutional implications).

Experts agree that HIV education in prison can be extremely effective due to the high concentrations of prisoners with behaviors that may place them at an heightened risk for HIV infection. *See* Freeman, *supra* note 83, at 283; Hammett, *supra* note 14, at 23. According to a 1994 Justice Department study, 75% of reporting prison systems provided comprehensive, instructor-led HIV education programs. *See* Hammett, *supra* note 14, at 24.

[FN96]. *See* Hammett, *supra* note 14, at 38 (commenting that Mississippi, Vermont, San Francisco, New York City, and Washington, D.C. prison systems distribute condoms to inmates). Colorado, West Virginia, and Washington state are currently debating the availability of condoms to inmates. *See, e.g.*, Tina Kelley, *'Protection' Behind Bars, The Issue of Condoms for Inmates Sparks a Wide-Ranging Debate*, SEATTLE POST-INTELLIGENCER, June 2, 1994, at C1 (commenting on availability of condoms in Washington penal system); Michael Romano, *Romer Advisers Urge Condoms for Prisoners*, ROCKY MOUNTAIN NEWS, March 20, 1996, at A4 (discussing prison condom issue in Colorado); Kristen Svignen, *Prison Officials Reconsidering Ban of Condoms*, CHARLESTON GAZETTE & DAILY MAIL (WV), June 16, 1994, at B1 (reporting issue in West Virginia).

[FN97]. *See* Hammett, *supra* note 14, at 39 (noting that correctional officials often conclude that safe injection programs would condone illegal activity); David Ammons, *Ruling on Condoms for Inmates Unlikely Soon*, SEATTLE TIMES, August 11, 1994, at B8 (reporting Washington correctional officials' opposition and doubt regarding condom distribution to inmates); Krueger, *supra* note 80, at 1B (detailing advantages and criticisms of possible Florida condom distribution).

[FN98]. *See* Jürgens, *supra* note 94, at 775-76 (commenting on successful and widely praised Canadian prison condom distribution program); Hammett, *supra* note 14, at 39 (reporting Vermont and Mississippi condom programs have resulted in minimal incidents of misuse or increased inmate sexual activity).

[FN99]. *See* Hammett, *supra* note 14, at 37; Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1454 (E.D. Pa. 1995) (approving prison reform settlement where Pennsylvania system agreed to adopt universal precautions policy). The Centers for Disease Control (CDC) has long advocated universal precautions guidelines for all correctional and law enforcement settings. *See* Hammett, *supra* note 14, at 37. The Occupational Safety and Health Administration (OSHA) has issued regulations mandating that prisons establish written exposure control plans, training, infection control equipment and testing for workers exposed to infectious disease such as HIV and tuberculosis. *Id.* at 38. A national study on HIV in United States prisons has indicated, however, that correctional administrators have unsatisfactorily implemented these universal precautions in many systems. *Id.* at 37.

[FN100]. *See* Hammett, *supra* note 14, at 37.

[FN101]. *See supra* notes 81-84 and accompanying text (discussing AIDS experts' findings that prisons attract overepresented group of HIV-positive individuals); *see also* Judd v. Packard, 669 F. Supp. 741, 743 (D. Md. 1987) (stating HIV transmission heightened in prison where virus spread through "homosexual" encounters).

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[FN102]. *See* Ann F. Hammond, Note, *AIDS in Correctional Facilities: A New Form of the Death Penalty?*, 36 WASH. U. J. URB. & CONTEMPP. L. 167, 167 (1989) (stating fear of AIDS rampant in prisons where inmates at high risk of exposure); Siegal, *supra* note 50, at 1550-51 (discussing imminence of prisoners contracting HIV through sexual assault).

[FN103]. *See supra* notes 104-120 and accompanying text (discussing judicial expansion of Eighth Amendment in prisoners' rights context).

[FN104]. *See, e.g.*, SARA POLONSKY, ET. AL., U.S. DEPT. OF HEALTH AND HUMAN SERVS., HIV PREVENTION IN PRISONS AND JAILS: OBSTACLES AND OPPORTUNITIESS 615 (1994) (stating estimated lifetime cost of treating HIV-infected inmate $85,000 in 1991); Hanchette, *supra* note 79, at 1993 WL 7331533 (calculating annual cost of treating and housing AIDS infected inmates at approximately $750,000); Krueger, *supra* note 80, at 1B (commenting that AIDS treatment cost Florida $7.8 million in 1994).

[FN105]. U.S. CONST. amend. VIII. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*; *see also*, Anthony F. Granucci, *“Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning*, 57 CAL. L. REV. 839, 852-60 (1969) (outlining early English underpinnings and philosophies behind Founders' adoption of Eighth Amendment).

[FN106]. *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879) (exploring Eighth Amendment applications to archaic methods of punishment and execution). In *Wilkerson*, the Court forbade emboweling, beheading, quartering, public dissection, and burning alive as legal means of execution because they were repugnant to the Eighth Amendment's ban of cruel and unusual punishments. *Id.*

[FN107]. 136 U.S. 436 (1890).

[FN108]. *Id*. at 447. The *Kemmler* Court upheld the constitutionality of a New York statute authorizing capital punishment by electrocution. *Id*. at 449; *see also* Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding bungled electrocution did not inflict unnecessary pain in violation of Eighth Amendment).

[FN109]. 217 U.S. 349 (1910).

[FN110]. *Id*. at 381-82. After a jury convicted Weems of falsifying government documents, he served 15 years of hard and painful labor while imprisoned in wrist and ankle chains. *Id*. at 363-64. In striking Weems' sentence, the Court held that the Eighth Amendment should remain progressive and reflect society's beliefs and opinions concerning humane punishment. *Id*. at 378. Fifty years later, Chief Justice Warren applied these sentiments and held that the Eighth Amendment should reflect “society's evolving standards of decency.” Trop v. Dulles, 356 U.S. 86, 101 (1958).

[FN111]. *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125-33 (1977) (forbidding prison labor union meetings and solicitation of new inmate members); Pell v. Procunier, 417 U.S. 817, 829-35 (1974) (upholding California prison regulation prohibiting press from interviewing individual inmates); Procunier v. Martinez, 416 U.S. 396, 415-19 (1974) (holding prison mail censorship and withholding regulation violated First Amendment), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989); Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974) (requiring due process notice and hearing before prison denies inmates good-time credits); Cruz v. Beto, 405 U.S. 319, 319-323 (1972) (allowing Buddhist inmate equal access to prison chapel as afforded to inmates of traditional denominations); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (upholding district court orders directing desegregation of Alabama prisons).

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[FN112]. *See, e.g.*, United States *ex. rel*. Knight v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) (noting state prison issues sole domain of sovereign and properly addressable only under exceptional circumstances); Kirby v. Thomas, 336 F.2d 462, 464 (6th Cir. 1964) (finding no authority to regulate prison's ordinary internal management and disciplinary procedures); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951) (restating well-settled proposition that courts' function not to superintend prison policies); *see also* Gutterman, *supra* note 9, at 379 (acknowledging historical judicial philosophy not to intervene in federal and state prison systems); Russell W. Gray, Note, Wilson v. Seiter: *Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1344 (1992) (commenting that federal courts took anti-activist approach to penal problems before 1960s).

[FN113]. *See* Gutterman, *supra* note 9, at 379.

[FN114]. *See* Holt v. Sarver, 309 F. Supp. 362, 373-85 (E.D. Ark. 1970) (placing Arkansas state penitentiary under decree for deplorable and unconscionable conditions), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *aff'd sub. nom*, Hutto v. Finney, 437 U.S. 678 (1978). In *Holt*, a courageous federal judge exposed the atrocities occurring within the Arkansas penal system. *Id*. Officials administered electric shock treatment to inmates and beat them with leather straps. *Id*. at 372. Prison guards, called “trusties,” were actually inmates given administrative authority to use deadly force in supervising daily prison life. *Id*. at 373-76. Convicts often clung to cell bars all night to escape the violent nocturnal knife attacks of fellow inmate aggressors, known as “creepers.” *Id*. at 377.

In Alabama in the mid-seventies, health officials described the correctional system as totally unfit for human habitation in violation of every known evaluative criteria. Pugh v. Locke, 406 F. Supp. 318, 323-24 (M.D. Ala. 1976), *aff'd sub. nom.*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978). Overcrowding forced inmates to sleep on mats on the squalid prison's floors, hallways and next to urinals. *Id*. at 324. Violence ran rampant; rape and murder were everyday occurrences. *Id*. Insects infested the food. *Id*. As such, the federal district court placed the Alabama correctional system under decree to remedy its myriad of constitutional contraventions. *Id*.

