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Note

***1541 RAPE IN PRISON AND AIDS: A CHALLENGE FOR THE EIGHTH AMENDMENT
FRAMEWORK OF WILSON v. SEITER**

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I. INTRODUCTION

Clifton Redman, an 18-year-old pretrial detainee, was booked into a San Diego detention center and placed in a cell with Kevin Clark, a convicted felon. Redman was 5'6" and weighed 130 pounds; Clark was nine years older and thirty-five pounds heavier.

On Redman's first night in his new cell, Clark raped Redman. Clark warned Redman not to tell anyone, or he would harm Redman's girlfriend and her family, whose address he had obtained from a letter in Redman's locker. The next day Redman telephoned his brother and his girlfriend and told them of the assault, and that he feared future attacks. The mother of Redman's girlfriend, Mrs. Pearson, called the ... Detention Facility and told jail personnel that Redman had been threatened with sexual assault and that her daughter had been threatened in the event Redman told anyone....

... The next day Redman was raped again, this time not only by Clark but by two other inmates. Each of the three rapists was older and larger than Redman, and each had an extensive criminal record. After the assaults, Redman again telephoned his brother, this time talking and crying for an extended period of time in an open area of the facility. The next morning Clark raped Redman again. [FN1]

When the detention center first assigned Redman to room with Clark, it already had on file a status report describing Clark as an "aggressive homosexual" who had allegedly "coerced" other inmates into engaging in sexual acts with him. [FN2]

At prisons and jails all across the United States, sexual attacks similar to the one just described are perpetrated every day. [FN3]

Courts have sometimes found that sexual assaults committed by inmates against other inmates may, in themselves, violate the Eighth Amendment's *1542 prohibition against cruel and unusual punishment. [FN4] However, these courts have required that plaintiffs satisfy numerous and significant legal burdens to make their claims. [FN5] And in *Wilson v. Seiter*, [FN6] the U.S. Supreme Court recently affirmed that to demonstrate an Eighth Amendment violation, inmates must prove that the supervising prison officials were "deliberately indifferent" to cruel and unusual conditions. [FN7] This test erects a daunting subjective state of mind hurdle to inmates challenging inhumane conduct or conditions of confinement. Therefore, while rape in prison remains a constant risks, the judicial system may fail to offer relief to many of the threatened inmates.

During the past decade, a terrifying variable has entered the arena: AIDS. The virus that causes this disease is transmitted rapidly through anal intercourse, especially forceful, violent intercourse. [FN8] No cure or vaccine exists for AIDS. All who contract AIDS die, some within weeks, many others after years of suffering. [FN9] AIDS poses a severe threat to human safety in the prison setting, where extraordinary behavioral patterns increase the risk that AIDS will spread to the prison community. [FN10] The combination of AIDS and rape within our prisons thus poses a dilemma: any man [FN11] sent to prison confronts, from the first moment he is incarcerated, the Kafkaesque prospect of brutal attack by another inmate [FN12] and infection with one of the world's most deadly diseases.

The Eighth Amendment of the Constitution protects prisoners from conditions of incarceration that amount to cruel and unusual punishment. This includes, under some circumstances, protection from assaults by other inmates and from the unchecked spread of contagious disease. [FN13] Thus far, courts have considered these two Eighth Amendment issues

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separately, since no court has yet been presented with a case that required analysis of the two in conjunction. [FN14] While some courts have found that sexual assaults against *1543 inmates may rise to the level of Eighth Amendment violations, others require a rigorous factual showing. [FN15] And while courts have generally concluded that prison officials must shield inmates from the spread of infectious disease, [FN16] many courts have ruled that the risk of the spread of AIDS is not enough to support a constitutional claim. [FN17]

The purpose of this note is twofold. First, it describes a specific problem existing in prisons today, namely the dangerous combination of rape and AIDS, and examines how the courts might approach the problem under the Eighth Amendment. Second, this note uses the specific example of the combination of rape and AIDS to show that the Supreme Court's Eighth Amendment jurisprudence, as recently articulated in *Wilson v. Seiter*, [FN18] is seriously flawed: The *Wilson* scheme does not adequately provide for situations in which the risk of harm is low, and the gravity of the harm is extreme. This note focuses solely on the rights of those threatened with HIV infection as a result of rape, and the liability that prison officials may face for failing to protect these rights. This note does not attempt to analyze rigorously the myriad alternatives for attacking the problem posed by rape and AIDS in prison. However, it does advocate that the best solutions may lie outside the realm of the judiciary.

Part II of this note paints a graphic picture of rape in prison and briefly describes the AIDS epidemic; it then asserts that the danger to human safety created by the combination of rape and AIDS within prison walls is unacceptable. Part III presents a brief history of the relationship between conditions of imprisonment and the Eighth Amendment, and discusses the Supreme Court's recent interpretation of the "cruel and unusual punishment" clause in *Wilson v. Seiter*. Part IV looks more closely at the two-pronged test established in *Wilson* and applies the test to instances of sexual assault in prison and to the presence of contagious disease in prison. It then analyzes how these separate lines of doctrine interact when applied to the combination of HIV transmission and prison-rape. Part V concludes that prisoners have the right to protection against infection with HIV through rape; however, the *Wilson* scheme makes vindication of this right extremely difficult. Since under *Wilson* the extremely grave effects of harm do not in themselves compel court-ordered protection, legislative action is necessary-either to remove the judicially erected obstacles or to more directly solve the underlying problem.

*1544 II. THE PROBLEM

A. Rape Behind Bars

Homosexual rape within male prisons occurs with frightening frequency and brutality. [FN19] It has been called "the most closely guarded secret activity of American prisons." [FN20] While news coverage of the problem is still rare, [FN21] at least one book exists which discusses the topic, [FN22] a U.S. Senate Subcommittee has heard testimony on its widespread incidence, [FN23] and references to its pervasiveness appear in law review articles [FN24] and numerous court opinions. [FN25] Supreme Court Justice Harry Blackmun has stated 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." [FN26]

Graphic descriptions of sexual attacks sometimes surface, in court testimony or in confidential interviews with inmates from institutions across the country, providing a glimpse into the horror of sexual victimization in prison. In Indiana, inmate McGill requested placement in protective custody after he had been the object of sexual advances by other inmates. Although McGill was in isolation and in protective custody twenty-three hours of each day, the measures did not shield him from attack:

On his third day [in isolation], McGill was leaving his cell for a shower when Ausley [another inmate] approached him and made sexually suggestive comments. McGill continued on to the showers. Ausley and *1545 Halliburton [a third inmate] followed McGill down the range, threatening him as they walked along.... Ausley and three other men entered the shower room as McGill shampooed his hair. While the three stood guard at the door, brandishing homemade knives, Ausley raped McGill in the anus after gagging him with a washcloth.... Ausley and the others then escorted McGill back to his own cell. [FN27]

Often, the younger, smaller, or less streetwise inmates are the victims. A not uncommon incident occurred in Cook County, Chicago, when "a fourteen-year-old boy ha[d] his head dry-shaved by inmates. After shaving him, four adult prisoners gang-rape[d] him. Another youngster [was] gang-raped by cellmates.... The boy end[ed] up in a psychiatric ward." [FN28]

Former Philadelphia Chief District Attorney Alan J. Davis recounted a story told by an eyewitness to the gang rape of a twenty-four-year-old:

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[T]hey had the kid on the floor. About twelve fellows took turns with him. This went on for about two hours. After this he came back to his bed and he stated, "They all took turns on me. He lay there for about twenty minutes and [X] came over to the kid's bed and pulled his pants down and raped him again. When he got done [Y] did it again, and about four or five others got on him. [FN29]

And in Texas, a court heard this testimony concerning the prevalence of homosexual rapes and attacks: One inmate testified that he was sexually assaulted while serving a sentence for a misdemeanor involving misuse of a credit card.... He testified that the aggressor hit him repeatedly over a period of two hours and ultimately forced him to perform oral sex. According to his testimony, he did not see a guard until two days later, when the aggressor was pulled from the cell block for raping another inmate. [FN30]

Rape in prison occurs brutally and inevitably. However, it is difficult to make an accurate assessment of the prevalence of rape in prison. Because of the nature of the offense, inmates rarely report their own victimization to the authorities. [FN31]

Victims are disinclined to report these attacks, due to internal and external pressures. In addition to the feelings of shame suffered by anyone who is raped, prison victims of homosexual attack perceive a "loss of manhood," and a shattering of their self-esteem. Moreover, they feel completely degraded in the eyes of their peers and relatives. [FN32] These feelings contribute to *1546 their reluctance to report the attacks. [FN33]

Victims are also threatened with violent reprisals or additional sexual assaults made by the original attacker [FN34] and by other inmates, [FN35] and thus discouraged from reporting the attacks. These threats carry extra weight as the rapists are rarely punished and remain in close proximity to their victims. Prison "etiquette" is such that any prisoner who "squeals" on a fellow inmate risks severe retribution from the other prisoners. [FN36] Revenge could mean further physical attacks and possibly even murder. [FN37]

Even if a victim overcomes these internal and external pressures and chooses to report an assault, the prison system offers him little relief. Prison officials rarely attempt to protect victims from further attacks, and some commentators have even suggested that actions of prison officials make homosexual rape easier to commit. [FN38] They do not discourage it because rape "facilitates greater control over the inmates ... divides the prisoners ... and gives them real cause to suspect, fear, fight, and hate each other." [FN39]

Thus, despite the extremely low number of rapes reported by male victims, [FN40] one federal judge postulated that the number of inmate reports may be only "the tip of the iceberg." [FN41] As part of a general report on prison violence in California, the California Department of Corrections reported forty-six, fifty-four, and forty-seven sexual attacks per year, committed by prisoners against other prisoners and staff, for the years of 1982, 1983, and 1984 respectively. [FN42] One expert testified that "the actual number of sexual assaults may be five to six times greater than the reported number of such incidents." [FN43]

As further evidence indicating the frequency of rape in prison, thirty-six inmates testifying at U.S. Senate hearings on sexual crimes in prison reported *1547 having seen or heard approximately seventy-five sexual attacks. [FN44] Moreover, four of these inmates admitted that they had been victims of rape. [FN45] In 1974 it was estimated that of the forty-six million Americans, who will be arrested at some time in their lives, ten million will be raped while in prison. [FN46] Thus, the problem is shocking not only in its brutality, but also in the frequency of its occurrence. Rape is "rampant" in our country's prison system. [FN47]

Sexual assault in prison is acknowledged as a "serious problem of substantial dimensions." [FN48] Yet the special circumstances surrounding homosexual rape and the prison setting discourage prevention of the crime. Virtually no one reports incidents of forcible sex to the officials, and very few inmates bring lawsuits as a result of sexual attacks. [FN49]

B. AIDS and Human Immunodeficiency Virus (HIV)

AIDS has quickly become one of the most critical health policy issues in the United States. [FN50] Since the disease's discovery ten years ago, [FN51] more cases of AIDS have been reported here than any other country in the world, [FN52] totalling 206,392 known cases as of December, 1991; 133,233 (64.6 percent) have already resulted in death. [FN53] Experts predict that by the end of 1993, these totals may be as high as 480,000 cases resulting in possibly 340,000 *1548 deaths. [FN54] Although some drugs, such as azylothymidine (AZT), have been approved by the Food and Drug Administration as

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treatments to slow the effects of the disease, [FN55] there is no known cure; [FN56] AIDS "is invariably fatal." [FN57]

AIDS is caused by a virus known as Human Immunodeficiency Virus (HIV). [FN58] HIV invades the human body's immune system and selectively destroys certain white blood cells, the CD4 (formerly known as T4 or helper T lymphocytes [FN59]), essential for the proper functioning of the human immune system. [FN60] The CD4 cells are responsible for recognizing foreign organisms in the body and for orchestrating the complicated immune responses necessary for fighting disease. [FN61] The human body cannot replace the lost CD4 cells as fast as HIV destroys them, causing a complete or partial breakdown of the body's ability to fight off foreign microbes that normally would be eliminated by a properly functioning immune system. [FN62] AIDS primes the body for an onslaught of "opportunistic infections," and gradually leads to death. [FN63]

One may be infected with HIV and may pass the virus on to others without exhibiting any symptoms of AIDS. [FN64] Although researchers believe that *1549 most, if not all, HIV infected people will eventually develop AIDS, [FN65] the period during which an infected person shows no outward symptoms but remains infectious is quite unpredictable, often lasting years. [FN66]

HIV is transmitted through intimate contact, by way of semen or blood. [FN67] Anal intercourse is high-risk behavior, because the virus in semen comes in contact with the mucosal surfaces of the rectum, [FN68] conduct that is regularly classified as high-risk activity for the transmission of the disease. [FN69] More than 75 percent of AIDS cases in the U.S. results from sexual contact, and sexual transmission is "predominantly related to the number of sexual partners and the practice of receptive anal-genital intercourse." [FN70] The manner of intercourse occurring in prisons is particularly dangerous because the violent nature of the attacks frequently causes severe rectal injury and bleeding. And when, as is common, numerous assailants participate, the chances of infection are further increased.

The percentage of prisoners infected with the AIDS virus varies from prison to prison. [FN71] A survey of federal prisons found 2.5 percent of incoming and 2.6 percent of exiting inmates infected with HIV. [FN72] Studies in other states show the incidence of infection ranging from 0 percent in some states to 17 percent in New York. [FN73] As of September, 1990, the Department of Justice had reported more than 5400 cases of AIDS in U.S. prisons since 1981 (or 202 cases per 100,000), [FN74] as compared to 14.65 cases per 100,000 in the general public. [FN75] These data are not comprehensive. Most prison systems do not test all inmates, [FN76] so these numbers represent only those who *1550 have volunteered or been required to be tested for HIV. [FN77]

C. The Frightening Combination

The frequency of prison rape and the presence of the AIDS virus imply a distressing probability: Significant numbers of prison inmates are at risk of being cruelly and fatally victimized. Anyone convicted of a crime and eligible for incarceration faces the prospect of a much more severe sentence than the judge or the State ever intended: slow, debilitating death.

The problem of sexual attacks and victimization in prisons is not new. Abysmal living conditions, tremendous overcrowding, and internal socialization of prisoners create an environment where such activity often becomes commonplace. AIDS is the critical new variable in the equation. The problem of sexual attacks begged for a solution before AIDS; but because of this new dimension, it is imperative that the issue be addressed immediately. [FN78] The problem will only get worse, not better, as time goes by and AIDS infects more and more people.

Yet inmates face significant obstacles in obtaining relief under current *1551 Eighth Amendment jurisprudence. The following sections will briefly describe the history of the Eighth Amendment with respect to inhumane prison conditions and outline the relevant case law pertaining to the specific dangers presented by the combination of AIDS and homosexual rape. The discussion will then focus upon a framework that can effectively address the issue of rape and AIDS in prison.

