

Harvard Law Review
November, 1994
The Supreme Court, 1993 Term
*231 LEADING CASES
I. Constitutional Law
D. Eighth Amendment

Copyright © 1994 by The Harvard Law Review

Cruel and Unusual Punishment -- Prison Conditions. -- A growing awareness of the often appalling conditions in American prisons has forced the Supreme Court to confront the question of when prison conditions are so inhumane that they violate the Eighth Amendment's prohibition of cruel and unusual punishment. [FN1] The 1970s and 1980s marked a period of increased responsiveness to prisoners' claims of unconstitutional prison conditions. [FN2] In *Wilson v. Seiter*, [FN3] however, the Court ushered in a new era of deference to prison officials [FN4] and held that an Eighth Amendment challenge to substandard prison conditions would succeed only if prison officials exhibited "deliberate indifference" to a substantial risk of serious harm to the inmate. [FN5]

Last Term, in *Farmer v. Brennan*, [FN6] the Court further curtailed the protection that the Eighth Amendment affords prison inmates by holding that *Wilson's* "deliberate indifference" standard requires that some prison official have actual knowledge of a substantial risk to inmates. In announcing a subjective standard for deliberate indifference, the Court limited prisoners' right to be free from cruel and unusual punishment and created a virtually insurmountable barrier for inmates who challenge the conditions of their confinement.

Dee Farmer, a transsexual [FN7] imprisoned for credit card fraud, was transferred for disciplinary reasons from a correctional institution to a *232 maximum security penitentiary for men. [FN8] Within two weeks of the transfer, she was raped and brutally beaten by a fellow prisoner. [FN9] Farmer is young, slight, and has a distinctly feminine appearance: she has silicone breast implants and has undergone estrogen therapy. [FN10] However, she has not yet undergone successful genital-alteration surgery. She was incarcerated at a facility for men because it is the policy of federal prison authorities to house preoperative transsexuals with prisoners who share their biological sex. [FN11] After the assault, Farmer filed an action under 42 U.S.C. § 1983 [FN12] and alleged that her transfer to the penitentiary constituted cruel and unusual punishment. She argued that prison officials knew or should have known of the substantial risk that she would be seriously harmed if placed in the general population of a maximum security facility for men [FN13] and that prison officials therefore acted with deliberate indifference to the risk. [FN14]

The district court granted summary judgment for the prison officials, stating that a failure to prevent inmate assault violates the Cruel and Unusual Punishments Clause only if prison officials were criminally reckless -- that is, if they had actual knowledge that Farmer was in danger. [FN15] The district court found that the prison officials lacked such knowledge, because Farmer had never told them of her fears. [FN16] The Seventh Circuit summarily affirmed the district court's decision. [FN17]

In a 9-0 decision, the Supreme Court affirmed the lower court's definition of deliberate indifference but held that Farmer's failure to notify prison officials of the danger she faced was not dispositive of *233 their lack of knowledge. The Court therefore remanded for a determination whether prison officials knew of the risk to Farmer. [FN18]

Justice Souter, writing for the Court, rejected an objective standard for deliberate indifference and asserted that a subjective standard "comports better with the text of the [Eighth] Amendment as [the Court's] cases have interpreted it." [FN19] In sum-

marizing the Court's prison conditions doctrine, Justice Souter noted that the Constitution "imposes duties on prison officials, who must provide humane conditions of confinement." [FN20] He also acknowledged that "the protection [an inmate] is afforded against other inmates' [is] 'a condition of confinement' subject to the strictures of the Eighth Amendment." [FN21] However, he then argued that not all inter-inmate violence constitutes cruel and unusual punishment of the victim. [FN22] Justice Souter explained that *Wilson v. Seiter* set forth a two-part test under which only those injuries that are both substantial and the result of some prison official's deliberate indifference are constitutional violations. [FN23]