As of 1995, thirty-nine states plus the District of Columbia, were under court order or consent decree to limit population and/or improve conditions in either the entire state penal system or individual correctional institutions. NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION, INC., STATUS REPORT: STATE PRISONS AND THE COURTS (1995), *reprinted in* 3 PRISONERS AND THE LAW APP. B-109 (Ira P. Robbins, ed. 1995).

[FN115]. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 296 (1991) (claiming prison conditions violated Eighth and Fourteenth Amendments in § 1983); Estelle v. Gamble, 429 U.S. 97, 99-100 (1976) (alleging incompetent prison medical care as basis of inmate's § 1983 claim); Cameron v. Metcuz, 705 F. Supp. 454, 455-59 (N.D. Ill. 1989) (basing prisoner's § 1983 action on assault and wounding bite by violent HIV-positive inmate).

> The Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1994) provides, in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

The Civil Rights Act protects state prisoners from constitutional infringements imposed by authorities acting under the color of state law. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 27-28 (1993) (considering prisoner's § 1983 suit stemming from excessive exposure to cellmate's cigarette smoking); Tillery v. Owens, 907 F.2d 418, 422-28 (3d Cir. 1990) (holding prison conditions unconstitutional in inmates' § 1983 class action); Williams v. Coughlin, 875 F. Supp. 1004, 1013-14 (W.D.N.Y. 1995) (holding prison officials liable under §

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1983 for depriving inmate of food for 100 hours). Federal prisoners utilize the *Bivens* action to sue federal prison officials for violations of their constitutional rights. *See generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (enabling claimants to bring constitutional claims against federal authorities acting in their official capacities); *see also* Farmer v. Brennan, 511 U.S. 825, 829-31 (1994) (describing federal prisoner's *Bivens* claim against federal penitentiary for failing to protect against inmate violence); Young v. Quinlan, 960 F.2d 351, 356 (3d Cir. 1992) (recounting inmate's *Bivens* action against prison officials stemming from rape by other prisoner).

An aggrieved prisoner may sue state prison officials in their individual capacities and receive damages. *See* Papasan v. Allain, 478 U.S. 265, 278 n.11 (1986). A court may award punitive damages in a § 1983 suit provided that the prisoner demonstrate correctional officials' malicious intent or callous indifference to the inmate's constitutional rights. *See* Smith v. Wade, 461 U.S. 30, 56 (1983); *see also* Holloway v. Wittry, 842 F. Supp. 1193, 1201 (S.D. Iowa 1994) (awarding punitive damages against guard who willfully failed to assist attacked inmate). The Eleventh Amendment, however, prohibits the award of damages against state prison administrators in their official capacity. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

Moreover, the doctrine of qualified immunity may shield prison guards and administrators from an inmate's section 1983 claim for damages in their individual capacities. *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978); *see also* Cleavinger v. Saxner, 474 U.S. 193, 206 (1985) (granting qualified immunity to prison administrative disciplinary board members). To defeat the qualified immunity defense, a prisoner must show that a reasonable person would have known that the prison official's conduct violated the aggrieved inmate's clearly established constitutional rights. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (expounding qualified immunity standards in case involving government officials' allegedly unconstitutional practice). The qualified immunity defense shields officials only from the award of damages. *See* Wood v. Clemons, 89 F.3d 922, 925 (1st Cir. 1996) (holding qualified immunity protects prison official from damage suit based upon strip search policy). Thus, qualified immunity does not foreclose a prisoner's petition for injunctive relief. *See* Doe v. Wigginton, 21 F.3d 733, 737 (6th Cir. 1994) (noting qualified immunity not defense to inmate's request for injunctive relief seeking HIV test).

Furthermore, sovereign immunity will protect federal and state governments against suits for damages. *See* Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 265 (S.D.N.Y. 1990), *aff'd sub. nom.*, Deutsch v. F.B.I., 930 F.2d 909 (2d Cir. 1991). Absent statutory waiver of traditional sovereign immunity, federal courts have no jurisdiction to entertain monetary claims against the United States. *Id. But see* Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) (holding United States liable in tort to same extent as private citizens).

Courts can hold a municipality or local government agency, such as a department of corrections, liable under § 1983 when the implementation of the organization's policy or custom violates the Constitution. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-94 (1978). To prove a policy or custom unconstitutional, a claimant need only prove a single incident of a constitutional violation carried out by an agency's highest policy making official for that activity. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

[FN116]. *See Nature and Number of Civil Suits Filed in the Federal Courts in 1995* (chart), NAT'L L.J., Aug. 26, 1996, at A5 (reporting 63,550 prisoner petitions out of 248,335 civil actions filed in federal courts in 1995); Hayes v. New York City Dep't of Corrections, No. 91 Civ. 4333 (JSM), 1995 WL 495633, at *2 (S.D.N.Y. Aug. 21, 1995) (commenting that prisoners' suits comprise large portion of Southern District of New York's federal caseload), *rev'd on other grounds*, 84 F.3d 614 (2d Cir. 1996); *see also* Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON L. REV. 1, 6 (1988) (remarking 218 prisoner cases filed in 1966 increased to over 16,000 cases in 1982).

[FN117]. *See* Williams v. Griffin, 952 F.2d 820, 824-25 (4th Cir. 1991) (precluding prison official's summary

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judgment motion where overcrowded prison had four sewage flooded showers for 94 inmates); Tillery v. Owens, 907 F.2d 418, 422-28 (3d Cir. 1990) (holding prison conditions unconstitutional where prison maintained double-celling, unsanitary facilities, shortages of clothing, and endemic vermin). *But see* Ware v. Fairman, 884 F. Supp. 1201, 1207 (N.D. Ill. 1995) (finding no Eighth Amendment violation where prison forced inmate to sleep on freezing floor without blanket); Summers v. Sheahan, 883 F. Supp. 1163, 1169 (N.D. Ill. 1995) (holding that triple-celling where inmate slept on cold floor for two months only temporary inconvenience).

[FN118]. *See* Farmer v. Brennan, 511 U.S. 825, 830-31 (1994) (alleging prison officials failed to prevent inmate rape in violation of Eighth Amendment); Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 77 (6th Cir. 1995) (precluding summary judgment when evidence showed officials knew youthful inmate susceptible to sexual assault); LaMarca v. Turner, 995 F.2d 1526, 1533-39 (11th Cir. 1993) (finding constitutional violations when inmates repeatedly raped in prison bathroom, shower, and yard, yet incidents uninvestigated); Young v. Quinlan, 960 F.2d 351, 354-58 (3d Cir. 1992) (declaring prison officials liable to inmate forced to perform oral sex by razor-wielding cellmate).

[FN119]. *See* Estelle, 429 U.S. at 104-05 (announcing that prisons' medical malpractice will not violate Eighth Amendment); *see also* Dias v. Vose, 865 F. Supp. 53, 58-60 (D. Mass. 1994) (ruling no constitutional violation for prison's negligent treatment of inmate's appendicitis), *aff'd*, 50 F.3d 1 (1st Cir. 1995). *But see* Arnold v. Lewis, 803 F. Supp. 246, 257 (D. Ariz. 1992) (finding prison psychiatrist liable under Eight Amendment for failure to provide adequate mental health care).

[FN120]. *See, e.g.*, Pelfrey v. Chambers, 43 F.3d 1034, 1035-37 (6th Cir. 1995) (reversing inmate's dismissal when guards attacked him with knife and cut his hair off); Munz v. Michael, 28 F.3d 795, 797-98 (8th Cir. 1994) (finding constitutional violation when marshals kicked and stomped inmate in retaliation for vandalizing squad car); Northington v. Jackson, 973 F.2d 1518, 1523-25 (10th Cir. 1992) (imposing liability on officer who held gun to inmate's head and threatened to shoot for minor infraction).

[FN121]. *See* Helling v McKinney, 509 U.S. 25, 28-29 (1993) (holding inmate stated viable Eighth Amendment claim where exposed to unreasonably high levels of environmental tobacco smoke).

[FN122]. *See* *Farmer*, 511 U.S. at 836-37 (applying deliberate indifference standard to claim involving inmate rape); *Helling*, 509 U.S. at 33 (using deliberate indifference framework to assess inmate's claim stemming from excessive exposure to cigarette smoke); Wilson v. Seiter, 501 U.S. 294, 297-300 (1991) (reformulating deliberate indifference standard in general challenge of prison's conditions).

