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DUTY-TO-PROTECT CLAIMS BY INMATES AFTER THE PRISON RAPE ELIMINATION ACT

*David K. Ries**

Roderick Johnson was on probation in Texas for a nonviolent burglary offense.¹ In January 2000, Johnson's probation was revoked and, within nine months, he was transferred to a maximum-security prison.² The prison officials responsible for Johnson's cell assignment there "knew that Johnson was homosexual and possessed an effeminate manner,"³ but placed him in the prison's general population after telling him "we don't protect punks on this farm."⁴ Soon afterward a prison gang asserted ownership over Johnson and forced him into daily sex acts.⁵ Throughout his eighteen-month stay in prison, Johnson

* Brooklyn Law School Class of 2006; B.A. Vassar College, 1998. I thank the members of the *Journal of Law & Policy* as well as the various practitioners who took the time to answer my questions. Special thanks go to all those who read drafts of this Note: Ursula Bentele, Liz Budnitz, Eve Cary, Matt Keller, Claire Kelly, Skye Phillips, Kathryn Razin, and Cory Shindel. Lastly, thanks to Jean Kaminsky, for her love and support.

¹ Roderick Keith Johnson v. Gary Johnson, 385 F.3d 503, 512 (5th Cir. 2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

"The Crips already had a homosexual that was with them," Mr. Johnson explained. "The Gangster Disciples, from what I understand, hadn't had a homosexual under them in a while. So that's why I was automatically, like, given to them." According to court papers and [Johnson's] own detailed account, the Gangster Disciples and then other gangs treated Mr. Johnson as a sex slave. They bought and sold

“sought help from guards, filed numerous ‘life-endangerment’ forms, and wrote letters to prison administrators,” but he remained in the facility’s general population.⁶ During those eighteen months, Johnson was passed among various prison gangs, and rape became a routine part of his prison life.⁷

Prison rape, disturbingly a running joke in popular culture,⁸ is conservatively estimated to occur 12,000 times a year and affect nearly thirteen percent of the nation’s prisoners.⁹ In 1994, in *Farmer v. Brennan*,¹⁰ the Supreme Court held that no legitimate penological purpose is served by allowing rape to occur within

him, and they rented him out. Some sex acts cost \$5, others \$10.

Id.

⁶ *Johnson*, 385 F.3d at 513.

⁷ Liptak, *supra* note 5, at A1. “‘I was forced into oral sex and anal sex on a daily basis,’ said Mr. Johnson, who has been living in a boarding house [in Austin, Texas] since his release in December [2003]. ‘Not for a month or two. For, like, 18 months.’” *Id.*

⁸ Sabrina Qutb & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time Just What Part of Prison Rape Do You Find Amusing?*, S.F. CHRON., June 9, 2002, at D2, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/06/09/IN181350.DTL>.

⁹ The Prison Rape Elimination Act, 42 U.S.C. § 15601(2) (2005) (“[E]xperts have conservatively estimated that at least 13% of the inmates in the United States have been sexually assaulted in prison”). The estimate of 12,000 rapes comes from the corrections industry. Eli Lehrer, *A Blind Eye, Still Turned: Getting Serious About Prison Rape*, NAT’L REVIEW, June 2, 2003, at 10. “Even if this is the actual number, it still represents more rapes than are reported annually against women in New York City, Los Angeles, Philadelphia, Boston, San Diego, and Phoenix combined.” *Id.* Higher estimates have been made. Extrapolating from the findings of a study of Nebraska’s prison system by Professor Cindy Struckman-Johnson of the University of South Dakota to the national level, Human Rights Watch cites a total of more than 140,000 inmates who have been anally raped while in prison. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 130 (2001) [hereinafter NO ESCAPE], available at <http://www.hrw.org/reports/2001/prison>. These rapes occur within a national prison system of federal and state facilities that, in 2001, held at least 24,147 prisoners known to be HIV-positive. LAURA MARUSCHAK, U.S. DEP’T OF JUSTICE, HIV IN PRISONS, 2001 2 (2004) [hereinafter HIV IN PRISONS 2001], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp01.pdf>.

¹⁰ 511 U.S. 825 (1994).

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prisons.¹¹ Further, the Court held that inmates who are raped in prison due to the “deliberate indifference” of prison officials suffer cruel and unusual punishment within the meaning of the Eighth Amendment to the U.S. Constitution.¹² This decision was handed down fourteen years after Justice Blackmun noted in his dissent in *United States v. Bailey* that rape was a fact of prison life.¹³ Johnson’s case suggests that this continues to be true in 2005.¹⁴ Once a prisoner has been raped, or “turned out” in prison parlance,¹⁵ that prisoner (or “punk”)¹⁶ can expect to be continuously raped by other sexual predators and shared among prison gang members throughout his sentence.¹⁷ Alternatively, the prisoner’s body may become the property of a single dominating prisoner.¹⁸ This occurs despite the Supreme Court’s statement that sexual assault is “simply not part of the penalty that criminal

¹¹ *Farmer*, 511 U.S. at 833 (holding that “allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objective’”).

¹² *Id.* at 832-33.

¹³ *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) “A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.” *Id.* (footnote omitted).

¹⁴ *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004).

¹⁵ NO ESCAPE, *supra* note 9, at 90-91.

¹⁶ *Id.* at 93.

¹⁷ *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 929 (S.D. Tex. 1999).

The evidence before this court revealed a prison underworld in which rapes, beatings, and servitude are the currency of power. Inmates who refuse to join race-based gangs may be physically or sexually assaulted. To preserve their physical safety, some vulnerable inmates simply subject to being bought and sold among groups of prison predators, providing their oppressors with commissary goods, domestic services, or sexual favors.

Id.

¹⁸ *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004). In presenting the facts of the case, the Court of Appeals described Roderick Johnson’s experience, writing that “[i]n October 2000, not long after his arrival in the general population, a prison gang member named Hernandez asserted ‘ownership’ over Johnson, forcing Johnson to become his sexual servant.” *Id.* at 512.

offenders pay for their offenses against society.”¹⁹

The 108th Congress endeavored to rid U.S. prisons of sexual assault by passing the Prison Rape Elimination Act of 2003 (PREA).²⁰ Congress incorporated into the statute a cause of action under *Farmer* for inmates who have been subjected to rape.²¹ Additionally, Congress authorized funding for the Bureau of Justice Statistics to study this issue and created the National Prison Rape Elimination Commission to recommend national standards for eradicating prison rape.²² The PREA, by mandating the collection of records and the creation of standards for prison management, may aid future plaintiffs who, like Johnson, bring legal claims against prison officials who fail in their duty to protect prisoners from sexual assault by other prisoners.

Both Congress and the Supreme Court have now expressed the need for prison administrators to address inmate-on-inmate rape in

¹⁹ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The Court held that “[prison] conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.” *Farmer*, 511 U.S. at 834.

²⁰ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601-15609). For discussion of the lobbying effort behind the passage of the Prison Rape Elimination Act, see James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 3-8 (2004).

²¹ 42 U.S.C. § 15601(13) (2005). Presuming that Congress knew the case law on prison rape, the PREA was passed in part to further inform the meaning of liability for deliberate indifference to rape.

The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Id. (citation omitted). “Fighting prison rape is also affirmatively mandated by the Constitution.” 149 CONG. REC. H7765 (daily ed. July 25, 2003) (statement of Rep. Robert C. Scott).

²² 42 U.S.C. §§ 1560304, 15606 (2005). See *infra* Parts III.A., III.B for discussion of the Prison Rape Elimination Act.

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correctional facilities.²³ However, Congress's effort to eliminate prison rape may be undermined by the discretion the statute affords to federal and state executive bodies in implementing preventive programs.²⁴ Officials responsible for state prison systems may continue to deny the extent of prison rape within their facilities, while facility administrators may continue to tolerate its existence.²⁵ Therefore, to have their constitutional rights

²³ MATHEW BENDER & CO. CIVIL RIGHTS ACTIONS TREATISE § 2.09(C) (2004). "Prison officials have a clearly established duty not to be deliberately indifferent to physical or sexual assaults or the possibility of such assaults on inmates by other inmates." *Id.* (citing *Farmer v. Brennan*, 525 U.S. 825 (1994)); 42 U.S.C. § 15601(13) (2005) (incorporating the Supreme Court's holding into the PREA by stating that "[i]n *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment") (citation omitted).

²⁴ See Olga Giller, Note and Comment, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659, 688-89 (2004) (writing of the PREA that "eradicating prison rape takes more than passing legislation and setting legal precedent. . . . While physical changes in prison administration will assist in ameliorating the scourge of prison rape, only structural change will prove lasting"). See also Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 N. ENG. L. REV. 391 (2005).

Opponents to the PREA feel that the Act is simply an empty gesture that does show high-level governmental recognition of the problem of prison rape, but does not provide for any real remedy. Robert Weisberg and David Mills, writing for MSN Slate, claim that "the main thing the law aims to do is collect data," a goal that will prove difficult because of "unreliable observations and underreporting inherent in prison assault" and redundant because many reports produced by various organizations across the country provide the same information that the government seeks to obtain.

Id. at 427 (citing Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, MSN SLATE, Oct. 1, 2003, at <http://slate.msn.com/id/2089095>).

²⁵ Within state systems, prison officials deny that the problem of prison rape is as substantial as prisoners, or even prison staff, report. NO ESCAPE, *supra* note 9, at 133-35. Whereas staff at three Nebraska state prisons estimated that sixteen percent of inmates "were being pressured or forced into sexual contact" in a 1996 study, *id.* at 135, over half of all state corrections departments officials surveyed by Human Rights Watch reported that sexual assault occurred too

vindicated, inmates will be forced to bring suits that rely on *Farmer*, but will prevail only when they can show that “deliberate indifference” by wardens or other prison officials contributed to the assaults they endured.²⁶ Federal courts may grant administrators discretion in prisoners’ rights cases,²⁷ but this discretion should not include the power to ignore the threat of sexual assault to prisoners under their control.

This note explores the potential uses of the PREA in litigation brought by inmates against prison officials for “deliberate indifference” to the threat of rape. Part I describes the procedures used and the obstacles faced by prisoners who bring lawsuits challenging the conditions of their imprisonment. Part II discusses the Supreme Court’s “deliberate indifference” standard for holding prison supervisors liable for Eighth Amendment violations and examines the application of this standard by the federal courts to claims brought by prisoners in response to assaults within prisons. Part III presents a review of the PREA and outlines some of the prison programs that could be implemented as a result of the legislation. Lastly, Part IV of this note discusses ways in which future plaintiffs who sue prison officials for deliberate indifference to a risk of sexual assault will be able to use the PREA in their lawsuits.

infrequently to maintain data. *Id.* at 133.

Penal security staffs will also, if not encourage, then definitely tolerate a homosexual relationship by a potentially troublesome prisoner, theorizing that a prisoner who is getting some degree of emotional and sexual gratification from his prison “wife” is less likely to cause trouble than a prisoner who is not because he’s comfortable and, once emotionally attached, he will not want to lose his “wife”.

WALTER RIDEAU & RON WILKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 88-89 (1992).

²⁶ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

²⁷ *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (“[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.”).

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I. PRISONER LITIGATION

Under 42 U.S.C. Section 1983 (Section 1983), inmates can sue prison staff for violations of their Eighth Amendment right to be free from cruel and unusual punishment.²⁸ Lawsuits alleging harms against a prisoner perpetrated by another prisoner are brought as “condition-of-confinement” claims²⁹ on the theory that when an individual is held in custody, there is a corresponding duty assumed by the government to ensure that the individual will remain safe.³⁰ Only in the last quarter of the twentieth century have prisoner challenges to conditions of confinement been recognized by the Supreme Court as valid claims under the Eighth Amendment.³¹ This expansion of constitutional protection has

²⁸ 42 U.S.C. § 1983 (2005). In relevant part, the statute states:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id. See *infra* Part I.A. Federal officials are sued for violations of prisoners’ rights in actions known as “Bivens claims” pursuant to the Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). For city officials who are responsible for the conditions of city jails, liability under Section 1983 is controlled by the Supreme Court’s decision in *Monell v. Dep’t of Social Serv.*, 436 U.S. 658 (1978).

²⁹ See *infra* part I.B. *Flint v. Ky. Dep’t of Corr.*, 270 F.3d 340, 352 (6th Cir. 2001). “Where the harm is perpetrated by another prisoner, rather than by a government official, the claim is characterized as one of ‘conditions of confinement,’ rather than of ‘excessive use of government force.’” *Id.* (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 400-01 (6th Cir. 1999)).

³⁰ *DeShaney v. Winnebago County Dep’t of Social Serv.*, 489 U.S. 189, 199-200 (1989). “[W]hen the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.*

³¹ *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981) (describing expansion

since been limited by further decisions of the Supreme Court and by Congress's passage of the Prison Litigation Reform Act.³²

A. Prisoner Claims under Section 1983

Section 1983 provides a right of action for a person who suffers "a deprivation of any rights, privileges, or immunities secured by the Constitution" under color of law.³³ State prisoners may bring claims under this statute³⁴ for violations of their First Amendment rights to expression,³⁵ association,³⁶ and religion,³⁷ as well as their due process rights,³⁸ privacy rights under the Fourth Amendment,³⁹ and Eighth Amendment rights.⁴⁰ Federal prisoners are able to bring similar claims against federal prison officials, known as "Bivens claims," following the Supreme Court's

of Supreme Court's interpretation of the Eighth Amendment "beyond the barbarous physical punishments at issue in the Court's earliest cases" to reach conditions "that are 'totally without penological justification'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

³² See *infra* Part I.C.