Although the Court had "never paused to explain the meaning of the term 'deliberate indifference,'" Justice Souter observed that the case law is instructive: deliberate indifference falls "somewhere between the poles of negligence at one end and purpose or knowledge at the other." [FN24] He rejected Farmer's argument that the Court's prior adoption of an objective standard for deliberate indifference in the context of [section 1983](#) municipal liability for constitutional torts militated in favor of adopting the same standard in the prison conditions context. [FN25] Justice Souter concluded that *Wilson* required a subjective standard for deliberate indifference and that prison officials must therefore have actual knowledge of danger to a prisoner for that prisoner successfully to establish an Eighth Amendment violation. [FN26]

*234 Justice Souter took great pains to provide assurances that Farmer would not encourage prison officials to "take refuge in the zone between 'ignorance . . . ' and 'actual knowledge'" by turning a blind eye to inmate violence. [FN27] He explained that a prison official's state of mind is a question of fact appropriately left in the capable hands of the jury. [FN28] He also pointed out that a subjective standard does not require that prisoners wait to be harmed to assert a successful claim, for the trier of fact may infer a constitutional violation before an assault occurs from the facts and circumstances of a case. [FN29]

In a passionate concurrence, Justice Blackmun emphasized the violence that rages in many American prisons. He argued that "inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind" and therefore that *Wilson*, the case that first announced the deliberate indifference requirement for all prison conditions cases, ought to be overruled. [FN30] He described prison rape as "potentially devastating to the human spirit" and cautioned that the state has an obligation to protect inmates from prison violence. [FN31] Nevertheless, Justice Blackmun joined the Court's decision. He justified his choice by asserting that Farmer does not extend *Wilson*; he stated that Farmer "creates no new obstacles" for prisoners and that the opinion sends a "clear message" that prison officials must not abdicate their duty to protect inmates. [FN32] "Short of overruling *Wilson*," Justice Blackmun concluded, "the Court could do no better." [FN33]

Justice Stevens sounded a similar theme in his short concurrence. He expressed his belief that *Wilson* should be overruled and that inhumane prison conditions always violate the Eighth Amendment. He explained, however, that he concurred because the opinion is "faithful to [the Court's] precedents." [FN34]

Justice Thomas concurred in the judgment, also for reasons of stare decisis. According to Justice Thomas, prison conditions are never "punishment." He pointed to a dictionary definition of punishment as a "penalty . . . inflicted upon a person by . . . the judgment and sentence of a court" to buttress his argument that, aside from a judge's *235 sentence or a statutory mandate, only a prison official's intent to harm a prisoner could qualify as punishment. [FN35] Thus, according to Justice Thomas, only an intentional injury would rise to the level of an Eighth Amendment violation. [FN36] Justice Thomas condemned the entire body of prison conditions jurisprudence as an attempt by the Court to usurp the role of the legislature in prison reform. [FN37] He went so far as to state that, even given stare decisis considerations, he might vote to overrule the leading case of *Estelle v. Gamble* [FN38] and its progeny were the issue squarely presented. [FN39]

Farmer v. Brennan effectively leaves inhumane prison conditions without constitutional remedy. Although the Court has long

indicated that the state has a duty to protect prisoners from inhumane conditions, Farmer's subjective standard seriously erodes this constitutional duty. Further, Farmer makes it virtually impossible for an inmate to prove a breach of the remnants of this duty. The decision is particularly unfortunate because the Supreme Court's precedent in *Wilson* did not require a subjective standard for deliberate indifference. The Court, therefore, would have done better to have adopted an objective standard.

The Court has often characterized the core value of the Eighth Amendment as the prevention of the abuse of state power. [\[FN40\]](#) One component of this core value is ensuring that prison inmates be treated humanely while in the state's custody. The Court has recognized the state's duty to care for prison inmates [\[FN41\]](#) and has indicated that this duty of care encompasses "the minimal civilized measure of life's necessities." [\[FN42\]](#) As Justice Souter wrote in *Farmer*, "[t]he Amendment . . . imposes duties on [prison] officials . . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates.'" [\[FN43\]](#)

***236** *Farmer*, however, eviscerates this Eighth Amendment duty of care. After *Farmer*, prison conditions will only be deemed unconstitutional if some prison official is shown to have been aware of a substantial risk of serious harm to inmates. A subjective standard for deliberate indifference leaves prison officials with no duty actively to seek out this knowledge. Prison officials need not, for example, make an effort to familiarize themselves promptly with the files of new inmates or to cultivate inmate informers. At best, *Farmer* encourages passivity; at worst, despite the Court's protestations to the contrary, it rewards willful blindness to the risks that prisoners face.

