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Articles

**\*407 REDEFINING EIGHTH AMENDMENT PUNISHMENTS: A NEW STANDARD FOR DETERMINING THE LIABILITY OF PRISON OFFICIALS FOR FAILING TO PROTECT INMATES FROM SERIOUS HARM**

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I. Introduction

While it is now well-established that the Eighth Amendment's prohibition against cruel and unusual punishments regulates prison conditions, [FN1] translating that prohibition into liability standards to govern the behavior of prison officials and afford remedies to injured prisoners has been difficult. In the last two decades, courts have struggled to define what conduct is actionable under the Eighth Amendment. While the text of the Amendment is broad, providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" [FN2]--a number of courts and commentators have singled out the word "punishments" as the boundary of the Amendment's reach. [FN3] This trend contrasts with the innovative approach \*408 of the pioneering lower federal courts that used the Eighth Amendment to reverse the "hands-off" attitude towards inhumane prison conditions that prevailed until thirty years ago. [FN4] Throughout the 1970s and 1980s, courts held that the Eighth Amendment required prison officials to provide prisoners with basic necessities, such as reasonable protection from violence [FN5] and adequate medical care, [FN6] without explicitly linking the failure to meet these duties with the infliction of punishment.

The central problem in the application of the Eighth Amendment to the prison setting has been defining the extent to which prison officials are liable for failing to protect inmates from harm. [FN7] While the United States Supreme Court has affirmed that prison officials have an affirmative duty to protect prisoners from serious injury, [FN8] it has significantly limited that duty by only allowing liability to attach when a prison official fails to act despite having knowledge of a substantial risk of serious harm to a prisoner. [FN9] Knowledge has been singled out as the prerequisite to a prison official's liability under the Eighth Amendment. This stringent standard, which I refer to as the "knowledge requirement," [FN10] has its roots in the theory that emphasizes the \*409 importance of the word "punishment" in the text of the Eighth Amendment.

This Article traces how the Supreme Court linked punishments and knowledge to form the knowledge requirement, [FN11] and then severs that connection by arguing that the Supreme Court's particular conception of punishments is flawed and should be replaced by an alternative theory. It argues that the knowledge requirement is flawed for both conceptual and pragmatic reasons and should be replaced by a liability standard based on the common law duty of care owed by landowners to invitees. A prison official should not only be liable when he fails to act despite knowledge of a substantial risk of serious harm to an inmate. A prison official should be liable for objectively serious harms suffered by a prisoner caused by the prison official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care.

Beginning in the 1990s, the Supreme Court abruptly re-introduced the concept of punishment into its Eighth Amendment jurisprudence and formulated a uniform test for determining the liability of prison officials. Under the current test, to be liable under the Eighth Amendment for harm befalling a prisoner, a prison official must display deliberate indifference to a substantial risk of serious harm to an inmate. [FN12]

Federal courts apply the knowledge requirement to hundreds of prison condition cases each year. [FN13] A number of commentators have \*410 criticized the knowledge requirement because the difficulty of proving a prison official's state of mind makes it difficult to establish liability. [FN14] Furthermore, because inhumane prison conditions stem from institutional

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sources rather than individuals, it is often impossible to single out individuals for blame, leaving injured prisoners without a remedy. [FN15] Some commentators have thus argued that prison conditions are part of the punishment of imprisonment and that any objectively inhumane conditions should lead to liability regardless of the presence of individual knowledge of these conditions. [FN16] I will refer to this argument as the "objective harm approach."

**\*411** While motivated by legitimate concerns, the objective harm approach has failed because it is unprincipled. The theory works best in extreme cases where there are system-wide breakdowns in a prison. When violent attacks are so frequent that prisoners cling to the bars at night for fear of being raped, [FN17] it is clear that sentencing a prisoner to such conditions is cruel and unusual punishment. But the objective harm approach is difficult to apply when the incident appears to be isolated. Suppose an inmate is violently attacked by another inmate in a facility where the overall rate of assaults appears to be relatively low. It may be difficult to prove that his conditions of confinement are objectively inhumane. One might reply that the objective harm that the individual has suffered makes the punishment inhumane for him. But does that mean that any severe harm an inmate suffers while incarcerated is actionable? The logical extension of this argument would be that an inmate who slips and falls, entirely by his own fault, and suffers serious harm could argue that his punishment is "cruel and unusual." Furthermore, the Supreme Court has always rejected respondeat superior liability in the area of government liability and requires victims of constitutional deprivations to sue individuals. [FN18] If one is to hold individual prison employees responsible for constitutional harms, the courts need a fair way of determining what conduct is actionable. Any theory of Eighth Amendment liability needs some notion of culpability or fault to link a harm suffered by a prisoner to a state actor. This integral element is missing from the objective harm approach.

This Article navigates a third path between the knowledge requirement and the objective harm approach. Part II of this Article begins with a history of the knowledge requirement, tracing its origins in two early appellate cases, *Johnson v. Glick* [FN19] and *Duckworth v. Franzen*. [FN20] These cases utilize what this Article refers to as the analytic conception of punishment, which has two components. First, **\*412** punishment is "a deliberate act intended to chastise or deter." [FN21] Second, the paradigmatic example of a punishment under the analytic conception is the direct infliction of punishment by a state actor such as the judge's imposition of a sentence. [FN22]

Under the analytic conception of punishments, it is unclear why the failure of a prison official to protect an inmate from harm is punishment. While a guard's failure to protect a vulnerable inmate can be condemned as irresponsible or cruel, it is difficult to conceive of his inaction as punishment under the analytic conception. First, his action is unlikely to be motivated by a desire to discipline the prisoner for a specific transgression. Second, unlike the judge's direct imposition of punishment, a failure to prevent injury is only an indirect cause of harm rather than a direct cause of harm. In many cases (such as inmate-on-inmate attacks), the direct harm is caused by other inmates or natural causes and is not state-inflicted.

In *Wilson v. Seiter* [FN23] and *Farmer v. Brennan*, [FN24] the Supreme Court grappled with fitting the acts of individual prison officials into the analytic conception of punishments. The Court reasoned that "knowledge" is an essential element of "punishment." [FN25] It then singled out the concept of knowledge and used it to define the conduct that is actionable as an Eighth Amendment punishment. The result is the knowledge requirement. The presence of a prison official's knowledge of a risk of serious harm to an inmate determines whether there is liability under the Eighth Amendment.

**\*413** In Part III, this Article argues that while the analytic conception of punishments may accurately describe pre-modern forms of punishment such as torture and public execution, the nature of punishments has changed in the modern era. This Article critiques the analytic conception of punishments and argues that the link between knowledge and punishments should be severed. It does so by offering an alternative--the contextual approach--that directly responds to the two elements of the analytic conception of punishments. First, instead of starting from an abstract definition, the contextual approach examines the particular nature of a punishment such as imprisonment. Second, through this analysis it becomes evident that it is prison officials, not judges, who inflict punishments through their control of the conditions of imprisonment. Prison is a punishment that is continuously inflicted and cannot be reduced to a single, intentional act. The actions of prison officials are the key determinant in the way that the punishment of a prison sentence is inflicted. Prisoners are utterly dependent on prison officials for their basic necessities such as protection from violence and the provision of medical care. Prison officials have a duty to protect inmates from risks of serious harms because if they did not, then the infliction of the punishment of imprisonment would be cruel and unusual.

Part IV shifts the grounds of criticism of the knowledge requirement from theory to policy. The problem with the knowledge requirement is that it is taken from another context, that of criminal recklessness and is, thus, insensitive to the nature of problems arising in the prison setting. The central problem with the knowledge requirement is that it inaccurately and

inadequately defines the scope of the prison official's duty. The knowledge requirement only requires prison officials to act when they know that a risk of danger is substantial. This standard is nebulous and only requires action at a point when it may be too late to avert the danger. As a result, it entrenches a view that assaults and harms in prison are inevitable and cannot be prevented. Reasonable prevention measures before risks become substantial are needed to adequately ensure a minimal level of safety in prisons. Requiring knowledge as a prerequisite to liability shields certain pervasive harms that exist in the regions between knowledge and ignorance from scrutiny. In addition, knowledge as a prerequisite to liability allows the higher level officials, who are most likely to have the power to effectuate change, to avoid liability. Such high level officials are less likely to have an active daily knowledge of problems though \*414 their failures may have greater systematic effects than those of lower level officials.

Part V offers a new standard for governing the liability of prison officials that is consistent with the contextual approach and remedies the practical flaws of the knowledge requirement. A clear statement that prison officials are obligated to take active measures to prevent substantial risks of harm from developing is necessary. The Eighth Amendment's prohibition against cruel and unusual punishments should be viewed as a representation that the infliction of a prison sentence meets basic standards of humanity. Translating this principle into liability terms, this Article proposes that the knowledge requirement should be replaced by the duty owed by landowners to invitees. The common law rule is that because such landowners implicitly represent that the premises are safe, they are liable for all known dangers on the property, as well as those which could reasonably be discovered through inspection. Similarly, in the prison context, the state engenders reliance by representing through the Eighth Amendment that punishments such as imprisonment will not be cruel and unusual. Thus, prison officials should be liable for objectively serious harms suffered by a prisoner caused by the prison official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care. This standard would remedy many of the failures of the knowledge requirement by forcing prison officials to take preventive measures, not allowing them to passively ignore dangers that exist in the twilight between knowledge and ignorance, and providing a workable test for the liability of high level officials.

## II. The Revival of the Word Punishments in Eighth Amendment Jurisprudence and the Rise of the Knowledge Requirement

The federal courts that pioneered the application of the Eighth Amendment to prison conditions were motivated by the stark reality of inhumane prison conditions to dramatically break with established precedent. Guided only by basic notions of justice, they revived a constitutional amendment, previously left dormant for almost two hundred years, to reform the nation's prisons. While these ideals were sufficient to justify intervention in the more extreme cases, in recent years the courts have struggled with finding principles to define the bounds of their authority. They have done so incrementally, at times \*415 erratically, and in the process have sporadically incorporated theory into case law.

In early cases, judges were only loosely guided by the text of the Eighth Amendment, and instead focused on a broad set of idealistic principles to measure prison conditions. While some judges noted that the concept of punishments was a limiting principle defining the Amendment's reach, that approach was the exception rather than the rule. As federal courts demanded more of prison officials, a concern has been to find a way to distinguish accidental suffering from suffering that can be linked to some culpable conduct. One early solution in the area of prisoner medical care was to require that the prison official act with a state of mind greater than negligence. The Supreme Court referred to this general state of mind as deliberate indifference without defining the term with much detail. A second solution was to focus on the objective magnitude of the harm befalling the prisoner. Such an objective harm test examined whether there were pervasive deprivations in the prison that rose to the level of constitutional deprivation. Beginning in the early 1980s, a third approach to the problem emerged. That was the revival of the word punishments as a limiting principle to the Eighth Amendment. In *Wilson* [FN26] and *Farmer*, [FN27] the Supreme Court ratified the third approach and promulgated the knowledge requirement.

### A. Early Evolution

The application of the Eighth Amendment to prison conditions is a relatively recent phenomenon. As originally conceived by the Framers, the Eighth Amendment only proscribed brutal methods of torture. [FN28] While the Supreme Court took a first step to expanding the Amendment's reach in the early part of the Twentieth Century by applying the Amendment to strike down excessive sentences, [FN29] both federal and state courts utilized a "hands-off" approach to prison \*416 conditions until about thirty years ago. [FN30] The courts refused to intervene in any way to provide rights or remedies for incarcerated individuals. While the common law required prison officials to provide prisoners with reasonable protection from harm, [FN31] there were significant barriers to prisoner initiated tort actions in state court. [FN32] It was largely understood that

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the Eighth Amendment only applied to the sentencing decisions of judges and that prisoners had no enforceable rights.

Courts reversed this inertia and began applying the Eighth Amendment to prison conditions in the 1960s when federal circuit and district courts began hearing claims brought by prisoners. [FN33] This receptiveness was partly motivated by the state of terror and violence that characterized certain prisons. [FN34] By 1974, the Fifth Circuit Court of Appeals was able to declare that "[i]t can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights." [FN35] Significantly, the lower courts revived the Eighth Amendment without any express authorization by the Supreme Court. One commentator, while approving of the end result of this revolution, has asserted that these courts saw the \*417 Amendment as a general jurisdictional provision allowing them to intervene in prison conditions as they pleased. [FN36]

That is only a partly accurate description of what occurred. While these courts were guided by broadly defined principles, their decisions were not totally divorced from the text of the Eighth Amendment. Part of the theoretical backbone for these early efforts was provided by Justice Blackmun, then a Judge for the Eighth Circuit Court of Appeals. In 1968, the Eighth Circuit decided the case of *Jackson v. Bishop*, [FN37] a challenge to the use of straps and wooden handles to whip the bare skin of inmates who had broken prison rules. As the challenged conduct was clearly a formal punishment, it was conduct that fits squarely within the text of the Eighth Amendment.

While acknowledging the reluctance of federal courts to interfere with internal prison affairs, [FN38] Judge Blackmun reviewed the few cases decided by the Supreme Court under the Eighth Amendment and concluded that those decisions recognized the flexibility of the boundaries of the Amendment. [FN39] Citing cases recognizing that the Amendment prohibited torture, [FN40] cases striking down a range of disproportionate sentences, [FN41] and language in cases describing concepts such as the "traditional humanity of modern Anglo-American law" and the prohibition of "unnecessary pain" and the "wanton infliction of pain," Judge Blackmun concluded that the Eighth Amendment polices against "disproportion, both among punishments and between punishment and crime," and is guided by "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." [FN42] The Eighth Circuit thus held that the use of such corporal punishment "runs afoul of the Eighth Amendment" because it "offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . ." [FN43]

\*418 The expansive *Jackson* standard was cited as authority by a number of lower courts in the Eighth Circuit in holding that inhumane prison conditions were unconstitutional. [FN44] While the *Jackson* court did not specifically refer to the word "punishments" in its opinion, it is significant that it was reviewing a punishment that was inflicted in prison. There was no question in *Jackson* that the regulated conduct fell within the four corners of the Eighth Amendment, which was not the case in later decisions involving conduct that could not be characterized as formally inflicted punishment. Courts could interpret the *Jackson* standard in two ways. One is that *Jackson* involved a particular set of facts and should not be applied outside the setting of prison punishments. The second is that *Jackson* represented a broader principle that could be applied to analogous cases. Five years after *Jackson*, the Second Circuit Court of Appeals voiced the first view.

In *Johnson v. Glick*, [FN45] Judge Henry Friendly first gave significance to the word punishments as a limiting principle to the reach of the Eighth Amendment. The issue, in *Johnson*, was whether a pre-trial detainee could recover damages under the Eighth Amendment for a spontaneous attack by a prison guard. While the Second Circuit held that there was a cause of action under the Due Process Clause of the Fourteenth Amendment, [FN46] it also held that the conduct did not violate the Eighth Amendment. The reason was that an isolated attack by a prison guard, while cruel and unusual, is not a punishment. [FN47] Judge Friendly reasoned that the Supreme Court and circuit courts had only applied the Eighth Amendment in cases involving punishment, which must be "deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners." [FN48] Citing *Jackson* as an example of a case involving prison discipline, Judge Friendly noted that cases where the Eighth Amendment has been \*419 applied by courts involved the common "thread" of being such punishments. [FN49]

In 1976, the Supreme Court passed over the *Johnson* theory and its reliance on the word punishments as the defining principle of the Eighth Amendment; instead the Court ratified a broad reading of the *Jackson* standard in the landmark case of *Estelle v. Gamble*. [FN50] The plaintiff, Mr. Gamble, claimed that prison officials had given him inadequate medical treatment for a back injury he had suffered while in prison. [FN51] In evaluating this claim, the Court first briefly noted that the Eighth Amendment was originally intended to prohibit "torture[s]" and "barbar[ous]" methods of punishment. [FN52] The Court explicitly broke with this history and adopted a broad reading of *Jackson* and held that the Eighth Amendment required courts to measure penal standards against "broad and idealistic concepts of dignity, civilized standards, humanity,

and decency . . . ." [FN53] The Eighth Amendment is defined by the "evolving standards of decency that mark the progress of a maturing society." [FN54]

Rather than relying on the word "punishments" as the Second Circuit did in *Johnson*, the *Estelle* Court looked beyond the text of the Amendment to derive a set of general principles. [FN55] *Estelle* goes beyond both *Jackson* and *Johnson*. Not only was the deprivation of adequate medical care not a formal punishment, it was not directly inflicted by a state actor as was the assault that occurred in *Johnson*. *Estelle* is seminal in that it recognizes that the Eighth Amendment is not only a negative prohibition preventing state actors from imposing excessive punishments, but is an affirmative obligation that requires prison officials to intervene and protect inmates from harm caused by third parties. In setting forth such an obligation in the context of medical needs, it provided the foundation for a general obligation to provide for other basic necessities such as reasonable protection from inmate \*420 assaults. A few circuits had established such a right prior to *Estelle*. [FN56] By the late 1980s, nearly all circuits had explicitly established this Eighth Amendment duty to protect. [FN57]

*Estelle* is also significant because it introduces a state of mind requirement into the Eighth Amendment liability inquiry. Prisoners do not have an action for purely accidental deprivations. Instead, the Eighth Amendment only prohibits the "unnecessary and wanton infliction of pain." [FN58] A prison official can only be liable for the inadequate care of a prisoner if he acts with a state of mind called deliberate indifference, a general form of intent more culpable than negligence. In promulgating the deliberate indifference standard in medical care cases, the *Estelle* Court took a step toward defining the particular sort of conduct that is actionable under the Eighth Amendment.