III. CRUEL AND UNUSUAL PUNISHMENT: THE EIGHTH AMENDMENT

Courts routinely consider Eighth Amendment claims of prisoners who face deplorable or dangerous conditions of confinement such as sustained sub-zero temperatures without heat, blankets, or coats, [FN79] violent assaults from other inmates, [FN80] attacks by guards or prisoners during riots, [FN81] or gang rapes by other inmates. [FN82] Prisoners at risk of sexual attack that could expose them to HIV infection can turn to the courts for relief [FN83] under the Eighth Amendment [FN84] by bringing suit under 42 U.S.C. § 1983 [FN85] against the responsible *1552 officials [FN86] or

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governmental entities. [FN87] This section presents the historical*1553 development of Eighth Amendment jurisprudence protecting prisoners from post-sentencing cruel and unusual punishment, focusing specifically on dangers within the prison community. The case law on unconstitutional conditions of confinement is relatively recent, and it was not until 1990 that the interplay of the different cases was clarified in *Wilson v. Seiter*. [FN88]

In the 1890 case of *In Re Kemmler*, [FN89] the Supreme Court recognized that the Cruel and Unusual Punishment Clause protects prisoners from punishment involving "torture or a lingering death." [FN90] Since then, the Supreme Court has extended the protection of the Eighth Amendment well beyond the acts of torture and barbarity. [FN91] The Court has stated that the Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain," [FN92] punishments that are "grossly disproportionate to the severity of the crime," [FN93] and punishments that "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" [FN94]

Before the 1970s the courts took a decidedly "hands-off" approach to questions of prison administration and any cruelty that might arise from practices of incarceration. [FN95] But during the 1970s and early 1980s, the Supreme Court and the lower federal courts began to scrutinize prison administration more closely, to rid the prisons of inhumane conditions that would amount to cruel and unusual punishment. [FN96] In the landmark case of *1554 *Estelle v. Gamble*, [FN97] the Supreme Court recognized that post-sentencing conditions of confinement could be "cruel and unusual punishment" and established that a successful claim of cruel and unusual punishment must include a determination of "deliberate indifference" on the part of the supervising prison officials. [FN98] The Court reasoned that since an inmate must rely on prison authorities to treat his medical needs, the state has a constitutional obligation to provide medical care for those whom it incarcerates. [FN99] However, the Court made clear that not every failure to provide adequate medical care would rise to a constitutional violation. [FN100] Neither mere negligence, nor "an inadvertent failure to provide adequate medical care," nor ordinary medical malpractice constitutes an Eighth Amendment violation unless the act or omission can be said to be a result of "deliberate indifference" on the part of the responsible officials. [FN101]

In 1981, the Supreme Court cemented a growing judicial role in prison oversight in *Rhodes v. Chapman* [FN102] by declaring it "unquestioned that 'c onfinement in a prison ... is a form of punishment subject to judicial scrutiny under the Eighth Amendment standards.'" [FN103] The Court stated that conditions of imprisonment "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities." [FN104] This "minimal civilized measure" remains the constitutional threshold of seriousness that must be met for conditions of incarceration to amount to cruel and unusual punishment. [FN105]

Five years later, in *Whitley v. Albers*, [FN106] the Court modified the *Estelle* *1555 "deliberate indifference" analysis to allow for the balancing of institutional concerns for security against the Eighth Amendment rights of prisoners. In *Whitley*, an inmate brought suit under the Eighth Amendment for injuries resulting from a gunshot wound to the knee suffered during prison guards' attempts to quell a riot. [FN107] The Court found that *Estelle*'s "deliberate indifference" standard did not "adequately capture" the importance of competing obligations such as institutional concerns for safety and security, [FN108] the Court stated that the Constitution requires that conduct prohibited by the Eighth Amendment must be the result of "obduracy and wantonness" on the part of the officials. [FN109] When institutional interests such as prison security must be balanced against the prisoners' rights, then only "'force ... applied ... maliciously or sadistically for the very purpose of causing harm'" will satisfy the requirement of "obduracy and wantonness." [FN110] The Court thus constructed a two-tiered Eighth Amendment scheme for the "wantonness" inquiry: In cases where competing institutional interests must be considered, the plaintiff must show that the officials acted "maliciously" or "sadistically"; when only the interests of the prisoner are concerned, the standard remains "deliberate indifference." [FN111]

After *Estelle*, *Rhodes*, and *Whitley*, courts were clearly required in Eighth Amendment cases to consider the intent or indifference of the prison officials, the seriousness of the challenged conditions or conduct, and the competing institutional interests facing the officials. But the cases failed to resolve how these considerations were to be synthesized. Last year, in *Wilson v. Seiter*, [FN112] the Court finally attempted to reconcile the previous cases within one principled scheme for resolving Eighth Amendment post-sentencing questions. In *Wilson*, the plaintiff inmate of an Ohio correctional facility sued for violation of his Eighth Amendment rights alleging "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." [FN113] Justice Scalia, writing for the majority, created a two-pronged approach for deciding Eighth Amendment cases. The "objective" prong requires an inquiry into the "seriousness" of the alleged conduct or omission; the "subjective" prong requires an inquiry into the state of mind of the responsible prison official. [FN114] Justice Scalia stated that *Rhodes* dealt only with the "objective" prong and established

the baseline *1556 standard for that inquiry as the denial of the "minimal civilized measure of life's necessities." [FN115]

Whitley and Estelle, on the other hand, made clear that a finding of "wantonness" or "deliberate indifference" on the part of prison officials is also required, and this provided the basis for the "subjective" prong. [FN116] In *Wilson*, the Court for the first time stated that all claims under the Eighth Amendment [FN117] must allege that the officials acted with "deliberate indifference" in causing pain or suffering. [FN118]

Wilson's standard of "deliberate indifference" effects a significant change in Eighth Amendment jurisprudence. It excludes from the subjective analysis any consideration of the gravity of the harm suffered by the plaintiff. The level of subjective intent necessary to create an Eighth Amendment claim is not to be raised or diminished to reflect the objective severity of the alleged violation. This rigidity is likely to raise an insurmountable barrier to some claims which allege conduct that should be deemed "cruel and unusual."

IV. Homosexual Rape and AIDS: Applying the Wilson Standard

This section will describe the objective and subjective standards and apply them to the individual cases of 1) intra-inmate assault and 2) failure to contain the spread of contagious disease. Then it will attempt to construct the standards that would be applicable to situations in which the threat of AIDS and the risk of rape occur in combination. Through this analysis, it shall be apparent that while the "objective prong" extracts a heavy evidentiary requirement in rape cases, the burden is lighter when the alleged violation is a failure to prevent the spread of disease. Thus, the additional factor of disease or AIDS in rape cases may justify a lowering of the objective standard that is used in cases involving rape alone. Courts have shown a willingness to accept this justification. However, both the objective and subjective prongs must be met to establish an Eighth Amendment claim, and the subjective intent prong is less easily adapted to the situation that combines AIDS and rape. The subjective prong may be too inflexible to respond adequately to the potentially life threatening danger posed by the combined situation.

*1557 A. The Objective Test

The objective component of the *Wilson* test requires a fact based inquiry into whether the nature of the challenged conduct or omission "offend[s] 'evolving standards of decency.'" [FN119] This judgment must be based on objective indicia drawn from the history and current state of mores and standards of modern society, [FN120] "with due regard for differences in the kind of conduct against which" the claim is lodged. [FN121] While the Constitution does not mandate "comfortable prisons," [FN122] it does require that prisoners are guaranteed some modicum of humane treatment and "the minimal civilized measure of life's necessities." [FN123] For example, prisoners may seek relief from extended periods of freezing temperatures, [FN124] unreasonable levels of overcrowding; [FN125] a pervasive risk of physical attacks or sexual assaults from other prisoners, [FN126] or a deliberately indifferent denial of adequate medical care. [FN127]

Most recently, in *Hudson v. McMillian*, [FN128] the Court further refined the objective prong by dividing the inquiry into categories of the kind of conduct or omission alleged. In *Hudson*, the plaintiff inmate sued guards who had shackled and handcuffed him, and then beat him about the face and body, causing minor bruises and swelling, loosened teeth, and a cracked dental plate. During the beating, another guard watched and told the guards "not to have too much fun." [FN129] Justice O'Connor, speaking for the majority, found that the guards had acted maliciously and sadistically. Finding that Eighth Amendment claims must be considered contextually, she noted that different types of conduct necessarily require different standards under the objective prong. [FN130] The Court held that whenever a plaintiff's claim alleges *1558 that prison guards used excessive force, the prisoner satisfies the objective prong by showing that the harm caused was not "de minimis"; he need not, as some lower courts had reasoned, surmount a "significant injury" hurdle. [FN131] The Court stated that "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." [FN132] The *Hudson* decision did not, however, modify the standards by which claims of conditions of confinement other than "guard beatings" are analyzed.

1. Pervasiveness of the risk of assault.

In any Eighth Amendment claim for assault or rape, plaintiffs must show that the harm or threat of harm is objectively "bad" or "cruel and unusual." The *Wilson* Court specifically recognized that failure to protect inmates from violent attacks at the hands of other inmates may rise to the level of cruel and unusual punishment [FN133] and that prison officials have an affirmative duty under the Constitution to protect prisoners from such attacks, [FN134] including sexual assaults. [FN135]

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The courts have recognized that the Eighth Amendment can mandate prospective relief, which is essential in the AIDS situation. Even the threat of violent attack or sexual assault may rise to a level that offends "objective *1559 standards of decency," [FN136] thus satisfying the objective prong of the Wilson test. However, the granting of prospective relief requires a showing that the threat of attack is "constant" or "pervasive." [FN137]

It has been said that "[c]onfinement in a prison where terror reigns is cruel and unusual punishment." [FN138] However, the threshold of "pervasiveness" remains unclear. Prisoners have no constitutional right to protective measures that would render prisons "assault-free," [FN139] yet they do not necessarily have to prove the existence of a "reign of terror" to get relief. [FN140] The determination of "pervasiveness" is a fact-based inquiry in which the claimant must substantially support a reasonable fear of sexual attack. [FN141] Existing case law provides little guidance, other than to stipulate that one incident will not suffice to prove pervasiveness, [FN142] but sufficient risk will. [FN143]

Further confounding the analysis of pervasiveness is the inconsistency with which the standard is applied. No court has stated whether pervasiveness should be measured in terms of 1) the risk of violence in general, 2) the risk of attack from one particular inmate, 3) the risk of attack to a particular person or group of persons, or 4) the risk that an attack will come from one particular inmate and will be directed to another particular inmate. The absence of a clear articulation of how to define "pervasiveness" has significant ramifications for the "subjective" prong analysis as well as providing the focus for the "objective" prong analysis. A sufficient pervasiveness *1560 showing may in some cases be determinative of the subjective inquiry. [FN144] Thus, the outcome of rape cases brought under the Eighth Amendment turns upon the uncertain determination of the pervasiveness of the risk of harm.

2. Risk of the spread of disease.

The Eighth Amendment requires that prison officials insure that prisoners are not infected with contagious diseases carried by other prisoners. In *Estelle v. Gamble*, the Supreme Court established the government's constitutional duty to tend to the "serious" medical needs of those it incarcerates. [FN145] Lower courts have interpreted *Estelle* as requiring that prisons prevent the spread of contagious diseases when possible. [FN146] In *Lareau v. Manson*, [FN147] the defendant prison officials made no effort to screen incoming inmates for contagious disease, despite significant overcrowding which further heightened the risk of infection. [FN148] The Second Circuit affirmed the district court's findings that such a failure was "sufficiently harmful" and violated the Eighth Amendment rights of the convicted prisoners. [FN149] Moreover, the circuit court added that plaintiffs need not show a spread of infection within the prison population before obtaining relief. [FN150] This finding effectively required prison officials take preventive measures to stop the spread of disease. The court of appeals affirmed an extensive remedial order requiring that every incoming inmate receive a medical examination, including screening tests for communicable diseases, and also mandated that all those inmates carrying communicable diseases be isolated from the healthy population. [FN151]

The Fifth Circuit reached a similar conclusion in *Smith v. Sullivan*, [FN152] finding that the housing of inmates suffering from scabies and gonorrhea among healthy inmates for months at a time would "obviously" violate *Estelle*'s requirement of adequate medical care. [FN153] A federal district court in Minnesota found that plaintiff inmates who had contracted tuberculosis had *1561 succeeded in stating an Eighth Amendment claim in *DeGidio v. Perpich*. [FN154] Other courts have found that the failure to screen incoming inmates, [FN155] or the failure to prevent "constant and habitual exposure of convicted prisoners to persons who are contagiously ill" [FN156] may rise to the level of seriousness required by *Estelle*. [FN157] These cases dictate that prison officials have a general duty to reasonably protect prisoners from contracting contagious diseases. In contrast to the analysis required in the assault and rape context, the cases dealing with the spread of disease do not set forth any express threshold of risk nor distinguish between diseases of varying severity. They simply find that failure to take steps to prevent the spread of disease, per se, may violate the objective prong of the Eighth Amendment. [FN158]

Based on these precedents, many inmates have brought suit asserting Eighth Amendment violations for the failure of prison officials to adequately protect them from HIV infection. [FN159] But contrary to other non-AIDS disease cases, courts have generally been unreceptive to these lawsuits. As one commentator argued, AIDS is distinct from tuberculosis and other contagious diseases because it is only transmitted through intimate contact and therefore does not normally present a constitutionally prohibited level of danger to uninfected inmates. [FN160] The courts, adopting this same rationale, have rejected claims alleging the threat of AIDS contagion from infected prisoners where nothing more than casual and permissible contact and interaction between inmates occurred. [FN161] Moreover, courts have been especially deferential to defendant prison officials where the officials made conscious efforts to reduce the risk of AIDS transmission, such as

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prohibiting homosexual activity, housing aggressive inmates separately, or instituting AIDS education programs. [FN162]

Under most circumstances, such deference to medical science and prison *1562 officials may be entirely appropriate and reasonable. Reality demonstrates, however, that the courts are overly optimistic in putting faith in the actual enforcement of, or voluntary compliance with, rules prohibiting homosexual activity. [FN163] Fortunately, the courts have at least left the door open to permit claims where situations do present a dangerous risk of transmission. [FN164]

3. Uncharted territory: The combination of AIDS and widespread rape in prison.

The courts have not yet recognized the danger of contracting AIDS from rape as a valid, single claim. To address this combined situation, I draw from the "pervasive risk" standard of the assault cases as well as from the "serious medical needs" standard of the disease cases.

The Supreme Court has said that conditions of confinement, "alone or in combination," [FN165] may violate the Eighth Amendment, especially if the combination has "a mutually enforcing effect" producing the deprivation of a single identifiable right. [FN166] Existing precedent hints that a prison in which HIV infected inmates are free to rape, and thereby infect other prisoners with HIV, may "offend 'evolving standards of decency.'" [FN167] But no court has yet been presented with factual allegations of a rape in prison by an HIV infected inmate. [FN168] However, numerous courts have suggested that a complaint that alleged such facts would satisfy the objective component of Eighth Amendment inquiry. [FN169] For example, in *Glick v. Henderson* [FN170] the Eighth Circuit stated that it could "envision situations in which courts would be warranted in involving themselves in the administration of a prison in order to protect inmates from practices conducive to the spread of AIDS." [FN171] In a concurring opinion, one judge also expressed the belief that *1563 a claim that alleged with sufficient specificity a "housing policy that exposes the plaintiff to an unreasonable danger of sexual assault by an AIDS carrier or victim" [FN172] could warrant a finding of an Eighth Amendment violation.

The appropriate evidentiary standard to be applied to the situation of HIV infection through rape should include aspects of the analyses applied in the sexual assault precedents and in the disease precedents. One who brings an action based solely on the threat of sexual assault must show a "pervasive risk" to oneself or to an identifiable class of which one is a member. But in the disease cases, one need not show a pervasive risk of infection; [FN173] failing to segregate or even failing to screen incoming inmates for contagious diseases may create an unconstitutional risk per se. Thus, where there is no pervasive risk of assault, there may still be a claim if the risk of AIDS infection is an additional factor. Some judges have suggested that a plaintiff seeking to state a claim of HIV risk through sexual assault would still have to establish that they were at a "pervasive risk" [FN174] while others have suggested that they might have only to show "unreasonable risk." [FN175] The Lareau court's conclusion that one need not prove that a disease has already spread before obtaining relief also supports the notion of a reduced standard. [FN176]

One might predict that a court would apply a lower standard than "pervasive risk" even if the court chose to focus on the assault aspect. The homosexual rape jurisprudence would dictate the use of the pervasiveness standard if AIDS is viewed merely as an aggravating consequence of sexual assault, because HIV presence does not increase the likelihood of the risk of rape to the inmate, just the gravity of the consequences. However, reducing the standard to one of "substantial risk" or "a risk" is justifiable in light of the heightened "gravity" of the mutually reinforcing effect of the combination of homosexual rape and HIV infection. Such a change in the articulated law would be entirely logical under the objective standard, which is intended to be a measure of the "seriousness" or "offensiveness" of the asserted condition, taking account of the gravity of the harm as one factor in the analysis. [FN177] Indeed, the decisions that discuss the possible combination of AIDS and rape suggest that the courts already implicitly take "seriousness" of harm into consideration when these serious consequences are apparent.

