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Note & Comment

***121 THE "DELIBERATE INDIFFERENCE" TEST DEFINED: MERE LIP SERVICE TO THE PROTECTION OF PRISONERS' CIVIL RIGHTS**

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As he went through Cold-Bath Fields he saw

A solitary cell;

And the Devil was pleased, for it gave him a hint

For improving his prisons in Hell. [FN1]

When a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not. [FN2]

Introduction

The Eighth Amendment to the United States Constitution affords protection against excessive bail, excessive fines, and the infliction of cruel and unusual punishment. [FN3] Civil rights actions are the vehicles by which federal courts protect prisoners' Eighth Amendment rights. [FN4] However, a recent decision of the nation's highest court may effectively deprive prisoners of the right to be free from cruel and unusual punishment in the form of confinement conditions.

In *Farmer v. Brennan*, [FN5] the Supreme Court of the United States reiterated that a prisoner must prove that prison officials acted with "deliberate indifference" toward his civil rights to establish a violation of the Eighth Amendment. [FN6] The deliberate indifference test has been in place since 1976. [FN7] Acting without a precise Supreme Court definition, however, lower courts *122 have inconsistently interpreted and applied the test, resulting in very different analyses of section 1983 prisoner complaints. [FN8] Thus, in an effort to guide lower courts and create uniformity in prisoner civil rights cases, the Court further defined the deliberate indifference test in *Farmer*. Under *Farmer*, a prisoner must now prove not only that prison officials disregarded his civil rights, but also that the prison officials acted with a subjective awareness [FN9] of disregard for those rights. In an over-crowded judicial system, where courts seldom heeds even legitimate [FN10] pro se complaints, and seldom grant requests for the assistance of counsel, prisoners asserting violations of their civil rights will undoubtedly feel a strong impact from the newly defined deliberate indifference test.

I. *Farmer v. Brennan* [FN11]

Dee Farmer is a self-admitted pre-operative transsexual [FN12] who "projects feminine characteristics." [FN13] In 1989, while serving time for credit card fraud *123 in the United States Penitentiary in Terre Haute, Indiana (hereinafter "USP-Terre Haute"), a maximum security penitentiary for men, [FN14] Farmer was raped and brutally beaten by another prisoner. [FN15] He subsequently filed a Bivens [FN16] action in the United States District Court for the Western District of Wisconsin, [FN17] alleging that prison officials [FN18] acted with deliberate indifference to his safety. [FN19] Farmer requested compensatory and punitive damages and an injunction barring future confinement in any penitentiary. [FN20]

The defendant prison officials filed a motion for summary judgment pursuant to [Federal Rule of Civil Procedure 56](#). [FN21] In response, Farmer filed a cross-motion for summary judgment and invoked [Federal Rule of Civil Procedure 56\(f\)](#),

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requesting that the court postpone its ruling until the defendants produced documents previously requested by Farmer. [FN22] The defendants moved for a protective order staying discovery until resolution of other issues. [FN23] Without ruling on the defendant prison officials' request to stay discovery, the district court denied Farmer's Rule 56(f) motion and granted summary judgment to the defendants. [FN24] The court held that although prison officials may be held liable for violence inflicted against prisoners, they are *124 liable only if they had actual knowledge of a potential danger to the prisoner; they must have acted "reckless in a criminal sense." [FN25] The court stressed that Farmer did not voice any concern for his safety when authorities transferred him into the general population at USP-Terre Haute and thus found that Farmer had failed to provide evidence that the defendants knew of the risk to his safety. [FN26]

The Court of Appeals for the Seventh Circuit summarily affirmed, without opinion, the district court's decision. [FN27] The Supreme Court granted certiorari [FN28] to resolve conflicts in the lower courts regarding the deliberate indifference test. [FN29]

II. Court's Analysis

A. The Basic Framework

In *Farmer v. Brennan*, [FN30] the Supreme Court faced the task of defining the previously espoused deliberate indifference test. The Court began its discourse by stating that although "[t]he Constitution 'does not mandate comfortable prisons' [FN31] . . . neither does it permit inhumane ones." [FN32] Thus, according to the Court, "it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" [FN33]

The Eighth Amendment imposes a duty on prison officials to take reasonable measures to guarantee the safety of prisoners, [FN34] and "[i]n particular, 'to protect prisoners from violence at the hands of other prisoners.'" [FN35] Moreover, the *Farmer* Court noted that violent prison assaults are "simply not part of the penalty that [prisoners] pay for their offenses against society." [FN36] Although "[p]rison conditions may be 'restrictive and even harsh,' [FN37] . . . gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e],' [FN38] any more than it squares with 'evolving standards of decency.'" [FN39]*125

The Court nevertheless went on to state that based on the plain meaning of the words of the Eighth Amendment, [FN40] the Amendment does not prohibit "cruel and unusual conditions"; it [only prohibits] cruel and unusual 'punishments.'" [FN41] In the Court's view, prison officials cannot be said to have inflicted punishment if they had no knowledge of the risk of harm to the inmate. [FN42] Thus, the Court reasoned that not every injury inflicted upon one prisoner by another results in Eighth Amendment liability for prison officials responsible for the victim's safety. [FN43]

B. The Two-Prong Test

The *Farmer* Court reiterated that a violation of the Eighth Amendment occurs only when a two-prong test has been satisfied. [FN44] The first prong requires a prisoner to show a "sufficiently serious" [FN45] deprivation of "the minimal civilized measure of life's necessities." [FN46] In claims based on an alleged failure of prison officials to prevent harm, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." [FN47] *Farmer* apparently did not challenge this prong of the test. [FN48]

*126 The second prong of the test for an Eighth Amendment violation gave rise to the issue in *Farmer*. This prong depends on the tenet that the Eighth Amendment is concerned only with the unnecessary and wanton infliction of pain. [FN49] The *Farmer* Court therefore stated that "a prison official must have a 'sufficiently culpable state of mind' [FN50] to violate the Eighth Amendment's cruel and unusual punishments clause." [FN51] In prison-conditions cases, the prisoner must show that the official's state of mind was that of deliberate indifference to the prisoner's safety or health. [FN52] Before *Farmer*, the Supreme Court had not adequately defined the deliberate indifference standard, leaving lower courts to their own interpretations of the term. [FN53]

C. Defining "Deliberate Indifference" in Prison-Conditions Cases

1. Historical Underpinnings

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In *Farmer*, the Supreme Court explained that it first used the term deliberate indifference in 1976 in *Estelle v. Gamble* [FN54] to describe a mens rea more culpable than negligence. [FN55] The *Estelle* Court stated that in the context of a prisoner's medical treatment claim, allegations that a physician was negligent in diagnosing or treating the prisoner are insufficient to state an Eighth Amendment claim. [FN56] Since 1976, the Court has consistently held that *Estelle* established a general rule that liability premised on the Eighth Amendment requires more than an ordinary lack of due care for the inmate's safety, *127 health, or interests. [FN57] Thus, holding prison officials to a purely objective standard of foreseeability of the risk of harm to a prisoner is insufficient to create liability for harm to a prisoner's health or safety. [FN58]

2. The Equivalent of Recklessness?

Although prisoners may not base prison-conditions claims on prison officials' negligence, neither are prisoners required to show that officials deliberately acted or failed to act with the aim of causing harm. As the Court explained in *Farmer*, proving deliberate indifference does not necessitate a showing of "acts or omissions for the very purpose of causing harm or with knowledge that harm will result." [FN59] Indeed, "the very high state of mind prescribed by [[cases in which prison officials allegedly used excessive physical force] [FN60] does not apply to prison conditions cases." [FN61]

After distinguishing the deliberate indifference test from both the negligence [FN62] and the "purposeful conduct" [FN63] standards, the *Farmer* Court then equated deliberate indifference in the constitutional law sense with the term reckless disregard in the criminal sense. [FN64] Realizing that the definitions of "reckless" and "disregard" were insufficient in themselves to lend meaning and understanding to the terms "deliberate" and "indifference," however, the Court explained the civil and criminal law interpretations of "recklessness." [FN65] The Court recognized that *Farmer* argued for adoption of the civil law definition [FN66] of recklessness, whereas the government urged the Court to adopt the criminal law definition [FN67] of recklessness. [FN68]

