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A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison

James E. Robertson

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A CLEAN HEART AND AN EMPTY HEAD:*

THE SUPREME COURT AND SEXUAL TERRORISM IN PRISON

JAMES E. ROBERTSON**

Stepping into the darkened cell, he was swept into a whirlwind of violent movement that flung him hard against the wall, knocking the wind from him. A rough, callused hand encircled his throat, the fingers digging painfully into his neck, cutting off the scream rushing to his lips. "Holler, whore, and you die," a hoarse voice warned, the threat emphasized by the knife point at his throat He was thrown on the floor, his pants pulled off him. As a hand profanely squeezed his buttocks, he felt a flush of embarrassment and anger, more because of his basic weakness—which prevented him from doing anything to stop what was happening—than because of what was actually going on. His throat grunted painful noises, an awful pleading whine that went ignored as he felt his buttocks spread roughly apart. A searing pain raced through his body as the hardness of one of his attackers tore roughly into his rectum. . . . A sense of helplessness overwhelmed him and he began to cry, and even after the last penis was pulled out of his abused bleeding body, he still cried, overwhelmed by the knowledge that it was not over, that this was only the beginning of a nightmare that would only end with violence, death, or release from prison.¹

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* Several federal courts have used the phrase "a clean heart and an empty head," which appears in the title of this Article. See, e.g., *Studiengesellschaft Kohl v. Kraft, Inc.*, 862 F.2d 1564, 1579 (Fed. Cir. 1988) (discussing patent law); *Smith v. Ullman*, 874 F. Supp. 979, 987 (D. Neb. 1994) (discussing prison violence); *American Medical Sys., Inc. v. Medical Engineering Corp.*, 794 F. Supp. 1370, 1397 (E.D. Wis. 1992) (discussing patent law).

** Distinguished Professor of Correctional Law, Minnesota State University (james.robertson@mnsu.edu). B.A., 1972, University of Washington; J.D., 1975, Washington University; M.A., 1979, California State University at Sacramento; Diploma in Law, 1988, Oxford University. The author gratefully acknowledges the considerable assistance provided by Shawn M. Brown, A. Carter Arey, and the other editors of the *North Carolina Law Review*.

1. WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES* 73 (1992).

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INTRODUCTION

A commentator recently characterized male rape as the “most closely guarded secret activity of America’s prisons.”² This proposition belies many facts of prison life: sexual assault victims have brought numerous civil rights actions since the demise of the hands-off doctrine;³ commentators have produced a large body of

2. Brian Saccenti, *Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious*, 59 MD. L. REV. 642, 642 n.4 (2000) (quoting CARL WEISS & DAVID JAMES FRIAR, *TERROR IN THE PRISONS*, at x (1974)). Other commentators have spoken of this supposed “secret.” See, e.g., Sarah E. Frink, *Aids Behind Bars: Judicial Barriers to Prisoners’ Constitutional Claims*, 5 DRAKE L. REV. 527, 542 (1997) (quoting WEISS & FRIAR, *supra*, at x); David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1544 (1992) (quoting WEISS & FRIAR, *supra*, at x); Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 868 (1997) (quoting WEISS & FRIAR, *supra*, at x).

3. See *infra* notes 124–332 and accompanying text (discussing the case law of the deliberate indifference test as it applies to prison rape). The hands-off doctrine constituted a “judicial policy of non-intervention in prison practices and conditions except in the most egregious instances.” See James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1039 (1997); see also, e.g., *Bethae v. Crouse*, 417 F.2d 504, 505–06 (10th Cir. 1969) (“We

scholarly work on the subject;⁴ the media has sporadically “exposed” the secret;⁵ and Human Rights Watch has advanced a host of measures for safeguarding inmates from rape.⁶

have consistently adhered to the so-called ‘hands-off’ policy”); *Sarshik v. Sanford*, 142 F.2d 676, 676 (10th Cir. 1944) (“The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.”); *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) (“[I]t is unthinkable that the judiciary should take over the operation of . . . prisons.”); Martin W. Spector, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986–87 (1962) (“[C]ourts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situation.”); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 507 (1963) (noting that except on rare occasions courts followed the “hands-off” doctrine, leaving prisoners “without enforceable rights”).

4. See, e.g., NO ESCAPE: MALE RAPE IN U.S. PRISONS (HUMAN RIGHTS WATCH 2001), available at <http://www.hrw.org/reports/2001/prison/report.html> (last visited Nov. 17, 2002) (on file with the North Carolina Law Review) [hereinafter HUMAN RIGHTS WATCH] (stating that the organization conducts regular, systematic investigations of human rights abuses around the world); DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 18 (1980) (describing a 1975 survey study on prison sexual assault); PETER L. NACCI & THOMAS R. KANE, SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS 15 (1982) (profiling targets and assailants in a study of sexual relationships among federal prisoners); ANTHONY M. SCACCO, JR., RAPE IN PRISON 3 (1975) (summarizing conclusions of a study regarding sexual victimization in prison facilities); WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 15–16 (1982) (listing results of a study on the jargon used by inmates to describe homosexual relationships); Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Rape and Their Willingness to Respond to Acts of Rape*, in PRISON VIOLENCE IN AMERICA 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994) (noting proposed steps to ameliorate prison victimization); Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 55 (1990) (discussing inmate attitudes towards male sexual aggression); Carolyn Newton, *Gender Theory and Prison Sociology: Using Theories of Masculinity to Interpret the Sociology of Prisons for Men*, 33 HOW. J. CRIM. JUST. 193, 197 (1993) (describing the social hierarchy of male inmates); Cindy Struckman-Johnson et. al, *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 *passim* (1996) (explaining the research methodology and results of a study regarding sexual coercion).

5. See, e.g., Greg Burton, *Prison Rapes Covered Up, Inmates Say*, SALT LAKE TRIB., Nov. 9, 1997, at B1 (contrasting the records of the Utah Department of Corrections, which indicated dozens of reported rapes, with a report to an accrediting body by correctional officials that claimed an absence of sexual assaults); Tamar Levin, *Little Sympathy or Remedy for Inmates Who Are Raped*, N.Y. TIMES, April 15, 2001, at 1, available at <http://www.mugu.com/pipermail/upstream-list/2001-April/001759.html> (on file with the North Carolina Law Review) (responding to a general public disinterest in the problem of prison rape); Brenda Rodriguez, *Rape Contributes to Spread of AIDS: Sexual Assaults in Prisons Rarely Reported*, SAN ANTONIO EXPRESS-NEWS, Sept. 15, 1997, at 1A (recounting the rape and consequent infection of an inmate with AIDS and noting that rapes are rarely reported); Charles M. Sennott, *Prison System Enacts Reforms to Stop Inmate Rape*, BOSTON GLOBE, Nov. 9, 1994, at 37 (noting a general public unawareness regarding prison rape).

6. See HUMAN RIGHTS WATCH, *supra* note 4, at I. *Summary and Recommendations* (delineating measures to reduce the number of prison rapes).

In truth, prison rape is the most tolerated act of terrorism in the United States. As one inmate stated, "Sexual assaults . . . have become unspoken, de facto parts of court-imposed punishments."⁷ Moreover, perpetrators of prison rape rarely face criminal prosecution⁸ or severe intra-prison disciplinary sanctions.⁹

While judicial intervention brought many improvements in prison conditions and practices,¹⁰ prison rape—the most widely and deeply feared aspect of imprisonment¹¹—has been left to fester.¹² In the meantime, the exploding prison population¹³ has diminished monitoring of inmates and created what Human Rights Watch describes as "a stronger incentive to pacify—rather than challenge—

7. VICTOR HASSINE, *LIFE WITHOUT PAROLE* 134 (2d ed. 1999) (describing the author's personal experience as a "lifer").

8. See HUMAN RIGHTS WATCH, *supra* note 4, at *I. Summary and Recommendations* ("Few public prosecutors are concerned with prosecuting crimes committed against inmates, preferring to leave internal prison problems to the discretion of the prison authorities; similarly, prison officials themselves rarely push for the prosecution of prisoner-on-prisoner abuses."); see also, e.g., *Vosberg v. Solem*, 845 F.2d 763, 766 (8th Cir. 1988) (reporting no prosecutions arising from more than 140 instances of assaults, including rape, at the South Dakota State Penitentiary); HASSINE, *supra* note 7, at 137 (stating that prison staff "very seldom initiate criminal prosecution against a rapist"); Shara Abraham, *Male Rape in U.S. Prisons: Cruel and Unusual Punishment*, 9 HUM. RTS. BRIEF 5, 5 (2001) (observing that "prosecutors rarely bring charges against prison rapists"); Rodriguez, *supra* note 5 (finding dozens of reported sexual assaults, but only one reported conviction documented by the Utah Department of Corrections).

9. See HUMAN RIGHTS WATCH, *supra* note 4, at *I. Summary and Recommendations* ("In nearly every instance Human Rights Watch has encountered, the authorities have imposed light disciplinary sanctions against the perpetrator—perhaps thirty days in disciplinary segregation—if that. Often rapists are simply transferred to another facility, or are not moved at all.").

10. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 368 (1998) (concluding that "[the prison] reform cases were an important contribution to three major developments: the emergence of a national corrections profession, the formulation of national standards for corrections, and the general bureaucratization of prisons"); Alvin J. Bronstein, *15 Years of Prison Litigation*, 11 J. NAT'L PRISON PROJECT 1, 6 (Spring 1987) ("Litigation has resulted in profound and permanent changes in the conditions under which tens of thousands of prisoners must live."); Susan P. Strum, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 670 (1993) (concluding that "court intervention generally has improved the living conditions and practices in the facilities at issue").

11. See CARL WEISS & DAVID JAMES FRIAR, *TERROR IN THE PRISONS* 4 (1974) ("[P]rison rape is the first thing [an inmate] fear[s]."); Jones & Schmid, *supra* note 4, at 55 ("[P]erhaps, more than anything else an inmate fears sexual assault.").

12. See Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 682–83 (1997) ("What we cannot blink away is the astonishing prevalence and tolerance of sexual violence and subjugation particularly among male prisoners.").

13. Compare SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997, at 490 tbl.6.35 (Bureau of Justice Statistics 1998) (indicating that prisons held 315,974 inmates in 1980), with ALLEN J. BECK & PAIGE M. HARRISON, *PRISONERS IN 2000* 2 (2001) (indicating there were more than 1.3 million sentenced inmates by the end of 2000).

the more dangerous prisoners who may be exploiting others.”¹⁴ For a male behind bars,¹⁵ the bottom-line reads: “[P]rison authorities cannot protect his body’s privacy.”¹⁶

The real secret about prison rape concerns its resistance to the deterrent effects of civil rights litigation brought under 42 U.S.C. § 1983.¹⁷ This Article contends that fault principally lies with the Supreme Court’s reading of the constitutional prohibition of cruel and unusual punishment.¹⁸ In limiting its reach to deliberate

14. HUMAN RIGHTS WATCH, *supra* note 4, at VIII. *Deliberate Indifference*.

15. This Article addresses solely the rape of male inmates. The literature indicates that rape among inmates is principally confined to the male prison population. Female inmates engage in sexual relationships with other inmates but for different reasons than their male counterparts. Power and dominance as motivating factors for male prison rape give way to pseudo-familial relationships among female inmates, in which sexual relationships are largely consensual. See MICHAEL WELCH, *CORRECTIONS: A CRITICAL APPROACH* (1996) (discussing the subculture of female inmates). Sexual assault of women prisoners by staff has a long and continuing history. See, e.g., *Downey v. Denton County, Tex.*, 119 F.3d 381, 389–90 (5th Cir. 1997) (affirming an award of damages arising from a jailer’s sexual assault of a female inmate); *Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 665 (D.D.C. 1994) (“The evidence revealed a level of sexual harassment [of female inmates by staff] which is so malicious that it violates contemporary standards of decency.”), *rev’d on other grounds*, 93 F.3d 910 (D.C. Cir. 1996); WOMEN’S RIGHTS PROJECT: *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* 1 *passim*, available at <http://hrw.org/reports1996/Us1.htm> (HUMAN RIGHTS WATCH 1996) (last visited Oct. 25, 2002) (on file with the North Carolina Law Review) (finding widespread sexual exploitation of female inmates by male correctional staff).

16. WEISS & FRIAR, *supra* note 11, at 68; see also James E. Robertson, “*Fight or F...*” and *Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339, 339 (1995) (“[S]taff cannot or will not protect them from rape, assault, and other forms of victimization.”) (citation omitted); Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison*, in *PRISON VIOLENCE IN AMERICA*, *supra* note 4, at 27, 28 (“Prisons are largely unable to protect the physical safety of their inmates.”); Note, *Sexual Assaults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punishment*, 36 ALB. L. REV. 429, 438 (1972) (“Victims are at the mercy of their aggressors and receive little protection from prison authorities who are in charge of their safe keeping.”).

17. 42 U.S.C. § 1983 (1994) (providing that “[e]very person who, under color of . . . [state law] subjects, or causes . . . the deprivation of any rights, immunities, or privileges secured by the Constitution and laws shall be liable to the party injured”). Originally codified in Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871), § 1983 lay dormant until *Monroe v. Pape*, 365 U.S. 167 (1961). The Supreme Court ruled that the drafters of the Act provided a federal remedy when state officials failed to enforce constitutional rights because of “prejudice, passion, neglect, intolerance or otherwise.” *Monroe*, 365 U.S. at 181.

18. See U.S. CONST. amend. VIII (prohibiting in relevant part “cruel and unusual punishment”). Numerous commentators have addressed the origins of this prohibition. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (refusing to engage in cruel and unusual punishment analysis unless in relation to the death penalty); *Weems v. United States*, 217 U.S. 349, 389–90 (1910) (White, J., dissenting) (discussing the historical basis of the cruel and unusual punishment prohibition); Anthony F. Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839,

indifference to a high risk of harm,¹⁹ the Court imagines prison rape as individualized, culpable behavior.²⁰ Accordingly, correctional officers who possess “clean hearts,” no matter their “empty headed” response to prison rape, escape liability.²¹

Part I of this Article provides a primer on prison rape and includes discussion of the causes, frequency, and impact of prison rape. Part II reviews the genealogy of the Supreme Court’s deliberate indifference test. Part III examines how the lower federal courts have applied the deliberate indifference test to prison rape litigation. Part IV advances a new constitutional jurisprudence in prison rape cases. Concluding remarks follow.

I. PRISON SEXUAL TERRORISM

The founders of the penitentiary had “clean hearts” if not noble aspirations. They sought to reform offenders.²² However, what should have been their worst fear came true:

To be an imprisoned male in the United States is to experience a Hobbesian world; one encounters a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it. A new inmate soon learns that he must either fight his predators or flee. Escape from inmate violence, however, is available only in a form of segregation from the general

839–41 (1961) (noting the historical development of the American cruel and unusual punishment prohibition); James E. Robertson, *Four Little Eighteenth-Century Words: An Integrated Reading of the Cruel and Unusual Punishment Clause*, 37 CRIM. L. BULL. 475, 482–83 (2001) (commenting on the Eighth Amendment’s counter-majoritarian role in protecting marginalized members of society).

19. See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (ruling that prison officials’ deliberate indifference to a significant risk of inmate-on-inmate assault transgresses the Eighth Amendment).

20. Roberto Unger wrote that “[m]odern social thought was born proclaiming that society is made and imagined, that it is a human artifact rather than an expression of an underlying natural order.” ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 1 (Cambridge 1987).

21. Excusing harm on the basis of a “clean heart and an empty head” stands in sharp contrast to the admonishment of “you should have known better.” As one commentator observed: “[Y]ou should have known better” suggests that the accused person is charged with knowledge beyond the minimum required for moral and legal censure.” Bailey Kuklin, “*You Should Have Known Better*,” 48 KAN. L. REV. 545, 549 (2000) (footnote omitted).

22. See David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON* 111, 113–14 (Norval Morris & David J. Rothman eds., 1995) (describing the early prison as reformatory in aim: “Just as the defects in the social environment had led the inmate into crime, the disciplined and disciplining environment of the institution would lead him out of it”).

prison population or subservience to a fellow inmate who is capable of offering protection.²³

While the prison has missed the mark in rehabilitating inmates²⁴ and reducing crime rates through deterrence²⁵ or incapacitation,²⁶ it

23. James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 102 (1985-1986) (footnotes and internal quotations omitted); *see also, e.g.*, *Falls v. Nesbit*, 966 F.2d 375, 380 (8th Cir. 1992) ("Prisons are, by the very nature of the persons housed within their walls, dangerous, violent, and sometimes unpredictable."); MATTHEW SILBERMAN, *A WORLD OF VIOLENCE* 2 (1995) (describing the prison as a "world of violence in which weakness is shunned and strength is worshipped"); HANS TOCH, *POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE* 53 (1977) [hereinafter TOCH, PRISONS] ("Inmates are terrorized by other inmates, and spend years in fear of harm."); Scharf, *supra* note 16, at 28 ("Rapes, beatings, knifings, and killings are commonplace occurrences in many prisons."); Hans Toch, *Study and Reducing Stress*, in *THE PAINS OF IMPRISONMENT* 25, 41 (Robert Johnson & Hans Toch eds., 1982) (describing the prison as a "human warehouse with a junglelike underworld").