³³ 42 U.S.C. § 1983 (2005).

³⁴ *Monroe v. Pape*, 365 U.S. 167 (1961) (discussing reasons for applying Section 1983 to the states and stating of the Act that one "aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice").

³⁵ *Procunier v. Martinez*, 416 U.S. 396 (1974) (hearing a claim brought by California state inmates under § 1983 to challenge censorship of prisoner mail).

³⁶ *Turner v. Safley*, 482 U.S. 78 (1987) (hearing a claim brought by Missouri state inmates to challenge prison restrictions on inmate-to-inmate communications as well as inmate marriages).

³⁷ *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 347 (1987) (hearing a claim brought by New Jersey state inmates under § 1983 challenging prison regulation that prevented them from attending a Muslim congregational service).

³⁸ *Sandin v. Conner*, 515 U.S. 472, 476 (1995) (hearing a claim brought by a Hawaii state inmate under § 1983 for a deprivation of procedural due process in connection with a prison disciplinary hearing).

³⁹ *Hudson v. Palmer*, 468 U.S. 517, 520 (1984) (hearing a claim brought by a Virginia state inmate under § 1983 challenging a search of his cell for contraband as unreasonable under the Fourth Amendment).

⁴⁰ *Hudson v. McMillian*, 503 U.S. 1 (1992) (hearing a claim brought by a Louisiana state inmate under § 1983 for guards' use of excessive force).

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decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁴¹ The Supreme Court has held that supervisors of state employees may be held liable for their subordinates' conduct under Section 1983 only when there is an "affirmative link" between a violation of a plaintiff's constitutional rights and the supervisor's own official conduct.⁴² In the context of an inmate's lawsuit, the Court held that Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right."⁴³ Thus, supervisors can only be held liable for their own culpable conduct, not for that of their subordinates through respondeat superior.⁴⁴

Supervisors may be liable for "failure to supervise"⁴⁵ as well as "failure to train" employees under their control.⁴⁶ A supervisor's

⁴¹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that federal courts have jurisdiction over claims of constitutional rights violations under 28 U.S.C. § 1331); *see also* Michael Irvine, *Excerpts from a Jailhouse Lawyer's Manual, Fifth Edition: Chapter 17: Using 42 U.S.C. § 1983 and 42 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305, 349 (2000) [hereinafter *Jailhouse Lawyer's Manual § 1983*].

⁴² *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (holding that supervisors of the Philadelphia police department were not liable for unconstitutional mistreatment by police officers because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the defendants]—express or otherwise—showing their authorization or approval of such misconduct"). *See* Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147, 151-52 (1997) [hereinafter Kinports].

⁴³ *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986) (affirming summary judgment for defendant where inmate claimed a negligent deprivation of liberty without due process under the Fourteenth Amendment because he suffered injuries caused by defendant's misplacement of a pillowcase in a jailhouse stairway).

⁴⁴ Kinports, *supra* note 42, at 153 (describing that *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978), "signaled the Court's unwillingness to impose respondeat superior liability on supervisors").

⁴⁵ *Monell*, 436 U.S. at 694 n.58 ("By our decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.").

⁴⁶ *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that

direct participation in a constitutional rights violation also will make that supervisor liable under Section 1983, as will the creation of policies or customs that lead to a foreseeable violation.⁴⁷ Noting that the Supreme Court has not established a standard for supervisory liability under Section 1983 separate from the constitutional standard applied to violations of the specific right alleged, Professor Kit Kinports has identified various factors that courts of appeals use in assessing supervisors' culpability:

[T]he courts of appeals tend to agree that five interrelated factors ought to be considered in applying that [constitutional] standard and determining whether a particular supervisor is liable on the facts of a given case: (1) the extent to which prior similar incidents have occurred; (2) the supervisor's response to those prior incidents; (3) the supervisor's response to the specific incident on which the suit is based; (4) the extent to which the supervisor can be considered a cause of the violation; and (5) the nature of the supervisor's awareness of the constitutional misconduct.⁴⁸

Since state governments are immune from legal claims by way of the Eleventh Amendment,⁴⁹ courts must find individual officials

"inadequacy of [government employee] training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact"). For cases applying "failure to train" liability to supervisors, see Kinports, *supra* note 42, at 165-68.

⁴⁷ *Jailhouse Lawyer's Manual § 1983*, *supra* note 41, at 308.

⁴⁸ Kinports, *supra* note 42, at 169.

Although the courts agree that these are the relevant considerations, they have not been consistent in applying them. As a result, the courts have reached contrary outcomes in similar cases, seemingly without any regard to the particular standard of supervisory liability they purport to be applying. And all too often, they have been unduly generous in ruling in favor of supervisory officials.

Id.

⁴⁹ *Papasan v. Allain*, 478 U.S. 265, 276 (1986).

The [Eleventh] Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

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liable for their injuries to provide prisoners with redress. Individual officials whose conduct is within the scope of Section 1983 may nevertheless be immune from liability. The Supreme Court held in *Imbler v. Pachtman*, for example, that legislators, judges, and prosecutors receive absolute immunity when sued under Section 1983, unless they commit “willful deprivations of Constitutional rights.”⁵⁰ Other government officials avoid liability under Section 1983 when they act in their “official capacities.”⁵¹ However, pursuant to the Supreme Court’s decision in *Monell v. Department of Social Services*, officials can be sued under Section 1983 for their execution of a government policy or custom when that policy or custom is the “moving force of the constitutional violation” alleged.⁵² This has provided the means for holding government supervisors liable when those supervisors represent government policy.⁵³

Government officials may be found liable for damages when their conduct is beyond the scope of their official capacities; thus, they are said to have “qualified immunity.”⁵⁴ The doctrine of

Citizens of another State, or by Citizens or Subjects of any Foreign State.” This language expressly encompasses only suits brought against a State by citizens of another State, but this Court long ago held that the Amendment bars suits against a State by citizens of that same State as well.

Id. (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

⁵⁰ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

⁵¹ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (holding that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983”).

⁵² *Monell v. Dep’t of Social Serv.*, 436 U.S. 658, 694 (1978).

[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. . . . [T]his case unquestionably involves official policy as the moving force of the constitutional violation.

Id.

⁵³ *Id.* at 694.

⁵⁴ *Id.* at 707 (Powell, J., concurring). “It has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity.” *Id.* (citing *Wood v.*

qualified immunity deems government officials liable only when “it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted.”⁵⁵ This applies to all 1983 claims and severely limits the ability of plaintiffs to win damages under Section 1983.⁵⁶ To defeat a government official’s motion for qualified immunity, a plaintiff must first demonstrate that a violation of federal or constitutional law indeed occurred and then proceed to show that the violated law was clearly established and that a reasonable official would have understood his conduct to be a violation.⁵⁷ When defendants prevail on grounds of qualified

Strickland, 420 U.S. 308 (1975); *Procunier v. Navarette*, 434 U.S. 555 (1978)).

⁵⁵ *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

⁵⁶ Sheldon Nahomad, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L. Q. 613, 637-38 (2002).

The damages remedy functions not only to deter unconstitutional conduct but also to compensate innocent people as a matter of corrective justice. Regrettably, however, the Supreme Court has all too often emphasized the possible over-deterrence of government officials and employees at the expense of providing corrective justice to those harmed by unconstitutional conduct. It is fair to say that this move has been based on the Court’s intuition about the non-meritorious nature of many 1983 claims, to say nothing of its concern for federalism, and its apparent distaste for many 1983 plaintiffs, especially prisoners. It was on such grounds, for example, that the Court transformed qualified immunity, originally a defense to liability, into an immunity from suit, effectively converting it, primarily for instrumental reasons, into a kind of absolute immunity.

Id. (footnotes omitted).

⁵⁷ *Saucier*, 533 U.S. at 201-02.

A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? . . . [T]he next, sequential step is to ask whether the right was clearly established. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Id. Relying on Supreme Court decisions is the most persuasive means for a plaintiff to claim that the right allegedly violated was clearly-established at the time of their injury. *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991) (holding that the Sixth Circuit looks “first to decisions of the Supreme Court” in

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immunity, plaintiffs' constitutional harms may be left uncompensated, and only plaintiffs who seek injunctive relief or take solace in further establishing the law for future litigants will be satisfied.⁵⁸

For plaintiffs using Section 1983 to remedy a constitutional harm, injunctive relief is generally available as are both compensatory and punitive damages.⁵⁹ Only when state and municipal officials are sued in their "individual capacities," however, can they be held liable for monetary damages.⁶⁰ Plaintiffs suing officials in their "official capacities" can expect to receive at most injunctive relief.⁶¹ For prisoners, both the injunctive relief and monetary relief available under Section 1983 and through Bivens claims have been severely limited by the Prison Litigation

determining whether rights are clearly established for purposes of qualified immunity). Courts of Appeals decisions clearly establish the law in their own circuits. The Supreme Court's decision in *Hope v. Pelzer*, held that a Department of Justice report warning prison officials that their conduct might violate the Eighth Amendment provided notice sufficient to deny them qualified immunity. 536 U.S. 730 (2002). This raises the question of what role administrative regulations might generally play in clearly establishing law for qualified immunity purposes. See Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 709-10 (2004).

⁵⁸ John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 113 (1999).

Qualified immunity disfavors the backward-looking remedy of cash payments to victims of past harms and, in so doing, opens the door to forward-looking remedies requiring investments in the future. Structural reform injunctions walk through that door. They direct resources toward preventing future harms rather than compensating past injuries, thereby implementing the bias in favor of the future that qualified immunity invites and allows.

Id.

⁵⁹ See Daniel D. Williams, *Twenty-Eighth Annual Review of Criminal Procedure: VI. Prisoners' Rights: Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 87 GEO. L.J. 1940, 1944-45 (1999). A prevailing plaintiff may also recover attorney's fees. 42 U.S.C. § 1988 (2005).

⁶⁰ *Jailhouse Lawyer's Manual § 1983*, supra note 41, at 309.

⁶¹ *Id.*

Reform Act.⁶² The Supreme Court also has reined in the discretion of federal courts to fashion injunctions to prevent violations of prisoners' constitutional rights.⁶³ Therefore, even successful prisoner-plaintiffs face difficulties in obtaining meaningful relief.

B. Challenges to Conditions of Confinement

Until late in the twentieth century, the Eighth Amendment's prohibition against "cruel and unusual punishments" was applied only to criminal sentences.⁶⁴ However, through its decisions in *Estelle v. Gamble* and *Rhodes v. Chapman*, the Supreme Court

⁶² See *infra* Part I.C.

⁶³ *Lewis v. Casey*, 518 U.S. 343 (1996) (reversing a decision of the Ninth Circuit that upheld an injunction ordering improvements to a prison system's law libraries).

The actual-injury requirement would hardly serve the purpose we have described above— of preventing courts from undertaking tasks assigned to the political branches —if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.

Id. at 357 (emphasis in original); *Bell v. Wolfish*, 441 U.S. 520, 544 (1979) (holding that judges ought to be discouraged from managing prisons).

The court might disagree with the choice of means to effectuate [security] interests, but it should not "second-guess the expert administrators on matters on which they are better informed. . . . Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?"

Id. at 544 (quoting *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978)).

⁶⁴ *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For 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.

Id.

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interpreted the Cruel and Unusual Punishments Clause of the Eighth Amendment to include prison conditions.⁶⁵ These decisions came during a period in which the federal courts had employed a “totality-of-circumstances” analysis to issue structural injunctions intended to prevent prison conditions from becoming overly harsh.⁶⁶

In *Estelle v. Gamble*, a case brought as a challenge to the level of medical care offered in a Texas state prison, a prisoner claimed that he had received inadequate treatment for an injury he sustained while performing a prison work assignment.⁶⁷ The Supreme Court used its established Eighth Amendment doctrine of measuring punishments against “evolving standards of decency” to hold that the constitutionality of conditions of imprisonment could

⁶⁵ *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981). Arguments against this extension of the Eighth Amendment persist in Supreme Court dissents by Justice Thomas and in commentary. See, e.g., Sara Rose, Comment, “Cruel and Unusual Punishment” Need Not Be Cruel, Unusual, or Punishment, 24 CAP. U.L. REV. 827 (1995).

⁶⁶ Russel W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U.L. REV. 1339, 1352 (1992) (citing Courts of Appeals decisions from 1970 through 1985 that applied the totality of circumstances test); John Jeffries, *supra* note 58, at 111-12. Professor Jeffries argues that remedies exceeded rights when courts ordered more structural injunctions, because

courts increasingly focused on prophylactic precautions against the risk of constitutional violations. Over time, specific remedial strategies that recurred in one case after another assumed a life of their own. They underwent a subtle transformation from ad hoc remedies for independently demonstrated unconstitutionality of confinement to normative criteria for assessing the acceptability of prison operation. In effect, remedies became quasi-rights. . . . Whether this phenomenon is described as remedy exceeding right or as remedy implicitly redefining right or as remedy merely becoming a “criter[ion] by which . . . lawfulness is judged” is for present purposes immaterial. The important point is that in structural reform litigation, courts prospectively and selectively impose requirements that in other remedial contexts would not be constitutionally compelled.