*1564 On the other hand, a court relying upon the "disease precedents" [FN178] would, no doubt, employ a lower standard than "pervasive risk." [FN179] While courts have assumed that AIDS does not easily pass between people from casual contact, the presence of rape in prison bridges the logical gap that made AIDS seem less of a threat than other contagious diseases. *Smith v. Sullivan* [FN180] and *Lareau v. Manson* [FN181] required the plaintiffs to show a relatively low level of risk that they would actually get the disease, thus assuming that the mere presence of a contagious inmate among the healthy ones was "sufficiently harmful to evidence" a constitutional violation. [FN182] The same logic should therefore apply to AIDS when rape is shown to be a factor, since HIV is spread by this activity. This view has some support in judicial precedent: Although courts have rejected every case where AIDS was merely alleged to be in the environment, it has been intimated that an Eighth Amendment violation may have occurred in the one case where there was a possibility of

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transmission through a bite. [FN183] The court in that case left room for a different result because the tacit assumption of non-transmissibility was inapplicable.

Courts should thus recognize that the transmission of AIDS is heightened by the incidence of rape in prison. A standard acknowledging the risks and problems posed by AIDS might allow inmates alleging Eighth Amendment violations from the threat of homosexual rape by HIV carriers to sustain a claim based on a "substantial risk" of being raped. This standard would be higher than the one normally applied to disease cases, but lower than the threshold that must be met in assault cases.

As an alternative to relying on either the assault cases or the disease cases, the appropriate standard may be one that is a function of the judge's perception of the gravity of the danger in question. While the courts do not normally require evidence that prisoners are at high risk of actually catching the disease present in the population, they do require such evidence when the danger is rape. To be sure, most courts acknowledge that rape incidents can rise to a "cruel and unusual" level, but the courts clearly view the contraction of disease, even a nondeadly disease, [FN184] as categorically more dangerous. While failure to segregate disease carrying inmates is "obviously" an Eighth Amendment violation, [FN185] rape is not, unless the risk of an attack is *1565 proven to be pervasive. The cases belie a pattern of conclusions that the threats of disease and rape are simply different in degree. Where the gravity of consequences is perceived by the courts to be high, as with disease, the risk that need be shown is low, approaching nil. Where the gravity (as seen by the courts) is low, namely the temporary physical anguish and subsequent psychological trauma of a sexual assault, [FN186] the plaintiff must show a high level of risk, namely pervasiveness. When the precedents are viewed in this fashion, an argument in favor of explicitly lowering the requirement from "pervasiveness" to something less exacting to account for the increased "gravity" of HIV contraction seems persuasive.

The dichotomy between AIDS and non-AIDS disease cases can also be explained in terms of "gravity of the harm." Although the consequences of contracting any potentially life threatening disease are equally grave, the risk of contracting AIDS was thought to be de minimis. Where a significant risk of transmission has been established, however, cases have acknowledged the potential viability of claims alleging the threat of AIDS infection. [FN187] These cases evidence a value judgement about the seriousness of the harm that infuses all objective inquiries, showing that pervasiveness is not the only inquiry. The courts clearly perceive AIDS to be a serious constitutional issue when it truly has been transmitted.

As a normative matter, courts should be more sensitive to allegations of rape where the possibility of contracting AIDS exists. If inmates must wait until a level of AIDS exists where a "pervasive risk" could be established in court, whatever remedy a court might formulate would almost certainly be too late to save an unfortunate few. Since the objective prong of the Wilson formulation is specifically intended to account for the gravity of the cruelty of the challenged activity or omission, it is entirely appropriate for courts to construct a lower evidentiary standard in cases where the combination of rape and AIDS works a "mutually enforcing effect," [FN188] and presents a serious risk of death.

Regardless of which evidentiary standard is adopted, one ambiguity remains. The specificity with which the risk must be alleged is still unsettled. The law does not clarify whether the plaintiff must prove 1) a general risk of the spread of AIDS within the prison population where rape is a problem, 2) a general risk of rape where AIDS is known to be present in the population, 3) a risk specifically to himself of getting raped at all, 4) a risk that HIV infected inmates are raping other inmates, or 5) that HIV infected inmates *1566 threaten to rape him. This ambiguity with the term "pervasiveness" leaves room for judges to decide in favor of the plaintiff or the defendant.

B. The Subjective Test

The second component of the Eighth Amendment test focuses upon the subjective intentions or knowledge of the prison officials. No matter how egregious the conditions of confinement, no claim may succeed without an inquiry into the state of mind of the responsible officials, [FN189] because the challenged conduct or conditions must amount to "punishment" by some entity or official. [FN190] The Whitley Court mandated that all claims under the Eighth Amendment must show that the challenged conduct or conditions came as a result of "wantonness" on the part of prison officials. [FN191] The Wilson Court stated that wantonness in the context of the Eighth Amendment "does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which ... the objection is lodged.'" [FN192] Moreover, the Court has also held that the Eighth Amendment does not require "an express intent to inflict unnecessary pain." [FN193] Wilson held that the "deliberate indifference" formulation of the subjective mental standard applies to all cases except for those resembling Whitley, where the state confronts safety and security concerns that compete with the

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interest in protecting individual prisoners. [FN194] Since no competing governmental interest exists in cases brought by those fearing HIV infection from homosexual rape, the plaintiff must show that the defendant officials' failure to protect him from attack or infection was caused by "deliberate indifference." This determination is to be made without regard to the likelihood of infection or the severity of pain that AIDS inflicts.

The Supreme Court has never explained the exact meaning of "deliberate indifference." The Estelle [FN195] Court first articulated the standard, but stated only that in the context of inadequate medical care, neither "an inadvertant failure" nor "negligen ce " in diagnoses or treatment rose to the level of deliberate indifference. [FN196] Wilson did not define the phrase either, but further refined the parameters of the analysis by stating that deliberate indifference lies somewhere between the "malicious and sadistic " standard of Whitley and negligence. [FN197] In addition, Wilson confirmed that the "deliberate indifference" standard should be applied to cases involving "inhumane conditions of confinement, failure to attend to ... medical needs, or a combination *1567 of both." [FN198]

The Wilson Court cited five circuit court opinions that had applied the "deliberate indifference" standard, impliedly favoring those interpretations. [FN199] The formulations of the First Circuit in Cortes-Quinones v. Jimenez-Nettleship, [FN200] and the D.C. Circuit in Morgan v. District of Columbia, [FN201] were among those implicitly endorsed. [FN202] The standard used in these two cases is relatively easy to meet-the plaintiff need only show that the prison officials "should have known" about the impending danger. In Cortes, a woman brought suit for damages resulting from the death of her son in a Puerto Rico jail. The son, a diagnosed schizophrenic, was killed by other prisoners, his body found dismembered. [FN203] The First Circuit described the severe overcrowding at the jail, which effectively allotted to each prisoner "space equivalent to 30 by 74 inches," as "appallingly bad," [FN204] and also noted that the defendants "knew or certainly should have known of the deceased's psychological problems." [FN205] The court found that evidence of violent and chaotic conditions, coupled with the failure of prison officials to segregate psychologically ill inmates, amounted to "'deliberate indifference in the sense that the official had knowlege or should have known of a pervasive risk of harm to inmates.'" [FN206]

In Morgan v. District of Columbia, [FN207] a fight erupted between the plaintiff and another inmate over a jar of peanut butter, [FN208] resulting in severe permanent damage to the plaintiff's eye and jaw. [FN209] Morgan sued prison officials for failing to protect him sufficiently from the other inmate, who was psychologically unstable. The D.C. Circuit held that the district court instruction to the jury was a proper articulation of the standard:

Deliberate indifference occurs if there is an obvious unreasonable risk of violent harm to a prisoner or a group of prisoners which is known to be present or should have been known, and the District through its employees who knew or should have known of the risk were outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct *1568 or avoid the risk of harm to the prisoner or prisoners who were subject to the unreasonable risk of violent harm. [FN210]

The existence of reports on file documenting the attacker's mental instability [FN211] coupled with a bureaucratic breakdown resulting in the generally chaotic environment within the prison [FN212] "support ed a finding that the District had a well-established practice of deliberate indifference to the threat of violence in the Jail." [FN213] Thus, the court found that the subjective requirement was met even in the absence of any evidence of specific knowledge that the particular attack was imminent. Both the First and D.C. Circuit opinions suggest that one may satisfy the "deliberate indifference" subjective prong by alleging at least a combination of a significantly violent and uncontrolled prison atmosphere and at least some level of knowlege of the specific vulnerability of certain inmates within that population to attacks from other inmates.

The circuit court cases cited by Wilson should be contrasted with one post-Wilson case. In McGill v. Duckworth, [FN214] Judge Easterbrook of the Seventh Circuit interpreted the standard as one requiring actual knowledge on the part of the prison officials. The plaintiff, a protective- custody inmate, brought suit against prison officials for failure to prevent other inmates from brutally gang-raping him in a shower. The court found that any standard that allows for proof that defendants "'should have known'" of the risk to the plaintiff approaches absolute liability in the prison context, and is thus inappropriate. [FN215] The court held that, to satisfy the "deliberate indifference" standard, McGill "had to show that the defendants had actual knowledge of the threat the rapist posed, that the rape was readily preventable, but that instead of intervening the guards allowed the rapist to proceed." [FN216] McGill's claim alleged that five assaults occurred in the segregation unit during the first three months of the year, all against protective-custody inmates, thus placing these vulnerable prisoners with disciplinary-status inmates was contrary to "common sense." [FN217] The court rejected this argument as a "species *1569 of the 'should have known' approach," [FN218] and declared McGill's case fatally flawed due to his failure to inform the guards that he was about to be raped. [FN219]

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The distinctions between the alternative formulations of deliberate indifference are more than merely semantic, because under the Seventh Circuit regime, to pass the crucial subjective test, plaintiffs might be forced to establish through testimony of the defendants themselves that they had actual knowledge of 1) a significant rape problem, 2) the imminence of a specific rape, or 3) the presence of HIV in the prison. [FN220] Under a D.C. or First Circuit interpretation, the subjective prong could be satisfied by proof that the gravity or the duration of the dangerous conditions proven was such that the defendants should have known of the risk of attack. [FN221] The choice between an "actual knowledge" standard and a "should have known" standard will prove pivotal in cases where prospective relief from the danger posed by the transmission of AIDS through rape is sought.

Wilson's instruction on this point is critical. The Court seems to adopt a "should have known" standard when it states, "[t]he long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent." [FN222] However, consideration of the gravity of the harm alleged is apparently eliminated from the analysis by the conclusion that "wantonness" does not "depend upon the effect of the challenged conduct or omission upon the prisoner." [FN223] Previously, the more discretionary "should have known" standard enabled a court to take gravity of harm to the prisoner into account in the subjective analysis; this approach could thereby blur the line between objective and subjective prongs. Wilson explicitly removes that choice, making the subjective and objective standards essentially separate and distinct. [FN224] The two-pronged framework thus makes *1570 it very difficult for an inmate to make an Eighth Amendment claim when pervasiveness or risk is low, but gravity of harm is extremely high.

1. Deliberate indifference to the risk of assault.

According to Wilson, the proper subjective "wantonness" standard to apply to intra-inmate assault cases is "deliberate indifference." The cases applying the subjective inquiry to assault cases have not articulated a consistent level of risk or a description of the conditions that will trigger a finding of deliberate indifference on the part of prison officials. [FN225] Some courts have mentioned that persistent overcrowding and frequent violence in the prison, specific knowledge of the vulnerable stature of the eventual victim, and a bureaucracy that prevented officials from responsibly monitoring the housing of potentially dangerous inmates are factors which can amount to "deliberate indifference." [FN226] Other courts have found "deliberate indifference" where information about a victim's obvious vulnerability was or should have been in his file, and the responsible officials failed to read his file. [FN227] One court found that even when officials had affirmatively acted to place a prisoner in protective isolation, his subsequent sexual victimization while in isolation could still be attributed to the officials' deliberate indifference. [FN228] The variety of findings comes in part as a result of the ability of the courts to manipulate the requirements of the deliberate indifference test.

The courts have not developed a principled approach to this problem of definitional specificity. This point is illustrated by two essentially equivalent cases which were decided very differently. In *Morgan v. District of Columbia*, [FN229] the D.C. Circuit upheld a jury verdict in favor of a plaintiff who sustained significant eye and jaw damage when he was brutally beaten by another inmate in a fight. [FN230] The court found that prison officials could be held liable for failure to prevent injury as a result of the danger to "his fellow inmates" posed by the specific assailant in the case. The court focused on evidence that the prison officials had in their possession information which should have apprised them of this particular assailant's dangerous stature and violent nature and history. [FN231] The officials' imputed knowledge of the danger posed by this inmate, combined with evidence that bureaucratic breakdowns and institutional chaos resulting in improper or unchecked housing of dangerous inmates in general, were found to be sufficient to support *1571 the plaintiff's claim. [FN232]

In contrast, the Fourth Circuit, in *Ruefly v. Landon*, [FN233] dismissed a claim by a plaintiff who lost an eye and suffered a broken cheekbone as a result of an attack by another inmate wielding a padlock. [FN234] The plaintiff alleged that prison officials knew of his assailant's violent and dangerous nature from his previous fights and psychiatric status. The court found that Ruefly had failed to state a claim because he did not allege that the officials knew that this particular inmate posed a "specific risk of harm to Ruefly." [FN235] The court found this failure singularly fatal to Ruefly's claim; whereas, in *Morgan*, no showing of a known danger to Morgan was made, and Morgan nevertheless won his case.

Neither *Morgan* nor *Ruefly* attempted to define the risk to which administrators must be deliberately indifferent. *Ruefly* required specific knowledge of the risk of assault to the plaintiff himself, but did not state whether that allegation would have been sufficient in itself, or whether it would also have to be combined with specific knowledge that this assailant would attack this victim. *Morgan*, on the other hand, demanded no evidence that the officials were indifferent to the threat posed to the plaintiff by the assailant, and supported its judgment in part through evidence of generalized danger posed by the free

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movement of violent inmates within the prison. These cases show that the ambiguity inherent in the subjective standard itself, as applicable to assault, allows courts to reach opposite outcomes in substantially similar cases. These kinds of choices among narrow or wide definitions of risk were not in any way limited by the Wilson opinion. Wilson eliminates divergent conclusions within the subjective prong only when that divergence is based on "gravity" considerations, and not where the divergence is based on other factors such as the application of the test in different ways by different judges.

To date, *McGill v. Duckworth* [FN236] is the only circuit court case to apply the Court's new formulation to an assault case. [FN237] In requiring the plaintiff to show that the guards had actual knowledge that he was about to be attacked, the court clearly required that prison officials be in some sense aware of the specific assault about to be perpetrated. [FN238] Attempts to show knowledge of a more generalized risk to young or vulnerable inmates were rejected. [FN239] *1572 If all courts were to adopt this narrow a definition of the risk, it would be almost impossible for any inmate to win a lawsuit unless he could prove that the guards virtually stood by and watched him be raped. [FN240]

McGill seemed predicated upon a belief that rape and violent assaults in prison were to be expected and accepted. Indeed, Judge Easterbrook stated that "some level of brutality and sexual aggression among inmates is inevitable." [FN241] Thus, this case is an example of how the judges' own views of the "objective" cruelty of rape or assault may dictate how narrowly they define the risk. That choice may in turn dictate a specific outcome in a given assault case, regardless of the evidence relating to the "subjective" inquiry. In the rape cases, judges can define the risk narrowly when they are inclined to deny relief, and, conversely, define it broadly when they are inclined to extend relief. This flexibility bears profoundly on whether Wilson's two-distinct-prong standard is appropriate as an across the board requirement. [FN242]

2. Failure to prevent the spread of disease.

Courts have been willing to find deliberate indifference in cases involving the spread of non-AIDS diseases. But none of the cases explain how they reach the conclusion that the officials had the requisite intent. They all seem to assume that a failure to discover and segregate carriers of contagious disease is conclusive proof that the officials were deliberately indifferent to the needs of the inmates. [FN243] Thus, courts seem to impose an affirmative duty to take steps to discover contagious disease carriers.