In the years after *Estelle*, litigation over prison conditions continued to grow rapidly. While *Estelle* set forth the deliberate indifference standard for claims of medical deprivation, it was unclear what principle governed non-medical deprivations. The Court seemed to imply that a state of mind requirement was not applicable to general conditions of confinement cases. For example, in *Hutto v. Finney*, [FN59] the Supreme Court affirmed the lower court's determination that conditions in the Arkansas prison were unconstitutional under the Eighth Amendment. [FN60] The Court subjected those conditions of confinement to objective scrutiny under the Eighth Amendment without any finding \*421 that prison officials had a culpable state of mind with respect to those conditions. [FN61]

The circuit standards of liability for non-medical cases differed. In cases involving the failure to protect inmates from harm, many appellate courts focused primarily on the level of inmate assaults and injury in determining liability. For example, the Fourth Circuit Court of Appeals held that negligence by prison officials was enough to sustain Eighth Amendment liability if a "pervasive and unreasonable risk of harm" existed in the prison. [FN62] Some cases went further and premised liability solely on the existence of excessive levels of violence. [FN63] Other circuits conducted a more individualized inquiry, requiring a showing of some form of recklessness or gross negligence on the part of the responsible prison official. [FN64]

Five years after *Estelle*, in *Rhodes v. Chapman*, [FN65] the Supreme Court extended the reach of the Eighth Amendment to general conditions of confinement not traceable to the actions of individual state officials. [FN66] In doing so, it seemed to advocate the imposition of liability solely on the basis of the severity of the objective harm suffered by the prisoner. *Rhodes* involved a challenge to the practice of double-celling inmates in Ohio state prisons. [FN67] While the Court ultimately rejected the claim that double-celling was inherently prohibited by the Eighth Amendment, it undertook a short analysis of the Eighth Amendment's application to general conditions of confinement. [FN68] Drawing on the same basic principle of "wanton and unnecessary infliction of pain," \*422 outlined in *Estelle*, the Court concluded that prison conditions alone "may deprive inmates of the minimal civilized measure of life's necessities." [FN69] It fleshed out the *Estelle* standard and stated that it embodied a basic test that required prison conditions to meet a contemporary standard of decency. In *Rhodes*, the Supreme Court seemed to move towards an objective harm approach to defining liability under the Eighth Amendment.

## B. Emergence of the Knowledge Requirement

### 1. Early Foundations

Judge Friendly's theory of the Eighth Amendment in *Johnson* lay dormant for more than a decade until it was revived by Judge Posner, in *Duckworth v. Franzen*. [FN70] In *Duckworth*, prisoners were injured when the bus in which they were chained caught fire. [FN71] A jury found a number of high level officials liable, including the head of the Illinois prison system, the warden of the prison, and the director of security for the prisoners, for violating the prisoners' Eighth Amendment rights and the Seventh Circuit Court of Appeals reversed. [FN72] As characterized by the Seventh Circuit, the harm was accidental and at most the defendants could only be charged with some form of negligence. [FN73] Rather than applying the

Supreme Court's analysis from *Estelle*, that the Eighth Amendment only applies to the "unnecessary and wanton" infliction of pain, Judge Posner analyzed whether the conduct fit within the text of the Eighth Amendment. While not citing *Johnson*, Posner similarly concluded that "[t]he infliction of punishment is a deliberate act intended to chastise or deter." [FN74] For Judge Posner, the essence of a punishment is that it is a "deliberate" act. [FN75] Under the clear meaning of punishment, negligence is not actionable, and only conduct with sufficient elements of deliberateness are covered by the Eighth \*423 Amendment. If the infliction of the suffering is not intentional, it must be at least criminally reckless. [FN76]

Shortly after the Seventh Circuit decided *Duckworth*, the Supreme Court implicitly approved parts of its analysis in *Whitley v. Albers*. [FN77] *Whitley* involved an incident where a prisoner was shot by a guard who was trying to bring a riot under control. [FN78] The Ninth Circuit Court of Appeals held that a deliberate indifference standard should be applied to determine whether the guard was liable for violating the prisoner's Eighth Amendment rights. [FN79] The Supreme Court reversed, holding that when prison guards respond to a riot, they only violate the Eighth Amendment when they apply force "maliciously and sadistically for the purpose of causing harm." [FN80]

*Whitley* is significant for three reasons. First, it set forth an individual state of mind requirement for a case arising outside of the medical context. Second, it recognized that Eighth Amendment state of mind requirements could differ depending on different situations. [FN81] Finally, it introduced the possibility that deliberateness could be defined in a narrower way than the Court did in *Estelle*. The motivation for doing so was to distinguish accidental harms that are not covered by the Eighth Amendment from deliberately inflicted pain, which is actionable. In discussing the factors that can be used to establish deliberateness, the Court referred to the *Duckworth* definition of deliberate indifference as criminal recklessness. [FN82] In *Whitley*, the Court progressed further toward a knowledge requirement.

\*424 2. The Maturation of the Knowledge Requirement: *Wilson v. Seiter* and *Farmer v. Brennan*

a. *Wilson v. Seiter* [FN83]

The knowledge requirement became entrenched outside of the context of medical harms and prison riots in the 1991 case of *Wilson v. Seiter*. [FN84] In *Wilson*, the Court rejected the objective harm theory of the Eighth Amendment and expanded *Estelle*'s deliberate indifference standard to all conditions of confinement cases. *Wilson* was an Eighth Amendment challenge to conditions in a state prison in Ohio. [FN85] In his complaint, Pearly L. Wilson alleged that he was confined under an assortment of unconstitutional conditions including "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." [FN86] The Court used the opportunity to re-evaluate its Eighth Amendment prison conditions jurisprudence.

Reviewing its prior Eighth Amendment prison cases, the Court held that they "mandate[d] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." [FN87] The Court's intellectual foundation for this conclusion was the theory of the Eighth Amendment and punishments analysis in *Duckworth* and *Johnson* as shown by the prominent citation to those cases. [FN88] The Court specifically recounted the discussion in *Duckworth* defining punishments as deliberate acts intended to chastise and deter and the early assertion in *Johnson* that the unifying thread in Eighth Amendment cases was that they all involved punishments. In *Wilson*, the Court first applied the word punishments to define the sort of conduct that is actionable under the Eighth Amendment. [FN89]

The Court saw no need to distinguish between conditions of confinement such as inadequate medical care and other types of \*425 conditions such as a lack of reasonable protection from assault. [FN90] It thus concluded that the *Estelle* standard should determine the liability of prison officials for all of those conditions. *Wilson* holds that a defendant only violates the Eighth Amendment if he shows "deliberate indifference" toward any inhumane condition of confinement. [FN91] In requiring plaintiffs to prove a subjective element for all conditions of confinement cases, *Wilson* was the first version of a knowledge requirement.

In *Wilson*, the Court rejected a number of formulations of the objective harm theory as unworkable. These included a distinction between "one-time" conditions and "systemic" conditions, where a state of mind requirement would only apply to the former. [FN92] It also rejected an "overall conditions" test that allowed liability to attach if the totality of conditions "deprive prisoners of the minimal civilized measure of life's necessities." [FN93]

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Justice White, in *Wilson*, protested the majority's promulgation of a uniform subjective requirement to all conditions of confinement cases. [FN94] They stated that "conditions are themselves part of the punishment," [FN95] and that the objective severity of a prison's overall conditions alone should be actionable. [FN96] The dissent argued that a state of mind requirement should be limited to cases involving isolated acts or omissions by individual prison officials and that an intent requirement was unworkable in cases involving systemic deprivations. [FN97]

While the dissent in *Wilson* made a powerful point, it did not propose a workable standard of Eighth Amendment liability. As this Article explained earlier, the objective harm approach is unworkable. Moreover, the problem with the concurring opinion's approach is that it offers no way to distinguish between systemic and isolated deprivations. \*426 To a great extent, many of the harms suffered by individuals in prison can always be linked to some systemic flaw. Thus, if an objective test applies to cases where the harm is allegedly systemic, individuals will plead systemic causes to avoid the subjective requirement present in cases of isolated deprivations. The dissent's test in effect would essentially eviscerate any subjective standard-- an unworkable result. Its viability as a counter theory to the majority's analysis was fleeting.

#### b. *Farmer v. Brennan* [FN98]

While offering a uniform standard to govern the liability of prison officials, the *Wilson* deliberate indifference requirement allowed lower courts a great deal of flexibility in defining the conduct that is actionable under the Eighth Amendment. After all, it was just an extension of the *Estelle* test, which only requires a state of mind greater than negligence for liability. Circuit courts defined deliberate indifference in different ways, some more lenient than others. [FN99] Some circuits offered broad interpretations, equating deliberate indifference with a state of mind akin to negligence or gross negligence. [FN100] Others defined deliberate indifference narrowly, holding that the term requires a finding that the official had actual knowledge of a substantial risk of harm to the inmate. [FN101]

In fact, just two years after *Wilson*, in *Helling v. McKinney*, [FN102] the Supreme Court seemed to be leaning towards a lenient standard of deliberate indifference. It held that prison officials can exhibit deliberate indifference by not responding to harms with possible future effects on inmate health such as second-hand tobacco smoke. [FN103] While the prison official defendants denied that they knew with certainty of the dangers of second-hand smoke, the Court held that they could still be liable for failing to take measures to reduce its harms. [FN104] In doing so, the \*427 Court seemed to hold that actual knowledge was not a prerequisite for a prison official's liability under the Eighth Amendment for deliberate indifference.

*Farmer* [FN105] resolved the ambiguity over the meaning of deliberate indifference and cemented a requirement of knowledge to Eighth Amendment liability. The facts of *Farmer* are a classic example of a duty to protect case. *Dee Farmer* was a transsexual who was serving time for a non-violent offense. [FN106] He had strikingly feminine features and had been segregated from other prisoners in a federal prison for safety considerations. [FN107] Despite these facts, prison officials later assigned him to the general population of a maximum-security prison. [FN108] *Farmer* was beaten and raped by his cellmate within two weeks. [FN109] *Farmer* brought a *Bivens* action against a number of prison officials and the district court entered judgment in favor of the officials. The Seventh Circuit affirmed.

The *Farmer* opinion starts auspiciously by confirming that prison officials have an affirmative duty to protect inmates and provide them with humane conditions of confinement. [FN110] The Court then qualified this statement by warning that not "every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials responsible for the victim's safety." [FN111] As it previously explained in *Wilson*, the Court noted that the Eighth Amendment only protects inmates from deprivations that meet an objective threshold of seriousness and are caused by the subjective deliberate indifference of prison officials. [FN112]

The Court then noted that the circuits had defined deliberate indifference differently, and then proceeded to resolve the circuit split. [FN113] The parties to the case framed the issue narrowly as a choice between \*428 criminal and civil recklessness definitions of deliberate indifference. [FN114] The Court described the civil law standard of recklessness as a failure to act despite "an unjustifiably high risk of harm that is either known or so obvious that it should be known." [FN115] In contrast, under a criminal law standard, the prison official is only liable if he "disregards a risk of harm of which he is aware." [FN116] Both standards place emphasis on the issue of knowledge, with the criminal recklessness standard offering a more stringent conception of the requisite knowledge for liability.

The Court chose the more restrictive criminal recklessness standard for reasons similar to those given by Judge Posner in *Duckworth* a decade earlier. It reasoned that there is a clear distinction between prison conditions and punishments.

[FN117] While the conditions in a prison may be cruel and unusual because inmates are inadequately protected from harm, unless a prison official knows of a substantial risk of danger to an inmate, the conduct does not qualify as an Eighth Amendment punishment. In the Farmer Court's words, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." [FN118] Under this standard, knowledge is an absolute requirement for Eighth Amendment liability. In order to be liable for an inmate assault, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." [FN119] While a fact finder can conclude that an official knew of a risk from the fact that it was "obvious," the prison officials may still avoid liability by proving that they "were unaware even of an obvious risk to inmate health or safety." [FN120] No matter how egregious or preventable an assault is, a prison official cannot be held responsible unless the inmate proves the official knew the inmate was at risk of being assaulted.

With Farmer, the ability of courts to intervene to protect the rights of prisoners has been limited. The courts who initiated such intervention acted without the full development of a comprehensive \*429 theory to explain their actions. The idea of deliberate indifference in Estelle and the reliance on the word punishments by Judges Friendly and Posner, in Johnson and Duckworth, were the foundations of the knowledge requirement revived by the Supreme Court in Wilson and Farmer. The willingness to intervene in the face of inhumane prison conditions has been supplanted by a universal theory of liability that defines the scope of the Eighth Amendment.

### III. Re-Conceptualizing Eighth Amendment Punishments

Shifting from the history of the knowledge requirement, this Part briefly summarizes and then criticizes its theoretical foundations. Subsection A of this Part describes the theoretical foundation of the knowledge requirement, the "analytic conception" of punishments. The analytic conception is rooted in the formal definitions of punishment presented in the Johnson and Duckworth opinions. Conceiving of punishments as discrete, deliberate, authorized, state actions with a punitive purpose leads the Court to conclude that it is the judge's sentencing decision that is the paradigmatic example of punishment.

In Wilson and Farmer, the Court applies this act-centered definition to the individual conduct of prison officials to determine whether such conduct is actionable under the Eighth Amendment. Because the action or inaction of prison officials in the prison setting rarely fit completely within the formal definition of punishments, the Court abstracts a number of core characteristics, most notably knowledge, from the definition of punishment and shapes it into a bright-line test for liability.

Subsection B critiques the analytic conception of punishments that underlies the knowledge requirement. The Court's application of the formal definition of punishment is problematic in that it implies that punishments are an analytic concept, not subject to change or evolution. This Subsection offers an alternative contextual approach to analyzing punishments such as incarceration. It is not the judge's verbal act of sentencing alone that inflicts punishment, but rather the acts of the administrators afterwards that determine the nature of the infliction. It is thus a mistake to evaluate the conduct of those officials in isolation to determine whether they meet a formal definition of punishment. Instead, those actions and inactions should be seen as a continuing determinant of the character of the continuous infliction of punishment that characterizes the modern prison. The courts should not limit the act \*430 of punishments to the sentencing decisions of judges because it is a combination of action and inaction by the prison official who administer the prison sentence that make it humane or inhumane.