The reference to a "Hobbesian world" alludes to Thomas Hobbes's (1588-1679) contention that humans once lived in a natural condition where the strong prevailed over the weak. Seeking protection from their aggressive, base instincts, they formed the Leviathan, an authoritarian state. *See* THOMAS HOBBS, *LEVIATHAN* 186 (C.B. MacPherson ed., Penguin Books 1968) (1651) (describing the state of human kind in a state of nature as one of "continuall feare, and danger of violent death; and the life of man, solitary, poore, nasty, brutish, and short"); *see also* EDGAR BODENHEIMER, *JURISPRUDENCE* 131-36 (1974) (summarizing Hobbes's extensive writings); DAVID L. WESTBY, *THE GROWTH OF SOCIOLOGICAL THEORY* 23-31 (1991) (explaining Hobbes's views on human nature).

24. *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (reviewing numerous studies of rehabilitation and concluding that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effects on recidivism"). Furthermore, during the 1970s and 1980s rising crime rates, social tumult, and the growing numbers of non-white inmates led to public opposition to rehabilitation. *See* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 29-31 (1981) (discussing the demise of rehabilitation as correctional policy).

25. Deterrent theory posits that offenders are rational and will abstain from criminal behavior if the prospective costs exceed potential gains. *See, e.g.*, MICHAEL TONRY, *MALIGN NEGLECT* 19 (1994) (stating that "[t]he clear weight of evidence in every Western country indicates that tough penalties have little effect on crime rates").

26. Incapacitation theory posits that disabling offenders will reduce crime rates. *See, e.g.*, RICHARD HAWKINS & GEOFFREY ALPERT, *AMERICAN PRISON SYSTEMS* 108-28 (1989) (noting the change in the U.S. from systems of punishment such as banishment and death to a system of incarceration). The scholarly literature largely concludes that imprisonment has a marginal impact on crime rates. *See, e.g.*, JOSEPH DILLION DAVEY, *THE POLITICS OF PRISON EXPANSION* 108 (1998) (stating that "the association between increases in crime rates and the increase in imprisonment rates showed a low correlational coefficient"); Alfred Blumstein, *Prisons*, in *CRIME* 387, 391 (James Q. Wilson & Joan Petersilia eds., 1995) (observing that "crime rates have not dramatically declined despite a quadrupling of the prison population, which perhaps suggest[s] that the considerable growth in the prison population . . . has not succeeded in significantly reducing the crime rate") (emphasis omitted). *But see* RICHARD A. WRIGHT, *IN DEFENSE OF PRISONS* 133

has come of age in one endeavor—promoting sexual terrorism. In its most elementary state, “[s]exual terrorism is the system by which males frighten, and by frightening, dominate and control females.”²⁷ No matter that victim and assailant in prison rape are both biological males; the target is socially reconstructed—he is “‘female,’ in the eyes of other inmates.”²⁸ The victim’s immediate referent group, other inmates, redefines the victim as a submissive, surrogate woman.²⁹ Consequently, as the court in *Schwenk v. Hartford*³⁰ observed, “The victims of these attacks are frequently called female names and terms indicative of gender animus . . . [such as] ‘pussy’ and ‘bitch[,]’ during the assaults and thereafter.”³¹

Ironically, men rape other men in prison to validate their masculinity.³² The prison rapist lives in an environment that

(1994) (acknowledging that prisons are a “maligned and vilified” institution, but arguing that they are “modestly effective” in their deterrent and incapacitative functions).

27. Carole J. Sheffield, *Sexual Terrorism: The Social Control of Women*, in ANALYZING GENDER 171, 171 (Myra Marx Ferree & Beth B. Hess eds., 1987).

28. HUMAN RIGHTS WATCH, *supra* note 4, at V. *Rape Scenarios*; cf. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, in SYMBOLIC INTERACTION 205, 205 (Jerome G. Manis & Bernard N. Meltzer eds., 1967) (describing a degradation ceremony as a process “whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types”).

29. See WOODEN & PARKER, *supra* note 4, at 16.

30. 204 F.3d 1187 (9th Cir. 2000).

31. *Id.* at 1203 n.14. Sexual assault assigns inmates to well defined roles within an aggression-based social hierarchy. A categorization of these rules includes:

Pitcher—a heterosexual inmate who is the aggressor in instances of sexual victimization and thus occupies the masculine role.

Daddy—a heterosexual inmate who “courts, befriends, or patronizes weaker, inexperienced inmates into sexual gratification.”

Kid—a heterosexual or bisexual inmate, sometimes referred to as a “sex slave,” who provides sexual gratification often in exchange for protection.

Punk—a heterosexual or bisexual inmate who initially resists sexual approaches but eventually submits.

Fag—a so-called “natural homosexual.”

Queen—a homosexual or transsexual inmate who adopts effeminate behavior and typically plays a submissive role in sexual acts.

Skinner—a sex offender.

Diddler—a child molester.

James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 7 n.21 (1999) (footnote omitted) (quoting Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT’L J. SOC. L. 135, 139 tbl.2 (1992)).

32. See, e.g., *Schwenk*, 204 F.3d at 1203 n.14 (“[P]rison rapists commit assaults in part to establish and maintain masculine gender.”); SCACCO, *supra* note 4, at 3 (“It [i.e., sexual victimization] is an act whereby one male (or group of males) seeks testimony to what he considers is an outward validation of his masculinity.”); Kevin N. Wright, *The Violent and Victimized in a Male Prison*, in PRISON VIOLENCE IN AMERICA, *supra* note 4, at 103, 119 (“The literature suggests that prison violence is

perversely encourages sexual assault by equating manhood with domination and femininity with subservience.³³ Accordingly, most sexual aggressors define themselves as heterosexual, if not as "real men."³⁴ Moreover, the structure of prison life constantly assaults one's manhood, denying respite to sexual aggressors and only further victimizing their prey.³⁵ For example, the single-sex population deprives inmates the validation of women sexual partners;³⁶ numerous official rules governing inmate behavior rob them of the autonomy associated with masculinity;³⁷ and limitations on physical possessions preclude the affirmation of self through property ownership, such as cars and the like.³⁸

In 1961, A.V. Huffman pioneered the study of sexual aggression in prison.³⁹ He discerned "extreme anxiety, confusion, and tension" among victims:⁴⁰ "Some had reacted by feigning suicide or other compulsive behavior."⁴¹ Forty years later, Human Rights Watch had little new to add. "Victims of prison rape," it concluded, "commonly

related to the threat incarceration poses to the individual's identity and particularly his sense of masculinity."); cf. Donald J. Cotton & A. Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 50 (1982) ("Rape is not primarily motivated by the frustration of sexual needs.").

33. See Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, in THE PAINS OF IMPRISONMENT, *supra* note 23, at 63, 64 ("[V]ictories in the field of battle reassure the winners of their competence as human beings in the face of the passivity enforced by institutional regulations. This is particularly important for prisoners whose masculinity is threatened by the conditions of confinement."); see also, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL* 265 (1975) (stating that "[h]omosexual rape in the Philadelphia prisons turned out to be a microcosm of the female experience with heterosexual rape"); A. NICHOLAS GROTH, *MEN WHO RAPE* 13 (1979) ("In every act of rape, both aggression and sexuality are involved, but it is clear that sexuality becomes the means of expressing the aggressive needs and feelings that operate in the offender and underlie his assault."); cf. WOODEN & PARKER, *supra* note 4, at 14 (explaining that in the inmate subculture "eroticism has come to be associated with aggression").

34. See LOCKWOOD, *supra* note 4, at 124.

35. See, e.g., Newton, *supra* note 4, at 197 ("[T]he prisoner's masculinity is in fact besieged from every side . . .").

36. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 71-72 (1958) (observing that "[a] society composed exclusively of men tends to generate anxieties in its members concerning their masculinity").

37. *Id.* at 76 (rendering inmates "dependent" upon staff for their welfare and thereby constituting "a serious threat to the prisoner's self-image as a fully accredited member of adult society").

38. *Id.* at 69 (observing that "in modern Western culture, material possessions are so large a part of the individual's conception of himself that to be stripped of them is to be attacked at the deepest layers of personality").

39. See A.V. Huffman, *Problems Precipitated by Homosexual Approaches on Youthful First Offenders*, 7 J. SOC. THERAPY 217 *passim* (1961).

40. *Id.* at 221.

41. *Id.*

reported nightmares, deep depression, shame, loss of self-esteem, self-hatred, and considering or attempting suicide.”⁴² Indeed, their trauma may exceed that of female sexual assault victims.⁴³

Prison rape victims suffer on average nine coerced sexual acts.⁴⁴ Once identified as any “easy mark,” the victim becomes all the more appealing to aggressors:

“Piri I’ve been hit on already,” he said

“Well, I got friendly with this guy name Rube.” Rube was a muscle bound degenerate whose sole ambition in life was to cop young kids’ behinds. “Yeah,” I said, “and so”

“Well, this cat has come through with smokes and food and candy and, well, he’s a spic like me and he talked about the street outside and about guys we know outside and he helped me out with favors”

“My God, I thought, what can I tell him? Rube would use that first time to hold him by threatening to tell everybody that he screwed him. And if anybody found out, every wolf in the joint would want to cop.”⁴⁵

Commentators disagree over the number of victims.⁴⁶ Estimates range from one percent of the prison population to as high as twenty-eight percent.⁴⁷ In fact, a statistical fog surrounds prison rape: “[W]e have no way of accurately determining a national rate.”⁴⁸

42. HUMAN RIGHTS WATCH, *supra* note 4, at VI. *Body and Soul: The Physical and Psychological Injury of Prison Rape*. Numerous published studies separated the Human Rights Watch report from Huffman’s. See, e.g., Donald J. Cotton & A. Nicholas Groth, *Sexual Assault in Correctional Institutions: Prevention and Intervention*, in VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN, AND MEN 127 *passim* (Irving R. Stuart & Joanne G. Greer eds., 1984); Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT’L J. SOC. L. 135 *passim* (1992); Edward H. Peeples, Jr. & Anthony M. Scacco, Jr., *The Stress Impact Study Technique: A Method for Evaluating the Consequences of Male-On-Male Sexual Assault in Jails, Prisons, and Other Selected Single-Sex Institutions*, in MALE RAPE 241 *passim* (Anthony M. Scacco, Jr., ed., 1982); Struckman-Johnson et al., *supra* note 4, *passim*.

43. See Cotton & Groth, *supra* note 42, at 131.

44. See Struckman-Johnson et al., *supra* note 4, at 75.

45. PIRI THOMAS, *DOWN THESE MEAN STREETS* 265–66 (1967); see, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (“Once raped, an inmate is marked as a victim and is subsequently vulnerable to repeated violation.”); *LaMarca v. Turner*, 662 F. Supp. 647, 686 (S.D. Fla. 1987) (observing that “[o]nce an inmate is raped, he is marked as a victim for repeated sexual assaults for the remainder of his imprisonment”), *aff’d in part and vacated in part on other grounds*, 995 F.2d 1526 (11th Cir. 1993).

46. See generally Christopher Hensley et al., *The History of Prison Sex Research*, 80 PRISON J. 360 *passim* (2000) (providing a primer on the prison rape literature).

47. See Daniel Lockwood, *Sexual Exploitation in Prison*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 440, 440 (Marilyn D. McShane & Frank D. Williams III eds., 1996). Compare, e.g., LOCKWOOD, *supra* note 4, at 18 (reporting that 28% of male inmates at

Several factors account for this uncertainty. Most victims do not self-report rape.⁴⁹ They abstain out of shame,⁵⁰ intimidation,⁵¹ and fear of being identified as a “rat”⁵² and an “easy mark” for future acts

two maximum security prisons in New York had experienced aggressive sexual behavior, with 51% involving some degree of physical violence, and finding that 71% of white inmates under the age of twenty-one reported being targeted for aggressive sexual approaches), Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000) (finding sexual aggression rates of 21% and 20% among inmates in seven Midwestern facilities), Struckman-Johnson et. al, *supra* note 4, at 7 (reporting a 13% rate of rape in a Nebraska prison), and WOODEN & PARKER, *supra* note 4, at 1 (finding that 15% of inmates in a California prison reported that they had been raped), with, e.g., NACCI & KANE, *supra* note 4, at 8–9 tbl.1 (finding that 11% of inmates housed in one federal prison experienced sexual aggression, and less than 1% stated that they performed a nonconsensual sex act, but that 29% responded affirmatively when asked if they had been propositioned), Christine A. Saum et al., *Sex in Prison: Exploring Myths and Realities*, 75 PRISON J. 413, 427 (1995) (finding that less than 1% of inmates queried in a Delaware prison acknowledged being raped), and Richard Tewksbury, *Measures of Sexual Behavior in an Ohio Prison*, 74 SOC. & SOC. RES. 34, 36 (1989) (concluding that less than 1% of inmates queried in an Ohio prison acknowledged being raped).

48. Lockwood, *supra* note 47, at 440; see also Struckman-Johnson & Struckman-Johnson, *supra* note 47, at 383 (observing that “after decades of research, social scientists have yet to agree on what percentage of incarcerated men experience coercive sexual contact”). A bare majority of states compile data on reported prison rape. See Abraham, *supra* note 8, at 5 (discussing the “curtain of silence” that surrounds prison rape).

49. See, e.g., HASSINE, *supra* note 7, at 137 (observing that rape victims “seldom report” their victimization); Abraham, *supra* note 8, at 6 (describing the “severe underreporting” of prison rape by victims); Siegal, *supra* note 2, at 1545 (stating that victims are “disinclined to report these attacks”); Struckman-Johnson & Struckman-Johnson, *supra* note 47, at 380 (writing that “many researchers have noted that sexual assault is likely to be underreported by male prisoners”); Vetstein, *supra* note 2, at 870 (stating that “few victims” report prison rape).

50. See HUMAN RIGHTS WATCH, *supra* note 4, at VII. *Anomaly or Epidemic* (describing “the terrible stigma” attached to prison rape). A 1996 study of Nebraska inmates concluded that half of the victims did not disclose their worst-case incident to anyone and of those who did confide in someone, 23% told friends and family; 23% confided in another inmate; 18% in counselors or clergy; and 10% in medical staff. See Struckman-Johnson et. al, *supra* note 4, at 75.

51. See, e.g., *Butler v. Dowd*, 979 F.2d 661, 665 (8th Cir. 1992) (recounting withdrawal of the plaintiff’s complaint against his assailant after being threatened by him).

52. See, e.g., *Shrader v. White*, 761 F.2d 975, 989 (4th Cir. 1985) (“In addition to violence officially observed but unreported, the evidence makes clear that if violence is not officially observed, the inmates’ fear of being retaliated against for ‘snitching’ severely limits any possibility that inmate witnesses will make any report.”); *Smith v. Norris*, 877 F. Supp. 1296, 1304 (E.D. Ark. 1995) (“Since rapes are almost always accompanied by threats of retaliation, if the victim tells staff, one wonders how many rapes occurred that were not reported—the victim preferring to find safety via some other mechanism within the inmate culture.” (quoting an unpublished report by the Civil Rights Division of the United States Department of Justice (July, 1991))), *aff’d in part and rev’d in part*, *Smith v. Ark. Dep’t of Corr.*, 103 F.3d 637 (8th Cir. 1996); *Smith v. Ullman*, 874 F. Supp. 979, 985 (D. Neb. 1994) (noting that naming one’s assailant is an act of snitching, a practice “often brutally discouraged in the general [prison] population”); *Jensen v. Gunter*, 807 F. Supp. 1463, 1472 (D. Neb. 1992) (“First, there is a reluctance among inmates to inform prison

of aggression.⁵³ Moreover, as the court in *Anderson v. Redman*⁵⁴ noted, "By the time an inmate reaches his initial classification destination, be it maximum, medium, or minimum, it is difficult to discern non-consensual homosexual activity, because the resistance of most non-consensual victims has been broken by that time."⁵⁵ Coercive techniques—such as extorting sex for overdue debts⁵⁶ or protection from fellow inmates⁵⁷—lead most victims to surrender their bodies silently but not willingly.⁵⁸

officials of the misconduct of another inmate. This is termed 'snitching,' and is frowned upon severely by other inmates." (citation omitted)); SYKES, *supra* note 36, at 87 ("[T]he name is never applied lightly as a joking insult Instead, it represents the most serious accusation that one inmate can level at another for it implies a betrayal that transcends the specific act of disclosure."); Raymond G. Kessler & Julian B. Roebuck, *Snitch*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 449 (explaining that snitches are "hated and despised . . . and may be the object of violent reprisals").

