PATRIARCHY ON LOCKDOWN: DELIBERATE INDIFFERENCE AND MALE PRISON RAPE

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Once an ex-con told me i was pretty,
he said if i were in prison i'd be somebody's woman,
i'd have to obey him and be faithful to him,
if i got caught screwing with someone else,
i'd be slit with a knife or a razor blade,
slit until the blood from my faggot ass
met the blood from my throat,
bled until the redness became a poem
and then a song,
until a mute nation heard
but they haven't heard and sometimes
i realize they can't hear at all

From Tommi, "The Rape Poem," Washington State, 1976[1]

INTRODUCTION

This poem represents the brutal reality that many of America's prisoners face as they attempt to negotiate through and survive in the world's largest prison system.[2] By the end of 2001 there were almost 2,000,000 prisoners being held in federal and state prisons as well as in local jails.[3] This staggering number demonstrates that one out of every one hundred forty people in the United States is behind bars.[4] While it is a common belief that incarceration rates have always risen at a steady pace, radical changes in the criminal justice system beginning in the 1980s tell a very different story.[5] As

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[*] J.D. Candidate 2004, Benjamin N. Cardozo School of Law, Editor-in-Chief, *Cardozo Women's Law Journal.* I would like to thank my husband, Antonio Vigil, for his support, comments and motivation. I would also like to thank my parents, Inna and Boris Giller, for their inspiration and encouragement. This note is dedicated to the memory of my grandmothers, Klavdia Vaynerman and Polina Giller who always loved and supported me without question.

[1] Daniel Burton Rose, *The Anti-exploits of Men Against Sexism, 1977-78, in* PRISON MASCULINITIES 224 (Don Sabo et al. eds., 2001).

[2] *See* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 27 (2001). "No other country in the world is known to incarcerate as many people, and only a small handful of countries have anything approaching a similar rate of incarceration." *Id.*

[3] *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2001 1 (2002).

[4] *See* HUMAN RIGHTS WATCH, *supra* note 2, at 27.

[5] *See id.* at 28. "These increases reflect an important overall shift in federal and state

incarceration rates increase so do the problems associated with prison life. Dangerous overcrowding, conspicuous understaffing and race baiting are the hallmarks of a prison system where violence and abuse run rampant.[6] The inability of the criminal justice system to deal with the real problems underlying crime have led to an explosion of violence in America's prisons.[7] These maladies within the prison system manifest themselves in violence, exploitation, sexual harassment and rape.

Prison rape has been called "America's oldest, darkest, yet most open secret."[8] Although the exact number of prisoners who are sexually assaulted is difficult to discern, it is widely believed that sexual harassment such as intimidation, propositions, extortion, assault and rape runs rampant in the prison system.[9] A prison in its very nature is a hierarchical, strict and penal institution whose main goal is to punish, not rehabilitate. Modeling itself on the patriarchal structure of American society as a whole, the prison system mirrors and magnifies the racial, gender and class structures that divide the United States.

In this Note, I argue that the prison system is essentially a patriarchal and hierarchical institution used as a tool of social control and punishment both inside and outside of the criminal justice system. Part I creates a theoretical framework of patriarchy and punishment, which will be used as the base for further critique. Part II outlines Eighth Amendment jurisprudence and discusses the deliberate indifference standard as it was applied before *Farmer v. Brennan.*[10] Part III focuses on the *Farmer v. Brennan* decision and the "new" deliberate indifference standard. Here, I argue that *Farmer* was not the victory for prisoners that its advocates would liked it to have been. Part IV applies the *Farmer* standard to federal and state cases that

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sentencing rules. In particular, they are indicative of a general trend toward longer prison terms, more stringent parole policies, mandatory minimum sentences, and most recently, 'three strikes' laws." *Id.*

[6] *See generally* HUMAN RIGHTS WATCH, *supra* note 2, at 31(discussing in depth the violence endemic to the prison system).

[7] These problems include institutional racism, unemployment, the ghettoization of the inner cities, segregation and an under-funded public education system to name a few. *See generally* HUMAN RIGHTS WATCH, *supra* note 2.

[8] Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 128 (2001-2002).

[9] *See, e.g.,* Jason Mallory, *Sexual Assault in Prison: The Numbers Are Far From Funny,* 9 THE TOUCHSTONE 1 (Nov./Dec. 1999) (according to one conservative estimate, there were more than 300,000 males sexually abused annually in U.S. prisons); STOP PRISON RAPE, FACT SHEET, *available at* http://www.spr.org/en/doc_01_factsheet.html (last visited Feb. 16, 2004) (stating that a recent study of four Midwestern states found that approximately 20% of inmates reported being sexual harassed, while 9% reported being raped); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates,* 36 AM. CRIM. L. REV. 1 (1999) (indicating that anecdotal evidence proves that sexual harassment among male inmates is a widespread and serious problem).

[10] 511 U.S. 825 (1994).

have come out both for and against prisoners suing officials for deliberate indifference. Part V discusses various strategies for engendering change within the prison system, including the proposed Prison Rape Reduction Act and a series of suggestions and strategies for prison reform.

I. PATRIARCHY AND PUNISHMENT IN THE PRISON SYSTEM

According to Sabo, Kupers and London, "[p]rison is an ultramasculine world where nobody talks about masculinity."[11] While studies of crime and punishment have included race, gender and class in the analysis, "what is missing in these approaches is any commentary on the collusion of prisoners, police, corrections officers, corporations, and legislators in supporting certain patterns of masculinity."[12] Patriarchy and hegemonic masculinity are the foundations of society both inside and outside of the prison system.[13]

Sabo, Kupers and London identify the four earmarks of patriarchal institutions including: homosociality, sex segregation, hierarchy and violence.[14] These key elements work together to create, nurture and maintain a system of patriarchy leading to domination and submission inside and outside of the prison system.[15] Behind bars, prisoners create and maintain their own sets of hierarchies, which inform all facets of their daily lives. This is exemplified by the inter-male dominance hierarchy system

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[11] Don Sabo et al., *Gender and the Politics of Punishment, in* PRISON MASCULINITIES 3 (Don Sabo et al. eds., 2001).

[12] *Id.*

[13] *See* SYLVIA WALBY, THEORIZING PATRIARCHY 19 (1994) (defining patriarchy as a system of government where men ruled societies through their positions as heads of households and where the domination of younger men who were not household heads was as important, if not more important than, older men's domination over women); *see also* Sabo, *supra* note 11, at 5 (arguing that hegemonic masculinity refers to our society's historical understanding and valorization of male dominance, heterosexism, whiteness, violence and ruthless competition).

[14] *See* Sabo et al., *supra* note 11, at 7-8. ("Homosociality" or contact between men is the norm and includes an exclusive space for men to gather and work out their relationships and relative power. The prison system including its inhabitants and employees is mostly male. 'Prison culture breathes masculine toughness and insensitivity, and it impugns softness, caring, and femininity. Men do 'hard time' in prisons, not 'soft time.'"). Sabo believes that, "[p]atriarchal cultures often isolate men from family and women in order to extol the virtues of masculinity as they denigrate or ignore women and femininity. Male prisoners are permitted to interact with women [only] in highly controlled circumstances. . . ." *Id.* at 8 (alteration in original). Hierarchy informs daily life inside and outside of prison and includes prison officials, government agents and the federal government. As the power level increases so does male dominance. "Women and prisoners hold the lowest positions in the pecking order, with women guards and professionals a notch above the prisoners themselves. Status differences are also carefully regulated among prisoners, with violence-prone men at the top and feminized males at the bottom." *Id.* Sabo explains how patriarchy is maintained through violence:

> Prisoners use the threat and practice of physical or sexual assault to maintain the pecking order. Guards rule through the threat of the application of violence, keeping their batons in hand and more lethal weapons at the ready. Racism in the hearts and minds of some guards and prisoners stokes hate and aggression.

Id.

[15] *See id.*

created by the prisoners at the Attica Correctional Facility in New York.[16] Dominant prisoners head this system, followed by prisoners with resources, marginalized prisoners and weaker, stigmatized prisoners.[17] In fact, even the terms "prisoner," "convict," "inmate," "correctional officer," and "prison guard" are loaded with hierarchical symbolism informed by the intersection of race, class and gender.[18]

The prison code, a natural extension of patriarchy, is a strict system of behavior and order that governs prisoners' daily lives.[19] Oddly enough, prison staff also subscribes to the code.[20] In fact, "[i]t is ironic that a code established in the interest of prisoner solidarity and resistance to unfair authority, can so easily be manipulated by staff to divide prisoners."[21] Prison guards take advantage of the code in order to instill fear and maintain order within the prison population.[22] Sexual domination and abuse is tolerated because it divides the prisoners into, "perpetrators and victims, thus diminishing the likelihood of united resistance."[23] This cycle of domination then shifts from guards intimidating prisoners to stronger prisoners intimidating weaker prisoners.[24] Thus, the prison code assists in the maintenance of strict hierarchy and order while at the same time dividing, conquering and pacifying the prison population.