#### A. The Analytic Conception of Punishments

The analytic conception of punishment has two components. First, punishment is a deliberate act. As Judge Posner explained in Duckworth: "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century." [FN121] And as Judge Friendly described in Johnson, punishment must be "deliberately administered for a penal or disciplinary purpose . . . ." [FN122] While not explicitly mentioned in Wilson, there is an implicit assumption that punishments are administered by the state. [FN123] These characteristics reflect the traditional conception of the formal definition of punishments. [FN124]

Second, the paradigmatic act of punishment in the criminal justice system is the sentencing of a criminal by a judge. Under the analytic conception, punishment is a deliberate act with the motivation to chastise or deter for a penal or disciplinary purpose. The act that best fits these characteristics is the act of sentencing by a judge. The Wilson Court explicitly comes to this conclusion when it explains:

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The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment. If the pain inflicted is not formally meted out as punishment by the statute or \*431 the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify. [FN125] A stronger version of this idea is advocated by Justice Thomas who asserts that "judges or juries--but not jailers--impose 'punishment.'" [FN126]

The problem with the analytic conception of punishments is that the conduct of prison officials who fail to protect inmates from serious harm does not fit neatly within the four corners of a definition of punishment as a deliberate act imposed for penal reasons. While the Supreme Court, in *Farmer*, firmly established that prison officials have a duty to protect prisoners under the Eighth Amendment, it is unclear how the inaction of a prison official who fails to fulfill that duty is a punishment. Viewed as an isolated event separate from the context of the infliction of punishment, the fact that a prison official fails to intervene despite knowing that an inmate is at a substantial risk of serious harm does not seem to qualify as a punishment under the analytic conception.

The difficulty of conceptualizing inaction as punishment is multi-faceted. The failure to protect an inmate from serious harm is usually not a deliberate act imposed in retribution for a specific act of wrongdoing. Thus, a strict application of the formal definition of punishments set forth in *Johnson and Duckworth* would exclude the failure to protect inmates from serious harm from Eighth Amendment scrutiny. Moreover, there is a disjunction between the harm suffered and the inaction of the prison official. While the judge directly imposes the sentence on an individual, the actual harm in a failure to protect case is inflicted by another inmate. Thus, it is difficult to directly attribute the harm to a particular prison official acting at a particular point in time. The inactions of a number of prison officials at all levels of the hierarchy may have played some role in the end result--the infliction of pain on one prisoner by another [FN127]

\*432 There is clearly a tension in relying on an analytic conception of punishments to define the boundaries of the Eighth Amendment and requiring that prison officials protect inmates from harm. Taken to its logical extreme, the use of the word punishments as a limiting principle could lead to the result advocated by Justice Thomas--the overruling of thirty years of Eighth Amendment jurisprudence by limiting its reach to excessive sentences and returning to the "hands-off" era where federal judges did not hear prisoner claims. Instead, the Court navigated a middle ground. Rather than requiring conduct to meet the formal definition of punishment to be actionable, it identified knowledge as the essential element of punishment that must exist for a prison official to be liable under the Eighth Amendment.

While the precise source of knowledge as the defining characteristic of punishment and Eighth Amendment liability is murky, one can trace its general origins. In *Wilson*, the Court viewed the word punishments as requiring a "mental element" for Eighth Amendment liability. [FN128] This logically follows from the definition of punishment as a deliberate act. The phrase "deliberate act" indicates that a certain state of mind is required for an act to be a punishment. While this is uncontroversial, it is a more radical step to conclude that an act must be motivated by a particular state of mind such as knowledge of a substantial risk of serious harm to be considered a punishment.

The *Farmer* Court's identification of deliberate indifference with criminal recklessness can be linked to Judge Posner's analysis in *Duckworth*. But *Duckworth* does not present a clear analytic path from the definition of punishment to the argument that knowledge is an integral part of an Eighth Amendment punishment. Judge Posner simply asserts: "If the word 'punishment' in cases of prisoner mistreatment is to retain a link to normal usage, the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense." [FN129] The *Farmer* Court's analysis is similarly lacking in reason, simply stating that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, \*433 cannot under our cases be condemned as the infliction of punishment." [FN130] While the *Farmer* Court purports to draw the authority for its interpretation from the text of the Eighth Amendment, in reality, only one element of the word punishment provides the foundation for the liability standard that the *Farmer* Court eventually adopted. That element is knowledge and the Court's promulgation of the knowledge requirement was a way of retaining a link between an Eighth Amendment liability standard and the word punishments.

The end result of this effort is not a standard compelled by the text of the Amendment, but a judicially created standard justified by a particular conception of punishments. The Supreme Court acknowledges as much when it states, "'deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute . . . ." [FN131]

B. Reconceptualizing Eighth Amendment Punishments: The Contextual Approach to Eighth Amendment Punishments

## 1. The Evolving Nature of Punishments

The Supreme Court's utilization of the analytic conception of punishments in its Eighth Amendment analysis assumes that punishments can be meaningfully described in a single, abstract phrase. But there is something lacking in the terse phrase a "deliberate act intended to chastise or deter." [FN132] While Judge Posner uses the traditional roots of this definition to bolster its credibility as binding authority, [FN133] a weakness of such an axiomatic approach is that the nature of punishments has evolved significantly in the last century. Instead of relying on an abstract, analytic conception of punishments, courts should adopt a more contextual approach that recognizes the particular ways that different punishments actually operate. The contextual approach to punishments evaluates the nature of punishments in their particular form. The advantage of this approach is that it is more sensitive to the different ways in which punishments are inflicted.

**\*434** The analytic conception of punishments best describes certain types of pre-modern forms of punishment as described by Michel Foucault in *Discipline and Punish*. [FN134] Earlier punishments, most notably torture and public execution, were more tightly linked to the judicial process and the state. For example, the judicial system's use of torture was not only a method of punishment, but a way of ascertaining the truth by forcing a confession. [FN135] The idea that it is judges who inflict punishment had special weight in such systems because judges needed to directly utilize punishments to carry out their own duties, as they had no other methods to investigate crimes. [FN136]

The close link between central state authority and punishment was also demonstrated by the sovereign's use of public execution. Such executions were highly ceremonial events occurring in the public square for all to see. They were a "ritual of violence" where "the criminal was physically attacked, beaten down, dismembered, in a symbolic display of the sovereign's power." [FN137] The execution's specific purpose was to reassert the sovereign's power by inflicting overwhelming harm on those who broke the law. Because the laws emanate from the sovereign, breaking the law challenges the sovereign's power to rule, and the public execution is the sovereign's response to that threat. [FN138] This ritual was the ultimate exercise of a centralized state's power and served as "a ceremonial by which a momentarily injured sovereignty is reconstituted." [FN139]

A prison term is a very different punishment than judicial torture or a public execution, and the formal definition of punishment does not capture the complex, changing nature of modern punishments. The analytic conception's primary identification of punishments with the judge's imposition of a sentence ignores the reality of how punishments are actually inflicted. The idea that punishments such as imprisonment are judge-inflicted should be put to rest as common sense shows how judges are separated from the actual infliction of punishment.

**\*435** In *Violence and the Word*, Robert Cover describes the interaction between the judge's act of legal interpretation and the force that backs that interpretation. [FN140] Cover explains that legal interpretation is distinguishable from the interpretation of other texts because the state will enforce a judge's legal interpretation with potent force. While Cover's theory emphasizes the power of the judge's interpretative act, it also highlights its vulnerability. The judge's act of imposing a prison sentence is meaningless without the cooperation of a large number of other actors. [FN141] The act of sentencing a person to prison is a weak abstraction until multi-layered bureaucracies carry out and actually inflict the punishment. [FN142] It is inaccurate to say that punishment starts and ends with the imposition of a sentence; in fact, it is only the beginning.

This separation between the authority to impose the sentence and the actual infliction of the prison term means that the judge's power to control the actual infliction of punishment is limited. In contrast to the public execution and judicial torture models of punishment, where the sovereign had substantial control over how the punishment was carried out, it is the bureaucrats who now determine how the punishment is inflicted. As Foucault has observed, the shift to modern forms of punishment has de-centralized the power of inflicting punishment and "create[d] a proliferation of the authorities of judicial decision-making and extend[ed] its power of decision well beyond the sentence." [FN143] This dispersal of the power of punishment is hidden, maybe not deliberately, [FN144] but it should not be ignored. In reality, one could argue that judges do no more than "impose" punishments. It is the prison official who "inflicts" punishment by physically depriving inmates of their liberty and separating them from the rest of society. At the very least, it is problematic to say that a punishment is defined within the bounds of the act of sentencing.

**\*436** The analytic conception ignores all of this and attempts to evaluate the conduct of prison officials as if it occurs in a vacuum instead of as an integral part of the way the punishment of imprisonment is inflicted. Rather than evaluating the actions of prison officials apart from the broader context of the punishment they are inflicting, they should be seen as determinative of the nature of the punishment's infliction. This is especially true of a punishment such as imprisonment that is continuously inflicted. Instead of a one day affair, such as the public execution that works to convey a signal to the public,

the prison attempts to transform the individual--from a felon to a law-abiding citizen. [FN145] Such a punishment seeks to "supervise the individual, to neutralize his dangerous state of mind, to alter his criminal tendencies, and to continue even when this change has been achieved." [FN146]

The acts of prison officials are thus the key to an extended process of punishment where inmates are deliberately deprived of basic freedoms and comforts. Erving Goffman describes the prison as a "total institution." [FN147] A total institution is characterized by an attempt to reshape the identity of the incarcerated by separating him from the symbols and possessions that define him in the outer world. The inmate cedes all control over his life to a highly regimented social system. [FN148] There is no relationship in prison "that is not supervised by authority or arranged according to hierarchy." [FN149] Prison officials are integrated into this system of control. They have almost total bureaucratic power over their charges, and Foucault describes, "appear to be the possessors of almost infinite power within their realm." [FN150]

It is prison officials, not judges, who inflict punishment and determine its character. The contextual approach reveals how the actions of these officials cannot be separated from the nature of punishments such as imprisonment.

#### \*437 2. The Contextual Approach and the Eighth Amendment Duty to Protect

An account of punishments that views the acts of prison officials as inextricably intertwined with the infliction of punishment better explains why the Eighth Amendment requires prison officials to provide inmates with reasonable protection from serious harm. While the Supreme Court has firmly recognized that this duty exists, there is a tension between earlier justifications for the duty and the recent revival of the word punishments in Eighth Amendment cases. Earlier cases derive the duty from a general sense of obligation arising from the state's affirmative act of confining an individual. While the Farmer court re-affirms the duty, if one truly believes that it is only punishments that are regulated by the Eighth Amendment, it is unclear how a prison official's failure to protect an inmate from harm is a punishment. This tension is more apparent than real. It is rooted in the Court's particular conception of punishments and can be resolved when one recognizes that punishments such as imprisonment are not inflicted by judges but by prison officials. The duty to protect regulates this infliction so it does not transgress basic levels of humaneness.

It is now a well-established legal principle that state officials do not have an affirmative duty to rescue those in need. [FN151] This standard follows from a particular conception of the Constitution as a charter of negative liberties that only protects citizens from affirmative actions by government. [FN152] Also implicit in the standard is the state action doctrine. The Constitution does not regulate harm that is directly inflicted by private parties. Thus, a government actor cannot be liable for failing to prevent purely private harms. [FN153] The Supreme Court ratified this view in *DeShaney v. Winnebago County Dept of Social Services*. [FN154] In *DeShaney*, the Court held that the state cannot be held liable under the Due Process Clause of the Fourteenth Amendment for failing to prevent \*438 the death of a child by an abusive parent. The Court reasoned that the "Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." [FN155] It follows that the Clause does not require the state to protect individuals from harm or deprivation of rights by private actors. [FN156]

While *DeShaney* and the view of a negative Constitution has been heavily criticized as ignoring the interaction between state action and certain private harms, [FN157] even *DeShaney* concedes that the state has an affirmative duty to protect individuals from each other when it confines such individuals involuntarily. [FN158] Its justification for this duty is a general sense of substantive right. In the *DeShaney* Court's words,

When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his . . . reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [FN159]

This basic argument, that an affirmative duty to protect arises from the fact that prisoners are involuntarily confined and totally dependent on state officials for protection, has been widely accepted in the Eighth Amendment context. [FN160] This Eighth Amendment duty has not been \*439 limited to the prison context but is triggered by any act of involuntary confinement by the state. [FN161]

The general rationale for this duty is not difficult to see. Unlike the facts in *DeShaney* where the state arguably did not create the danger to the child, [FN162] the state affirmatively creates the pre-conditions to violence pervading many prisons. [FN163] Prisons house individuals with anti-social or violent dispositions. [FN164] Different institutions classify inmates by crime and danger level. [FN165] The grouping of such individuals in one institution predictably creates a violent

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environment. [FN166] Moreover, by stripping prisoners of their sense of self, the state creates a culture in which status is determined by physical force. [FN167] In society, an inmate may have functioned within a traditional role such as a father, husband, leader, or wage-earner. In prison, an inmate is primarily a convicted criminal. Deprived of other social vehicles for establishing social dominance, inmates resort to basic means such as force to re-establish control over \*440 their lives as well as their masculinity. [FN168] While some argue that prison should be a painful experience to achieve goals of deterrence and retribution, [FN169] one cannot deny that the state plays some part in causing prison violence.

While an Eighth Amendment duty to protect makes sense when interpreting the Amendment through broad substantive norms, its foundation is shakier when one is limited to the text of the Amendment. The Court clearly signaled in *Wilson* and *Farmer* that it was moving towards a textual mode of interpretation in the Eighth Amendment context. As discussed earlier, this raises problems for the duty to protect as it is unclear how a prison official's failure to intervene is in itself a punishment. The *Farmer* Court's solution to this problem was to strike a compromise by essentially holding that the duty is only triggered when the prison official has knowledge of a substantial risk of serious harm. In doing so, the Court preserved some notion of a duty to protect while limiting its reach to conduct that can be analogized to its conception of punishments. The problem with this approach is two-fold. First, it never adequately resolves whether there is a textual basis for the Eighth Amendment duty to protect. Second, such a compromise is necessarily influenced by extra-textual considerations, diluting the authority of the Court's interpretation.

The solution to this dilemma is a different conception of punishments. The tension between text and duty to protect arises unnecessarily through the narrow analytic conception of punishments. Because the analytic conception separates the acts of prison officials from the infliction of punishment, it is difficult to see how a failure to protect an inmate from serious harm is an infliction of punishment. Once one recognizes that it is prison officials rather than judges who actually inflict punishment, it becomes clear that the actions of such officials determine the nature of the infliction. The contextual approach emphasizes the importance of the duty to protect. A prison official who performs his basic duty to provide reasonable safety to inmates will ensure that the punishment of imprisonment is inflicted in a way that comports with humane standards. When prison officials deliberately neglect this basic duty, then the infliction of the punishment of imprisonment devolves into a cruel and unusual state.

\*441 The Eighth Amendment duty to protect is not only justified by an indeterminate notion that the affirmative act of confinement gives rise to affirmative duties. It is instead justified as a minimal standard that regulates the infliction of prison as a punishment so it meets basic standards of human decency. In contrast to the analytic conception, this view recognizes how the infliction of punishment can be cruel and unusual not only through discrete and knowing actions, but through inaction. The Eighth Amendment duty to protect thus follows from a more contextual understanding of the meaning of punishments.

#### IV. The Passivity of the Knowledge Requirement

If the only problem with the knowledge requirement was that it rests on shaky theoretical foundations, the case for change would not be compelling. Constructing liability standards is a difficult task, especially in the context of constitutional law where a broadly worded text must be translated into specific tort principles to govern the behavior of individuals. But the knowledge requirement has real world effects on prisoners and their safety.

The knowledge requirement is essentially a recklessness standard taken from the criminal law. [FN170] The problem with the use of such a standard is its insensitivity to the underlying Eighth Amendment duty to provide reasonable protection to prisoners. By only requiring prison officials to act when they have knowledge of a substantial risk of serious harm, [FN171] the knowledge requirement emasculates the duty to protect. As the contextual approach argues, the focus of the Eighth Amendment inquiry should be on whether prison officials have met this basic duty, and the knowledge requirement undermines this effort by diluting the meaning of the duty.

Subsection A argues that the knowledge requirement undermines the duty to protect by only requiring prison officials to react when a risk has become substantial. Knowing inaction is not the only source of inhumane prison conditions. It is apathy and an unwillingness to search out and prevent sources of harm that cause injury to prisoners. Active prevention measures before risks become substantial are a critical aspect of a reasonably safe prison environment and should be required by the Eighth Amendment. Subsection B argues that the knowledge requirement's exclusive fixation on the issue of a prison official's \*442 knowledge is problematic. Some of the most serious problems in the prison setting are entrenched in an area that lies between knowledge and good faith ignorance, and a knowledge requirement removes them from the ambit of the Eighth Amendment.