53. See *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980) ("[I]t appears that once a prisoner has been thus victimized, word spreads throughout the prison and he becomes a special target for subsequent attacks."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 925 n.115 (S.D. Tex. 1999) (citation and internal quotation marks omitted) (delineating various reasons why victims do not report attacks, including "reluctance to identify oneself as an easy mark"), *rev'd on other grounds*, 178 F.3d 385 (5th Cir. 1999).

54. 429 F. Supp. 1105 (D. Del. 1977).

55. *Id.* at 1117 n.31. Estimates of consensual inmate sexual activity vary, ranging from 2% to 65%, possibly due to the fact that inmates underreport sexual activity, fearing they will be labeled as "weak." Christopher Hensley, *Consensual Homosexual Activity in Male Prisons*, in 26 *CORRECTIONS COMPENDIUM* 1, 1 (2001); see also Helen Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 *PRISON J.* 415, 425 (2000) (reporting that 96% of correctional officers found it sometimes difficult "to distinguish between consensual and coercive [sexual] acts among inmates"); Saum et al., *supra* note 47, at 418 (concluding that "some sexual activity may appear consensual although an inmate may actually be coerced").

56. See Helen M. Eigenberg, *Homosexuality in Male Prisons: Demonstrating the Need for a Social Constructionist Approach*, 17 *CRIM. JUST. REV.* 219, 222 (1992) (describing how aggressive inmates provide "gifts" to new naïve inmates and then demand "payment or else"). As recently as the 1970s some commentators perceived the resulting sexual activity as instances of "seduction" rather than rape. See Helen M. Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, 28 *J. CRIM. JUST.* 435, 437-38 (2000) [hereinafter Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*] (citing commentators writing between 1951-1975).

57. See, e.g., *Payne v. Collins*, 986 F. Supp. 1036, 1048 & n.18 (E.D. Tex. 1997) (finding the existence of inmate violence by virtue of the fact that inmates pay "protection money," which "usually assumes the form of . . . goods . . . or participation in homosexual acts"); *WOODEN & PARKER*, *supra* note 4, at 189-204 (finding that correctional officers agreed with the proposition that "it is a very common occurrence for young, straight boys to be turned out, or forced into being punks"); Eigenberg, *supra* note 55, at 420-21 (describing the process whereby vulnerable inmates find "protectors" who later threaten to cease their "good deed" unless sexual payments are given).

58. See, e.g., *Butler v. Dowd*, 979 F.2d 661, 665 (8th Cir. 1992) (describing an assailant's intimidation of his victim, who consequently checked out of administrative segregation and thus exposed himself to further victimization); *Wells v. Israel*, 854 F.2d 995, 1000 (7th Cir. 1988) ("Wells himself sent three letters soliciting homosexual favors

Staff members bear witness to prison rape as a fact of life behind bars. Eighty-six percent of surveyed Texas correctional officers “disagreed” or “strongly disagreed” that prison rape rarely occurs.⁵⁹ In turn, officers queried in a California prison strongly supported the following propositions: (1) “forced or pressured sexual encounters are very common”; (2) “homosexual inmates have a more difficult time than heterosexual inmates due to [sexual] pressure”; and (3) “it is a very common occurrence for young, straight boys to be turned out, or forced into being punks.”⁶⁰ Moreover, officers surveyed in two New York prisons knew of two-thirds of the sexual incidents recounted by targeted inmates.⁶¹

Staff awareness of prison rape does not confer a willingness to deter sexual aggressors or rescue their victims. Justice Blackmun correctly charged that “[p]rison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.”⁶² The Eighth Circuit Court of Appeals would later agree: “[S]ome prison administrators [are unable or unwilling] to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates.”⁶³ Indeed, a distinguished district judge, Frank Johnson, found the “well-designed and intentioned policies and procedures” of Texas prisons to be a façade.⁶⁴

Evidence has shown that, in fact, prison officials deliberately resist providing reasonable safety to inmates. The result is that individual prisoners who seek protection from their attacker are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system Prison officials at all levels play a game of

and threatening harm if those favors were not granted.”); Eigenberg, *Officers’ Definitions of Rape in Male Prisons*, *supra* note 56, at 438 (“[R]ape in prison often relies upon extortion techniques where coercion is more important than outright force.”); HUMAN RIGHTS WATCH, *supra* note 4, at *I. Summary and Recommendations* (“Prisoners, including those who had been forcibly raped, all agree that the threat of violence, or even just the implicit threat of violence, is a more common factor in sexual abuse than is actual violence.”).

59. Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 44 tbl.3 (1989) (finding that 50% disagreed that rape is rare and another 35.5% of the officers strongly disagreed).

60. WOODEN & PARKER, *supra* note 4, at 189–204.

61. See LOCKWOOD, *supra* note 4, at 130.

62. *United States v. Bailey*, 444 U.S. 394, 421–22 (1980) (Blackmun, J., dissenting) (footnotes omitted).

63. *Martin v. White*, 742 F.2d 469, 470 (8th Cir. 1984).

64. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 928 (S.D. Tex. 1999).

willing disbelief, one that appears adequate on paper and fails dismally in practice.⁶⁵

Surveys of correctional officers reveal deep ambivalence about prison rape. Many prison employees believe that inmates bear principal responsibility for combating sexual aggression.⁶⁶ In their eyes, those who refrain from combat become unworthy of protection.⁶⁷ Corrections officers often view gay inmates as legitimate targets.⁶⁸

According to some inmates, staff regard rape as a legitimate deterrent to crime and a just desert for its commission. "The guards just turn their backs," observed one inmate; "[t]heir mentality is the tougher, colder, and more cruel and inhuman a place is, the less chance a person will return."⁶⁹ Author Victor Hassine, himself a lifer, concurred: "Some staff members . . . view prison rape as part of the punishment-risk that lawbreakers take when they commit their

65. *Id.*; see also SCACCO, *supra* note 4, at 30 (stating that "[t]he shocking fact is that there is both overt and covert implication of officers in the [sexual] attacks that take place in penal institutions"); Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Van*, in MALE RAPE 107, 111 (Anthony M. Scacco, Jr. ed., 1982) (observing a "lack of supervision by guards and the inadequate facilities to provide security").

66. See, e.g., LEE H. BOWKER, PRISON VICTIMIZATION 13 (1980) (observing that some correctional staff "tell them to fight it out"); HANS TOCH, LIVING IN PRISON 208 (rev. ed. 1992) (observing that prison staff "advise inmates of the advantages of using violence when one is threatened"); Eigenberg, *supra* note 4, at 159 (observing that prison staff "in the prison vernacular, . . . seem to offer little assistance to inmates except the age-old advice of 'fight or fuck' "). For instance, in addressing conditions in a Florida prison, the court in *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993), observed: "When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems 'like men,' that is, use physical force against the aggressive inmate." *Id.* at 1533.

67. See *Young v. Quinlan*, 960 F.2d 351, 354 (3d Cir. 1992) (asserting that a correctional officer told the plaintiff that "protection was not one of his duties, that plaintiff had better learn to get along because the officials at Lewisburg do not like crybabies"); WOODEN & PARKER, *supra* note 4, at 2 ("In response to his claims of sexual assault and harassment, one of the staff members stated, 'I don't feel sorry for you. You're getting what you deserve.' ").

68. See Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, *supra* note 56, at 444-45. Writing to Human Rights Watch, a homosexual inmate in Texas described the disbelief of staff upon learning of his rape:

Defendant J.M., a security officer with the rank of sergeant, came to investigate the series of latest allegations. Defendant J.M. refused to interview the inmate witnesses and told plaintiff that he was lying about being sexually abused. After plaintiff vehemently protested that he was being truthful, defendant J.M. made comments that plaintiff "must be gay" for "letting them make you suck dick."

HUMAN RIGHTS WATCH, *supra* note 4, at VIII. *Deliberate Indifference* (footnote omitted).

69. *Id.* at *Prisoners' Voices I* (inmate R.L., New York, Oct. 21, 1996).

crimes. Others see it simply as retribution carried out at an interpersonal level.”⁷⁰

Professor Helen Eigenberg advances a more serious allegation:

[S]ome officers may use rape or the threat of sexual violence to control inmates. Some officers may manipulate housing assignments to intimidate inmates by threatening to assign more vulnerable inmates to bunk with known sexual predators. Or, perhaps officers may tolerate coercive acts because they facilitate division among inmates, making them, as a group, more manageable.⁷¹

Letters from inmates support her assessment. “The main reason why sexual assaults occur,” wrote one inmate, “is because prison officials and staff promote them. It’s their method of sacrificing the weak inmates to achieve and maintain control of the stronger aggressive or violent inmates.”⁷² Another inmate observed: “[I]t seems that young men and gays and first timers are used as sacrificial lamb [sic]. The reason is to use these men as a way to keep the gangs and killers from turning on the system which created prison the Hell that it is.”⁷³

Similar allegations arise in federal courts.⁷⁴ For instance, the self-admitted rapist in *Richardson v. Penford*⁷⁵ described an “arrangement” with an officer: he and other inmates would have access to “any new kid . . . in return for information of contraband on the Unit.”⁷⁶ The plaintiff in *Richardson* had been repeatedly raped even though he had informed the defendant correctional officer of his

70. HASSINE, *supra* note 7, at 136.

71. *Correctional Officers’ Definitions of Rape in Male Prisons*, *supra* note 56, at 436; *see also* HASSINE, *supra* note 7, at 144 (characterizing some rapes as a “set-up,” in which staff arrange the rape of an inmate).

72. HUMAN RIGHTS WATCH, *supra* note 4, at *Prisoners’ Voices 1* (inmate W.F., Missouri, Sept. 21, 1996).

73. *Id.* at *Prisoners’ Voices 1* (inmate R.G., California, Oct. 21, 1996); *see also* HASSINE, *supra* note 7, at 136 (“Pragmatic prison officials probably see rape as an effective management tool that provides potentially dangerous inmates with sexual gratification, while at the same time pitting inmates against each other.”).

74. *See, e.g.*, *Northington v. Marin*, 102 F.3d 1564, 1567–68 (10th Cir. 1996) (claiming that defendant officer identified the plaintiff as a “snitch”); *Pavlick v. Mifflin*, 90 F.3d 205, 209 (7th Cir. 1996) (ruling that a jury could infer knowledge of an impending assault on the part of a guard who left an inmate’s cell unlocked while he slept); *Richardson v. Penfold*, 839 F.2d 392, 394–96 (7th Cir. 1988) (ruling that a guard could be liable for an inmate’s rape because he allowed the rapist to enter the plaintiff’s cell despite his plea not to be left alone with him); *Morgan v. Ariz. Dep’t of Corr.*, 976 F. Supp. 892, 893 (D. Ariz. 1997) (alleging that a correctional officer assigned the plaintiff a cellmate who had earlier told the defendant officer of his desire to injure the plaintiff).

75. 839 F.2d 392 (7th Cir. 1988).

76. *Id.* at 394.

fears.⁷⁷ Left defenseless, he discovered that sexual terrorism arises from the conduct of *both* staff and inmates.

II. BLAMING THE VICTIM

The Supreme Court first articulated the concept of deliberate indifference in *Estelle v. Gamble*.⁷⁸ An inmate injured on a Texas prison farm complained that the medical care he received violated the Eighth Amendment.⁷⁹ Speaking for the Court, Justice Marshall read the Eighth Amendment to prohibit "deliberate indifference to [the] serious medical needs" of prisoners.⁸⁰ He attributed this standard to "the common law view that 'it is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of liberty, care for himself.'"⁸¹ Except to indicate that deliberate indifference entails "wanton infliction of unnecessary pain," Justice Marshall failed to delineate how one would state a cognizable claim.⁸² Justice Stevens, the sole dissenter, feared that the Court's opinion could be read to require a "subjective motivation of the defendant."⁸³ His reading of the Eighth Amendment precluded a state-of-mind requirement in that the "character of the punishment" alone could inflict impermissible harm.⁸⁴ While the district and circuit courts subsequently agreed that prison rape victims must prove deliberate indifference, they broke ranks over the requisite mental state needed for liability. Some courts required proof of the defendants' actual knowledge of a high risk of rape.⁸⁵ Other courts found safe harbor in the objective tort law standard of what defendants ought to have known.⁸⁶

77. *See id.* at 393-94.

78. 429 U.S. 97 (1976).

79. *See id.* at 99-102.

80. *Id.* at 106.

81. *Id.* at 103-04 (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

82. *Id.* at 105.

83. *Id.* at 116 (Stevens, J., dissenting).

84. *Id.* (Stevens, J., dissenting).

85. *See, e.g., Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (holding that when the prisoner's "very right to life is at stake," the requisite mental state for deliberate indifference would be met); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985) (noting that a guard's refusal to allow treatment for a prisoner's serious illness constitutes cruel and unusual punishment).

86. *See, e.g., Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (noting that a showing of "pervasive risk" of harm is sufficient to establish the requisite tort standard for reckless disregard); *Gullatte v. Potts*, 654 F.2d 1007, 1012 (5th Cir. 1981) (recognizing the objective test for tort liability that requires a plaintiff to show that a prison official "knew or should have known" of the high likelihood of harm); *LaMarca v. Turner*, 662 F. Supp. 647, 686

*Wilson v. Seiter*⁸⁷ then brought clarity to the deliberate indifference test. The petitioner complained of several conditions of confinement, including unsanitary lavatories, insect infestation, and inadequate heating and ventilation.⁸⁸ The defendants secured a summary judgment before the district court, and the Sixth Circuit Court of Appeals affirmed.⁸⁹ Writing for the Supreme Court, Justice Scalia ruled that prison conditions, however adverse, cannot inflict cruel and unusual punishment unless the defendant prison officer acted with “a sufficiently culpable state of mind.”⁹⁰ After reviewing several Eighth Amendment cases, Justice Scalia concluded that “deliberate indifference” constituted the minimum degree of culpability.⁹¹ Moreover, he defined deliberate indifference as “wanton” infliction of pain and suffering.⁹²

In *Farmer v. Brennan*,⁹³ the Supreme Court once again addressed the deliberate indifference standard. Left to fend for himself in the general prison population, a transsexual inmate had been raped.⁹⁴ His suit failed at trial because his keepers did not know of any threat specifically directed at him.⁹⁵ His appeal to the Supreme Court rested on the proposition that the staff must have known that his transgendered body would place him in grave danger.⁹⁶ The *Farmer* Court embraced the analysis posited in *Wilson v. Seiter*,⁹⁷ but made two clarifications. First, actual knowledge of a significant risk of injury could arise from situations so dangerous that the defendants “must have known” of the perils facing the plaintiff.⁹⁸ Second, a substantial risk of harm need not be specific to the plaintiff if “all prisoners in . . . [the plaintiff’s] situation face such a risk.”⁹⁹ A unanimous Court remanded for a determination whether the

(S.D. Fla. 1987) (ruling that the defendant officer knew or should have known of the dangers facing the plaintiff), *aff’d in part and vacated in part on other grounds*, 995 F.2d 1526 (11th Cir. 1993).

87. 501 U.S. 294 (1991).

88. *See id.* at 296.

89. *See id.*

90. *Id.* at 298.

91. *Id.* at 304 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391–92 (4th Cir. 1987)).

92. *Id.* at 303.

93. 511 U.S. 825 (1994).

94. *See id.* at 830.

95. *See id.* at 832.

96. *See* Reply Brief for Petitioner at 7–8, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247).

97. *See Farmer*, 511 U.S. at 838 (approving *Wilson*’s actual knowledge requirement).

98. *See id.* at 842 (quotation marks and citation omitted).

99. *Id.* at 842–43.

defendants actually knew that the plaintiff as a transsexual faced a high risk of assault.¹⁰⁰

As illustrated by the rulings in *Wilson* and *Farmer*, *McGill v. Duckworth*¹⁰¹ provided the lower federal courts with the test for cruel and unusual punishment that perversely blames rape victims. The plaintiff brought suit after being raped in an unsupervised prison shower room.¹⁰² His assailants had made "sexually suggestive comments" as they followed him to the shower area.¹⁰³ In route, he encountered two correctional officers but said nothing about his nearby tormentors.¹⁰⁴ Because the plaintiff had failed to inform the officers of his fears, the court ruled that his rape did not inflict cruel and unusual punishment.¹⁰⁵ "A prisoner normally proves actual knowledge of impending harm," explained Judge Easterbrook, "by showing that he complained to prison officials about a specific threat to his safety."¹⁰⁶ As a precondition for constitutional protection from rape, the court required what many potential victims of rape would find too dangerous—a willingness to rat.¹⁰⁷

Contemporaneous with the *Duckworth*, *Wilson*, and *Farmer* trilogy of cases, Lawrence Friedman wrote of "the exaggerated individualism of twentieth-century Americans"¹⁰⁸ and its expression in the criminal justice system as a "deep concern for . . . individual responsibility" for criminal acts.¹⁰⁹ Indeed, this "exaggerated

100. See *id.* at 848.

101. 944 F.2d 344 (7th Cir. 1991).