Id. at 111-12 (quoting in part Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 638 (1981)).

⁶⁷ *Estelle*, 429 U.S. at 98.

be assessed under the Eighth Amendment.⁶⁸ The Court held, however, that whereas the “evolving standards of decency” assessment provided an objective test for determining whether a punishment was cruel and unusual, claims regarding conditions of confinement required an inquiry into the subjective intent of the prison’s officers.⁶⁹ The Court adopted a “deliberate indifference” standard for evaluating the actions of prison officials.⁷⁰ The Court required a finding of “wanton infliction of pain” in order to hold prison officials liable for unconstitutional prison conditions.⁷¹ This standard was intended to limit the liability of prison officials to the creation or support of conditions that could genuinely be deemed “cruel” under the Eighth Amendment.⁷² Although the Court deemed the medical care offered to the prisoner a condition of his confinement, it denied that any inadequacies in the prisoner’s care constituted cruel and unusual punishment.⁷³ The Court maintained that, in general, defendant prison officials should be found at fault under this standard only when the conditions are “wanton,” as only

⁶⁸ *Id.* at 102. “[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’” *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁶⁹ *Id.* at 105-06.

[A]n inadvertent failure to provide adequate medical care cannot be said to constitute “an unnecessary and wanton infliction of pain” or to be “repugnant to the conscience of mankind”. . . . In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend “evolving standards of decency” in violation of the Eighth Amendment.

Id.; Gray, *supra* note 66, at 1357-58 (explaining that the Supreme Court’s state-of-mind requirement for conditions of confinement derives from the Eighth Amendment’s explicit proscription only of punishment).

⁷⁰ *Estelle*, 429 U.S. at 104 (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”) (citation omitted).

⁷¹ *Id.* at 104.

⁷² *Wilson v. Seiter*, 501 U.S. 294, 297-98 (1991) (discussing the holding of *Estelle v. Gamble*).

⁷³ *Estelle*, 429 U.S. at 107-08.

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then can the prison conditions at issue be considered “punishment.”⁷⁴

Having accepted that conditions of confinement could impose constitutional harms on prisoners, the Supreme Court soon was faced with the task of determining more precisely which conditions merited judicial scrutiny. In *Hutto v. Finney*,⁷⁵ a majority of the Court held that the “interdependence of the conditions producing the violation”⁷⁶ justified “a comprehensive order to insure against the risk of inadequate compliance.”⁷⁷ Shortly thereafter, the Court examined a challenge under the Eighth Amendment to overcrowded prison conditions.⁷⁸ In *Rhodes v. Chapman*, the Court considered “whether the housing of two inmates in a single cell . . . is cruel and unusual punishment”⁷⁹ as a condition of confinement or as the root cause of other harms suffered by inmates.⁸⁰ The majority decision held that the so-called “double-celling” of inmates was not unconstitutional per se,⁸¹ rather, “restrictive and

⁷⁴ *Seiter*, 501 U.S. at 300. For a discussion of the subjective element of the Eighth Amendment’s application to conditions of confinement, as defined in *Farmer v. Brennan*, see *infra* Part II.A.

⁷⁵ *Hutto v. Finney*, 437 U.S. 678, 684 (1978) (affirming an injunction against the Arkansas prison system “that placed limits on the number of men that could be confined in one cell, required that each have a bunk, discontinued the ‘grue’ diet, and set 30 days as the maximum isolation sentence”).

⁷⁶ *Id.* at 688.

⁷⁷ *Id.* at 687.

⁷⁸ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁷⁹ *Id.* at 339.

⁸⁰ *Id.* at 340.

Asserting a cause of action under 42 U. S. C. § 1983, [plaintiffs] contended that “double celling” at [their facility] violated the Constitution. The gravamen of their complaint was that double celling confined cellmates too closely. It also was blamed for overcrowding at [the prison], said to have overwhelmed the prison’s facilities and staff. As relief, respondents sought an injunction barring petitioners, who are Ohio officials responsible for the administration of SOCF, from housing more than one inmate in a cell, except as a temporary measure.

Id.

⁸¹ *Id.* at 350. “The question before us is . . . whether the *actual* conditions of confinement . . . are cruel and unusual.” *Id.* (emphasis added).

even harsh” conditions were a constitutional “part of the penalty that criminal offenders pay for their offenses against society.”⁸² The Court emphasized, however, that conditions of confinement may not be “grossly disproportionate to the severity of the crime warranting imprisonment.”⁸³

Further, the *Rhodes* decision refocused the inquiry conducted by the court in *Estelle* and *Hutto* by examining whether the allegedly unconstitutional condition caused “unquestioned and serious deprivations of basic human needs” comprising “the minimal civilized measure of life’s necessities.”⁸⁴ The Court’s subsequent decision in *Wilson v. Seiter*⁸⁵ accepted this inquiry as the objective test for evaluating prison conditions under the Eighth Amendment, holding that, whether alone or in isolation, conditions of confinement are cruel and unusual when they deprive prisoners of “a single, identifiable human need.”⁸⁶ In subsequent condition of confinement cases, the Supreme Court recognized that “human needs” include food, clothing, shelter, medical care, and reasonable

⁸² *Id.* at 347. “[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.” *Id.*

⁸³ *Id.* “Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.” *Id.*

⁸⁴ *Id.*

In *Estelle v. Gamble*, we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. In *Hutto v. Finney*, the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities.

Id.

⁸⁵ 501 U.S. 294 (1991).

⁸⁶ *Id.* at 304. See also Gray, *supra* note 66, at 1384-85 (discussing *Wilson v. Seiter*’s rejection of the “totality of circumstances” test in favor of the “core conditions” or “single identifiable human need” test).

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safety.⁸⁷ The Supreme Court's condition of confinement decisions also clarified that state officials may be held responsible for the constitutional harms to which inmates are exposed during imprisonment.⁸⁸

In *Helling v. McKinney*, the Court extended the protection of the Eighth Amendment to prospective violations, noting that it would be "odd" for courts to ignore the threat of future constitutional harms.⁸⁹ In that case, a prisoner challenged the conditions of his confinement based on the imminent danger posed by the secondhand smoke to which he was exposed by his cellmate.⁹⁰ Recognizing the potential validity of the prisoner's claim, the Court remanded the case to the trial court for a determination regarding whether the conditions complained of were sufficiently serious to satisfy both the objective and

⁸⁷ *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 199-200 (1989), and citing cases, *infra* note 88.

⁸⁸ *Helling v. McKinney*, 509 U.S. 25, 33 (1994). "It is cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Id.* (citing *DeShaney*, 489 U.S. at 200; *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982)); *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring) ("[H]aving chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the 'contemporary standard of decency' required by the Eighth Amendment.") (citing *DeShaney*, 489 U.S. at 198-200); *id.* at 199-200 (1989).

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e. g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id.; see also Will A. Smith, Comment, *Civil Liability for Sexual Assault in Prison: A Challenge to the "Deliberate Indifference" Standard*, 34 CUMB. L. REV. 289, 309-11 (2003) (describing applications of this dicta from *DeShaney* as a "state-created-danger theory" of liability).

⁸⁹ 509 U.S. 25 (1994).

⁹⁰ *Id.* at 28. "The complaint . . . alleged that respondent was assigned to a cell with another inmate who smoked five packs of cigarettes a day. . . . Respondent sought injunctive relief and damages for [prison officials] subjecting him to cruel and unusual punishment by jeopardizing his health." *Id.*

subjective tests of deliberate indifference.⁹¹ The Court held that a challenge to a future harm requires a likelihood and seriousness beyond what “a scientific and statistical inquiry” can provide.⁹² A prisoner must show both that the future harm threatens to deprive him of an identifiable human need and “that the risk of which he complains is not one that today’s society chooses to tolerate.”⁹³ In *Farmer v. Brennan*, the Court resolved that protection against sexual assault is a human need warranting protection under the Eighth Amendment.⁹⁴

C. The Prison Litigation Reform Act: An Obstacle to Prisoner Rape Suits

In 1996, the course of prison litigation was altered still further through Congress’s enactment of the Prison Litigation Reform Act (PLRA).⁹⁵ The PLRA was passed to address a perceived deluge of

⁹¹ *Id.* at 35.

⁹² *Id.* at 36. “[W]ith respect to the objective factor, determining whether McKinney’s conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to [secondhand smoke].” *Id.*

⁹³ *Id.* For a more complete discussion of the Court’s treatment of imminent dangers in *Helling v. McKinney*, see Katherine L. Frazier, Comment, *Constitutional Law – Helling v. McKinney: Future Risks of Harm Actionable Under the Eighth Amendment*, 25 U. MEM. L. REV. 1479 (1995).

⁹⁴ *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994).

[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. . . . [P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates. In particular . . . prison officials have a duty to protect prisoners from violence at the hands of other prisoners. . . . [G]ratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective [nor] squares with evolving standards of decency.

Id. (quotations and citations omitted).

⁹⁵ Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in 18 U.S.C. § 3636, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997, and other scattered sections).

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frivolous and meritless prisoner claims that overwhelmed the federal courts.⁹⁶ The legislation significantly limits the types of claims and remedies that are available to inmates.⁹⁷ Indeed, in 1997, the number of prisoner civil rights suits filed decreased by thirty-one percent,⁹⁸ by 2000, that number decreased further to forty percent less than before passage of the PLRA.⁹⁹

Prior to the enactment of the PLRA, the Attorney General was responsible for certifying that each state prison system's grievance procedure was in compliance with standards issued pursuant to the Civil Rights of Institutionalized Persons Act.¹⁰⁰ A court would scrutinize a prison's administrative grievance procedure before

⁹⁶ Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1658 (2002).

PLRA proponents declared their intention to curtail the number of frivolous and meritless inmate suits clogging the federal judiciary. They then used exaggerated examples of inmate complaints to suggest subtly that all inmate suits are frivolous and meritless. While proponents provided assurances that meritorious inmate suits would not be affected by the PLRA, they made little effort to acknowledge that meritorious inmate suits do exist.

Id.

⁹⁷ 42 U.S.C. § 1997e(c) (2005). "The court shall . . . dismiss any action brought with respect to prison conditions . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." *Id.*

⁹⁸ Randall S. Jeffrey, *Restricting Prisoners' Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 BUFFALO L. REV. 1099, 1108 n.29 (2001) (citing Crawford-El v. Britton, 523 U.S. 574, 597 n.18 (1998) (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 28 tbl. C-2 (2000)).

⁹⁹ Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1525 (2003).

¹⁰⁰ Civil Rights of Institutionalized Persons Act, Pub L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. §§ 1997-1997j (1994)). For discussion of how this certification program was administered ineffectively by the Justice Department, see Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1320 (1991).

deciding whether to dismiss the inmate's claim for failure to exhaust his administrative remedies.¹⁰¹ The PLRA, however, limited judicial scrutiny of grievance procedures to the simple question of whether a prison made any remedies available through a grievance procedure.¹⁰² Thus, under the PLRA, federal courts will dismiss a Section 1983 suit brought by a prisoner if administrative remedies are available and the prisoner has failed to exhaust them.¹⁰³ The PLRA also raised the stakes for dismissals of claims by enacting a "three strikes" provision for prisoners' court fee waivers.¹⁰⁴ Prisoners whose lawsuits were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim" on three prior occasions would become ineligible for fee waivers in all future actions or appeals.¹⁰⁵

Under the PLRA, in order to prevail on a claim for compensatory damages, a prisoner must demonstrate a physical

¹⁰¹ 42 U.S.C. § 1997 (1994). See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483 (2001).

¹⁰² Branham, *supra* note 101, at 498. "The only substantive requirement remaining on the face of [42 U.S.C. § 1997(e)] that administrative remedies must meet in order for the exhaustion requirement to apply is that the remedies be 'available.'" *Id.*

¹⁰³ 42 U.S.C. § 1997(e) was amended by the Prison Litigation Reform Act to make exhaustion of administrative remedies a requirement of litigation. "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2005).

¹⁰⁴ 28 U.S.C. § 1915(g) (2005).

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id.

¹⁰⁵ *Id.* Jeffrey, *supra* note 98, at 1133.

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injury.¹⁰⁶ Congress categorically denied recovery for mental and emotional injuries to prisoners without evidence of “actual injury,” a requirement that the federal courts already maintained.¹⁰⁷ The PLRA also placed limitations on the injunctive relief available to inmates.¹⁰⁸ The statute mandates that federal courts may order only narrowly-drawn injunctions that address the likelihood of a specific injury’s reoccurring.¹⁰⁹ Despite these restrictions, prisoners continue to bring suits asking courts to enjoin prison supervisors and improve unsafe conditions.¹¹⁰

¹⁰⁶ 42 U.S.C. § 1997e (2005). “Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” *Id.*

¹⁰⁷ See *Carey v. Phipus*, 435 U.S. 247, 264 (1978) (“[A]lthough mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”); *Slicker v. Jackson*, 215 F.3d 1225, 1229 (11th Cir. 2000) (holding that “compensatory damages under § 1983 may be awarded only based on *actual injuries* caused by the defendant and cannot be presumed or based on the abstract value of the constitutional rights that the defendant violated”) (citing *Carey*, 435 U.S. at 264; *Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986)); *But see Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003) (holding that “mental injury suffices for Eighth Amendment cruel and unusual punishment cases”). For a discussion of how the physical injury requirement fails to further the goals of the PLRA and may be unconstitutional, see Jennifer Winslow, Comment, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655 (2002).