Farmer's failure adequately to preserve the Eighth Amendment duty of care is not surprising: *Farmer* is an offshoot of *Wilson*, which, as Justice White recognized, inappropriately drew on a line of Eighth Amendment cases that attempted to deal with isolated incidents rather than with conditions of confinement generally. [\[FN44\]](#) However, *Farmer* and *Wilson*, as prison conditions cases, can be distinguished from the cases that involved isolated occurrences. The Court's isolated incidents cases sought to limit the state's liability for harms that occurred under extraordinary circumstances rather than to consider what duty of care is ordinarily required. [\[FN45\]](#) A subjective standard is arguably appropriate in isolated incidents cases, in which prison officials need to make decisions "in haste, under pressure, and frequently without the luxury of a second chance." [\[FN46\]](#) However, a subjective standard is particularly unsuitable in the prison conditions context. The incidence of prison rape, for example, has reached epidemic proportions [\[FN47\]](#) and reflects an institutional failure to protect vulnerable inmates. Prison conditions doctrine defines what minimum standard of care a prisoner can reasonably demand during the normal course of her incarceration; this standard of care should therefore be measured by what a reasonable ***237** prison official should have known rather than by what the official actually knew. A subjective standard should thus be limited to cases that, unlike *Farmer*, involve isolated events.

In addition, *Farmer* creates problems of proof for prisoners who seek to establish that the state has not fulfilled its duty of care. [\[FN48\]](#) Justice Souter announced that an inmate who claims a violation of his Eighth Amendment rights could prove that a risk of harm was so obvious that a prison official must have been aware of it. [\[FN49\]](#) However, a prisoner would have almost no hope of bringing a successful claim. Plaintiffs in prison conditions cases confront significant jury prejudice against prisoners. [\[FN50\]](#) Establishing actual knowledge in the face of a prison official's assertion that he was unaware of the risk to inmates is difficult, even if the official clearly must have known of the risk. [\[FN51\]](#) These problems with a subjective standard of proof occur in all prison conditions cases, but particular complications arise in the context of prison rape. [\[FN52\]](#)

***238** Justice Souter's insistence that pre-attack relief will be available [\[FN53\]](#) also rings hollow. The actual knowledge requirement will mean that, to establish liability, a prisoner must inform a guard of his fear of attack before an attack occurs. The prisoner would therefore need to be aware of the impending attack and be willing to inform the guards. Yet new prison-

ers may not recognize signs of an impending attack, [\[FN54\]](#) and even for those inmates who are aware, "snitching" carries the threat of serious retaliation. [\[FN55\]](#) Although the Court held that Dee Farmer's failure to tell guards of her fear that she would be attacked was not dispositive of the officials' lack of actual knowledge, [\[FN56\]](#) in the face of a prison official's protestations to the contrary, a prisoner would find it almost impossible to prove conclusively that a prison official was aware of a risk. As a practical matter, Farmer's subjective standard will often mean that the state will bear no liability for inhumane prison conditions. [\[FN57\]](#)

Farmer will also frustrate claims of Eighth Amendment violations by endorsing Wilson's requirement that the prisoner identify at least one prison official who exhibited deliberate indifference. As Justice White argued in his concurrence in the judgment in *Wilson*: "Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined" [\[FN58\]](#) The difficulty involved in finding one actor who is aware of a risk of harm to inmates is particularly *239 acute under the conditions that prevail in American prisons. In underfunded, understaffed, and overcrowded institutions, [\[FN59\]](#) the chances are slim that any one official knows of a risk to a particular inmate. [\[FN60\]](#)