102. See *id.* at 346.

103. *Id.*

104. See *id.*

105. See *id.* at 349–50.

106. *Id.* at 349.

107. See *supra* note 52 and accompanying text (discussing and documenting inmates' refusal to rat on sexual aggressors). The following is illustrative of the stigma attached to ratting, even for victims of rape:

Green [a rape victim] is asked to name his rapists. Apologetically, he refuses, frightened for his life. He is curtly told that if he doesn't give names nothing can be done for him. They plan to send him back to the same cell. While still in the hospital, Green spends hours of agonized thought over whether to release the name. The guards must realize what will happen to him if he does No names, he decides.

WEISS & FRIAR, *supra* note 11, at 5.

108. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 438 (1993).

109. *Id.* at 443; see also Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 866–67 (2000) ("America has always been a strongly individualistic society, but that aspect of our social character seems to have grown more pronounced during this period of rapid social and economic

individualism" and its attendant "ideology of responsibility"¹¹⁰ have shaped the application of the Constitution to prison violence, including inmate-on-inmate rape. We can see their influence in *Duckworth's* use of the deliberate indifference test. Writing for the court, Judge Easterbrook required the plaintiff to take responsibility for his safety by confiding with his keepers.¹¹¹ The plaintiff, however, "chose" silence¹¹² and thus would alone bear the risk of rape.

Judge Easterbrook failed to grasp that in prison one's choices are framed by the social environment. For the *Duckworth* plaintiff, his social environment transformed an unsullied "choice"—that is, whether to seek protection by informing staff of his fears—into a profound dilemma: to rat and risk assault for transgressing the most important of inmate norms;¹¹³ or to remain silent and "fight or fuck."¹¹⁴ For most inmates, the only honorable and manly course is fighting one's tormentors.¹¹⁵ Many prison workers agree that violence undertaken to prevent rape represents legitimate use of force.¹¹⁶

change, and a growth in individualism naturally implicates concerns about group solidarity.").

110. Richard C. Boldt, *Criminal Law: Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1017 (1986) (stating that the ideology of responsibility "creates images of autonomous individuals and represents them to the community as reality"); see also Suzzana Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544–50 (1986) (juxtaposing the "modern" individualistic paradigm with the "classical" holistic paradigm). "Individualism," wrote Alexis de Tocqueville, "[exists in the American character as a] mature and calm feeling which disposes each citizen to sever himself from the mass of his fellows . . ." ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 104 (Henry Reeve text, Phillips Bradley ed., Vintage Books 1945) (1835). Tocqueville attributed American individualism to a democratic and egalitarian society that "intoxicated [people] with their new power." *Id.* at 105. Instead of acknowledging their debt to this society, "they acquire[d] the habit of always considering themselves as standing alone . . ." *Id.*

111. See *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991).

112. See *id.* at 346.

113. See *supra* note 52 (documenting the contempt inmates have for "rats" and the grave dangers that arise from being identified as a snitch).

114. See Robertson, *supra* note 16, at 339 (observing that "most inmates have but two [realistic] options: to fight in self-defense or become passive victims of a predatory subculture").

115. See, e.g., LOCKWOOD, *supra* note 4, at 13 (observing that "[t]he target's violent response is an explicit normative expectation"); Robertson, *supra* note 16, at 346 (concluding that "target-initiated violence is the normative response among inmates to homosexual propositions").

116. See SILBERMAN, *supra* note 23, at 19 ("Not only do inmates justify violence in the name of self-defense, but correctional officers frequently lend support to such aggressive responses."); TOCH, *supra* note 66, at 208–10 (stating that correctional officers respect inmates who fight and inform inmates of the advantages of doing battle); Robertson, *supra* note 16, at 346 ("Correctional officers also view target-initiated violence as a legitimate form of self-defense."). Robertson also reported that twelve state departments of correction explicitly recognize self-defense as grounds for acquittal in disciplinary

In the deliberate indifference test, the Supreme Court has constructed a constitutional framework that excludes a significant segment of prison rape victims from Eighth Amendment protection. It does so in a manner similar to the doctrine of assumption of risk. This doctrine provides that workers assent to the ordinary dangers of the workplace and thus cannot recover damages for resulting injury.¹¹⁷ Like the deliberate indifference test, the assumption of risk doctrine posits that individuals make free and rational choices about the risks and rewards of their endeavors.¹¹⁸ But the victim of prison rape does not "choose" a prison environment that constructs some inmates as surrogate women, while expecting every inmate to be "a man" and not "rat-out" his tormenters¹¹⁹ and/or flee to protective custody.¹²⁰ Just as "economic compulsion," not free will, drove workers to "assume" workplace risk,¹²¹ the Hobson's choice offered rape targets belies the notion of individual freedom. Blaming them for their victimization should not stand.

hearings; another twenty-one departments customarily permit acquittal on grounds of self-defense. See Robertson, *supra* note 16, at 349-51 (surveying the policies and practices of state departments of corrections when self-defense is at issue in disciplinary charges).

117. See PROSSER & KEETON ON THE LAW OF TORTS 480 (W. Page Keeton et al. eds., 5th ed. 1984) (describing the doctrine of assumption of risk).

118. See, e.g., Scott Giesler, *The Uncertain Future of Assumption of Risk in California*, 28 LOY. L.A. L. REV. 1495, 1514 (1995) (describing how the assumption of risk doctrine arose from a belief in individual choice and freedom); Samuel R. Guelli, *Tort Law: The Status of Assumption of Risk in Product Liability in Ohio After Cremeans v. Willmar Henderson Mfg.*, 566 N.E.2d 1203 (Ohio 1991), 18 DAYTON L. REV. 243, 252 n.73 (1992) ("Commentators recognized that assumption of risk was derived from theories of individualism and laissez-faire economics . . ."); Jordan Yospe, *U.S. Industries v. Director: "Claim" Versus "Condition" in the Analysis of Workers' Compensation Cases*, 12 AM. J. L. & MED. 273, 274 (1986) ("Such common law defenses arose in part from the then prevalent ideology of individualism and a desire to encourage industrial expansion.").

119. See *supra* note 52 (indicating that inmates who identify their assailants are considered "rats").

120. Protective custody is a form of restrictive, segregated housing for inmates-at-risk. See Hosna v. Groose, 80 F.3d 298, 301 (8th Cir. 1996) (describing the restrictions imposed on protective custody inmates, including few privileges, limited personal property, confinement in their cells for all but two or three hours a day, and exclusion from prison programming). In the inmate subculture, protective custody housing is seen as a refuge for snitches or inmates unable to cope with the general prison population. See *infra* text accompanying notes 187-88 (discussing the harsh stigma imposed upon protective custody inmates by the inmate subculture).

121. See Jane P. North, Comment, *Employee's Assumption of Risk: Real or Illusory Choice?*, 52 TENN. L. REV. 35, 49 (1984) (observing that the "most telling criticism" of the doctrine arises from the lack of voluntariness in the assumption of risk in everyday life); see also PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 117, at 91 (observing that the doctrine has been "violent[ly] denounc[ed] at the hands of every writer who has dealt with the subject") (footnote omitted).

III. THE SUM OF ITS PARTS

The deliberate indifference test that emerged from *Farmer v. Brennan*¹²² consists of two inquiries in rape cases. First, did the defendant possess actual knowledge of the dangers facing a specific or readily identifiable inmate?¹²³ Second, if this is the case, did the defendant fail to respond in a reasonable manner?¹²⁴ In large part, the Court has left the substance of these provisions to be determined by the lower federal courts.¹²⁵ “[T]he Supreme Court,” observed one commentator, “seems to make law in the same way as Congress and other legislatures—by announcing abstract rules.”¹²⁶

Two themes emerge from the extensive and disparate case law of the lower federal courts. First, the courts have eschewed systemic analysis, which ignores fault and focuses on context,¹²⁷ in favor of an individualized concept of misbehavior by correctional staff. As one court explained, the evidence must show that the “[defendant personally] knew of ways to reduce the harm but knowingly declined to act, or that he [personally] knew of ways to reduce the harm but recklessly declined to act.”¹²⁸

Second, at the insistence of the Supreme Court,¹²⁹ lower federal courts have been highly deferential toward prison staff.¹³⁰ They have

122. 511 U.S. 825 (1994).

123. *See id.* at 835–44.

124. *See id.* at 844–45.

125. *See id.* at 834 n.3 (acknowledging that the Court had not addressed at “what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes”).

126. Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of ‘Judicial Power,’* 80 B.U. L. REV. 967, 994 (2000) (footnotes omitted).

127. For an example of a decision employing systemic analysis, see *Alberti v. Heard*, 600 F. Supp. 443, 457 (S.D. Tex. 1984) (footnote omitted) (attributing pervasive violence and sexual activity to multiple sources, including “inadequate staffing levels, inadequate supervisory techniques, a poor physical design and an unreliable communication system”).

128. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995) (emphasis added).

129. *See, e.g., Sandin v. Connor*, 515 U.S. 472, 482 (1995) (“[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”); *Turner v. Safley*, 482 U.S. 78, 89–90 (1987) (“[A] standard [of deference] is necessary if ‘prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations;’ . . . [w]hen accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.” (quoting *Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. 119, 128 (1977) (citation omitted))); *Bell v. Wolfish*, 441 U.S. 520, 556–57 (1979) (upholding the random search of cells out of deference to the realities of prison life). Before *Sandin v. Connor*, Justice Blackmun had expressed concern that “careless invocations of ‘deference’ ” might result in a “judicial blind eye” to deplorable prison conditions. *Block v. Rutherford*, 468 U.S. 576, 594 (1984) (Blackmun, J., concurring) (quoting *Bell*, 441 U.S. at 562).

renounced what one court called “second guessing the difficult choices that prison officials must face.”¹³¹ The court in *Lewis v. Richards*¹³² went so far as to posit that “[e]xercising poor judgment . . . falls short of meeting the standard of consciously disregarding a known risk to his safety.”¹³³ *Lewis* prison staff had denied protective custody to an inmate targeted by a gang, but they did transfer him to a different area of the prison.¹³⁴ Five months later, predators made good on their threats.¹³⁵ In the subsequent legal action, the court found this modest defensive measure satisfied the Eighth Amendment.¹³⁶

A. Part I: Knowing the Risk

The lower federal courts have identified two avenues by which defendants acquire knowledge of a significant risk of rape: (1) specific notice; or (2) awareness of a risk so obvious that one must have known. An explication follows.

1. Specific Notice

Complaining directly to prison officials remains the most explicit and accepted manner of establishing actual knowledge.¹³⁷ As the

130. See, e.g., *Ainsworth v. Risley*, 244 F.3d 209, 213 (1st Cir. 2001) (“[W]here burdens are laid upon the exercise of constitutional rights by prisoners, the Supreme Court’s current approach is to give very substantial latitude to the state’s judgment.” (quoting *Beauchamp v. Murphy*, 37 F.3d 700, 704 (1st Cir. 1994))); *LaMarca v. Turner*, 995 F.2d 1526, 1543 (11th Cir. 1993) (“The court should have ‘accorded wide-ranging deference in the adoption and execution of policies and practices that in [the prison officials’] judgment are needed to preserve internal order and discipline and to maintain institutional security.’” (quoting *Bell*, 441 U.S. at 547)); *Redman v. County of San Diego*, 942 F.2d 1435, 1441 (9th Cir. 1991) (“[P]rison administrators ‘should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.’” (quoting *Bell*, 441 U.S. at 547)); *Harris v. Thigpen*, 941 F.2d 1495, 1521 n.38 (11th Cir. 1991) (“Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.” (quoting *Turner*, 482 U.S. at 84–85)).

131. *LaMarca*, 995 F.2d at 1538.

132. 107 F.3d 549 (7th Cir. 1997).

133. *Id.* at 554 (citing *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991)).

134. See *id.* at 553.

135. See *id.* at 553–54.

136. See *id.*

137. See, e.g., *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) (ruling that documents bearing the warden’s signature demonstrate his knowledge of the dangers facing the plaintiff); *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996) (“In failure to protect cases, [a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety.” (quoting *McGill*, 944 F.2d at 349)); *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (finding deliberate

court in *Pope v. Shafer*¹³⁸ observed, "A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety."¹³⁹ Notification in this manner comes at great risk to a targeted inmate: he becomes a snitch.¹⁴⁰ An inmate's life "isn't worth a nickel" if he reports his rape, observed Justice Blackmun.¹⁴¹ Rapists will typically issue such a warning at the close of the initial assault.¹⁴² Also, as the plaintiffs' experts in *LaMarca v. Turner*¹⁴³ explained, the reporting process is itself "degrading and humiliating . . . [and] may 'dramatically increase rather than decrease the risks that [an inmate] will be seen to be vulnerable people to be raped again.'"¹⁴⁴ Indeed, Eigenberg found

indifference where prison guards had failed to act when the plaintiff informed them of threats of violence from other prisoners); *Williams v. Gersbacker*, No. 93-1515, 1993 U.S. App. LEXIS 27694, at *3-*4 (6th Cir. 1993) (holding that "in order to establish a pervasive risk of harm, a prisoner must apprise prison officials of the problem"); *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991) ("A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety."); *Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990) (stating that the plaintiff's case "would have been stronger if she had been able to identify the official she allegedly notified of the danger to her husband," who was killed while serving time in jail); *Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) ("In the absence of any such specific known risk of harm . . . we cannot say that the defendants violated the eighth amendment by failing to take precautions . . ."); *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984) ("The prisoner must identify who is threatening him to allow corrections officers a reasonable opportunity to protect the threatened prisoner from harm."); *Smith v. Ullman*, 874 F. Supp. 979, 984 (D. Neb. 1994) (holding that in order to demonstrate deliberate indifference, an inmate must communicate information to a prison official).

138. 86 F.3d 90 (7th Cir. 1996).

139. *Id.* at 92 (quoting *McGill*, 944 F.2d at 349).

140. See *Comstock v. McCrary*, 273 F.3d 693, 699 n.2 (6th Cir. 2001) ("Being labeled a 'snitch' was dreaded, because it could make the inmate a target for other prisoners' attacks."); *Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex. 1984) ("[I]t is apparent that the inmates have an unwritten code of silence which results in most acts of violence going undetected."); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982) ("[T]he evidence is absolutely clear that the inmate code exists and that it prevents the reporting of a great many episodes of actual or threatened violence."); *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976) ("A cardinal precept of the convict subculture is that no inmate should report another inmate to officials."), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 483 U.S. 781 (1978).

141. *United States v. Bailey*, 444 U.S. 394, 426 n.6 (1980) (Blackmun, J., dissenting); see also *Gullatte v. Potts*, 654 F.2d 1007, 1010 (5th Cir. 1981) (recounting the murder of an inmate who reported a rape).

142. See *Withers v. Levine*, 615 F.2d 158, 160 (1980) ("There is evidence, however, that many more such [prison sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported.").

143. 662 F. Supp. 647 (S.D. Fla. 1987).

144. *Id.* at 686 (internal quotations).

that 72.9% of correctional officers believed that raped inmates will not come forward for the reasons delineated above.¹⁴⁵

Naming one's tormentor, on the other hand, does not create a right to protective custody housing or other defensive measures unless the threat can be authenticated.¹⁴⁶ As one court explained:

Certainly a guard does not have to believe to a moral certainty that one inmate intends to attack another at a given place at a time certain [sic] before that officer is obligated to take steps to prevent such an assault. But, on the other hand, he must have more than a mere suspicion that an attack will occur.¹⁴⁷

For instance, in *Turner v. Marshall*,¹⁴⁸ the plaintiff's identification of his tormentors did not satisfy prison staff.¹⁴⁹ They took no action and instead sanctioned him when he refused to join the general prison population.¹⁵⁰ The trial court ruled against the plaintiff, explaining that he provided "no corroboration whatsoever as to how he could be in danger Plaintiff [did] not cite a single threat, potential threat or incident that could warrant fear for his safety."¹⁵¹

A party other than the target can apprise prison staff of a genuine threat to a specific inmate.¹⁵² For example, in *Berry v. City of*

145. See Eigenberg, *supra* note 4, at 147.

146. The case law on the authenticity of a threat is largely confined to jail suicide cases. See, e.g., *Bell v. Stigers*, 937 F.2d 1340, 1344 (8th Cir. 1991) ("A single off-hand comment about shooting oneself when no gun is available cannot reasonably constitute a serious suicide threat."); *Estate of Cartwright v. Concord*, 618 F. Supp. 722, 728 (N.D. Cal. 1985) (ruling that the circumstances surrounding the deceased's suicide threat, which included the deceased laughing and joking about committing suicide, relieved jailers of liability), *aff'd*, 856 F.2d 1437 (9th Cir. 1988); see also *Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (ruling that two prior fights did not provide constitutionally adequate notice that an inmate posed a specific risk of harm); cf. *Marsh v. Arn*, 937 F.2d 1056, 1061 (6th Cir. 1991) (holding that the prison guard's knowledge of two previous fights among inmates was insufficient evidence "to raise a jury question as to whether . . . [the defendant] had actual knowledge of genuine, or has [sic] one court put it, a 'specific' risk of harm").