Knowledge is an inflexible prerequisite to liability that is not necessarily co-extensive with culpability and often shields from liability higher level prison officials who are most likely to have the power to effectuate change.

These points are concretely illustrated in the problem of inmate sexual assault highlighted in the seminal case of *Farmer v. Brennan*. [FN172] As recounted earlier in this Article, Dee Farmer was an effeminate, transsexual inmate who was placed in the general population of a maximum security prison. He was raped and beaten by a cellmate just two weeks later. While it is a problem that is not completely understood, [FN173] the prevalence of inmate rape in prisons and jails has \*443 been well-documented. [FN174] Inmate rape is a problem that can only be effectively addressed through active prevention measures because it is difficult to prove there is a substantial risk of inmate rape in a prison. Inmate rape is surrounded by ugly stereotypes and misconceptions that make it easy for prison officials to turn a blind eye to its reality.

#### A. The Passivity of the Substantial Risk of Serious Harm Requirement

The Eighth Amendment knowledge requirement sanctions passiveness by prison officials by only requiring action when the prison official knows of a substantial risk of serious harm. The requirement that there be a substantial risk before prison officials are obligated to act under the Eighth Amendment is problematic in two ways. First, it is difficult to know when a risk is substantial and even more difficult for plaintiffs to prove the substantiality of a risk. Second, the standard requires action at too late a stage. Many types of harm in the prison setting can only be addressed if actively prevented.

##### 1. Difficulty of proving the substantiality of a risk

The *Farmer* Court gives little guidance as to what it means when it refers to a substantial risk of harm. [FN175] As a result, it is unclear when the Eighth Amendment requires prison officials to act. One can conceive of risks in the prison setting in at least two ways. There are general risks and there are specific risks. [FN176] Every prison official knows that there is a general risk that inmates will be assaulted by other inmates in a maximum security prison. Only a few, if any, might know that there is \*444 a specific risk that a particular inmate is in substantial danger of being attacked. The facts of *Farmer* illustrate this distinction. A prison official may have known that there is a general risk that inmates in a maximum security prison will rape one another. Nonetheless, only a few prison officials may have had the specific knowledge that an effeminate transsexual was faced with a dangerous situation. Courts tend to require more specific proof than general allegations that prisons are dangerous before imposing liability under the knowledge requirement. [FN177] But general risks can become specific risks quite suddenly and under the knowledge requirement, prison officials do not have an obligation to do anything until that risk passes some undefined threshold.

It is often difficult to prove that a risk is substantial even when it is. This is especially true in cases such as *Farmer* involving inmate rape. In many cases, it is almost impossible for a victim of such an assault to prove there was a substantial risk of sexual assault in his prison. Sexual assaults in prison are misunderstood and often unreported, making accurate documentation difficult. [FN178] While there is a wide range of coercive sexual behavior in prison, only incidents involving visible force tend to be discovered and documented. Drawing the line between rape and consensual sex is often difficult in the prison setting. [FN179] At one end of the spectrum are situations where the assaultor physically forces the assaulted to submit through violence. At the other end of the spectrum is non-coercive sex between totally equal partners. In between these two end-points lie a vast range of relationships with varying degrees of violence and coercion. Inmates often coerce other inmates \*445 into sexual relations. [FN180] Many inmates will trade sex for protection or submit because they learn that resistance will only make things worse. [FN181] Many courts do not distinguish between these different forms of sexual assault and instead indiscriminately classify inmate rape as a subset of physical assaults. [FN182] Many federal and state sources operate similarly and do not document inmate rape cases separately from general incidents of violence. [FN183] Furthermore, officials may not record these incidents even when they discover them because they are too quick to label sexual assault as "consensual." [FN184] Predictably, this narrow focus on the most violent incidents of rape will underestimate the frequency of the wide range of sexual assault that occurs in prison. [FN185]

Apart from the tendency to only record the most violent incidents of sexual assault, inmate rape generally tends to be underreported. Rape is a stigmatic experience that is unreported by the victim for a number \*446 of reasons, further hindering accurate documentation. Victims feel ashamed and have doubts about their sexual orientation after being raped. [FN186] A victim may fear that revealing he was raped will designate him as a homosexual by other prisoners [FN187] and make him a target for other sexual predators. [FN188] The inmate code of silence dictates that "snitches" who report incidents to prison officials are shunned and threatened with violence. [FN189] The stigma of rape is so high that many victims do not seek any medical treatment unless they have physical injuries so severe that they cannot hide the fact that they were assaulted.

[FN190] One study estimates that more than half of the inmate rape victims do not tell anyone about their victimization. [FN191]

The difficulty of establishing the substantiality of a risk makes it difficult for raped prisoners to prove that prison officials have violated their Eighth Amendment duty to protect. The pain they suffer is attributed to the inherent nature of the prison setting and the individual is left without a remedy.

## 2. The reactive nature of the substantial risk standard

The substantial risk standard narrows the duty to protect because it only requires action when a problem has evolved to a late stage. By the time a risk becomes clearly substantial, it may be too late to do anything about the assault. Prison officials will then be excused because even reasonable efforts would not have stopped the assault. By only requiring action in the face of a substantial risk, the Eighth Amendment duty to protect becomes a requirement of reactionary rather than pro-active measures.

**\*447** A duty to protect that is to have a meaningful impact in the prison setting must encompass preventive actions. Prison officials cannot provide inmates with reasonable safety unless they take basic preventive steps to reduce the risk of inmate assaults. [FN192] Some of those steps must be taken before concrete knowledge of a substantial risk of serious harm develops. [FN193] As argued above, minor risks can quickly develop into major ones. If prison officials wait until such a risk develops, it may be too late to avert acts of violence. The knowledge requirement only requires prison officials to react to problems, not preempt them. While prison officials cannot be expected to preempt every possible risk, certain basic measures are essential to ensuring that inmates are reasonably protected. [FN194] Under the knowledge requirement, such preventive measures are not constitutionally required until prison officials know of a substantial risk of serious harm. [FN195] While prison officials cannot respond to every possible risk, they should be obligated to take measures to prevent violence and other harm to inmates.

**\*448** The prevalence of the general risk of assault in prison makes it easy for some judges to conclude that violence is inevitable in the prison setting, making the threshold quite high for a risk to be substantial. A statement by Judge Easterbrook illustrates this principle:

Prisoners are dangerous (that's why many are confined in the first place). Guards have no control over the temperament of the inmates they supervise, the design of the prisons, the placement of the prisoners, and the ratio of staff to inmates. Some level of brutality and sexual aggression among them is inevitable no matter what the guards do. [FN196] The problem with this assertion is that it establishes a paradigm where it seems that prison officials have no ability to prevent assaults. While general risks are always in the background of the prison setting and so will not in themselves be considered "substantial," [FN197] one must not forget that identifiable and preventable specific risks also exist. While Dee Farmer was raped partly because he was a transsexual living in a prison population, he was also raped because he was placed in a maximum security prison and celled with a particularly dangerous inmate. The general risk caused by the existence of an effeminate individual in the prison setting may be unpreventable, but the specific risk of placing him in a high risk situation was avoidable.

The example of inmate rape illustrates the importance of prevention in the prison setting. The prevalence of sexual assault in prison is widely acknowledged. Much of the public believes it is a significant problem. [FN198] The Supreme Court and some appellate courts have acknowledged the occurrence of inmate rape. [FN199] Some courts have **\*449** reduced sentences for individuals who are particularly vulnerable to sexual assault in prison, [FN200] and in one publicized case, prosecutors used the threat of rape in prison as leverage when negotiating with indicted individuals. [FN201]

Despite these facts, prison officials have done little to prevent and deal with the problem of inmate rape, often generally denying that the problem truly exists. [FN202] Some prison officials tolerate it and see it as a problem that inmates should deal with on their own. [FN203] Like other forms of violence, inmate rape is encouraged by the failure to promulgate certain basic procedures. [FN204]

Most prisons do not have rape trauma treatment programs to treat inmate rape victims. [FN205] Inmate rape has become accepted as an inevitable part of prison culture. On one hand, there is little trouble acknowledging that prison rape is a problem. On the other hand, misconceptions and inertia mean that prisoners will continue to be assaulted without remedy.

### **\*450 B. Hiding Behind Knowledge**

#### 1. Denying Knowledge

(Cite as: 20 QLR 407)

The Supreme Court's use of knowledge as an absolute prerequisite to Eighth Amendment liability unduly narrows the Amendment's reach. Under the knowledge requirement, even if a defendant knows of the underlying facts of a specific risk, he can avoid liability by arguing that he did not subjectively appreciate the magnitude of the danger. [FN206] This standard poses a high hurdle for wronged prisoners who must prove knowledge to its greatest degree. Direct evidence of an individual's knowledge is almost never available, therefore knowledge can only be proven through circumstantial evidence, which cannot absolutely prove an individual's state of mind. [FN207]

A knowledge requirement means that the Eighth Amendment will rarely reach the substantial zone of harm in prison that lies between knowledge and ignorance. The nature and power of such a zone is illustrated potently, albeit in a different context, by Kenji Yoshino's description of the workings of the military's "Don't ask, don't tell" policy on gays. [FN208] Yoshino documents how an institution can coerce the invisibility of a group by imposing sanctions on individuals who publicize their group identity. [FN209] The result is that, in the military, gays inhabit a twilight zone where their presence is only tolerated if their identity is covered, which stifles the possibility of a change in the status \*451 quo. [FN210] Furthermore, the policy is a way that the state reifies and enforces social norms that had previously kept gays in the closet. [FN211] The "Don't ask, don't tell" policy is a way the military uses the invisibility of gays to silence them and defuse their political power.

The links between sexual orientation and the epistemology of the prison are strong ones. [FN212] In the Farmer case, there are underlying issues of sexuality that are not atypical of the prison context. While not explicitly addressed by a statutory policy, the problem of inmate rape is one that is in many ways stifled through methods similar to those coercing the invisibility of gays in the military. As noted earlier, there is a general acknowledgment that rape occurs behind prison walls. [FN213] At the same time, certain social norms that punish those victims who publicize their situation coerce the invisibility of the problem and allow the system to avoid acknowledging the existence of inmate rape in specific situations, thus avoiding true knowledge of the problem.

Just as gays can be stigmatized if they reveal their true identity, victims of inmate rape are often stigmatized when they come forward. Victims are perceived as failed men who cannot defend their masculinity from unwanted same-sex advances as a real heterosexual man can. [FN214] The victim may have to overcome a presumption that he has consented to the activity, [FN215] and in at least one case the court ratified this \*452 presumption of consent. [FN216] As one victim of inmate rape related: "I spent the night in the infirmary and left the next afternoon, but not before another guard captain had given me a hostile grilling in which he was clearly trying to put the blame on me. 'You sure you ain't homosexual?' he asked, as if a homosexual couldn't be raped." [FN217] As noted earlier, the source of the stigma can also be internal as the victim blames himself and seeks to deny the incident ever happened.

The knowledge requirement reinforces these social norms by making it unlikely that prison officials will be liable under the Eighth Amendment for inmate rapes. The result is in many ways analogous to the manipulation of gay invisibility in the military. Despite a general acknowledgment of the problem, powerful mechanisms prevent an honest perception of the occurrence of inmate rape. As a result, it lies entrenched in the structure of the prison system, shielded from scrutiny by the knowledge requirement.

## 2. The Irrelevance of Knowledge

The knowledge requirement privileges the existence of knowledge in evaluating the culpability of prison officials under the Eighth Amendment. But in some contexts, asking whether a person had knowledge of a substantial risk of serious harm shifts the focus to an issue that is trivial in relation to other ways in which that person may have contributed to the harm. That is most clearly the case with high \*453 level officials. Wardens, assistant wardens, and other supervising officials who are not in the field are much less likely to have first-hand knowledge of a potentially dangerous situation. [FN218] Asking such officials whether they had knowledge that Dee Farmer was in danger of being assaulted will lead to a predictable answer--no. But that should not be enough to automatically avoid liability. Suppose high level officials knew that if they had implemented rape prevention programs or implemented policies that would keep transsexuals from the general population that they would substantially reduce the risk of inmate rape, yet they failed to do so without good reason. The fact that they failed to appreciate the existence of a substantial risk of inmate rape in their prison should not excuse them from taking actions that prevent such risks from arising.

By insulating high level officials from liability, the knowledge requirement removes a potent pressure point from Eighth Amendment scrutiny. [FN219] In many cases lower level officials may not have control over decisions that allow inmate assaults to occur. This creates a dilemma for courts applying the knowledge requirement. Lower level officials may have the

requisite knowledge for liability, but they may not have control over the inadequate policies actually responsible for the assault.

The case of *Payne v. Collins*, [FN220] illustrates how the knowledge requirement can misallocate liability between high and low level officials. An inmate was killed by other inmates in a fight. The assault occurred mainly because inmates were allowed to roam that area of the prison freely and the only guard present had only two months of experience. [FN221] The court dismissed claims against the defendants who were responsible for decisions allowing inmates to have easy access to other inmates and forgoing experience and competency requirements for prison guards, because they had no specific knowledge of that assault. [FN222] In contrast, the claim against the inexperienced guard was not dismissed \*454 because she was present at the fight and had more immediate knowledge of its circumstances. [FN223]

Moreover, a focus on the individual state of mind of prison officials may mean that systemic causes of inmate violence will be left unscrutinized. *Madrid v. Gomez*, [FN224] a challenge to a maximum security prison in California illustrates this concern. The district court found there was a pervasive risk of violence in that prison because dangerous inmates were unsegregated, the prison had no written cell assignment policy, and requests for single-cell status were uniformly denied. [FN225] While there was a high prevalence of inmate assaults at the institution, the district court dismissed the duty to protect claim because there was no evidence that defendants knew of the precise extent of violence in the prison. [FN226] There are many such cases where assaults caused by decisions allowing dangerous inmates access to vulnerable inmates are left unscrutinized because of the knowledge requirement. [FN227]

While under current case law, entities cannot be held liable for Constitutional violations, at the very least, the higher level officials who have the most power to effectuate change in policy should not be excused from liability simply because they do not have knowledge of a particular risk situation. A new approach is needed.

#### V. Towards a New Liability Standard for Eighth Amendment Duty to Protect Cases

While the contextual approach to punishments demonstrates the inadequacies of the prevailing conception of Eighth Amendment \*455 punishments and provides a solid theoretical justification for an Eighth Amendment duty to protect, any theory needs to be translated into doctrine to fulfill its promise. As previously argued, the knowledge requirement arises out of a flawed conception of Eighth Amendment punishments, and its pragmatic problems require it to be rethought. This Part offers a new standard to replace the status quo's knowledge requirement.

First, this Part re-emphasizes the firm grounding of the duty to protect and argues that the Eighth Amendment should be understood as a general representation that punishments such as imprisonment will be inflicted by state officials in a humane way. Second, it translates this constitutional representation into a standard to govern the liability of individual officials. The most appropriate standard comes from the common law's imposition of an affirmative obligation on landowners to protect invitees not only from known dangers, but from those dangers that they would discover with reasonable care. The rationale for this duty is that landowners make a representation to invitees that their premises are safe. The Eighth Amendment serves a similar function and should require similar obligations, especially considering that prisoners are compelled to inhabit the prison. Third, this Part illustrates the advantages and application of this new standard, which will be referred to as the Eighth Amendment duty to protect standard. Finally, this Part argues that the Eighth Amendment duty to protect standard is workable.