Nevertheless, AIDS cases are treated differently. No court has found that either failing to test all inmates for HIV or failing to remove all HIV carriers from the uninfected population constitutes deliberate indifference to the health or well being of plaintiff prisoners. [FN244] But in none of these cases did the plaintiffs allege that they were victims or at risk of becoming victims, of rape by HIV infected prisoners. [FN245]

In the AIDS cases, the courts often embark on analyses of the reasonableness of preventive measures undertaken by prison officials, concluding *1573 that such measures preclude a finding of deliberate indifference. For example, in *Feigley v. Fulcomer*, [FN246] the court heavily weighed the un rebutted expert testimony that HIV testing for all prisoners provided little protection because of the test's inherent latency period, [FN247] concluding that the prison's conscious choice not to test all inmates did not amount to deliberate indifference. [FN248] The court also found that the prison's specifically enumerated and strictly enforced policies against homosexual contact, its aggression-based housing policies, and its significant AIDS education and awareness training programs precluded a finding of deliberate indifference. [FN249]

In *Deutsch v. Federal Bureau of Prisons* [FN250] the court considered a prison program that already practiced comprehensive screening of all inmates. The inmates were educated about high-risk activities, explicit rules prohibited *1574 sexual conduct, and inmates who posed a risk of infection to other inmates were segregated from the general population. [FN251] These factors combined with the plaintiff's failure to allege specific knowledge that the infected inmate "might engage in conduct which would expose Deutsch to a high risk of contracting AIDS" dictated that the defendants were not deliberately indifferent. [FN252]

Thus, the courts have allowed defendant prisons to rebut the claim of deliberate indifference with evidence of the institution of AIDS-preventive measures. But in all of these cases, the courts balanced the existence of preventive measures against what they considered to be an almost non-existent risk of HIV transmission. Some judges indicated that if a greater risk had been alleged, the outcomes might have been different. [FN253]

3. The combination of AIDS and sexual assault.

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The major difference between the subjective and objective prongs as applied to the hypothetical combination is that the objective test leaves room for a lowering of the proof threshold when AIDS and rape are found in combination, but the subjective test does not. In fact, the subjective test may be more difficult to pass in the combination claim than it would be under the existing precedents governing either AIDS or rape alone. As noted earlier, in the objective analysis, assault cases required a showing of pervasive risk, whereas disease cases have demanded only the most minimal showing of risk. [FN254] In contrast, for the subjective analysis, Wilson clearly indicates that the single standard of "deliberate indifference" applies to cases involving either medical care or intra-inmate assault. [FN255]

It is difficult to predict how a court might analyze the deliberate indifference standard under circumstances in which sexual assault and the possibility of HIV transmission occur in combination. [FN256] A court would likely *1575 consider numerous factors, such as 1) the frequency of sexual assaults in the particular prison, 2) the measures taken by officials to categorize and protectively house inmates according to their vulnerability, 3) knowledge of a specific inmate's expressed fear or actual history of victimization, and 4) knowledge of a specific inmate's aggressive history or propensity to be violent. Other relevant considerations may include efforts specifically intended to address the problem of AIDS, including HIV testing, the segregation of HIV carriers, education of prisoners about the risks of transmission from certain behavior, and strict enforcement of prohibitions against predatory sexual activity. [FN257] But there are no guidelines in the existing case law that inform a court of the proper weight that should be assigned to each of these factors.

Wilson instructs us that the gravity of the harm to the prisoner is irrelevant to the subjective analysis. While courts had been employing the deliberate indifference standard in cases prior to Wilson, the opinions often conflated the "subjective" intent aspects and the "objective" seriousness aspects; gravity, pervasiveness, and intent were all considered relevant. The "should have known" formulations of "deliberate indifference" (which the post- Wilson Seventh Circuit specifically rejected, [FN258]) may be seen as an understanding of the Eighth Amendment as allowing one comprehensive inquiry accounting for all variables. As long as the D.C. [FN259] and First Circuit [FN260] formulations of "deliberate indifference" (which allowed for proof that officials "should have known" of the danger) had currency, the normative qualities of the concept of "should" left room for judges to incorporate the gravity of the harm into the subjective inquiry.

Wilson's instruction that courts eliminate gravity of harm from the subjective inquiry will have little effect on the jurisprudence of either assault cases or disease cases that do not overlap with each other. In the rape cases, the plaintiff must still prove "pervasiveness" for the objective inquiry and may still prove intent with a sufficient showing of pervasiveness. [FN261] Settled law clearly views homosexual rape as serious enough to give rise to an objective *1576 Eighth Amendment violation, as long as sufficient pervasiveness is proved. But the law also seems to view rape as less serious than the threat of disease, since the latter requires no showing of pervasiveness.

Under Wilson a plaintiff must satisfy both subjective and objective inquiries. The introduction of AIDS into the picture may lower the objective prong hurdle that would normally be used in a rape case, but the additional gravity imposed by death as a result of AIDS cannot affect the subjective analysis. In the absence of proof of actual knowledge, "pervasiveness" is still the focus for proving deliberate indifference. Thus, in those cases where pervasiveness can be proven, plaintiffs will win regardless of the AIDS factor; and in those cases where pervasiveness cannot be proven, the extra gravity imposed by AIDS cannot, under Wilson, lead to a finding of deliberate indifference. Thus, the Wilson decision only affects the outcome of those cases where plaintiffs seek protection from very grave dangers that are not pervasive. The Wilson decision in essence leaves no room for courts to find an Eighth Amendment violation where the potential consequences of a low-frequency event are serious.

Wilson's requirement that gravity play no role in the subjective inquiry also casts doubt on the ability of plaintiffs fearing AIDS contraction through rape to successfully rely on the disease cases. The disease cases prior to Wilson did not require proof of a very high risk of infection; some relied on the seriousness of the threatened infection to impute knowledge to officials. [FN262] If the distinction between AIDS and other diseases rests in part on its nontransmissibility, then before Wilson, a plaintiff could have argued that once the medium for spreading the disease is in place, [FN263] regardless of its "frequency," AIDS should be treated as any other disease, and knowledge of its threat should be imputed because of its seriousness. [FN264]

However, after Wilson, a court would have to separately examine the level of knowledge the prison officials had concerning the threat of infectious disease, regardless of the gravity of consequences those diseases posed. Thus, even where rape would convert AIDS into the functional equivalent of other diseases by bridging the gap of transmissibility, courts approaching the AIDS/rape problem from the disease perspective after Wilson still must find that the officials somehow knew that AIDS

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would be spreading, regardless of the seriousness of the consequences that AIDS presents. Accordingly, plaintiffs must not only prove that AIDS exists, they must show significant risk that it will spread, which refocuses the analysis from the perspective of the *1577 disease back to "pervasiveness." The level of risk necessarily becomes the crucial inquiry in this line of cases as well.

The degree of specificity of knowledge that will suffice to show deliberate indifference is no less malleable in the combined case of rape and AIDS than it is in the simple assault/rape cases. [FN265] It is unclear what level of awareness by officials must be shown. Confounding the issue is the possibility that knowledge will be more difficult to impute because the claim can be stated in terms of "the risk of being raped by an HIV carrier." A court might require that the officials know that there was a general risk of rape by HIV carrying inmates, or that a particular inmate that they knew to be carrying HIV would rape someone, or that a particular HIV carrier would attack a particular inmate. The HIV variable serves only to narrow these options, not to widen them, because HIV carrying rapists are a subset of rapists. Furthermore, since the gravity of AIDS does not serve to reduce the pervasiveness requirement, a plaintiff realizes no net benefit from also alleging a chance of catching AIDS. Ironically, asserting the risk of AIDS infection may actually cause a court to define the risk even more narrowly than it would when considering plain rape.

As described above, [FN266] the absence of a clear articulation of the level of specificity of required knowledge allows courts to define the risk narrowly when they wish to find in favor of defendants, and broadly when they wish to find in favor of plaintiffs. After *Wilson*, this flexibility remains. *Wilson*, however, limits this flexibility in one important regard: Judges can no longer allow the gravity of the consequences to supersede all other considerations. Instead, the concept of pervasiveness is solely determinative. *Wilson* allows courts that are disinclined to protect inmates to require more specific pervasiveness and thereby defeat the claims. But a court that is inclined to extend greater protection because of greater gravity can no longer do so without disregarding *Wilson's* command. Where the incidence of both AIDS and rape in prison are low, few courts will be able to infer knowledge from the circumstances if they cannot consider the gravity of the harm.

C. The Overall Picture

Wilson's elimination of gravity of harm from the subjective inquiry effectively denies courts the ability to treat the combined threat of AIDS and homosexual rape as any more of an Eighth Amendment violation than rape alone. A plaintiff must be able to satisfy both the objective and subjective prongs to succeed. The deadly effect of the combination of AIDS and rape in prison may make it somewhat easier for a plaintiff to meet the requirements of the objective prong, but the prospect of death alone cannot satisfy the subjective prong. The determinative elements in the legal equation are: 1) the pervasiveness or high incidence of rape and 2) the court's choice of a specific definition of the risk that must be known by prison officials. Such a *1578 formulation effectively eliminates from Eighth Amendment protection those cases where the harm done to plaintiffs is extremely severe, but the likelihood of being subjected to the danger is not very high. The Supreme Court has instructed lower courts to stop considering certain cruel and unusual punishment claims; the victims of rape will be those who have the potential to suffer the most.

IV. CONCLUSION

"Death as a punishment is unique in its severity and irrevocability.... [T]he Eighth and Fourteenth Amendment cannot tolerate the infliction of a sentence of death ... to be wantonly and ... freakishly imposed." [FN267]

Placing prisoners at risk of death when they have not been sentenced to death upon a considered and just verdict is cruel and unusual punishment. The threat of death by AIDS as a result of rape creates just such a risk. Those who have committed the least reprehensible crimes are often at the greatest risk of infection, since the least threatening inmates are likely to be the easiest victims. This kind of random punishment is unjust and "grossly disproportionate" to the severity of the crimes committed. [FN268]

The *Wilson* decision may directly affect outcomes in only a few cases, but those cases will involve violations that offend human dignity and "transgress ... civilized standards of humanity and decency." [FN269] *Wilson* completely prohibits courts from offering additional protection to inmates in danger of contracting AIDS through rape. Courts can do no more than follow the analysis used in cases involving rape alone, even though the consequences of the situation combining rape and AIDS may be infinitely more grave. This outcome seems profoundly unjust.

Those stricken by AIDS inevitably die; this finality mandates that inmates at risk be able to secure prospective relief. Human

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beings should not be forced to wait until they have already been infected with a deadly disease before they can obtain relief. Yet Wilson makes this delay unavoidable. A standard that requires a finding of deliberate indifference on the part of prison officials effectively means that a showing be made that rape is rampant within the particular penal institution and that officials are aware. By definition, plaintiffs must wait until a significant, pervasive threat exists before they can seek relief. Moreover, because courts can choose how to define the risk that the guards must be aware of, they can define it narrowly enough to preclude review until after the victim has already been raped. [FN270]

While Wilson requires courts to determine whether the prison officials *1579 had knowledge of the harm, it fails to demonstrate persuasively why this standard must be met in every case. If prisoners may suffer harm that shocks the conscience, why should knowledge at any level of specificity be required? Our system of punishment is, at least in theory, based on proportionality of the sentence to the crime. If a court-constructed knowledge requirement prevents judges from adhering to this basic principle, then that knowledge requirement is unacceptable.

While courts have implicitly accepted the inevitability of some random assaults and rapes in prison, possibly on some theory that such an environment is a form of just desserts, this "retribution" analysis breaks down when the consequences of any one attack become not just temporary injury or psychological trauma, but a lingering, painful death.

Prison officials should not be allowed to ignore dangerous conditions that pose serious risks of death to inmates entrusted to their care. Perhaps they should even have a duty to discover such dangers, especially when, as in the case of either rape or AIDS, the dangers tend to be underground. It cannot be said that penal institutions do not know that rapes are committed within their walls. Nor can it be said that these institutions are unaware that AIDS can be spread through rape. The government must protect inmates from this mortal threat.

Wilson is not likely to be overturned soon, and thus the courts may feel constrained and prevented from offering relief to those at risk. While a thorough policy discussion presenting appropriate solutions is beyond the scope of this note, it is clear that the harm here is so grave that Congress and the state legislatures must act now to address the threat of AIDS in prisons where rapes occur or, preferably, to take significant steps to prevent intra-inmate rape altogether.

Prison officials should already be taking steps to reduce the incidence of rape in prison. Such steps should include increased guard surveillance, push-button alarm systems, and targeted cell assignment schemes. Of course, such schemes might be costly, [FN271] and would necessarily limit inmate *1580 freedom. More drastic responses must be approached with caution. While mass HIV-testing [FN272] and segregation [FN273] remain options, there has been marked movement away from such plans. [FN274] These programs are often difficult to administer [FN275] and breed discrimination and overt abuse of HIV carriers; [FN276] blanket testing and segregation have thus drawn significant opposition from civil rights groups. [FN277]

There are no simple nor costless solutions, but the problem of AIDS in *1581 prison is growing at an alarming pace. [FN278] Rape in prison now has consequences that go far beyond the psychological trauma that may have previously been considered fair punishment by tough-minded reformists. Rape may mean death. The courts have failed to recognize or address this new reality. The burden now falls upon the legislature to put an end to an intolerable situation.

[FN_a]. J.D., 1992, Stanford Law School. The author would like to thank Thomas D. Warren and Neal H. Kissel for their significant contributions to the development of this note.

[FN1]. *Redman v. County of San Diego*, 942 F.2d 1435, 1438-39 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992).

[FN2]. *Id.* at 1437.

[FN3]. See notes 19-49 *infra* and accompanying text.

[FN4]. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[FN5]. See text accompanying notes 133-144 *infra*.

[FN6]. [Wilson v. Seiter](#), 111 S. Ct. 2321 (1991).

[FN7]. *Id.* at 2326.

[FN8]. See text accompanying notes 67-70 *infra*.

[FN9]. Theodore H. Hammett & Saira Moini, Update on AIDS in Prisons and Jails, NAT'L INST. JUST.: AIDS BULL., Sept. 1990, at 2. Of all AIDS cases diagnosed before 1987, 80% had resulted in death by 1990. Moreover, no one has ever recovered from AIDS. *Id.*

[FN10]. See [Judd v. Packard](#), 669 F. Supp. 741, 743 (D. Md. 1987); [Larocca v. Dalsheim](#), 120 Misc. 2d 697, 707, 467 N.Y.S.2d 302, 309 (Dutchess County Sup. Ct. 1983).

[FN11]. Rape occurs within women's prisons as well, but this note does not attempt to address this problem, as homosexual rape by women generally does not transmit HIV. David G. Ostrow, Homosexual Behavior and Sexually Transmitted Diseases, in *SEXUALLY TRANSMITTED DISEASES* 61 (King K. Holmes, Per-Anders Mardh, P. Frederick Sparling & Paul J. Wiesner eds., 2d ed. 1990).

[FN12]. Rape by police and prison guards raises different issues altogether, which are beyond the scope of this note.

[FN13]. See parts III and IV *infra*.

[FN14]. While no court has ever been presented with a claim under the Eighth Amendment in which the plaintiffs alleged both a substantial risk of sexual victimization and AIDS infection, many courts have hinted that such an allegation would be sufficient to support a constitutional violation. See text accompanying note 164 *infra*.

[FN15]. Compare [McGill v. Duckworth](#), 944 F.2d 344 (7th Cir. 1991) (refusing to find constitutional violation), cert. denied, 112 S. Ct. 1265 (1992) with [Redman v. County of San Diego](#), 942 F.2d 1435 (9th Cir. 1991) (finding violation of plaintiff's Eighth Amendment rights) (*en banc*), cert. denied, 112 S. Ct. 972 (1992). See text accompanying notes 214-219 *infra*; note 135 *infra* and accompanying text.

[FN16]. E.g., [Lareau v. Manson](#), 651 F.2d 96 (2d Cir. 1981).

[FN17]. See text accompanying notes 159-162 & 244 *infra*. For a general discussion of the development of the legal issues concerning AIDS and prisons, see Urvashi Vaid, Prisons, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 235 (Harlon L. Dalton, Scott Burris & the Yale AIDS Law Project eds., 1987).

[FN18]. 111 S. Ct. 2321 (1991).

[FN19]. See generally CARL WEISS & DAVID JAMES FRIAR, *TERROR IN THE PRISONS* (1974).

[FN20]. *Id.* at x.

[FN21]. But see, e.g., John Hurst, Cellblocks Smell of Squalor, Fear, L.A. TIMES, Sept. 12, 1983, at A3 (referring to "prevalent violence and sexual attacks").