147. *Vun Cannon v. Breed*, 391 F. Supp. 1371, 1374-75 (N.D. Cal. 1975) ("Certainly a guard does not have to believe to a moral certainty that one inmate intends to attack another [inmate] But, on the other hand, he must have more than a mere suspicion that an attack will occur."); see *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986); see also, e.g., *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1990) (en banc) (citations omitted) (ruling that deliberate indifference arises when staff do nothing in the face of more than mere suspicion but less than moral certainty that an assault will occur).

148. No. C-92-1522 EFL, 1992 U.S. Dist. LEXIS 12594 (N.D. Cal. Aug. 13, 1992).

149. *Id.* at *5.

150. See *id.* at *4-*5.

151. *Id.* at *9.

152. See, e.g., *Berry v. Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990) (finding sufficient evidence for a jury to conclude that the wife of the deceased informed an unnamed jail official of the risk); *Rossiter v. Andrews*, No. 96-6257, 1997 U.S. Dist. LEXIS

*Muskogee*¹⁵³ an inmate informed his wife that he feared for his safety because he had ratted on his crime partners.¹⁵⁴ She allegedly told a jail official, whom she later could not name.¹⁵⁵ The defendants took no protective actions, resulting in the death of her husband.¹⁵⁶ She recovered damages at trial,¹⁵⁷ and on appeal, the Tenth Circuit concluded that she had provided sufficient credible evidence to support the jury's verdict.¹⁵⁸

Similarly, prison staff who witness an inmate-on-inmate sexual assault or hear cries from the victim acquire specific notice.¹⁵⁹ In one of the earliest cases on point, *Benny v. Pipes*,¹⁶⁰ the Ninth Circuit upheld a default judgment against prison staff.¹⁶¹ By alleging that the defendants "deliberately stood aside" while his fellow inmates assaulted him, the court stated that the plaintiff had averred the defendants' actual knowledge regarding his victimization.¹⁶²

2. Inferred Notice

Moreover, *Farmer* held that specific notice would no longer be required in the face of "an obvious, substantial risk to inmate safety."¹⁶³ In the lexicon of the deliberate indifference test, an

3869, at *8 (E.D. Pa. Mar. 25, 1997) (refusing to dismiss a suit arising from the defendant's failure to follow a court order mandating protective custody); *Matje v. Leis*, 571 F. Supp. 918, 930-31 (S.D. Ohio 1983) (denying a motion for summary judgment because court officers had warned jailers of the danger of suicide).

153. 900 F.2d 1489 (10th Cir. 1990).

154. *See id.* at 1497.

155. *Id.* at 1498 n.14.

156. *See id.* at 1497-99.

157. *Id.* at 1500.

158. *Id.* at 1499.

159. *See, e.g., MacKay v. Farnsworth*, 48 F.3d 491, 493 (10th Cir. 1995) (holding that prison guards knew that the plaintiff faced a risk of harm because guards had previously attempted to break up a fight between the plaintiff and another inmate); *Walker v. Norris*, 917 F.2d 1449, 1453 (6th Cir. 1990) (holding that prison guards violated the Eighth Amendment when they did not intervene in an attack but instead chose to observe); *Serrano v. Gonzalez*, 909 F.2d 8, 14 (1st Cir. 1990) (ruling that the officer's presence at an assault and his failure to intervene violated his duty to protect the plaintiff); *Wright v. Jones*, 907 F.2d 848, 850 (8th Cir. 1990) (upholding the denial of a directed verdict and a judgment notwithstanding the verdict because there was evidence that prison guards had knowledge of a previous fight); *Arnold v. Jones*, 891 F.2d 1370, 1372 (8th Cir. 1989) (observing that the sound of kitchen equipment being knocked over, the gathering of inmates, and other commotion alerted staff to a fight in the prison kitchen).

160. 799 F.2d 489 (9th Cir. 1996).

161. *Id.* at 494.

162. *Id.* at 495.

163. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). Earlier, in *Whitley v. Albers*, 475 U.S. 312 (1986), the Court had indicated that knowledge of the risk "can be inferred" when an inmate faces a substantial risk of harm. *Id.* at 321 (quoting *Duckworth v. Frazen*, 780 F.2d 645, 652 (7th Cir. 1985)).

inferred risk must be "pervasive" to be obvious.¹⁶⁴ The requisite inference arises through the defendant's knowledge of: (1) a high number of reported assaults; (2) a significant demand for protective custody housing; or (3) personal attributes correlated with vulnerability to sexual assault.

a. Reported Assaults

Courts have given considerable weight to reported assaults. In finding pervasive violence, the court in *Tillery v. Owens*¹⁶⁵ observed that a Pennsylvania prison averaged ninety-seven assaults per year amongst roughly 1,800 inmates.¹⁶⁶ Yet these figures pale when compared to the findings of *Palmigiano v. Garrahy*:¹⁶⁷ "155 assaults, rapes, and major fights per year [among some 650 inmates]; 330 other incidents of violence, and personal harm to inmates."¹⁶⁸ This data and other evidence led the *Palmigiano* court to find "ever-prevalent fear and violence" at a Rhode Island prison.¹⁶⁹ Similarly, the court in *Miller v. Carson*¹⁷⁰ described a "daily horror show" at a Florida jail.¹⁷¹ Amid a population of 600 inmates, the court counted more than 150 reported assaults in a period of eleven months.¹⁷² The court in *Gilland v. Owens*¹⁷³ discerned at a Tennessee jail an even higher rate of violence: in a two-month period, 298 violent incidents occurred among some 2,300 inmates; during the first six months of the year, the tally reached 685; and for the entire year, twenty-one inmates claimed that they had been raped.¹⁷⁴

By comparison, the decision in *Taylor v. Freeman*¹⁷⁵ demarked insufficient assault rates. Amongst a population of about 300 inmates, the plaintiff's data identified "on average one reported altercation per week (and perhaps only one fight per month in the

164. *Andrews v. Siegel*, 929 F.2d 1326, 1330 (8th Cir. 1991). The court defined a pervasive risk as follows: "It is enough that violence and sexual assaults occur . . . with sufficient frequency that prisoners . . . are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures . . ." *Id.* (quoting *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984)).

165. 907 F.2d 418 (3d Cir. 1990).

166. *See id.* at 422-23.

167. 443 F. Supp. 956, (D.R.I. 1977).

168. *Id.* at 967.

169. *Id.* at 968.

170. 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977).

171. *Id.* at 883.

172. *See id.*

173. 718 F. Supp. 665 (W.D. Tenn. 1989).

174. *See id.* at 674.

175. 34 F.3d 266 (4th Cir. 1994).

segregated dormitories) and sixty-five arguably serious injuries in forty-five months.”¹⁷⁶ The court found this level of assault constitutionally acceptable.¹⁷⁷ It reached this conclusion by constructing a baseline from an earlier ruling in *Shrader v. White*.¹⁷⁸ Over a somewhat longer time frame—sixty months—the *Shrader* Court concluded that seven inmate murders, fifty-four stabbings, and twenty-four serious assaults did not constitute a pervasive risk of harm.¹⁷⁹

Some courts have factored the severity of assaults into their calculations. In *Occoquan v. Barry*,¹⁸⁰ the trial court rested its finding of pervasive violence on an educated guess that the forty serious incidents reported in the past year represented the tip of the iceberg.¹⁸¹ In *Wheeler v. Sullivan*,¹⁸² the court took the opposite tack: it characterized the plaintiffs’ tally of 613 incidents reported over a sixty-two month period as falling short of pervasive.¹⁸³ *Wheeler* characterized the incidents labeled as fights and assaults as consistent with “the use of minimal force.”¹⁸⁴ Similarly, in *Westmoreland v. Brown*¹⁸⁵ the plaintiff’s failure to establish “serious or life threatening [injury]” undercut an allegation of pervasive violence.¹⁸⁶

b. Protective Custody Requests

For most inmates, retreating to protective custody represents an untenable option. A severe stigma attaches to its residents. Other inmates regard them as weak, the worst of qualities within the prison subculture,¹⁸⁷ or assume they are snitches.¹⁸⁸ Also, as a prison within a

176. *Id.* at 273.

177. *See id.* at 273–74 (vacating the injunction placed on prison officials to enforce protection).

178. *Id.* at 273 (citing *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985)).

179. *See Shrader v. White*, 761 F.2d 975, 980 (4th Cir. 1985) (Sprouse, J., concurring in part, dissenting in part).

180. 844 F.2d 828 (D.C. Cir. 1988).

181. *See id.* at 831–32.

182. 599 F. Supp. 630 (D. Del. 1984).

183. *Id.* at 646.

184. *Id.*

185. 883 F. Supp. 67 (E.D. Va. 1995).

186. *Id.* at 76.

187. *See TOCH, supra* note 66, at 224 (recounting the “‘weak’ persons (nonmen)” status accorded inmates in protective custody).

188. *See David K. v. Lane*, 839 F.2d 1265, 1267 (7th Cir. 1988) (“An inmate may request a transfer to protective custody but is usually somewhat reluctant to do so because of the stigma attached to such a request. For example, an inmate seeking protective custody may often be branded as a ‘stoolie,’ ‘wimp’ or homosexual by the general population.”); WEISS & FRIAR, *supra* note 11, at 23–25 (recounting the anxieties of inmates offered protective custody housing).

prison, protective custody affords inmates little freedom of movement, scant programming, and slim prospects for a prison job.¹⁸⁹

The court in *Ramos v. Lamm*¹⁹⁰ observed that the relative size of the protective custody population represents "one of the most accurate barometers" of fear.¹⁹¹ Protective custody housed eighteen percent of all inmates, a ratio which became the centerpiece of the court's finding of rampant violence in the defendants' Colorado prison.¹⁹² Similarly, the district court in *Palmigiano v. Garrahy*¹⁹³ observed that the protective custody population of a Rhode Island prison—about one of every five inmates—demonstrated an "[unacceptable] level of fear and violence."¹⁹⁴

Moreover, significant relative increases in the protective custody population evidence pervasive risk. In *Jensen v. Clarke*,¹⁹⁵ one of the defendants had previously informed the Nebraska legislature that "predatory behavior is increasing and weaker inmates are forced to seek protective custody, which has increased by 70 percent in less than two years."¹⁹⁶ Alongside anecdotal information, this increase led the court to conclude that the plaintiffs faced "a substantial risk of physical harm."¹⁹⁷

c. *Correlated Attributes*

An inference of pervasive risk also arises from certain group attributes correlated with a high likelihood of sexual assault. For example, the court in *Taylor v. Michigan Department of Corrections*¹⁹⁸ told of the rape of a youthful looking, mentally retarded inmate, whose height and weight stood at five feet and 120 pounds respectively.¹⁹⁹ The defendant warden argued that he had no knowledge of a threat specific to the plaintiff.²⁰⁰ The circuit court in

189. See James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 125-26 (1987) (describing the secluded life of protective custody inmates).

190. 485 F. Supp. 122 (D. Col. 1979), *aff'd in relevant part*, 639 F.2d 559 (10th Cir. 1980).

191. *Id.* at 141.

192. *Id.*

193. 443 F. Supp. 956 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir. 1979).

194. *Id.* at 967 n.12.

195. 94 F.3d 1191 (8th Cir. 1996).

196. *Id.* at 1199 (citing *El Tabech v. Gunter*, 922 F. Supp. 244, 261 (D. Neb. 1996)).

197. *Jensen*, 94 F.3d at 1196-97 (citing *Billman v. Indiana Dep't. of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995)).

198. 69 F.3d 76 (6th Cir. 1995).

199. *Id.* at 77-78.

200. *Id.* at 81.

Taylor concluded that this defense did not apply to cases in which a plaintiff's physical attributes placed him in a particular high-risk group.²⁰¹ "*Farmer* makes it clear," explained the court, "that the correct inquiry is whether he had knowledge about a substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be."²⁰² Hence, the court remanded the case for further findings of fact.²⁰³

Earlier, in *Doe v. Lally*²⁰⁴ a district court had opined, "[A] fairly clear cut profile of sexual assault victims in prisons can be made"²⁰⁵ The plaintiff in *Doe*, as well as the aforementioned *Taylor*, fit within that profile; small, youthful inmates like themselves often became victims of prison rape.²⁰⁶ These and other attributes often identify the following as at-risk groups: (1) snitches and other stigmatized inmates; (2) physically and mentally vulnerable inmates; and (3) gay and transsexual inmates. An examination of each category follows.

i. Prison Pariahs

The inmate code condemns snitching.²⁰⁷ Indeed, as an act of betrayal,²⁰⁸ it merits assault, sodomy, and even murder.²⁰⁹ In turn, several courts have ruled that inmates identified as "snitches" face high risk of harm.²¹⁰ For instance, in *Northington v. Marin*,²¹¹ the

201. *Id.* at 82.

202. *Id.* at 81 (emphasis added).

203. *See id.* at 84.

204. 467 F. Supp. 1339 (1979).

205. *Id.* at 1357.

206. *See id.* at 1349 (recounting that the typical sexual assault victim is from seventeen to twenty-three years of age and weighs 125 to 130 pounds).

207. *See supra* note 52 and accompanying text (discussing the condemnation accorded informers).

208. *See SYKES, supra* note 36, at 87 (discussing the act of snitching as not merely a betrayal of one or several inmates, but of inmates in general).

209. *See, e.g., MARK COLVIN, THE PENITENTIARY IN CRISIS: FROM ACCOMMODATION TO RIOT IN NEW MEXICO 186-89* (1992) (describing the gruesome attacks on informants and other inmates in protective custody during the infamous riot at the Penitentiary of New Mexico in 1980); SILBERMAN, *supra* note 23, at 24 (stating that "when prisoners have taken control of prisons, the first thing they did was to go after snitches and kill them").

210. *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001) (observing that a correctional officer "was aware of the obvious danger associated with a reputation as a snitch"); *Reece v. Groose*, 60 F.3d 487, 488 (8th Cir. 1995) (noting that being known as a snitch placed one "at a substantial risk of injury at [other inmates'] hands"); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138-39 (9th Cir. 1989) (finding that by labeling an inmate a "snitch" staff intended to subject him to assault by fellow inmates); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (per curiam) (holding that the inmate's allegations that staff labeled him a "snitch" and thus exposed him to the threat of

defendant officer identified the plaintiff as a snitch during a conversation with inmates.²¹² The plaintiff claimed that fellow inmates assaulted him upon learning of his alleged transgression.²¹³ The court concluded that the defendant must have known that he placed the plaintiff in "serious jeopardy"²¹⁴ and thus affirmed the \$5,000 judgment for the plaintiff.²¹⁵

Sex offenders, especially those convicted of victimizing children, also represent an anathema in the inmate subculture.²¹⁶ As illustrated by the facts of *Arnold v. County of Nassau*,²¹⁷ inmate norms call for their savage beating. Charged with rape, inmate Arnold soon found himself in the midst of an "inmate trial."²¹⁸ The threatening pack of inmates announced their verdict by "'punching [him] and kicking [him] all over the place.' He thought he was 'going to die.'" ²¹⁹

ii. The Physically and Mentally Vulnerable

A serious risk of assault can also be inferred for inmates of slight physical stature. As Human Rights Watch reported, "Unsurprisingly—given that physical force, or at least the implicit threat of physical force, is a common element of rape in prison, victims of rape tend to be smaller and weaker than perpetrators."²²⁰ The fate of the plaintiff in *Young v. Quinlan*²²¹ illustrates both the dangers facing the inmates described above and prison staff's

assault stated a § 1983 cause of action). District courts are in accord. See, e.g., *Sims v. Ballou*, No. 94-3300-RDR, 1997 U.S. Dist. LEXIS 13530, at *5 (D. Kan. Aug. 20, 1997) ("[W]here an inmate has identified a pervasive risk of harm caused by being labeled as an informant, or alleges a retaliatory motive, he may state a claim for relief."); *Ellis v. Gomez*, No. C 93-1360 BAC, 1993 U.S. Dist. LEXIS 9640, at *5 (N.D. Calif. June 20, 1993) (ruling that "[a] claim that prison staff intentionally spread a rumor that a prisoner was a 'snitch' may state a claim").