[FN123]. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 836-37 (1994) (applying deliberate indifference test to prisoner's suit alleging failure to protect against violent sexual assault); Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981) (using deliberate indifference standard in challenge of prison's double-celling policy); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (applying deliberate indifference test to prisoner's medical malpractice suit under Eighth Amendment).

[FN124]. *See* *Helling*, 509 U.S. at 35-36 (holding viable claim entails incarceration under conditions posing substantial risk of serious harm); *Wilson*, 501 U.S. at 298 (requiring objectively serious Eighth Amendment deprivation to prove deliberate indifference).

[FN125]. *See* *infra* notes 149-50, 183 and accompanying text (discussing subjective element of deliberate indifference test).

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[FN126]. 429 U.S. 97 (1976).

[FN127]. *See id*. at 104 (holding that prison officials' deliberate indifference to inmate's medical needs violated Eighth Amendment).

[FN128]. *See id*. at 104-05; *see also* Siegal, supra note 50, at 1554 (commenting that *Estelle* Court created deliberate indifference test).

[FN129]. *Estelle*, 429 U.S. at 98-101. Inmate J.W. Gamble sued Texas prison officials and medical staff under 42 U.S.C. § 1983 for subjecting him to a series of misdiagnoses and incorrect treatments after a bale of cotton fell on his back during a prison work assignment. *Id*. at 99-101. The United States Court of Appeals for the Fifth Circuit reversed the district court's dismissal of Gamble's claim and reinstated his complaint. *Id*. at 98.

[FN130]. *See id*. at 106.

[FN131]. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[FN132]. *See id*. at 103-04. The Court held that states are obligated to provide medical care to prisoners because prisoners cannot provide for themselves. *Id*.

[FN133]. *See id*. at 105-06.

[FN134]. *See id*. Applying the new test, the Court concluded that Gamble's treatment did not rise to the level of deliberate indifference and thus, did not violate the Eighth Amendment. *Id*. at 107. The prison medical staff treated Gamble on 17 occasions spanning a three month period and prescribed pain killers, muscle relaxers, and bed rest. *Id*. The Court noted that, at most, Gamble's treatment rose to malpractice, but did not violate the Eighth Amendment under the Court's strict standard. *Id*.

The Court further defined the constitutional parameters of prison medical care and held that prison doctors who inadequately respond to prisoners' needs, guards who intentionally deny or delay access to medical care, or interfere with treatment will violate the Eighth Amendment if officials act with deliberate indifference. *Id*. at 104-05.

[FN135]. 452 U.S. 337 (1981).

[FN136]. *See id*. at 345. In *Rhodes*, Ohio state prisoners alleged that double-bunking in tiny cells measuring 63 square feet amounted to cruel and unusual punishment. *Id*. at 340-41. Although the district court found the prison to be of commendable quality as a whole, the court concluded that the double-celling policy violated the Eighth Amendment. *Id*. at 343. The district court relied upon three national correctional standards of cell dimensions in ordering the prison to furnish inmates with 50-55 square feet of living space per prisoner. *Id*.

[FN137]. *See id*. at 347.

[FN138]. *See id*. (defining unconstitutional prison conditions). The Court concluded that double-celling was constitutional because it neither deprived inmates of necessities like food, medical care, or sanitation, nor increased violence or created other intolerable conditions. *Id*. at 348. Thus, the prisoners could not demonstrate that double-celling inflicted the wanton and unnecessary pain needed to sustain a valid Eighth Amendment action. *Id*.

[FN139]. *See id*. at 351 & n.16. The *Rhodes* Court noted that prisons pose unique and complex dilemmas which

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require the expertise of professional penal administrators as opposed to intrusive decrees imposed by the less qualified federal bench. *Id*.

Many legal commentators argue in favor of judicial intervention and advocate that institutional reform litigation has restored prisoners' constitutional rights without undermining prisons' legitimate penalogical interests. *See* Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857, 858 (1992) (arguing federal judicial intervention beneficial to penal institutions); M. Day Harris & Dudley D. Spiller, Jr., U.S. DEP'T OF JUSTICE, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21 (1977) (suggesting judicial remedies have improved prison conditions).

[FN140]. 475 U.S. 312 (1986).

[FN141]. *See id*. at 320 (rejecting deliberate indifference standard and applying heightened "wantonness" test in prison disturbance setting). In *Whitley*, Oregon state prisoners initiated a melee and took a prison guard hostage. *Id*. at 314-15. Whitley, the prison security manager, assembled an armed assault team and charged the captive cellblock with shotguns yelling, "Shoot the bastards!" *Id*. at 315-16. During the melee, a guard shot Albers, the inmate petitioner. *Id*. at 316. Albers brought suit under 42 U.S.C. § 1983, alleging that Whitley and other prison guards violated his Eighth Amendment rights as a result of the shooting. *Id*. at 317.

[FN142]. *See id*. at 320-22 (balancing competing interests and siding with prison administrators). The Court reiterated its deference to experienced and able correctional officers in this volatile context, especially when a disturbance metamorphasizes into actual bloodshed. *Id*. at 321. This Deference applies equally both in measures taken in defense to real violence and measures taken to prevent violence. *Id*. at 322. Actions taken in bad faith, however, do not receive such prophylactic treatment from courts. *Id*.

[FN143]. *Id*. at 320. When violence erupts in prison, the Court declared that it will respect prison officials' decision-making ability. *Id*. at 321-22. Hence, the *Whitley* Court used a standard more deferential to prison security than the Court's previous use of the deliberate indifference standard. *See id*. at 320 (rejecting deliberate indifference standard for higher sadistic and malicious subjective test for excessive force claims).

[FN144]. *Id*. at 312, 320-21. This new malicious and sadistic test sufficiently encapsulates the bench's hesitation to second-guess many of the necessitously hasty and strained judgments made by prison security when violence erupts behind cell walls. *See id*. at 321-22 (deferring to prison officials' sound judgments in maintaining security and discipline). The *Whitley* Court reasoned that the deliberate indifference query used in *Estelle* was appropriate to address prisoners' medical concerns, however, these same concerns do not ordinarily clash with other equally important government responsibilities, such as security. *Id*. at 320; *see also* Hudson v. McMillian, 503 U.S. 1, 6-8 (1992) (extending sadistic and malicious standard to govern all allegations of excessive force by prison guards).

Subsequently, in *Hudson v McMillian*, an inmate sued two prison guards alleging that one guard handcuffed and held him while the second guard punched him in the face, mouth, and stomach, causing a cracked dental plate, bruises and loosened teeth. *Hudson*, 503 U.S. at 4. During the beating, another guard watched in amusement, cautioning the guards "not to have too much fun." *Id*. The Court of Appeals for the Fifth Circuit agreed with the lower court's finding that the prison guards applied excessive and wanton force in violation of the Eighth Amendment but reversed the magistrate judge's award of damages because Hudson's injuries were not significant enough to violate the Eighth Amendment. *Id*. at 5. The Supreme Court of the United States rejected this "significant injury" requirement, however, and held that inmates need not endure severe mistreatment to state an Eighth Amendment violation. *Id*. at 7-10. The Court found Hudson's injuries sufficiently grave to satisfy the Court's Eighth Amendment objective component, thus entitling Hudson to damages. *Id*. at 8-10.

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The *Hudson* Court applied the *Whitley* subjective standard for excessive force suits and held that force is cruel and unusual if it is applied maliciously and sadistically to cause harm. *Id*. If officials apply excessive force in a good faith effort to restore control, there is no constitutional violation. *Id*. Determining that Hudson fulfilled the objective and subjective tests to demonstrate the guards' cruel and unusual application of excessive force, the Court upheld the Fifth Circuit's ruling that the defendant prison guards acted maliciously and sadistically. *Id*. at 4-6.

Because *Hudson*'s narrow holding only applied to excessive force cases, the decision did not affect the deliberate indifference standard applicable to conditions of confinement. *See id*. at 7-8 (mandating heightened test only in excessive force contexts); Wilson v. Seiter, 501 U.S. 294, 306 (1991) (reversing judgment in prison conditions case because appeals court erroneously used *Whitley* standards).

[FN145]. 501 U.S. 294 (1991).