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16 *See id.*

17 *See* Sabo et al., *supra* note 11, at 9. (Dominant prisoners are usually "tough guys with the capacity and willingness to use violence to get what they want."). Prisoners with resources are "stand-up guys, gangs and inmates who can move within the prison and operate in the prison economy because of their access to drugs and contraband, and carry out contracts, assaults and extortion schemes." *Id.* Marginalized prisoners are defined as "religious groups, college students, individuals involved in prison programs, and prisoners without social ties who quietly do their bids." *Id.* The bottom of the prison hierarchy includes "snitches, homosexuals, sex offenders, child abusers, bitches and punks." *Id.*

18 *See* Sabo et al., *supra* note 11, at 9. A prisoner is a "positive thinker, always thinking freedom, held against his will, respected, honorable, a leader among prisoners, viewed as a 'smart-ass' and potential problem by prison officials and guards, political." *Id.* A convict is "convicted of a crime, has a con mentality of trying to get over on anyone in any way possible, guilty but considers himself to be a 'victim of the system.'" *Id.* An inmate "will do anything, has no individual will or resistance, acts as a snitch or a house mouse (informer) . . . ." *Id.* A correctional officer is defined as a "decent person, just and fair, a human being in a uniform, helps prisoners better themselves, does not try to break a prisoner's spirit, encourages prisoners to participate in programs that can help them become healthier and stronger." *Id.* at 10. A prison guard is "oppressive . . . ." *Id.*

19 *See* Sabo et al., *supra* note 11, at 10-11. The prison code is a complex set of rules. These rules include suffering in silence, not snitching, never admitting fear, not engaging in behavior that would brand you a punk, sissy or gay, never helping the authorities in any way, not trusting anyone, and always being ready to fight and to kill if necessary. *See id.*

20 *See id.* at 11-12. "There is intense solidarity among correctional officers, and any officer who breaks ranks and informs about the abuses committed by fellow officers is likely to be shunned or harmed." *Id.*

21 *Id.* at 12.

22 *Id.*

23 *See* Sabo et al., supra note 11, at 12.

24 *See id.*

Homosexuality is both shunned and celebrated in prison. This dichotomous relationship manifests itself in sexual abuse and violence as well as in real, intimate relationships between men. "In a wicked twist of irony, it is often the avowedly homosexual youths, because of their 'feminine' mannerisms and pariah status, who fall victim to the most brutal of prison gang rapes. . . ."[25] Sexuality is seen as another way to separate the prison population and place prisoners into rigid gender roles that often stay with them throughout their period of incarceration. According to Stephen Donaldson, prisoners are divided into three distinct categories: "men," "queens" and "punks."[26] Prisoners who are gay or perceived as gay are raped and sexually harassed as a way to initiate them into their new roles.[27]

Race and sexuality intersect at the heart of prison rape. An anonymous ex-prisoner painfully recounted the role that race played in his sexual assault recalling, "[s]ince I'm light skinned the first dudes that raped me were Blacks who thought I was white. After word got out that I was black, they left me alone but then the whites took me off. After that I was a 'Black' punk

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25 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 285-86 (1981).

26 *See* Stephen "Donny" Donaldson, *A Million Jockers, Punks and Queens*, *in* PRISON MASCULINITIES 118-19 (Don Sabo et al. eds., 2001). According to Donaldson:

> A man who is sexually active [ ] is called a 'jocker'. . . If a jocker is paired off, he is a 'Daddy.' If he engages in sexual coercion, he is a 'booty bandit.' Men almost always identify as heterosexual [ ], and the majority of them behave heterosexually before and after confinement.

Id. at 118.

However, " Manhood, . . . is a tenuous condition, as it is always subject to being 'lost' to another, more powerful or aggressive, Man; hence, a Man is expected to 'fight for his manhood.'" *Id.* at 119. "Below the class of Men in every way is a very small class of 'queens.'" *Id.* Queens are, "effeminate homosexuals. . . transvestites charged with prostitution. They seek and are assigned the roles of females and are referred to exclusively with feminine pronouns and terms. . . They are highly desirable as sexual partners because of their willingness to adopt 'feminine' traits, and they are highly visible . . ." *Id.* Queens are "often scapegoated, involved in prostitution, and viewed with contempt by the Men and by the staff." *Id.* For more on transgendered prisoners, see Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). "At the very bottom of the structure is the class of 'punks,' [ ] . . . prisoners who 'have been forced into a sexually submissive role,' through rape or convincing threat of rape." Donaldson, *supra* note 26, at 119. Most punks are, "heterosexual by preference and history, though some are gays or bisexuals who have rejected the 'queen' role but were forced into a passive role anyway. They are, for all practical purposes, slaves and can be sold, traded, and rented or loaned out at the whim of their 'Daddy.'" *Id.*

27 *See* HUMAN RIGHTS WATCH, *supra* note 2, at 220. This is best demonstrated by the testimony of D.L., an inmate in Florida, who gave the following testimony to Human Rights Watch in 1998:

> I am a self-confessed homosexual . . . . I have witnessed on numerous occasions many rapes forcefully and through manipulation. I have been a victim of both on a couple of occasions . . . . Homosexual harassment in the FL D.O.C. is common. Every day I experience some type of harassment from the officers and inmates alike. Name-calling, joking, Aids jokes, stereo-typed as having Aids etc. . . . Rape is widespread in F.D.O.C., however most of the sexual targeting is done through manipulation and putting fear into the weak timid young guys.

Id. (emphasis in original).

and passed on to whites."[28]

While it is clear that rape is a brutal reality of prison life, the more delicate question is whether rape can be seen as a punishment separate from a judicially imposed sentence. According to the Eighth Amendment of the United States Constitution, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[29] Although there is a constitutional ban on cruel and unusual punishment, the parameters of what constitutes such punishment are in constant flux. Therefore, it is plausible to argue that prison rape is a form of punishment that is collateral to a recognized sentence handed down by a judge. Justice Blackmun has echoed this notion. In his concurring opinion in *Farmer v. Brennan*, the seminal prison rape case, he argued "[a] punishment is simply no less cruel or unusual because its harm is unintended."[30] On the other hand, Justice Clarence Thomas has argued that "[f]or generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."[31] The difference between these two opinions is underpinned by the varying degree to which those in power should be held responsible for exacerbating or ameliorating prison conditions.

II. THE DELIBERATE INDIFFERENCE STANDARD BEFORE *FARMER V. BRENNAN*

Imagine the following scenario: you are a prisoner at a federal or state correctional facility and have been sexually assaulted by a fellow prisoner. You did not immediately report the rape because the rapist threatened to kill you if you told anyone. When you finally reported the rape to a guard, he ignored your complaint and told you to "fuck or fight."[32] You have exhausted all remedies at the prison level and now want to appeal to a court for help. How do you proceed?

Prisoners can bring a direct action under the Eighth Amendment or file a *Bivens* suit against the federal government and its agents for civil rights violations.[33] Bringing a claim against a state government and its officials can

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[28] Anonymous, *The Story of a Black Punk*, *in* PRISON MASCULINITIES 127 (Don Sabo et al., eds. 2001).

[29] U.S. CONST. amend. VIII.

[30] 511 U.S. 825, 855 (1994) (Blackmun, J., concurring).

[31] Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).

[32] This is a common saying used by guards as a response to prisoners who fear being raped and take precautionary measures such as being placed in protective custody or for prisoners who have been raped and are seeking help from the prison establishment. *See generally* Sabo et al., *supra* note 11; WILLIAM F. PINAR, THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA: LYNCHING, PRISON RAPE, & THE CRISIS OF MASCULINITY (Peter Lang 2001).

[33] *Bivens* suits are brought pursuant to a violation of the Eighth Amendment. *See* Bivens v. Six Unknown Agents of Federal Bureau of Narcotics Agents, 403 U.S. 388 (1971) (holding that

also be done pursuant to 42 U.S.C. § 1983.[34] When the case gets to court, what standard will the judge apply in determining whether prison officials violated your civil rights?

From the late 1890s to the 1960s, courts began to flesh out the definition of cruel and unusual punishment under the Eighth Amendment. In *Wilkerson v. Utah*, the Supreme Court upheld the sentence of a public shooting of a murderer, while at the same time holding that torture and other unnecessary cruelty would violate the Eighth Amendment.[35] A decade later, in *Weems v. United States*, the Court broadened the scope of cruel and unusual punishment as it tried to balance the proportionality of punishment to the crime committed.[36] Weems, a coast guard officer in the Philippines, was sentenced to fifteen years of hard labor for "falsifying a public and official document."[37] Weems' punishment of hard labor was to be carried out for the benefit of the state with the punishment being further enhanced by forcing him to wear a ball and chain attached to his ankle and wrist at all times.[38] The Supreme Court found this type of punishment offensive stating that "[s]uch penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportionate to offense."[39] The judgment against Weems was reversed because the punishment was found to be "repugnant to the Bill of Rights."[40]

In *Weems*, the Court broadened the definition of cruel and unusual punishment by holding that the degree of punishment must be commensurate with that of the crime.[41] In *Louisiana ex rel. Francis v. Resweber*, the Court took up the question of whether it was cruel and unusual punishment to conduct a second execution by electric chair because the first execution had inadvertently failed.[42] This case paved the way for the

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although in *Bivens*, there was a Fourth Amendment violation federal courts had the power to award damages for violations of constitutionally protected interests).

[34] § 1983 provides that:

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

42 U.S.C. § 1983 (1988).

[35] 99 U.S. 130 (1878).

[36] 217 U.S. 349 (1910).

[37] *Id.* at 357.

[38] *See id.* at 364.

[39] *Id.* at 366-67.

[40] *Id.* at 382.

[41] *See Weems*, 217 U.S. at 365.

[42] 329 U.S. 459 (1947).

exploration of the intent requirement in deciding whether the factor of cruel and unusual punishment was present. The petitioner argued that because his first electrocution had failed due to an electrical problem, it would be cruel and unusual punishment to attempt to execute him for a second time.[43] In considering the arguments, the Court found that "[t]he cruelty against which [the] Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method of punishment involved in any method employed to extinguish life humanely."[44] As demonstrated in *Resweber*, the "unforeseeable accident," of the electric chair malfunction did not constitute cruel and unusual punishment because it was not intended by the State as an additional penalty to the valid punishment of execution.[45] Thus, intent became a part of the cruel and unusual punishment discussion paving the way for the deliberate indifference dilemma.