*128 The Court explained recklessness in the civil law sense as where a person acts or fails to act, [FN69] when he knew or should have known, [FN70] of the unreasonably high risk of harm. [FN71] Conversely, criminal law generally dictates that to be reckless, one must actually be aware of a risk of harm and disregard that risk; it is not enough that the person should have known. [FN72] The Court ultimately adopted a definition of deliberate indifference equivalent to criminal law recklessness and pointedly rejected *Farmer's* invitation to adopt an objective standard. [FN73]

Embracing the subjective criminal recklessness standard of deliberate indifference, the *Farmer* Court held that a prison official's failure to alleviate a significant risk that he should have noticed is not an infliction of punishment within the meaning of the Eighth Amendment. [FN74] It follows that a prison official is not liable for denying humane confinement conditions to a prisoner unless the official knew of and ignored an excessive risk to inmate health or safety according to the Court. [FN75] Succinctly stated, "[t]he 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." [FN76]

3. Utilizing and Distinguishing Precedent

The Court relied heavily on *Wilson v. Seiter* [FN77] for the proposition that liability cannot be imposed on prison officials under the Eighth Amendment solely on the basis of objectively inhumane prison conditions. [FN78] Indeed, the Court submitted that *Wilson* and later cases [FN79] held that Eighth Amendment claims must satisfy a subjective prong [FN80] and stated that it is therefore essential to investigate a prison official's state of mind in Eighth Amendment cases. [FN81] Thus, the *Farmer* Court conclusively adopted the criminal law recklessness *129 gauge for application in Eighth Amendment prison conditions claims. [FN82]

In ratifying the lower courts' subjective approach to the deliberate indifference test, the Court rejected *Farmer's* analogy to *Canton v. Harris*, [FN83] a section 1983 action. In *Canton*, the Court held that a municipality could be found liable for failing to adequately train its employees, [FN84] implying that deliberate indifference only requires an objective showing of mens rea. However, the Court in *Farmer* stated that *Canton's* objective state of mind requirement was inappropriate for determining the liability of prison officials under the Cruel and Unusual Punishment Clause, [FN85] and noted that section 1983 does not have a "state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." [FN86] The Court based the distinction between prison-conditions cases and claims against government entities in part on the idea that "conceptually" it is virtually impossible to find a subjective state of mind of a government entity, as in *Canton*, versus that state of mind of a single government official, as is at issue in prison-conditions cases. [FN87]

*130 4. Ignoring the Obvious

The Court in *Farmer* emphasized that a subjective approach to the deliberate indifference test would not allow prison officials to ignore obvious dangers to prisoners. [FN88] Stressing the distinction between "act[ing] or fail[ing] to act believing that harm actually would befall an inmate," and "act [[ing] or fail[ing] to act despite [the prison official's] knowledge of a substantial risk of serious harm," [FN89] the Court reasoned that it was unlikely that officials would "take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'" [FN90] In commenting on the "obviousness" of risks, however, the Court noted that although a factfinder may determine that prison officials must have known of a risk of harm due to the obvious nature of the risk, a prison official may show that "the obvious escaped him." [FN91] When a prison official stands accused of inflicting cruel and unusual punishment upon a prisoner, the official who was not aware of the risk of harm may attempt to prove that he was unaware of even an obvious risk of harm. [FN92] Simply because the fact finder may infer knowledge from the obviousness of the risk of harm does not mean that the obviousness is conclusive of knowledge. [FN93]

Although the obviousness of a risk is not conclusive on the issue of mens rea, the Court also stated that a prison official cannot avoid liability by merely refusing to verify underlying facts that he strongly suspects to be true, or by declining to confirm inferences that he strongly suspects to exist. [FN94] The *131 *Farmer* Court also reasoned that an official cannot evade liability by showing that although he knew of a substantial risk of serious harm, he was not aware that it was the petitioner who was particularly susceptible to that risk of harm or that it was the particular aggressor who would inflict the harm upon the petitioner. [FN95] The Court clarified that it is irrelevant whether the danger results from a single source or many sources, just as it is irrelevant whether the prisoner confronts an extreme risk of defilement for reasons personal to him, or because all prisoners in his position face such a risk. [FN96]

D. In Summation

Based on these reasons, the Court in *Farmer* held that, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." [FN97] Under the particular facts presented by *Farmer's* complaint, *132 the Court concluded that the case should be remanded to ensure that the lower court had not relied heavily on the fact that *Farmer* did not express his fear of harm to prison officials. [FN98] Further, the Court pointed out that there may have been more information available to *Farmer* which would assist him in preparing his case against the prison officials because the lower court denied *Farmer's* Rule 56(f) motion. [FN99]

III. Analysis

In adopting the Eighth Amendment Cruel and Unusual Punishment Clause, the Framers intended to significantly improve the treatment of those judged guilty of perpetrating a crime. [FN100] Mindful of the previously inhumane and torturous treatment of prisoners confined within the power of British prison officials, [FN101] as well as the cruelty resulting from bureaucratic indifference to prison conditions, the Framers were careful to include an explicit prohibition on cruel and unusual punishment. [FN102] Thus, they geared the prohibition *133 of cruel and unusual punishment specifically toward curtailing the abuse and neglect of prisoners left to the care -- and responsibility -- of the prison system. Understood at its most basic level, the Framers intended the prohibition of cruel and unusual punishment to serve as a deterrent to prison officials and as a guarantee of a most basic human right -- freedom from harm at the hands of those who may exercise control during one's most vulnerable moments.

With all due respect, although the Court seemingly exercised good intentions in deciding *Farmer v. Brennan*, [FN103] nine United States Supreme Court Justices [FN104] effectively undermined the objectives of the Cruel and Unusual Punishment Clause [FN105] by furthering the long-standing confusion [FN106] surrounding the meaning and application of the deliberate indifference test. The Court imposed a virtually impossible burden on prisoners to prove a prison official's subjective disregard of the prisoner's right to be free from serious harm while incarcerated. If the Court continues to give seemingly minimal regard to prisoners' rights, prisoners will be left with no protection for their health or safety.

Prisoners undoubtedly file a great number of insubstantial civil rights actions. Courts should summarily dismiss prisoners' frivolous civil rights claims [FN107] when it becomes clear that the complaint, even when viewed in the light most favorable to the prisoner, is meritless. However, inhumane prison conditions and the use of excessive force against prisoners does give rise to legitimate Eighth Amendment claims. Prison overcrowding is a problem and the number of prison-conditions claims is

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on the rise. In cases in which it appears that the prisoner has a valid grievance against prison officials, the complaint should never be dismissed, or at least never dismissed with prejudice. Particularly in a pro se prisoner complaint case, the Court should not hold the prisoner to the same standard of proof generally required by the Federal Rules of Civil Procedure to withstand a motion to dismiss or a motion for summary judgment. [FN108] Rather, a pro se prisoner is allowed more latitude in stating a cause of action. [FN109] The Farmer Court, however, seemed to nullify the purpose of [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) and the Court's prior decisions regarding the standard of proof for a pro se complainant *134 under that Rule by requiring a pro se prisoner to prove a prison official's subjective intent -- a particularly difficult burden -- at the pre-trial stage.

A. Ignoring the Obvious, Criminal Recklessness, and "Willful Blindness"

The Farmer Court's opinion perpetuates the pre-existing problems in defining deliberate indifference. The Court began by formulating a bright-line test, which could have clarified the Court's position on prisoners' civil rights. However, the Court then blurred that bright line with discussions of criminal law recklessness, the obviousness of risks, and the equivalent of the criminal law concept of willful blindness. Quite simply, the Court failed in its attempt to clarify the confusion that existed among the lower courts prior to Farmer.

The Farmer Court's reasoning is inherently circular. The Court stated that a prison official is not free to ignore the obvious. It then stated that ignoring the obvious may be enough for fact finders to hold a prison official liable. Then, the Court explained that prison officials may escape liability when a prisoner alleges that the officials ignored the obvious by showing that the obvious escaped them. Finally, the Court concluded that courts must be clear in instructing juries that proof of subjective intent for liability is required under the Eighth Amendment Cruel and Unusual Punishment Clause and that whether a reasonable man would or should have known is irrelevant under the Eighth Amendment. [FN110] The Court adopted the criminal law willful blindness idea but proceeded to create a loophole through which prison officials may easily slip.