#### A. Eighth Amendment as an Affirmative Representation of Humane Punishments

The most important implication of the contextual approach to punishments is its emphasis on the Eighth Amendment duty to protect. Any doctrinal amendments should center on the importance of this duty as a minimal standard that requires the inflictors of punishments to provide a minimal amount of safety for inmates. The current case law is fundamentally flawed because it marginalizes this duty. For example, in *Farmer*, the Supreme Court's treatment of the Eighth Amendment duty to protect is two-faced. While it boldly asserts at the outset of its opinion that the Eighth Amendment requires prison officials to provide inmates with reasonable protection from serious harm, it then qualifies and narrows that duty. The focus of the inquiry, in *Farmer*, is on the defendant's perception of a substantial risk of serious harm rather than the duty to protect inmates from harm. Whether the defendant acted in \*456 such a way to fulfill this basic duty is not part of the liability determination and is only mentioned as an afterthought as a defense to liability rather than as an affirmative obligation. [FN228]

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Through the knowledge requirement, the Court limits the reach of the Eighth Amendment rather than articulating what the provision means for prison conditions. While the Supreme Court in *Wilson and Farmer* purports to make Eighth Amendment prison jurisprudence faithful to the text of the Eighth Amendment, it focuses narrowly on only one word of that Amendment-- punishments. In doing so, it ignores portions of the text that might lead to a fuller understanding of the concept of punishments and what the Eighth Amendment requires of prison conditions. The result is a strange surgery of sorts, with the Court excising concepts such as knowledge from the traditional definition of punishments, mixing it with principles from the criminal law, and in the end imposing a test that is purportedly compelled by the text.

A number of prominent commentators have criticized a particular method of interpreting the Constitution referred to as "clause-bound" interpretation. [FN229] Rather than looking at the document as a whole, the "clause-bound" approach focuses on particular amendments or provisions of the Constitution. The problem with this method of interpreting the text is that it takes words out of context and blinds the interpreter to information that might illuminate the meaning of the text. The faults of "clause-bound" textualism are magnified by the Court's approach in *Wilson and Farmer* (adopted from the analysis in *Duckworth and Johnson*), which can only be described as "word-bound." Not only is the Eighth Amendment examined in isolation from the rest of the Constitution, a particular word of that Amendment is examined apart from the rest of the Amendment's text and used to define the scope of the Amendment.

A cursory glance of the text of the Eighth Amendment reveals the problems of analyzing the word punishments in isolation from the rest of the Amendment. The full text of the Amendment reads: "[e]xcessive \*457 bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [FN230] The first impression of this sentence is that it is in the passive tense. No state actor, no individual, and no active voice are present in the text of the Amendment. The statement is too generally worded to be a prohibition against specific sorts of acts. The Amendment, on its face, is not limited to the active infliction of punishment by a judge. If a hypothetical Eighth Amendment were to state, "[n]or shall the Judiciary inflict Cruel and Unusual Punishments," then it would be clear that the Amendment applied primarily to the discrete, knowing, sentencing decisions by Judges. But that is not so. Indeed, the passive tense in the text supports an interpretation of the Amendment placing emphasis on the two adjectives, cruel and unusual, describing the nature of the sort of infliction of punishment that is prohibited by the Amendment. The focus of the text is not on whether a specific actor has engaged in a certain type of conduct, but rather on whether the nature of a punishment is cruel and unusual.

The Eighth Amendment does not derive its meaning from a single word in its text, but rather from the text taken as a whole. The phrase "nor cruel and unusual punishments inflicted" is not a particular statement requiring a mental element for a prison official to be liable for failing to prevent harm to a prisoner. Instead, it should be read as a general declaration as to the nature of punishments that the state inflicts. The Eighth Amendment is a representation by our government that punishments such as imprisonment will be inflicted in a humane way subject to basic standards of decency. It is a promise that all prisoners rely on; therefore, it must be honored.

#### B. The Landowner's Duty to the Invitee: An Eighth Amendment Duty to Protect Standard

The next step is to translate this general constitutional statement into a workable liability standard to evaluate the conduct of individuals. In *Farmer and Wilson*, the Supreme Court undertook a similar project but began from a different starting point. Its foundation was the analytic conception of punishments, and the result was the adoption of a criminal recklessness standard of liability. This Article has deconstructed this approach and shown through a contextual approach to punishments how there is a general affirmative duty on the part of prison officials to \*458 protect inmates from serious harm. As the inflictors of punishment, prison officials must be regulated by minimal standards to ensure that punishments are not cruel and unusual. But what is the scope of that duty? This Section of the Article expands the inquiry and begins the search for a liability standard from a location that goes beyond the analytic conception of punishments. Instead of relying solely on the word punishments as a source of a standard of liability, the standard is derived from the premise that the Eighth Amendment is a broad representation that punishments will be inflicted humanely.

As described in the leading treatise on torts, there is a well-established common law rule that when a landowner invites persons onto his premises for purposes of business, the landowner has "an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover." [FN231] The person to whom the landowner owes the duty is referred to as an invitee, a common example of which is a customer in a store. The scope of the duty is a full one and extends to "everything that threatens the invitee with an unreasonable risk of harm." [FN232] The landowner has a particular duty to "inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the

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arrangement or use." [FN233] At the same time, the landowner is not an insurer obligated to compensate the invitee for any harm he befalls, and will not be liable for those risks of which "he did not know and could not discover with reasonable care." [FN234] Furthermore, there is no obligation to protect the invitee from dangers that are both known to him and from which he has the ability to protect himself. [FN235]

The rationale for this duty is that the landowner makes an implicit representation to the invitee that his premises are safe when he opens his premises for business. [FN236] The duty does not arise when the landowner passively allows individuals to enter his land; there must be an element of invitation. Through this invitation, the landowner engenders reliance on a representation that his premises are safe for use, and thus is \*459 obligated to take affirmative measures to ensure that they are reasonably safe.

The landowner's duty to the invitee is a standard that follows logically from this Article's conception of the Eighth Amendment and should govern the liability of prison officials for failing to protect inmates from serious harm. Call this the Eighth Amendment duty to protect standard. Under an Eighth Amendment duty to protect standard, a prison official is liable for an objectively serious harm suffered by a prisoner caused by the official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care. A prison official is not liable for a risk of serious harm that the prisoner knows of and has the ability to protect himself from.

Like the landowner who represents that his premises are safe for use, the Eighth Amendment is an affirmative representation by the state that its methods of punishment will not be inflicted in a cruel and unusual way. The prisoner is compelled to accept the state's invitation to inhabit the prison and is not merely invited. Thus, the prisoner is forced to rely upon the state's representation that his punishment will meet modern standards of decency. Prison officials should not only be obligated to act at the point when they have knowledge of a substantial risk of serious harm. They should also be liable for harm caused by dangers that they could discover through reasonable inspection.

Of course, the Eighth Amendment duty to protect standard would have to be adjusted to account for the fact that the situation of the prison official is not entirely analogous to the situation of the typical landowner. The typical landowner is not confronted with the daunting task of managing a group of individuals, many of whom may have violent tendencies, both day and night. The prison official is responsible for regulating almost every facet of the lives of individuals and their interactions with other individuals. It is impossible to predict the ultimate outcome of these interactions. The differences between the prison official and the typical landowner, however, are not so great that they preclude the application of the landowner's duty to invitees to prison officials. The reasonableness of the efforts of prison officials to seek out serious harm to inmates can be evaluated in the context of the difficulties of the prison official's responsibilities. The standard should not require prison officials to predict what will occur, but should focus on what prison officials can reasonably do to seek out problems before they occur. The essence of the Eighth Amendment duty to protect \*460 standard is not to hold prison officials to the same standards of landowners, but to establish that prison officials have an obligation to seek out dangers before they occur.

The typical invitee is also not in the same position as the typical prisoner. The prisoner is guilty of a crime and therefore bears a greater degree of moral culpability than the typical invitee. In some instances, the prisoner may have a role in instigating or contributing to the harm that befalls him. The prisoner may be in a better position to evaluate the risks of the prison setting and take measures to avoid harm. Again, this is not an insurmountable barrier to the application of the landowner's duty to the invitee to the prison context. The Eighth Amendment duty to protect would take into account the prisoner's ability to avoid harm and the possibility that he may have instigated the harm. These factors would be balanced against the lack of control that the prisoner has in regulating his surroundings and the unavoidable dependence of the prisoner on prison officials.

The duty to protect standard would clearly send the signal that prison officials have an obligation to do more than passively respond to information. Instead, they must actively seek it out and confront it. The prison official is not liable, however, for everything that happens to inmates in prison. If the harm could not be discovered through reasonable inspection, or the inmate has the ability to avoid the harm through his own facilities, then the prison official will not be liable.

### C. Application

The application of the Eighth Amendment duty to protect standard to the facts of Farmer will illustrate that the new standard remedies many of the aforementioned concerns of the knowledge requirement, specifically the need for prevention, difficulty of proving knowledge, and liability of high level officials. Under the current framework, given that the beating and rape of

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Farmer is clearly an objectively serious harm, the question would be whether Dee Farmer could prove that a specific prison official knew that he was at a substantial risk of serious harm. This could mean a number of different things depending on how one interprets the knowledge requirement. Farmer might have to prove that a prison official knew that he was at a specific risk of harm from his particular cellmate. Or, if the knowledge requirement is interpreted more broadly, he would only have to show that prison officials had knowledge that releasing a transsexual into the prison population would \*461 subject that individual to a substantial risk of serious harm. A prison official could be completely exonerated of any liability if he shows that he lacked this requisite knowledge.

The other issue is whether Farmer can show that he was subject to a substantial risk of serious harm. That could entail the general proof that incidents of inmate rape and violence were pervasive at the prison. It could also entail specific proof that his cellmate had a past history of preying on weaker individuals. Also possible is the argument that transsexuals are per se at a substantial risk of serious harm or that Farmer himself had been the subject of past victimization and was thus at substantial risk. It is unclear at what point the substantiality requirement would be met. If Farmer does not meet his burden of proof on both of these issues, then the court would dismiss the case and affirm that prison officials have no obligation to take any reasonable measures to protect him.

Instead of only requiring prison officials to act when they have knowledge of a substantial risk of harm to inmates, a duty to protect standard would ask whether the harm suffered by Farmer was caused by the failure of a prison official to take reasonable precautions to protect the prisoner from a risk of serious harm discoverable with reasonable care. The duty to protect standard would focus on what prison officials affirmatively did to fulfill their Eighth Amendment duty to protect, and thus remedy the tendency of the knowledge requirement to require only reaction to harms. Farmer could show that the supervisory officials in charge of implementing the policies for assigning prisoners to different locations with reasonable inquiry would have known of the potential dangers of celling transsexual prisoners in maximum security prisons with other inmates. The failure of these officials to implement preventive measures to minimize the risk of such situations would make them liable for the harm inflicted on Farmer. Farmer could also have shown that the individual prison officials who processed him and were in charge of his particular cell block would have known of the danger posed by a transsexual's incarceration with a high risk inmate through reasonable inquiry and inspection. The defendants could argue that Farmer himself knew of the danger of his situation and could have protected himself by taking appropriate measures to obtain a transfer to a single cell or another facility.

The duty to protect standard requires prison officials to seek out harm to inmates rather than allowing them to wait until a substantial risk of serious harm develops. The standard recognizes that inmates will \*462 only be reasonably safe if prison officials take preventive steps before risks become substantial. Even if prison officials are not aware of a specific danger other than the general risk inherent in all prisons, the Eighth Amendment duty to protect should require basic measures to prevent assault and other forms of harm.

A duty to protect standard would also address the problems of establishing the knowledge of prison officials. A prison official is not excused from liability simply because he did not know of the risk to the Farmer. The duty to protect standard would continue by asking whether the official could have discovered and prevented the risk to Farmer through reasonable inspection. Rather than sending the signal that it is possible to avoid liability by denying knowledge or avoiding it, a standard that requires officials to seek out knowledge would demonstrate a commitment towards greater scrutiny of the inflictors of punishment. It would also broaden the scope and potency of the Eighth Amendment duty to protect. Rather than allowing the obligation to be defined solely by the subjective intent of prison officials, implementing a liability standard based on prevention would help ensure a minimal standard of safety.

Retiring the knowledge requirement would also make it more likely that the Eighth Amendment would reach harms such as inmate rape that are difficult to document and establish as a substantial risk. Such a change would make it more possible for inmates who have been raped to establish liability if prison officials have not taken basic preventive measures to seek out and reduce a risk of rape in prison that was discoverable with reasonable care. The message would be clear to prison officials that their obligation is not to wait and see whether plaintiffs can prove that inmate rape really does occur, but rather they must implement procedures to deal with the risk.

The duty to protect standard would also increase the scrutiny of the conduct of high-level officials. Rather than evaluating their knowledge of whether particular risks exist, the new standard would evaluate whether high-level officials could have discovered and prevented the sorts of risks that they might encounter in the scope of their duties. Even when high-level officials do not have the knowledge of specific risks of harm that low-level officials may have, they are still obligated to

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evaluate and seek out problems in the system that they have the power to remedy. For example, a warden with access to aggregate statistics of violence in a prison would have a duty to seek out systemic causes of such violence and implement policies to remedy that violence. \*463 Making officials with the power to change the system responsible might increase the possibilities for reform. [FN237]

#### D. Workability

The duty to protect standard would be workable. One concern of any standard that increases the liability of prison officials is that it would second-guess the difficult decisions they must make under less than ideal conditions after the fact with twenty-twenty hindsight. The solution to this problem is not to limit the substantive rights of inmates, but to evaluate the conduct of these professionals with due regard to their expertise and through standards promulgated by experts in the field. The Federal Bureau of Prisons as well as the American Correctional Association publish a body of literature outlining typical professional norms in the field of corrections. [FN238] Federal judges and juries often have access to these guidelines and other forms of expert testimony through the litigants in a case so they would not be adrift in evaluating what sorts of actions are reasonable given the circumstances. Just as it is widely accepted that the conduct of medical professionals can be evaluated by practices in the medical field, the conduct of prison officials should be subject to scrutiny. There is evidence that courts would still defer appropriately to the professional decisions by prison officials. Even under the current Farmer standard, courts sometimes assess the reasonableness of prison officials' response after it has been found that they had knowledge of a risk. Examination of those cases shows that many courts have dismissed cases where prison officials had knowledge on the grounds that their response was reasonable. [FN239]

Another concern might be that it would make prison officials insurers liable for any harm that befalls a prisoner because there is an infinite array of risks in prison and there is always something more that \*464 they can do to prevent risks of harm from developing. [FN240] For example, there is always a risk of assault in prison and the only way to eliminate the risk that an inmate will be attacked would be to lock all inmates in individual cells. [FN241] While there is always some action that one could take to reduce a risk, the standard adds the caveat that the action be reasonable. Reasonableness should be evaluated in light of the resource restraints and conflicting obligations under which prison officials operate. Nor would a duty to protect make prison officials liable for failing to prevent trivial injuries. The duty to protect standard would only require prison officials to seek out and deal with problems that an inmate could not avoid on his own.

Another argument might be that the knowledge requirement is a way of minimizing the burden of prisoner lawsuits by screening out frivolous suits in which prisoners attempt to recover for accidental injuries. That result does not follow given a proper understanding of the duty to protect. The scope of that duty only requires prison officials to provide prisoners with a reasonable level of safety from harm that results from their incarceration. The duty does not extend to accidental harms that a prisoner could avoid on his own. [FN242] Also, as long as prison officials have implemented policies and act reasonably in finding and preventing risks of harm, they will not be liable for unpreventable assaults.

Moreover, for better or for worse, legislative responses such as the Prison Litigation Reform Act can provide a response to the problem of frivolous lawsuits. [FN243] Courts can use other methods for screening meritless cases before they consume judicial resources. One method might be to utilize the Wilson and Farmer requirement that an injury be \*465 objectively serious before it qualifies as an Eighth Amendment injury. [FN244] If an assault only results in a few bruises or scratches, it does not qualify as an objectively serious harm. [FN245] In addition, prison officials would still be able to offer affirmative defenses, such as qualified immunity, that would shield them from liability if they acted reasonably in carrying out their discretionary duties. [FN246] Finally, prison officials usually are indemnified or insured by the state against liability in lawsuits. [FN247]

Prison officials should not be allowed to wait until they know of a substantial risk of harm before they are obligated to take action. Instead of focusing exclusively on knowledge, courts should focus on the fundamental question of whether prison officials have met their duty of ensuring the reasonable safety of inmates. The Eighth Amendment inquiry should be broadened to ensure that prison officials carry out the infliction of punishment of imprisonment in a way that is not cruel and unusual.