[FN22]. C. WEISS & D.J. FRIAR, *supra* note 19.

[FN23]. Investigation of Juvenile Delinquency in the United States, part 20, Conditions in Juvenile and Young Offender Institutions: Hearings on S. Res. 48 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 4691 (1971) [hereinafter *Juvenile Delinquency Hearings*].

[FN24]. See, e.g., Jeff Bleich, Comment, [The Politics of Prison Crowding](#), 77 CAL. L. REV. 1125, 1177 (1989); Victoria P. Pappas, Note, In Prison with AIDS: The Constitutionality of Mass Screening and Segregation Policies, 1988 U. ILL. L. REV. 151, 152 n.14, 175; James E. Robertson, The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates, 56 U. CIN. L. REV. 91, 93-94 (1987).

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[FN25]. See, e.g., *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting); *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992); *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992); *Hassine v. Jeffes*, 846 F.2d 169, 172 (3d Cir. 1988); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1222 (5th Cir.) (finding insufficient staffing "leading to frequent violence and homosexual assault among the inmates"), clarified, 799 F.2d 992 (5th Cir. 1986); *Jones v. Diamond*, 636 F.2d 1364, 1372 (5th Cir. 1981) (citing jail official's testimony that he had received "reports of many sexual assaults"), overruled on other grounds, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.) (finding that "the risk of sexual assault was a serious problem of substantial dimensions"), cert. denied, 449 U.S. 849 (1980); *Little v. Walker*, 552 F.2d 193, 194 (7th Cir. 1977) (painting "an ugly picture of constant physical attacks and sexual assaults by other inmates"), cert. denied, 435 U.S. 932 (1978); *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971) (citing testimony that "[p]risoners are frequently attacked and raped"), later proceeding sub. nom., *Hutto v. Finney*, 437 U.S. 678 (1978); *Larocca v. Dalsheim*, 120 Misc. 2d 697, 707, 467 N.Y.S.2d 302, 309 (Dutchess County Sup. Ct. 1983).

[FN26]. *Bailey*, 444 U.S. at 421 (Blackmun, J., dissenting).

[FN27]. *McGill*, 944 F.2d at 346.

[FN28]. C. WEISS & D.J. FRIAR, *supra* note 19, at 47.

[FN29]. *Id.* at 72.

[FN30]. *Alberti v. Klevenhagen*, 790 F.2d 1220, 1225 (5th Cir.), clarified, 799 F.2d 992 (5th Cir. 1986).

[FN31]. See, e.g., *Jones v. Diamond*, 636 F.2d 1364, 1372 (5th Cir. 1981) (citing testimony that although jailer knew of numerous sexual assaults, only one was proven because all the others victims refused to testify against their attackers), overruled on other grounds, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986).

[FN32]. See generally C. WEISS & D.J. FRIAR, *supra* note 19 (discussing frequency of homosexual rape in prisons).

[FN33]. See note 40 *infra*.

[FN34]. See, e.g., *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

[FN35]. *Alberti*, 790 F.2d at 1226 (noting that a complaint may identify victim as an "easy mark").

[FN36]. See, e.g., Robertson, *supra* note 24, at 102 & n.56 (describing gruesome attacks with blowtorches, impalings with metal pipes, decapitations, castrations, and eviscerations).

[FN37]. See, e.g., *Gullatte v. Potts*, 654 F.2d 1007, 1010 (5th Cir. 1981).

[FN38]. C. WEISS & D.J. FRIAR, *supra* note 19, at 27.

[FN39]. *Id.* at 27.

[FN40]. "Criminologists unanimously agree" that the number of reports filed by female victims of ordinary street rape is extremely low, as compared to the number of incidents that actually occur; "and among raped male victims, admission of rape is considerably less than that." *Id.* at 48.

[FN41]. *Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex.), *aff'd*, 790 F.2d 1220 (5th Cir. 1984), and clarified, 799 F.2d 992 (5th Cir. 1986). This sentiment was echoed by Dorris Cousner, a current official in the California Department of Corrections. Telephone Interview with Dorris Cousner, Associate Health Program Advisor, Office of Health Care Services, AIDS Education and Prevention Unit, Sacramento, California (Mar. 21, 1991).

[FN42]. A Joint Hearing on Violence at Folsom Prison, Summary of Hearing Held on June 19, 1985, Before the Joint Comm. on Prison Construction and Operations in Cooperation with the Assembly Comm. on Public Safety and the Senate Judiciary Comm. 26, 33 (1985) [hereinafter *Hearing on Violence at Folsom Prison*].

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[FN43]. *Alberti v. Klevenhagen*, 790 F.2d 1220, 1226 (5th Cir.), clarified, 799 F.2d 992 (5th Cir. 1986).

[FN44]. Juvenile Delinquency Hearings, *supra* note 23; see also C. WEISS & D.J. FRIAR, *supra* note 19, at 48.

[FN45]. Weiss and Friar called this "an excessively high admission of rape." C. WEISS & D.J. FRIAR, *supra* note 19, at 48.

[FN46]. *Id.* at 61.

[FN47]. *Id.* at ix (quoting former District Attorney of Philadelphia and U.S. Senator Arlen Specter).

But not all commentators agree about the rampancy of sexual assaults in prisons. One author has criticized using data from specific prisons to paint a general picture of prison life, asserting that prison conditions "vary widely over place and time," and that "extrapolating findings from one prison to another" is "quite inappropriate." Daniel Lockwood, Issues in Prison Sexual Violence, in *Prison Violence in America* 89, 90 (Michael Braswell, Steven Dillingham & Reid Montgomery eds., 1985).

[FN48]. *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.) (commenting specifically on the conditions at the Maryland House of Corrections), cert. denied, 449 U.S. 849 (1980); see also *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971) (referring to frequent rapes in the dormitories), later proceeding sub. nom., *Hutto v. Finney*, 437 U.S. 678 (1978).

[FN49]. Despite the obstacles presented in jail and by the courts, some inmates do bring successful lawsuits against the government. See, e.g., notes 135-143 *infra*.

[FN50]. C. EVERETT KOOP, SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE AIDS BROCHURE: WHAT AIDS MEANS TO YOU, (1988); see also THOMAS LINDSAY, AIDS: A GUIDE TO RESEARCH RESOURCES 4 (1989) (calling the "magnitude of the AIDS epidemic ... staggering"); *Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987) (taking judicial notice that "AIDS poses an almost unprecedented danger to the public health of this country and the world").

[FN51]. See Frederick P. Siegal, Severe Acquired Immunodeficiency in Male Homosexuals, Manifested by Chronic Perianal Ulcerative Herpes Simplex Lesions, 305 NEW ENG. J. MED. 1439 (1981).

[FN52]. This is "according to the World Health Organization ... of the reporting countries." ST. JOHN'S UNIVERSITY SCHOOL OF LAW, CRIMINAL LAW INSTITUTE, AIDS AND THE CRIMINAL LAW: PROSECUTING THE PERISHING, DEFENDING THE DISEASED 2 (1987-1988) [hereinafter ST. JOHN'S].

[FN53]. Centers for Disease Control, U.S. Department of Health and Human Services, HIV/AIDS: Surveillance 6, 18 (Year-end ed. Jan. 1992).

[FN54]. Centers for Disease Control, HIV Prevalence Estimates and AIDS Case Projections for the United States: Report Based Upon a Workshop, MORBIDITY & MORTALITY WKLY. REP., Nov. 30, 1990, at 1, 12.

[FN55]. Robert Yarchoan, Hiroaki Mitsuya & Samuel Broder, AIDS Therapies, 259 SCI. AM., Oct. 1988, at 110.

[FN56]. NATIONAL RESEARCH COUNCIL, AIDS: THE SECOND DECADE 39 (Heather G. Miller, Charles F. Turner & Lincoln E. Moses eds., 1990). A California study found that most people diagnosed with AIDS die within two years of that diagnosis. CALIFORNIA LEGISLATURE, SENATE OFFICE OF RESEARCH, FACTS ABOUT AIDS 1 (1987).

[FN57]. ST. JOHN'S, *supra* note 52, at 17. For a description of the variety of protozoal, fungal, bacterial, viral, and arthropodal opportunistic infections that can lead to death following the development of AIDS in an infected person, see Abe M. Macher, The Pathology of AIDS, 103 PUB. HEALTH REP.: J. U.S. PUB. HEALTH SERVICE 246-54 (1988).

[FN58]. Robert C. Gallo & Luc Montagnier, AIDS in 1988, 259 SCI. AM., Oct. 1988, at 41, 44; NATIONAL RESEARCH COUNCIL, *supra* note 56, at 39.

[FN59]. See Jonathan N. Weber & Robin A. Weiss, HIV Infection: The Cellular Picture, 259 SCI. AM., Oct. 1988, at 101.

[FN60]. Robert R. Redfield & Donald S. Burke, HIV Infection: The Clinical Picture, 259 SCI. AM., Oct. 1988, at 90, 90-93.

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[FN61]. *Id.* at 90-92. HIV enters the host CD4 cell, and may either lie dormant for an indefinite period or reproduce itself at a rapid rate within the host cell. William A. Haseltine & Flossie Wong-Staal, *The Molecular Biology of the AIDS Virus*, 259 *SCI. AM.*, Oct. 1988, at 52. The virus kills the CD4 directly by reproducing itself, "budding" from the original cell and damaging cell membranes of other CD4 cells. Redfield & Burke, *supra* note 60, at 92-93.

[FN62]. NATIONAL RESEARCH COUNCIL, *supra* note 56, at 39; see also ST. JOHNS, *supra* note 52, at 4.

[FN63]. See Macher, *supra* note 57, at 249; see also ST. JOHNS, *supra* note 52, at 4; NATIONAL RESEARCH COUNCIL, *supra* note 56, at 39. More than 60% of those diagnosed with AIDS in this country have already died. Center For Disease Control, Update Acquired Immunodeficiency Syndrome-United States, 1981- 1990, MORBIDITY & MORTALITY WKLY. REP., June 7, 1991, at 358, 359.

[FN64]. JOINT LEGISLATIVE BUDGET COMMITTEE OF CALIFORNIA, AIDS EDUCATION IN CORRECTIONAL FACILITIES, A REVIEW 9 (1990); see also Redfield & Burke, *supra* note 60, at 91; *Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987) ("carriers of ... [HIV] may readily transmit it ... wittingly or unwittingly").

[FN65]. JOINT LEGISLATIVE BUDGET COMMITTEE OF CALIFORNIA, *supra* note 64, at 9.

[FN66]. Centers For Disease Control, *supra* note 54, at 5.

[FN67]. C.E. KOOP, *supra* note 50.

[FN68]. Hammett & Moini, *supra* note 9, at 2.

[FN69]. See, e.g., NATIONAL RESEARCH COUNCIL, *supra* note 56, at 40; Marianne Glasel, High Risk Practices in the Transmission of AIDS, in *AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION* 355, 356 (Vincent T. DeVita, Jr., Samuel Hellman & Steven A. Rosenberg eds., 2d ed. 1988); see also, e.g., *Cal. Penal Code* § 7516 (b)(1), (3) (West 1991).

[FN70]. Margaret A. Fischl, Prevention of Transmission of AIDS During Sexual Intercourse, in *AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION*, *supra* note 69, at 369. The Department of Health and Human Services reports that transmission of AIDS to men whose only mode of exposure is sex with other men account for 56% of all AIDS cases in the United States. Centers for Disease Control, *supra* note 54, at 19.

[FN71]. Cf. Hammett & Moini, *supra* note 9, at 4 (finding incidence of AIDS in prisons to be "predictably higher" than in the outside population).

[FN72]. Don Colburn, AIDS in U.S. Prisons Mirrors Outside World, *WASH. POST*, May 10, 1988, § Z (Health), at 7.

[FN73]. Hammett & Moini, *supra* note 9, at 3, 4. The per capita rate of AIDS in New York State is the third highest in the U.S., ranked just below Washington, D.C. and Puerto Rico.

[FN74]. This number represents only those cases reported by facilities responding to surveys conducted by the Department of Justice. Records have only been collected since 1981; thus, the actual figure is much greater. Forty-five federal and state penitentiaries reported 3661 cases, and 30 large city and county jails reported 1750. *Id.* at 1, 2.

[FN75]. *Id.* at 4.

[FN76]. Most of the prisons within jurisdictions with a high degree of HIV infection do not test inmates on a mass basis. *Id.* at 4. Between 1986 and 1987, mass screening of inmates in states across the country increased significantly, but this trend seems to have slowed. As of October, 1989, 15 state prison systems and the Federal Bureau of Prisons conducted mass screenings of all incoming, outgoing, and/or current inmates. *Id.* at 6.

Some states mandate testing of all inmates, incoming, outgoing, or current inmates, or some combination thereof. See *Ala. Code* § 22-11A-17(a) (1990); *Ga. Code Ann.* § 42-5-52.1(b), (c) (Michie 1989); *Idaho Code* § 39-604(1), (3) (Supp. 1990); *Mich. Comp. Laws Ann.* § 791.267 (West 1992); *Nev. Rev. Stat.* § 209.511 (1986 & Supp. 1987); *R.I. Gen. Laws* § 42-56-37 (Supp. 1990).

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Some states, including Florida and Texas, have passed laws explicitly allowing mass testing of all inmates without their permission, but without mandating such testing. See, e.g., [Fla. Stat. Ann. § 384.32\(1\) \(West Supp. 1991\)](#); [Tex. Code Crim. Proc. Ann. § 46A.01\(b\) \(West Supp. 1991\)](#) (applies only to county or municipal jails).

Utah and Oklahoma are states which include AIDS in their statutory definition of "venereal disease," thus expanding applicable health and safety provisions to cover AIDS. See [ST. JOHN'S](#), *supra* note 52, at 63, 67. Colorado and Illinois mandate testing of inmates convicted of certain sex offenses and hypodermic needle-related offenses. [Colo. Rev. Stat. § 18-3-415 \(1990\)](#); [Ill. Ann. Stat. ch. 38, para. 1005-5-3 \(Smith-Hurd Supp. 1990\)](#).

Some states test all prisoners in the absence of statutory authority. Of the 15 states conducting mass screenings, [Hammett & Moini](#), *supra* note 9, at 6, Missouri, Mississippi, Nebraska, New Hampshire, North Dakota, and Wyoming lack statutory formulation.

[FN77]. For example, as of March 21, 1991, the California Department of Corrections has identified 611 inmates with HIV who are currently in the correctional system. Telephone Interview with Dorris Cousner, *supra* note 41. But these inmates were tested for HIV on an individual basis. [Cal. Penal Code § 7501 \(West Supp. 1992\)](#). Custodial, law enforcement personnel, and inmates can request a certain inmate be tested for HIV if they have "reason to believe he or she has come into contact with the blood or semen of an inmate or in any other manner has come into contact with the inmate in such a way that could result in HIV infection" [Cal. Penal Code §§ 7501\(a\)-\(b\) \(West 1991\)](#). Of the 611 identified HIV infected inmates, 298 were completely asymptomatic. Telephone Interview with Dorris Cousner, *supra* note 41. Those tested represent only a small portion of the total inmate population, there are undoubtedly many inmates with HIV who remain unidentified by the authorities. A legislative report estimated that there may be more than 2300 HIV infected inmates in California State Prisons. Joint Legislative Budget Committee of California, *supra* note 64, at 11.

[FN78]. Inmates have not noticeably changed their behavioral patterns in response to the AIDS epidemic. Telephone Interview with Dorris Cousner, *supra* note 41. Homosexual rape remains a significant problem. For example, California statistics from the mid-1980s, years after AIDS was deemed a significant health risk, showed an increase in sexual attacks in state prisons. Hearing on Violence at Folsom Prison, *supra* note 42, at 33.

[FN79]. See [Henderson v. DeRobertis](#), 940 F.2d 1055 (7th Cir. 1991), cert. denied, 112 S. Ct. 1578 (1992); [Rozecki v. Gaughan](#), 459 F.2d 6 (1st Cir. 1972).

[FN80]. See, e.g., [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988); [Murphy v. United States](#), 653 F.2d 637 (D.C. Cir. 1981).

[FN81]. See, e.g., [Whitley v. Albers](#), 475 U.S. 312 (1986); [Robertson](#), *supra* note 24, at 102 & n.56.