211. 102 F.3d 1564 (10th Cir. 1996).

212. See *id.* at 1567–68.

213. *Id.* at 1567.

214. *Id.*; see also *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001) (finding widespread agreement in the case law that rats place themselves in grave danger); cf. *Ellis*, 1993 U.S. Dist. LEXIS 9640, at *5 (ruling that "[a] claim that prison staff intentionally spread a rumor that a prisoner was a 'snitch' may state a claim").

215. See *Northington*, 102 F.3d at 1571.

216. See, e.g., Dennis Giever, *Jails, in PRISONS: TODAY AND TOMORROW* 414, 448 (Joycelyn M. Pollock ed., 1997) [hereinafter *PRISONS*] ("[O]ther prisoners will look down on many sex offenders (especially child molesters) and often will go to great lengths to injure or even kill them.").

217. 89 F. Supp. 2d 285, 303 (E.D.N.Y. 2000).

218. *Id.* at 291.

219. *Id.*

220. HUMAN RIGHTS WATCH, *supra* note 4, at IV. *Predators and Victims*.

221. 960 F.2d 351 (3d Cir. 1992).

occasional indifference to their safety. Describing himself as “small, young, white, and effeminate,”²²² the plaintiff complained of sexual approaches by his cellmate upon entering the institution.²²³ After staff relocated him, his new cellmate threatened to kill him unless he became his “wife.”²²⁴ Prison officials rejected his repeated requests to be moved.²²⁵ Four days later, his cellmate held a razor blade to his throat and forced him to perform fellatio.²²⁶ Attributing the repeated assaults on the plaintiff to his “youthful appearance and slight stature,” the Third Circuit held that he had averred sufficient facts to proceed to trial.²²⁷

Jails and prisons house more mentally ill persons than hospitals.²²⁸ Approximately sixteen percent of the prison population suffer from mental illnesses.²²⁹ These inmates infrequently receive treatment,²³⁰ and what passes for care is largely custodial.²³¹ Moreover, the pressures of the prison environment can cause mental deterioration.²³² While some mentally ill inmates will become violent,²³³ more will lack the wherewithal to avoid exploitation.²³⁴

222. *Id.* at 353 n.2.

223. *Id.* at 353.

224. *Id.* at 354.

225. *See id.*

226. *See id.*

227. *Id.* at 362.

228. *See* Chris Sigurdson, *The Mad, Bad, and Abandoned*, CORRECTIONS TODAY, Dec. 2000, at 70.

229. *See, e.g.*, JAMES AUSTIN & JOHN IRWIN, *IT'S ABOUT TIME* 104 (3d ed. 2001) (stating that “an estimated 16% [of prisoners] have some documented mental health problem”); ALLEN J. BECK & LAURA M. MARUSCHAK, *MENTAL HEALTH TREATMENT IN STATE PRISONS*, 2000, at 3 (2001) (estimating that 16.2% of state inmates are mentally ill); Sigurdson, *supra* note 228, at 71 (estimating that 15% of the inmate population suffers from severe mental illness).

230. *See* AUSTIN & IRWIN, *supra* note 229, at 104 tbl.5-2 (indicating that only five percent receive care). *But see* BECK & MARUSCHAK, *supra* note 229, at 3 (reporting that seventy-nine percent of mentally ill state inmates receive mental health therapy or counseling from trained professionals).

231. Marilyn D. McShane, *Mentally Ill Prisoners*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 320, 324 (citation omitted) (“[P]sychological services were institutional control wrapped in the ‘ceremonial robes of treatment.’”).

232. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) (“[S]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.”).

233. *See* Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 560 (1st Cir. 1988) (stating that “common sense suggests that including schizophrenics or possible psychopaths, along with others, in a dormitory . . . , is a recipe for an explosion, which, given the other known conditions, could easily lead to someone’s death”).

Case law has recognized that many mentally ill inmates face inordinate danger.²³⁵ For instance, the court in *Pugh v. Locke*²³⁶ recounted the sexual assaults inflicted on a severely retarded inmate. State correctional officials made no special provision for his safety or that of other disabled prisoners.²³⁷ He fell victim to gang rape during his first night of incarceration in an Alabama prison.²³⁸ Apparently no change occurred in his housing status, and two inmates began to strangle him during the following evening.²³⁹ They stopped, but not mercifully, when they decided to sell him to other inmates for their sexual enjoyment.²⁴⁰ He did not suffer alone; the court found that prison conditions throughout Alabama subjected inmates to "constant fear of violence."²⁴¹

iii. Gays and Transsexuals

One can also infer a high risk of rape among gay and transsexual inmates. Gay inmates confront a prison sexual code that defines them as "fair game."²⁴² Expecting little resistance, sexual aggressors will frequently target gays. In one study, forty-one percent of gay inmates reported that they had been sexually assaulted, a level triple that of the institution's overall sexual assault rate.²⁴³ A landmark study of Philadelphia's jail system found gays "readily available as male prostitutes . . . [because of] bribery, persuasion, and the threat of force."²⁴⁴ Equal protection challenges to their segregation²⁴⁵ and/or

234. See Robert Freeman, *Management and Administrative Issues*, in PRISONS, *supra* note 216, at 270, 293 (stating that the mentally ill or handicapped are "often victim[ized]" in the general prison population and thus require "special handling").

235. See, e.g., *Cortes-Quinones*, 842 F.2d at 558-60 (faulting defendants for placing a severely disturbed inmate in the general prison population, where he was killed); *Coleman v. Wilson*, 912 F. Supp. 1282, 1304-05 (E.D. Cal. 1995) (faulting defendants for failing to prevent "the obvious risk of harm to mentally ill inmates"); *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976) (describing the sexual exploitation of a mentally ill inmate), *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom.* *Alabama v. Pugh*, 483 U.S. 781 (1978).

236. 406 F. Supp. 318 (M.D. Ala. 1976).

237. See *id.* at 324-25.

238. See *id.* at 325.

239. See *id.*

240. See *id.*

241. *Id.* at 329.

242. WOODEN & PARKER, *supra* note 4, at 18.

243. See *id.*; see also Struckman-Johnson et al., *supra* note 4, at 71 (reporting a thirteen percent overall assault rate in a Midwestern prison).

244. Davis, *supra* note 65, at 8.

245. See *Gay Inmates of Shelby County Jail/Criminal Justice Complex v. Barksdale*, 819 F.2d 289, 292 (6th Cir. 1987) (ruling that inmates lack a liberty interest in residing in the general prison population).

joint-housing with protective custody inmates have failed.²⁴⁶ While their ranks may include so-called "aggressive" gays,²⁴⁷ lower federal courts have largely seen them as a vulnerable population.²⁴⁸

A transsexual inmate also faces a pervasive risk of sexual assault. The district court in *Star v. Gramley*²⁴⁹ anticipated *Farmer v. Brennan* when it observed that "inmates dressed as females undoubtedly would require heightened protection."²⁵⁰ The Supreme Court in *Farmer* agreed that transsexual inmates should anticipate "a great deal of sexual pressure."²⁵¹

B. Part II: Disregarding a Known Risk

According to the *Farmer* Court, defendants who know of an impending rape will escape liability unless they consciously "disregard[] that risk by failing to take reasonable measures to abate it."²⁵² Unfortunately, the Supreme Court has yet to identify the "reasonable measures" in question.²⁵³ Lower federal courts have filled much of the constitutional void. Their case law provides that a "known risk" is "disregarded" when staff fail to (1) rescue targeted inmates; (2) conduct searches for weapons used in rapes; (3) classify offenders; (4) hire and train prison staff; (5) investigate rapes and prosecute alleged rapists; (6) and/or marshal defensible space.

246. See *Finney v. Mabry*, 546 F. Supp. 628, 641 (E.D. Ark. 1982) (stating that housing a homosexual and protective custody inmates together does not violate the Constitution).

247. See *Redman v. County of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1990) (en banc) (disapproving the housing of an "aggressive" homosexual with "young and tender" inmates).

248. See, e.g., *Jensen v. Gunter*, 807 F. Supp. 1463, 1474 n.6 (D. Neb. 1992) ("I in no way mean to imply that homosexual inmates are any more likely than any other inmate to sexually assault a cellmate; defendants' evidence in this regard was convincing."); *Wheeler v. Sullivan*, 599 F. Supp. 630, 651-52 (D. Del. 1984) (finding no deliberate indifference to an inmate's rape despite the failure to segregate homosexual inmates).

249. 815 F. Supp. 276 (C.D. Ill. 1993).

250. *Id.* at 278.

251. *Farmer v. Brennan*, 511 U.S. 825, 848 (1994). See generally Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POLIT. & CIV. RTS. L. REV. 27 (1995) (arguing that prisons for women ought to house male-to-female transsexuals).

252. *Farmer*, 511 U.S. at 847.

253. See *Smith v. Norris*, 877 F. Supp. 1296, 1298 (E.D. Ark. 1995) ("The Supreme Court has provided limited guidance in this area, stating only that prison conditions are to be evaluated under 'evolving standards of decency,' and . . . this judgment 'should be informed by objective factors to the maximum extent possible.'" (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981))).

1. Failure to Rescue

The most blatant instances of deliberate indifference arise when staff witness an inmate-on-inmate assault and fail to respond promptly.²⁵⁴ *Walker v. Norris*²⁵⁵ described one instance. A knife-wielding, intoxicated prisoner charged an inmate-janitor at the Tennessee State Prison.²⁵⁶ The janitor fled to the prison yard, where his assailant caught and stabbed him to death as he pleaded to the defendant officers to rescue him.²⁵⁷ Although the officers had several opportunities to aid the victim's flight as well as frustrate his assailant's pursuit, they stood aside.²⁵⁸ Characterizing the defendants' conduct as "deliberate indifference,"²⁵⁹ the court affirmed the judgment for the deceased's administratrix.²⁶⁰

Case law directs staff to undertake reasonable but not heroic measures to rescue inmates from assault.²⁶¹ For instance, the court in *Solesbee v. Witkowski*²⁶² chastised the defendant correctional officers who stood aside for some three minutes while the nearby assault continued.²⁶³ The defendants' concern for their own safety qualifies that duty. Hence, the court in *Arnold v. Jones*²⁶⁴ held that unarmed prison officials have no duty to physically intervene in a prison fight that may cause them serious injury.²⁶⁵

254. See, e.g., *Walker v. Norris*, 917 F.2d 1449, 1453-54 (6th Cir. 1990) (concluding that officers exhibited deliberate indifference as they watched an inmate being stabbed to death); *Serrano v. Gonzalez*, 909 F.2d 8, 11-12 (1st Cir. 1990) (affirming judgment for the plaintiff, who alleged that guards watched inmates assault him but "did nothing to protect him"); *Wright v. Jones*, 907 F.2d 848, 850 (8th Cir. 1990) (affirming judgment for the plaintiff arising from the defendants' failure to protect him despite the foreseeability of the assault); *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986) (finding an Eighth Amendment violation because the defendants "deliberately [stood] aside" while inmates assaulted the plaintiff).

255. 917 F.2d 1449 (6th Cir. 1990).

256. See *id.* at 1451.

257. See *id.* at 1451-52.

258. See *id.* at 1452.

259. *Id.* at 1453.

260. See *id.* at 1454.

261. See *Solesbee v. Witkowski*, No. 94-6916, 1995 U.S. App. LEXIS 13283, at *7 (4th Cir. May 31, 1995) (approving the trial court's jury instruction that correctional officers must provide "reasonable protection"); *Moore v. Winebrenner*, 927 F.2d 1312, 1322 (4th Cir. 1991) ("A heroic effort to insure safety, although perhaps a moral duty, is not a legal one. But even ordinary unheroic humans, confronted with a known risk of danger to prisoners, must take specific measures to counter such danger . . .").

262. No. 94-6916, 1995 U.S. App. LEXIS 13283 (4th Cir. May 31, 1995).

263. See *id.* at *11-*13.

264. 891 F.2d 1370 (8th Cir. 1989).

265. See *id.* at 1372.

2. Failure to Search for Weapons

Prison rapists frequently employ weapons to intimidate or immobilize victims.²⁶⁶ For instance, accounts of inmate rape often portray the assailant holding a knife to the throat of his victim during intercourse.²⁶⁷ Accordingly, the failure of staff to seize contraband weapons can show their disregard for prison rape.²⁶⁸ The court in *Tillery v. Owen*²⁶⁹ reached this conclusion upon learning that a host of weapons—brass rods, knife blades, metal bars, chisels, wrenches, hammer picks, ice picks, double and single-bladed axes, spikes, razor blades, and spears—could be found throughout the defendants' prison.²⁷⁰ Inmates had smuggled many out of the prison industry facility.²⁷¹ A single officer supervised this area.²⁷² In combination with other adverse prison conditions, the availability of weaponry led the court to rule that the defendants had breached their constitutional duty of "good faith protection."²⁷³

Similarly, the Eleventh Circuit in *LaMarca v. Turner*²⁷⁴ found that "[a]ggression was . . . exacerbated by the readily available contraband and an excessively permissive atmosphere."²⁷⁵ The court described sexual assaults involving a bush ax, a baseball bat, and a stabbing weapon.²⁷⁶ The defendants permitted the free flow of contraband, including weaponry, into the facility.²⁷⁷ Their laxity contributed to the court's finding of deliberate indifference to the inmates' safety.²⁷⁸

266. See, e.g., HASSINE, *supra* note 7, at 139 (categorizing rapes involving weaponry and other applications of force as "strong arm rape"); HUMAN RIGHTS WATCH, *supra* note 4, at V. *Rape Scenarios* (discussing the use and/or threat of force in prison rapes).

267. See, e.g., HUMAN RIGHTS WATCH, *supra* note 4, at V. *Rape Scenarios* (describing a knife-to-the-throat rape); RIDEAU & WIKBERG, *supra* note 1, at 73 (describing a knife-to-the-throat rape).

268. See, e.g., *LaMarca v. Turner*, 995 F.2d 1526, 1236–38 (11th Cir. 1993) (describing prison staff as indifferent to the availability of weapons amid unconstitutional levels of violence); *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977) (stating that "[e]asy inmate access to unsupervised machinery and other resources resulted in widespread possession of weapons" in Louisiana's notorious Angola prison); *Tillery v. Owen*, 719 F. Supp. 1256, 1274–75 (E.D. Pa. 1989) (finding ready access to weaponry in a prison beset by unconstitutional levels of violence).

269. 719 F. Supp. 1256 (W. D. Pa. 1989).

270. See *id.* at 1276.

271. See *id.* at 1274.

272. See *id.*

273. *Id.* at 1275.

274. 995 F.2d 1526 (11th Cir. 1993).

275. *Id.* at 1533.

276. See *id.*

277. See *id.* at 1532.

278. See *id.* at 1536–38.

3. Failure to Classify and/or Separate

"[T]he state," wrote the court in *Doe v. Lally*,²⁷⁹ "should make every effort to identify likely victims of homosexual assaults early in the initial classification process."²⁸⁰ Failure to do so, in the presence of a pervasive risk of harm, constitutes deliberate indifference.²⁸¹

The court in *Redman v. County of San Diego*²⁸² recounted the ill effects of defective classification. The defendants celled an inmate known to be an "aggressive homosexual" with the plaintiff in the general population.²⁸³ The plaintiff's cellmate repeatedly raped him.²⁸⁴ Jail officials had assumed that general population inmates could successfully fend off assault-prone inmates.²⁸⁵ They clearly did not have in mind the plaintiff, a five-foot six-inches tall, 130-pound youthful male.²⁸⁶ The *Redman* Court held that the defendants' deficient classification procedures, coupled with their knowledge of the cellmates' characteristics and backgrounds, could constitute deliberate indifference to the safety of the plaintiff.²⁸⁷

The court in *Langston v. Peters*²⁸⁸ indicated that only "super aggressive" inmates represent an undue threat because all inmates can be considered threatening.²⁸⁹ A cellmate raped the *Langston* plaintiff, who claimed that staff had assured him that he would not share his cell.²⁹⁰ The plaintiff argued that the staff's failure to inquire into the disciplinary history of the assailant, who had sexually assaulted another inmate a year earlier, constituted deliberate indifference.²⁹¹ Ruling for the defendants, the court reasoned that housing the plaintiff with his assailant did not place him at greater risk than other prospective cellmates.²⁹²

279. 467 F. Supp. 1339 (D. Md. 1979).

280. *Id.* at 1357.