#### VI. Conclusion

While the knowledge requirement is routinely applied by lower courts throughout the country to the claims of injured prisoners, it is a flawed test that should be reconsidered. The Eighth Amendment is a representation that the punishment of

imprisonment will be inflicted in accordance with basic standards of humanity. The prison officials who administer that punishment should be governed by the standard of liability based on the landowner's duty to invitees. Under the Eighth Amendment duty to protect standard, a prison official is liable for an objectively serious harm suffered by a prisoner caused by a prison official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care. A prison official is not liable for a risk of serious harm that the prisoner knows of and has the ability to protect himself from. The knowledge requirement rests on the flawed analytic conception of punishments, which should be replaced by a contextual conception of punishments that is more sensitive to the way that punishments such as imprisonment \*466 are actually inflicted. By making knowledge a prerequisite to liability, the knowledge requirement allows harms to fester that could be prevented. Courts should recognize the limits of knowledge and be wary of limiting the scope of the Eighth Amendment to the harms that we choose to acknowledge.

[FN1]. Law Clerk to Judge John G. Koeltl, United States District Court, Southern District of New York. Yale Law School, J.D. (2000). Thanks to Kenji Yoshino for extensive comments on an earlier draft of this piece.

[FN1]. U.S. Const. amend. VIII. The Eighth Amendment applies to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666-68 (1962). Prisoners who are denied their Eighth Amendment rights by state officials can bring civil rights suits against those officials under 42 U.S.C. § 1983, which provides judicial remedies to individuals deprived of some right, privilege, or immunity protected by the Constitution or laws of the United States by a person acting under the color of state law. 42 U.S.C. § 1983 (1994). Prisoners can bring similar suits against federal officials under the precedent of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[FN2]. U.S. Const. amend. VIII.

[FN3]. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.' "); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment."); John Hart Ely, *Democracy and Distrust* 14 (1980) ("The Cruel and Unusual Punishment Clause does invite the person interpreting it to freelance to a degree, but the freelancing is bounded. The subject is punishments, not the entire range of government action...."); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1196 (1987) ("[A]lthough the text of the [E]ighth [A]mendment may not tell us precisely what 'cruel and unusual punishments' are, the language does require that the [A]mendment's prohibition apply only to actions that can plausibly be described as 'punishments.' "); see also Thomas K. Landry, "Punishment" and the Eighth Amendment, 57 *Ohio St. L.J.* 1607, 1607 (1996); The Supreme Court: 1990 Term, Leading Cases, Eighth Amendment, *Cruel and Unusual Punishments Clause--Prison Conditions: Wilson v. Seiter*, 105 *Harv. L. Rev.* 235, 242 (1991) [hereinafter *The Supreme Court: 1990 Term*].

[FN4]. At one time, federal courts did not assert jurisdiction over prisoner claims. See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* 30-34 (1998). See generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *Yale L.J.* 506 (1963) [hereinafter *Beyond the Ken of the Courts*] (describing and critiquing court's "hands-off" approach to prisoner rights claims).

[FN5]. See *Farmer*, 511 U.S. at 833 (listing cases where courts have held that prisoners are entitled to reasonable protection against violence).

[FN6]. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

[FN7]. There is a different standard of liability that governs cases where prison officials directly inflict harm on prisoners. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 7-10 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986).

[FN8]. *Farmer*, 511 U.S. at 833-34.

[FN9]. *Id.* at 837.

[FN10]. This test is more commonly referred to as the deliberate indifference standard. The meaning of deliberate indifference, however, has evolved over time. Compare *Estelle*, 429 U.S. at 104-05, with *Farmer*, 511 U.S. at 837. I use the

term "knowledge requirement" to refer to the Supreme Court's most recent interpretation of deliberate indifference in *Farmer*.

[FN11]. Only one article has as its primary focus the relationship between the word punishment and the Eighth Amendment standard governing the liability of prison officials. Landry, *supra* note 3, at 1607. Landry argues for a conception of punishment more tightly linked to government action that is even narrower than the knowledge requirement the Supreme Court has adopted. He maintains that the Eighth Amendment should only regulate authorized actions by prison officials leaving unauthorized acts to be regulated by tort law. As Landry's interpretation of punishments is more stringent than that of the Court's, a refutation of the Court's standard a fortiori answers Landry's argument.

[FN12]. *Farmer*, 511 U.S. at 837.

[FN13]. *Farmer* is a frequently cited case. A LEXIS Shepard's search shows that between 1995 and 2000, *Farmer* was cited in 2753 cases. In the same period, another widely cited case, *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was cited in 4655 cases.

The frequency that the knowledge requirement is utilized is not surprising given the persistency of inhumane prison conditions. Recent opinions confirm that pervasive sexual assault and violence are still a major problem in state prison systems. See, e.g., *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637 (8th Cir. 1996); *Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76 (6th Cir. 1995); *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993). Other opinions detail brutal assaults on individual prisoners. See, e.g., *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998) (describing one inmate's rape by more than twenty other inmates); *Wilson v. Wright*, 998 F. Supp. 650 (E.D. Va. 1998) (describing a 136 pound inmate forcibly sodomized by a 290 pound cell-mate).

[FN14]. See, e.g., Scott Rauser, *Prisons are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in McGill v. Duckworth*, 78 Minn. L. Rev. 165, 167 (1993) (arguing that knowledge is too harsh a standard for Eighth Amendment liability); Candace Ada Mueller, Note, *The Evolving Standards in Prison Conditions Cases: An Analysis of Wilson v. Seiter and the Cruel and Unusual Punishment Clause*, 13 B.C. Third World L.J. 155, 179-83 (1993) (noting the difficulty of defining deliberate indifference); *The Supreme Court: 1993 Term, Leading Cases, Eighth Amendment, Cruel and Unusual Punishments Clause--Prison Conditions: Farmer v. Brennan*, 108 Harv. L. Rev. 231, 235 (1994) (noting that the *Farmer* standard will often mean that harmed prisoners will often have no remedy).

[FN15]. See *The Supreme Court: 1990 Term*, *supra* note 3, at 238-39 (noting the institutional sources of prison conditions).

[FN16]. See, e.g., Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. Rev. 373, 398 (1995) (arguing that judges know the nature of prison conditions when they sentence inmates, thus these prison conditions, such as violence, should be considered part of a sentence); James P. Rosenzweig, *State Prison Conditions and the Eighth Amendment: What Standard for Reform under Section 1983?*, 1987 U. Chi. Legal F. 411 (arguing, pre- *Wilson/Farmer*, against distinguishing between objective severity of harms suffered by prisoners and subjective state of mind of prison officials); Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 Dick. L. Rev. 419, 437 (1995) (arguing that the conditions of confinement are always part of the punishment imposed by the state and the knowledge requirement is satisfied by the fact that the state always intends to imprison convicted defendants); Diana L. Davis, Comment, *Deliberate Indifference: An "Unnecessary" Change?*, 29 Hous. L. Rev. 923, 950 (1992) (arguing that judges always know they are sentencing inmates to places of violence and deliberate indifference should be replaced with a totality of circumstances test); Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 Am. U. L. Rev. 1339, 1386 (1992) (arguing that deliberate indifference should be defined broadly given the state of prisons); Daniel Yves Hall, Note, *The Eighth Amendment, Prison Conditions and Social Context Wilson v. Seiter*, 58 Mo. L. Rev. 207, 223 (1993) (arguing that deliberate indifference can be inferred from inhumane conditions of confinement).

[FN17]. See *Farmer*, 511 U.S. at 843-44 (citing *Hutto v. Finney*, 437 U.S. 678, 681-82 n.3 (1978)).

[FN18]. Peter H. Schuck, *Suing Government: Citizen Remedies For Official Wrongs* 38 (1983).

[FN19]. 481 F.2d 1028 (2d Cir. 1973).

[FN20]. 780 F.2d 645 (7th Cir. 1985).

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[FN21]. *Id.* at 652. Generally, punishment is formally defined as the infliction of pain deliberately imposed by the state to discipline an individual who has broken the law. See, e.g., Black's Law Dictionary 1247 (7th ed. 1999) ("A sanction--such as a fine, penalty, confinement, or loss of property, right or privilege--assessed against a person who has violated the law."); H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* 4-5 (1968) (defining punishment as consisting of five elements: (1) pain or unpleasant consequences, (2) for an offense, (3) to an actual or alleged offender, (4) administered by someone other than the offender, (5) who is an authority of the legal system); Thomas Hobbes, *Leviathan* 353 (C.B. Macpherson ed., 1968) (1651) (defining punishment as "an Evil inflicted by publique Authority on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the law; to the end that the will of men may thereby the better be disposed to obedience").

[FN22]. *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) ("[J]udges or juries--but not jailers--impose 'punishment.' ").

[FN23]. 501 U.S. 294 (1991).

[FN24]. 511 U.S. 825 (1994).

[FN25]. *Id.* at 838 ("But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for condemnation, cannot under our cases be condemned as the infliction of punishment.").

[FN26]. 501 U.S. 294 (1991).

[FN27]. 511 U.S. 825 (1994).

[FN28]. See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839 (1969) (noting that pursuant to American framers "cruel and unusual punishment" was only intended to prohibit barbarous forms of punishment).

[FN29]. See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that incarceration for addiction to narcotics is cruel and unusual); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (holding that depriving a person of citizenship is cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 356 (1910) (applying Eighth Amendment to disproportionate punishments).

[FN30]. See, e.g., *Beyond the Ken of the Courts*, supra note 4, at 506 (describing and critiquing "hands-off" approach to prisoner rights claims).

[FN31]. See *Restatement (Second) of Torts* § 320 (1965). The existence of other tort remedies does not preclude constitutional tort remedies. See *Carlson v. Green*, 446 U.S. 14, 17-23 (1980).

[FN32]. See Note, *Physical Security in Prison: Rights Without Remedies?*, 12 New Eng. L. Rev. 269, 283-84 (1976) (describing barriers to prisoner state tort law suits).

[FN33]. See, e.g., *Beard v. Lee*, 396 F.2d 749, 751 (5th Cir. 1968) (noting that federal courts are fora for cruel and unusual punishment claims); *Panella v. United States*, 216 F.2d 622, 626 (2d Cir. 1954) (recognizing that prisoners can bring actions under Federal Tort Claims Act); *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La. 1970) (holding that conduct that shocks the conscience is cruel and unusual punishment); *Kish v. County of Milwaukee*, 48 F.R.D. 102, 104-05 (E.D. Wis. 1969) (holding in sexual assault cases that Eighth Amendment requires courts to intervene in cases that shock the conscience).

[FN34]. For example, in *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), the entire Arkansas prison system was ruled unconstitutional. *Id.* at 833; see also *Hamilton*, 338 F. Supp. at 1018. There were prisons literally run by the inmates. These so-called "trustee" systems, whereby some inmates were armed and given guard responsibilities--were documented in a number of opinions. See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1307-09 (5th Cir. 1974) (describing prison with armed trustee guards with unchecked authority over inmates); *Holt*, 309 F. Supp. at 373.

[FN35]. *Parker v. McKeithen*, 488 F.2d 553, 556 (5th Cir. 1974).

[FN36]. Feeley, *supra* note 4, at 14 ("The Eighth Amendment was relevant to prison conditions cases, however--not as a source of standards, but as a basis for judicial jurisdiction.").

[FN37]. 404 F.2d 571 (8th Cir. 1968).

[FN38]. See *id.* at 577.

[FN39]. See *id.* at 579.

[FN40]. See *id.* at 577 (citing *In re Kemmler*, 136 U.S. 436, 446-47 (1890)).

[FN41]. These included a Philippine statute that imposed a punishment of hard labor for a false entry in a public record. See *Jackson*, 404 F.2d at 578 (citing *Weems v. United States*, 217 U.S. 349, 380-82 (1910)).

[FN42]. *Id.* at 579.

[FN43]. *Id.*

[FN44]. See, e.g., *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La. 1970) ("[T]he conditions of plaintiff's confinement ... so shock the conscience as a matter of elementary decency and are so much more cruel than is necessary ... such confinement constitutes cruel and unusual punishment ...."); *Holt v. Sarver*, 300 F. Supp. 825, 827 (E.D. Ark. 1969) ("The opinion of the Court of Appeals in *Jackson v. Bishop*, makes clear that the concept of 'cruel and unusual punishment' is a flexible and expanding one....") (citations omitted).

[FN45]. 481 F.2d 1028 (2d Cir. 1973).

[FN46]. See *id.* at 1032-33.

[FN47]. *Id.* at 1032.

[FN48]. *Id.*

[FN49]. See *Johnson*, 481 F.2d at 1032.

[FN50]. 429 U.S. 97 (1976).

[FN51]. See *id.* at 98.

[FN52]. See *id.* at 102.

[FN53]. See *id.* (citation omitted).

[FN54]. See *Estelle*, 429 U.S. at 102 (citation omitted).

[FN55]. See, e.g., *Helling v. McKinney*, 509 U.S. 25, 40-41 (1993) (Thomas, J., dissenting) (criticizing *Estelle* for not applying text of Eighth Amendment); *Bukowski*, *supra* note 16, at 431 (noting that *Estelle* relied heavily on *Jackson*, which did not root its analysis in the word punishment).

[FN56]. See, e.g., *Woodhouse v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) ("A prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief."); see also *Curtis v. Everette*, 489 F.2d 516, 518 (3d Cir. 1973).

[FN57]. See, e.g., *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991); *Goka v. Bobbitt*, 862 F.2d 646, 649 (7th Cir. 1988); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988); *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986); *Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985); *Gullatte v. Potts*, 654 F.2d 1007, 1012 (5th Cir. 1981); *Ramos v. Lamm*, 639 F.2d 559, 566, 572 (10th Cir. 1980).

[FN58]. U.S. Const. amend. VIII.

[FN59]. 437 U.S. 678 (1979).

[FN60]. The shocking conditions of the Arkansas state prisons are detailed in two district court opinions: *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), and *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). The lawsuits that these opinions adjudicated were the first time that an entire prison system was attacked. See *Holt*, 309 F. Supp. at 365. Inmates served as guards and were basically running the prison. See *id.* at 373. Sexual assault was so prevalent that inmates were so afraid that they clung to the bars at night. See *id.* at 377.

[FN61]. See *Hutto*, 437 U.S. at 685.

[FN62]. See *Withers v. Levine*, 615 F.2d 158, 162 (4th Cir. 1980). As the Fourth Circuit explained: "Given the pervasive and unreasonable risk of harm, negligence by prison officials in their performance of their duty of care is a violation of the constitutional right and actionable under § 1983." *Id.* In reaching this conclusion, the Fourth Circuit reasoned that "[t]he constitutional right would often remain unredressed if a higher standard of care were required." *Id.*

[FN63]. See, e.g., *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224-26 (5th Cir. 1986) (holding that as matter of law level of violence in prison violated Eighth Amendment); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (holding that existence of a pervasive risk of harm is enough for liability); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1578 (D. Id. 1984) (concluding that double-celling decreases personal safety).

[FN64]. See, e.g., *Goka v. Bobbitt*, 862 F.2d 646, 651 (7th Cir. 1988); *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986); *Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985); *Gullate v. Potts*, 654 F.2d 1007, 1013 (5th Cir. 1981).

[FN65]. 452 U.S. 337 (1981).

[FN66]. See *id.* at 347.

[FN67]. See *id.* at 340.

[FN68]. See *id.* at 351-52.

[FN69]. *Rhodes*, 452 U.S. at 347.

[FN70]. 780 F.2d 645 (7th Cir. 1985).

[FN71]. See *id.* at 648.

[FN72]. *Id.*

[FN73]. *Id.* at 653.

[FN74]. *Duckworth*, 780 F.2d. at 652.

[FN75]. See *id.* at 653.

[FN76]. *Id.* at 652.

[FN77]. 475 U.S. 312 (1986).

[FN78]. See *id.* at 316.

[FN79]. See *id.* at 318.

[FN80]. *Id.* at 320-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). This language was taken directly from a discussion in *Johnson* concerning whether a prison guard's conduct rises to the level where it "shocks the conscience."

Johnson, 481 F.2d at 1033.