Today, courts apply the deliberate indifference standard in deciding whether a prisoner has a claim of cruel and unusual punishment. The Supreme Court first required a showing of deliberate indifference in the case of *Estelle v. Gamble*.[46] In that case, a prisoner brought a pro se action against the medical director of the state corrections department and two correctional officers for cruel and unusual punishment when they failed to adequately treat a back injury that he sustained while engaging in prison work.[47] Writing for the majority, Justice Marshall held that "deliberate indifference to serious medical needs of prisoners constitute the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[48] In addition, the Court concluded that the petitioner was not required to show that prison officials possessed express intent to inflict unnecessary pain.[49] In order for the petitioner to state a cognizable claim, he must allege acts or omissions that prove to be sufficiently harmful to assert deliberate indifference to his medical needs. It is only such indifference that would offend "evolving standards of decency" and violate the Eighth Amendment.[50]

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43 *See id.* at 464.

44 *Id.*

45 *Id.*

46 429 U.S. 97 (1976).

47 *See id.* at 97.

48 *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153 (1976)).

49 *See id.* at 104-05.

50 *See id.* at 106. Four years later the Court held that double celling prisoners did not constitute deliberate indifference and therefore, did not violate the Eighth Amendment. *See* Rhodes v. Chapman, 452 U.S. 337, 348 (1981); *see also* Whitley v. Albers, 475 U.S. 312 (1986) (holding that shooting and wounding a prisoner in the course of a prison riot did not constitute cruel and unusual punishment under the Eighth Amendment as long as force was applied in a good faith effort to maintain or restore discipline and order); Cortes- Quiniones v. Jimenez-

In 1989, the Court further defined the parameters of deliberate indifference. In *City of Canton v. Harris*, the issue centered on whether a municipality could be held liable in a § 1983 action for constitutional violations resulting from a failure to properly train its employees.[51] In this case, Ms. Harris was arrested and taken into custody. While at the police station, she exhibited symptoms of non-responsiveness and continually slumped over and fell down.[52] She received no immediate medical attention and was left on the floor by police officers to prevent her from falling.[53] When she was released from custody an hour later, she was taken to the hospital by ambulance and hospitalized for one week.[54] In deciding whether the City of Canton was liable for the omissions of its employee police officers, the Court found that "inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[55] At the same time, the right to sue was narrowed to cases "where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality. . . ."[56] Again, some type of intent was needed in order to prove deliberate indifference within the framework of a § 1983 action.

The Court returned to the deliberate indifference question in the context of prison life in the case of *Wilson v. Seiter*.[57] Wilson brought a § 1983 claim against the Hocking Correctional Facility in Nelsonville, Ohio claiming that overcrowding, excessive noise, inadequate heating and cooling, improper ventilation, unsanitary cooking and dining facilities and inadequate restrooms constituted cruel and unusual punishment and violated his Eighth and Fourteenth Amendment rights.[58] The Court first described the deliberate indifference standard as an "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."[59] As the majority broadened the scope of the deliberate indifference requirement, they argued that intent was an implicit component of the term "punishment."[60] According to Marjorie Rifkin , "the deliberate indifference standard, thus, subdivided into two component parts:

Nettelship, 842 F.2d 556 (1st Cir. 1989) (holding that prison officials were deliberately indifferent to prisoners' health and safety when they failed to segregate a psychiatrically disturbed prisoner who was eventually murdered and dismembered within a few months of being transferred from a state penitentiary to an overcrowded jail).

51 489 U.S. 378, 380 (1989).

52 *See id.* at 381.

53 *See id.*

54 *See id.* While at the hospital, she was diagnosed with several emotional ailments and continued to receive outpatient treatment for an additional year.

55 *Id.* at 387.

56 *Canton*, 489 U.S. at 387.

57 501 U.S. 294, 296 (1991).

58 *See id.*

59 *Id.* at 299.

60 *See id.* at 302.

a subjective component, relating to the state of mind of prison officials and an objective component, relating to the seriousness of the deprivation resulting from the officials' 'wanton' conduct."[61] Thus, inmates would have to show some form of culpable intent was present in the mind of prison officials in order to state a claim of deliberate indifference.[62] Foreshadowing a rift in the Court about the scope of intent, the concurring minority argued that differentiating between prison condition cases and individual punishment cases was artificial.[63] The concurring justices believed that the intent requirement was not only a departure from precedent, but was also going to prove extremely difficult to apply in future cases.[64] Discussing these differences the concurring justices reasoned that:

> Inhumane prison conditions often are the results of cumulative actions and inactions by numerous officials inside and outside of prison, sometimes over a long period of time. In those circumstances, it is as far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.[65]

The issue of intent was explicitly addressed in the case of *McGill v. Duckworth.*[66] McGill was a prisoner who was removed from the general population because he was labeled as a "snitch."[67] On his third day in protective custody, he was threatened and then raped by a disciplinary status inmate.[68] McGill filed a § 1983 action, alleging that his Eighth and Fourteenth Amendment rights were violated. He argued that prison officials had been deliberately indifferent to his safety because he was placed in a unit where both protective and disciplinary prisoners were allowed to mingle when using the shower and recreational facilities.[69] A jury found for McGill but the Seventh Circuit Court of Appeals reversed.[70] The Seventh Circuit found that McGill did not prove that the defendants possessed actual knowledge of a specific threat to his safety and therefore could not be held

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61 Marjorie Rifkin, Farmer v. Brennan*: Spotlight on an Obvious Risk of Rape in a Hidden World,* 26 COLUM. HUM. RTS. L. REV. 273, 282 (1995).

62 *See Wilson,* 501 U.S. at 302.

63 *See id.* at 309.

64 *See id.* at 310. In *Estelle v. Gamble,* the court held that an express intent to inflict unnecessary pain was not required. *See* 429 U.S. 97, 104 (1976), *petition for rehearing denied,* 429 U.S. 1066 (1977).

65 *Wilson,* 501 U.S. at 310.

66 944 F.2d 344 (7th Cir. 1991), *cert. denied,* 503 U.S. 907 (1992).

67 *See id.* at 346.

68 *See id.*

69 *See id.*

70 *See id.* at 346-47.

to be deliberately indifferent to his safety.[71] At the time of this decision, the circuits were split as to how to define deliberate indifference.[72] The Supreme Court inadvertently deepened the split by observing that "McGill knew, far better than his guards, of a risk of attack . . . ." and that the guards acted in good faith in carrying out their duties without any attempt to inflict cruel and unusual punishment on him.[73]

In 1992, the Supreme Court again considered the deliberate indifference standard. In *Hudson v. McMillian*, the petitioner brought a § 1983 action against three correctional officers who beat and injured him while he was handcuffed.[74] A magistrate judge found for the plaintiff but the Fifth Circuit Court of Appeals reversed, holding that Hudson's injuries were not significant enough to constitute cruel and unusual punishment.[75] The Supreme Court reversed, finding that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident."[76] While the *Hudson* Court narrowed the injury requirement in a deliberate indifference action, they failed to shed any additional light on the role that intent or knowledge should play in cruel and unusual punishment cases.

In the last major deliberate indifference case decided before *Farmer v. Brennan*, prisoners won an unexpected yet controversial victory. In *Helling v. McKinney*,[77] plaintiff McKinney brought a § 1983 action against a Nevada state prison alleging deliberate indifference to his health and safety due to his confinement to a cell where his cellmate smoked five packages of cigarettes each day.[78] Helling asked the Court to hold that Eighth Amendment actions could only be brought in cases where the petitioner was currently suffering from serious medical problems.[79] The Court rejected this

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71 *See id.* at 349-50.

72 *See* Scott Rauser, Comment, *Prisons are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in* McGill v. Duckworth, 78 MINN. L. REV. 165 (1993). According to Rauser, the circuits went back and forth between tort and criminal standards of recklessness. Tort recklessness, "the more prevalent of the two standards in inmate assault claims, entails an objective inquiry into the defendant's state of mind." *Id.* at 177. The law of torts defines a reckless act "when a reasonable person would have had reason to know that his or her conduct created an unreasonable and substantial risk of physical harm." *Id.* On the other hand, criminal recklessness requires "a subjective state of mind," and the plaintiff must demonstrate that the defendant actually recognized [and disregarded] the risk of danger. *Id.* at 177-78.

73 *McGill*, 944 F.2d at 353.

74 503 U.S. 1, 4 (1992).

75 *See id.* at 5.

76 *Id.* at 9 (internal citation omitted).

77 509 U.S. 25 (1993).

78 *See id.* at 28.

79 *See id.* at 32. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court gave an Eighth Amendment remedy to prisoners who were housed in overcrowded, punitive isolation cells with other prisoners who had hepatitis and venereal diseases, even though no infection by other prisoners had been qualitatively proven.

suggestion arguing "it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing had happened to them."[80] Upon remanding the case to the Ninth Circuit for further deliberation, the Court did not forget to mention that although McKinney now had a valid cause of action, he would still face the more difficult task of proving both the subjective and objective elements necessary for a successful Eighth Amendment claim.[81]

III. *FARMER V. BRENNAN*: A UNIFIED STANDARD OF DELIBERATE INDIFFERENCE?

Dee Farmer was serving a federal sentence for credit card fraud at the Federal Correctional Institute in Oxford Wisconsin ("FCI-Oxford"),[82] when medical personnel at the Bureau of Prisons diagnosed him as a transsexual. Federal prisons have a practice of incarcerating preoperative transsexuals in the general population with prisoners of the same biological sex.[83] In March 1989, Farmer was transferred to the United States Penitentiary in Terre Haute, Indiana ("USP- Terre Haute").[84] Although Farmer was initially placed in administrative segregation, he was eventually integrated into the general population.[85] Within two weeks of the integration, he was beaten and raped in his own cell by a fellow inmate.[86] Several days later, Farmer reported the incident and prison officials placed him into segregation to await a hearing about his HIV status.[87]

Farmer commenced a pro se *Bivens* action alleging violation of his Eighth Amendment right to be free from cruel and unusual punishment.[88] The amended complaint alleged that the respondents transferred Farmer to USP-Terre Haute and placed him in the general population despite knowledge that the prison had a violent environment, a history of assaults

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80 *Helling*, 509 U.S. at 33.