¹⁰⁸ 18 U.S.C. § 3626(a) (2005). “Prospective relief . . . shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff.” *Id.* § 3626(a)(1)(A). “Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” *Id.* § 3626(a)(2).

¹⁰⁹ *Id.* § 3626(a). “The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” *Id.*

¹¹⁰ See *Nami v. Fauver*, 82 F.3d 63 (3d Cir. 1996) (inmates housed in protective custody sought injunctive relief challenging conditions of their

In the context of prison sexual assault cases, the PLRA creates numerous procedural hurdles. Researchers have noted that the Act's exhaustion requirement is particularly problematic because inmates fear retaliation from their assailants if they make use of administrative grievance procedures by reporting threats or even actual assaults.¹¹¹ Further, the physical injury requirement calls for evidence that prison medical or psychiatric facilities may not reliably collect or maintain.¹¹² Moreover, in seeking injunctive relief, prisoner-plaintiffs basing their claims on continuing threats of assault have a difficult burden in proving the likelihood that they will be attacked again in the future.¹¹³ Finally, the PLRA could limit relief to an order concerning a specific cellmate's protective custody status, excluding broader suits that would protect other inmates as well.¹¹⁴

confinement in relation to general population inmates); *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wyo. 2002) (inmates who suffered a risk of assault from their conditions of confinement at a Wyoming state prison prevailed in having the court instruct prison management to consent to enforcement of specific administrative regulations already in place at the facility).

¹¹¹ See *Flint v. Ky. Dep't of Corr.*, 270 F.3d 340 (6th Cir. 2001) (deciding a suit brought by a father after his son was murdered in prison by another inmate who mistakenly "accused Flint of 'ratting' on him"); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 THE PRISON J. 379, 380 (2000). "[M]any researchers have noted that sexual assault is likely to be underreported by male inmates because of fears of reprisals, unwillingness to be a 'snitch,' and fear of being labeled a homosexual or weak." *Id.* (citations omitted).

¹¹² *Butler v. Dowd*, 979 F.2d 661, 669 (8th Cir. 1992) (affirming plaintiffs' award of nominal damages for multiple rapes because no "objective medical evidence supporting their physical injuries or detailing the extent of their emotional injuries" was presented at trial).

¹¹³ *Id.* at 674 ("Although [plaintiff] claims that he is still subject to threats from fellow inmates, he does not claim that he is still subject to sexual assault.").

¹¹⁴ *Cf. Miller v. French*, 530 U.S. 327, 347 (2000) (holding that "[t]he PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right").

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II. SUPERVISORY LIABILITY FOR INMATE-ON-INMATE ASSAULTS

In *Rhodes v. Chapman*, the Supreme Court addressed the problem of prison overcrowding and held that officials have no general duty to make prisons “free of discomfort.”¹¹⁵ Officials in that case were not liable for inmate-on-inmate assaults under the Eighth Amendment where those assaults were claimed to be a result of overcrowded conditions and the double-celling of inmates.¹¹⁶ In *Farmer v. Brennan*, the Supreme Court heard the case of a prisoner who claimed an Eighth Amendment violation grounded in the fact that prison officials had imposed unconstitutional conditions on the prisoner specifically and had allowed the prisoner to be assaulted by other inmates.¹¹⁷ The “deliberate indifference” standard defined in that decision has

¹¹⁵ *Rhodes v. Chapman*, 452 U.S. 336, 349 (1981). “[T]he Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes, cannot be free of discomfort.” *Id.*

¹¹⁶ *Id.* at 342-43, 348-49. “As to violence, the [trial] court found that the number of acts of violence at [the prison] had increased with the prison population, but only in proportion to the increase in population. Respondents failed to produce evidence establishing that double celling itself caused greater violence” *Id.* at 342-43. This led the Court to hold that “there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.” *Id.* at 348. *But see id.* at 375. “There is no dispute that the prison was violent even before it become overcrowded, and that it has become more so. Contrary to the contention by the majority, I do not assert that violence has increased due to double celling. I accept the finding of the District Court that violence has increased due to overcrowding.” *Id.* (Marshall, J., dissenting) (emphases and citations excluded).

¹¹⁷ *Farmer v. Brennan*, 511 U.S. 825 (1994).

[Plaintiff’s] complaint alleged that respondents either transferred petitioner to [a particular facility] or placed petitioner in [that prison’s] general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who “projects feminine characteristics,” would be particularly vulnerable to sexual attack by some [of the prison’s] inmates. This allegedly amounted to a deliberately indifferent failure to protect petitioner’s safety, and thus to a violation of petitioner’s Eighth Amendment rights.

Id. at 830-31.

since been applied to claims in which there is a connection between a prison official's conduct and the assault of an inmate by another inmate.¹¹⁸ Prisoners have sought to hold supervisors liable in this way for conditions such as those unsuccessfully challenged in *Rhodes v. Chapman*.¹¹⁹ Some circuits have held that when a prisoner's particular double-cell assignment leads to a violent assault, a prison supervisor may be found liable for deliberate indifference to the prisoner's safety.¹²⁰

A. THE *FARMER* DELIBERATE INDIFFERENCE STANDARD

Following *Estelle v. Gamble*, federal courts differed with respect to the mental state required to subject prison officials to liability for prison conditions.¹²¹ Ten years after it considered the objective seriousness of injuries suffered by prisoners to find Eighth Amendment violations in *Rhodes v. Chapman*, the Court refocused the Eighth Amendment test on an inquiry into the mindset of prison officials in *Wilson v. Seiter*.¹²² The Court cautioned that a condition's effect on an inmate was not determinative of a violation of the Eighth Amendment; rather, a prison official's actions in subjecting an inmate to a specific condition of confinement, taken with deliberate indifference to the violation of an inmate's rights, would determine the existence of an Eighth Amendment violation.¹²³

Almost twenty years after defining the deliberate indifference standard for conditions of confinement claims in *Estelle v.*

¹¹⁸ See *infra* Part II.B.

¹¹⁹ See *infra* Part II.C. (discussing cases arising out of assaults that allegedly occurred because of prisons' use of double-celling).

¹²⁰ See *infra* Part II.C.

¹²¹ Compare *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) ("In *Estelle v. Gamble* . . . we said . . . only the unnecessary *and wanton* infliction of pain implicates the Eighth Amendment") (emphasis in original), with *Stokes v. Delacambre*, 710 F.2d 1120, 1126 (5th Cir. 1983) (describing that the decision in *Smith v. Wade*, 461 U.S. 30 (1983), "specifically upheld a standard of recklessness").

¹²² *Wilson v. Seiter*, 501 U.S. 294 (1991).

¹²³ *Id.* at 303.

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Gamble, the Court decided *Farmer v. Brennan* and more clearly defined for the federal courts the requirements of the deliberate indifference standard.¹²⁴ This clarification came in the context of a prison rape claim.¹²⁵ Dee Farmer, an eighteen-year-old transsexual convicted of credit card fraud, was placed in the general population of a federal prison and was raped numerous times by fellow inmates.¹²⁶ Farmer brought a pro se civil suit against the prison's warden and guards for failing to protect her from an ongoing threat of foreseeable sexual assault.¹²⁷

The *Farmer* decision reaffirmed that conditions of confinement could be violative of the Eighth Amendment.¹²⁸ Further, the Court set forth a two-prong test for determining when prison officials could be held liable for constitutional rights violations related to prison conditions.¹²⁹ Under the first prong, courts must consider whether the prison conditions were "objectively, sufficiently serious."¹³⁰ This prong makes use of the standard set forth in

¹²⁴ *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

¹²⁵ *Id.* at 830 (stating that "according to petitioner's allegations, petitioner was beaten and raped by another inmate in petitioner's cell. . . . [P]etitioner then filed a *Bivens* complaint, alleging a violation of the Eighth Amendment").

¹²⁶ *Id.* at 829 (describing that the plaintiff, Dee Farmer, "underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful 'black-market' testicle-removal surgery"); *Farmer v. Brennan*, 81 F.3d 1444, 1445 (7th Cir. 1996). "Farmer is serving a twenty year federal sentence for credit card fraud, which was imposed in 1986 when she was 18 years old." *Id.*

¹²⁷ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). This note uses the female pronoun to refer to Dee Farmer because, as stated by the Seventh Circuit in a decision following the Supreme Court's remand of the case, "Farmer uses the female pronoun to refer to herself, despite the fact that she is still biologically male. We will respect that preference" *Farmer v. Brennan*, 81 F.3d 1444, 1445 n.1 (7th Cir. 1996).

¹²⁸ *Farmer*, 511 U.S. at 832. "[T]reatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Id.* (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993)).

¹²⁹ *Farmer*, 511 U.S. at 834. "[A] prison official violates the Eighth Amendment only when two requirements are met." *Id.*

¹³⁰ *Id.* at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)).

Rhodes v. Chapman, which requires that the conditions challenged must deprive a plaintiff of a human need.¹³¹ To claim that prison officials failed to prevent a violation of an inmate's need for safety under the objective prong, a plaintiff must demonstrate "conditions posing a substantial risk of serious harm."¹³²

Under the second prong, the Court must determine whether prison officials had a "sufficiently culpable state of mind."¹³³ In clarifying the subjective prong of the standard, the Court considered both civil standards for liability as well as different criminal mental states.¹³⁴ Although prisoners' rights litigation consists of civil lawsuits, the Court adopted something akin to the criminal standard of "subjective recklessness."¹³⁵ The result was a

¹³¹ *Id.* at 834 (holding that "a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities") (citing *Rhodes v. Chapman*, 425 U.S. 337, 347 (1981)).

¹³² *Id.* at 834. "For a claim (like the one here) 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.* (citing *McKinney*, 509 U.S. at 35).

¹³³ *Farmer*, 511 U.S. at 837. As described by Judge Posner in a Seventh Circuit prisoner rape case:

Prison employees who act with deliberate indifference to the inmates' safety violate the Eighth Amendment. But to be guilty of "deliberate indifference" they must know they are creating a substantial risk of bodily harm. If they place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent—even grossly negligent or even reckless in the tort sense—in failing to know. But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.

Billman v. Indiana Dep't of Corr., 56 F.3d 785, 788 (7th Cir. 1995) (citations omitted).

¹³⁴ *Farmer*, 511 U.S. at 836-37. "With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other," the Court considered the civil and criminal standards of "recklessness," as well as the civil liability standard of "gross negligence." *Id.* at 836-37; *see also id.* at 836 n.4 (dismissing gross negligence as "typically meaning little different from recklessness as generally understood in the civil law").

¹³⁵ *Id.* at 839-40 (stating "subjective recklessness as used in the criminal

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deliberate indifference standard “somewhere between the poles of negligence at one end and purpose or knowledge at the other.”¹³⁶ The threshold for this standard is that an official must have been aware or should have been aware of the unconstitutional conditions established under the objective prong.¹³⁷ The Court noted that, in *Dee Farmer’s* case, the record contained statements by some defendants admitting knowledge of Farmer’s vulnerability to sexual assault.¹³⁸ The Supreme Court generally limited the liability of prison supervisors, however, by suggesting that “it remains open to the [defendant] officials to prove that they were unaware even of an obvious risk to inmate health and safety.”¹³⁹

Despite this difficult standard, the language of the *Farmer* decision suggests that demonstrating prison conditions that present a general threat of rape may be sufficient to satisfy both the objective and subjective prongs of the deliberate indifference test.¹⁴⁰ Courts thus might presume that a defendant had notice of a

law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause”).

¹³⁶ *Id.* at 836.

¹³⁷ *Id.* at 837 (holding “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate safety”).

¹³⁸ *Id.* at 848-49.

For example, in papers filed in opposition to respondents’ summary-judgment motion, petitioner pointed to respondents’ admission that petitioner is a “non-violent” transsexual who, because of petitioner’s “youth and feminine appearance” is “likely to experience a great deal of sexual pressure” in prison. And petitioner recounted a statement by one of the respondents, then warden of the penitentiary in Lewisburg, Pennsylvania, who told petitioner that there was “a high probability that [petitioner] could not safely function at USP-Lewisburg” an incident confirmed in a published District Court opinion.

Id. (citations omitted).

¹³⁹ *Farmer*, 511 U.S. at 844.

¹⁴⁰ *Id.* at 842-43.

For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus

threat to the plaintiff because the prison's conditions posed such an obvious risk to all inmates.¹⁴¹ Plaintiffs may show that a risk was "long-standing, pervasive, well-documented or expressly noted by prison officials in the past" and then link this information to their supervisors' awareness of the threat.¹⁴²

Under *Farmer*, "[a] failure to give advance notice is not dispositive";¹⁴³ rather, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."¹⁴⁴ Prior to *Farmer*, a prison guard or supervisor could be held deliberately indifferent only when an inmate reported a threat from a particular, identified aggressor.¹⁴⁵ In *Farmer*, however, the Court held that prison officials may be held liable when they are aware of a risk to an inmate despite their not knowing by whom that inmate is threatened.¹⁴⁶ The *Farmer* decision focused the inquiry of courts on the conduct of prison officials rather than on prisoners' own steps to inform prison

"must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Id.

¹⁴¹ Thus, when a defendant is aware of prison conditions generally, "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.