[FN146]. *See id*. at 306 (comparing standards of deliberate indifference applied to Eighth Amendment challenges). Before *Wilson*, the Court applied various levels of deliberate indifference in different Eighth Amendment contexts. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (applying sadistic and malicious standard instead of deliberate indifference test for excessive force claims); Rhodes v. Chapman, 452 U.S. 311, 345-47 (1981) (concluding that overall prison conditions causing wanton and unnecessary pain equals deliberate indifference); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding that prisoners must show that medical care deliberately indifferent to serious health needs).

In *Wilson*, an inmate in the Ohio Department of Corrections sued prison officials alleging that the prison's overcrowding, excessive noise, improper ventilation, inadequate heating and cooling, and housing with mentally and physically ill inmates violated the Eighth Amendment. *Wilson*, 501 U.S. at 296. Wilson brought his action under 42 U.S.C. § 1983 seeking injunctive relief and $900,000 in damages. *Id*. The district court granted summary judgment to the defendant prison officials and the Sixth Circuit affirmed. *Id*.

[FN147]. *See id*. at 298-99 (mandating objective and state-of-mind inquiry to prison condition challenges). The *Wilson* majority expressed little empathy for the plight of prisoners. *See id*. (reiterating that Constitution does not mandate comfortable prisons). Under *Wilson*, only those deprivations that deny the minimal civilized measures of life's necessities are sufficient to state an Eighth Amendment violation. *Id*.

[FN148]. *See id*. at 304-05 (explaining only certain combinations of conditions which deprive prisoner's basic needs violate Eighth Amendment). For example, the Court identified such basic needs as food, warmth, and shelter. *Id*. at 304; *see* Hudson, 503 U.S. at 8-9 (noting extreme deprivations required to show Eighth Amendment conditions of confinement violation); Williams v. Coughlin, 875 F. Supp. 1004, 1013-14 (W.D.N.Y. 1995) (finding unconstitutional deprivation where prisoner denied food for five days for disciplinary infraction).

Some prison conditions clearly violate the Eighth Amendment from an objective standpoint. *See* Tillery v. Owens, 907 F.2d 418, 422-28 (3d Cir. 1990) (finding squalid prison conditions and excessive overcrowding violated Eighth Amendment). The Pittsburgh state prison in *Tillery* double celled approximately 1,182 inmates thereby enabling only one inmate to stand up in a cell at one time. *Id*. at 422. Vermin, bed bugs, and mice were endemic, noxious odors of urine permeated the cell blocks, ventilation, plumbing, showers and fire safety fell below constitutional standards, and inmate violence was omnipresent. *Id*. at 423-28. Because overall conditions deprived inmates of their minimal life necessities, the court found the conditions unconstitutional. *Id*. at 426-28.

A fine line exists between unconstitutional prison conditions, which deny prisoners' basic human needs, and conforming, constitutional prisons. *See* Hassine v. Jeffes, 846 F.2d 169, 172 (3d Cir. 1988) (upholding constitutionality of overcrowded prison with poor physical plant). Although the prison in *Hassine* exceeded its

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design capacity by more than 25%, and its double bunking policy resulted in increased violence, the court concluded that the prison's facilities exceeded the inmate's minimal needs and was therefore constitutionally adequate. *Id*. at 172. *Compare* McCord v. Maggio, 927 F.2d 844, 846 (5th Cir. 1991) (finding constitutional violation where inmate lived in sewage-filled, unlit, roach-infested cell for two years) *and* Johnson v. Pelker, 891 F.2d 136, 139 (7th Cir. 1989) (reversing dismissal where inmate's cell contained no running water and covered with feces), *with* Askew v. Fairman, 880 F. Supp. 557, 561-62 (N.D. Ill. 1995) (concluding no Eighth Amendment violation where inmate slept on 35-degree, rodent-infested floor during winter months).

[FN149]. *Wilson*, 501 U.S. at 298. Although the *Wilson* Court failed to formally define the appropriate standard, the Court placed the subjective component of the deliberate indifference standard somewhere below the *Whitley* standard of sadism and malice, and above mere negligence. *See id*. at 305-06 (declaring deliberate indifference standard encompasses subjective inquiry of prison officials' intent). Accordingly, the Court vacated the Sixth Circuit's judgment because it misused the *Whitley* sadistic and malicious intent requirement in this context. Id; *see supra* note 145 and accompanying text (declaring *Whitley* only applies to claims that prison officials used excessive force on inmates).

[FN150]. *See Wilson v. Seiter*, 501 U.S. 294, 298-303 (1991) (delineating objective and subjective components of newly formulated deliberate indifference standard).

[FN151]. *See* Gutterman, *supra* note 9, at 375 (criticizing *Wilson* as narrow for undermining federal court intervention that results in prison improvements); Gutterman, *supra* note 140, at 889 (predicting difficulties in applying *Wilson* subjective intent requirement); Rifkin, *supra* note 9, at 282 (arguing *Wilson* expanded breadth of deliberate indifference standard); Siegal, *supra* note 50, at 1556 (contending *Wilson* caused negative change in Eighth Amendment jurisprudence); Diana L. Davis, Comment, *Deliberate Indifference: An "Unnecessary" Change?*, 29 HOUS. L. REV. 923, 939-60 (1992) (declaring *Wilson* standard restricts prisoners' rights and suggesting alternative standards).

[FN152]. *See supra* note 152 and accompanying text (explaining scholars' dissatisfaction with *Wilson* Court's strict standard of demonstrating unlawful deliberate indifference).

[FN153]. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding officials' deliberate indifference to medical needs of prisoners violates Eighth Amendment).

[FN154]. *See* Dunn v. White, 880 F.2d 1188, 1195 (10th Cir. 1989) (observing prison's failure to protect incarcerated from HIV infection may violate Eighth Amendment); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (concluding that housing scabies and gonorrhea infected inmates with healthy prisoners violates Eighth Amendment); Johnson v. United States, 816 F. Supp. 1519, 1522 (N.D. Ala. 1993) (stating Eighth Amendment may require prison officials to reasonably protect inmates from communicable disease); Jarrett v. Faulkner, 662 F. Supp. 928, 929 (S.D. Ind. 1987) (declaring exposing inmates to communicable disease possibly unconstitutional).

[FN155]. 509 U.S. 25 (1993).

[FN156]. *See id*. at 32-33. In *Helling*, prison officials placed inmate Helling with a cellmate who smoked five packs of cigarettes daily. *Id*. Helling subsequently filed suit under 42 U.S.C. § 1983 alleging that constant exposure to cigarette smoke constituted cruel and unusual punishment. *Id*. at 28-29. A federal magistrate judge granted judgment for the defendant prison officials, concluding that Helling had no constitutional right to be free from cigarette smoke. *Id*. The United States Court of Appeals for the Ninth Circuit reversed and held that

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Helling had stated a valid Eighth Amendment claim by alleging that he had been involuntarily exposed to second-hand smoke that posed an unreasonable risk of harm to his future health. *Id.*

[FN157]. 651 F.2d 96 (2d Cir. 1981).

[FN158]. *See id.* at 109. In *Lareau*, Connecticut inmates asserted, *inter alia*, that the prison's excessive overcrowding and officials' failure to screen incoming inmates for communicable disease violated the Constitution. *Id.* at 98. For example, dayrooms, dubbed "fishtanks," were so overcrowded that inmates had to crawl over each other in order to use the single available toilet. *Id.* at 99-100. The Second Circuit affirmed the district court's findings that the prison officials' failure to implement a screening system was sufficiently harmful to violate the Eighth Amendment as applied to convicted prisoners and the Due Process Clause of the Fourteenth Amendment as applied to pre-trial detainees. *Id.* at 98.

[FN159]. *See id.* at 109. The court of appeals approved the district court's extensive remedial order mandating that prison officials administer a complete medical screening examination to all entering inmates. *Id.* at 110-11.

[FN160]. *See* Harris v. Thigpen, 941 F.2d 1495, 1500-05 (11th Cir. 1991) (rejecting Alabama inmates' broad challenge to mandatory HIV testing and segregation policy); Dunn v. White, 880 F.2d 1188, 1195-96 (10th Cir. 1989) (challenging prison's mandatory HIV testing as unconstitutional); Glick v. Henderson, 855 F.2d 536, 538-39 (8th Cir. 1988) (considering inmate's suit alleging prison's lack of HIV prevention and testing programs violated Eighth Amendment); Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1453-54 (E.D. Pa. 1995) (approving settlement seeking to eliminate discrimination against HIV-positive inmates and protect inmates' HIV status).

[FN161]. 720 F. Supp. 475 (M.D. Pa. 1989).