Farmer is a particularly unfortunate decision because its subjective standard for deliberate indifference was not compelled by the Court's precedent in *Wilson*. The *Wilson* Court set forth a two-part test for determining whether a prisoner's Eighth Amendment rights were violated. First, the deprivation must be "sufficiently serious." [\[FN61\]](#) Second, some prison official must have a culpable state of mind. [\[FN62\]](#) The *Farmer* Court incorrectly maintained that an objective standard for deliberate indifference would be inconsistent with *Wilson*. The holding of *Wilson* is merely that, in order to prevail on a claim that prison conditions constitute cruel and unusual punishment, a prisoner must show that some prison official exhibited the culpable state of mind of deliberate indifference. [\[FN63\]](#) Although the *Farmer* Court stressed that *Wilson* requires some kind of subjective standard for deliberate indifference, [\[FN64\]](#) the *Wilson* Court never defined deliberate indifference. *Wilson* did not determine whether deliberate indifference turned on a prison official's actual knowledge (a subjective standard) or on what a reasonable prison official should have known (an objective standard). [\[FN65\]](#) Given *Wilson*'s silence on this issue, the *Farmer* Court was hardly bound to adopt an unjust and unworkable subjective standard. [\[FN66\]](#)

*240 By further limiting the ability of prison inmates successfully to challenge the conditions of their confinement, *Farmer v. Brennan* takes yet another step down *Wilson*'s misguided path. An objective standard for deliberate indifference would comport better with the Eighth Amendment duty of care. *Farmer* and *Wilson* are unlikely to be overruled any time soon, and due to the unpopularity of prisoners' rights issues, it is doubtful that the legislative branch will attempt to forge a remedy. For the time being, at least, prisoners such as Dee Farmer are left in an appalling situation: they are incarcerated under abominable conditions that are the functional equivalent of cruel and unusual punishment, yet they are denied any realistic opportunity to prevent or redress violations of their Eighth Amendment rights. The picture is not entirely bleak, however, for *Farmer* contains the seeds of its eventual overruling. *Farmer* is deeply flawed because it is premised on an implausible conception of reality. The *Farmer* Court makes predictions that are unlikely to be borne out in fact. Prisoners will someday be able to show that the Court was too sanguine in providing assurances that *Farmer* would not prevent inmates from establishing that their Eighth Amendment rights had been violated. At that time, the recognition of the Court's mistaken understanding of prison conditions litigation will warrant that *Farmer* be overturned. [\[FN67\]](#)

[\[FN1\]](#). See U.S. Const. amend. VIII. The abysmal conditions in American prisons are well documented. See, e.g., [Rhodes v. Chapman](#), 452 U.S. 337, 369-72 (1981) (Marshall, J., dissenting); Susan P. Sturm, [The Legacy and Future of Corrections Litigation](#), 142 U. Pa. L. Rev. 639, 687-91 (1993). Prior to the 1970s, the Court had a "hands-off" policy toward prison conditions. See, e.g., Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the "Hands-Off" Doctrine*, 1977 Det. C.L. Rev. 795, 796-98 (noting that, according to the hands-off approach, "[c]ourts are without power to supervise prison

administration or to interfere with the ordinary prison rules or regulations" (quoting [Banning v. Looney](#), 213 F.2d 771, 771 (10th Cir.) (per curiam), cert. denied, [348 U.S. 859 \(1954\)](#)) (internal quotation marks omitted)).

[FN2]. See, e.g., [Hutto v. Finney](#), 437 U.S. 678, 685 (1978); [Estelle v. Gamble](#), 429 U.S. 97, 102-03 (1976); see also Haas, supra note 1, at 830-31 (noting the "overall trend toward the greater recognition of protected inmate liberties"); Note, The Role of the Eighth Amendment in Prison Reform, 38 U. CHI. L. REV. 647, 655 (1971) (explaining that, "[in] recent years, . . . the judiciary has indicated a willingness to go far beyond its traditional role" (footnote omitted)).

[FN3]. [501 U.S. 294 \(1991\)](#).