¹⁴² *Id.*

¹⁴³ *Id.* at 848.

¹⁴⁴ *Id.* at 842.

¹⁴⁵ *McGill v. Duckworth*, 944 F.2d 344, 349-50 (7th Cir. 1991) (deciding inmate-on-inmate rape claim prior to *Farmer* and holding that "[o]ther circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage") (citing *Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987); *Blankenship v. Meachum*, 840 F.2d 741 (10th Cir. 1988)).

¹⁴⁶ *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). "Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* For examples of courts using this language in determining deliberate indifference, see *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004); *Krein v. Norris*, 309 F.3d 487, 491-92 (8th Cir. 2002); *Lopez v. LeMaster*, 172 F.3d 756, 762 n.5 (10th Cir. 1999).

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officials of aggressive conduct by other inmates.¹⁴⁷

The Court also held that defendants may prevail “if they responded reasonably to the risk even if the harm ultimately was not averted.”¹⁴⁸ Indeed, the official’s response could preclude a prisoner’s claim for an injunction, even if that response postdates litigation.¹⁴⁹ A prisoner seeking injunctive relief must demonstrate a threat of future harm “in light of the prison authorities’ *current* attitudes and conduct”;¹⁵⁰ thus, the defendants “could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.”¹⁵¹

B. Supervisors’ Liability for Reported or Obvious Threats of Harm

Following from the Supreme Court’s precedents stating that personal safety is a human need that cannot be deprived under the Eighth Amendment,¹⁵² prisoners who are the victims of assault may try to hold prison supervisors directly liable for not preventing

¹⁴⁷ *Farmer*, 511 U.S. at 843-44. “If, for example, prison officials were aware that inmate rape was so common and uncontrolled . . . it would be obviously irrelevant to liability that the officials could not guess beforehand precisely who would attack [victims of assault.]” *Id.*

¹⁴⁸ *Id.* at 844.

¹⁴⁹ *Id.* at 847 n.9 (“[E]ven prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.”).

¹⁵⁰ *Id.* at 845 (emphasis added).

¹⁵¹ *Id.* at 847 n.9.

¹⁵² *Helling v. McKinney*, 509 U.S. 25, 33 (1994). “The [Eighth] Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’ It is ‘cruel and unusual punishment to hold convicted criminals in unsafe conditions.”” *Id.* (citing *Deshaney v. Winnebago County Dep’t of Social Serv.*, 489 U.S. 189, 200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982)).

their harm.¹⁵³ Without evidence establishing a direct connection between an official's own conduct and an inmate's harm, however, a warden or corrections official will be liable only for inmate-on-inmate assaults the circumstances of which were within the official's control.¹⁵⁴ As with other types of Section 1983 claims, wardens and other supervisors will not be held liable for claims against prison guards through respondeat superior.¹⁵⁵ Rather, the series of factors listed by Professor Kinports and quoted above will be applied to determine supervisory liability in prisoner assault cases.¹⁵⁶

¹⁵³ See, e.g., *Johnson v. Johnson*, 385 F.3d 503, 512 (5th Cir. 2004) ("This is a § 1983 suit brought by a former Texas prisoner against . . . defendant prison officials [who] failed to protect him from prison gangs who repeatedly raped him."); *Greene v. Bowles*, 361 F.3d 290, 292 (6th Cir. 2004) (reviewing a "[Section] 1983 suit against Warden Brigano and other prison officials resulting out of an attack on Greene by another inmate"); *Weiss v. Cooley*, 230 F.3d 1027, 1029 (7th Cir. 2000) (addressing a claim by the plaintiff "that the jail officials put him with other inmates who the officials knew would attack him").

¹⁵⁴ *LaMarca v. Turner*, 662 F. Supp. 647, 663 (S.D. Fla. 1987). "Where the defendants hold supervisory positions, vicarious liability will not suffice." *Id.* (citing *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978) for the proposition that a municipality will not be vicariously liable for the acts of its employees absent evidence that the injury inflicted was the result of official policy).

¹⁵⁵ "Respondeat superior or vicarious liability will not attach under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. at 694-95).

¹⁵⁶ Kinports, *supra* note 42, at 169.

[T]he courts of appeals tend to agree that five interrelated factors ought to be considered in . . . determining whether a particular supervisor is liable on the facts of a given case: (1) the extent to which prior similar incidents have occurred; (2) the supervisor's response to those prior incidents; (3) the supervisor's response to the specific incident on which the suit is based; (4) the extent to which the supervisor can be considered a cause of the violation; and (5) the nature of the supervisor's awareness of the constitutional misconduct.

Id. These same factors have been used by courts considering supervisory liability in inmate-on-inmate assault cases. For consideration of the occurrence of prior similar incidents, see *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1214 (D. Wyo. 2002). The court granted plaintiffs' motion for summary judgment on a claim of unconstitutional conditions at a prison, in part because the plaintiffs demonstrated that "between one hundred and three hundred inmate assaults"

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In a case brought under Section 1983, one of the factors to be considered in assessing supervisory liability is the supervisor's awareness of the constitutional misconduct for which the plaintiff brings suit.¹⁵⁷ Under the *Farmer* standard, a plaintiff-inmate has

occurred at the prison during a six year period without sufficient response from prison supervisors." *Id.* at 1214. The supervisor's response to prior incidents was considered in *Ware v. Jackson County*, 150 F.3d 873 (8th Cir. 1998). The court in that case affirmed a denial of the defendant county's motion for judgment as a matter of law in a suit over the plaintiff's rape by a subordinate corrections officer. The court stated that the corrections supervisors "were informed of the first set of allegations against [the subordinate]. However, there is no evidence that they were instructed to increase their supervision of [the subordinate]." *Id.* at 884. The defendant-supervisor's response to the incident before the court was a factor in *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999). By that decision, the court reversed summary judgment of inmate's claim against a supervisor, where "[a] juror could find that [defendant]'s abdication of his responsibility [to alert subordinates on his shift of plaintiff's protective status], in the face of such a known danger to [plaintiff]'s safety, was a reckless dereliction of duty." *Id.* at 34. The extent to which the supervisor himself caused the alleged incident was an important consideration in *Hale v. Tallaposa County*, 50 F.3d 1579 (11th Cir. 1995). Summary judgment for a jail supervisor was reversed where the plaintiff "presented sufficient proof of causation to survive summary judgment," by presenting evidence

sufficient to support a reasonable jury determination that the excessive risk of violence [at the facility] flowed from an atmosphere of deliberate indifference reflected in [the supervisor]'s failure to classify or segregate violent from non-violent inmates, assign inmates to cells or beds, adequately train the jailers, and adequately supervise and monitor the inmates.

Id. at 1584-85. Finally, the court looked to the supervisor's awareness of constitutional misconduct in *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wyo. 2002). Prison supervisors were found liable on a failure-to-discipline claim because they "admitted their knowledge of a substantial risk of serious harm to inmates, as well as their failure to discipline subordinates or take any other corrective action. In light of the undisputed facts, their failure to discipline amount[ed] to deliberate indifference." *Id.* at 1216. Also, in *Daskalea v. District of Columbia*, the court affirmed the district's liability for negligent supervision where the plaintiff inmate's Eighth Amendment rights were violated by "persistent, open and notorious conduct," which supervisors "failed to notice, let alone stop." 227 F.3d 433, 445 (D.C. Cir. 2000).

¹⁵⁷ Kinports, *supra* note 42, at 180-81.

The final factor that the courts of appeals tend to consider in

the best chance of proving the subjective prong of deliberate indifference when the inmate can show that he reported a threat of assault to the supervisor-defendant.¹⁵⁸ For example, a plaintiff in Arkansas who had been sexually assaulted in prison claimed that the warden of his facility was liable because the warden had reviewed some of the prisoner's requests for a change in cell assignment.¹⁵⁹ The trial court granted the warden judgment as a matter of law, holding that he lacked subjective knowledge of the risk to the plaintiff.¹⁶⁰ The Eighth Circuit, in *Spruce v. Sargent*, reversed this finding on the basis of evidence that the warden had also received reports that were filed by the prisoner after his cellmate forced him to perform oral sex.¹⁶¹ The court held that this evidence was sufficient for a jury to find that the warden had the notice required for deliberate indifference.¹⁶²

In determining whether to hold supervisors liable under Section 1983 for inmate-on-inmate assaults, courts also consider "the extent to which the supervisor can be considered a cause of the violation."¹⁶³ Officials can be linked to a deprivation of

determining a supervisor's liability for her subordinate's unconstitutional behavior is the nature of the supervisor's awareness of the risk of constitutional injury. The greater the supervisor's awareness of the problem, the more culpable she seems and the more likely the courts are to conclude that their particular standard of supervisory liability is met.

Id.

¹⁵⁸ *McGill v. Duckworth*, 944 F.2d 344, 349-50 (7th Cir. 1991). "Other circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage." *Id.* (citing Fourth Circuit and Tenth Circuit cases).

¹⁵⁹ *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998).

¹⁶⁰ *Id.* at 785.

¹⁶¹ *Id.* at 786.

¹⁶² *Id.* The Court of Appeals held "that there was sufficient evidence from which a jury could conclude that Warden Sargent knew Spruce was subject to an excessive risk of harm from sexual assault." *Id.*

¹⁶³ *Kinports*, *supra* note 42, at 178.

Given Section 1983's requirement that the defendant "subject[]" the plaintiff to a violation of her constitutional rights or "cause[] [her] to be [so] subjected," and the Supreme Court's requirement in *Rizzo v. Goode* of an "affirmative link" between the supervisory official and the

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constitutional rights when their failure to train subordinates caused those subordinates to act with deliberate indifference.¹⁶⁴ The connection between the resulting harm and the supervisor must be established through proof that the failure to train employees actually led to the violation of the individual's constitutional rights.¹⁶⁵

In *Lopez v. LeMaster*, the Tenth Circuit found that plaintiff Genaro Lopez failed to establish such a connection between a government supervisor and the inmate-on-inmate assault he suffered.¹⁶⁶ Lopez was an arrestee in the Jackson County jail in Oklahoma and was placed in a general population cell, where he was threatened by another inmate.¹⁶⁷ Although he reported the threat to his jailer, the jailer returned Lopez to the same cell; Lopez was subsequently beaten so severely as to leave jail the next day with a concussion and a strained spine.¹⁶⁸ Lopez brought suit against the sheriff who supervised the jail, claiming that the jailer

plaintiff's constitutional injury, causation issues often arise in cases involving supervisory liability.

Id.

¹⁶⁴ See *City of Canton v. Harris*, 489 U.S. 378 (1989) (finding municipality liability in § 1983 suit for inadequate training of police that led to constitutional rights violations); *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992) “[M]any § 1983 claims against municipalities [are molded] into ‘failure to train’ or ‘failure to supervise’ claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to a challenged incident.” *Id.* The court went on to discuss the application of *City of Canton v. Harris* to a claim that New York City was liable for its failure to train police not to cover up exculpatory evidence or to commit perjury.

¹⁶⁵ See *Wilson v. Town of Mendon*, 294 F.3d 1, 6 (1st Cir. 2002). “Liability will attach to the municipal employer . . . where a specific deficiency in training is the ‘moving force’ behind a constitutional injury.” *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 388-89, 391); *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001). “[W]hen a superior’s failure to train amounts to deliberate indifference to the rights of persons with whom his subordinates come into contact, the inadequacy of training may serve as the basis for § 1983 liability.” *Id.* (quotations and citations omitted).

¹⁶⁶ *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999).

¹⁶⁷ *Id.* at 758.

¹⁶⁸ *Id.* at 758-59.

to whom he complained was not properly trained.¹⁶⁹ This failure-to-train claim could not be sustained, however, because following his assault Lopez could not identify the jailer to whom he had reported the incident.¹⁷⁰ In addressing Lopez's appeal of a summary judgment order against him, the Tenth Circuit held that the identity of the jailer was necessary in order to establish the sheriff's liability.¹⁷¹ Lopez was unable to demonstrate that the particular jailer to whom he had complained had in fact not been trained or that his training had been insufficient.¹⁷² Lopez's suit survived, however, on his separate claim that the sheriff was generally responsible for the conditions at the jail.¹⁷³

In Section 1983 cases against government supervisors, courts also consider the supervisors' responses to the alleged constitutional violations as well as similar prior incidents in determining liability.¹⁷⁴ Putting in place measures that are known

¹⁶⁹ *Id.* at 760 ("Appellant alleges that his jailer's acts and omissions were the result of Sheriff LeMaster's failure to provide adequate training and supervision of jail personnel.")

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999).

Appellant has presented no evidence concerning deficiencies in training of the particular jailer involved in his case. Nor has he shown that the county had a policy of providing its jailers with insufficient training in the areas closely related to his ultimate injury from which we might infer that his particular jailer's training also was insufficient.

Id.

¹⁷³ *Id.* at 760-62. *See infra* text accompanying notes 179-82.

¹⁷⁴ Kinports, *supra* note 42, at 174-78. "As a general rule, the courts are more likely to find a supervisor liable the less adequate the remedial steps she has taken in response to prior violations." *Id.* at 174.