[FN162]. *See id.* at 476-77.

[FN163]. *See id.* at 479. Under a "universal precautions" system, prison workers assume and treat all inmates as if they are HIV-infected. *Id.* at 480. The Centers for Disease Control (CDC) has long advocated the universal precautions guidelines for all correctional and law enforcement settings. Hammett, *supra* note 14, at 37. The Occupational Safety and Health Administration (OSHA) has also issued regulations mandating that prisons establish written exposure control plans, training, infection control equipment and testing for workers exposed to infectious disease such as HIV and tuberculosis. *Id.* at 38. A national study on HIV in United States prisons has demonstrated, however, that many prison systems have poorly implemented the universal precautions guidelines. *Id.* at 37.

[FN164]. 941 F.2d 1495 (11th Cir. 1991).

[FN165]. *See id.* at 1516-20. The court applied a "rational basis" test and concluded that even if Alabama's approach represented the minority view, testing and segregation are still rationally related to the legitimate goals of reducing HIV transmission. *Id.* at 1517.

[FN166]. *See id.* at 1521. The court also noted that the class of intervening inmates, who vehemently opposed the reintegration of HIV-positive prisoners, were predominately motivated by ignorance and fear of the disease. *Id.* at 1518-20. The court predicted that violence would most likely result if segregation ceased. *Id.* at 1518.

[FN167]. 612 F. Supp. 1383 (D. Minn. 1985), *dismissed sub. nom.*, DeGidio v. Pung, 704 F. Supp. 922 (D. Minn. 1989), *reconsidered*, 723 F. Supp. 135 (D. Minn. 1989), *aff'd*, 920 F.2d 525 (8th Cir. 1990).

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[FN168]. *See id.* at 1389-90.

[FN169]. *Id.* at 1386. Three of the named plaintiffs were current and former inmates who became infected with tuberculosis during the prison outbreak. *Id.* at 1385. The fourth named plaintiff, the father of inmate DeGidio, also contracted the disease during frequent visits with his son. *Id.*

[FN170]. *See id.* at 1389-90. After a thirty-one day trial, the district court denied the plaintiff's motion for injunctive relief and entered judgment for the prison officials, emphasizing that the prison had implemented the extensive screening and control practices originally sought by the plaintiffs. *DeGidio*, 704 F. Supp. at 959-60).

[FN171]. *See DeGidio*, 920 F.2d at 527 (noting that prison environment poses high-risk for tuberculosis infection); Freeman, *supra* note 83, at 265 (commenting on high prevalence of tuberculosis in prisons). Tuberculosis is an infectious bacterial disease transmitted through airborne droplets expelled from an infected person's lungs through, for example, coughing, sneezing or talking. *DeGidio*, 704 F. Supp. at 924. Tuberculosis is usually contracted by sharing living quarters with someone infected with an active case of infectious pulmonary tuberculosis. *Id.* Due to the overcrowding of many prisons, prison systems report that over 10% of their inmates are tuberculosis infected. Freeman, *supra* note 83, at 266.

[FN172]. *See, e.g.*, Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1988) (holding no Eighth Amendment violation where inmate in contact with HIV-infected inmate's sweat and sneezes); Marcussen v. Brandstat, 836 F. Supp. 624, 626-28 (N.D. Iowa 1993) (rejecting inmate's claim for HIV exposure from forced sharing of toiletries with HIV-positive cellmate); Johnson v. United States, 816 F. Supp. 1519, 1520-21, 1524-25 (N.D. Ala. 1993) (dismissing claim where inmate forced to feed and “sanitize” AIDS-infected cellmate).

[FN173]. *See In re* Connecticut Prison Overcrowding and AIDS Cases, Doe v. Meachum, Nos. H-80-506(JAC), Civ. H-88-562(PCD),(JGM), 1990 WL 261348, at *1- *5 (D. Conn. Nov. 2, 1990) (approving consent judgment that comprehensively reformed Connecticut state prison HIV medical policies); Starkey v. Matty, No. CIV. A.80-9011 (E.D. Pa. May 24, 1991) (approving consent decree providing Pennsylvania inmates with improved AIDS treatment and voluntary HIV testing), *cited in*, Freeman, *supra* note 83, at 275.

[FN174]. 511 U.S. 825 (1994).

[FN175]. *See id.* at 829-31, 837 (adopting criminal recklessness standard for subjective element of deliberate indifference framework).

[FN176]. *See id.* at 837 (promulgating refined version of deliberate indifference test to prisoner's rape claim). Because lower courts applied the deliberate indifference standard in an inconsistent fashion, the *Farmer* Court sought to adopt a uniform standard. *Id Compare* McGill v. Duckworth, 944 F.2d, 344, 348 (7th Cir. 1991) (utilizing criminal recklessness standard requiring officials to possess actual knowledge of risk), *and* LaMarca v. Turner, 995 F.2d 1526, 1536-37 (11th Cir. 1993) (holding deliberate indifference constitutes officials' objective knowledge of unconstitutional conditions and disregard of appropriate alternative), *with* Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 560 (1st Cir. 1988) (concluding deliberate indifference shown where official knew or should have known of pervasive harmful risk), *and* Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (requiring prisoners to demonstrate deliberate indifference by proving officials knew or should have known of safety risks).

[FN177]. Although Dee Farmer was born male, Majorie Rifkin, her appellate counsel, states that Farmer prefers to be referenced as a female due to her transsexual status. Rifkin, *supra* note 9, at 273 n.1. The *Farmer* Court skillfully avoided any reference to Farmer's gender in its opinion. *Id.*

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[FN178]. *Farmer*, 511 U.S. at 830. Farmer charged prison officials with violating her Eighth Amendment rights after her cellmate beat and raped her. *Id*. Although Farmer underwent estrogen therapy, silicone breast implants, and unsuccessful genital removal surgery to create a feminine appearance, federal prison policy required her to be housed in all-male institutions because she was biologically male. *Id*. at 829-30. Officials transferred Farmer for disciplinary reasons to the maximum security Terre Haute Penitentiary, which housed violent and hardened criminals. *Id*. at 829. Within two weeks of incarceration, Farmer's cellmate beat and forcibly raped her at knife point. *Id*. at 830; *see* Rifkin, *supra* note 9, at 273-74 (detailing Farmer's ordeal by co-author of her Supreme Court brief).

[FN179]. Farmer v. Brennan, 511 U.S. 825, 831 (1994).

[FN180]. *Id*. at 834.

[FN181]. *See id*. A California federal district court has listed some of the factors that courts typically examine in determining whether a prison's violence is "substantial": testimony and/or statistics of the actual number of inmate-on-inmate assaults; evidence that inmates are fearful for their lives due to the prison's brutality; and, whether there are particular conditions in the prison, such as overcrowding, that contribute to a pervasive risk of violence. Madrid v. Gomez, 889 F. Supp. 1146, 1268 (N.D. Cal. 1995).

[FN182]. Farmer, 511 U.S. at 837-39. The *Farmer* subjective prong is based on the Model Penal Code's standard of criminal recklessness. *Id*. at 839 (citing MODEL PENAL CODE § 2.02(2)(c) & cmt. 3 (1985)). The Model Penal Code provides in pertinent part:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c)(1973).

In *Farmer*, Justice Souter advocated the criminal law's version of recklessness because it is a customary and workable standard that directly focuses on the *malus actus* of the wrongdoer. *Farmer*, 511 U.S. at 839-40. Consequently, the Court rejected tort law's objective recklessness test which imposes liability where a person fails to act when exposed to an unreasonably severe risk of harm that is either known or so obvious that it should be known. *Id*. at 836.

The Seventh Circuit used a creative "cobra" analogy to describe the proper application of the *Farmer* Court's deliberate indifference framework. *See* Billman v. Indiana Dep't of Corrections, 56 F.3d 785, 788 (7th Cir. 1995) (applying *Farmer* standard to prisoner's claim that officials failed to protect him from deadly assault). The court of appeals contended:

> If [prison officials] place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent-even grossly negligent or even reckless in the tort sense-in failing to know.

Id.