[FN81]. See [Whitley](#), 475 U.S. at 320 ("The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.").

[FN82]. See *id.* at 321.

[FN83]. 501 U.S. 294 (1991).

[FN84]. *Id.* at 296.

[FN85]. See *id.*

[FN86]. *Id.*

[FN87]. [Wilson](#), 501 U.S. at 299.

[FN88]. See *id.* at 300.

[FN89]. See John J. Phillips, Note, [Jailhouse Shock: Hudson v. McMillian and the Supreme Court's Flawed Interpretation of the Eighth Amendment](#), 26 Conn. L. Rev. 355, 368 (1993).

[FN90]. See [Wilson](#), 501 U.S. at 303 ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

[FN91]. The Court first generally defined "deliberate indifference" as a level of culpability above negligence in [Estelle v. Gamble](#), 429 U.S. 97, 106 (1976).

[FN92]. See [Wilson](#), 501 U.S. at 300.

[FN93]. See *id.* at 304.

[FN94]. See *id.* at 306.

[FN95]. *Id.*

[FN96]. See [Wilson](#), 501 U.S. at 308 (White, J., concurring). Justices Marshall, Blackmun, and Stevens joined Justice White in concurring only as to the judgment because the majority's reasoning was inconsistent with the Court's prior decisions. *Id.*

[FN97]. See *id.* at 309-10 (White, J., concurring).

[FN98]. 511 U.S. 825 (1994).

[FN99]. See *id.* at 832; see also [Young v. Quinlan](#), 960 F.2d 351, 360 (3d Cir. 1992) (describing post- [Wilson](#) variation in definition of deliberate indifference).

[FN100]. Many courts defined deliberate indifference as a state of mind where a prison official knew or should have known of a danger. See, e.g., [Jensen v. Clarke](#), 73 F.3d 808, 811 (8th Cir. 1996); [Young v. Quinlan](#), 960 F.2d 351, 360-61 (3d Cir. 1992); [Redman v. County of San Diego](#), 942 F.2d 1435, 1443-44 (9th Cir. 1991) (en banc); [Cortes-Quinones v. Jimenez-Nettleship](#), 842 F.2d 556, 558 (1st Cir. 1988).

[FN101]. See [McGill v. Duckworth](#), 944 F.2d 344, 348 (7th Cir. 1991).

[FN102]. 509 U.S. 25 (1993).

[FN103]. *Id.* at 35.

[FN104]. See *id.*

[FN105]. 511 U.S. 825 (1994).

[FN106]. *Id.* at 829.

[FN107]. *Id.* at 829-30.

[FN108]. *Id.* at 830.

[FN109]. See *Farmer*, 511 U.S. at 830.

[FN110]. *Id.* at 833-34. In the Supreme Court's words: "The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must take 'reasonable measures to guarantee the safety of inmates.'" *Id.* at 832 (citations omitted).

[FN111]. *Id.* at 834.

[FN112]. See *Farmer*, 511 U.S. at 834.

[FN113]. *Id.* at 832 ("We granted certiorari because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'" ) (citations omitted).

[FN114]. *Id.* at 836-37.

[FN115]. *Id.* at 836.

[FN116]. *Farmer*, 511 U.S. at 836-37.

[FN117]. See *id.* at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" ).

[FN118]. *Id.* at 838.

[FN119]. *Id.* at 837.

[FN120]. *Farmer*, 511 U.S. at 844.

[FN121]. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

[FN122]. *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973)); see also, *Bell v. Wolfish*, 441 U.S. 520, 537-39 (1979) (explaining that determination of punishment partly hinges on whether act was intended as punishment).

[FN123]. *Johnson*, 481 F.2d at 1032 (noting that punishment is administered "with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners").

[FN124]. See, e.g., *Landry*, *supra* note 3, at 1609 (asserting that "punishment is a penalty deliberately imposed in response to unwanted behavior"). There are alternative views of punishment. Justice Blackmun argues that "[a] prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' ... regardless of whether a state actor intended the cruel treatment to chastise or deter." *Farmer*, 511 U.S. at 854-55 (Blackmun, J., concurring); see also *Wilson*, 501 U.S. at 306-07 (White, J., concurring); *Estelle v. Gamble* 429 U.S. 97, 116-17 (1976) (Stevens, J., dissenting).

[FN125]. *Wilson*, 501 U.S. at 300.

[FN126]. *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); see also *Farmer*, 511 U.S. at 859 (Thomas,

J., concurring). Justice Thomas's view is originalist and would limit the reach of the Eighth Amendment to the judge's sentencing decision. Any harm inflicted afterwards is not punishment and would not be actionable under the Eighth Amendment. Yet, even Justice Thomas explicitly concedes that there is no overwhelming textual or historical support for a strict constructionist reading of the amendment. See *Helling*, 509 U.S. at 40 (Thomas, J., dissenting) ("[T]he evidence is not overwhelming ....").

[FN127]. See, e.g., *Dexter v. Thompson*, No. 93-CV-0745E(F), 1995 WL 495072, at \*4 (W.D.N.Y. Aug. 18, 1995) (noting that infliction of pain by non-state actor stretches meaning of punishment); Sara L. Rose, Comment, "Cruel and Unusual Punishment" Need Not Be Cruel, Unusual, or Punishment, 24 *Cap. U. L. Rev.* 827, 844-49 (1995) (stating that inmate-on-inmate violence is not a punishment because it is not imposed by a judge or jury to punish or for disciplinary purpose).

[FN128]. *Wilson*, 501 U.S. at 300.

[FN129]. *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985).

[FN130]. *Farmer*, 511 U.S. at 838.

[FN131]. *Id.* at 840.

[FN132]. *Duckworth*, 780 F.2d at 652.

[FN133]. See *id.* ("This is what the word means today; it is what it meant in the eighteenth century....").

[FN134]. Michel Foucault, *Discipline and Punish* 1-69 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

[FN135]. See *id.* at 41.

[FN136]. See *id.* at 35-47.

[FN137]. Herbert L. Dreyfus et al., *Michel Foucault: Beyond Structuralism and Hermeneutics* 145 (1983).

[FN138]. Foucault, *supra* note 134, at 48 ("The right to punish, therefore, is an aspect of the sovereign's right to make war on his enemies....").

[FN139]. *Id.*

[FN140]. See Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1626-29 (1986).

[FN141]. See *id.*

[FN142]. See, e.g., Foucault, *supra* note 134, at 22 ("[T]he power of judging has been transferred in part, to other authorities than the judges of the offense. The whole penal operation has taken on extra-judicial elements and personnel."); Cover, *supra* note 140, at 1609.

[FN143]. Foucault, *supra* note 134, at 21.

[FN144]. As Foucault observes: "justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself." *Id.* at 10.

[FN145]. *Id.* at 248.

[FN146]. *Id.* at 18.

[FN147]. Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 4 (1961).

[FN148]. *Id.* at 25; see also Gresham M. Sykes, *The Society of Captives* 65 (1958). In Foucault's words: "The prison, that

darkest region in the apparatus of justice, is the place where the power to punish, which no longer dares to manifest itself openly, silently organizes a field of objectivity in which punishment will be able to function openly as treatment and the sentence be inscribed among the discourses of knowledge." Foucault, *supra* note 134, at 256.

[FN149]. Sykes, *supra* note 148, at 41.

[FN150]. Foucault, *supra* note 134, at 239.

[FN151]. See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983) (noting there is no constitutional duty to rescue); *Riss v. City of New York*, 240 N.E.2d 860, 861 (N.Y. 1968) (noting there is no common law duty to rescue).

[FN152]. See *Jackson*, 715 F.2d at 1203 (arguing that Constitution is charter of negative liberties); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 872-86 (1986) (outlining cases that show Constitution is a charter of negative liberties).

[FN153]. See, e.g., *Martinez v. California*, 444 U.S. 277, 284-85 (1980) (holding that parole board not liable for murder by released parolee because parolee's actions were not state action).

[FN154]. 489 U.S. 189 (1989).

[FN155]. *Id.* at 195.

[FN156]. See *id.*

[FN157]. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2323-26 (1990) (attacking distinction between negative and positive rights); Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. Chi. L. Rev. 1048, 1072-73 (1986). For critiques of *DeShaney*, see Akhil Reed Amar & David Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992), and David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53.

[FN158]. See *DeShaney*, 489 U.S. at 198-200.

[FN159]. *Id.* at 200.

[FN160]. The *DeShaney* reasoning was utilized in *Farmer* as a rationale for the duty to protect. See *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (citing *DeShaney* for proposition that prison officials' affirmative duty to protect prisoners arises from action of involuntary confinement); see also *Hasenfus v. LaJeunesse*, 175 F.3d 68, 71 (1st Cir. 1999) (duty to protect when incarcerated); *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992) (citing *DeShaney* in noting affirmative duty to protect); *Smith v. Ullman*, 874 F. Supp. 979, 985 (D. Neb. 1994) ("Unlike the citizen, who may avoid or deter an impending assault by travel elsewhere or self-defense, the inmate must rely on an appropriate response from prison officials.") (citations omitted).

[FN161]. The Court has applied the Eighth Amendment duty to protect to mental institutions, whose inmates are involuntarily confined. See *Youngsberg v. Romeo*, 457 U.S. 307, 315-16 (1982); see also *Washington v. Harper*, 494 U.S. 210, 225 (1990). In refusing to extend the reach of the Eighth Amendment to corporal punishment in schools, the Court reasoned that the Eighth Amendment only applies to the convicted, but also placed reliance on the fact that schoolchildren are theoretically able to leave the school and go home. See *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). In rejecting a lawsuit brought by guards alleging that they were not adequately protected, the court emphasized that the guards were not involuntarily confined. See *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986).

[FN162]. See *DeShaney*, 489 U.S. at 201 ("While the State may have been aware of the dangers that Joshua played in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

[FN163]. For a similar argument in another context see Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1482 (1992) ("The apparently private character of homophobic violence should not blind us to the reality of the state power that enables and underwrites it.").

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[FN164]. See, e.g., [Farmer](#), 511 U.S. at 858 ("Prisons... house society's most antisocial and violent people in close proximity with one another."); [Hudson v. Palmer](#), 468 U.S. 517, 526 (1984) ("Prisons ... are places of involuntary confinement of persons who have demonstrated proclivity for anti- social criminal, and often violent, conduct.").

[FN165]. See, e.g., Gutterman, *supra* note 16, at 398 (showing how conditions in prison vary dramatically).

[FN166]. See, e.g., Michael B. Mushlin, 1 Rights of Prisoners § 2.06, 66 (2d ed. 1993); Matthew Silberman, A World of Violence 2 (1995); Anders Kaye, [Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence](#), 63 U. Chi. L. Rev 693, 695-99 (1996); James E. Robertson, "Fight or F..." and Constitutional Liberty: An Inmate's Right to Self- Defense when Targeted by Aggressors, 29 Ind. L. Rev. 339, 343 (1995).

[FN167]. Sykes, *supra* note 148, at 41, 91.

[FN168]. See Michael Scarce, *Male On Male Rape* 35-36 (1997).

[FN169]. See, e.g., Sykes, *supra* note 148, at 10 ("Like those who argue for imprisonment as retribution, the adherents of imprisonment as deterrence tend to support those policies which would make life in prison painful ....").

[FN170]. See [Farmer v. Brennan](#), 511 U.S. 825, 836-38 (1994).

[FN171]. See *id.* at 847.

[FN172]. 511 U.S. 825 (1994).

[FN173]. There are a number of explanations for the prevalence of same-sex rape in prison. The first is biological. Deprivation of contact with members of the opposite sex is a major part of the punitive aspect of incarceration, making the search cost for an opposite-sex partner almost infinite. See Richard A. Posner, *Sex And Reason* 121 (1992). Rape is a way to substitute unwilling same-sex partners for willing or unwilling opposite-sex partners.

Another explanation is that inmate rape fills a social desire for dominance rather than a biological need. See [LaMarca v. Turner](#), 662 F. Supp. 647, 687 (S.D. Fla. 1987) (finding that inmate rape is primarily motivated by domination rather than sexual desire). Inmate rape is a way that stronger inmates demonstrate their manhood and assert control over weaker inmates. See, e.g., Wilbert Rideau & Billy Sinclair, *Prison the Sexual Jungle*, in *Male Rape: A Casebook of Sexual Aggressions* 19 (Anthony M. Scacco ed., 1982) [hereinafter *Male Rape*]; Donald J. Cotton & Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. Prison & Jail Health 47, 50-51 (1982); Phil Gunby, *Sexual Behavior in an Abnormal Situation*, 245 JAMA 215, 215 (1981); Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 Fed. Probation 46, 47 (1984) [hereinafter *Nacci, Sex and Sexual Aggression*]; Edward Sagarin, *Prison Homosexuality and Its Effect on Post-Prison Sexual Behavior*, 39 Psychiatry 245, 255 (1976). This sort of sexual domination is seen as the ultimate form of power and control over another individual. See Craig L. Anderson, *Males As Sexual Assault Victims: Multiple Levels of Trauma*, 7 J. Homosexuality 145 (1981-1982); Nicholas Groth et. al., *Male Rape: Offenders and Victims*, 137 Am. J. Psychiatry 806 (1980). A culture has developed where the aggressor in such same-sex acts maintains his masculinity, while the penetrated takes on a feminine role. See Sykes, *supra* note 148, at 95-96; Alan Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, in *Male Rape* 116-17; Gunby, *supra*, at 217; Peter Nacci, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 Fed. Probation 31 (1983); Donald Tucker, *A Punk's Song: View from the Inside*, in *Male Rape* 68.

[FN174]. One of the most recent and thorough studies of inmate rape confirms that sexual assault is a major problem in today's prisons. See Cindy Struckman-Johnson et. al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex Res. 67, 67 (1996) (finding that twenty percent of the inmates in a relatively well-run prison were forced to have sexual contact against their will--about half of those inmates were forced to have intercourse). See generally David Siegal, [Rape in Prison and Aids: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter](#), 44 Stan. L. Rev. 1541, 1544 (1992) (noting that sexual assault within the prison context occurs with surprising "frequency and brutality").

[FN175]. The Court explicitly declined to answer this question in *Farmer*. See [Farmer](#), 511 U.S. at 834 n.3 ("At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.").

[FN176]. See, e.g., [Westmoreland v. Brown](#), 883 F. Supp. 67, 75 (E.D. Va. 1995) (describing existence of spectrum of harm

from specific risk to more generalized knowledge).

[FN177]. See, e.g., [Webb v. Lawrence County](#), 144 F.3d 1131, 1135 (8th Cir. 1998) ("Although defendants knew that, in general, inmate rape and assault is pervasive in this nation's prison system, there was no evidence or allegations that inmate rape is a common occurrence in this particular jail.").

[FN178]. See, e.g., [Lewis v. Richards](#), 107 F.3d 549, 555 (7th Cir. 1997) (dismissing inmate's argument that violence was pervasive at prison because of lack of documentation); [Alberti v. Klevenhagen](#), 790 F.2d 1220, 1225-26 (5th Cir. 1986) (describing difficulty of proving case without documented evidence); Scarce, supra note 168, at 37 ("Lacking the significance that statistical evidence provides, prison rape is usually disbelieved, ignored, or blamed on the victims themselves.").

[FN179]. See, e.g., [Anderson v. Redman](#), 429 F. Supp. 1105, 1117 n.31 (D. Del. 1977) ("By the time an inmate reaches his initial classification destination, be it maximum, medium, or minimum, it is difficult to discern nonconsensual homosexual activity, because the resistance of most nonconsensual victims has been broken by that time."); Scarce, supra note 168, at 39 ("Frequently this coercive sexual relationship is mistaken for consensual homosexuality."); Struckman-Johnson, supra note 174, at 68.

[FN180]. See, e.g., [Payne v. Collins](#), 986 F. Supp. 1036, 1048 n.18 (D. Tex. 1997) ("'Protection money' usually assumes the form of either goods from the prison commissary or participation in homosexual acts."); Sagarin, supra note 173, at 252 ("One aggressor claimed to have had a homosexual pimping operation going in the prison for a time, in which he was 'renting out' to others a group that he called 'his boys.' "); Struckman-Johnson, supra note 174, at 72 (noting in a study of sexual assaults in a mid-western prison system that blackmail was used in eleven percent of the cases, bribes were used in thirteen percent).