In holding that the deliberate indifference test requires prisoners to show that prison officials acted with a subjective mens rea, the Farmer Court specifically rejected Farmer's request that the Court adopt a definition comparable to that of civil law recklessness. [FN111] The Court opted for a definition more akin to criminal law recklessness, thereby making it clear that prison officials must have been "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and . . . [they] must also draw the inference." [FN112]

However, after espousing this theory of deliberate indifference, the Court expressly reasoned that the "criminal law recklessness" definition would not allow prison officials to ignore obvious dangers to prisoners. [FN113] The Court explained that prisoners are not required to show that prison officials acted or failed to act believing that the threat of harm would come to fruition. [FN114] Pointing out that the issue of whether prison officials had knowledge is a factual determination, the Court reasoned that, "a factfinder may *135 conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." [FN115]

The Court's statement that the factfinders have latitude to find knowledge from the obviousness of a risk is basically the civil law standard of recklessness that the Court rejected. [FN116] Thus, it appears that a prisoner must prove actual knowledge to satisfy the Court's deliberate indifference test, yet he may lawfully prevail in the case without actually reaching that level of proof if the fact finders infer knowledge from evidence of the obviousness of the risk of harm. [FN117] This logic is not only facially circular, but also proves unworkable in practice.

Given such confusion, it is unreasonable to expect jurors to understand a jury instruction on deliberate indifference. In practice, the typical jury has to rely on intuition to determine whether prison officials have violated a prisoner's fundamental rights. Two negative implications result from the Court's ambiguity. First, the jury may be so thoroughly confused as to the meaning of "obvious" [FN118] that it will simply return a verdict in favor of the defendant prison officials. Or, the jury may misunderstand the jury instruction as requiring the prisoner to prove not only that the harm was obvious, but that the prison officials actually knew of the obvious risk. [FN119] Either way, the result sanctions the effective deprivation of prisoners' rights.

In claims under the Eighth Amendment Cruel and Unusual Punishment Clause, prison officials generally prevail at the pre-trial stage with a motion to dismiss or a motion for summary judgment. [FN120] Thus, most initial prison-*136 conditions claims are heard by judges rather than juries. The question of knowledge, then, will almost always be settled at a stage early in the proceedings where the "fact finder" is bound [FN121] by the test, similar to that of criminal law

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recklessness, of actual knowledge of the risk of harm. Because the Farmer Court clearly stated that it was adopting a purely subjective, criminal law recklessness test for deliberate indifference, few judges will look past that clarity and into the realm of obvious risks and willful blindness. [FN122] When the bare holding states a clear intention, the remainder of the opinion receives little attention; (this is particularly true when that remainder is unclear.) [FN123] Realistically, prisoners will rarely be able to convince a judge to overlook Farmer's clear adoption of the criminal law recklessness definition for deliberate indifference in favor of the hidden civil law recklessness definition found in the Farmer Court's obviousness analysis. This is especially true because the Farmer Court specifically rejected the equivalent of this "ignoring the obvious" analysis, the civil law recklessness standard. [FN124]

Regardless of a lack of knowledge, the notion of imposing liability where one ignores the obvious is not a novel idea in criminal law. The concept of willful blindness describes the circumstance in which courts may hold a person liable for his criminal actions even though he lacks actual knowledge of the crime he has committed. This theory of liability is based on the premise that although the person suspects that criminal activity is afoot, he purposefully avoids verifying underlying facts or inferences that would confirm his suspicions (and thereby create knowledge) in order to avoid criminal liability. [FN125] Specifically, the Model Penal Code states that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." [FN126] It appears that the Farmer Court effectively created a new form of "willful blindness" within one area of Eighth Amendment prison-conditions claims when Justice Souter explicitly stated that prison officials are not free to ignore the obvious. Unfortunately, the new form of willful blindness is uncertain and ill-defined, as conceived by the Farmer Court in this context of the Eighth Amendment. Further, it is questionable whether even a well-reasoned concept of willful blindness should be extended from the criminal law to the constitutional law context. *137 Constitutional law protects a specifically enumerated, fundamental right to be free from cruel and unusual punishment.

After stating that prison officials cannot avoid liability simply by ignoring obvious risks to a prisoner's safety, the Court again stated that the obviousness of a risk of harm is not conclusive proof of knowledge. The Court noted that "a prison official may show that the obvious escaped him" and thereby escape liability even if the risk of harm was obvious. [FN127] The Court cautioned that in jury instructions regarding deliberate indifference it should be clear that subjective culpability is required for a finding of liability under the Eighth Amendment. "It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." [FN128]

A significant problem with the Farmer Court's analysis of the "obviousness of the risk" concept lies in the plain meaning of the term "obvious." Obviousness encompasses an inescapable awareness within its meaning: it is impossible to not be aware of something that is obvious absent some level of mental incapacity. Black's Law Dictionary [FN129] defines "[o]bvious risk" as "one so plain that it would be instantly recognized by a person of ordinary intelligence." Doubleday Dictionary [FN130] defines "[o]bvious" as "[i]mmediately evident; easily perceived; manifest," and lists "clear, apparent, and plain" as synonyms. The same problems exist under the definition of "obvious" in Funk & Wagnalls Standard Desk Dictionary: [FN131] an adjective used to describe something "[i]mmediately evident; palpably true; [or] manifest."

If one follows these legal and common definitions, the implications are astonishing. The definitions imply that in order for a prison official to avoid liability for a violation of the Eighth Amendment by claiming that the obvious escaped him, one must find that he is of below "ordinary intelligence." In doing so, one inevitably acknowledges that the federal government is employing persons of less-than-average intelligence in positions of extreme power within the prison systems. Further, in order for a prison official to claim that the obvious escaped him, he must basically admit being of limited, or less-than-average, intelligence. Thus, by using the term "obvious" to determine whether a prison official had knowledge of the risk of harm, the *138 Court essentially pegs prison officials as either ignorant or "deliberately indifferent."

Further, it is unclear from the Court's opinion whether the claim that "the obvious escaped me" is an affirmative defense, or whether the prisoner claiming a violation of his rights also has the burden of proving that the prison official could not have missed "seeing" the obvious. This is an insurmountable problem because the prisoner's burden of proof and persuasion could be drastically different, depending on whether or not the prison official must rebut the allegations after the prisoner proves the obviousness of a risk and alleges this ground for relief. It appears from one portion of the Court's opinion that the burden may shift to prison officials to prove that the obvious escaped them, [FN132] however, the Court pays limited attention to this line of analysis, leaving unanswered the question as to the respective burdens of proof.

Notwithstanding the Court's error in this aspect of the willful blindness analysis, the Court erred merely by considering this idea if it was truly espousing a subjective mens rea requirement. As previously explained, courts require actual knowledge of

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the substantial risk of serious harm under the deliberate indifference test equivalent to the criminal law recklessness standard, a level of mens rea which necessarily leaves no room for inquiry about the characteristics of the harm. In other words, regardless of whether the harm was obvious, a prison official cannot be held liable under a subjective mens rea requirement unless he did "draw the inference" as to the risk of harm. Thus, the Court's mere discussion of the "obviousness" concept is misleading unless the Court did not truly intend to require actual knowledge of the harm. The clarity with which the Court explained this definition of deliberate indifference, however, would certainly seem to eliminate this possibility. [FN133] The resulting confusion allows prison officials to escape liability merely by exploiting the Court's lack of clarity in Farmer. In the vast majority of cases, a prisoner alleging deliberate indifference cannot possibly prove that the obvious did not escape the prison official.