[FN183]. *See Farmer*, 511 U.S. at 832 (mandating that prison officials have duty to warranty safety of inmates). Scholars argue that prisoners face an onerous burden when attempting to surpass the Court's new deliberate indifference test and will be hard-pressed to invoke constitutional protection when faced with impending danger. *See* Stacy Lancaster Cozad, Note, *Cruel But Not So Unusual*: Farmer v. Brennan *and the Devolving Standards of Decency*, 23 PEPP. L. REVV. 175, 203-04 (1995) (arguing that *Farmer*'s actual knowledge subjective standard

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narrows prisoners' Eighth Amendment protections against assault); Lisa DiBartolomeo, Comment, *Subjective Awareness Governs the Deliberate Indifference Standard in Cruel and Unusual Punishment Claims*, 29 SUFFOLK U. L. REV. 294, 301 (1995) (expounding that *Farmer* fails to sufficiently protect inmates); *The Supreme Court-Leading Cases*, 108 HARV. L. REVV. 231, 231 (1994) (asserting that *Farmer's* actual knowledge requirement strips prisoners of Eighth Amendment protection). *But see* Rifkin, *supra* note 9, at 294 (contending that prisoners can survive summary judgment more easily because of *Farmer*).

[FN184]. *See Farmer v. Brennan*, 511 U.S. 825, 842-45 & n.10 (1994) (allowing circumstantial evidence to prove actual knowledge element and eliminating prior notification requirement).

[FN185]. *See* Rifkin, *supra* note 9, at 292 (commenting *Farmer* clarifies that prisoners need not inform guards of impending assault). In *Farmer*, the Court stated that prison officials can defend against inmates' use of circumstantial evidence by demonstrating either that they had no knowledge of a substantial risk of harm or, that they actually knew of some underlying facts supporting a substantial risk, but believed the risk insubstantial or nonexistent. *Farmer*, 511 U.S. at 844.

[FN186]. *See id.* at 841-42. Majorie Rifkin, co-author of Farmer's Supreme Court brief, emphatically states that this portion of the *Farmer* holding is a cause for celebration by prisoners' rights advocates because it allows proof of prison official's knowledge through circumstantial evidence. Rifkin, *supra* note 9, at 293. If a prisoner demonstrates the existence of an obvious risk of harm within the prison, Rifkin contends that more failure-to-protect cases, like Farmer's, are likely to reach the jury. *Id.* at 293-94. This is so, Rifkin asserts, because such proof may be sufficient to create a triable issue of fact by raising a reasonable inference under *Farmer* that prison officials' possessed actual knowledge of dangerous violence within the prison. *Id.* at 293-94.

John Boston, Project Director of the Prisoners' Rights Project, discusses several effective methods and resources that prisoners' advocates can utilize to demonstrate prison officials' actual knowledge after *Farmer*. John Boston, et al., Farmer v. Brennan: *Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 100-03 (1994). First, prisoners' advocates can utilize written reports, either external or internal, regarding the level of violence at the prison or of individual incidents. *Id.* at 100. Advocates may also find internal department of corrections correspondence, including budget and staffing requests, helpful. *Id.* at 101. Lastly, prisoners' counsel may use written inmate grievances to estop prison officials from later denying knowledge of a risk of violence. *Id.* at 102.

[FN187]. *See Farmer*, 511 U.S. at 843-45.

[FN188]. *See id.* at 845-46 & n.10 (reiterating prisoners need not await consummation of threatened violence before obtaining preventative relief); *see also* Stillman v. Godinez, No. 92C5731, 1995 WL 549111 at *4 (N.D. Ill. Sept. 11, 1995) (noting actual notification unnecessary under *Farmer*); Rifkin, *supra* note 9, at 292-93 (opining *Farmer* implied prior notification not required to sustain prisoners' failure-to-protect claims).

[FN189]. *See Farmer v. Brennan*, 511 U.S. 825, 845-46 & n.10 (1994) (providing enumerated safeguards enabling prisoners to obtain injunctive relief before assault occurs). Justice Souter reminded courts that one does not have to await the culmination of a threatened injury before obtaining relief. *Id.* Justice Blackmun, in concurrence, declared that *Farmer* sends a message to prison officials reminding them of their affirmative duties to ensure inmate safety under the Eighth Amendment. *Id.* at 851-52 (Blackmun, J., concurring).

Although concurring in the judgment, Justice Blackmun disagreed with the majority's insistence on a subjective component of the deliberate indifference test, and proclaimed he would overrule *Wilson v. Seiter*, the decision that established the subjective component. *Id.* (Blackmun, J., concurring). Under Blackmun's proposed test, an aggrieved inmate could state an Eighth Amendment violation regardless of any prison officials' culpable

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state of mind. *Id*. at 857 (Blackmun, J., concurring).

On the merits, the Court vacated and remanded Farmer's action because the district court erroneously required inmate Farmer to notify prison officials of the impending rape. *Id*. at 849. The Court opined that the district court denied Farmer's motion for additional discovery because Farmer failed to notify prison guards of the impending attack. *Id*. On remand, the district court should allow Farmer to present additional evidence of the prison's long-standing violence and the foreseeable danger of placing her in this violent environment to establish sufficiently the level of deliberate indifference. *Id*. Thus, the district court should allow evidence that Farmer's former warden allegedly admitted that placing a transsexual into the general population of a high-security prison could pose a significant threat of danger to her safety. *Id*. at 847-49.

[FN190]. *See id*. at 845 (quoting Helling v. McKinney, 509 U.S. 25, 36 (1993)).

[FN191]. *See id*.

[FN192]. *See id*. at 845-46 & n.9. Justice Souter stated that even prison officials who are criminally reckless at the outset of a prisoner's case may avert the issuance of an injunction by proving, during the litigation, that they are no longer ignoring an objectively severe level of violence and would continue to take affirmative action to prevent violence after the lawsuit terminated. *Id*. Lower courts may also grant prison officials additional time to allow them to rectify the situation before the court grants an injunction. *Id*. at 846-47.

[FN193]. *See id*.

[FN194]. *See* Farmer v. Brennan, 511 U.S. 825, 846-47 (1994).

[FN195]. *See id*.

[FN196]. *Compare* Boston, *supra* note 187, at 90 (concluding that *Farmer* relieves prisoners of burden of using direct evidence to establish subjective intent), *with* Cozad, *supra* note 184, at 203-04 (arguing that *Farmer* narrows prisoners' Eighth Amendment protections against assault).

John Boston, a noted prisoners' rights advocate, proclaims that *Farmer* is invaluable to prisoners because the aggrieved inmate can offer proof of an obvious risk of danger and create an automatic triable factual issue. *Id*. at 90; *see also* Rifkin, *supra* note 9, at 292-95 (lauding *Farmer* standard for allowing circumstantial evidence of actual knowledge and rejecting prior notification requirement).

Furthermore, because the Fourteenth Amendment, and not the Eighth Amendment, protects pretrial detainees, some courts are pondering whether to apply the *Farmer* Eighth Amendment deliberate indifference standard to claims brought by pre-trial detainees or to apply a less burdensome test given that pre-trial detainees retain greater liberty interests than convicted prisoners. *See* Dorsey v. St. Joseph County Jail Officials, No. 3:91CV321AS, 1996 WL 18965, at *1, *4-*6 (N.D. Ind. Jan 18, 1996) (debating application of *Farmer* test to detainee's failure-to-protect suit arising from attack); Fickes v. Jefferson County, 900 F. Supp. 84, 87 (E.D. Tex. 1995) (commenting that legal standard governing detainee's failure-to-protect suit unresolved in Fifth Circuit).

The overwhelming trend seems to favor the adoption of the *Farmer* standard to failure-to-protect actions brought by pre-trial detainees. *See* Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996) (holding *Farmer* standard applicable to detainee claims based on officials' episodic acts or omissions); Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995) (applying *Farmer* standard to detainee's suit arising from injuries sustained when inmate beaten by prisoners); Westmoreland v. Brown, 883 F. Supp. 67, 73-74 (E.D. Va. 1995) (concluding *Farmer* standard logical and legally permissible to prisoner's claim that guard arranged beating); Kenyon v. Cheshire County Jail Adm'r, No. CIV.92-515-M, 1994 WL 529925, at *3 (D.N.H. Sept. 22, 1994) (employing *Farmer* deliberate indifference test to detainee's claim that officials exposed him to AIDS).

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[FN197]. *See* Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 77-78 (6th Cir. 1995) (reversing summary judgment when warden knew prison camp posed violent risk to small, vulnerable inmate); Stillman v. Godinez, No. 92C5731, 1995 WL 549111 at *5 (N.D. Ill. Sept. 11, 1995) (denying dismissal when prisoner alleged prison officials failed to protect him against known assault risk); Hudson v. United States Bureau of Prisons, No. VC-92-1360, 1994 U.S. Dist. LEXIS 11664 (N.D. Cal. Aug. 3, 1994) (precluding summary judgment when prisoner sexually assaulted and officials destroyed written complaint); Patterson v. Walrath & John Doe Correctional Officer, No. 94-2451, 1994 WL 328353 (E.D. Pa. July 11, 1994) (upholding claim when prisoner raped and sodomized by inmate with sexual offense record).