[FN4]. See [The Supreme Court, 1990 Term -- Leading Cases](#), 105 HARV. L. REV. 177, 235-36 (1991). Wilson is one of several recent cases in which the Court has limited inmates' rights. See, e.g., [Whitley v. Albers](#), 475 U.S. 312, 320-21 (1986); [Davidson v. Cannon](#), 474 U.S. 344, 348-49 (1986); see also 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, 1346 (1992) (arguing that the Supreme Court has, in recent years, limited inmates' constitutional rights).

[FN5]. [Wilson](#), 501 U.S. at 303.

[FN6]. [114 S. Ct. 1970 \(1994\)](#).

[FN7]. A transsexual is "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment . . . to bring about a permanent sex change." [Farmer](#), [114 S. Ct. at 1975](#) (quoting AMERICAN MEDICAL ASS'N, ENCYCLOPEDIA OF MEDICINE 1006 (1989)). In deference to the fact that Dee Farmer considers herself female, this Comment uses feminine pronouns to refer to Farmer.

[FN8]. See [id. at 1975](#); [id. at 1986](#) (Blackmun, J., concurring). Farmer was officially transferred for committing credit card fraud within the correctional facility. However, she was also cited for engaging in consensual sex. See Brief for the Petitioners at 2 n.6, Farmer (No. 92-7247).

[FN9]. See [Farmer](#), [114 S. Ct. at 1975](#).

[FN10]. See [id.](#)

[FN11]. See [id.](#)

[FN12]. Prison conditions suits are brought under [42 U.S.C. § 1983](#), which provides in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured
[42 U.S.C. § 1983 \(1988\)](#).

[FN13]. Penitentiaries generally house inmates who are more violent than those in correctional institutions. See [Farmer](#), [114 S. Ct. at 1975](#).

[FN14]. See [id.](#)

[FN15]. See [id.](#) at 1976. The district court opinion was not published.

[\[FN16\]](#). See id.

[\[FN17\]](#). See id.

[\[FN18\]](#). See id. at 1984-85.

[\[FN19\]](#). Id. at 1979. Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Ginsburg joined Justice Souter's opinion.

[\[FN20\]](#). Id. at 1976.

[\[FN21\]](#). Id. at 1977 (quoting [Wilson v. Seiter, 501 U.S. 294, 303 \(1991\)](#)). Justice Souter explained that the state has a duty to protect prisoners from violence, for violence serves no penological function. See id. (citing [Hudson v. Palmer, 468 U.S. 517, 548 \(1984\)](#) (Stevens, J., concurring in part and dissenting in part)).

[\[FN22\]](#). See id. at 1976-77. Justice Souter reasoned that there is a difference between events that our society might wish to deter and events that should be deemed constitutional violations. See id. at 1979.

[\[FN23\]](#). See id. at 1977. Justice Souter elaborated that the requirement of deliberate indifference follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." Id. (quoting [Wilson, 501 U.S. at 297](#)) (internal quotation marks omitted).

[\[FN24\]](#). Id. at 1977-78.

[\[FN25\]](#). See id. at 1979.

[\[FN26\]](#). See id. at 1979-80. Justice Souter declared that "it was no accident that we said in *Wilson* and repeated in later cases that Eighth Amendment suits against prison officials must satisfy a 'subjective' requirement." Id. (citing [Wilson, 501 U.S. at 298](#); [Helling v. McKinney, 113 S. Ct. 2475, 2482 \(1993\)](#); and [Hudson v. McMillian, 112 S. Ct. 995, 999 \(1992\)](#)).

[\[FN27\]](#). Id. at 1981 (quoting Brief for Petitioner at 27, Farmer (No. 92-7247)).

[\[FN28\]](#). See id. at 1981-82. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 1981. Justice Souter also made clear that prison officials need not have prior knowledge that a particular inmate will be the attacker. See id. at 1982. Justice Souter did, however, insist that, "[w]hen instructing juries in deliberate indifference cases . . . , courts should be careful to ensure that the requirement of subjective culpability is not lost." Id. at 1982 n.8.