B. Application of the Newly Defined Deliberate Indifference Test

Several recent lower court cases have relied on Farmer in deciding pro se prisoner complaint cases. In McKellar v. Chesney, [FN134] the United States District Court for the Eastern District of Pennsylvania relied heavily on Farmer *139 in dismissing a prisoner's pro se complaint that prison officials were deliberately indifferent to his civil rights when they knowingly failed to protect him from violence by his allegedly suicidal and dangerous cellmate. [FN135] McKellar claimed that prison officials had been deliberately indifferent to his right to be free from cruel and unusual punishment. [FN136] McKellar alleged that he was not told that he should not keep shaving razors in the cell because his cellmate was restricted access to sharp objects. Prison officials presumably knew that McKellar had razor blades in his cell because they provided McKellar with the shaving kit. After his cellmate threatened to kill McKellar and slashed at his wrists, McKellar alleged that the prison officials did not unlock the cell door to allow McKellar to escape the violence of his cellmate. [FN137] In dismissing the complaint, the court relied on Farmer for the proposition that "[i]njuries suffered by one prisoner at the hands of another do not necessarily indicate a constitutional violation by those officials or officers responsible for the victim's well-being." [FN138] The court noted that McKellar had failed to satisfy the Farmer test because he failed to allege that each defendant was aware of facts "from which a reasonable inference could be drawn that a substantial risk of harm to the plaintiff existed and that each disregarded that risk." [FN139]

Another instance of confusion remaining after, or perhaps created by Farmer, is Fields v. Parke. [FN140] In Fields, the United States Court of Appeals for the Sixth Circuit affirmed a grant of summary judgment against a prisoner who had filed a civil rights action after being violently assaulted by another inmate. [FN141] The plaintiff in Fields alleged that the prison officials were deliberately indifferent by failing to protect him because they knew that a danger of assault existed. [FN142] The court affirmed the judgment of the lower court and cited Farmer for the proposition that it is necessary to show a conscious disregard for the prisoner's rights. [FN143] The court, however, failed to mention that it might be sufficient to show the "obviousness of the risk of harm" or that it was not necessary for the prisoner to show that the harm was particular to him, rather than to all prisoners in his situation. Thus, while the court may have correctly interpreted the bottom line of Farmer, requiring subjective mens rea, it did not evaluate the other sections of the Court's opinion.

*140 Conversely, in Rossell v. Thomas, [FN144] the United States Court of Appeals for the Ninth Circuit interpreted Farmer and held in favor of a prisoner, insofar as the court vacated and remanded for further consideration by the lower court. [FN145] Rossell filed a pro se civil rights claim and then appealed the lower court's judgment that the claim was frivolous. [FN146] Rossell alleged that the defendants "recklessly increased his sex- offense treatment classification knowing that Rossell would be exposed to a risk of serious harm or violence from other inmates." [FN147] In remanding, the court noted that deliberate indifference requires a showing that the prison officials "subjectively knew of and disregarded a known or obvious risk." [FN148] The Rossell court relied on Farmer for the proposition that prison officials have a duty to protect inmates from violence, [FN149] and also stated that it is not necessary for a prisoner to suffer harm before he can file a claim for relief under Farmer. [FN150] Although Rossell did not file a detailed complaint alleging specific evidence of the prison officials' knowledge of the risk of harm, the court remanded the case for further findings of fact and pointed out the possibility of holding the defendants liable if they "knew of an obvious risk." [FN151] While possibly well-intentioned, the court did not explain the test further or provide additional guidance to the lower court to follow on remand. Perhaps, as in McKellar and in Fields, the court simply did not know where to go next with the Farmer opinion.

C. The Impact: A Deprivation of Prisoners' Rights

From a public policy perspective, requiring a subjective mens rea for liability under the Eighth Amendment is a double-edged sword: we want to encourage responsible and humane treatment of our prisoners from a moral and constitutional perspective yet do not want to encourage prisoners to file frivolous claims against prison officials. A subjective mens rea reduces the

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number of claims filed by prisoners but a more objective standard mandates better treatment of prisoners. The interests in preventing serious harm to prisoners and recognizing the original intent of the Framers should outweigh the interest in minimizing lawsuits filed against prison officials and preventing *141 the courts from becoming overseers of the prison system. Requiring prisoners to prove a prison official's subjective disregard of a substantial risk of serious harm to the prisoner's well-being creates a virtually impossible burden for the prisoner, nullifying protection of prisoners' rights to be free from cruel and unusual punishment and sending a clear message to prison officials that they need not respect the constitutional rights of prisoners under their control.

Providing less protection to prisoners does a disservice to the Framers' intentions. [FN152] Harm to prisoners that is within the control of prison officials to prevent is outside the accepted limits of punishment. For instance, particularly egregious harms, such as rape and violent assault, serve no penological purpose and disturb our very sense of human dignity. [FN153] It is hoped that such harms will be prevented through recognition of the Eighth Amendment prohibition of cruel and unusual punishment. [FN154] Nevertheless, the requirement that prisoners prove a subjective state of mind sends the message that society is ambivalent toward what goes on behind prison walls. Instead, members of society should be extremely interested: we will release most prisoners one day.

The federal courts are the guardians of prisoners' constitutional rights. Although that may be an unpopular and time-consuming task, the Framers of the Constitution created that guardianship task for the judiciary by drafting and adopting the Eighth Amendment. [FN155] Thus, a desire to discourage the filing of claims against prison officials is simply not an excuse for requiring proof of a prison official's subjective state of mind in an Eighth Amendment claim. Although it is clear that prisoners sometimes file many complaints of this sort without cause, unduly heightening the burden placed on those with a claim is not the proper solution. This may occur in civil claims to reduce *142 caseloads and court over-crowding; however, we should not engage in this sort of pre-trial weeding-out when dealing with claims of constitutional magnitude.

Few prisoners will be dissuaded from filing suits against prison officials simply because of the requirement to show a subjective mens rea. Logic suggests that those who file complaints against prison officials for illegitimate reasons, will continue to file complaints because this mens rea requirement is yet another action "against prisoners." More realistic is that those filing legitimate complaints for Eighth Amendment violations will be discouraged from filing because they realize the virtual impossibility of proving the prison officials' intentions. [FN156] It seems, then, that we are failing to protect both ideas behind requiring a subjective intent component of "deliberate indifference."

Some may argue that the word "punishment" implies an intentional action. [FN157] In a civilized society punishment is properly composed of imprisonment or probation. In reality, however, a prisoner's punishment encompasses the standard of living which the prisoner endures while serving his sentence. When a prisoner suffers a rape or beating or stabbing or other harm, either mental or physical, that the perpetrator may not have intended, the harm does not serve to placate the prisoner. Although an intentional harm may evoke greater anger in the prisoner, the harm caused by any unconstitutional action is the same. As Justice Blackmun stated in his concurring opinion in *Farmer*, "[r] egardless of what state actor or institution caused the harm and with what intent, the experience of the inmate is the same. A punishment is simply no less cruel or unusual because its harm is unintended." [FN158] Thus, to argue that we should require a subjective intent before holding prison officials liable for harm done to a prisoner under their care ignores the fact that the result of the harm is the same irrespective of the actor's state of mind.

*143 Conclusion

The Court in *Farmer v. Brennan* [FN159] chose to define deliberate indifference in a manner that defies logic, applicability, and the intention of the Framers. By requiring a prisoner to prove a prison official's subjective state of mind, the Court effectively reduced to an even lower level the chances of a legitimate pro se prisoner's civil rights complaint of ever being heard. Logically, it is impossible to explain how an obvious risk of harm can escape a minimally intelligent prison official. In application, it appears that courts are continuing to reach varied results under the deliberate indifference standard because the definition of the required state of mind is no more clear now than it was before *Farmer*. Finally, and most importantly, the *Farmer* Court went far in eliminating the rights of prisoners to be free from cruel and unusual punishment and to enjoy minimal levels of safety while they are helplessly confined. Although prisoners have inundated the courts with frivolous claims, an increased burden placed on everyone filing claims is an improper solution. Equally improper is a minimizing of constitutional rights by suggesting that the harms to prisoners are less significant than harms to other citizens, or that prisoners deserve less protection. As long as prisoners are in custody, they are society's responsibility. Although we may not like being handed this obligation, the Framers of the Constitution of the United States assigned it to us and we must regard

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the duty with as much respect and pride as if it were one conferred to us as a direct order by the Framers themselves.

[FN1]. *Hassine v. Jeffes*, 846 F.2d 169, 173 (3d Cir. 1988) (quoting S.T. Coleridge, *The Devil's Thoughts*, in *Poetical Works* (E. Hartley ed., 1978)).

[FN2]. *United States v. Bailey*, 444 U.S. 394, 404 (1980) (quoting Chief Justice Burger, Address Before the Bar of the City of New York, in 25 Record of the Ass'n of the Bar of New York, Mar. 1970 Supp. 14, 17) (emphasis in original).

[FN3]. U.S. Const. amend. VIII (applicable to the states under U.S. Const. amend. XIV).

[FN4]. Civil rights cases against the federal government and its agents are brought pursuant to the Eighth Amendment as " Bivens actions." See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Prisoner civil rights cases against state prison officials are brought pursuant to 42 U.S.C. s 1983 (1988) [hereinafter s 1983]. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. s 1983 (1988).