[FN198]. *See, e.g.*, Fickes v. Jefferson County, 900 F. Supp. 84, 86-87, 89 (E.D. Tex. 1995) (denying summary judgment where victim placed in cell with nine violent offenders and dangerous weapons); Smith v. Norris, 877 F. Supp. 1296, 1300-02 (E.D. Ark. 1995) (granting summary judgment to prisoner when inmate stabbed in open barracks with minimal guard supervision); Fisher v. Koehler, 692 F. Supp. 1519, 1562 (S.D.N.Y. 1988) (finding prison officials excessive reliance upon open dormitory housing constituted deliberate indifference to inmates' safety).

[FN199]. *See* Taylor, 69 F.3d at 80-82 (upholding prisoner's claim that warden knew of risk of sexual assault to small, vulnerable-looking prisoners); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558-60 (1st Cir. 1988) (finding officials liable for placing psychologically disturbed inmate in general population where he was dismembered); Adams v. Drew, 906 F. Supp. 1050, 1058-60 (E.D. Va. 1995) (precluding summary judgment where HIV-positive inmate assaulted after warning guard that offenders' harbored animosity towards AIDS-infected victim).

[FN200]. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 32-33, 56 (1983) (upholding punitive damages against prison guard who callously housed inmate with two known violent cellmates); Redman v. County of San Diego, 942 F.2d 1435, 1448-49 (9th Cir. 1991) (finding deliberate indifference when official housed raped plaintiff with known aggressive homosexual); Morgan v. District of Columbia, 824 F.2d 1049, 1058-61 (D.C. Cir. 1987) (holding officials liable for placing psychotic and known violent inmate with passive prisoner).

[FN201]. *See* El Tabech v. Gunter, 922 F. Supp. 244, 252-54 (D. Neb. 1996).

[FN202]. *See* Smith v. Norris, 877 F. Supp. 1296, 1300-02, 1307, 1314 (E.D. Ark. 1995).

[FN203]. *See* Taylor v. Michigan Dep't of Corrections, 69 F.3d 76, 84 (6th Cir. 1995).

[FN204]. 50 F.3d 1579 (11th Cir. 1995).

[FN205]. *Id*. at 1580-81. Police detained Hale on a failure-to-appear warrant, while authorities held his two attackers for murder and attempted murder. *Id*. at 1584. Prison officials neither classified nor segregated inmates based upon the seriousness of the committed offenses. *Id*. Although Hale screamed for help both during and after the assault which occurred at approximately 9:30 PM, the night relief jailer failed to discover Hale's bruised and bloodied body until 1:30 AM. *Id*. at 1581.

[FN206]. *See id*. at 1583-85. Inmate Hale produced evidence that inmate-on-inmate violence, often severe enough to require medical attention and hospitalization, occurred regularly during the two years preceding the suit. *Id*. at 1583. The jail's sheriff testified at his deposition that he knew of the scope and severity of the jail's violence. *Id*.

[FN207]. *See id*. at 1585.

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[FN208]. 56 F.3d 785 (7th Cir. 1995).

[FN209]. *See id*. at 788-90. Inmate Billman's *pro se* complaint charged that Indiana prison officials failed to protect him from an alleged rape by his cellmate, who had a known propensity for sexual assaults, failed to intervene when the rape occurred, and failed to warn him of his cellmate's HIV-positive status. *Id*. at 788. Although Billman did not test positive for HIV, he lived with the agonizing fear of contracting AIDS in addition to the humiliation inflicted by the rape. *Id*. The Seventh Circuit concluded that the facts, as alleged in Billman's complaint, could amount to deliberate indifference in violation of the Eighth Amendment. *Id*. Thus, the Court reinstated Billman's case. *Id*. at 790.

[FN210]. *See id*. at 787.

[FN211]. *See* Anderson v. Romero, 72 F.3d 518, 524 (7th Cir. 1996).

[FN212]. *See, e.g.*, Boston, *supra* note 187, at 98-99 (criticizing *Farmer*' s injunction requirements that reflect naiveté regarding practicalities of prison life); Rifkin, *supra* note 9, at 305 (asserting *Farmer* demonstrates unrealistic approach to state of prison life and violence); *The Supreme Court-Leading Cases, supra* note 184, at 236 (asserting *Farmer* subjective standard unsuitable in prison conditions context).

[FN213]. *See* Boston, *supra* note 187, at 98.

[FN214]. *See id*. (setting forth primary reasons prisoners avoid formal complaint procedures).

[FN215]. *See* Redman v. County of San Diego, 942 F.2d 1435, 1438 (9th Cir. 1991) (recounting testimony that prison attacker threatened to harm raped inmate's girlfriend and family if he reported rape). In *Redman*, the plaintiff inmate lied to prison officials when questioned about problems with other prisoners because of his attackers' coercive intimidation. *Id*. at 1438. As such, no further investigation occurred and officials left inmate Redman in his cell where his attacker and two other inmates proceeded to rape the plaintiff yet again. *Id*. at 1438-39; *see also* Robinson v. Cavanaugh, 20 F.3d 892, 895 (8th Cir. 1994) (affirming summary judgment to prison officials where fearful prisoner refused to identify assailant); Young v. Quinlan, 960 F.2d 351, 353-56 (3d Cir. 1992) (summarizing inmate's sexual assault where aggressor threatened plaintiff's life if he reported incident).

[FN216]. *See supra* notes 60-61 and accompanying text (discussing prison code of silence that rewards complaining inmates with violent revenge). On this point, one scholar has argued that courts should recognize a prisoner's constitutional right to self-defense when threatened by violence from other inmates. Anders Kaye, Note, *Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence*, 63 U. CHI. L. REVV. 693, 725 (1996).

[FN217]. *See* Farmer v. Brennan, 511 U.S. 825, 829-30 (1994) (considering raped prisoner's *pro se* complaint alleging officials failed to protect against violence); *see generally* JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (3d ed. 1995) (offering prisoners detailed legal advice to assist them in litigating *pro se* actions).

[FN218]. *See Farmer*, 511 U.S. at 855 (Blackmun, J., concurring) (arguing narrow *Farmer* standards are unmeaningful and unrealistic as applied to prison life); *supra* note 213 and accompanying text (discussing prisoner's rights advocates' criticisms of *Farmer* injunctive relief standards).

[FN219]. *See supra* notes 102-103 and accompanying text (explaining increased likelihood of rape and AIDS

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combination with potentially mortal ramifications).

[FN220]. *See* Riddle v. Mondragon, 83 F.3d 1197, 1207-08 (10th Cir. 1996) (denying injunction to threatened sex offender for failure to establish officials' deliberate indifference); Fish v. Boyll, No. C-91-3529EFL, 1995 WL 322431, at *2-3 (N.D. Cal. May 22, 1995) (finding no deliberate indifference where assault caused by officials placing dangerous, emotionally-unstable inmate with plaintiff); *see also* Boston, *supra* note 187, at 98 (criticizing *Farmer* for requiring prisoners to unnecessarily file formal grievances before obtaining injunctive relief).

[FN221]. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (restating traditional test for preliminary injunction requiring claimant to suffer irreparable harm absent injunction); Blackshear Residents Org. v. Romney, 472 F.2d 1197, 1198 (5th Cir. 1973) (upholding finding that neighborhood group irreparably harmed if HUD approved low-income project in area).

[FN222]. *See supra* note 183 and accompanying text (outlining requirements of *Farmer* subjective test based on concepts of criminal recklessness); *see also* Breland v. Abate, 917 F. Supp. 220, 222-23 (S.D.N.Y. 1996) (holding no deliberate indifference when guard asleep during prisoner's assault); Torrence v. Musilek, 899 F. Supp. 380, 382-83 (N.D. Ill. 1995) (finding no deliberate indifference when inmates wrote letter to official threatening assault and subsequently attacked plaintiff).

[FN223]. *See* Cozad, *supra* note 184, at 203 (arguing *Farmer*'s strict actual knowledge standard for deliberate indifference inquiry strips protection from inmates); Siegal, *supra* note 50, at 1544-50 (considering prisons' rampant violence level and significantly increasing HIV infection); *supra* notes 213-217 and accompanying text (noting shortcomings of *Farmer* decision may not insulate prisoner's from violent attacks).