81 *See id.* at 35.

82 *See* Farmer v. Brennan, 511 U.S. 825, 829-30 (1994). The Bureau of Prison personnel who diagnosed Farmer as a transsexual defined the term as "a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex." *Id.* (quoting AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)). Farmer, a genetic male, was considered a transsexual because his pre-incarceration history included dressing in women's clothing, undergoing estrogen therapy, receiving silicone breast implants, and submitting to unsuccessful "black market" testicle removal surgery. *See id.*

83 *See id.* at 829-30. Farmer was also often segregated from the general prison population, and at least one of those segregations was related to safety concerns. *See id.* at 830.

84 *See id.*

85 *See Farmer*, 511 U.S. at 830.

86 *See id.*

87 *See id.*

88 *See id.* Named as respondents in the complaint were the warden of USP-Terre Haute, the Director of the Bureau of Prisons (sued only in their official capacities), the warden of FCI-Oxford and a case manager at the correctional facility, as well as the Director of Bureau of Prisons North Central Region Office and an official in that office (all were sued in their official and individual capacities). *Id.*

and that as a transsexual, Farmer would have been made more vulnerable to assault within the general population.[89] The respondents moved for summary judgment. In granting their motion, the trial court held that "[s]ince respondents had no knowledge of any potential danger to petitioner, they were not deliberately indifferent to his safety."[90] The Seventh Circuit Court of Appeals affirmed the lower court's decision without an opinion and the Supreme Court granted certiorari in order to settle a split between the circuits as to the definition of deliberate indifference.[91]

The Supreme Court began its discussion on deliberate indifference by surveying their own prior decisions addressing the matter.[92] Upon synthesizing existing case law, the Court created a two-part test that would be used to analyze deliberate indifference. The first prong of the test required that "the deprivation alleged, must be, objectively, [and] 'sufficiently

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[89] *Id.* at 831. Farmer sought compensatory and punitive damages and an injunction barring future confinement in any penitentiary, including USP-Terre Haute. *See Farmer*, 511 U.S. at 831.

[90] *Id.* at 832.

[91] *See id.* At that time, the Seventh Circuit believed that "deliberate indifference could be established only with proof that a prison official actually knew of an unreasonable risk and deliberately chose to ignore it." Rifkin, *supra* note 61, at 284. Before *Farmer v. Brennan* was decided, the following courts of appeals subscribed to the Seventh Circuit's view: the First Circuit in Desrosiers v. Moran, 949 F.2d 15,19 (1st Cir. 1991) (finding that a "reckless" mental state in a deliberate indifference case must be judged not in the tort law sense but in the stricter criminal law sense, requiring actual knowledge of impending harm); the Fourth Circuit in Ruefly v. Landon, 825 F.2d 792, 793 (4th Cir. 1987) (holding that it was obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Eighth Amendment); and the Eleventh Circuit in La Marca v. Turner, 995 F.2d 1526, 1537 (11th Cir. 1993) (holding that mere knowledge of the infirm conditions at the prison were not enough to constitute deliberate indifference. What was needed was a demonstration that the defendant knowingly or recklessly failed to take action even though he had the knowledge of the gravity of the situation). *But see* Cortes- Quinones v. Jimenez-Nettelship, 842 F.2d 556, 558 (1st Cir. 1988) (holding that deliberate indifference can be defined to encompass acts or omissions so dangerous that a defendant's knowledge of a risk could be inferred).

The Third and Ninth Circuits shared a different, less-stringent view focusing on prison officials' deliberate indifference only if they knew or should have known that prisoners were at risk. *See* Young v. Quinlan, 960 F.2d 351, 360 (3d Cir. 1992) (holding that the Third Circuit's definition of deliberate indifference as when a prison official knew or should have known is consistent with the Ninth Circuit's view); Redman v. County of San Diego, 942 F.2d 1435, 1442 (9th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992) (holding that the deliberate indifference standard requires a finding of some degree of "individual culpability" but does not require an express intent to punish).

The Sixth, Eighth, Tenth and D.C. Circuits had an even more lenient view of deliberate indifference. *See* Stewart v. Love, 696 F.2d 43 (6th Cir. 1982) (holding that mere negligence is not enough to prove deliberate indifference); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984) (holding that prison officials may be liable where they are deliberately indifferent to a prisoner's constitutional rights, either because they actually intended to deprive him of some right or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980) (holding large part of an entire Colorado prison unconstitutional as a deliberately indifferent violation of the Eighth Amendment); Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (holding that deliberate indifference occurs when there is an obvious unreasonable risk of harm to a prisoner or group of prisoners which is known to be present or should have been known).

[92] *See Farmer*, 511 U.S. at 834-35.

serious.'"[93] The second prong required that a "prison official have a 'sufficiently culpable state of mind.'"[94] Thus, the Court in *Farmer* created a test that had an objective and a subjective component and stood squarely in the middle of the deliberate indifference jurisprudence.

The next step for the Court was to define the term "culpable state of mind." Farmer argued for an objective intent specification claiming that a subjective test would undermine the point of a deliberate indifference standard in the first place.[95] The Court rejected this argument holding that "[a] prison official cannot be found liable . . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety[.]"[96] The official must also "[b]oth be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[97] This argument culminated in the Court's determination that a subjective recklessness standard as used in criminal law[98] was the appropriate standard for the intent component of deliberate indifference. In addition, the Court held that the objective intent standard was not an appropriate test for determining the liability of prison officials under the Eighth Amendment because, "[a]n official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment."[99]

The Court also discussed the ways in which prison officials could be found deliberately indifferent to inmates' health and safety needs. Farmer argued that "without an objective test for deliberate indifference, prison officials [would] be free to ignore obvious dangers to inmates."[100] The Court

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[93] *Id.* at 834. "[A] prison official's act or omission must result in the denial of the 'minimal civilized measure of life's necessities.'" (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Applying this first part of the test to Farmer's case, the Court stated that, "[f]or a claim [sic] based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.*

[94] *Id.* This prong of the test "follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* (quoting *Wilson*, 501 U.S. at 297).

[95] *See Farmer*, 511 U.S. at 837.

[96] *Id.*

[97] *Id.*

[98] The Official Draft of the Model Penal Code defines recklessness as:

> Consciously disregard[ing] a substantial and unjustifiable risk . . . The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1042 (Aspen Law & Business, 7th ed. 2001); *see also Farmer*, 511 U.S. at 839-40.

[99] *Farmer*, 511 U.S. at 838 (internal citation omitted).

[100] *Id.* at 842 (alteration in original).

responded by stating that when using the newly created test, an Eighth Amendment claimant would not have to specifically show that a prison official acted or failed to act due to actual knowledge of the fact that harm would befall them; it would be sufficient to prove that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.[101] In addition, the Court held that prison officials must prove that they were unaware of even obvious risks to prisoner health and safety.[102] While the first part of the holding demanded that prison officials take action in order to better protect prisoners' safety and health, the second part included a variety of escape hatches to be used by prison officials in disproving knowledge and liability for Eighth Amendment violations.[103]

Farmer's final argument rested on the premise that under a subjective deliberate indifference standard, prisoners would unjustly have to suffer physical injury before bringing an action to obtain injunctive relief.[104] Dismissing this argument as flawed, the Court reasoned that "a subjective approach to deliberate indifference does not require a prisoner seeking 'a remedy for unsafe conditions [to] await a tragic event [such as an] actual assault before obtaining relief.'"[105] According to Marjorie Rifkin, "plaintiffs who seek injunctive relief to prevent a substantial risk of serious harm will be afforded prospective relief if they demonstrate the defendants' continuing disregard for their safety throughout litigation and into the future."[106] At the same time, the Court held that when a prisoner fails to take advantage of or needlessly bypasses adequate prison procedures before seeking injunctive relief, he may be forced to exhaust all administrative remedies before bringing his case to court.[107] Unfortunately, the Court did not take into account the difficulties that most prisoners face in bringing their grievances and concerns to both prison officials and the courts.[108]

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[101] *See id.*

[102] *See id.* at 844.

[103] *See id.* at 844-45. Some of the escape hatches include: 1) prison officials showing that they did not know of any underlying facts indicating as sufficiently substantial danger making them unaware of the danger; 2) prison officials knew the underlying facts but unreasonably believed that the risk was not substantial or nonexistent; 3) prison officials responded reasonably to a safety or health risk. *See id.*

[104] *See Farmer*, 511 U.S. at 845.

[105] *Id.* (quoting *Helling*, 509 U.S. at 33-34).

[106] *See* Rifkin, *supra* note 61, at 305.

[107] *See Farmer*, 511 U.S. at 847.