[FN5]. 114 S. Ct. 1970 (1994).

[FN6]. *Id.* at 1974, 1984.

[FN7]. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding in a s 1983 pro se action, inter alia, that deliberate indifference to a prisoner's serious illness or injury violates the Eighth Amendment).

[FN8]. See *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993) (defining the deliberate indifference test as a subjective one); *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (holding that whether prison officials acted with deliberate indifference is determined by a "subjective standard of recklessness"), cert. denied, 112 S. Ct. 1265 (1992); *Young v. Quinlan*, 960 F.2d 351, 360 - 61 (3d Cir. 1992) (holding that whether prison officials acted with deliberate indifference is an objective -- knew or should have known -- standard of knowledge); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.) (holding that an objective level of knowledge will satisfy the standard of deliberate indifference in prison conditions cases), cert. denied, 488 U.S. 823 (1988); *Morgan v. Dist. of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987) (holding that deliberate indifference is an objective standard). See also *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991); *Miltier v. Beorn*, 896 F.2d 848, 851-52 (4th Cir. 1990); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984).

[FN9]. See *Farmer*, 114 S. Ct. 1970 (1994). Although the Farmer Court did not explain its holding in so many words, the requirement of subjective awareness of the risk of harm essentially means that the prisoner must show that the defendant prison official acted intentionally. It is questionable whether a prison official could act in disregard of a substantial risk of serious harm of which he is aware without intending for the harm to occur.

[FN10]. See infra notes 108 - 09 and accompanying text for a discussion of the standard of proof in ruling on a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) and its bearing on the present issue of potentially legitimate pro se complaints. In particular, the text and footnotes discuss the significance of allowing a pro se prisoner more latitude in stating a cause of action. *Conley v. Gibson*, 355 U.S. 41, 45 - 46 (1957); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988).

[FN11]. 114 S. Ct. 1970 (1994).

[FN12]. *Id.* at 1974 -75. Transsexuality is "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex." *Id.* at 1975 (citing American Medical Association, *Encyclopedia of Medicine* 1006 (1989)). See also 2 Funk & Wagnalls Standard Desk Dictionary 721 (1983 ed. 1980).

[FN13]. *Farmer*, 114 S. Ct. at 1975. Farmer had been dressing as a female for several years prior to his incarceration in 1986. *Id.* Farmer had also previously undergone estrogen therapy, received silicone breast implants and underwent "black market" testicle-removal surgery. However, he had not yet undergone successful genital-alternation surgery. *Id.* While incarcerated, Farmer continued hormonal therapy "by using drugs smuggled into prison" and wore his clothing "in a feminine manner." *Id.*

This Note uses the masculine pronoun when referring to Farmer, because Dee Farmer is physically/biologically still male.

[FN14]. Id.

[FN15]. Id. Authorities transferred Farmer to the USP-Terre Haute "for disciplinary reasons" from the Federal Correctional Institute in Oxford, Wisconsin [hereinafter "FCI-Oxford"]. Id. Federal prison authorities usually house pre-operative transsexuals with other prisoners of the same biological sex. Id. Prior to his transfer to USP-Terre Haute, authorities housed Farmer both in general populations and in segregation, sometimes due to disciplinary problems and at other times due to concerns for his safety. Id. When authorities first transferred Farmer to USP-Terre Haute, they housed Farmer in administrative segregation but subsequently moved Farmer into the general population. Farmer made no objections to the move into the general population. Another prisoner attacked Farmer within two weeks of this move. Id.

[FN16]. See Bivens, *supra* note 4.

[FN17]. Farmer, 114 S. Ct. at 1975.

[FN18]. Id. Farmer named the following as defendants in the action: the warden of USP-Terre Haute and the Director of the Bureau of Prisons in their official capacities; the warden of FCI-Oxford and a case manager at FCI-Oxford and the Director of the Bureau of Prisons North Central Region Office and an official in that same office in their official and personal capacities. Id.

[FN19]. Id. at 1974. Farmer complained that the defendants acted in violation of the Eighth Amendment either by transferring Farmer to USP-Terre Haute or by placing him in the general population at USP-Terre Haute even though they knew USP-Terre Haute had a violent environment and that Farmer would be particularly susceptible to sexual attacks by other prisoners due to his status as a transsexual. Id. at 1975. Farmer alleged that the defendants' actions were deliberately indifferent to Farmer's safety. Id.

[FN20]. Id. at 1975 -76. Farmer also requested an order to the effect that the Bureau of Prisons place Farmer in a "co-correctional facility" which mixes both male and female inmates. However, the Bureau has discontinued this type of facility, and Farmer no longer requested this relief at the Supreme Court level. Id. at 1976.

[FN21]. Id.

[FN22]. Id.

[FN23]. Id. Defendant's summary judgment motion raised the issue of qualified immunity. Id.

[FN24]. Id.

[FN25]. Id.

[FN26]. Id.

[FN27]. Id.

[FN28]. Farmer v. Brennan, 114 S. Ct. 1156 (1993).

[FN29]. Farmer, 114 S. Ct. at 1976. See also *supra* note 8 and accompanying text.

[FN30]. 114 S. Ct. 1970 (1994).

[FN31]. Id. at 1976 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

[FN32]. Id. (quoting *Helling v. McKinney*, 113 S. Ct. 2475, 2480 (1993)).

[FN33]. Id. (quoting *Helling*, 113 S. Ct. at 2480).

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[FN34]. Id. (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 -27 (1984)).

[FN35]. Id. (quoting *Cortes-Quinones*, 842 F.2d 556, 558 (1st Cir. 1988)).

[FN36]. Id. at 1977 (quoting *Rhodes*, 452 U.S. at 347).

[FN37]. Id. (quoting *Rhodes*, 452 U.S. at 347).

[FN38]. Id. (quoting *Hudson*, 468 U.S. at 548).

[FN39]. Id. (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

[FN40]. Id. at 1979 - 80. The Court specifically stated that the "approach [requiring subjective intent to satisfy the deliberate indifference test] comports best with the text of the [Eighth] Amendment as our cases have interpreted it." Id. at 1979.

[FN41]. Id. (emphasis in original). Justice Blackmun, concurring in the judgment, pointed out that the word "punishment" does not necessarily imply a subjective state of mind in prison officials. Id. at 1988 (Blackmun, J., concurring) (citing Webster's Third New International Dictionary 1843 (1961) (defining punishment as "severe, rough, or disastrous treatment") and Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as "[a]ny pain, suffering, or loss inflicted on or suffered by a person because of a crime or evil-doing")).

Justice Thomas, also concurring in the judgment, espoused the view that only judges and juries, not prison officials, are capable of inflicting punishment. Id. at 1990 (quoting *Helling*, 113 S. Ct. 2475, 2484 (1993) (Thomas, J., dissenting)) (Thomas, J., concurring). Thus, under Thomas' analysis of the term "punishment," conditions of confinement can never violate the Eighth Amendment Cruel and Unusual Punishment Clause. Id. However, the majority of the Court has never adopted Justice Thomas' view. Although Justice Thomas disagreed with the Farmer Court's majority reasoning, he concurred in the judgment because "stare decisis counsels hesitation in overruling dubious precedents," id. at 1991 (referring to *Estelle*, 429 U.S. 97), and because he "[did] not read the remand portion of the Court's opinion to intimate that the courts below reached the wrong result [in dismissing Farmer's complaint]" Id.

[FN42]. Id. at 1982. The Court noted that "[a]n act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis." Id. at 1979.

[FN43]. Id. at 1977.

[FN44]. Id.

[FN45]. Id. (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). The Court refrained from answering the question of when a risk of harm becomes "sufficiently serious" to warrant Eighth Amendment protection because the question was not raised. Id. n.3. However, the Court did state that the test for what is "sufficiently serious" is an objective one. Id. at 1977.

[FN46]. Id. (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[FN47]. Id.

[FN48]. The Court never refers to Farmer's challenge of the "sufficiently substantial risk of serious harm" prong of the test for a violation of the Eighth Amendment. Further, the Court's opinion does not address this issue. Thus, this note assumes that the government also did not question that this prong of the test was satisfied.

[FN49]. Id. (quoting *Wilson*, 501 U.S. at 297).

[FN50]. Id. (citations omitted).

[FN51]. Id.