[\[FN29\]](#). See id. at 1982-84.

[\[FN30\]](#). Id. at 1986-87 (Blackmun, J., concurring).

[\[FN31\]](#). Id. at 1987.

[\[FN32\]](#). Id. at 1986.

[\[FN33\]](#). Id. at 1989.

[FN34]. *Id.* at 1990 (Stevens, J., concurring).

[FN35]. *Id.* at 1990 (Thomas, J., concurring in the judgment) (quoting [Helling v. McKinney](#), 113 S. Ct. 2475, 2483 (1993) (Thomas, J., dissenting) (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990))) (internal quotation marks omitted).

[FN36]. See *id.*

[FN37]. Justice Thomas quipped that Farmer once again "refine[d] the 'National Code of Prison Regulation,' otherwise known as the Cruel and Unusual Punishments Clause." *Id.* at 1990.

[FN38]. [429 U.S. 97 \(1976\)](#). The Gamble Court first held that inadequate medical care can result in an Eighth Amendment violation. See *id.* at 104-05.

[FN39]. See [Farmer](#), 114 S. Ct. at 1991 (Thomas, J., concurring in the judgment).

[FN40]. See, e.g., [Gamble](#), 429 U.S. at 103; [Whitley v. Albers](#), 475 U.S. 312, 318 (1986).

[FN41]. See, e.g., [Whitley](#), 475 U.S. at 319; [Rhodes v. Chapman](#), 452 U.S. 337, 347 (1981); [Hutto v. Finney](#), 437 U.S. 678, 685 (1978); cf. [Gamble](#), 429 U.S. at 116 (Stevens, J., dissenting) (arguing that "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it").

The rationale for this duty of care is that, in depriving prisoners of their liberty, the state has left them incapable of caring for themselves. See, e.g., [DeShaney v. Winnebago County Dep't Social Servs.](#), 489 U.S. 189, 200 (1989); [Rhodes](#), 452 U.S. at 347; [Gamble](#), 429 U.S. at 104.

[FN42]. [Rhodes](#), 452 U.S. at 347.

[FN43]. [Farmer](#), 114 S. Ct. at 1976 (quoting [Hudson v. Palmer](#), 468 U.S. 517, 526-27 (1984)).

[FN44]. See [Wilson](#), 501 U.S. at 309 (White, J., concurring in the judgment). Justice White claimed that the Wilson majority, in deciding that deliberate indifference was the appropriate standard for all claims of unconstitutional prison conditions, relied upon cases that were not actually challenges to conditions of confinement but rather were challenges to "specific acts or omissions directed at individual prisoners." *Id.* at 309. He cited as an example *Estelle v. Gamble*, which he characterized as a challenge to inadequate treatment of a particular inmate rather than a challenge to medical care at the prison. See *id.* Justice Scalia, writing for the Court, responded that Justice White made a baseless distinction between conditions of confinement and isolated incidents. Justice Scalia argued that the "medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed." [Wilson](#), 501 U.S. at 303. However, there are situations in which one can make a valid distinction between conditions and isolated incidents, although the categories tend to collapse into each other. Recurring events and institutional policies are fundamentally different from unpredictable accidents. An isolated instance of medical malpractice is different from a flawed system of administering medical care at a prison. See [Gamble](#), 429 U.S. at 108 (Stevens, J., dissenting).

[FN45]. See, e.g., [Whitley v. Albers](#), 475 U.S. 312, 312-13 (1986).

[FN46]. [Farmer](#), 114 S. Ct. at 1978 (quoting [Hudson v. McMillian](#), 112 S. Ct. 995, 998 (1992) (quoting [Whitley](#), 475 U.S. at 320)) (internal quotation marks omitted).

[FN47]. See DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 4-8 (1980).

[FN48]. Both the Court and Justice Blackmun dismissed the concern that Farmer might violate the constitutional imperative to protect inmates and declared that Farmer would not have adverse effects on prisoners who seek to protect their constitutional right to be free from cruel and unusual punishment. See *id.* at 1981-84; *id.* at 1986 (Blackmun, J., concurring).