[FN224]. *See supra* notes 155-172 and accompanying text (discussing legal analysis of Eighth Amendment claims involving transmission of disease in prisons); Siegal, *supra* note 50, at 1563 (contending that appropriate analytical framework addressing rape and HIV should include aspects from above-mentioned decisions).

[FN225]. *See* DeGidio v. Perpich, 612 F. Supp. 1383, 1390 (D. Minn. 1985) (determining that prison officials' failure to screen inmates for tuberculosis may constitute deliberate indifference), *dismissed*, DeGidio v. Pung, 704 F. Supp. 922 (D. Minn. 1989), *reconsidered*, 723 F. Supp. 135 (D. Minn. 1989), *aff'd*, 920 F.2d 525 (8th Cir. 1990); Austin v. Pennsylvania Dep't of Correction, No. 90-7497, 1992 WL 277511, at *6 (E.D. Pa. Sep. 29, 1992) (ordering injunction to remedy prison's inadequate tuberculosis screening program).

[FN226]. *See* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (holding that court may remedy prison's inadequate medical practices before actual spread of infectious disease); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (stating prison which housed scabies and gonorrhea infected inmates with uninfected prisoners violates Eighth Amendment); *see also* Glick v. Henderson, 855 F.2d 536, 541 (8th Cir. 1988) (McMillian, J., concurring) (requiring inmate to demonstrate unreasonable risk of being exposed to HIV for constitutional violation).

[FN227]. Goss v. Sullivan, 839 F. Supp. 1532, 1537 (D. Wyo. 1993).

[FN228]. 509 U.S. 25 (1993).

[FN229]. *See id.* at 33-35 (finding prisoner's exposure to unreasonable levels of environmental tobacco smoke sufficient to state Eighth Amendment claim).

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[FN230]. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

[FN231]. *See supra* note 187 and accompanying text (discussing objective prong of *Farmer* deliberate indifference standard requiring inmates to show high levels of violence); *see also* Madrid v. Gomez, 889 F. Supp. 1146, 1268 (N.D. Cal. 1996) (stating courts require constant threat of violence to violate Eighth Amendment); notes 102-105 and accompanying text (expounding upon deadly consequences of rape and AIDS convergence in prison).

[FN232]. *See* Siegal, *supra* note 50, at 1564 (advocating objective standard acknowledging deadly risk posed by sexual assault and AIDS).

[FN233]. *See supra* notes 34-66 and accompanying text (describing high risk of assault and sexual violence in correctional institutions nationwide).

[FN234]. *See Farmer*, 511 U.S. at 845-46 (rejecting prior notification requirement that mandated inmates suffer injury before obtaining relief); Helling v. McKinney, 509 U.S. 25, 33-35 (1993) (stating courts may not deny relief to inmates who show unsafe conditions although no injury present).

[FN235]. *See Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (reaffirming that prisoners need not endure violent assault before obtaining injunctive relief); *Helling*, 509 U.S. at 32-33 (holding officials may violate Eighth Amendment by exposing inmate to communicable disease although complainant asymptomatic); LaMarca v. Turner, 662 F. Supp. 647, 665-66 (S.D. Fla. 1987) (granting injunction to correct prison's deficient protective systems against widespread, rampant inmate rapes), *appeal dismissed*, 861 F.2d 724 (11th Cir. 1988); *see also* Kenyon v. Cheshire County Jail Admin., No. 92-515-M, 1994 WL 529925, at *4 (D.N.H. Sept. 22, 1994) (stating prison's practice exposing inmates to HIV presumably warranted enjoinment).

Moreover, awarding injunctive relief proves necessary because "[u]nless the victim is immediately removed from general population and remains in isolation or segregation for the remainder of his confinement, he will promptly become marked by the other prisoners as a 'punk', and then subjected to repeated sexual aggression, virtually on a daily (or nightly) basis." Brief for Stop Prisoner Rape, Inc. at 9, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247).

[FN236]. *See* 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 301[02], at 301-30 & n.12 (Joseph M. McLaughlin & Joseph Fogel eds., 1996) (describing clear and convincing standard as higher than preponderance burden and discussing applications in substantive areas); PAUL J. LIACOS, ET. AL, HANDBOOK OF MASSACHUSETTS EVIDENCEE § 5.2.2 (1994) (defining clear and convincing standard as intermediate, greater than preponderance but less than reasonable doubt). The Supreme Judicial Court of Massachusetts has suggested the following as a jury instruction for the clear and convincing burden of persuasion:

> The burden of persuasion ... in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist.

Callahan v. Westinghouse Broadcast Co., 372 Mass. 582, 588, 363 N.E.2d 240, 244 (1977) (quoting Dacey v. Connecticut Bar Ass'n, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976)); *see also* Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1983) (mandating clear and convincing proof of actual malice in commercial libel suits).

[FN237]. *See supra* note 233 and accompanying text (arguing courts should use objective criteria in context of

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prison rape and AIDS).

[FN238]. *See Callahan*, 372 Mass. at 588, 363 N.E.2d at 244 (delineating clear and convincing framework authorizing trier of fact to weigh credibility of testimony).

[FN239]. Wilson v. Seiter, 501 U.S. 294, 311 (1991) (White, J., concurring).

[FN240]. *See* Brief of Stop Prisoner Rape, Inc. at 34, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) (describing "An Ounce of Prevention" orientation program warning Vermont prisoners of sexual assault); *see also* Ill. H.B. 2122, Ill. 89th Gen. Assembly (1995) (introduced Feb. 16, 1995) (proposing orientation program to all incoming prisoners on sexual assault issues); Butler v. Dowd, 979 F.2d 661, 675 (8th Cir. 1992) (acknowledging prison's failure to warn prisoners of sexual assault risk factor in Eighth Amendment analysis).

[FN241]. *See* Sennott, *Prison System Enacts Reforms to Stop Inmate Rape, supra* note 38, at 37 (reporting Massachusetts' implementation of training seminar sessions educating correctional officers about prison rape); *see also Butler*, 979 F.2d at 675 (holding prison official's failure to investigate rapes and provide officer training supported deliberate indifference finding); Young v. Quinlin, 960 F.2d 351, 363 n.23 (3d Cir. 1992) (noting prison officials should, at minimum, investigate every allegation of violence of threat of harm); LaMarca v. Turner, 662 F. Supp. 647, 664-65 (S.D. Fla. 1987) (holding prison superintendent liable for sexual assaults by failing to implement training and investigation programs), *appeal dismissed*, 861 F.2d 724 (11th Cir. 1988); McMurry v. Phelps, 533 F. Supp. 742, 763 (W.D. La. 1982) (suggesting increased guard supervision and training would reduce threat of violence to pre-trial detainees), *overruled on other grounds*, Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985); Boston, PRISONERS SELF-HELP LITIGATION MANUAL, *supra* note 218, at 90 (asserting failure to classify inmates and separate violent inmates constitutes deliberate indifference).

[FN242]. *See* MICH. COMP. LAWS § 791.262(b) (1995) (promulgating behavioral classification for inmate housing based upon comprehensive criteria); N.Y. CORRECT. LAW § 500-b (McKinney 1995) (outlining classification parameters and procedures to protect vulnerable inmates from assault). Moreover, courts have found prison officials liable for failing to adequately protect inmates from violence when officials negligently used basic classification information in their inmate placement decisions. *See* El Tabech v. Gunter, 922 F. Supp. 244, 264 (D. Neb. 1996) (finding prison officials liable for prison's violence by ignoring classification information and randomly housing inmates), *aff'd*, Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996); Walsh v. Mellas, 837 F.2d 789, 798-99 (7th Cir. 1988) (upholding liability against officials who failed to review inmate files in determining housing compatibility); *see also* Rifkin, *supra* note 9, at 278-79 (contending inadequate inmate housing classification system creates high risk of assault).

[FN243]. *See supra* notes 94-99 and accompanying test (considering experts' urgence of voluntary AIDS testing, HIV education and condom issuance in prisons).

[FN244]. *See supra* note 99 and accompanying text (discussing success of prison condom distribution systems); *supra* note 64 (commenting upon federal sexual assault intervention program and behavioral inmate classification system).

[FN245]. LaMarca v. Turner, 662 F. Supp. 647, 687 (S.D. Fla. 1987), *appeal dismissed*, 861 F.2d 724 (11th Cir. 1988).

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