[FN181]. See, e.g., [Withers v. Levine](#), 449 F. Supp. 473, 475 (D. Md. 1978) ("[A]n inmate prone to sexual victimization, can minimize his harm, by agreeing to some homosexual activity."); Rideau, supra note 173, at 12 ("[W]hile the initial rape-demasculation might have been effected by physical force, the ensuing sexual acts are generally done with the galboy's 'consent' and 'cooperation.' "); Cotton, supra note 173, at 50 ("He may be forced to 'hook up' (provide sexual services) to one inmate (his 'jock' or 'dad') in exchange for protection from sexual victimization by other prisoners.").

[FN182]. See Siegal, supra note 174, at 1581 n.135 ("Courts seem to make no qualitative distinction between sexual and nonsexual assaults, treating sexual assault as merely a subset of violent attack in general.").

[FN183]. See Robert Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 Int'l. J. Soc. L. 135, 136 (1992).

[FN184]. As one commentator noted:

Nonetheless, it was hard to separate consensual homosexuality from rape, since many continuing and isolated homosexual liaisons originated from a gang rape .... Similarly, many individual homosexual acts were possible only because of the fear-charged atmosphere .... Prison officials are too quick to label such activities "consensual."

Davis, supra note 173, at 112.

[FN185]. Tucker, supra note 173, at 67 ("In the setting of jails and prisons, it is difficult to draw sharp distinctions between rape and other forms of sexuality.... You just can't single out violent rape from the rest of prison sexuality without getting an incomplete and distorted picture as a result.").

[FN186]. When asked by guards, inmates have been known to lie about being raped. See [Redman v. County of San Diego](#), 942 F.2d 1435, 1438-39 (9th Cir. 1991); [Wheeler v. Sullivan](#), 599 F. Supp. 630, 634 (D. Del. 1984).

[FN187]. See, e.g., Cotton, supra note 173, at 51-52 (noting how rape victim loses his manhood); Davis, supra note 173, at 108 ("After a young man has been raped, he is marked as a sexual victim for the duration of his confinement. This mark follows him from institution to institution.").

[FN188]. See, e.g., [Thomas v. District of Columbia](#), 887 F. Supp. 1 (D.C. Cir. 1995) (recognizing that spreading rumors about an inmate's homosexuality can lead to danger of rape).

[FN189]. See Sykes, *supra* note 148, at 87-90.

[FN190]. Scarce, *supra* note 168, at 163.

[FN191]. See Struckman-Johnson, *supra* note 174, at 74; see also *LaMarca v. Turner*, 662 F. Supp. 647, 686 (D. Fla. 1987) (testimony of experts that prison rapes are underreported by at least fifty percent).

[FN192]. See, e.g., James E. Robertson, *Surviving Incarceration: Constitutional Protection From Inmate Violence*, 35 Drake L. Rev. 101, 122-35 (1986) (detailing need for preventive measures); see also *Neely v. Feinstein*, 50 F.3d 1502, 1508 (9th Cir. 1995) (arguing that prison officials must take some steps to protect even if not sure that harm will occur); *Smith v. Ullman*, 874 F. Supp. 979, 986-87 (D. Neb. 1994) (noting need for prevention of harm in an Eighth Amendment standard).

[FN193]. This point was well-established in the common law. According to the Restatement (Second) of Torts, One who has taken the custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

Restatement (Second) of Torts § 320 cmt. d (1965).

[FN194]. For examples of violence caused by the failure to implement basic preventive measures see *Redman v. County of San Diego*, 942 F.2d 1435, 1444 (9th Cir. 1991) (describing policy of overcrowding and failure to segregate rapists), and *Hale v. Tallapoosa County*, 50 F.3d 1579, 1584-85 (11th Cir. 1995) (describing failure to classify or segregate violent from non-violent inmates, failure to train guards, failure to adequately monitor inmates).

[FN195]. See, e.g., *Hemauer v. Jefferson County Corr. Dept.*, 173 F.3d 428 (6th Cir. 1999) (unpublished) (affirming trial court's grant of summary judgment in case where inmate was killed in inadequately staffed dorm); *McClenton v. McGuire*, 165 F.3d 32 (7th Cir. 1998) (unpublished) (affirming trial court's grant of summary judgment that was based on plaintiff's failure to produce evidence that defendants knew of substantial risk of violence, where epileptic inmate was raped during seizure by cellmate convicted of sexual); *Nichols v. Simmons*, No. 95CIV.130-5-D, 1996 WL 407489, at \*4 (D. Miss. 1996) (dismissing claim where inmate was beaten by inmates who roamed jail without supervision); *Baker v. Lehman*, 932 F. Supp. 666, 670 (D. Pa. 1996) (dismissing cases where inmate was attacked with scissors in clothing shop that had no security measures).

[FN196]. *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991); see also *United States v. Haynes*, 143 F.3d 1089, 1091 (7th Cir. 1998) ("Prisons collect violent persons who have little respect for the law, which makes them hard to control without the use of devices such as segregation that are unpleasant in their own right."); *Berg v. Kincheloe*, 794 F.2d 457, 461 (9th Cir. 1986) (noting difficulty of balancing conflicting factors in protecting inmates).

[FN197]. See, e.g., *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998) ("Although defendants knew that, in general, inmate rape and assault is pervasive in this nation's prison system, there was no evidence or allegations that inmate rape is a common occurrence in this particular jail.").

[FN198]. See, e.g., Stephen Donaldson, *Can We Put an End to Inmate Rape?*, USA Today Magazine, May 1, 1995, at 40; Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape Most Favor Condoms For Inmates*, Boston Globe, May 17, 1994, at 22.

[FN199]. See *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (noting that a new prisoner can expect to be raped on the first day of incarceration); *Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999) (observing that disclosure of inmate transsexuality is dangerous "given that, in the sexually charged atmosphere of most prison settings, such disclosure might lead to inmate-on-inmate violence").

[FN200]. See, e.g., *United States v. Gonzalez*, 945 F.2d 525 (2d. Cir. 1991); *United States v. Lara*, 905 F.2d 599 (2d. Cir. 1990); *United States v. Ruff*, 998 F. Supp. 1351 (D. Ala. 1998).

[FN201]. See Howard Schneider, *U.S. Prosecutor's Remarks Derail Extradition Efforts; Canadian Judge Swayed by Harsh Jail Threat*, Wash. Post, Oct. 30, 1997, at A27.

[FN202]. See Donaldson, *supra* note 198, at 40.

[FN203]. *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) (One warden testified that "to [the Warden's] knowledge, inmates in the prison had to 'fight' against sexual aggressors; i.e., it is the inmates' own responsibility to 'let people understand that [they]'re not going to put up with that." ); *LaMarca v. Turner*, 995 F.2d 1526, 1533 (11th Cir. 1993) ("Rather than offer to help, the staff suggested that the inmates deal with their problems 'like men,' that is, use physical force against the aggressive inmate.").

[FN204]. See *LaMarca v. Turner*, 662 F. Supp. 647, 678-83 (S.D. Fla. 1987) (detailing lack of basic procedures such as investigative protocol, inmate movement controls, stationing of officers, and segregation of predators).

[FN205]. See, e.g., Dumond, *supra* note 183, at 135; Struckman-Johnson, *supra* note 174, at 75.

[FN206]. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994); see also *Hemauer v. Jefferson County Corr. Dept.*, No. 98 CIV 5206, 1999 WL 96752, at \*4 (6th Cir. Feb. 2, 1999) (finding no knowledge though inmate wrote note warning guards he was in danger); *Oetken v. Ault*, 137 F.3d 613, 614 (8th Cir. 1998) (finding no knowledge though inmate told officers he was afraid of cellmate); *Sinnett v. Simmons*, 45 F. Supp. 2d 1210, 1219 (D. Kan. 1999) (finding prison officials did not draw inference of substantial risk though they placed a violent inmate in unit reserved for vulnerable inmates); *Snell v. DeMello*, 44 F. Supp. 2d 386, 391-93 (D. Mass. 1999) (finding no knowledge though inmate told guard of threat).

[FN207]. See, e.g., *Redman v. County of San Diego*, 942 F.2d 1435, 1450 (9th Cir. 1991) (noting that most defendants will not admit consciousness and disregard of a substantial risk); *Matthew v. Armitage*, 36 F. Supp. 2d 121, 125 (N.D.N.Y. 1999) (noting that direct evidence of knowledge is rarely available).

[FN208]. See Kenji Yoshino, Note, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 Yale L.J. 485, 538-57 (1998).

[FN209]. See *id* at 544-45.

[FN210]. *Id.* at 545 ("[T]he superficial judgments about gays that justify the policy ... survive precisely because the coerced invisibility of gays prevents them from being challenged.").

[FN211]. *Id.* at 556-57.

[FN212]. It is significant that Foucault applies his theory of power to both. Compare Foucault, *supra* note 134, with Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley trans., Pantheon Books 1st ed. 1990) (1978).

[FN213]. See sources cited at *supra* notes 198-201.

[FN214]. See, e.g., *Roland v. Johnson*, 856 F.2d 764, 766 (6th Cir. 1988) (describing how warden told inmate's mother that her son would not have to worry about being raped in prison if he was not a homosexual); *Wheeler v. Sullivan*, 599 F. Supp. 630, 649 (D. Del. 1984) (describing situation where inmate rape victim was subjected to questioning about whether he was a homosexual); Rideau, *supra* note 173, at 11 ("One of the key elements of the prisoner's belief system is that a 'man' cannot be forced to do anything that he does not want to--a 'real man' cannot be exploited.").

In one illustrative case, prison officials had a policy of allowing sexual predators to roam the general population unchecked. While they segregated homosexuals who were not sexual predators, they offered no such protection for any heterosexuals. They did so because they assumed that heterosexuals would be able to defend themselves against sexual assault from homosexuals. See *Redman v. County of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1991).

[FN215]. As one commentator documents in the prison context: "Officers equate homosexuality/bisexuality with participation and assume that inmates participate consensually in large numbers." Nacci, *Sex and Sexual Aggression*, *supra* note 173, at 48. Another commentator describes general societal attitudes:

If gay men are homophobically stereotyped as hypersexual beings always having or wanting to have sex, then theoretically gay men cannot be raped. The old adage, "You can't rape the willing" describes this mentality. In that respect, gay men are culturally designed to be unrapeable, unable to be violated sexually on any level.

Scarce, *supra* note 168, at 70-71.

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[FN216]. See [Lewis v. Richards](#), 107 F.3d 549, 555 (7th Cir. 1997). The inmate-plaintiff alleged that he was raped three times. The third rape occurred after he filed a civil rights suit for the first two rapes. Although the plaintiff had been placed in protective custody after the first two rapes, he was put back in general population over his objections, where he alleged that he was raped again. Prison officials argued that the third incident was consensual and disciplined the inmate. The court accepted this finding without question, and affirmed dismissal of the inmate's suit on summary judgment. This uncritical acceptance that the third incident was consensual was unjustified. The inmate had allegedly been raped twice before and prison officials had a clear incentive to label the assault consensual given that they were being sued for allowing similar incidents to occur.

[FN217]. Tucker, *supra* note 173, at 24.

[FN218]. An effect of this is that higher level officials tend to be shielded from liability because supervisors are less likely to have knowledge of a risk of harm. See [Grau v. Gilmore](#), No. 94-2182, 1994 WL 718518, at \*1 (7th Cir. Dec. 27, 1994) (noting that supervisory officials are much less likely to have actual knowledge).

[FN219]. Such high level officials may have more power to change inadequate policies. See Schuck, *supra* note 18, at 100-13.

[FN220]. 986 F. Supp. 1036 (E.D. Tex. 1997).

[FN221]. See *id.* at 1045.

[FN222]. See *id.* at 1060.

[FN223]. See *id.* at 1063.

[FN224]. 889 F. Supp. 1146 (N.D. Cal. 1995).

[FN225]. See *id.* at 1237-39.

[FN226]. See *id.* at 1239, 1269.

[FN227]. See, e.g., [Perkins v. Grimes](#), 161 F.3d 1127, 1130 (8th Cir. 1998) (dismissing claim for lack of knowledge where inmate was raped after he was celled with a sexual predator due to policy of random cell assignments); [Fisher v. Cocke County](#), No. 95-5359, 1996 WL 520793, at \*3-4 (6th Cir. Sept. 12, 1996) (dismissing claim for lack of knowledge where inmate was beaten when sheriff did not follow manual regarding classification procedures); [Langston v. Peters](#), No. 93 C2607, 1995 WL 461912, at \*6-7 (7th Cir. Aug. 2, 1995) (dismissing claim for lack of knowledge where inmate was raped ten days after being celled with rapist); [James v. Milwaukee County](#), 956 F.2d 696, 703 (7th Cir. 1992) (dismissing claim for lack of knowledge where non-violent offender was celled with sexual predator and raped due to deficient classification policy); [Sinnott v. Simmons](#), 45 F. Supp. 2d 1210, 1218 (D. Kan. 1999) (dismissing claim for lack of knowledge where inmate in protective custody was attacked by violent inmate who prison officials placed in protective custody unit).

[FN228]. The Farmer Court briefly mentions, at the end of the opinion, that even if a defendant knows of substantial risk of harm to an inmate, he can avoid liability if he responded reasonably to the risk yet the harm was not averted. See [Farmer v. Brennan](#), 511 U.S. 825, 844-45 (1994).

[FN229]. See Ely, *supra* note 8, at 11-41; Akhil Reed Amar, [The Bill of Rights as a Constitution](#), 100 Yale L.J. 1131, 1131 (1991) ("Instead of being studied holistically, the Bill has been chopped up into discrete chunks of text, with each bit examined in isolation.").

[FN230]. U.S. Const. amend. VIII.

[FN231]. W. Page Keeton et al., [Prosser and Keeton on the Law of Torts](#) 419 (5th ed. 1984).

[FN232]. *Id.* at 425.

[FN233]. *Id.* at 426 (footnotes omitted).

[FN234]. *Id.* at 426-27.

[FN235]. Keeton, *supra* note 231, at 427.

[FN236]. See *id.* at 422.

[FN237]. See generally Schuck, *supra* note 18, at 100-07 (arguing that the government should be liable for official misconduct); Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639, 662-81 (1993) (commenting on the effectiveness of prison litigation).

[FN238]. See American Correctional Association, *Standards for the Administration of Correctional Agencies* (1995).

[FN239]. See, e.g., *Jones v. Kelly*, 918 F. Supp. 74, 80 (W.D.N.Y. 1995) (holding that even though defendant may have known about risk of assault, reasonable investigation into allegations was enough to avoid liability); *Kunkel v. Stockwell*, 887 F. Supp. 215, 219 (E.D. Mo. 1995) (holding that even though guards may have known about risk of assault, they acted reasonably).

[FN240]. See, e.g., *United States v. Haynes*, 143 F.3d 1089, 1091 (7th Cir. 1998) ("Prisons collect violent persons who have little respect for the law, which makes them hard to control without the use of devices such as segregation that are unpleasant in their own right."); see also *Berg v. Kincheloe*, 794 F.2d 457, 461 (9th Cir. 1986) (noting difficulty of balancing conflicting factors in protecting inmates).

[FN241]. See *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991).

[FN242]. Justice Blackmun explained the distinction between duty to protect cases and simple accidents in the following way: "When the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall. But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed." *Davidson v. Cannon*, 474 U.S. 344, 350 (1986) (Blackmun, J., dissenting).

[FN243]. The Prison Litigation Reform Act requires inmates to exhaust their administrative remedies before filing a claim. 42 U.S.C. § 1997e(a) (2000).

[FN244]. See *Farmer*, 511 U.S. at 834.

[FN245]. See, e.g., *Mabine v. Vaughn*, 25 F. Supp. 2d 587, 591 (E.D. Pa. 1998) (dismissing assault claim because harm was not objectively serious).

[FN246]. See generally *Anderson v. Creighton*, 483 U.S. 635, 643 (1987) (describing test for qualified immunity).

[FN247]. See Schuck, *supra* note 18, at 85-88 ("[M]ost states provide some form of indemnification, but usually only narrowly.").

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