[FN82]. See, e.g., [McGill v. Duckworth](#), 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN83]. Reliance on the courts for relief could mean long procedural delays that may compound the victimization while the litigant awaits his day in court. While litigation may be futile for an individual plaintiff, the courts' duty remains. This situation is a powerful argument for extrajudicial resolution.

[FN84]. Convicted prisoners can also sue under the Due Process Clauses of the Fifth and Fourteenth Amendments, or under state common law theories, such as negligence. See, e.g., [Redman v. County of San Diego](#), 942 F.2d 1435, 1439, 1440 n.7 (9th Cir. 1991) (en banc) (citing [Youngberg v. Romeo](#), 457 U.S. 307, 315-16 (1982)), cert. denied, 112 S. Ct. 972 (1992). However, these suits are less common. See [Pappas](#), *supra* note 24, at 169 n.58.

The Eighth Amendment applies only after conviction. [Whitley](#), 475 U.S. at 318-19. The Supreme Court has held that "conduct that shocks the conscience" or "afford[s] brutality the cloak of law" within the penal setting violates the Fourteenth Amendment. [Rochin v. California](#), 342 U.S. 165, 172, 173 (1952). Because they have not been convicted, pretrial detainees cannot be subjected to conditions that would amount to "punishment." [Bell v. Wolfish](#), 441 U.S. 520, 535 (1979); see, e.g., [Redman](#), 942 F.2d at 1439 (citing [Youngberg](#), 457 U.S. at 315 (recognizing a historical "right to personal security" under the due process clause of the Fourteenth Amendment that is "not extinguished by lawful confinement, even for penal purposes")); cf. [Rozecki v. Gaughan](#), 459 F.2d 6, 8 (1st Cir. 1972) (finding that protection for pretrial detainees should be at least as great as that for convicted criminals). Thus, pretrial detainees claiming unconstitutional conditions of confinement usually sue under the Fourteenth Amendment. Nevertheless, courts often look to Eighth Amendment formulations of acceptable conditions and state of mind formulations when addressing claims of pretrial detainees. See, e.g., [Redman](#), 942 F.2d at 1441, 1442; [Lareau v. Manson](#), 651 F.2d 96, 109 (2d Cir. 1981).

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The Supreme Court made clear that conduct proscribed by the language in *Rochin* also violates the objective Eighth Amendment standards of *Estelle v. Gamble*, 429 U.S. 97, 103, 106 (1976) (using the phrase "infliction of such unnecessary suffering ... inconsistent with contemporary standards of decency" or "repugnant to the conscience of mankind" to indicate conduct that violates the Eighth Amendment). The Court has also stated that the Fourteenth Amendment affords convicted criminals no greater protection than the Eighth Amendment in situations where prisoners challenge the intentional actions of prison officials. *Whitley*, 475 U.S. at 327. In dicta, the Ninth Circuit stated its belief that the Constitution affords convicted prisoners as much protection from sexual attack as it does pretrial detainees. *Redman*, 942 F.2d at 1443; cf. *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir.) ("[t]he same conditions of violence and sexual abuse which constitute cruel and unusual punishment may also render the confinement of pretrial detainees punishment per se") (emphasis added), clarified, 799 F.2d 992 (5th Cir. 1986).

[FN85]. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1988) provides that:

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.

See, e.g., *Wilson v. Seiter*, 111 S. Ct. 2321 (1991); *Estelle v. Gamble*, 429 U.S. 97 (1976). The Eighth Amendment applies to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

[FN86]. Administrators of prisons, as well as other government officials, are shielded from suit for damages under the doctrine of "qualified immunity." *Procunier v. Navarette*, 434 U.S. 555 (1978); *Wood v. Strickland*, 420 U.S. 308 U.S. 308 (1975). Defendants may invoke "qualified immunity" as an affirmative defense to a § 1983 claim if they acted in "good faith" compliance with the law. *Wood*, 420 U.S. at 308. This defense turns on the "objective reasonableness" of the official's conduct—that is, conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" at the time the conduct took place. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The rationale is that officials cannot be held responsible for understanding obscure constitutional interpretation or for predicting future evolution of constitutional jurisprudence. *Id.* at 818-19. In order to defeat an immunity defense, a plaintiff must make the difficult showing that a reasonable officer would have known that the specific conduct at issue was prohibited. *Anderson v. Creighton*, 483 U.S. 637, 640 (1987).

Qualified immunity may be an effective defense in suits alleging failure to test and segregate HIV-infected inmates. See, e.g., *Deutsch v. Federal Bureau of Prisons*, 737 F. Supp. 261, 268 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991). No right to such safety measures is clearly established. However, this defense is usually unsuccessful in cases charging failure to protect inmates sexually victimized by other inmates under the Eighth Amendment. See, e.g., *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988). This type of immunity provides an extra layer of defense for prison officials in Eighth Amendment suits, because the plaintiff must prove that a reasonable person would have known that their conduct violated a clearly established constitutional right. In these cases, this standard means reasonable knowledge of the conduct or omission would clearly amount to deliberate indifference. This dual requirement undoubtedly makes it difficult to win damages. But for the purposes of insuring protection from infection with HIV through rape, the ability to sue for damages post hoc is not as important as the ability to prevent infection in advance through a court ordered injunction, and defendants cannot raise qualified immunity defenses to suits for injunctions. See *Givens v. Jones*, 900 F.2d 1229 (8th Cir. 1990). For a more thorough discussion of absolute and qualified immunity from § 1983 suits, see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 399-419 (1989).

A municipality cannot be held liable under § 1983 based on respondeat superior. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-94 (1978); *Bolin v. Black*, 875 F.2d 1343, 1347 (8th Cir.), *cert. denied*, 493 U.S. 993 (1989); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986).

[FN87]. Suits against the Federal government may encounter "sovereign immunity" problems, see *Deutsch*, 737 F. Supp. at 265, although Congress may waive the availability of this defense. See, e.g., The Federal Torts Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"). Suits against state governments may be subject to Eleventh Amendment obstacles, but suits against state officials for injunctive relief from constitutional violations are commonly sustained under the standard of *Ex parte Young*, 209 U.S. 123 (1908). See, e.g., *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971), later proceeding sub. nom., *Hutto v. Finney*, 437 U.S. 678 (1978).

A municipality can be found liable under § 1983 only when the "execution of a [municipality's] policy or custom inflicts the injury." *Monell*, 436 U.S. at 690-94. This showing may be satisfied by proof of a single incident of a constitutional violation perpetrated by an agency's highest policy making official for that activity. *Pembaur v. City of Cincinnati*, 475 U.S. 469

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(1986). A plurality of the Supreme Court cast doubt on the ability of plaintiffs to prove a policy or custom through evidence of inaction. [City of Oklahoma City v. Tuttle](#), 471 U.S. 808 (1985) (plurality opinion). But subsequently, some lower courts have accepted as proof evidence that a known hazardous risk was allowed to continue over time without significant steps taken to alleviate the risk. See, e.g., [Morgan v. District of Columbia](#), 824 F.2d 1049, 1058 (D.C. Cir. 1987).

[FN88]. 111 S. Ct. 2321 (1991).

[FN89]. 136 U.S. 436 (1890).

[FN90]. *Id.* at 447. The Court refused to find error in a New York Court of Appeals ruling that the state's method of administering capital punishment, by electrocution, was not cruel and unusual. See also [Wilkerson v. Utah](#), 99 U.S. 130, 136 (1878) (stating that "punishments of torture, ... and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution").

[FN91]. [Rhodes v. Chapman](#), 452 U.S. 337, 345 (1981).

[FN92]. [Gregg v. Georgia](#), 428 U.S. 153, 173 (1976).

[FN93]. [Estelle v. Gamble](#), 429 U.S. 97, 103 n.7 (1976) (citing [Gregg](#), 428 U.S. at 173).

[FN94]. [Estelle](#), 429 U.S. at 102 (quoting [Trop v. Dulles](#), 356 U.S. 86, 101 (1958)).

[FN95]. See [Turner v. Safely](#), 482 U.S. 78 (1987); [Bell v. Wolfish](#), 441 U.S. 520, 531 (1979); [Procunier v. Martinez](#), 416 U.S. 396, 405 (1974) ("Courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform."), overruled on other grounds, [Thornburgh v. Abbott](#), 490 U.S. 401 (1989). For further discussion of the hands-off doctrine, see [The Supreme Court-Leading Cases](#), 105 HARV. L. REV. 177, 235, 236 n.1 (1991) (asserting that [Wilson v. Seiter](#), 111 S. Ct. 2321 (1991), marks a return to the pre-1970 approach) and Pappas, *supra* note 24, at 161 & n.104.

[FN96]. See [Rhodes v. Chapman](#), 452 U.S. 337, 353 n.1 (1980) (Brennan, J., concurring) (listing numerous cases where prison conditions were declared unconstitutional); [Hutto v. Finney](#), 437 U.S. 678, 685 (1978) ("[c]onfinement in a prison ... is a form of punishment subject to scrutiny under the Eighth Amendment"); see also Elizabeth Alexander, *The New Prison Administrator and the Court: New Directions In Prison Law*, 56 TEX. L. REV. 963, 965 (1978) (pointing to a need for guidance in the abundance of prison condition cases); Deborah A. Montick, *Comment, Challenging Cruel and Unusual Conditions of Prison Confinement: Refining the Totality of Conditions Approach*, 26 HOW. L.J. 227, 229 & n.12 (1983) (pointing to the Supreme Court's refinement of the application of the Eighth Amendment in the 1970s). See generally NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEYS GENERAL, *PRISON CONDITIONS: AN OUTLINE OF CASES* (1979) (listing prison condition cases and remedies ordered).

[FN97]. 429 U.S. 97 (1976).

[FN98]. *Id.* at 104-05. The plaintiff inmate, J.W. Gamble, sued Texas prison officials for failing to provide him with adequate medical care during his imprisonment. *Id.* Gamble had been injured when a bale of hay fell on him while he was on a prison work assignment, and he was subjected to series of misdiagnoses and incorrect treatments for his severe pain and black-outs. *Id.* at 99-101.

[FN99]. *Id.* at 103, 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.") (quoting [Spicer v. Williamson](#), 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)). Failure to provide medical care "may result in pain and suffering which no one suggests would serve any penological purpose." *Id.*

[FN100]. *Id.* at 104-05.

[FN101]. *Id.* at 105-06.

[FN102]. 452 U.S. 337 (1981).

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[FN103]. *Id.* at 345 (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978)). In *Rhodes*, inmates at an Ohio prison brought suit claiming that double celling prisoners in cells measuring 63 square feet amounted to cruel and unusual punishment. 452 U.S. at 340-41. Pointing to a lack of significantly onerous consequences of double celling, *id.* at 348-49, the Supreme Court reversed the district court's holding for the plaintiff, calling it "insupportable." *Id.* at 347. Three years earlier, in *Hutto*, the Supreme Court stated that conditions of confinement are properly the subject of Eighth Amendment scrutiny, but focused its analysis primarily on solitary confinement conditions and failed to articulate a widely applicable standard for examining similar claims. *Hutto*, 437 U.S. at 685; see Montick, *supra* note 96, at 230. The Court confirmed that a combination of deprivations of basic human needs and other deplorable conditions "transgress[ed] today's 'broad and idealistic concepts of dignity'" *Hutto*, 437 U.S. at 685 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

[FN104]. *Rhodes*, 452 U.S. at 347 (emphasis added). The Court employed this language as the basic formulation for the one prong of its Eighth Amendment analysis. *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991); see notes 165-169 *infra* and accompanying text.

[FN105]. *Wilson*, 111 S. Ct. at 2326-27.

[FN106]. 475 U.S. 312 (1986).

[FN107]. *Id.* at 314-16. Armed with shotguns, Whitley and other prison guards engineered a successful assault on the group of prisoners holding a guard hostage, during which Whitley yelled "shoot the bastards." *Id.* at 315. Albers, an inmate, was shot in the knee by one of the rescuers. *Id.*

[FN108]. *Id.* at 320.

[FN109]. *Id.* at 319.

[FN110]. *Id.* at 319-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), cert. denied sub nom., *John v. Johnson*, 414 U.S. 1033 (1973)).

[FN111]. See *Wilson*, 111 S. Ct. at 2326; *Whitley*, 475 U.S. at 320-22.

[FN112]. 111 S. Ct. 2321 (1991).

[FN113]. *Id.* at 2321.

[FN114]. *Id.* at 2323-25. The Court found that the word "punishment" implicitly requires a subjective inquiry.

[FN115]. *Id.* at 2324 (stating that "only those deprivations denying 'the minimal civilized measure of life's necessities' ... are sufficiently grave to form the basis of an Eighth Amendment violation") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The objective standard was subsequently modified by *Hudson v. McMillian* to require contextually specific "objective" test standards. 112 S. Ct. 995, 999-1000 (1992); see text accompanying notes 128-130 *infra*.

[FN116]. *Wilson*, 111 S. Ct. at 2324.

[FN117]. There is an exception for those claims that require a balancing of competing institutional interests that require "malicious" and "sadistic" intent, as in *Whitley*. *Id.* at 2326.

[FN118]. *Id.* at 2326-27. This is equally true for claims alleging inadequate medical care, neglect of diet, temperature or clothing, or failure to protect inmates from violence at the hands of other inmates. *Id.* The Court rejected the concurrence's attempts to distinguish between conditions of confinement affecting all prisoners and those actions directed at specific prisoners. *Id.* at 2324 n.1.

For an extensive comment on the propriety and the logical implications of the *Wilson* decision, see *The Supreme Court-Leading Cases*, *supra* note 95, at 235-55.

[FN119]. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); see also *Gregg v. Georgia*, 428 U.S. 153, 168-73 (1976) (extensively recounting the history and development of Eighth Amendment standards).

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[FN120]. See *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981) (holding the practice of double-celling of prisoners as not objectively unconstitutional). The Supreme Court confirmed this to be the core of the objective inquiry in *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992).

[FN121]. *Hudson*, 112 S. Ct. at 1000, settled any question that this contextual analysis applied to the objective prong as well as the subjective prong.

[FN122]. *Rhodes*, 452 U.S. at 349. If conditions cannot be deemed cruel and unusual, then "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347.

[FN123]. *Wilson*, 111 S. Ct. at 2324 (quoting *Rhodes*, 452 U.S. at 347).

[FN124]. See, e.g., *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991), cert. denied, 112 S. Ct. 1578 (1992); *Rozecki v. Gaughan*, 459 F.2d 6 (1972).

[FN125]. See, e.g., *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991), cert. denied, 112 S. Ct. 1994 (1992).

[FN126]. See *Murphy v. United States*, 653 F.2d 637, 644 (D.C. Cir. 1981) (pervasive risk of assaults); *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980) (pervasive violence and sexual assaults); *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971) (frequent attacks and rapes), later proceeding sub. nom., *Hutto v. Finney*, 437 U.S. 678 (1978).

[FN127]. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

[FN128]. 112 S. Ct. 995 (1992).

[FN129]. *Id.* at 997.

[FN130]. For example, as *Estelle*, *Rhodes* and *Wilson* made clear, "conditions-of-confinement" claims must allege "deprivations denying 'the minimal civilized measure of life's necessities.'" *Id.* at 1000 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Also, "medical needs" claims must allege indifference to needs that are "serious." *Id.* (quoting *Estelle*, 429 U.S. at 105).

[FN131]. *Id.* at 1000-01.

[FN132]. *Id.* at 1000.

[FN133]. *Wilson*, 111 S. Ct. at 2326-27; see also *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir.), clarified, 799 F.2d 992 (5th Cir. 1986); *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).

[FN134]. See *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 561 (1st Cir.), cert. denied, 488 U.S. 823 (1988); *Murphy v. United States*, 653 F.2d 637, 644 (D.C. Cir. 1981); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977); *Holt v. Sarver*, 442 F.2d 304, 306 (8th Cir. 1971), later proceeding sub. nom., *Hutto v. Finney*, 437 U.S. 678 (1978); *Cameron v. Metcuz*, 705 F. Supp. 454, 458 (N.D. Ind. 1989).