281. *See, e.g.,* Hale v. Tallapoosa County, 50 F.3d 1579, 1584-85 (11th Cir. 1995) (describing how failure to classify or segregate violent from non-violent inmates violates the Eighth Amendment); Vosberg v. Solem, 845 F.2d 763, 766 (8th Cir. 1988) (finding no policy to segregate inmates likely to suffer sexual assault); Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (justifying judicial remedy when a defective classification system deprives inmates of their right to safety).

282. 942 F.2d 1435 (9th Cir. 1991).

283. *Id.* at 1437.

284. *See id.* at 1439.

285. *See id.* at 1444.

286. *See id.* at 1437.

287. *See id.* at 1444-48.

288. No. 93 C 2607, 1995 U.S. Dist. LEXIS 10985 (N.D. Ill. Aug. 2, 1995).

289. *Id.* at *27.

290. *See id.* at *8.

291. *See id.* at *7.

292. *Id.* at *24.

Controversy surrounds the separation of white and black inmates as a defensive measure against rape. Four noteworthy studies of prison rape find a predominance of black aggressors and white victims. Leo Carroll estimated that at least seventy-five percent of sexual assaults involved black assailants and white victims in a Rhode Island prison.²⁹³ In his study of sexual victimization in three New York prisons, Daniel Lockwood found that blacks comprised eighty percent of the aggressors as compared to six percent of white inmates.²⁹⁴ Wooden and Parker reported that non-Hispanic whites "are much more likely to be 'hit-on' " than other ethnic groups.²⁹⁵ Recently, Human Rights Watch acknowledged the racial imbalance in sexual targeting.²⁹⁶

The Supreme Court in *Lee v. Washington*²⁹⁷ barred *de jure* racial segregation unless "the necessities of prison security and discipline" required otherwise.²⁹⁸ Accordingly, case law permits temporary segregation of the races only when other responses have failed and the need arises from a particularized threat rather than a generalized concern for safety.²⁹⁹ Nonetheless, prison officials employ surrogate considerations, such as gang membership or residence, in cell assignments.³⁰⁰

293. See LEO CARROLL, HACKS, BLACKS AND CONS 182 (1974) (Waveland Press ed. 1988).

294. See LOCKWOOD, *supra* note 4, at 29.

295. WOODEN & PARKER, *supra* note 4, at 134-35.

296. See HUMAN RIGHTS WATCH, *supra* note 4, at IV. *Predators and Victims*.

297. 390 U.S. 333 (1968) (per curiam).

298. *Id.* at 334.

299. See, e.g., *Mason v. Schriro*, 45 F. Supp. 2d 709, 715 (W.D. Mo. 1999) (forbidding separation of the races because of lack of "specific evidence of the security dangers that are implicated"); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1189 (S.D. Ohio 1979) ("A vague fear on the part of prison officials that segregation may result in violence is simply not enough to justify suspension of the fundamental constitutional right [of equal treatment of the races]."); *Mickens v. Winston*, 462 F. Supp. 910, 911-12 (E.D. Va. 1978) ("(Prison) authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." (quoting *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, and Stewart, JJ., concurring)), *aff'd*, 609 F.2d 508 (4th Cir. 1979); *Battle v. Anderson*, 376 F. Supp. 402, 421 (E.D. Okla. 1971) ("Racial segregation of correctional facilities cannot be justified on the basis that integration may result in inmate violence.").

300. See Leo Carroll, *Racial Conflict*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 377 (discussing the use of "surrogate variables" employed by staff to separate the races); cf. *Wright v. Morris*, 811 F. Supp. 341, 343 (S.D. Ohio 1992) (describing the plaintiff's "strong case" for alleging prison staff engaged in racial segregation in cell assignments, which the court condemned).

Inmates often practice voluntary racial and ethnic segregation.³⁰¹ Lockwood observed that fear of sexual aggression by blacks led whites to band together in New York prisons.³⁰² Whites who experienced interracial sexual incidents came to hate nonwhites.³⁰³

4. Failure to Hire and/or Train

Prisons operate as "revolving doors" for correctional officers and inmates alike. Many officers quit, especially among the ranks of the most able.³⁰⁴ The unprecedented growth in the inmate population has aggravated the chronic shortage of well-trained, experienced correctional officers.³⁰⁵

A host of cases tell of the correlation between shortage of staff and violence,³⁰⁶ such as "severely understaffed" prisons throughout Texas, allowing predators to "do as they wish"³⁰⁷ In the previously discussed *Tillery* case, the court concluded that inadequate numbers of staff contributed to an atmosphere of pervasive

301. See, e.g., HASSINE, *supra* note 4, at 72 (stating that de facto segregation remains "very much alive"); JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 83 (1983) ("[T]here are powerful motivations and strong peer pressures among the prisoners to segregate themselves."); Carroll, *supra* note 300, at 378 (discussing "inmate preferences for self-segregation").

302. LOCKWOOD, *supra* note 4, at 78 (describing the racially motivated conduct of white males).

303. See *id.* at 79 (describing the racial attitudes of white inmates targeted for sexual assault).

304. See Thomas A. Wright & Dennis A. Sweeney, *Turnover [Among Correctional Officers]*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 131, 133. The academic literature presents correctional officers as "alienated, cynical, burned out, stressed but unable to admit it, suffering from role conflict of every kind, and frustrated upon imaging [sic]." Susan Philliber, *Thy Brother's Keeper: A Review of the Literature on Correctional Officers*, 4 JUST. Q. 9, 9 (1987).

305. See *supra* note 13 (comparing the prison population in 1980 with that of 1998).

306. See, e.g., *Lopez v. Lemaster*, 172 F.3d 756, 761 (10th Cir. 1999) ("[J]ailers could do nothing to prevent attacks"); *Vosberg v. Solem*, 845 F.2d 763, 766-67 (8th Cir. 1988) ("Evidence revealed that one guard attempted to monitor 175 cells on four separate tiers during the night. Many of these cells housed two prisoners and monitoring rounds were conducted only every three or four hours."); *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977) (observing that understaffing contributed to "[e]asy inmate access to unsupervised machinery and other resources [that] resulted in widespread possession of weapons"); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1579 (D. Idaho 1984) ("It is beyond cavil that if the guards are in fear of their own safety [because of understaffing], the inmates at the institution are perhaps more justifiably afraid."); *Feliciano v. Barcelo*, 497 F. Supp. 14, 18-32 (D.P.R. 1979) (finding that understaffing made it "difficult to protect the prisoners"); *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 658 (S.D. Tex. 1975) (finding that understaffing permitted inmate "goon squads").

307. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1290-92 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981), *aff'd in part and rev'd in part*, 666 F.2d 854 (5th Cir.), *modified*, 679 F.2d 1115 (5th Cir. 1982).

violence.³⁰⁸ No more than seven officers supervised more than 700 inmates in one cellblock.³⁰⁹ Sometimes no one guarded the shower area.³¹⁰

Sexual predators thrive under such circumstances. Raped inmates have reported that their cries for help went unanswered.³¹¹ "Although correctional staff are generally supposed to make rounds at fifteen-minute intervals," explained Human Rights Watch, "they do not always follow this schedule. Moreover, they often walk by prisoners' cells without making an effort to see what is happening within them."³¹²

5. Failure to Investigate and/or Prosecute

The ruling in *LaMarca v. Turner*³¹³ indicates that failure to investigate a rape may amount to ratification of unconstitutional conduct and thereby give rise to supervisory liability.³¹⁴ Expert testimony described the minimum elements of an appropriate prison rape investigation: "(1) medical evidence should be secured, (2) a full victim statement should be taken, and (3) the matter should be referred to a local prosecutor."³¹⁵ The trial court ruled that the defendants' failure to follow these procedures, in light of pervasive violence, demonstrated deliberate indifference.³¹⁶ In affirming the district court's judgment, the Eleventh Circuit Court of Appeals concluded that this omission contributed to "an atmosphere of tolerance of rape which enhanced the risk that incidents would occur."³¹⁷

A persistent failure to refer inmate-on-inmate assaults for prosecution also implies unacceptable tolerance of prison violence. The plaintiff in *Vosburg v. Solem*³¹⁸ had been sexually assaulted on

308. See *Tillery v. Owen*, 719 F. Supp. 1256, 1275 (E.D. Pa. 1989).

309. See *id.*

310. See *id.*

311. See HUMAN RIGHTS WATCH, *supra* note 4, at VIII. *Deliberate Indifference* ("Several inmates have reported to Human Rights Watch that they yelled for help when they were attacked, to no avail.").

312. *Id.*

313. 662 F. Supp. 647 (S.D. Fla. 1987), *aff'd in part and vacated in part on other grounds*, 995 F.2d 1526 (11th Cir. 1993).

314. *Id.* at 658.

315. *Id.*; see also *Fisher v. Koehler* 718 F. Supp. 1111, 1124-25 (S.D.N.Y. 1989) (requiring prison investigators to complete appropriate training courses).

316. See *LaMarca*, 662 F. Supp. at 658; see also *Marchese v. Lucas*, 758 F.2d 181, 182, 188 (6th Cir. 1985) (finding supervisory liability arising from the absence of "serious" investigations following inmate assaults).

317. *LaMarca*, 995 F.2d at 1533.

318. 845 F.2d 763 (8th Cir. 1988).

four occasions.³¹⁹ Other young inmates at the South Dakota State Penitentiary suffered the same fate.³²⁰ In the face of what the court characterized as a pervasive risk, staff failed to refer for prosecution any of the more than 140 instances of fighting and assaults, including rape, from 1981 to 1985.³²¹ Moreover, never in the institution's history had an inmate faced prosecution for institutional rape.³²² In contrast, all suspected criminal acts at the neighboring North Dakota State Penitentiary had been referred during a similar time frame.³²³ The Eighth Circuit Court of Appeals indicated that the defendant's inaction supported a finding of deliberate indifference to the plaintiff's rape.³²⁴

6. Failure to Maximize Defensible Space

Safeguarding inmates requires defensible space, whereby staff can detect assaults and rapidly aid victims. Ironically, the very layout of many prisons renders their architecture an accessory to rape.³²⁵ Objectionable structures include shared cells and dormitories, where, according to inmate-author Victor Hassine, "rapists have their free pick of victims."³²⁶

Case law confirms that living quarters and other unguarded space invite unconstitutional victimization.³²⁷ For instance, the aforementioned *Vosberg* case described a sexual assault that lasted forty-five minutes but went undetected.³²⁸ The assailant had attacked

319. *Id.* at 766.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *See id.* at 767; *see also* *Martin v. White*, 742 F.2d 469, 475 (8th Cir. 1984) (ruling that failure to report prison assaults to the prosecutor "is in itself relevant evidence of [the defendant's] . . . reckless disregard of the rights of his other prisoners").

325. *See* Edith Flynn, *The Ecology of Prison Violence*, in *PRISON VIOLENCE* 115, 123 (Albert K. Cohen et al. eds., 1976) ("[Prisons are not] particularly [well] designed to facilitate effective staff intervention, whenever the life and safety of inmates or fellow staff are endangered.").

326. HASSINE, *supra* note 7, at 136.

327. *See, e.g.,* *Nami v. Fauver*, 82 F.3d 63, 66 (3d Cir. 1995) (refusing to dismiss claim alleging that double-celling led to rapes); *LaMarca v. Turner*, 995 F.2d 1526, 1532 (11th Cir. 1993) (describing rapes in dorms, the interior view of which was obstructed); *Martin*, 742 F.2d at 471 ("A solid, relatively soundproof metal door with a glass window separates the guards in the rotunda from the inmates in the wings. This door is kept locked. From the rotunda area, the guards cannot see into the inmate's cells."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 918 (S.D. Tex. 1999) (describing a rape in the shower room); *Benjamin v. Malcolm*, 564 F. Supp. 668, 672 (S.D.N.Y. 1983) (describing three-tiered cell blocks that prevented the detection of assaults), *rev'd on other grounds*, 178 F.3d 385 (5th Cir. 1999).

328. *See Vosberg v. Solem*, 845 F.2d 763, 768 (8th Cir. 1988):

his victim in an unsupervised, darkened room used to develop photographs.³²⁹ The plaintiff's rape represented but one instance in a reign of terror at the South Dakota State Penitentiary. Inmates violated fellow prisoners at various locations.³³⁰ Not even the guards' station permitted viewing individual cells.³³¹ Consequently, the court upheld the jury's award of \$10,000 for the plaintiff.³³²

IV. RECONSIDERING THE DELIBERATE INDIFFERENCE TEST

The contemporary prison breeds violence unlike any other institution. When asked to intervene on the part of the weak, lower federal courts carefully disclaim any warranty of safety.³³³ "Prisons," lamented one district court, "are dangerous places," where "violence is inevitable [short of sedating inmates]."³³⁴ Commentators correctly describe the prison as a "world of violence,"³³⁵ a "walled battlefield,"³³⁶ "Hobbesian,"³³⁷ and "junglelike."³³⁸

A: They took me to the broom closet and—

Q: In the broom closet or dark room?

A: The dark room, excuse me. And they—we waited there until the people in the dark room left, which would be approximately a minute.

Q: Did you see any guards up there at that time?

A: No, I did not.

Q: Did you see Mr. Wait around after you gave him your pass?

A: No, I did not.

Q: Then what happened?

A: After everybody else besides me, Mr. Miller and Mr. Brooks, everybody else left, then Mr. Miller said that he was going to go out and stand jiggers. Mr. Brooks told me to get—take off my pants and then get into a dog position.

Q: Then what happened?

A: He put lotion on my rectum, shoved his penis in and started slapping me.

Q: How long did that last?

A: Approximately forty-five minutes.

329. *See id.*

330. *See id.* at 766.

331. *See id.*

332. *See id.* at 765.

333. *See, e.g.,* McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991) ("A prisoner's interest in safety does not lead to absolute liability, however, any more than the state is the insurer of medical care for prisoners."); D.R. v. Phyfer, 906 F. Supp. 637, 641 (M.D. Ala. 1995) ("[T]he constitutional rights of inmates are [not] violated every time a prisoner is injured." (quoting Zatlner v. Wainwright, 802 F.2d 397, 400 (11th Cir. 1986))).

334. Shaffer v. DeMarco, No. 92-1047, 1994 U.S. Dist. LEXIS 20632, at *11 (C.D. Ill. April 22, 1994) (quoting *Duckworth*, 944 F.2d at 348); *see also* Falls v. Nesbit, 966 F.2d 375, 380 (8th Cir. 1992) ("Prisons are, by the very nature of the persons housed within their walls, dangerous, violent, and sometimes unpredictable.").

335. SILBERMAN, *supra* note 23, at 2.

336. Robertson, *supra* note 16, at 341.

337. Robertson, *supra* note 23, at 102.

338. TOCH, PRISONS, *supra* note 23, at 41.

Shortly before *Farmer v. Brennan*, the district court in *Smith v. Ullman*³³⁹ bluntly recommended that “[t]he courts, if . . . they are serious about decrying violence in the nation’s prisons, might reexamin[e] the court-created Eighth Amendment jurisprudence which tolerates that violence.”³⁴⁰ It urged judges to “reconsider” the deliberate indifference test because it failed to acknowledge “environmental factors—including predatory persons in that environment” as the “driving force” in prison life.³⁴¹

Justice White had rendered a similar assessment in his concurring opinion in *Wilson v. Seiter*.³⁴² He too viewed the prison as a complex social system rather than a collection of discrete individuals. “[I]nhumane prison conditions,” he asserted, “often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time”³⁴³ “In truth,” he concluded, “intent simply is not very meaningful when considering a challenge to an institution, such as a prison system. The responsibility for subminimal conditions in any prison inevitably is diffuse”³⁴⁴

Justice White’s assessment could not be truer of prison rape. This seemingly bilateral act involving rapist and victim would not arise but for a cauldron of social action and inaction. The prison environment threatens the inmate’s self-image as a competent, virile man. As Sykes observed, the “pains of imprisonment”—loss of liberty, limitations on goods and services, deprivation of heterosexual relationships, little autonomy, and lack of personal safety³⁴⁵—inflict

339. 874 F. Supp. 979 (D. Neb. 1994).

340. *Id.* at 986 (emphasis added).

341. *Id.* (internal quotation marks omitted). Previously, in *DeShaney v. Winnebago County*, 489 U.S. 196 (1989), the Court’s dictum had explicitly rejected “the State’s [guilty] knowledge of the individual’s predicament” as the basis for the Eighth Amendment duty to protect custodial populations. *Id.* at 200. Instead, Chief Justice Rehnquist’s majority opinion looked to an environmental consideration: their dependence on the state for “basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety.” *Id.* (emphasis added). Consequently, he posited that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.* at 199–200.

342. 501 U.S. 294 (1991).