[FN49]. See [Farmer, 114 S. Ct. at 1981-82.](#)

[FN50]. Although ideally juries are not affected by petty prejudices, the Court must be realistic about the limitations of the jury system. See Theodore Eisenberg, [Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases](#), 77 *GEO. L.J.* 1567, 1567, 1594 n.96 (1989). Prison officials are credible witnesses, and convicted criminals are very unsympathetic plaintiffs. Cf. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 *YALE L.J.* 447, 454 (1978) ("At the defendants' table sit the police officers . . . with the American flag figuratively wrapped around them [T]he [section 1983](#) plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict."); Diana L. Davis, Comment, [Deliberate Indifference: An "Unnecessary" Change?](#), 29 *HOUS. L. REV.* 923, 960 (1992) (pointing out that the unpopularity of prison inmates leaves people unmoved by abysmal prison conditions). Juries will therefore resist finding prison officials liable under [§ 1983](#). A jury might be particularly unsympathetic to Farmer due to her transsexualism.

[FN51]. See Barbara Kritchevsky, [Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Actions](#), 60 *GEO. WASH. L. REV.* 417, 462 (1992).

[FN52]. Same-sex rape raises the specter of homophobia. Many people believe that victims of same-sex rape are homosexual. See Brief of Stop Prisoner Rape, Amicus Curiae in Support of Petitioner at 24, *Farmer* (No. 92-7247). A jury might be reluctant to credit that an attack constitutes harm and might therefore refuse to find that the Eighth Amendment has been violated. Cf. SUSAN ESTRICH, *REAL RAPE* 57-58 (1987) (explaining that, in cases that involve the rape of a woman by a man, courts and juries are extremely suspicious of victims who know their attackers). This reluctance may be even more pronounced if the factfinder knew that the victim was in fact homosexual. Cf. D.J. West, *Homophobia: Covert and Overt*, in *MALE VICTIMS OF SEXUAL ASSAULT* 13, 13-19 (Gillian C. Mezey & Michael B. King eds., 1992) (noting the pervasiveness of homophobia); Robert B. Mison, Comment, [The Homosexual Advance as Insufficient Provocation](#), 80 *CAL. L. REV.* 133, 158 (1992) (explaining that, in a criminal prosecution for the manslaughter of a homosexual victim, "the typical American jury . . . will evaluate the homosexual victim . . . with feelings of fear, revulsion, and hatred").

In addition, as Justice Blackmun has acknowledged, prison rape is a constant threat to young, small, nonviolent inmates. To avoid rape by several inmates, a prisoner may seek protection from another inmate in exchange for sexual favors. See [United States v. Bailey](#), 444 *U.S.* 394, 421-22 (1979) (Blackmun, J., dissenting); WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS* 101-16 (1983); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 *STAN. L. REV.* 1541, 1544-47 (1992). Although such arrangements are just as coercive as violent assault, juries would be particularly unwilling to find that the relationship constitutes harm within the meaning of the Eighth Amendment.

[FN53]. See [Farmer, 114 S. Ct. at 1983-84.](#)

[FN54]. Cf. Donald Tucker, *A Punk's Song: View From the Inside*, in *MALE RAPE* 58, 77 (Anthony M. Scacco, Jr. ed., 1982) ("Perhaps the most useful small step would be to prepare honestly the incoming first-timer for what he is going to face."). Moreover, an experienced guard is likely to be in a better position than a new prisoner to know whether that prisoner is in danger of being sexually attacked.

[FN55]. See [Gullatte v. Potts](#), 654 *F.2d* 1007, 1010 (5th Cir. 1981); Scott Rauser, Comment, [Prisons Are Dangerous Places:](#)

[Criminal Recklessness as the Eighth Amendment Standard of Liability in *McGill v. Duckworth*, 78 MINN. L. REV. 165, 189 \(1993\).](#)

[FN56]. See [Farmer, 114 S. Ct. at 1984.](#)

[FN57]. Cf. Daniel Y. Hall, Note, The [Eighth Amendment, Prison Conditions and Social Context: *Wilson v. Seiter*](#), 58 MO. L. REV. 207, 227 (1993) (noting that, "because indifference 'is almost never admitted and can be proved only by the conduct and circumstances,'" as a practical matter, an objective standard must be applied) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984)).