[FN135]. See, e.g., *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992); *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

Courts seem to make no qualitative distinction between sexual and nonsexual assaults, treating sexual assault as merely a subset of violent attack in general. In addressing both types of cases, courts point to the prisoners' "right to be protected from the constant threat of violence and from sexual assault." *Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir. 1981), overruled on other grounds, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); see also *Redman*, 942 F.2d at 1440 n. 7 (a rape case where the court relied on premise that "failure to protect ... [prisoners] against assaults by other prisoners results in a constitutional violation") (emphasis added); *Alberti*, 790 F.2d at 1224 ("[v]iolence and sexual assault among inmates may rise to a level rendering conditions cruel and unusual"); *Little*, 552 F.2d at 197 ("[v]iolent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are manifestly 'inconsistent with

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contemporary standards of decency") (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). The court's failure to separate out sexual assault may be either due to a lack of real understanding of the additional psychological trauma that accompanies rape, see text accompanying notes 31-32 *supra*, or it may be a conscious conclusion that the additional trauma is not sufficient grounds on which to base a legal distinction. While the sexual nature of rape is important for its relationship to AIDS transmission, and the cases specifically about rape illustrate the point that rape is prevalent in prisons, the actual legal analysis within the objective prong section of this paper draws no distinction between sexual and nonsexual assaults. So, even though some of the cases in this section do not directly address rape, their analysis is nevertheless on point.

[FN136]. See *Morgan*, 824 F.2d at 1057; *Alberti*, 790 F.2d at 1224; *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984); *Jones*, 636 F.2d at 1373; *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974).

[FN137]. *Walsh*, 733 F.2d at 475; *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); *Jones*, 636 F.2d at 1373; *Withers*, 615 F.2d at 161.

[FN138]. *Jones*, 636 F.2d at 1373.

[FN139]. *Murphy v. United States*, 653 F.2d 637, 644 (D.C. Cir. 1981).

[FN140]. *Withers*, 615 F.2d at 161.

[FN141]. The following cases illustrate the kinds of facts that must be proven. In *Jones*, 636 F.2d at 1373, the plaintiff was able to establish a pervasive risk of sexual assault by presenting evidence of constant physical and sexual attacks generally within the population during 15 to 16 hour periods each day when no guards were on duty. See also *Withers*, 615 F.2d at 158 (testimony from three similarly victimized witnesses sufficient to establish "a serious problem of substantial dimensions," satisfying the pervasiveness requirement); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058-61 (D.C. Cir. 1987) (testimony from nurse, inmate, and jail officers about high frequency of violence sufficient); *Alberti v. Klavenhagen*, 790 F.2d 1220, 1225-26 (5th Cir.) (evidence sufficient where numerous inmates testified to rampant violence and sexual assaults and experts testified to typically high ratio of actual incidents to number reported), clarified, 799 F.2d 992 (5th Cir. 1986). In *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973), the Fourth Circuit found that the risk might be pervasive even when the plaintiff had not been attacked and did not fear attack except as a result of coming to the aid of other younger and weaker inmates who were at risk. And in an early district court case, the court stated that the level of risk could be viewed as either one of "a pattern of indisputed and unchecked violence or, on a different level, of an egregious failure to provide security to a particular inmate." *Penn v. Oliver*, 351 F. Supp. 1292, 1294 (E.D. Va. 1972) (emphasis added).

[FN142]. *Withers*, 615 F.2d at 161.

[FN143]. *Id.* at 161; *Woodhous*, 487 F.2d at 890 ("occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment") (citing *Penn v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972) (rejecting claim based on an isolated fight between two inmates)). However, the Wilson Court has noted that "deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners." *Wilson v. Seiter*, 111 S. Ct. 2321, 2324 n.1 (1991).

[FN144]. For a discussion of pervasiveness in the subjective test section, where sufficiently widespread or pervasive risk can be evidence that the prison officials intended that the risk be present or at least were deliberately indifferent to that risk, see text accompanying notes 233-242 *infra*.

[FN145]. 429 U.S. 97, 105 (1976). Again, this duty is limited by the premise that a failure that does not amount to "deliberate indifference to serious medical needs" is not an Eighth Amendment violation. See text accompanying notes 97-101 *supra*. At the time *Estelle* was decided, its holding clearly ran against a historical tradition of not requiring prisons to furnish medical care. See *Pappas*, *supra* note 24, at 161 n.99.

[FN146]. *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977); *DeGidio v. Perpich*, 612 F. Supp. 1383, 1390 (D. Minn. 1985); *Laaman v. Helgemoe*, 437 F. Supp. 269, 311- 15 (D.N.H. 1977); *Pappas*, *supra* note 24, at 172-79.

[FN147]. 651 F.2d 96 (2d Cir. 1981).

[FN148]. *Id.* at 109.

[FN149]. This failure also violated the due process rights of the pre-trial detainees. *Id.* For a discussion of "due process" standards, see note 84 *supra*.

[FN150]. *Lareau*, 651 F.2d at 109. The case actually pertained to pre-trial detainees, but the lower court noted in dictum that the omissions would have sufficed to violate the Eighth Amendment.

[FN151]. *Id.* at 111.

[FN152]. 553 F.2d 373 (5th Cir. 1977).

[FN153]. *Id.* at 380.

[FN154]. 612 F. Supp. 1383, 1390 (D. Minn. 1985).

[FN155]. *Laaman v. Helgemoe*, 437 F. Supp. 269, 312 (D.N.H. 1977) (failure to screen inmates, among other problems, rendered a New Hampshire penitentiary unconstitutionally cruel).

[FN156]. *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981), overruled on other grounds, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986).

[FN157]. See *Pappas*, *supra* note 24, at 163-65.

[FN158]. These cases still inform our analysis even though they were all decided before the first clear bifurcation of the objective and subjective prongs in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). See text accompanying notes 95-132 *supra*.

[FN159]. See, e.g., *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988); *Portee v. Tollison*, 753 F. Supp. 184 (D.S.C. 1990), *aff'd*, 429 F.2d 694 (4th Cir. 1991); *Deutsch v. Federal Bureau of Prisons*, 737 F. Supp. 261 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991); *Feigley v. Fulcomer*, 720 F. Supp. 475 (N.D. Pa. 1989); *Cameron v. Metcuz*, 705 F. Supp. 454 (N.D. Ind. 1989); *Davis v. Stanley*, 740 F. Supp. 815 (N.D. Ala. 1987).

[FN160]. See *Pappas*, *supra* note 24, at 176-79.

[FN161]. See *Glick*, 855 F.2d at 536 (rejecting argument that contact with sweat of infected inmates, mosquito bites, open sneezing, and prisoner housing posed a significant risk); *Portee*, 753 F. Supp. at 184 (rejecting that the sharing of utensils and plates and the presence of a homosexual on kitchen duty was a significant risk); *Deutsch*, 737 F. Supp. at 261 (rejecting claim of inmate who was forced to share cell with HIV infected inmate, even when sharing of personal belongings alleged); *Davis*, 740 F. Supp. at 815 (rejecting claim where plaintiffs was housed with HIV infected cellmate for 30 days, sharing coffee cup and cigarettes).

[FN162]. See, e.g., *Davis*, 740 F. Supp. at 815; *Deutsch*, 737 F. Supp. at 261; *Feigley*, 720 F. Supp. at 475.

[FN163]. Merely printing edicts forbidding homosexual activity in prison does not prevent such activity by men who have already, by definition, demonstrated an inability or an unwillingness to follow the law. See text accompanying notes 1-3 & 19-49 *supra*; see also *Davis*, 740 F. Supp. at 818 (arguing that the risk of HIV infection was minimal, due to rules prohibiting sexual conduct); cf. *Pappas*, *supra* note 24, at 178 (implying that because the practices that are known to spread disease are normally prohibited by prison regulations, the risk of contracting disease, and thus the constitutional problem, are thereby obviated).

[FN164]. See text accompanying notes 170-177 *infra*; see also *Glick*, 855 F.2d at 539 (expressly reserving option for finding for a plaintiff when a risk of infection is present); *id.* at 541 (McMillian, J., concurring) (echoing majority sentiment and explicitly referring to risk of sexual assault); *Portee*, 753 F. Supp. at 186 (possibility of colorable claim if plaintiff could show a "pervasive risk" of contracting the AIDS virus); *Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987) (speculating that officials might be liable for failure to isolate an AIDS carrier who subsequently infected another inmate); *Larocca v.*

Dalsheim, 120 Misc. 2d 697, 707-09, 467 N.Y.S.2d 302, 309 (Dutchess County Sup. Ct. 1983) (intimating that result might have been different if sexual coercion had been alleged).

[FN165]. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[FN166]. Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991).

[FN167]. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

[FN168]. There are a number of possible explanations for the absence of such a case: AIDS and prison law is still new; intimidation; complicated legal avenues; or prisons with serious AIDS problems take sufficient steps to segregate aggressive homosexuals.

[FN169]. See note 164 supra.

[FN170]. 855 F.2d 536 (8th Cir. 1988).

[FN171]. *Id.* at 538-39. In Glick, inmates brought an action alleging a constitutional violation from the prison's failure to test and segregate carriers of the AIDS virus where other inmates regularly came in normal contact with practicing homosexuals, such as with their sweat during work detail, mosquito bites, sneezes, food preparation, and general prisoner mobility. *Id.* at 539. The circuit court affirmed the lower court's dismissal of the case without prejudice, because the particular facts alleged were insufficient to state a claim. *Id.*

[FN172]. *Id.* at 541 (McMillian, J., concurring) (emphasis added); see also note 164 supra. In *Cameron v. Metcuz*, 705 F. Supp. 454 (N.D. Ind. 1989), in what the court called a "cutting edge" legal question, *id.* at 458, a plaintiff sued for the unreasonable risk presented by a bite wound inflicted by another HIV infected inmate, but the court did not address that substantive issue. *Id.* at 459-60.

[FN173]. *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981); *DeGidio v. Perpich*, 612 F. Supp. 1383, 1390 (D. Minn. 1985).

[FN174]. Glick, 855 F.2d at 539; *Portee v. Tollison*, 753 F. Supp. 184, 186 (D.S.C. 1990).

[FN175]. Glick, 855 F.2d at 541 (McMillian, J., concurring). But see *Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987) (suggesting a gross negligence or recklessness standard).

[FN176]. *Lareau*, 651 F.2d at 109.

[FN177]. See *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992).

[FN178]. See text accompanying notes 145-157 supra.

[FN179]. Cf. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Lareau*, 651 F.2d at 109; *Smith v. Sullivan*, 553 F.2d 373 (5th Cir. 1977).

[FN180]. 553 F.2d 373 (5th Cir. 1977).

[FN181]. 651 F.2d 96 (2d Cir. 1981).

[FN182]. *Id.* at 109; *Smith*, 553 F.2d at 380.

[FN183]. *Cameron v. Metcuz*, 705 F. Supp. 454 (N.D. Ind. 1989).

[FN184]. See, e.g., *Smith*, 553 F.2d at 380 (finding scabies and gonorrhea sufficiently threatening).

[FN185]. Another possible explanation for the different treatment of assault cases and disease cases is that courts feel that prison officials may more logically be held responsible for the spread of disease than for assault. Assaults are criminal acts, perpetrated by independent, intervening third parties over which prison officials have less control.

While this explanation may adequately account for the differences in treatment of assault and disease cases, it may also indicate a perception that assaults on prisoners are less serious than disease. Focusing the inquiry on the culpability of the assailant draws attention away from the tangible, serious harm inflicted on the victims, and tends to absolve officials of the duty to prevent activity that is commonplace within prison walls. Prison guards undoubtedly could prevent more assaults than they do. See text accompanying note 39 *supra*. Notwithstanding the intervening act, assault victims deserve more protection from prison officials than they often get in an environment where they cannot adequately protect themselves.

[FN186]. See note 164 *supra*.

[FN187]. *Id.*

[FN188]. *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991).

[FN189]. *Id.* at 2325.

[FN190]. *Id.*

[FN191]. 475 U.S. 312 (1986).

[FN192]. *Wilson*, 111 S. Ct. at 2326 (quoting *Whitley*, 475 U.S. at 320).

[FN193]. *Whitley*, 475 U.S. at 319.

[FN194]. *Wilson*, 111 S. Ct. at 2324. And *Hudson* means that the deliberate indifference standard applies to all claims except excessive force claims; the latter rely on a "malicious and sadistic test."

[FN195]. *Estelle v. Gamble*, 429 U.S. 97 (1976).

[FN196]. *Id.* at 105-06.

[FN197]. *Wilson*, 111 S. Ct. at 2328.

[FN198]. *Id.* at 2327 (citations omitted).

[FN199]. *Id.* Those cases are *Lopez v. Robinson*, 914 F.2d 486 (4th Cir. 1990); *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); *Lafaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987); *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987).

[FN200]. *Cortes*, 842 F.2d at 556.

[FN201]. *Morgan*, 824 F.2d at 1049.

[FN202]. *Wilson*, 111 S. Ct. at 2328. The other three cases interpreted "deliberate indifference" in contexts not directly applicable to the issue at hand.

[FN203]. *Cortes*, 842 F.2d at 556, 558-559.

[FN204]. *Id.* at 558.

[FN205]. *Id.* at 559 (emphasis added).

[FN206]. *Id.* at 560 (emphasis added) (quoting from the jury instructions at trial) (citing *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980). The court added that where an official is already on actual notice of a prisoner's need for physical protection, "administrative negligence can rise to the level of deliberate indifference." *Id.* at 561 (citation omitted).

[FN207]. 824 F.2d 1049 (D.C. Cir. 1987).

[FN208]. The court suggested that the fight may have erupted because Morgan had previously resisted the sexual advances of the other inmate. *Id.* at 1054.

[FN209]. *Id.* at 1054-55.

[FN210]. *Id.* at 1058 (emphasis added) (citing both *Murphy v. United States*, 653 F.2d 637, 644-45 (D.C. Cir. 1981) ("deliberate indifference can be inferred from evidence that danger was sufficiently obvious to apprise officials of need for protective measures") and *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985) ("comparing deliberate indifference to recklessness in the criminal law sense"), cert. denied, 479 U.S. 816 (1986)).

Murphy said that to prevail under deliberate indifference, the plaintiff must show that "violence and sexual assault occur ... with sufficient frequency that the ... prisoners ... are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures." 653 F.2d at 645 (emphasis added).

[FN211]. *Morgan*, 824 F.2d at 1059.

[FN212]. *Id.* at 1059-61.

[FN213]. *Id.* at 1061.

[FN214]. 944 F.2d 344 (7th Cir. 1991). For a detailed account of the facts underlying the action, see text accompanying note 27 *supra*.

[FN215]. *McGill*, 944 F.2d at 348-49. Judge Easterbrook stated that there is always some level of brutality and homosexual rape in prison, and it will always be possible to say that guards "should have known" of the risk." *Id.* at 348.

[FN216]. *Id.* at 349.

[FN217]. *Id.* at 350.

[FN218]. *Id.*

[FN219]. *Id.* at 351. The Seventh Circuit drew heavily for its interpretation on its own circuit's earlier, pre-Wilson decision, *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986), which distinguished between tort law concepts of recklessness on the one hand and criminal recklessness on the other for its interpretation of "deliberate indifference." The court chose the latter, requiring that evidence would have to be strong enough to show that the defendant had "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Id.* at 653 (emphasis added).

[FN220]. Justice Scalia indicated that "[t]he long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent," thereby implicitly rejecting any formulation that would automatically exclude cases in which actual knowledge could not be proven by direct testimony. *Wilson v. Seiter*, 111 S. Ct. 2321, 2325 (1991). The analysis of the cases cited by Whitley and Wilson might make a strong case for the adoption of a "should have known" standard over the more strict "actual knowledge" requirement gleaned by the Seventh Circuit.

[FN221]. See *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823 (1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987).

[FN222]. *Wilson*, 111 S. Ct. at 2325. My analysis assumes that "pervasiveness" and "long duration" are functionally equivalent in that they both evidence a sufficient level of incidence to apprise officials of the existence of an objective constitutional violation.

[FN223]. *Id.* at 2326 (emphasis added).

[FN224]. The objective and subjective standards still hold in common an inquiry into "the long duration" of the unconstitutional condition, and are thus not wholly separate. See, e.g., *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 998 (5th Cir. 1991) (citing *Wilson* 111 S. Ct. [at 2325], cert. denied, 112 S. Ct. 1994 (1992)).