343. *Id.* at 310 (White, J., concurring).

344. *Id.* (White, J., concurring) (emphasis added).

345. See SYKES, *supra* note 36, at 73–78; see also Richard Cloward, *Social Control in the Prison*, in *PRISON WITHIN SOCIETY* 78, 78–79 (Lawrence Haxelrigg ed., 1969) (describing imprisonment as a “status degradation” process that consigns inmates to a “lower species”) (internal quotation marks and footnote omitted).

over time symbolic “castrat[ion].”³⁴⁶ An inmate learns, however, that the prison society permits him to regain his manhood through aggression, domination, and penetration of male inmates.³⁴⁷ Even prison staff hold in esteem inmates willing to fight, while questioning the social worth of those who take flight or, worse yet, are cowed into sexual submission.³⁴⁸ Moreover, prison architecture rarely allows for effective policing.³⁴⁹

The *Wilson* Court, however, expressly rejected Justice White’s contention that only the severity of the sanction mattered in challenges to prison conditions.³⁵⁰ According to Justice Scalia’s majority opinion, punishment—unlike pain per se—constitutes a “deliberate act intended to chastise or deter.”³⁵¹ Thus, a wanton state-of-mind by the inflicting prison officers must be established unless the inflicted pain was “formally meted out [and thus deliberately administered] as punishment by statute or the sentencing judge.”³⁵²

Nonetheless, one can embrace Justice Scalia’s analytical model and still demonstrate that the deliberate indifference test should not govern prison rape litigation. The debate can be won on his terms by demonstrating that inmate-on-inmate rape has contaminated our conception of the prison. For inmates, the body politic, and trial courts, apprehension of sexual assault represents an integral feature of a judge’s prison sentence. Thus, the rape of a prisoner need not be attributed to prison officers’ wantonness to qualify as cruel and unusual punishment.

When a judge sentences an offender to prison, what is the content of that sanction? Because a prison sentence unquestionably entails the loss of significant liberty,³⁵³ we can find guidance in *Sandin*

346. SYKES, *supra* note 36, at 70.

347. See *supra* note 33 and accompanying text (discussing aspects of the prison social world that equate manhood and aggression).

348. See *supra* notes 59–73 and accompanying text (discussing staff attitudes about rape).

349. See *supra* notes 325–32 and accompanying text (discussing the lack of defensible space in many prisons).

350. See *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

351. *Id.* at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

352. See *id.* (emphasis altered).

353. See, e.g., BLACK’S LAW DICTIONARY 1194 (7th ed. 1999) (defining a prison as a “state or federal facility of confinement for convicted criminals”); FERDICO’S CRIMINAL LAW AND JUSTICE DICTIONARY 342 (John N. Ferdico ed., 1992) (defining a prison as a “confinement facility having custodial authority over adults sentenced to confinement for more than one year”) (emphasis omitted); THE DICTIONARY OF CRIMINAL JUSTICE 244 (George E. Rush ed., 3d ed. 1991) (defining “prison” as a “confinement facility hav[ing] custodial authority over adults sentenced to confinement”).

v. Conner.³⁵⁴ Prison officials had confined the respondent in segregation following an alleged rule violation.³⁵⁵ The court of appeals held that this sanction deprived him of a constitutionally protected liberty interest.³⁵⁶ In reversing, the Supreme Court in *Sandin* identified the residuum of liberty not extinguished by a sentence of imprisonment.³⁵⁷ That residuum, posited *Sandin*, protects inmates from deprivations “[exceeding] expected parameters of a prison sentence.”³⁵⁸ While the Court failed to delineate the authoritative sources of those expectations, it did acknowledge that a “prisoner’s subjective expectation . . . provide[s] some evidence that the conditions suffered were expected *within the contour of the actual sentence imposed*.”³⁵⁹

Inmates view rape as an expected, intrinsic feature of a prison sentence.³⁶⁰ Accordingly, one question haunts daily life for first-time inmates: Will I be raped?³⁶¹ For all inmates, “the threat of sexual assault actually dominates the prison environment and structures much of everyday interaction that goes on among inmates.”³⁶² Prison rape shapes daily life because it threatens every inmate’s manhood.³⁶³

354. 515 U.S. 472 (1995).

355. *See id.* at 474.

356. *See id.* at 476–77.

357. *Id.* at 483.

358. *Id.* at 485.

359. *Id.* at 486 n.9 (emphasis added). Moreover, the Court stated that expected parameters of a prison sentence could nonetheless violate inmates’ substantive rights. *See id.* at 487 n.11.

360. Compare *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))), with *HASSINE*, *supra* note 7, at 134 (“Sexual assaults are so pervasive in correctional facilities today that they have become unspoken, *de facto* parts of court-imposed punishments.”); *see also* HUMAN RIGHTS WATCH, *supra* note 4, at I. *Summary and Recommendations* (stating that “almost any prisoner may become a victim [of rape]”).

361. *See supra* note 11 (citing commentators who proclaim that the fear of being raped is uppermost in the minds of new inmates).

362. Norman E. Smith & Mary Ellen Batiuk, *Sexual Victimization and Inmate Social Interaction*, 69 PRISON J. 29, 30 (1989).

363. *See* HUMAN RIGHTS WATCH, *supra* note 4, at V. *Rape Scenarios* (“Through the act of rape, the victim is redefined as an object of sexual abuse. He has been proven to be weak, vulnerable, ‘female,’ in the eyes of other inmates.”); *id.* at VI. *Body and Soul: The Physical and Psychological Injury of Prison Rape* (stating the “widespread” view that “at the very least” the victim has been “proven to be a punk, ‘pussy,’ or coward by not preventing” his rape); LOCKWOOD, *supra* note 4, at 98 (discussing the “socially dislocating incidents” experienced by prison sexual assault victims, which include being seen as a “pussy”); SCACCO, *supra* note 4, at 87 (indicating that rape confers the stigma of femininity upon the victim); TOCH, *supra* note 66, at 215 (observing that victims are often selected because they are seen as having unmanly attributes).

An intangible, conferred asset, manhood brings status, power, and dignity in an otherwise demeaning and disempowering environment.³⁶⁴ To maintain one's manhood, no quarter can be given.³⁶⁵ In this sexualized social world, distrust and fear of fellow inmates become the operative principles of daily life.³⁶⁶ In his seminal study of sexual victimization, Lockwood characterized the following comments as typical:

ARE 4: I would live in apprehension [of sexual assault]. Every time I would unlock that door or lock out till the time I went back in it was constant pressure of watch out for this man.

ARE 36: Whenever I see him [i.e., a prospective assailant] around I am consciously aware of it. No matter what I am doing I have to keep it the back of my mind where he is. Not that he would try anything out there in the yard or anything, but the thing is, you never know . . . I have always got it in my mind whenever he is around to be well aware.³⁶⁷

For the body politic, prison rape shapes how we talk about and imagine prison life.³⁶⁸ "Judging by the popular media," wrote one commentator, "rape is accepted as almost a commonplace of imprisonment, so much so that when the topic of prison arises, a

364. See, e.g., SYKES, *supra* note 36, at 76 (arguing that the prison environment threatens to render the inmate "weak" and "helpless"); WOODEN & PARKER, *supra* note 4, at 14–15 ("The value structures of the lower-class subcultures found in prison . . . place extreme emphasis on maintaining and safeguarding the inmate's manhood and manliness . . ."); Newton, *supra* note 4, at 198 (discussing how the "ideal of dominance and power" is equated with masculinity).

365. See, e.g., JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST* 79 (1981) ("If you are a man, you must either kill or turn the tables on anyone who propositions you with threats of force. It is the custom . . ."); LOCKWOOD, *supra* note 4, at 52 ("The target's violent response is an explicit normative expectation of the prison community."); Robertson, *supra* note 16, at 346 (observing that "target-initiated violence is the normative response").

366. See BOWKER, *supra* note 66, at 1 ("Even in institutions where the rape rate is relatively low—perhaps averaging no more than a few incidents per year—there is widespread fear of being raped, and this fear motivates prisoners to defend themselves carefully against this possibility.").

367. Daniel Lockwood, *Issues in Prison Sexual Violence*, in *PRISON VIOLENCE IN AMERICA* 89, 92 (Michael Braswell et al. eds., 1985).

368. Since its inception, the prison has been a potent communicative symbol and cultural force. See JOHN BENDER, *IMAGINING THE PENITENTIARY* 11–40 (1987) (describing the prison as a cultural system and comparing a prison sentence to a novel). Today, the prison does not represent a symbol of justice; Sherman and Hawkins argued that for some observers the prison "conjures up unprincipled coercion [and] dehumanizing treatment." MICHAEL SHERMAN & GORDON HAWKINS, *IMPRISONMENT IN AMERICA* 95 (1981).

joking reference to rape seems almost obligatory.”³⁶⁹ A reporter for the *New York Times* expressed a similar conclusion: “Inmate rape has such an established place in the mythology of prison that references to confinement often call forth jokes about sexual assault.”³⁷⁰ An advertisement for the soft drink 7-Up vividly illustrates how the public accepts prison rape as part and parcel of a prison sentence.³⁷¹ As prisoners receive cans of the soft drink, an inmate drops one and remarks that he will not retrieve it, implying that bending down will expose him to rape.³⁷² Later, the soft drink spokesperson finds himself locked in a cell with an inmate who has his arm around him, implying that a sexual assault will soon commence.³⁷³

More than twenty years ago, Justice Blackmun put the nation’s judges on notice that “[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.”³⁷⁴ Similarly, case law provides judges with vivid accounts of the sexual terrorism they perpetuate when imposing prison sentences.³⁷⁵ For discerning judges, the readily available literature on prison rape demonstrates that the inmate subculture continues to define sexual aggression as a prized masculine trait;³⁷⁶ that the inmate population still blames the victim by redefining him as a “pussy” or

369. Joanne Mariner, *Body and Soul: The Trauma of Prison Rape*, in BUILDING VIOLENCE 125, 126 (John P. May ed., 2000) (emphasis added).

370. Levin, *supra* note 5.

371. Sabrina Qutb & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time. Just What Part of Prison Rape Do You Find Amusing?*, S.F. CHRON., June 9, 2002, available at <http://www.spr.org/> (on file with the North Carolina Law Review).

372. *See id.*

373. *See id.*; *see also, e.g.*, Brian Cernel, *California Attorney General Should Resign Over Prison Rape Statement*, available at <http://www.equityfeminism.com/articles/2001/000077.html> (last visited Oct. 23, 2002) (on file with the North Carolina Law Review) (quoting the Attorney General of California as stating, “I would love to personally escort Lay [the disgraced head of the bankrupt energy trading company, Enron] to an 8-by-10 cell that he could share with a tattooed dude who says, ‘Hi my name is Spike, honey’ ”); Lou Moran, *Commentary: The Horror of Prison Rape*, U.P.I., Feb. 20, 2001, available at <http://www.aegis.com/news/upi/2001/UP010217.html> (on file with the North Carolina Law Review) (describing prison staff as indifferent to prison rape and also noting “much of the public seems to tacitly accept the outrage”).

374. *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (footnotes omitted).

375. *See supra* notes 122–332 and accompanying text (reviewing the case law on the deliberate indifference test); *see also* HUMAN RIGHTS WATCH, *supra* note 4, at VIII. *Deliberate Indifference* (“Disappointingly, the federal courts have not played a significant role in curtailing prisoner-on-prisoner sexual abuse.”).

376. *See supra* notes 32–36 and accompanying text (discussing the subcultural equation of masculinity with domination).

“bitch;”³⁷⁷ and that a blind eye remains the preferred response to rape among some prison officers.³⁷⁸

The “evolving standards of decency,” the lodestar of the Eighth Amendment since *Trop v. Dulles*,³⁷⁹ beckon when courts are freed from the dead hand of the deliberate indifference test. Because the Army has historically served as a model for the administration of prisons,³⁸⁰ its policy of “zero tolerance” toward sexual assault³⁸¹ and sexual harassment³⁸² should be presumptive of corresponding standards of decency in prison. For inmates and custody staff, “zero tolerance” begins with “normalization”: “A male inmate is not to be accepted as a female surrogate in any sense”³⁸³ For wardens, “zero tolerance” requires a host of measures to safeguard all inmates. They include: (1) training programs about prison sexual violence for staff and inmates; (2) sufficient numbers of officers for policing inmates; (3) procedures for the apprehension of alleged inmate rapists and their referral for criminal prosecution; (4) classification systems for separating vulnerable and aggressive inmates from the

377. See *Schwenk v. Hartford*, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (“Once raped, an inmate is marked as a victim and is subsequently vulnerable to repeated violation. The victims of these attacks are frequently called female names and terms indicative of gender animus like ‘pussy’ and ‘bitch’ during the assaults and thereafter.”); see also *supra* notes 28–31 and accompanying text (describing the social reconstruction of the rape victim).

378. See *supra* notes 69–73 and accompanying text (discussing staff’s view of rape as a means for deterring, punishing, and managing inmates).

379. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

380. See Marilyn D. McShane & Frank D. Williams III, *Management [of Prisons]*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 4, 5 (“The prison resembled a paramilitary organization, using rank as authority . . .”). The paramilitary “boot camp” for inmates is but one example of the Army’s continuing influence on prisons. See Doris Layton MacKenzie, *Boot Camps*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 47, at 61 (stating that the first prison boot camps “were modeled after military boot camps”).

381. See Madeling Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 *DUKE L.J.* 651, 678 (1996) (stating that after 1991 “the services publicized ‘zero tolerance’ policies regarding sexual assault”).

382. See Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 *MINN. L. REV.* 305 *passim* (1998) (critiquing the military’s policy of “zero tolerance”). “Zero tolerance” in adult/juvenile statutory rape may also be at hand. Cf. Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 *STAN. L. & POL’Y REV.* 267, 268 (1999) (“Politicians in a number of states, including California, advocated the revival and revision of statutory rape laws, to send a clear message of zero tolerance for adult-teenage relationships through the aggressive prosecution of statutory rape.” (internal quotation marks and footnote omitted)).

383. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 *FED. PROBATION* 46, 51 (1984).

general population; (5) and easily monitored living quarters so as to deter and detect sexual assaults.³⁸⁴

For federal courts, "zero tolerance" requires abandonment of the deliberate indifference test. A presumption of liability should lie against prison wardens whenever a plaintiff establishes a prima facie case of rape.³⁸⁵ Unless defendant wardens demonstrate that they had employed the full range of countermeasures,³⁸⁶ injunctive relief and/or damages should be awarded. "A clean heart and an empty head" should no longer pass constitutional muster.

ROBERT BRIDGEN AS EPILOGUE

The sad fate of Robert Bridgen reminds us of the irony surrounding the deliberate indifference test. Conceived as a guarantee of access by inmates to medical staff,³⁸⁷ the test sometimes results in blaming victims for their injuries, including their own murder. Prison staff had moved inmate Bridgen, a sex offender, from the general prison population to protective custody after inmates assaulted him.³⁸⁸ Later, with the elimination of the protective custody unit, he rejoined the general prison population.³⁸⁹ There he complained of a robbery and harassment but refused transfer to another prison's protective custody unit.³⁹⁰ Shortly thereafter, an inmate murdered him.³⁹¹

The plaintiff argued that the defendants knew Bridgen faced danger.³⁹² The court concluded otherwise. It reasoned that Bridgen's two-year imprisonment rendered him knowledgeable of the risks of confinement, which he assumed through his refusal to enter

384. See HUMAN RIGHTS WATCH, *supra* note 4, at I. Summary and Recommendations.

385. Supervisory liability does not require a finding of liability on the part of the subordinates in question. See Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 644 n.178 (1997) (citing cases in support of this proposition). Plaintiffs, however, must demonstrate the supervisor's "direct responsibility" for the subordinate's conduct. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 375-77 (1976) (establishing the "direct responsibility" requirement).

386. See *supra* note 384 and accompanying text (delineating anti-rape measures). But see *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (stating that model standards "may be instructive in certain cases" but "do not establish the constitutional minima").

387. See *supra* notes 78-84 and accompanying text (discussing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

388. *Brigden v. Okla. Dep't of Corr.*, No. 96-6339, 1997 U.S. App. LEXIS 29876, at *84 (10th Cir. Apr. 29, 1997).

389. See *id.* at *5.

390. See *id.* at *8-*9.

391. See *id.* at *9.

392. See *id.* at *10.

protective custody.³⁹³ The court did not take issue with the Hobson's choice given the deceased: either face the dangers of the general population or the stigma and hardships of protective custody.³⁹⁴ He had no place to hide, and the deliberate indifference test denied him constitutional refuge.

393. *See id.* at *19–*20.

394. *See supra* notes 187–88 (discussing the lowly status accorded inmates housed in protective custody).