[108] Inmates suffer both procedural and substantive due process problems when trying to deal with safety and health problems in prisons. With the passage of the Prison Litigation Reform Act (PLRA) in 1996, a backlash against prisoners' rights has ensued. The Act has created a comprehensive set of constraints on prison litigation including: 1) invalidating all settlements that do not include explicit findings that the challenged conditions violated federal law or the constitution; 2) requiring that prospective relief in prison condition suits, such as consent decrees, be narrowly construed; 3) arbitrarily terminating court orders against unlawful prison conditions after two years regardless of the degree of compliance to the orders by prison officials; 4) restricting grants of attorney's fees for successful prison conditions suits; 5) limiting prisoners' access to the courts by increasing the filing fees on certain indigent prisoners; and 6)

However, Dee Farmer's case was remanded for further deliberation.[109] Relying on the record below, it was difficult for the Court to discern if the district court had concluded that the fact that Farmer did not lodge a formal complaint was the only dispositive reason for the prison officials' inaction.[110] The Court also found that the motion to dismiss as a matter of law was premature since there was sufficient evidence of possible actual knowledge in the record for Farmer to use on remand.[111]

While the majority sent the *Farmer* case back to the lower courts, it was Justice Blackmun's concurring opinion that really addressed the brutal realities of prison life. Although he concurred in the judgment with the majority, he used his concurrence to lash out against the majority's unrealistic definition of the deliberate indifference standard. Justice Blackmun argued that the majority should never have extended the *Wilson v. Seiter* rule holding that for Eighth Amendment purposes, punishment must be defined only as pain that is *intended* by a state actor.[112] To Blackmun, "[t]he Court's unduly narrow definition of punishment blind[ed] it to the reality of prison life."[113] Punishment was no less cruel because it was unintended and there was no reason to believe that in adopting the Eighth Amendment, the Framers intended to prohibit only the *intentional* infliction of cruel and unusual punishment.[114] Justice Blackmun reasoned that the Eighth Amendment was not adopted to protect prison officials from lawsuits but to "[g]uarantee[] each prisoner that reasonable measures [would] be taken to ensure [their] safety."[115] Where a prisoner can prove that no reasonable steps were taken to prevent punishment that served no specific "penological" purpose, the Eighth Amendment would be violated regardless of the existence of an identifiable wrongdoer with bad intentions.[116] In concluding his argument, Justice Blackmun once again expressed his disappointment with the fact that *Wilson v. Seiter* had not yet been overruled.[117] Yet he concurred with the majority because he believed that the Court's opinion did not create any new obstacles for inmates to overcome and at the same time sent a reminder to prison officials of the affirmative, constitutional duty that they had to safeguard the health and

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baring the recovery of damages for pain and suffering not accompanied by physical injuries. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 47 (discussing 18 U.S.C.A. § 3626).

109 *See Farmer*, 511 U.S. at 848.

110 *Id.*

111 *Id.* at 849.

112 *See id.* at 854 (Blackmun, J., concurring).

113 *Id.* at 855 (alteration in original).

114 *See id.* at 856.

115 *Farmer*, 511 U.S. at 857 (Blackmun, J., concurring) (alteration in original).

116 *See id.*

117 *See id.* To this day *Wilson v. Seiter* remains good, yet controversial, law.

safety of prisoners under their care.[118]

The *Farmer* decision set the standard for defining deliberate indifference. Some scholars see *Farmer* as "neither a major victory nor a devastating defeat for prisoners' rights."[119] This type of wavering position is what turns the *Farmer* decision from benign to dangerous precedent. Although *Farmer* did create a uniform standard for deliberate indifference, it did not take into consideration the real issues underpinning human rights violations in prison. According to Man and Cronan, "[a] prison official, who witnesses the prison subculture of masculinity on a daily basis, probably knows which inmates face a 'substantial risk of harm.'"[120] Violence is a key component of prison life. What prison guard does not personally know of the possibility and danger of prison rape? When asked about the chances of a young, new inmate escaping prison rape, a prison guard replied, "[a]lmost zero . . . unless he is willing to stick someone with a knife and fortunate enough to have one."[121]

Most people want to believe that the penitentiary is a place where prisoners are locked up and segregated from the rest of society. The culture inside of prisons is supposed to be different from the culture of the outside world. Unfortunately, this is not the case. "[J]ust as in prison, the ever present hierarchy, the sharp line between winners and losers, the perpetual fear of being betrayed or defeated and falling to the bottom of the heap . . . the castigation of those at the bottom as womanly or queer . . . ."[122] exist also in the outside world. Prison guards hold a unique position, for they live between these two worlds and possess an intimate knowledge of the hierarchy and violence that permeates our society. How could they not know the risks that prisoners face? How can they not be held responsible for using violence as a tool of control, oppression and coercion?[123] Looking at the *Farmer* standard through a critical anti-patriarchy lens makes it seem unrealistic and ineffective. As a high ranking state corrections officer conceded, "[r]egrettably [rape] is a problem of which we are happier not knowing the true dimensions. Overcrowding and the 'anything goes' morality sure haven't helped."[124]

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118 *See id.* at 852.

119 *See, e.g.*, John Boston et al., Farmer v. Brennan*: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 102 (1994).

120 Man & Cronan, *supra* note 8, at 176.

121 HUMAN RIGHTS WATCH, *supra* note 2, at 142 (internal citation omitted).

122 Terry A. Kupers, *Rape and the Prison Code*, *in* PRISON MASCULINITIES 116 (Don Sabo et al. eds., 2001) (internal citation omitted).

123 *See generally* Don Sabo et al., *Gender and the Politics of Punishment*, *in* PRISON MASCULINITIES 3 (Don Sabo et al. eds., 2001); Man & Cronan, *supra* note 8; HUMAN RIGHTS WATCH, *supra* note 2.

124 HUMAN RIGHTS WATCH, *supra* note 2, at 144.

IV. APPLYING THE *FARMER* STANDARD: CAN PRISONERS REALLY WIN?

The test created in *Farmer v. Brennan* continues to serve as the standard for deliberate indifference actions brought by prisoners in both state and federal prisons.[125] Damages and injunctive relief are the main remedies sought by victims of prison rape. Before damages and relief can be granted, prisoners must make out a prima facie case and survive the defendant's motion to dismiss. Prisoners do not have a constitutional right to a free attorney in §1983 civil rights actions,[126] with most cases being filed pro se by prisoners themselves.[127] Since many prisoners have limited language, education and research skills, surviving a motion to dismiss when filing pro se claims is an extremely daunting task.[128] Even when the prisoner plaintiff manages to overcome a motion to dismiss, courts do not always evenly apply

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125 *See* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 427 (2001). "*Farmer* resolved the ambiguity over the meaning of deliberate indifference and cemented a requirement of knowledge to Eighth Amendment liability." *Id.*

126 *See generally* Michael F. Williams & Edward Joyce, *Substantive Rights Retained by Prisoners*, 88 GEO. L.J. 1716, 1749-50 (2000).

127 Most prisoners investigate and file initial § 1983 actions pro se, or on their own.

128 *See generally* Brian Saccenti, Comment, *Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted By Showing That The Risk Was Obvious*, 59 MD. L. REV. 642 (2000). For examples of cases that have been dismissed by various lower courts for failure to state a claim of deliberate indifference, see Candelaria v. Coughlin, 155 F.R.D. 486, 1994 WL 267950 (S.D.N.Y. 1994) (rejecting paraplegic inmate's deliberate indifference claim that prison officials denied him pain killers, food and proper housing and transferred him to another facility as retaliation for pervious action that prisoner filed against prison officials); Jones v. Kelly, 918 F. Supp. 74 (W.D.N.Y. 1995) (holding that State Department of Correctional Services officials' denial of inmate's sought transfer to different correctional facilities did not subject official to §1983 civil rights liability for Eighth Amendment cruel and unusual punishment violation in absence of any proof that he deliberately, rather than negligently or inadvertently, disregarded substantial risk to inmate's safety); Kunkel v. Stockwell, 887 F. Supp. 215 (E.D. Mo. 1995) (holding that prisoner failed to create any genuine issue of material fact, precluding summary judgment, regarding prison guard's knowledge of risk another inmate presented to prisoner's safety, as necessary to show an Eighth Amendment violation in connection with inmate's attack on prisoner, absent evidence that guard in fact transported prisoner to medical unit after which attack occurred and thus heard threats exchanged on the way and absent evidence that prisoner informed guard of those threats); Webb v. Lawrence County, 950 F. Supp. 960 (W.D.S.D. 1996) (holding that incarceration of prisoner being held pending trial in same cell as prisoner who sexually assaulted him did not violate Eighth Amendment, on grounds that prison officials failed to protect plaintiff prisoner from such assaults. Even assuming that only deliberate indifference or reckless disregard as to risk to prisoner safety was required, officials had no reason to be aware and were not in fact aware of excessive risk to plaintiff prisoner's health or safety. In addition, the prisoner who committed assaults had assaulted no other prisoners while incarcerated, plaintiff did not notify officials of his fear of his cellmate or of assaults until he had been assaulted on four straight days, and plaintiff was removed from assaulting prisoner's cell thirty minutes after so notifying officials); Wilson v. Wright, 998 F. Supp. 650 (E.D. Va. 1998) (holding that a Virginia Department of Corrections employee did not act indifferently in assigning the plaintiff inmate to a double cell with another inmate with a history of violence, and thus the employee was entitled to qualified immunity in the plaintiff's § 1983 action for violations of the Eighth Amendment. In addition, the court found no evidence that the employee knew of any specific risk to the plaintiff, and thus the employee did not violate the rule that was clearly established at the time of the assignment).

the deliberate indifference standard. This uneven application often leads to different outcomes in the same circuits, perpetuating the notion that prison officials will only be held accountable for being deliberately indifferent to prisoner's safety when they are blatantly caught doing so.