[FN225]. Recall that this definitional "specificity" problem was also present in the objective prong analysis of the assault cases. See text accompanying notes 119-132 *supra*.

[FN226]. See, e.g., *Morgan v. District of Columbia*, 824 F.2d 1049, 1058- 62 (D.C. Cir. 1987); see also *Redman v. County of San Diego*, 942 F.2d 1435, 1043 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992).

[FN227]. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558-59 (1st Cir.), cert. denied, 488 U.S. 823 (1988).

[FN228]. *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).

[FN229]. *Morgan*, 824 F.2d at 1049.

[FN230]. *Id.* at 1054-55.

[FN231]. *Id.* at 1059.

[FN232]. *Id.* at 1058-61.

[FN233]. 825 F.2d 792 (4th Cir. 1987).

[FN234]. *Id.* at 792-93.

[FN235]. *Id.* at 794 (emphasis added).

[FN236]. 944 F.2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

[FN237]. Although *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 972 (1992) also came down after *Wilson*, it was a due process analysis that specifically declined to say whether the two-prong separateness also applied to 14th Amendment pre-trial detainee cases. *Id.* at 1443.

[FN238]. *McGill*, 944 F.2d at 349. The court said that the plaintiff should have informed the guards that he was about to be attacked as he passed them, with his assailant following him, on the way to the showers. *Id.* at 353. The court rejected the argument that the guards should have known of the threat posed by the assailant. *Id.* at 349.

[FN239]. *Id.* at 350.

[FN240]. This may in fact be the result Judge Easterbrook intended. See *id.* at 349 (stating that in order to prevail, the plaintiff "had to show ... that instead of intervening the guards allowed [the rapist] to proceed").

[FN241]. *Id.* at 348. The court began its opinion by stating "[p]risons are dangerous places." *Id.* at 345. It commenced its discussion of the facts by recounting the offenses committed by *McGill* that had resulted in his imprisonment in the first place. *Id.* at 346. These statements indicate that the judge believed that *McGill* was at least partly deserving of his fate.

[FN242]. See text accompanying notes 265-266 *infra*.

[FN243]. See, e.g., *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981); *DeGidio v. Perpich*, 612 F. Supp. 1383, 1390 (D. Minn. 1985).

[FN244]. See, e.g., *Portee v. Tollison*, 753 F. Supp. 184, 184-87 (D.S.C. 1990), *aff'd*, 929 F.2d 694 (4th Cir. 1991); *Deutsch v. Federal Bureau of Prisons*, 737 F. Supp. 261, 267 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991); *Feigley v. Fulcomer*, 720 F. Supp. 475, 478-80, 482-85 (M.D. Pa. 1989); *Davis v. Stanley*, 740 F. Supp. 815, 818 (M.D. Ala. 1987).

[FN245]. See *Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988) (rejecting the idea that a prison's failure to test and segregate AIDS infected prisoners violates civil rights when prisoner plaintiff has unsubstantiated fears of contracting the disease through nonsexual contact).

[FN246]. 720 F. Supp. 475 (M.D. Pa. 1989).

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[FN247]. The expert argued that mass testing "creates a false sense of security," *id.* at 479, and worried that the problem of false negatives could be potentially dangerous to those who changed their behavior in a risky fashion based on the test results. *Id.* at 479-80.

The problem of false negatives can be dealt with to some extent by both warning people of the test's limitations so that they do not take unnecessary risks, and lengthening the stay at the current reception and diagnostic centers. Most false negatives result from the short latency period between the time of initial infection and the time when the body's antibody response is measurable by the test. Furthermore, only the minority of inmates who are infected are likely to have been infected so recently to their initial incarceration that this will pose a problem. Despite the problem of false negatives, the vast majority of HIV carriers would be identified by testing.

Standard testing procedures are as follows: Inmates are first administered Enzyme Linked Immunosorbent Assay (ELISA) screening. If this initial test comes back positive, a second ELISA is performed. If the second ELISA yields a positive result, the inmate is administered the confirmatory (and more expensive) Western Blot test. Theodore M. Hammett, HIV Antibody Testing: Procedures, Interpretation, and Reliability of Results, NAT'L INST. JUST.: AIDS BULL., Oct. 1988, at 4.

There are two distinct problems associated with HIV testing: false positives and false negatives. Test results that falsely indicate positive presence of HIV could be dangerous if, as a result, an uninfected inmate were incarcerated with an entirely HIV-positive population and any of these prisoners were sexually predatory. This improper placement scenario was actually litigated in *McDuffie v. Rikers Island Medical Dept.*, 668 F. Supp. 328 (S.D.N.Y. 1987), and the court held that such a mistake did not violate the plaintiff's constitutional rights where no harm was alleged, and where no "deliberate indifference" could be found from official reliance on the tests. Such situations should be extremely rare, since through the use of the three-test system referred to above and adherence to strict quality control, false positives can be virtually eliminated. Hammett & Moini, *supra* note 9, at 2.

False negative results cannot be completely eliminated because of present testing technology, but pose less of an ideological dilemma. The human body's antibody response lags initial infection by, on average, six to twelve weeks, (though in some cases as long as six months or longer) during which the HIV tests may not be able to detect infection. Hammett, *supra*.

[FN248]. Feigley, 720 F. Supp. at 480.

[FN249]. *Id.* at 484-85. The plaintiff also failed to claim personal knowledge of the homosexual conduct and drug use he alleged. *Id.* at 485. In *Davis*, a court found that the sheriff's lack of knowledge of the presence of an infected inmate, caused by a conscious choice not to test all inmates for HIV, was not deliberate indifference where that choice was a reasonable one. *Davis*, 740 F. Supp. at 818. The judge stated, "It would not be unreasonable for the defendant to eschew the expensive process of screening and testing each incoming inmate in favor of stringent enforcement of rules against homosexual activities and intravenous drug use in jail." *Id.* at 818-19.

One commentator argued that the high cost of proper HIV testing may make mass testing of inmates "impossible." Pappas, *supra* note 24, at 174 & n.194. Other authority, however, indicates that as of October, 1988, testing every inmate in a penal system could cost as little as two or three dollars per inmate, for all the necessary tests. Hammett, *supra* note 247, at 4.

[FN250]. 737 F. Supp. 261 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991).

[FN251]. *Id.* at 267.

[FN252]. *Id.*; see also *Portee v. Tollison*, 753 F. Supp. 184, 186 (D.S.C. 1990); *aff'd*, 930 F.2d 694 (4th Cir. 1991). The *Portee* court reached the same conclusion based on similar preventive measures undertaken by the prison. *Id.* at 185-86. In *Portee*, the court did not consider what steps had been taken, if any, to remove aggressive inmates from the rest of the prison population, but relied only on explicit rules against sexual activity. *Id.*

[FN253]. See *Glick v. Henderson*, 855 F.2d 536, 539, 541 (8th Cir. 1988) (McMillian, J., concurring); *Portee*, 753 F. Supp. at 186; see also note 164 *supra*; cf. *Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989) (discussing prison's interest in responding to threat of AIDS and controlling its spread).

[FN254]. See text accompanying notes 133-164 *supra*.

[FN255]. *Wilson*, 111 S. Ct. at 2327. The *Glick* court suggested that it might sustain a claim based on "a failure of prison officials to reasonably respond to th[e] risk" of contracting AIDS, if that risk were pervasive. 855 F.2d at 539-40 (emphasis added); see also *id.* at 541 (McMillian, J., concurring). In *Judd v. Packard*, 669 F. Supp. 741 (D. Md. 1987), the court predicted that officials might be liable for failing to isolate a known HIV carrier "if the carrier infects another inmate who

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could show that such failure to isolate constituted grossly negligent or reckless conduct on the part of such officials." *Id.* at 743.

[FN256]. A hint may be provided in *Cameron v. Metcuz*, 705 F. Supp. 454 (N.D. Ind. 1989). In *Cameron*, the court considered a case where an HIV infected prisoner had bitten the plaintiff. The plaintiff alleged that prison officials knew of the assailant's violent and predatory tendencies and failed to protect the other prisoners from him; he did not allege that the officials knew that the assailant was HIV-positive. *Id.* at 456-57. The court dismissed the claim without prejudice so that the plaintiff could allege facts that would amount to deliberate indifference. *Id.* at 464. It seems possible that an allegation of the prison officials knowledge of the attacking inmates HIV-positivity could meet the reckless indifference standard.

[FN257]. When implementing such policies, courts have indicated that there is a need to be sensitive to the privacy rights of prisoners who test positive for HIV, at least in the absence of competing important government interests. See *Deutsch v. Federal Bureau of Prisons*, 737 F. Supp. 261, 268 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991). This right must nevertheless be balanced against the right of prison to segregate, which necessarily violates the privacy right. See *Rodriguez v. Coughlin*, No. CIV-87-1577E, 1989 U.S. Dist. LEXIS 15898, at *2-*3 (W.D.N.Y. 1989) (cited in *Deutsch* and contrasting cases upholding rights of privacy with cases affirming right of prisons to segregate HIV positive prisoners).

[FN258]. *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992).

[FN259]. *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987).

[FN260]. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988).

[FN261]. *Wilson* clearly implies that a strong showing of pervasiveness may prove intent.

[FN262]. See *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (the threat resulting from failure to screen inmates "so serious" and "sufficiently harmful to evidence deliberate indifference") (emphasis added).

[FN263]. In making such an argument, the plaintiff would have to characterize rape as simply a medium for AIDS transmission, like any other medium for passing disease.

[FN264]. For such an argument to be successful, a court would have to accept the "seriousness" explanation for the distinction between the assault cases and the disease cases, as opposed to the "intervening actor" explanation. See note 185 *supra*. In the disease context, the rape should be seen not as a criminal act absolving officials of blame, but simply as an existing mode of HIV transmission.

[FN265]. See text accompanying notes 229-242 *supra*.

[FN266]. See *id.*

[FN267]. *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1975) (Stewart, Powell, and Stevens, JJ., plurality opinion).

[FN268]. *Estelle v. Gamble*, 429 U.S. 97, 103 n.7 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

[FN269]. *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (quoting *Estelle*, 429 U.S. at 102).

[FN270]. See, e.g., *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992). The Seventh Circuit required actual knowledge of a specific rape—a standard that makes prospective relief nearly impossible to obtain.

[FN271]. Although arguments based on prohibitive cost are often made, these may not stand up under close scrutiny. The post-*Wilson* era of Eighth Amendment analysis of the subjective prong requires a consideration of the constraints facing the officials. *Wilson*, 111 S. Ct. at 2326. One potential constraint that defendant prison officials might face is, despite good intentions towards remedying violations of the Eighth Amendment's objective prong, they are forced into inaction by a lack of funds necessary to carry out the needed protective or remedial measures. Justice Scalia argued in *Wilson* that he found no cases in which officials had tried to use this defense subsequent to the articulation of "deliberate indifference" in *Estelle*. But the true nature of the independence of the subjective prong analysis of the Eighth Amendment might not have been apparent to prison officials until the decision in *Whitley*, and more recently in *Wilson*; it may be that the *Wilson* decision will directly

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spawn a flourishing of such defenses. Justice White, in his concurrence in *Wilson*, expressed fear that officials would do just that, though clear prior jurisprudence would have dictated that "humane considerations and constitutional requirements are not, in this day, to be measured or limited to dollar considerations." *Id.* at 2330 n.1 (White, J., concurring); see *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972); see also *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291, 1319 (1972); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (opinion by then Judge Blackmun); *Hamilton v. Love* 328 F. Supp. 1182, 1194 (E.D. Ark. 1971). Justice Scalia answered that he could not conceive of how the cost defense could change the analysis of the officials' intent level. *Wilson*, 111 S. Ct. at 2327. One circuit court interpreted this statement to mean that the cost defense was as illegitimate as ever. *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 1000 (5th Cir. 1991), cert. denied, 112 S. Ct. 1994 (1992).

[FN272]. The testing of all inmates has been held to be constitutionally permissible. *Harris v. Thigpen*, 727 F. Supp. 1564 (1990), *aff'd* in relevant part, 941 F.2d 1495 (11th Cir. 1991).

[FN273]. Courts have uniformly rejected claims that segregation of inmates with AIDS violates equal protection, due process, the right to free association, or the right against cruel and unusual punishment. See *Rodriguez v. Coughlin*, No. CIV-87-1577E, 1989 U.S. Dist. LEXIS 15898, at *4 (W.D.N.Y. 1989); see also *Judd v. Packard*, 669 F. Supp. 741, 743 (D. Md. 1987); *McDuffie v. Rikers Island Medical Dep't*, 668 F. Supp. 328, 329 (S.D.N.Y. 1987); *Cordero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984).

Moreover, it has been held that a prison's interest in preventing the spread of AIDS outweighs any privacy interests of inmates. *Dunn v. White*, 880 F.2d 1188, 1196 (10th Cir. 1989). For a discussion of the limited privacy rights of inmates, see note 257 *supra*. See also David Margolick, *Legal System Is Assailed on AIDS Crisis*, N.Y. TIMES, Jan. 19, 1992, § 1, at 10.

[FN274]. According to the U.S. Department of Justice, there is a trend "away from blanket segregation of HIV-infected prisoners" in state prison systems. *Hammet & Moini*, *supra* note 9, at 8. As of October, 1989, only four state prison systems and one jail system segregate all HIV positive inmates; another ten state systems and four jail systems segregate at least all inmates with AIDS, and some segregate inmates with ARC. *Id.* at 9.

No state has statutory language requiring automatic segregation of all HIV- positive inmates. However, a number of states require isolation, or allow it, under specific circumstances. See, e.g., *Ga. Code Ann. § 42-5- 52.1(e)* (Michie 1989) (required if inmate sexually active, sexually predatory, or if in best interest of inmate population); *Idaho Code § 39-604 (Supp. 1990)* (annotation says Attorney General opinion allows isolation if necessary to protect public health); *Mich. Comp. Laws Ann. § 791.267* (West 1992); *R.I. Gen. Laws § 42-56-37 (Supp. 1990)* ("shall take steps as are reasonable to prevent persons testing positive for ... HIV from infecting other inmates and/or correctional staff"); see also *Ala. Code § 22-11A- 18(b) (1990)* (allowing isolation of anyone (not just prisoners) if it "is necessary to protect public health").

Texas law permits county and municipal jails to segregate any inmate who tests positive, without any further justification whatsoever, but does not require segregation. *TEX. CODE CRIM. PROC. ANN. § 46A.01(c)* (West Supp. 1991).

In Colorado, all HIV positive inmates in the state prison system are housed separately from the rest of the prison population, under a direct order from former Governor Lamm. The AIDS and ARC infected inmates are sent to the main facility in Canyon City, where they can receive medical care. The asymptomatic inmates are housed separately, but are allowed to work and recreate with the other inmates. Both staff and inmates receive AIDS education and training on a regular basis, through videos and courses put out by the Federal Bureau of Prisons. Telephone Interview with Jack Tracy, Policy Coordinator/Analyst, Office of Public Information, Colorado Department of Corrections (Apr. 1, 1991).

[FN275]. See *Pappas*, *supra* note 24, at 183-84.

[FN276]. Hillary Stout, *Prisoners With AIDS Virus Often Face Discrimination*, U.S. Commission Finds, WALL ST. J., Mar. 21, 1991, at B3.

[FN277]. Some groups who oppose proposals to test all incoming and current inmates include the ACLU, the Prisoners' Rights Union, the Lobby for Individual Freedom and Equality, and the River City Democratic Club. Hearings on SB 38, Before the Assembly Committee on Public Safety, July 10, 1989, John Burton, Chair, California State Assembly; see also Joint Committee on Prison Construction and Operation, California Legislature, (Aug. 3-4, 1987) (testimony of Anita P. Arriola, Public Advocates, Inc.).

[FN278]. See, e.g., M.E. Malone & Elizabeth Neuffer, *AIDS on Rise in Prisons; Strained Mass. System Grapples with Burden*, BOSTON GLOBE, Mar. 29, 1992, Metro/Region 1 ("[s]oaring numbers of prisoners with AIDS are being identified in Massachusetts," an almost thirty-fold increase in the last five years).

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