The third factor that some courts of appeals consider in determining a supervisor's liability for her subordinate's constitutional wrong is the nature of the supervisor's response to the particular incident that led to the suit. Although some courts refuse to take this factor into account on the grounds that the supervisor's conduct subsequent to the constitutional violation cannot in any way have contributed to it, other courts view the supervisor's failure to respond appropriately to the violation as evidence that she was deliberately indifferent to it or acquiesced in it and therefore met whatever standard of culpability the

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to be ineffective or enacting policies that are then not enforced will not satisfy the duty of officials to prevent harm.¹⁷⁵ Once an awareness of a threat to inmates is established, supervising officials have a duty to discipline subordinates who are complacent about potential harm to inmates.¹⁷⁶ Officials may be found deliberately indifferent if, after a general risk to inmate safety becomes known, they fail in their duty to prevent future assaults.¹⁷⁷ Courts have found that plaintiffs' claims are sufficient when they assert that unsafe conditions at corrections facilities were caused by supervisors' deliberate indifference and the claims are supported by evidence that prison officials knew of a general risk of rape to inmates.¹⁷⁸

court has chosen.

Id. at 177.

¹⁷⁵ See *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000) (affirming liability of the director of D.C. corrections for an inmate's sexual harassment despite the correctional facility's maintenance of a sexual harassment policy because "a 'paper' policy cannot insulate a municipality from liability where there is evidence . . . that the municipality was deliberately indifferent to the policy's violation"); *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (holding that the practice of not locking down violent inmates contributed to assaults, therefore continuation of that policy made supervisors liable).

¹⁷⁶ *Ware v. Jackson County*, 150 F.3d 873, 883 (8th Cir. 1998), *reh'g denied*, 1998 U.S. App. LEXIS 22587 (holding that the facility director "knew of allegations" of sexual abuse by corrections officers against inmates and the "failure to discipline adequately was regarded as evidence of deliberate indifference").

¹⁷⁷ *Id.* at 884 (holding that the jury's finding of supervisory liability for corrections officers' sexual misconduct was supported by defendant director's failure to "order any precautionary measures to protect . . . inmates from being further victimized").

¹⁷⁸ See *Krein v. Norris*, 309 F.3d 487, 488 (8th Cir. 2002) (claiming that defendant was deliberately indifferent to inmate safety, plaintiff alleges liability for "failing to provide adequate security"); *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) (upholding liability of a defendant warden when, during trial, that warden testified that "inmates had to 'fight' against sexual aggressors These statements amount to direct evidence of Warden Sargent's knowledge of the risk of sexual assault and/or rape in the unit"); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 77 (6th Cir. 1995) ("The heart of plaintiff's Eighth Amendment claim is that Warden Foltz . . . neither had a policy to identify and

On those grounds, the Tenth Circuit recognized the claim of Lopez against Sheriff LeMaster, even though Lopez could not identify the guard to whom he had reported a threat of assault.¹⁷⁹ Absent evidence to demonstrate that the sheriff's failure to supervise a particular jailer caused his harm, Lopez argued that the sheriff was liable for "constitutionally infirm conditions at the jail" that also contributed to his injuries.¹⁸⁰ Using standards of the Oklahoma Department of Health as "persuasive authority concerning what is required" to ensure inmate safety, the Tenth Circuit held that Lopez had stated a sufficient claim "that the sheriff was aware of and disregarded an excessive risk to inmate health and safety by failing to take reasonable measures to abate the risk."¹⁸¹ The court held that prior attacks at the jail could have put the sheriff on notice of the unsafe conditions, and an admission by the sheriff following a suicide at the jail served as "evidence that [the sheriff] was aware of the risk of harm to inmates resulting from inadequate supervision, and failed to take reasonable measures to prevent it."¹⁸² Thus, Lopez ultimately survived the defendant's summary judgment motion based on the defendant's awareness of general conditions at his facility, rather than his awareness of conditions of confinement specific to Lopez.

The Supreme Court held in *Farmer* 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."¹⁸³ However, the Tenth

screen those potential transferees who would not be safe in the camp nor created guidelines for prison staff to follow when screening inmates for transfer."); *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1209 (D. Wyo. 2002) (holding defendants liable in a class action suit where an "Eighth Amendment 'failure to protect' case [arose] out of a challenge to the existing conditions at the Wyoming State Penitentiary" at which inmate-on-inmate assaults were common but went unaddressed).

¹⁷⁹ *Lopez v. LeMaster*, 172 F.3d 756 (10th Cir. 1999). For the facts of this case, see text accompanying notes 92-97.

¹⁸⁰ *Id.* at 760-64 (considering "Sheriff LeMaster's individual liability for these conditions").

¹⁸¹ *Id.* at 760-61 (citations omitted).

¹⁸² *Id.* at 762.

¹⁸³ *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (internal quotations

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Circuit's reasoning in *Lopez v. LeMaster* suggests that the claims of prison rape victims will be made stronger through proof of a general lack of safety at the facilities in which the claimants were housed.¹⁸⁴ In a more recent decision by the Seventh Circuit, *Riccardo v. Rausch*, the court went so far as to *require* evidence of general conditions in order to demonstrate an objective harm from the likelihood that a sexual assault would occur.¹⁸⁵ The plaintiff in that case reported to a guard that he felt threatened by a particular inmate with whom he was subsequently assigned to share a cell.¹⁸⁶ The inmate brought suit against the guard, and a jury found that the defendant knew that Riccardo faced a threat of serious harm from the new cell assignment.¹⁸⁷ The court reversed, holding that the subjective prong of the *Farmer* standard requires a jury to consider facility-wide data in order to reasonably find that a serious risk was known to a defendant.¹⁸⁸ The Seventh Circuit held that "a

omitted).

¹⁸⁴ See also, *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76 (6th Cir. 1995) (denying defendant corrections supervisor's summary judgment motion because conditions at correctional facility were enough evidence to create a question of fact as to defendant's deliberately indifference).

¹⁸⁵ *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1589 (2005). The Seventh Circuit reversed a jury award of \$1.5 million to an inmate who was sexually assaulted by a cellmate after he had reported to a guard that he felt threatened by that cellmate.

¹⁸⁶ *Id.* at 525.

¹⁸⁷ *Id.* at 527.

¹⁸⁸ *Id.* at 527-28.

[T]here may be other ways to show both an objectively serious risk and the guards' knowledge of that risk. For example, Riccardo might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in [the facility where plaintiff was incarcerated] (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks even though Riccardo was unable to show that [the defendant] should have deemed [the cellmate] to present an especial risk. If violence is common at [the prison], and inmates have good track records in identifying potential

prisoner's bare assertion [of a risk] is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion."¹⁸⁹

C. Supervisory Liability for Deliberately Indifferent Cell Assignments

In applying *Farmer*, a number of circuits have recognized that the objective prong of the deliberate indifference standard may be satisfied when a prisoner is housed in disregard of the threat that the placement may pose.¹⁹⁰ In *Rhodes v. Chapman*, the Supreme Court held that, as a general practice, "double-celling" inmates

aggressors, then guards who do not have their heads in the sand must actually (that is, subjectively) understand the risk an inmate faces when a protest is disregarded. But if violence is rare, or if there is poor correlation between inmates' alarms and subsequent violence, then Riccardo's initial protest would not have provided [the defendant] with actual knowledge of an impending assault. . . . [A] prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.

Id.

¹⁸⁹ *Id.* at 528.

¹⁹⁰ See *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004) (reversing summary judgment because a jury could find warden liable for plaintiff's placement in unit with a dangerous inmate who later attacked plaintiff); *Riccardo v. Rausch*, 375 F.3d 521, 527 (7th Cir. 2004) (hypothesizing liability if, on similar facts, plaintiff had been placed in a cell with an inmate known to be a sexual predator); *Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003) (reversing summary judgment because a jury could find prison officials liable where the plaintiff was "double-celled with an aggressive homosexual"); *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002) (reversing the dismissal of the plaintiff's claim that the detention facility in which he was held "did not take measures to separate and house inmates according to their safety needs and the security risks they posed" and that this led to the plaintiff's rape); *Nami v. Fauver*, 82 F.3d 63, 67 (3d Cir. 1996) (reversing dismissal of plaintiff's claim against supervisors of juvenile detention facility where "complaint alleged that the increase in rapes and other assaults was a result of double-celling"). See also *James v. Tilghman*, 194 F.R.D. 408, 417 (D. Conn. 1999) (denying post-trial motions on the grounds that "the jury found fault with defendants' continued placement of [the assailant] in a cellblock with new prison admittees, despite strong suggestion of [the assailant's] sexual proclivities").

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does not violate the Eighth Amendment.¹⁹¹ In addition to decisions that have explicitly held that double-celling resulting in rape can be unconstitutional, circuits have broadened the holding of *Rhodes* so that conditions that deprive inmates of physical safety generally can constitute cruel and unusual punishment.¹⁹²

In 1996, the Third Circuit interpreted the *Rhodes* holding in *Nami v. Fauver*, a case brought by prisoners at a youth detention center against the commissioner of the New Jersey Department of Corrections and other correctional officials.¹⁹³ The plaintiffs sued under Section 1983, claiming cruel and unusual punishment due to their confinement in double-celled units.¹⁹⁴ Included was the allegation that “[d]ouble-celling has resulted in rapes and other assaults, as well as psychological stress.”¹⁹⁵ The district court had considered these allegations, but had dismissed the case, “finding that the claim based on these allegations lacked merit because the plaintiffs failed to show deliberate indifference.”¹⁹⁶ In reversing the lower court’s decision, the Third Circuit held that if the defendants were on notice that rapes had occurred at the facility and knew that double-celling contributed to that occurrence, a jury could find that “all officials were deliberately indifferent to the possibility that the conditions under which they housed the plaintiffs significantly increased the possibility of such well-known harms as prison rape.”¹⁹⁷

The Sixth Circuit has twice held, in cases involving transsexual

¹⁹¹ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

¹⁹² Barrett, Note, *supra* note 24, at 412-13, 422 (discussing the adoption of a “core conditions” standard for assessing the constitutionality of prison conditions and finding that the Eighth Circuit, the D.C. Circuit and the Second Circuit, have each adopted a test whereby double-celling could be a deprivation of physical safety on specific facts, and thus violate the Eighth Amendment under *Rhodes*).

¹⁹³ *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 65-66.

¹⁹⁶ *Id.* at 66 (internal quotations omitted).

¹⁹⁷ *Id.* at 68. The Court held that notice could be established through letters that the plaintiffs claimed to have written to the defendants. *Id.* at 67. This was an appeal of a motion to dismiss, so no substantial record existed for the basis of this decision.

prisoners as plaintiffs, that supervisors may be held liable when prisoners' placements leave them vulnerable to assault.¹⁹⁸ *Taylor v. Michigan Department of Corrections* came before the Sixth Circuit on an appeal of the defendant's qualified immunity from suit prior to the *Farmer* decision.¹⁹⁹ In 1995, the plaintiff appealed a second summary judgment order on the issue of whether the defendant warden could be held liable for a subordinate's deliberate indifference in transferring the plaintiff-prisoner to a facility that "posed a substantial risk of serious harm to prisoners like plaintiff."²⁰⁰ The Sixth Circuit held that the warden could be found liable for "abandoning the specific duties of his position—adopting and implementing an operating procedure that would require a review of the inmate's files before authorizing the transfers—in the face of actual knowledge of a breakdown in the proper workings of the department."²⁰¹ More recently, in *Greene v. Bowles*, the Sixth Circuit held that a prison warden could be liable for assaults on a vulnerable prisoner by a predatory inmate who had been placed in the same unit.²⁰²

Just as the Sixth Circuit found a viable claim in *Taylor* for a supervisor's failure to implement "an operating procedure" that could have prevented an inmate's sexual assault, so too has the First Circuit held supervisors liable for the failure of classification

¹⁹⁸ *Greene v. Bowles*, 361 F.3d 290, 293-94 (6th Cir. 2004) (reversing summary judgment and holding that defendant Warden Brigano could be held liable for an attack on the plaintiff because Greene's placement in protective custody "without segregation or protective measures presented a substantial risk to her safety of which Warden Brigano was aware"); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 77 (6th Cir. 1995) (reversing summary judgment and holding that defendant-warden could be liable for "disregard[ing] a risk of harm of which he was aware—by failing to adopt reasonable policies to protect inmates like Taylor").

¹⁹⁹ *Taylor*, 69 F.3d at 78-79.

²⁰⁰ *Id.* at 77.

²⁰¹ *Id.* at 81. The Court went on to hold that "[a] jury could find on the facts that Foltz personally had a job to do, and that he did not do it." *Id.* at 81.

²⁰² *Greene*, 361 F.3d at 293-94 (holding that "Greene has raised an issue of fact as to Warden Brigano's knowledge of a risk to her safety because of her status as a vulnerable inmate and because of Frezzell's status as a predatory inmate").