[FN52]. Id. (quoting *Wilson*, 501 U.S. at 302- 03). The Court explained that the standard required in prison-conditions cases differs from that which applies in other cases. Id. at 1973. For instance, in cases alleging that prison officials used "excessive

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physical force," *Hudson v. Palmer*, 468 U.S. (1994). 112 S. Ct. at 996, against a prisoner, the prisoner must show that the accused "officials applied force 'maliciously and sadistically for the very purpose of causing harm," *Farmer*, 114 S. Ct. at 1978 (quoting *Hudson*, 112 S. Ct. at 998), or that "officials used force with 'a knowing willingness that harm occur," *Farmer*, 114 S. Ct. at 1977 (quoting *Hudson*, 112 S. Ct. at 999). The Court based the distinction between the two scenarios on the fact that in "excessive physical force" cases, the Court gives latitude to prison officials who make decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Id.* (quoting *Hudson*, 112 S. Ct. at 998).

[FN53]. See *supra* note 8 for examples of the varied interpretations of the deliberate indifference test. Although the existence of varied interpretations prompted the *Farmer* Court to define deliberate indifference, the lower court cases are not discussed in detail in this article because their primary importance is to show the inconsistency in interpretation.

[FN54]. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

[FN55]. *Farmer*, 114 S. Ct. at 1978. See *infra* note 109 for a comment on the *Farmer* Court's limited use of the term "mens rea."

[FN56]. *Estelle*, 429 U.S. at 106. The Court went on to explain that only a claim that officials were "deliberately indifferent" to the prisoner's serious medical needs can "offend evolving standards of decency in violation of the Eighth Amendment." *Id.* (original quotations omitted).

[FN57]. *Farmer*, 114 S. Ct. at 1978.

[FN58]. A "purely objective standard," analogous to the civil law standard of negligence, would be one in which prison officials are liable if they should have known of the risk of harm to the prisoner. The Court in *Farmer* also commented on the notion of "gross negligence," but only to note that it falls somewhere between negligence and recklessness and is an obscure term generally equated with civil law recklessness. *Id.* at 1978, n.4.

[FN59]. *Id.* at 1978 (emphasis added). The Court indicated that this conclusion is evinced by the inapplicability of the deliberate indifference standard in "excessive physical force" cases. See, e.g., *Hudson*, 112 S. Ct. at 996. See also *supra* note 52 and accompanying text for an explanation and discussion of the differences between prison-conditions cases and excessive physical force cases.

[FN60]. See, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986).

[FN61]. *Farmer*, 114 S. Ct. at 1978 (quoting *Wilson v. Seiter*, 501 U.S. 294, 302- 03 (1991)).

[FN62]. See *supra* notes 56 -58 and accompanying text for a discussion of the negligence standard for liability and its place in the sphere of constitutional inquiry.

[FN63]. See *supra* notes 59 - 61 and accompanying text for a discussion of the "purposeful or knowing conduct" standard for liability and its place in Eighth Amendment analysis.

[FN64]. *Farmer*, 114 S. Ct. at 1978.

[FN65]. *Id.* at 1978 -79.

[FN66]. *Farmer* argued that prison officials were deliberately indifferent if they "knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law." Petitioner's Reply Brief at 5, *Farmer* (No. 92-7247); see also Petitioner's Brief at 20 -21, *Farmer* (No. 92- 7247).

[FN67]. Prison officials argued that deliberate indifference requires the official to "know of the risk of harm to which an inmate is exposed." Respondent's Brief at 16, *Farmer* (No. 92-7247).

[FN68]. *Farmer*, 114 S. Ct. at 1979.

[FN69]. Civil law recklessness may apply when a person fails to act if he had a legal duty to do so.

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[FN70]. The civil law definition of recklessness thereby accounts for those situations in which a risk of harm is so obvious that it must have been known, or absolutely should have been known, to the alleged wrongdoer. *Id.* at 1978.

[FN71]. *Id.*

[FN72]. *Id.* at 1978 -79.

[FN73]. *Id.* at 1979.

[FN74]. *Id.*

[FN75]. *Id.*

[FN76]. *Id.*

[FN77]. 501 U.S. 294.

[FN78]. *Farmer*, 114 S. Ct. at 1979 (citing *Wilson v. Seiter*, 501 U.S. 294, 299 -302 (1991)).

[FN79]. *Helling*, No. 91-1958, slip op. at 9; *Hudson*, No. 90 - 6531, slip op. at 4 -5.

[FN80]. *Farmer*, 114 S. Ct. at 1979. *Farmer* contended that *Wilson* cited *Cortes-Quinones*, 842 F.2d 556, and *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987), for the purpose of adopting, or at least legitimizing, the objective test for deliberate indifference. The Court in *Farmer*, however, rejected this argument on the grounds that *Wilson* cited *Cortes-Quinones* and *Morgan* merely for the proposition that all prison conditions cases are governed by the deliberate indifference test. *Farmer*, 114 S. Ct. at 1979 -1980.

[FN81]. *Farmer*, 114 S. Ct. at 1979 (citing *Wilson*, 501 U.S. at 299).

[FN82]. *Id.* at 1980. The Court noted that the criminal law "subjective recklessness" standard is a "familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases" *Id.* Although recognizing that the reasons for questioning the defendant prison official's state of mind differ between the criminal law (isolating those who deserve to be punished) and Eighth Amendment claims (isolating those who have inflicted punishment), the Court pointed out that the results are the same in either case: a finding of recklessness requires a finding of a conscious disregard of a substantial risk of harm. *Id.* (citing Model Penal Code s 2.02(2)(c) (1985)). As well, the Court rejected the contention that adoption of the criminal law subjective standard would discourage jurors from imposing liability unless they drew the conclusion that prison officials acted like criminals. *Id.* The Court reasoned that because *Bivens* actions and s 1983 claims are civil in nature, it would be wholly inappropriate for courts to refer to the criminal law in enforcing the Eighth Amendment. *Id.*

[FN83]. 489 U.S. 378 (1989). The *Farmer* Court recognized the inherent problems in using the term "deliberate" in reference to recklessness, rather than merely to refer to an act or omission that is voluntary, not accidental, *Farmer*, 114 S. Ct. at 1980 (citing *Estelle v. Gamble*, 429 U.S. 97 105 (1976) (distinguishing deliberate indifference from an accident or mere inadvertence)). However, the Court noted that " 'deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute" *Id.* Therefore, the Court specifically rejected *Farmer's* insistence that the objective *Canton* test must govern the facts of this case. *Id.*

[FN84]. *Canton*, 489 U.S. at 389 - 90. *Canton* discussed deliberate indifference in terms of the obviousness of a risk and the ability to "reasonably" say that officials were deliberately indifferent. *Id.* at 390. Justice O'Connor's concurrence, in which three other Justices joined, agreed with the "obviousness" analysis and noted that liability is appropriate when officials are on constructive notice of the risk of harm. *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part).

[FN85]. *Farmer*, 114 S. Ct. at 1981.

[FN86]. *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 330 (1986)). See supra note 4 and accompanying text for a discussion of 42 U.S.C. s 1983. As the *Farmer* Court noted, the "underlying constitutional right" in a s 1983 action, as discussed in *Canton*, might be any "right[], privilege or immunity secured by the Constitution and laws" 42 U.S.C. s 1983.

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[FN87]. Farmer, 114 S. Ct. at 1981.

[FN88]. Id.

[FN89]. Id.

[FN90]. Id. (citing Petitioner's Brief at 27, Farmer (No. 92-7247)). The Court further explained that because the issue of whether a prison official had knowledge of a risk is a factual inquiry, the factfinder could draw inferences in the usual manner, id. (citing J. Hall, *General Principles of Criminal Law* 115, 118 (2d ed. 1960)), and conclude that the official must have been aware simply due to the obviousness of the risk of harm, id. (citing 1 W. LaFare & A. Scott, *Substantive Criminal Law* s 3.7, p. 335 (1986)). Thus, prison officials may show that they were unaware of underlying facts that indicated a risk of harm and that therefore they were unaware of the danger to the petitioner. Id. at 1982.

[FN91]. Farmer, 114 S. Ct. at 1981- 82.

[FN92]. Id. at 1982.

[FN93]. Id. at 1981 n.8, 1982.