In *Taylor v. Michigan Department of Corrections*,[129] a prisoner plaintiff brought a § 1983 civil rights action arguing that the prison warden had been deliberately indifferent to the danger that Taylor was exposed to when he was transferred from the Trustee Division of Jackson prison to Camp Pugsley.[130] Taylor was five-feet tall, weighed one hundred twenty pounds, was mildly mentally retarded with an IQ of 66, had youthful looking features and suffered from a seizure disorder.[131] Taylor argued that these qualifications indicated "that he belonged to a class of prisoners likely to be a target of sexual pressure in prison and that he could easily be in danger if placed in the general prison population."[132] Originally, Taylor was placed in an individual cell in the Trustee Division of the Jackson Prison but was soon moved to Camp Pugsley due to overcrowding.[133] Camp Pugsley, though also a minimum-security facility, housed prisoners in dormitory style barracks with approximately sixty prisoners to a room.[134] Shortly after his arrival at Camp Pugsley, another inmate raped Taylor.[135]

Taylor's initial § 1983 action was dismissed by the United States District Court for the Eastern District of Michigan for failure to prove that Warden Foltz was deliberately indifferent for failing to take reasonable steps to ensure that vulnerable inmates like Taylor would not be transferred to a facility where a substantial risk of harm existed.[136] Taylor appealed and the Sixth Circuit Court of Appeals reversed the decision of the lower court and remanded the case for trial. The Sixth Circuit found that triable issues of fact existed regarding whether Warden Foltz had any procedures in place to review transfer orders to insure that those orders were not being abused and that prisoners' files were being properly examined before transfer.[137] In addition, issues of triable fact existed as to whether Taylor fell into the category of inmates who were vulnerable to sexual assault, whether he was subjected to such a risk at Camp Pugsley, and whether Warden Foltz knew of the risk that the camp presented but failed to take reasonable steps to insure that his vulnerable wards were not sent there.[138] In concluding their

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129 69 F.3d 76 (6th Cir. 1995).
130 *See id.* at 78.
131 *See id.* at 77-78.
132 *Id.* at 78.
133 *See id.*
134 *See id.*
135 *See Taylor*, 69 F.3d at 79.
136 *See id.* at 80.
137 *See id.* at 84.
138 *See id.*

opinion, the Sixth Circuit majority quoted Winston Churchill when cautioning that "the treatment of crime and criminals is one of the most unfailing tests of civilization in any country."[139]

More recently in 2001, another Sixth Circuit decision reversed a lower court's denial of prison officials' motion for summary judgment.[140] A transgendered inmate using the pseudonym of Jane Doe brought a § 1983 civil rights claim.[141] Jane Doe was placed into a protective custody unit ("PC") at the Warren Correctional Institution ("WCI") in Ohio in order to protect her from other prisoners.[142] Hiawatha Frezzell, Doe's assailant, was also housed in the protective custody unit.[143] On July 11, 1996, Frezzell assaulted plaintiff Doe by punching her in the back of the head.[144] The next morning, Doe reported the incident to a prison guard and a case manager in the PC unit.[145] Neither of the defendants believed that segregation of Doe and Frezzell had been necessary at the time.[146] Later that day, Frezzell entered Doe's cell, assaulted and threatened to kill her.[147] Frezzell, caught in the act by another prison guard, was locked in his cell while proceedings for cell isolation were initiated against him.[148] While on lockdown that same day, Frezzell was allowed by two other officers to leave his cell three more times.[149] During his final leave, Frezzell went into Doe's cell and sexually assaulted her with a mop handle.[150]

Why would the Sixth Circuit find that prison officials were not deliberately indifferent to Jane Doe's safety? In addition, why would the Court hold that some of the defendants should have been allowed to plead qualified immunity as a defense, if they were found to not violate a clearly established constitutional right?[151] Deciding whether each of the defendants in this case were deliberately indifferent in their own right, the court analyzed each person's actions individually. One defendant was found to have taken sufficient steps to prevent Doe from being attacked and as a

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139 *See id.*

140 *See* Jane Doe v. Bowels, 254 F.3d 617, 622-23 (6th Cir. 2001).

141 *See id.* at 618.

142 *See id.* Jane Doe was a biological male but dressed and had feminine characteristics. She was diagnosed with gender disorder and was placed in an all-male prison because she was a biological male. *See id.*

143 *See id.* Frezzell was housed in the protective unit because he testified against other prisoners regarding their involvement in the 1993 Lucasville prison riot. He had a history of being violent and attacking other prisoners and was labeled as "predatory." *See id.*

144 *See Jane Doe*, 254 F.3d at 618.

145 *See id.*

146 *See id.* at 619.

147 *See id.*

148 *See id.*

149 *See id.*

150 *See Jane Doe*, 254 F.3d at 619.

151 *See id.* at 620.

matter of law was found to not be deliberately indifferent to the plaintiff's safety.[152] A second defendant was not entitled to qualified immunity because she had let Frezzell out of his cell to get a mop with which he raped Doe.[153] The court also found that there were genuine issues of material fact, which precluded their review of the qualified immunity claim of the third defendant.[154]

How did Jane Doe's case differ from the case of Timothy Taylor, the mentally retarded prisoner who was just as susceptible to predatory rape as a transsexual? Why was Jane Doe segregated from the general prisoner population while Timothy Taylor was not? Why did the Sixth Circuit find that the defendants in Taylor's case might have been deliberately indifferent, while the majority of the defendants in Doe's case were found to not have been? Does the fact that Doe was a transsexual make her more deserving of rape? Is there more sympathy for a young, retarded, man? While we cannot reach into the hearts and minds of the Sixth Circuit and read their true intentions, one thing is clear: their decisions were informed by their approach to race, gender and punishment. Neither prisoner was safe in protective custody or in a minimum-security prison. These lapses in their safety were underpinned by the fact that their respective status as a transsexual and a retarded person allowed prison officials to disregarded their well being. In other words, their status informed their punishments. As people who are considered "other" than the norm, their safety and needs were sacrificed in order to maintain a gendered and hierarchical social order.

Unfortunately, the Sixth Circuit is not the only court that has had to grapple with the issue of prison rape. In a series of decisions, the United States Court of Appeals for the Seventh Circuit has added its voice to the deliberate indifference debate. In *Billman v. Indiana Department of Corrections*,[155] Jason Billman, a prisoner who was raped by his cellmate, filed a § 1983 action against the prison system, prison officials, and guards seeking damages for the infliction of cruel and unusual punishment.[156] Billman's action was denied by the district court with prejudice but the decision of the lower court was later reversed in a panel decision by Judge Posner.[157] Unfortunately, Billman's story was not a novel one. He was placed into a cell with and then raped by a known sexual predator by the name of Darrell Crabtree. Crabtree was HIV positive and Billman was not informed in

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152 *See id.* at 621.

153 *See id.* at 621-22.

154 *See id.* at 622.

155 56 F.3d 785 (7th Cir. 1996).

156 *See id.* at 787.

157 *See id.* at 790.

advance of his roommate's violent sexual nature.[158]

The lower courts dismissed Billman's complaint because he "did not allege the requisite state of mind of each, or for that matter any, of the defendants."[159] Again, Billman's situation was not a novel one since "[h]is opportunities for conducting a precomplaint inquiry [were]... virtually nil."[160] In fact, "[t]he state's attorney smiled when [] [the court] asked him ... whether Billman would be given the run of the prison to investigate the culpability of prison employees for the rape."[161] Judge Posner argued that a prisoner's suit should not be dismissed just because they are unable to identify the exact person responsible for a violation of their Eighth Amendment rights before filing their complaint.[162] Posner also cautioned that:

> The peculiar perversity of imposing heightened pleading standards in prisoner cases... is that it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so... [and] it is the duty of the district court to assist him, within reason, to make the necessary investigation.[163]

In *Langston v. Peters*,[164] Eugene Langston sued numerous prison officials under § 1983 asserting that they violated his Eighth Amendment rights by failing to protect him from being raped by another prisoner and then providing inadequate medical treatment for the rape.[165] A magistrate judge held that even if the rape had actually happened as Langston claimed, he still failed to present sufficient evidence of deliberate indifference on the part of the named prison officials.[166]

Langston was serving a murder sentence when he was placed into protective custody for witnessing the murder of another prisoner.[167] He was transferred to Joliet Prison where he remained in protective custody until he assaulted a prison guard and was placed in the north segregation unit.[168] Eric Rayfield, another prisoner serving a murder sentence was placed into Langston's cell.[169] Ten days later, Rayfield assaulted and raped Langston.[170]

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158 *See id.* at 788.
159 *Id.*
160 *See id.* at 789 (alteration in original) (internal citation omitted).
161 *Billman*, 56 F.3d at 789.
162 *See id.*
163 *Id.* at 789-90 (alteration in original) (internal citation omitted).
164 100 F.3d 1235 (7th Cir. 1996).
165 *See id.* at 1236.
166 *See id.*
167 *See id.*
168 *See id.*
169 *See id.* at 1236.
170 *See Langston*, 100 F.3d at 1236.