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and placement systems at their facilities.²⁰³ The plaintiff in *Calderon-Ortiz v. Laboy* appealed to the First Circuit when the district court dismissed the plaintiff's claim against supervisors at a pretrial detention facility for their "failure to afford adequate protection to inmates from attack by other inmates."²⁰⁴ Applying *Farmer*, the First Circuit held that the supervisors as well as the guards at the facility "could have inferred that Calderon was at risk of being sexually assaulted" based on a general risk to inmates allegedly caused by the defendants' "practice of not enforcing policies of the [Corrections Administration] to ensure that weak, vulnerable inmates are housed separately from stronger, dangerous inmates."²⁰⁵

Most recently, in 2003, the Ninth Circuit held that, in challenging his double-celled housing arrangement with a "sexually aggressive cellmate," a prisoner-plaintiff had asserted a claim of deliberate indifference sufficient to survive the defendants' summary judgment motion.²⁰⁶ The notice to the defendants in that case came from the prison's computer records, which indicated that the plaintiff's cellmate had a history of assaults and rape.²⁰⁷ Existence of those computer records was

²⁰³ Compare *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995) (holding defendant liable for "abandoning the specific duties of his position—adopting and implementing an operating procedure that would require a review of the inmate's files before authorizing the transfers"), with *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002) (reversing dismissal of plaintiff's claim that his sodomy while imprisoned was the result of the institution "not tak[ing] measures to separate and house inmates according to their safety needs and the security risks they posed").

²⁰⁴ *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002). The plaintiff brought his claim under the Fifth Amendment because he challenged the conditions of his confinement as a pre-trial detainee (on charges later dismissed) on due process grounds. The Court of Appeals faulted the district court for not applying the *Farmer* deliberate indifference standard and used that standard in its de novo review of the case. *Id.* at 62-64.

²⁰⁵ *Id.* at 66.

²⁰⁶ *Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003) (reversing summary judgment where defendants were granted qualified immunity because "a reasonable prison official could have believed the [plaintiff's] double-celling arrangement was lawful").

²⁰⁷ *Id.* at 719 ("The computer records indicate that the cellmate had anally

sufficient evidence to create a question of fact as to whether prison officials were deliberately indifferent in double-celling the inmate.²⁰⁸ Evidence such as this will become more available to prisoner-plaintiffs because of the Prison Rape Elimination Act.²⁰⁹ The facts of this Ninth Circuit case are considered below, in light of changes in prison administration that could be effected by this recent legislation.

III. THE PRISON RAPE ELIMINATION ACT OF 2003

The Prison Rape Elimination Act of 2003 (PREA) was passed unanimously by both houses of Congress and was signed into law by President George W. Bush on September 4, 2003.²¹⁰ The findings included in the Act underscore the ways in which allowing sexual assaults in prisons contradicts the goal of imprisonment—whether that goal is viewed as incapacitation,²¹¹ rehabilitation,²¹² deterrence²¹³ or retribution.²¹⁴ The PREA

raped a sixteen year-old boy, and showed his assaults on other inmates, and a threat to rape another inmate.”).

²⁰⁸ *Id.* (“Even assuming the officers in question knew only about Durrell’s cellmate, there was sufficient information from which a jury could find ‘deliberate indifference.’”).

²⁰⁹ 42 U.S.C. § 15603 (2005). Pursuant to the Act, the Bureau of Justice Statistics planned to collect administrative records from 3,269 facilities in 2004. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 1 (2004) [hereinafter BJS REPORT].

²¹⁰ Julie Samia Mair et al., *National Challenges in Population Health: New Hope for Victims of Prison Sexual Assault*, 31 J. L. MED. & ETHICS 602, 602 (2003) (describing the PREA and reviewing some of the prior literature concerning prison rape).

²¹¹ Incapacitation is a justification of prison premised on the notion that removing law-breakers from free society will prevent them from committing further criminal acts. *Cf.* 42 U.S.C. § 15601(10) (2005) (finding that “[p]rison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots”).

²¹² The penological theory of rehabilitation is that criminal offenders can be more sociable following imprisonment. *Cf.* 42 U.S.C. § 15601(1) (2005) (finding that “[v]ictims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain

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promises to make prison officials more accountable for the rapes that occur in prisons²¹⁵ by requiring them to maintain better internal records on the occurrence of rape in their facilities²¹⁶ and by urging the creation of standards for improving the management of prisons in which rapes occur.²¹⁷ The PREA affords executive bodies at the federal and state levels discretion to implement preventive programs.²¹⁸ Congress was specific, however, about

stable employment upon their release from prison”); 42 U.S.C. § 15601(6) (2005) (finding that “[p]rison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault - if they receive treatment at all”).

²¹³ Deterrence is a justification for imposing imprisonment on even non-violent criminal offenders so that they and others will abide by the law to avoid being imprisoned in the future. *Cf.* 42 U.S.C. § 15601(8) (2005) (finding that “[p]rison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released – as 600,000 inmates are each year”).

²¹⁴ The penological justification of retribution does not look forward to possibilities of future lawbreaking, but instead views imprisonment as the penalty for crimes against victims or against society, or both. *Cf.* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (holding that “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society’”) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). For an example of an inmate whose prison experience exceeded the punishment for his victimless crimes, see *Young v. Quinlan*, 960 F.2d 351, 353 (3d Cir. 1991) (prisoner convicted for using \$42 of counterfeit money sued after he was forced to perform oral sex in prison and also tested positive for HIV while in prison).

²¹⁵ 42 U.S.C. § 15602(6) (2005) (stating that one purpose of the Act is to “increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape”).

²¹⁶ Pursuant to the PREA, the Bureau of Justice Statistics shall carry out “each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape,” *id.* § 15603(a), and the PREA will also result in national standards relating to “data collection and reporting.” *Id.* § 15606(e)(2)(L).

²¹⁷ *Id.* § 15606 (establishing the National Prison Rape Elimination Commission to investigate and then recommend national standards for reducing rape in prisons.).

²¹⁸ See *supra* note 24 (quoting authors who are concerned that the ultimate utility of the PREA in addressing the problem of prison rape is contingent on the accuracy of the data it collects and the implementation of its standards in state

methods it expected prisons to employ.²¹⁹

A. The Legislation and Its Implementation

The findings included in the PREA²²⁰ indicate that Congress was concerned about the victims of prison rape²²¹ and the effects of prison sexual assault that extend to the communities to which prisoners return.²²² The PREA requires the U.S. Department of

and federal prisons).

²¹⁹ 42 U.S.C. § 15606(e) (specifying the “[m]atters [to be] included” in the National Prison Rape Reduction Commission’s recommendations for national standards to reduce rape in prisons.).

²²⁰ *Id.* § 15601 (2005) (“Congress makes the following findings . . .”).

²²¹ Congress was concerned for the victims of prison rape particularly because the victims are often young offenders serving sentences for first-time or non-violent offenses. *Id.* § 15601(4) (2005) “Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.” *Id.*

[P]rison rape occurs every day. For example, just last month, a 19-year old college student in Florida, in jail on marijuana charges, was raped by a cell mate who was being held on charges of sexual battery. This rape occurred within hours of the student being placed in his cell.

149 CONG. REC. H7764 (daily ed. July 25, 2003) (statement of Rep. Frank Wolf). For an example of a first-time nonviolent offender being raped in prison, see *Young v. Quinlan*, 960 F.2d 351, 353 (3d Cir. 1991) (prisoner convicted on counterfeiting charges for passing \$42 in fake bills, sexually assaulted). See also WILBERT RIDEAU & RON WILKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 91-92 (1992) (excerpting ANTHONY M. SCACCO, JR., RAPE IN PRISON (1975) and providing Dr. Scacco’s description of the victimization of William Laite, a former Georgia legislator who was convicted of perjury and sentenced to jail in Tarrant County, Texas).

²²² The findings in the statute state that inmates who are either victims of sexual assault or perpetrators of sexual assault are more likely to be released with sexually-transmitted diseases. 42 U.S.C. § 15601(7) (2005) (“Prison rape undermines the public health by contributing to the spread of [HIV/AIDS, tuberculosis, and hepatitis B and C] diseases, and often giving a potential death sentence to its victims.”). In 2002, the year prior to the PREA’s passage, the rate of AIDS cases in prison was three and a half times higher than outside prison. LAURA MARUSCHAK, U.S. DEP’T OF JUSTICE, HIV IN PRISONS, 2002 5 (2004) [hereinafter HIV IN PRISONS 2002], available at <http://www.ojp.usdoj>.

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Justice's Bureau of Justice Statistics to collect and analyze data on the incidence of sexual assaults in federal, state, and local correctional facilities.²²³ The Act also establishes a new congressional commission—the National Prison Rape Elimination Commission (Commission)—to study the occurrence of sexual assaults in prisons, to evaluate the responses of prison officials to these assaults, and to make recommendations for national standards for prison safety.²²⁴ With “due consideration” of the Commission’s recommendations, the Attorney General will issue a final rule with “national standards for the detection, prevention, reduction, and punishment of prison rape.”²²⁵ The PREA also provides for training and education programs for corrections officials²²⁶ as well as grants to state prison systems to further

gov/bjs/pub/pdf/hivpj02.pdf (last visited April 4, 2005). The findings also state that because of the prevalence of rape in prison, prisoners are more likely to commit further crimes when they are returned to communities. 42 U.S.C. § 15601(8) (2005) (“Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released—as 600,000 inmates are each year.”). “Inmates, often non-violent first-time offenders, come out of a prison rape experience . . . far more likely to commit violent crimes than when they entered.” 149 CONG. REC. H7764 (daily ed. July 25, 2003) (statement of Rep. Robert Scott).

²²³ BJS REPORT, *supra* note 209, at 1.

²²⁴ 42 U.S.C. § 15606 (2005). “There is established a commission to be known as the National Prison Rape Elimination Commission.” *Id.*

²²⁵ *Id.* § 15607.

Not later than 1 year after receiving the [Commission’s] report . . . the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape. . . . [B]ased upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission . . . and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.

Id.

²²⁶ *Id.* § 15604. “The National Institute of Corrections shall conduct periodic training and education programs for Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.” *Id.*

prevention and prosecution of inmate-on-inmate rape.²²⁷

The Attorney General's standards will be immediately applicable to the Federal Bureau of Prisons.²²⁸ States that receive a certification of compliance with the national standards are eligible for grant money provided for by the Act.²²⁹ Going forward, the Attorney General will annually publish a report on grantee states that are not compliant with the standards.²³⁰ Noncompliance will be punished by a five percent reduction in federal funding to a state's prison system, although states can avoid this penalty by committing the same five percent of funding toward measures that will bring the prisons into compliance with the standards in future years.²³¹

²²⁷ *Id.* § 15605.

[T]he Attorney General shall make grants to States to assist those States in ensuring that budgetary circumstances (such as reduced State and local spending on prisons) do not compromise efforts to protect inmates (particularly from prison rape) and to safeguard the communities to which inmates return. The purpose of grants under this section shall be to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape.

Id.

²²⁸ *Id.* § 15607(b). "The national standards . . . shall apply to the Federal Bureau of Prisons immediately upon adoption of the final rule." *Id.*

²²⁹ *Id.* § 15605(d)(2) (2005). "Each [grant] application . . . shall — (A) include the certification of the chief executive that the State receiving such grant — (i) has adopted all national prison rape standards that, as of the date on which the application was submitted, have been promulgated under this Act . . ." *Id.*

²³⁰ *Id.* § 15607(c)(3). "Not later than September 30 of each year, the Attorney General shall publish a report listing each grantee that is not in compliance with the national standards." *Id.*

²³¹ *Id.* § 15605(c)(2).

For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by 5 percent, unless the chief executive of the State submits to the Attorney General — (A) a certification that the State has adopted, and is in full compliance with, the national standards . . . or (B) an assurance that not less than 5 percent of such amount shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards

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Data collection under the PREA is scheduled to begin in 2006, and a report analyzing those findings will be written in 2007.²³² In developing the methodology for this data collection, the Bureau of Justice Statistics has adopted definitions of sexual violence used by the Centers for Disease Control that encompass both completed and attempted nonconsensual acts.²³³ These definitions reflect the recommendations of experienced prison rape researchers familiar with the inconsistent data that has resulted from studies that relied on self-reporting by inmates to document the occurrence of rape.²³⁴ The divergent results have in part been a result of the inconsistent definitions of sexually assaultive conduct used in surveying prisoners.²³⁵ Recognizing these limitations, the PREA supplies definitions of rape that go beyond forcible penetration.²³⁶

The PREA also established a “Review Panel on Prison Rape,” which will hold annual hearings on the results of the data collections.²³⁷ The National Prison Rape Elimination Commission

Id.

²³² BJS REPORT, *supra* note 209, at 6.

²³³ Allen Beck et al., *Implementing the 2003 Prison Rape Elimination Act in Juvenile Residential Facilities*, 66 CORRECTIONS TODAY 26 (2004).

²³⁴ BJS REPORT, *supra* note 209, at 2.

²³⁵ NO ESCAPE, *supra* note 9, at 138. “Many of the studies that found lower rates of abuse either expressly counted only incidents involving the use of physical force, or did so by implication by leaving the term ‘rape’ undefined.”

Id.

²³⁶ 42 U.S.C. § 15609(9) (2005).

The term “rape” means — (A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

Id.

²³⁷ *Id.* § 15603(b)(3).

The duty of the Panel shall be to carry out, for each calendar year, public hearings concerning the operation of the three prisons with the

also will hold hearings as it compiles its findings and formulates recommended standards.²³⁸ Under the Act's provisions, the Attorney General must publish a final rule with the national standards one year after the issuance of the Commission's report.²³⁹ Ninety days after the Attorney General's standards are released, those standards will be delivered to state heads of corrections departments.²⁴⁰ Adoption of the standards by prison

highest incidence of prison rape and the two prisons with the lowest incidence of prison rape in each [sample] category of facilities . . . The Panel shall hold a separate hearing regarding the three Federal or State prisons with the highest incidence of prison rape. The purpose of these hearings shall be to collect evidence to aid in the identification of common characteristics of both victims and perpetrators of prison rape, and the identification of common characteristics of prisons and prison systems with a high incidence of prison rape, and the identification of common characteristics of prisons and prison systems that appear to have been successful in deterring prison rape.