[FN94]. Id. at 1982. In *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), the court discussed the issue of ignoring the obvious or failing to confirm or verify facts or inferences that a person strongly suspects to be true in the context of a criminal appeal from a conviction for possession of marijuana, under 21 U.S.C. s 841 (a)(1), and for knowingly transporting marijuana into the United States, under 21 U.S.C. s 952 (a). The United States Court of Appeals for the Ninth Circuit affirmed the conviction based on a jury instruction that the Government was required to prove beyond a reasonable doubt that the defendant was either actually aware of the marijuana hidden in the car he was driving or that if he wasn't actually aware of its presence, his ignorance was "solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth." Id. at 700. In affirming, the court of appeals noted the long-standing tradition, accepted in the United States as well as in England, of treating those who " 'shut [their] eyes' to avoid knowing what would otherwise be obvious to view," as having knowledge under criminal statutes. Id. (quoting R. Perkins, *Criminal Law* 776 (2d ed. 1969)).

Deeming knowledge to an individual who has suspicions but intentionally fails to make inquiries so as to remain ignorant is artfully termed "willful blindness." Id. (citing G. Williams, *Criminal Law: The General Part* s 57 at 157, 159 (2d ed. 1961)). Professor Williams states that, "[t]he rule that willful blindness is equivalent to knowledge is essential, and is found throughout the criminal law." Williams, *Criminal Law*, at 159. However, Williams also cautions that courts must limit the application of willful blindness to those situations where "it can almost be said that the defendant actually knew," in order for the willful blindness doctrine to remain distinct from the civil law concept of negligence. Id. Williams gives the standard scenario for willful blindness: "[h]e suspected the fact; he realized [sic] its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge." Id. "The inference of 'knowledge' of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief." *Jewell*, 532 F.2d at 701.

The Model Penal Code has also adopted the willful blindness doctrine. See Model Penal Code s 2.02 (7) (1962). The Supreme Court has adopted this analysis. See *Barnes v. United States*, 412 U.S. 837, 845 n.10 (1973); *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969). Many circuit courts have also adopted the standard. See, e.g., *United States v. Dozier*, 522 F.2d 224, 226 (2d Cir. 1975); *United States v. Sarantos*, 455 F.2d 877, 881 (2d Cir. 1972); *Griego v. United States*, 298 F.2d 845, 849 (10th Cir. 1962).

[FN95]. Farmer, 114 S. Ct. at 1982.

[FN96]. Id.

[FN97]. Id. The Court stated that, because a prison official's duty to protect inmates is limited to ensuring "reasonable safety," id. at 1983 (citing *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993)), 113 S. Ct. at 2481), we cannot hold prison officials liable for an Eighth Amendment violation when they act reasonably to prevent a harm of which they are aware, even if their actions do not ultimately prevent the harm. Id. However, Farmer did not define the term "reasonable" in the context of prison-conditions cases.

Furthermore, the Court rejected Farmer's argument that under the Court's newly defined deliberate indifference standard

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prisoners would be required to suffer harm before obtaining court-mandated relief from inhumane prison conditions. *Id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)) ("[on]e does not have to await the consummation of threatened injury to obtain preventative relief.") See also *Helling*, 113 S. Ct. at 2481. Rather, in seeking injunctive relief, a prisoner must present evidence of the prison officials "current attitudes and conduct" at the time he brings the action. *Farmer*, 114 S. Ct. at 1983. To survive a summary judgment motion, the inmate must produce evidence that when he filed the Eighth Amendment claim, and when the officials filed the motion for summary judgment, the officials intentionally and unreasonably disregarded, and are continuing to disregard, an objectively excessive risk of harm, and that they will persist in doing so after the court decides the motion. *Id.* To establish the need for injunctive relief, the prisoner must show that the inattention to the prisoner's safety has continued throughout the litigation and will persist into the future. *Id.* Courts may allow prisoners to use developments that post-date the pleadings and pretrial motions in establishing the continuing disregard for the prisoner's safety. *Id.* However, prison officials may use those same developments to show that, because they have ceased disregarding the risk of harm and will not revert to that practice after the completion of the litigation, injunctive relief is inappropriate under the facts of the particular case. *Id.* District courts may even allow prison officials time to rectify their inappropriate actions or behavior toward petitioner before issuing an injunction. *Id.* As well, the Farmer Court cautioned district courts to be careful in issuing injunctive relief to prisoners. *Id.* The Court finally noted that prisoners must exhaust internal prison procedures for relief prior to filing suit in court. *Id.* at 1983 n.9.

[FN98]. *Id.* The Court stated that it was not dispositive that Farmer failed to inform prison officials that he was afraid for his safety. *Id.*

[FN99]. *Id.* The Court also denied the respondent's request that the lower court's holding merely be affirmed because the lower court may have placed dispositive weight on Farmer's failure to voice his fears to prison officials, as well as on the possible availability of further evidence to support Farmer's claim. *Id.*

[FN100]. The prohibition against excessive fines, as well as the prohibition against cruel and unusual punishment, applies to those persons whom a jury found guilty of committing a crime and "applies only after the State has complied with the Constitutional guarantees traditionally associated with criminal prosecutions." *Whitley*, 475 U.S. at 318 (citing *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)) (internal quotations omitted).

[FN101]. See *Ingraham*, 430 U.S. at 664.

[FN102]. *Jordan v. Gardner*, 986 F.2d 1521, 1544 (9th Cir. 1993). See also *Harmelin v. Michigan*, 111 S. Ct. 2680, 2688 (1991) (Scalia, J., concurring); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976); *Weems v. United States*, 217 U.S. 349 (1910); Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839 (1969). The Framers were also aware of abuses of those merely suspected or accused of committing some criminal act. The Eighth Amendment prohibition of excessive bail applies to those persons accused of committing a crime who have not yet been convicted. For more background on the passage and intent of the Eighth Amendment prohibition on cruel and unusual punishment, see 2 J. Elliot, *Debates on the Federal Constitution* 111 (2d ed. 1854); 1 *Annals of Congress* 753-54 (1789); 3 J. Story, *Commentaries on the Constitution of the United States* 750-51 (1833); T. Cooley, *Constitutional Limitations* 694 (8th ed. 1927).

[FN103]. 114 S. Ct. 1970 (1994).

[FN104]. Justice Souter wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Ginsburg joined. Justices Blackmun and Stevens filed concurring opinions and Justice Thomas filed an opinion concurring in the judgment.

[FN105]. *Farmer*, 114 S. Ct. 1970. Justice Souter wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Ginsburg joined. Justices Blackmun and Stevens filed concurring opinions and Justice Thomas filed an opinion concurring in the judgment.

[FN106]. See *supra* notes 7- 8 and accompanying text.

[FN107]. For example, prisoners might file civil rights actions to harass prison officials, to make a point regarding prisoners' convictions and/or sentences, or "to get back at" the judicial system.

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[FN108]. *Haines v. Kerner*, 404 U.S. 519, 520 -21 (1972); *Balistreri*, 901 F.2d at 699.

[FN109]. *Conley*, 355 U.S. at 45 - 46; *Balistreri*, 901 F.2d at 699; *Karim-Panahi*, 839 F.2d at 623.

[FN110]. See *infra* notes 119 -21 and accompanying text for a discussion of the problems in utilizing the Farmer Court's "obviousness of the risk" analysis in a jury trial.

[FN111]. *Farmer v. Brennan*, 114 S. Ct. 1970, 1979 - 80 (1994).

[FN112]. *Id.* at 1979.

[FN113]. The Court stated that although people generally understand the word "deliberate" as implying knowledge, prisoners might utilize a "constructive knowledge" scheme in arguing awareness of a risk simply because of the obviousness of a risk of harm. *Id.* at 1980.

[FN114]. *Id.* at 1981.

[FN115]. *Id.* See also *supra* notes 87- 94 and accompanying text for a discussion of the Farmer Court's analysis of obvious risks and their effect on the subjective prong of the deliberate indifference test.

[FN116]. Under the civil law recklessness standard, prisoners would be required to show that the risk of harm was so obvious that prison officials must have been aware of the risk. Likewise, however, the analysis that the Court adopted -- allowing fact finders to infer knowledge from the obviousness of the risk of harm -- is, in application, an objective standard. The primary distinction between the two standards is logistical, especially considering that juries may be interpreting the standard.