Langston informed a corrections officer that he had been raped and needed medical attention but the officer refused to administer medical treatment.[171] Over two hours later, Langston was taken to the prison health care unit where he complained of pain and rectal bleeding.[172]

The Seventh Circuit found that the defendants were entitled to summary judgment on Langston's Eighth Amendment claims.[173] They also reasoned that "[e]ven if an objectively substantial risk existed that someone would retaliate against Langston for cooperating with prison officials, he was not retaliated against, so there was no punishment."[174] In addition, the court found that since the prison did not know of Rayfield's history of sexual assault and "even if Rayfield presented an objectively substantial risk of serious harm, the prison defendants cannot be said to have been deliberately indifferent to that risk."[175] As for the delay in obtaining medical care, prison officials were once again let off the hook. They were not found liable for the delay in obtaining medical treatment since the delay was not long enough to constitute an Eighth Amendment violation.[176]

In *Lewis v. Richards*,[177] Tommy Ray Lewis filed a § 1983 claim against prison officials at the Westville Correction Center ("WCC"), arguing that they violated his Eighth Amendment right to be free from cruel and unusual punishment by being deliberately indifferent to three separate incidents in which Lewis was sexually assaulted.[178]

Lewis was serving a four-year sentence in the general prison population when two members of the Gangster Disciples, a notorious prison gang, raped him in the dormitory.[179] Lewis immediately reported the rape to prison officials only to be confronted by twenty members of the gang who threatened him with physical harm if he ever told anyone else about the attack.[180] Months later, Lewis again told prison officials about the rape and more than half a year later was transferred to a different dormitory.[181] Two months after he was transferred, Lewis was raped, choked and stabbed by two members of the Disciples.[182] Lewis immediately reported the attack and filed a grievance with prison officials complaining about the rape and attack.[183]

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171 *See id.*

172 *See id.*

173 *See id.* at 1241.

174 *Id.*

175 *Id.*

176 *See Langston*, 100 F.3d at 1241.

177 107 F.3d 549 (7th Cir. 1997).

178 *See id.* at 551.

179 *See id.*

180 *See id.* This incident led Lewis to believe that the prison official told members of the gang instead of the proper authorities about the rape. *Id.*

181 *See id.*

182 *See Lewis*, 107 F.3d at 551-52.

183 *See id.* at 552.

He was finally placed into protective custody and filed his first § 1983 claim alleging that prison officials were deliberately indifferent to the first two rapes.[184] In March of 1993, Lewis was placed into the psychiatric ward on suicide watch after assaulting a nurse.[185] While there, three members of the Disciples who claimed that they were avenging Schaefer, the inmate who perpetrated the second assault, raped him again.[186] Prison officials contended that the third rape was actually consensual sexual activity between Lewis and the other prisoners.[187]

In reviewing Lewis's complaint, the Seventh Circuit found that Lewis failed to present sufficient evidence regarding the first two attacks to survive summary judgment.[188] The court found that the fact that an inmate sought and was denied protective custody was not dispositive of the fact that prison officials were deliberately indifferent to Lewis's safety.[189] Instead Lewis would have to demonstrate that the defendants consciously ignored the facts and took no actions to remedy the situation.[190] Upon reviewing the record, the court found that moving Lewis to another part of the prison was sufficient action on behalf of officials to cut off any liability stemming from deliberate indifference to Lewis' safety caused by the first two rapes.[191] Classifying the prison officials' behavior as "poor judgment," the court held that "[e]xercising poor judgment, however, falls short of meeting the standard of consciously disregarding a known risk to his safety."[192] Commenting on the third rape, the court held that there could be no final disposition on the issue since a disciplinary hearing regarding the issue of consensual sex had not yet occurred.[193] Although they held that Lewis did not have any fruitful § 1983 claims, the Seventh Circuit cautioned "[p]rison officials to take any and all reasonable steps to stamp out gang violence in their respective institutions."[194]

Together, the cases of *Billman, Langston* and *Lewis* further muddle the way in which the deliberate indifference standard should be applied. In *Billman,* Judge Posner allowed a cause of action and inferred deliberate indifference because the perpetrator was a known rapist. In *Lewis,* the fact that the plaintiff was raped three times by members of the same gang, all of

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184 *See id.*
185 *See id.*
186 *See id.*
187 *See id.*
188 *See Lewis,* 107 F.3d at 553.
189 *See id.*
190 *See id.*
191 *See id.* 553-54.
192 *Id.* at 554.
193 *See id.* at 555.
194 *Lewis,* 107 F.3d at 555.

whom were known violent criminals, was not enough to prove knowledge and deliberate indifference. In *Langston*, evidence presented that Joliet had a policy of single-celling prisoners who were in disciplinary segregation was also not enough to infer knowledge.[195] Billman was double celled with a known sexual predator, while Langston and Luis were both witnesses to murders and serving sentences for murder. They were both "snitches" who were placed in protective custody and their marginal status made them much more susceptible to prison rape. After synthesizing these cases, only one thing remains clear: proving deliberate indifference is arbitrary and unevenly applied.

The Eight Circuit Court of Appeals has also had an opportunity to weigh in on the deliberate indifference issue. In *Spruce v. Sargent*,[196] Kendell Spruce, a prisoner at the Arkansas Department of Corrections brought suit under § 1983 against Willis Sargent, the Unit Warden; Larry Norris, the Assistant Director of the Arkansas Department of Corrections; and Donald Tate, the Unit Captain, alleging that they failed to protect him from numerous sexual assaults.[197]

Spruce alleged that between January and December 1991, more than twenty different prisoners, at least one of whom infected him with the HIV virus, repeatedly raped him.[198] The case was tried before a jury and the defendants moved for judgment as a matter of law at the end of Spruce's evidence.[199] The district court granted the motion with respect to Sargent and Norris and the jury returned a verdict in favor of Tate.[200] Spruce appealed.

Upon reviewing the record, the Eighth Circuit found that that there was sufficient evidence to find that Warden Sargent had been deliberately indifferent to Spruce's safety.[201] Documents introduced by Spruce demonstrated that Sargent was aware of the rapes and at one point denied Spruce's request to not be celled with a particular inmate who had forced him to perform oral sex against his will.[202] In addition, Sargent's own testimony that he was aware of the fact that inmates in the prison had to fight against sexual aggressors and that it was "the inmates own responsibility to let people understand that they're not going to put up with that," made his deliberate indifference to Spruce's safety even more obvious.[203] At the same

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195 100 F.3d 1235, 1238 (7th Cir. 1997). It was also unclear as to why Langston was double-celled since there were empty cells in the disciplinary unit at that time. *Id.*

196 149 F.3d 783 (8th Cir. 1998).

197 *See id.* at 785.

198 *See id.*

199 *See id.*

200 *See id.*

201 *See id.* at 786.

202 *See Spruce*, 149 F.3d at 786.

203 *Id.*

time, the court did not find sufficient evidence that Assistant Director John Norris had the requisite subjective knowledge of the risk that Spruce would be raped.[204] The evidence presented against Norris was composed of a grievance form signed by Norris in which Spruce complained of being forced to cell with prisoners from the general population, of being jumped on by a fellow prisoner and of the mental stress that Spruce suffered as a result of these actions.[205] In regards to Norris's liability the court held that "'[a]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation,' is not 'deliberate indifference' to an inmate's health or safety and therefore not a violation of the Eighth Amendment."[206]

In *Perkins v. Grimes*,[207] the Eighth Circuit again took up the issue of prison rape. Kenneth Dean Perkins, appealed from an adverse judgment entered against him by the district court on his § 1983 failure to protect claim.[208] On September 8, 1995, Perkins was arrested for public intoxication, booked and placed for five hours into a holding cell at the Sebastian County, Arkansas, Adult Detention Center.[209] Perkins shared a cell with R.B. Lee Wilson who was also in jail for public intoxication.[210] Wilson was larger and heavier than Perkins and used his size and strength to demand sexual favors from him.[211] During this confrontation, Perkins began knocking on the cell door and as a jailer came to peer through the small cell window, Perkins began to silently mouth the word "help."[212] His pleas were ignored and twenty minutes later he was thrown against a wall and raped by Wilson.[213] After the rape, one of the jailers opened the door and asked if Wilson was "getting some."[214] Although he did not officially report the rape to his jailers, Wilson raped Perkins one more time before his release.[215] Perkins then went to the local emergency room where he was treated for injuries consistent with prison rape.[216] A criminal investigator was called to investigate the complaint. He determined that rape charges should be brought against Wilson, who ultimately plead guilty to the charges.[217]

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204 *See id.*
205 *See id.* at 786.
206 *Id.* (quoting *Farmer*, 511 U.S. at 838).
207 161 F.3d 1127 (8th Cir. 1998).
208 *See id.* at 1128-29.
209 *See id.* at 1129.
210 *See id.*
211 *See id.*
212 *Id.*
213 *See Perkins*, 161 F.3d at 1129.
214 *Id.*
215 *See id.*
216 *See id.*
217 *Id.*

Upon review of the relevant evidence, the Eighth Circuit ultimately found that jail employees were not deliberately indifferent to Perkins' safety.[218] The court found that although the officers knew Wilson, he never seemed to be a physical threat to people unless they "mouthed off."[219] In addition, officers perceived "no potential risk of harm, especially since the jailers conducted routine cell checks," and they were "no more than twenty feet away from the holding cell at all relevant times."[220] In fact, it was the jail's policy to check all of the cells at least four to five times an hour.[221] Although the court agreed with Perkins that jail employees were on notice as to Wilson's reputation as a disruptive inmate, "it found that they had no notice that Wilson posed a threat of serious injury to Perkins because Perkins did not effectively alert them that he faced such a threat."[222] They also found that the evidence indicated that "Perkins and Wilson had previously been housed together without incident and that Perkins' jailers neither knew, nor had reason to know, that Wilson was a violent sexual aggressor, either on this or on a previous occasion."[223] The court concluded their decision by holding that "[h]owever degrading the attacks upon Perkins. . . the district court did not clearly err in finding that the defendant did not act with deliberate indifference to Perkins' safety."[224]

While the decisions of the Sixth, Seventh and Eighth Circuits serve only as a cross-sample of findings regarding the deliberate indifference standard as it applies to prison rape,[225] they are representative of how courts interpret

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218 *See id.* at 1130.

219 *Perkins*, 161 F.3d at 1129

220 *Id.*

221 *See id.*

222 *Id.* at 1130.

223 *Id.*

224 *Id.* (internal citation omitted).