[FN58]. [Wilson, 501 U.S. at 310](#) (White, J., concurring in the judgment). For a discussion of the problems inherent in finding one prison official with actual knowledge, see The Supreme Court, 1990 Term -- Leading Cases, *supra* note 4, at 235-45. As the Court has recognized, one cannot know the subjective state of mind of an institution. See [Farmer, 114 S. Ct. at 1981](#) (discussing [Canton v. Harris, 489 U.S. 378 \(1989\)](#)). A focus on the institution thus requires an objective standard.

[FN59]. See Sturm, *supra* note 1, at 688-91.

[FN60]. See, e.g., [Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558-61 \(1st Cir.\)](#), cert. denied, 488 U.S. 823 (1988). In *Cortes-Quinones*, a psychologically disturbed inmate was killed and dismembered after being placed in the general population of a state penitentiary. The prisoner was transferred to the penitentiary under emergency conditions, and no official at the prison had adequate time to review the prisoner's files. See *id.*

[FN61]. [Wilson, 501 U.S. at 298.](#)

[FN62]. See [id. at 298-99.](#)

[FN63]. See [id. at 303.](#)

[FN64]. See [Farmer, 114 S. Ct. at 1979.](#)

[FN65]. Both before and after *Wilson*, several circuits made use of an objective standard for deliberate indifference. See, e.g., [Young v. Quinlan, 960 F.2d 351, 360-61 \(3d Cir. 1992\)](#); [Redman v. County of San Diego, 942 F.2d 1435, 1443 \(9th Cir. 1991\)](#) (en banc), cert. denied, 112 S. Ct. 972 (1992); [Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 560 \(1st Cir.\)](#), cert. denied, 488 U.S. 823 (1988); [Morgan v. District of Columbia, 824 F.2d 1049, 1057-58 \(D.C. Cir. 1987\)](#); [Martin v. White, 742 F.2d 469, 474 \(8th Cir. 1984\).](#)

[FN66]. The Court has clearly indicated that one objective standard, mere negligence, does not implicate the Eighth Amendment. See, e.g., [Whitley v. Albers, 475 U.S. 312, 319 \(1986\)](#). However, the *Farmer* Court was free to adopt a heightened negligence standard for deliberate indifference.

Justice Souter hinted that the proper institution for redressing harms to prisoners caused by the gross negligence of prison officials might be the legislature. See [Farmer, 114 S. Ct. at 1979](#). A legislature could easily create a cause of action for negligent harms to prisoners. Prisoners' rights is an unpopular cause, however, and prisoners lack political power. See Sturm, *supra* note 1, at 693. Politicians have little incentive to support an objective standard for deliberate indifference, and ameliorating the plight of inmates could only be accomplished at great financial expense. See [Rhodes v. Chapman, 452 U.S. 337, 357 \(1981\)](#) (Brennan, J., concurring in the judgment). Moreover, constitutional entitlements must not be made to wait upon

the convenience of the legislature. Cf. [The Supreme Court, 1988 Term -- Leading Cases, 103 HARV. L. REV. 137, 177](#) (criticizing [DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 \(1989\)](#), for its "ostensibly passive view of judicial decisionmaking"). Courts and commentators alike have argued that the courts are the best hope for reforming the American correctional system. See [Rhodes, 452 U.S. at 359-61](#) (Brennan, J., concurring in the judgment); Sturm, *supra* note 1, at 691-94.

[FN67]. Cf. Morton J. Horwitz, [The Supreme Court, 1992 Term -- Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 HARV. L. REV. 30, 71-92 \(1993\)](#) (commenting that, in [Planned Parenthood v. Casey, 112 S. Ct. 2791 \(1992\)](#), the Court viewed legitimate constitutional reform as a response to "changed circumstances").

END OF DOCUMENT