[FN117]. It is unlikely that many juries will be swayed toward holding prison officials liable absent the most clear and convincing proof -- a level of proof not legally required in civil claims. It is more probable that officials will evade liability in all but the most egregious of cases, where jurors might be particularly sympathetic or sensitive to the prisoner's claim and choose to infer knowledge from the obviousness of the risk of harm.

[FN118]. This confusion would result because the Court's definition of the required subjective mens rea is counter-intuitive when prison officials respond to allegations that the risk was obvious by stating, "the obvious escaped me."

[FN119]. In fact, it is unclear whether the prison officials would be required to show that the obvious escaped them or the prisoner would be required to prove the converse. See also *infra* note 135 and accompanying text for a discussion of the shifting burden of proof.

[FN120]. See *supra* notes 108-109 and accompanying text for a discussion of the standards to be applied in a motion to dismiss or a motion for summary judgment in prisoners' pro se complaints. Although courts dismiss most prisoner complaints in the early stages of litigation, this is counter- intuitive because the Federal Rules of Civil Procedure and courts interpreting those rules have established less stringent standards for pleading a cause of action in pro se complaints. Thus, it should be easier for prisoners to state facts upon which relief can be granted, thereby passing on to the later stages of fact-finding and trial. Realistically however, courts are generally skeptical of prisoner claims and therefore, do not usually give anything but superficial notice to the lesser standards required of pro se complainants.

[FN121]. Because of the clarity with which the Farmer Court adopted the subjective recklessness standard, it is unclear whether lower courts could look into other interpretations and analysis that might stem from the Court's reasoning without offending the Court's mandatory authority.

[FN122]. See, e.g., *McKellar v. Chesney*, No. 94 -2341, slip op. (E.D. Pa. July 26, 1994).

[FN123]. See, e.g., *Fields v. Parke*, 35 F.3d 1214 (6th Cir. 1994).

[FN124]. *Farmer*, 114 S. Ct. at 1979.

[FN125]. See *supra* note 95 and accompanying text.

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[FN126]. Model Penal Code s 2.02 (7) (1985). Under the Code, then, a person is assumed to have knowledge of the risk of harm if he is aware of the high probability of the existence of the risk of harm, unless he, in fact, believes that no risk of harm exists.

[FN127]. Farmer, 114 S. Ct. at 1981- 82 n.8 (quoting LaFave & Scott s 3.7, p.335), 1982. Although this method of escaping liability is found in the criminal law concept of willful blindness, as previously stated, this does not necessarily justify an extension of the idea into constitutional law. The merits of the willful blindness doctrine of the Model Penal Code s 2.02 (7) will not be discussed because the criminal law is not specifically at issue here. It suffices to say that extending the principle into the constitutional law, which deals with the protection of fundamental rights, is inappropriate without serious consideration of the ramifications of such a doctrine. It is evident from the Farmer Court's opinion and reasoning that it did not fully consider the effects of such an extension.

[FN128]. Farmer, 114 S. Ct. at 1982 n.8.

[FN129]. Black's Law Dictionary 1078 (6th ed. 1990).

[FN130]. Doubleday Dictionary 499 (1975).

[FN131]. 2 Funk & Wagnalls Standard Desk Dictionary 452 (1983 ed.).

[FN132]. Farmer, 114 S. Ct. at 1982 (stating that "it remains open to the prison officials to prove that they were unaware of even obvious risks to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so.") See also supra note 121 and accompanying text.

[FN133]. The Farmer Court specifically stated "we adopt [subjective recklessness as used in the criminal law] as the test for 'deliberate indifference' under the Eighth Amendment." Farmer, 114 S. Ct. at 1980. The Farmer Court also stated, "[w]e reject petitioner's invitation to adopt an objective test for deliberate indifference." Id. at 1979. Thus, there does not appear to be any question that the Farmer Court intended to adopt a requirement of a subjective mens rea for prison-conditions cases under the Eighth Amendment.

[FN134]. McKellar v. Chesney, No. 94 -2341, slip op. (E.D. Pa. July 26, 1994).

[FN135]. Id. at 2.

[FN136]. Id. at 3.

[FN137]. Id. McKellar specifically alleged that the prison officials looked on from outside the cell, rather than assisting McKellar. Id. at 2-3. McKellar's complaint stated that he suffered from, inter alia, insomnia, loss of appetite, weight loss and headaches as a result of the incident. He apparently received psychological treatment and prescription medications for his symptoms after the incident. Id. at 3.

[FN138]. Id. at 6 (quoting Farmer, No. 92-7247, 1994 LEXIS 4274, 62 U.S.L.W. 4446 (June 6, 1994) (subsequently reported at 114 S. Ct. at 1977).

[FN139]. Id., slip op. at 7- 8.

[FN140]. 38 F.3d 1215 (6th Cir. 1994).

[FN141]. Fields, No. 94 -5405, 1994 WL 573921 (6th Cir. Oct. 17, 1994).

[FN142]. Id. at *1. The court affirmed the lower court without the benefit of oral arguments. Id.

[FN143]. Id.

[FN144]. Rossell, 34 F.3d 1073 (9th Cir. 1994).

[FN145]. Id.

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[FN146]. Id.

[FN147]. Id. Although the court made no mention of the specific wording of Rossell's complaint, it is perhaps quite significant that Rossell alleged "recklessness" on the part of the defendant prison officials. This wording squares with the Farmer Court's bare definition of deliberate indifference in that it is an allegation of reckless behavior. Furthermore, Rossell alleged that the defendants committed an affirmative act when they increased his sex- offense classification, thereby increasing the risk of harm to Rossell's safety. Deliberate actions tend to suggest knowledge of the repercussions of those actions. In contrast, the complaints dismissed in other civil rights claims decided since Farmer, such as McKellar and Parke, did not contain the term "reckless" and the prisoners accused the defendant prison officials of failing to act, rather than of committing an affirmative act.

[FN148]. Id. (emphasis added).

[FN149]. Id.

[FN150]. Id.

[FN151]. Id.

[FN152]. The Eighth Amendment cruel and unusual punishments clause, on its face, could have been created for no purpose other than to provide protection to prisoners. Thus, when the clause is not utilized to that end, we fail to honor the Framers' significant objectives. See supra notes 100 -102 and accompanying text, for comments on the Framers' intentions in adopting the Cruel and Unusual Punishments Clause.

[FN153]. As Justice Blackmun noted in Farmer, "[p]rison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem, accompany the perpetual terror the victim thereafter must endure." Id. at 1987. See also [Note, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter](#), 44 Stan. L. Rev. 1541 (1992) (discussing the physical, emotional, and psychological implications of sexual violence in prisons).

[FN154]. The common, though perhaps liberal, understanding of the Cruel and Unusual Punishment Clause is that it enjoins gross mistreatment of prisoners. Residents of, and even visitors to, the United States would doubtless hope that the clause be honored, if ever convicted of a crime. By placing oneself in the shoes of a prisoner, it is easier to realize the hope that the clause condemns prison rape and assault.

[FN155]. Via the Constitution, the legislative branch creates laws that accord with the mandates of the Constitution and the judiciary branch upholds those laws. When the Constitution was drafted and ratified then, the Framers had to be aware that the judiciary would ultimately be responsible for ensuring that the Eighth Amendment was upheld. This is particularly true when the legislative branch either fails to pass Constitutional laws or, as a preliminary matter, fails to recognize the Constitutional mandates.

[FN156]. It is logical to suggest that the non-violent prisoner who files a complaint based on prison officials' deliberate indifference after the prisoner was attacked in prison while prison officials "ignored the obvious" risks of such an attack will not feel that he is being taken seriously if the court summarily dismissed his complaint. This may be particularly true when the prisoner is proceeding pro se and does not have an attorney to explain the judicial process to him. Certainly the prisoner would not rush to re-file the complaint, if the court happened to dismiss it without prejudice, if he just spent the past three months researching and writing the complaint to the best of his ability. Conversely, those prisoners who file complaints merely to badger judges and attorneys will continue to file because the new definition set forth in Farmer does not affect their ability to badger.

[FN157]. See, e.g., Farmer, 114 S. Ct. 1156, 1990 (1993) (Thomas, J., concurring in the judgment) (stating that judges and juries impose punishments, but not prison officials, and that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.") See also supra note 41 and accompanying text regarding Justice Thomas' view of deliberate indifference.

[FN158]. Id. at 1988.

[FN159]. Id. at 1970.

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