225 For more circuit court decisions, see generally, Giroux v. Somerset County, 178 F.3d 28 (1st Cir. 1999) (holding that there was a genuine and material issue of fact precluding summary judgment about the scope of defendant prison official's responsibility and whether he abdicated responsibility in placing inmate in holding cell with another inmate who assaulted him despite knowing that the inmate was on cell feed status which could indicate protective custody); Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997) (holding that a genuine issue of material fact existed, precluding summary judgment for corrections officers in §1983 action by inmate who was allegedly assaulted in his cell by other inmates, and who claimed that officer violated his Eighth Amendment right to be free from cruel and unusual punishment by opening door to plaintiff's cell for attacking inmates, or by permitting someone else to open it, existed as to whether officer was personally involved with assault); Nami v. Fauver, 82 F.3d 63 (3d Cir. 1996) (holding that allegations made by inmates under protective custody in particular unit at youth correctional facility were sufficient to state §1983 claim for cruel and unusual punishment, where inmates alleged that double celling of inmates in unit had resulted in increase in assaults, psychological stress, that unit inmates were required to spend twenty-four hours a day in their cells except for limited time for out of cell recreation, visits and job assignments, that unit inmates had more limited out of cell recreation time than general population, that access to drug and alcohol programs as well as to jobs and educational programs was more restricted for unit inmates than for general population, that unit inmates were required to wear painful device when transported to other locations and that letters had been written to administration concerning all matters set forth in inmates' §1983 complaint); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)

and apply the standard. After synthesizing the case law, one thing remains clear, courts unevenly apply the deliberate indifference standard. Defendants are found to be deliberately indifferent when they are shown to have actual knowledge of danger or a risk of danger to a prisoner's health or safety.[226] Yet according to *Farmer v. Brennan*, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted."[227]

How does a prisoner plaintiff prove that the action taken by the defendant was unreasonable? What type of behavior is actually unreasonable inside a prison? Is it unreasonable to double-cell prisoners, to let known sexual predators run free, and to house transsexuals, the mentally retarded and mentally ill in the general population? Looking at the decisions of the Sixth, Seventh and Eighth Circuits, the answer would be yes, everything is reasonable and anything goes:

> Why would deliberately indifferent behavior seem reasonable? The answer: to maintain order, hierarchy and the status quo. Prison officials use a range of tactics to maintain order: Corrections officers and prison administrators have also been known to threaten to expose prisoners to a greater threat of rape in order to evoke good behavior, to punish, or to squeeze out information . . . . For instance, guards tolerate some sexual domination among prisoners because it serves to divide them into perpetrators and victims, thus diminishing the likelihood of united resistance. Hierarchy is pervasive, steeped with intimidation. Guards intimidate prisoners, and the stronger prisoners intimidate the weaker ones.[228]

This hierarchical system involves prisoners, guards, wardens and the general public for it mirrors the strict hierarchy of the world outside the prison system. This social structure is strengthened when "[a] prison rapist 'enslaves' a new prisoner, a prison guard bashes the crotch of an inmate with his fist during a pat search, and a husband pressures his wife to have kinky sex in order to demonstrate his control."[229]

The patriarchal hierarchy is furthered when wardens sell vulnerable prisoners to fellow inmates.[230] According to Donald Sabo, "[e]ach man

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(holding that Eighth Amendment right of prisoners to be free from sexual abuse was clearly established prior to the time of alleged sexual assault by prison guard on male-to-female transsexual prisoner, and no reasonable prison guard could possibly have believed otherwise, thus defeating guard's claim of qualified immunity from prisoner's Eighth Amendment claim under §1983).

226 *See* Spruce v. Sargent, 149 F.3d 783, 786 (8th Cir. 1998).

227 *Farmer*, 511 U.S. at 844.

228 Sabo et al., *supra* note 11, at 12 (internal citation omitted).

229 *Id.* at 13.

230 *See* PINAR, *supra* note 32, at 1065. "Young men were used as 'gifts' from prison officials to

resides on a cultural continuum that reverberates the patriarchal forces of the larger gender order."[231] In applying this gendered hierarchy analysis to the deliberate indifference standard, one can place prisoners, prison officials and the court system on the same cultural continuum. All are players in the same game. Circumstantially, everyone has the requisite knowledge to be held accountable for their actions, yet the courts create legal fictions, such as the deliberate indifference standard, in order to keep prison officials free from liability. It is for this reason that the deliberate indifference standard should be a rebuttable presumption to be disproved by prison officials. If prison officials faced legal liability every time a prisoner's health or safety was compromised, the prison system would fall apart. Prisoners are at risk from the minute they enter prison to the moment they leave. In fact, due to the failure of the prison system to rehabilitate prisoners, ex-cons are just as, if not more vulnerable, outside of prison than they were inside.[232]

V. BEYOND *FARMER*: STOPPING PRISON RAPE

According to Lara Stemple, "[t]he risks associated with sexual assault in prison . . . extend beyond prison walls. Families, loved ones, and the general public are affected by the debilitating and sometimes dangerous aftermath of prisoner rape."[233] As more people become incarcerated, constituents are pressuring Congress to make prisons safer and more orderly. On September 3, 2004, President George Bush signed the Prison Rape Elimination Act of 2003 ("PREA") into law.[234] This law is the first of its kind to be passed in order to deal with sexual assault behind bars. The PREA mandates that a number of measures be taken to prevent prison rape and promote prisoner health and safety. First, it authorizes the Bureau of Justice Statistics to carry out a yearly comprehensive statistical review and analysis of the incidents and effects of prison rape.[235] This data will be compiled by conducting surveys and public hearings as well as establishing a review panel on prison rape,

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inmate leaders who helped them keep the institution quiet. One ex-prisoner claims to have been presented to an 'entire wing of the prison, as a bonus to the convicts for their good behavior.'" *Id.*

231 Sabo, *supra* note 11, at 13-14.

232 *See id.* at 15. Sabo, Kupers and London discuss the failure of the prison system when they ask, who benefits from the failures of imprisonment? "Politicians who base their prospects for election on 'tough-on-criminals' rhetoric, contractors who build the new prisons, vendors who supply the prisons, and corporations that run prisons for profit or utilize prison labor to undercut competition." *Id.*

233 Lara Stemple, *In Support of the "Prison Rape Reduction Act of 2002,"* (July 31, 2002), *available at* http: www.spr.org/en/reductionactstatement.html (internal citation omitted).

234 *See* Press Release, Stop Prison Rape, Stop Prison Rape Calls on the Senate Judiciary Committee to Pass the Prison Rape Reduction Act of 2002 (July 30, 2002), *available at* http: www.spr.org/en/pressreleases/pr_02_073002.html.

235 *See* Prison Rape Elimination Act of 2003, Pub. L. No. 108-79 § 4, 117 Stat. 972, 975 (2004).

which will report its findings to Congress.[236] Second, the PREA actively supports the prevention and prosecution of prison rape.[237] To this end, the Attorney General has been empowered to carry out a program that collects complaints from prisoners, transmits them to the appropriate federal, state and local authorities and periodically reviews states' responses to prisoner complaints.[238] In addition, a national clearinghouse of information has been created in order to provide information and assistance to federal, state and local authorities responsible for prevention, investigation and punishment of prison rape.[239] Third, the PREA provides cash grants to state and local governments, as well as prisons and prison systems to, "(A) undertake more effective efforts to prevent prisons rape; (B) investigate incidents of prison rape; or (C) prosecuting incidents of prison rape."[240] Fourth, the Act establishes a National Prison Rape Reduction Commission.[241] This Commission will undertake a comprehensive study of the social, economic, political, mental and physical impacts of prison rape.[242] The PREA also calls for the adoption of national standards for the "detection, prevention, reduction, and punishment of prison rape."[243]

As Lara Stemple notes, the Prison Rape Elimination Act "provides a much-needed framework for change."[244] But eradicating prison rape takes more than passing legislation and setting legal precedent. Grassroots work inside the prison system needs to be done to provide direct assistance. Prison officials can immediately take "[s]imple prevention measures such as pairing cellmates according to risk."[245] It is well known that rape is a private crime that is often perpetrated "at night and in hidden areas that are difficult to monitor."[246] In order to remedy this problem, "[a]ll prisons should at all times be staffed with sufficient numbers of correctional officers to ensure effective monitoring and control of the prison population. Officers should make regular rounds, closely monitoring prisoner's treatment and ensuring that abuse does not occur."[247] Departments of Corrections can also assist prisoners by creating and offering counseling programs to both victims and perpetrators of prison rape. In addition, orientation programs dedicated to prison rape prevention can be held for

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236 *See id.* at § 6 (b).
237 *See generally id.* at § 3.
238 *See id.*
239 *See id.* at § 5 (a)-(c).
240 *See id.* at § 6 (a), (b)(1)(A)-(C).
241 *See* Pub. L. No. 108-79 at § 7 (a).
242 *See id.* at § 4.
243 *Id.* at § 8 (1).
244 Stemple, *supra* note 233, at 4.
245 *Id.*
246 *Id.*
247 HUMAN RIGHTS WATCH, *supra* note 2, at 15.

incoming prisoners.[248]

While physical changes in prison administration will assist in ameliorating the scourge of prison rape, only structural change will prove lasting. Most importantly, we must rethink the institutionalization of punishment. Changing the relationship between punishment and institutional racism and sexism will make prison rape obsolete as a viable tool of social control. Patriarchal oppression affects all aspects of society and as Sabo, Kupers and London remind us, "we are all, in a sense, prisoners of hegemonic masculinity and its institutional and cultural moorings. By sorting through the gendered aspects of punishment today, we will be in a better position to change ourselves and the institutions that hem us in."[249]

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[248] *See id.* at 16.

[249] Sabo et al., *supra* note 11, at 17.