Id.

²³⁸ *Id.* § 15606(g). At the time of this writing, the membership of the commission is comprised of: Honorable Reggie B. Walton of the D.C. District Court, chair; James Evan Aiken, Jamie Fellner of Human Rights Watch; Nicole Stelle Garnett of University of Notre Dame Law School; John A. Kaneb of H.P. Hood, Inc.; Pat Nolan of Justice Fellowship; Gustavus Adolphus Puryear IV of Corrections Corporation of America; Brenda Smith of the Washington College of Law at American University; and Cindy Struckman-Johnson of the University of South Dakota. This list is available at the National Institute of Corrections' website, at http://www.nicic.org/Downloads/PDF/misc/prea_commission_members.pdf (last visited Mar. 26, 2005).

²³⁹ 42 U.S.C. § 15607(a)(1) (2005). "Not later than 1 year after receiving the [Commission's] report . . . the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape." *Id.*

²⁴⁰ *Id.* § 15607(a)(4).

Within 90 days of publishing the final rule . . . the Attorney General shall transmit the national standards adopted under such paragraph to the chief executive of each State, the head of the department of corrections of each State, and to the appropriate authorities in those units of local government who oversee operations in one or more prisons.

Id.

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accreditation organizations also will follow in the same year.²⁴¹

B. National Standards for Addressing Rape in Prisons

Congress set forth with extraordinary detail the matters that the National Prison Rape Elimination Commission is required to consider for recommendation as national standards.²⁴² Thus, the precise subjects of the Commission's recommendations can be anticipated. Since the passage of the PREA, the American Correctional Association (ACA) has released its own recommendations to correctional agencies²⁴³ and, in accordance with the PREA, the Commission will consider these standards in producing its report.²⁴⁴ The PREA limits the Attorney General's discretion in issuing standards by requiring that the final rule not "impose substantial additional costs" on state prison systems.²⁴⁵ Some of the methods outlined by Congress, to establish a preventive approach to rape without substantial costs, are detailed

²⁴¹ *Id.* § 15608(b)(2).

²⁴² *Id.* § 15606(e) (detailing the matters to be included in "recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape").

²⁴³ *ACA Policies and Resolutions*, 66 CORRECTIONS TODAY 68 (October 2004) [hereinafter *ACA Policy*].

²⁴⁴ 42 U.S.C. § 15606(f) (2005).

In developing recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape, the Commission shall consider any standards that have already been developed, or are being developed simultaneously to the deliberations of the Commission. The Commission shall consult with accreditation organizations responsible for the accreditation of Federal, State, local or private prisons, that have developed or are currently developing standards related to prison rape. The Commission will also consult with national associations representing the corrections profession that have developed or are currently developing standards related to prison rape.

Id.

²⁴⁵ *Id.* § 15607(a)(3). "The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." *Id.*

below.²⁴⁶

Perhaps the most effective means by which prison officials can reduce sexual assaults is to more carefully classify inmates for housing within facilities.²⁴⁷ This matter was cited by Congress as one that the Commission is charged to investigate.²⁴⁸ There are a number of inmate characteristics that wardens and guards could recognize as making inmates more susceptible to sexual assault.²⁴⁹

²⁴⁶ This note does not consider the extent to which funds could be allocated towards policies focused on the perpetrators of assaults. One method for addressing prison rapists is through criminal prosecutions for sexual assaults that occur within prisons. *Id.* § 15604 (2005) (stating that “[t]he National Institute of Corrections shall conduct training and education programs for . . . *punishment* of instances of prison rape”) (emphasis added); *see also* NO ESCAPE, *supra* note 9, at 235, 241. Human Rights Watch published a Federal Bureau of Prisons Program Statement entitled *Sexual Abuse/Assault Prevention and Intervention Programs* that includes a description of each prison supervisor’s “responsibility to ensure that the incident [of sexual assault] is referred to the appropriate law enforcement agency having jurisdiction.” *Id.* The private industry surrounding corrections has already begun to identify ways that states can spend grant money under the PREA on controlling inmates known to be threats of sexual assault. *States Slow to Design, Implement Changes after Passage of Rape Bill: Budget Constraints, Even with Assistance, Slows Process*, 9 CORRECTIONS PROF. 11 (2004). Alanco Technologies Inc., a company that sells tracking devices, is marketing a new line of their product as a way for corrections officials to track the movements of known sexual predators within their facility. *Security Firms Expect New Prison Law to Boost Product Sales*, 9 CORRECTIONS PROF. 11 (2004). Tracking devices are already being used in Ohio’s state prisons. Editorial, *No Excuse for Abuse; State Takes Necessary Action to Stop Sexual Attacks in Prisons*, COLUMBUS DISPATCH (Ohio), Mar. 13, 2004, at 12A.

²⁴⁷ JAMES AUSTIN ET AL., NAT’L INST. OF CORRECTIONS, CRITICAL ISSUES AND DEVELOPMENTS IN PRISON CLASSIFICATION 1 (2001) (“Traditional inmate classification systems have been narrowly focused on determining the custody level of inmate. . . . Very little attention has been drawn to how an inmate should be housed and programmed once the prisoner arrives at the facility.”).

²⁴⁸ 42 U.S.C. § 15606(e)(2) (2005). The Commission’s report on national standards “shall include recommended national standards relating to— (A) the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape” *Id.*

²⁴⁹ NO ESCAPE, *supra* note 9, at 63.

Specifically, prisoners fitting any part of the following description are more likely to targeted: young, small in size, physically weak, white,

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Young or slim prisoners—whether homosexual or heterosexual—face a greater risk of sexual assault in prison.²⁵⁰ Identifiable homosexuals and white inmates are also disproportionately targeted.²⁵¹ It is indeed possible to protect vulnerable inmates; for example, San Francisco has implemented rape-prevention protocols within its jail whereby officials identify potential victims and segregate them from potential predators.²⁵²

The identification of prisoners with a heightened risk of committing rape or being victimized by sexual assault is not one of the practices recommended by the American Correctional Association (ACA).²⁵³ Policies that would identify such prisoners were, however, among those previously recognized by the organization's Standards Committee and were presented to Congress upon its consideration of the PREA.²⁵⁴ The low cost of

gay, first offender, possessing "feminine" characteristics such as long hair or a high voice; being unassertive, unaggressive, shy, intellectual, not street-smart, or "passive"; or having been convicted of a sexual offense against a minor. Prisoners with any one of these characteristics typically face an increased risk of sexual abuse, while prisoners with several overlapping characteristics are much more likely than other prisoners to be targeted for abuse.

Id.

²⁵⁰ Josh Getlin, *'I'm Still Fighting'; He Suffered the Devastation of Jailhouse Gang Rape. Now, Stephen Donaldson Resolves to Stop a Crime that Others Would Rather Keep Quiet*, L.A. TIMES, May 20, 1994, at E1.

²⁵¹ NO ESCAPE, *supra* note 9, at 70-73.

²⁵² Lehrer, *supra* note 9, at 10.

²⁵³ *ACA Policy*, *supra* note 243.

²⁵⁴ *Prison Rape Reduction: Hearing on H.R. 1707 Before the House Subcomm. on Crime, Terrorism, and Homeland Sec., House Judiciary Comm.*, 108th Cong. (2003) (statement of Charles J. Kehoe, President, American Correctional Association), available at 2003 WL 11717551. Charles Kehoe gave testimony that

ACA's Standards Committee, in January 2003, finalized the adoption of several specific standards that are intended to significantly impact sexual misconduct and prison rape. Working closely within and outside the corrections profession, the Standards Committee adopted standards: I. to revise the intake screening requirements for all offenders to *specifically identify* those who are vulnerable or have tendencies to act out with sexually aggressive behavior; . . . III. to require that offenders

this type of policy in relation to its potential effectiveness in reducing rape among cellmates necessitates strong consideration of this practice from the National Prison Rape Elimination Commission.²⁵⁵ Prison segregation policies have been challenged in the past, notably by inmates with HIV, on the grounds that while placed in segregated housing, prisoners are denied privileges granted to other inmates.²⁵⁶ These challenges have been unsuccessful,²⁵⁷ and presumably, segregating vulnerable and predatory inmates also would be deemed constitutionally sound.²⁵⁸

with history of sexually assaultive behavior are. . . *identified*, monitored and counseled; and, IV. to require that offenders at risk for victimization are *identified*, monitored and counseled.

Id. (emphasis added).

²⁵⁵ 42 U.S.C. § 15607(a)(3) (2005) (“The Attorney General shall not establish a national standard . . . that would impose substantial additional costs”); AUSTIN, *supra* note 247, at 1 (“The most dramatic impact of objective classifications systems has been the economic benefits reaped from our ability to place larger proportions of the inmate in lower custody levels without jeopardizing inmate, staff, or public safety.”); NO ESCAPE, *supra* note 9, at 146-47 (describing the implementation in North Carolina of a pilot program whereby prisoners were classified by their risk of being a perpetrator or victim of rape and this classification was considered in their housing assignments); Scott Canon, *Progress Lags Despite New Legislation to Stop Prison Rape*, KAN. CITY STAR, Mar. 22, 2004, at 1 (describing “a more careful sorting of predator from prey” as a “relatively inexpensive” method of preventing sexual assaults in prison).

²⁵⁶ Jin Hee Lee, *Excerpts from a Jailhouse Lawyer’s Manual, Fifth Edition: Chapter 22: AIDS in Prison*, 31 COLUM. HUM. RTS. L. REV. 355, 378-80, 383-86 (2000) [hereinafter *Jailhouse Lawyers’ Manual AIDS*].

²⁵⁷ *Onishea v. Hopper*, 171 F.3d 1289, 1292 (11th Cir. 1999) (affirming dismissal of claims that “HIV-positive inmates are unable to participate in many programs and activities with the HIV-negative, general population”).

²⁵⁸ A Supreme Court decision this term regarding segregation of prisoners by race will affect only inmate classifications that are based on race. *Johnson v. California*, 125 S. Ct. 1141 (2005). The Court held that strict scrutiny should be applied to the California Department of Corrections’ policy of double-celling inmates according to racial classifications, to prevent violence by “racial gangs.” *Id.* at 1144. In reaching its decision, the Court maintained that the deferential standards of review of prison regulations established in *Turner v. Safley*, 482 U.S. 78 (1987), continues to be applicable to other sorts of classifications. *Johnson*, 125 S. Ct. at 1149. The Court held “[w]e have never applied *Turner* to

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The Commission also will recommend standards for the implementation of a “system for reporting incidents” of rape in prisons.²⁵⁹ The ACA recommends that facilities “[f]oster an environment in which the reporting of sexual assaults behavior is encouraged and reports may be made without fear of reprisal.”²⁶⁰ For example, the Ohio Department of Rehabilitation and Correction has responded to the passage of the PREA with plans to establish confidential means by which inmates may report assaults or threats, possibly through the use of a free phone line.²⁶¹ The Bureau of Justice Statistics’s data collection will create a model of one method by which prisons may solicit reports of assault privately and confidentially. The Bureau is developing Audio Computer-Assisted Self-Interviews, which are computer questionnaires that encourage inmates to report victimization by neither requiring that reports be made in writing nor requiring revelations to prison staff.²⁶² Although studies of the effectiveness of this method are to be conducted in only a small number of prisons, if effective, these computer systems may provide a means for inmates to file confidential grievances.

Another matter for consideration requested by Congress is for improved training of corrections staff.²⁶³ The ACA recommended that prisons provide training to staff and inmates on how prisoners can protect themselves against assault.²⁶⁴ Training of this kind is

racial classifications. . . . [W]e have applied *Turner*’s reasonable-relationship test *only* to rights that are inconsistent with proper incarceration.” *Id.* at 1149.

²⁵⁹ 42 U.S.C. § 15606(e)(2)(K) (2005). The Commission shall recommend standards relating to “creating a system for reporting incidents of prison rape that will ensure the confidentiality of prison rape complaints, protect inmates who make prison rape complaints from retaliation, and assure the impartial resolution of prison rape complaints.” *Id.*

²⁶⁰ *ACA Policy*, *supra* note 243, at 70.

²⁶¹ Alan Johnson, *Inmate-Staff Relationships: Efforts Under Way to End Illegal Sex*, *Prison Chief Says*, COLUMBUS DISPATCH, Mar. 18, 2004, at 3B.

²⁶² BJS REPORT, *supra* note 209, at 2.

²⁶³ 42 U.S.C. § 15606(e)(2)(H) (2005). The Commission shall recommend standards for “the training of correctional staff sufficient to ensure that they understand and appreciate the significance of prison rape and the necessity of its eradication.” *Id.*

²⁶⁴ *ACA Policy*, *supra* note 243, at 70.

currently being developed by the National Institute of Corrections.²⁶⁵ The PREA requires the National Institute of Corrections to make “periodic” training and education available to “Federal, State and local authorities.”²⁶⁶

The PREA also calls for the Commission to recommend improved follow-up procedures for prisons to undertake in response to incidents of rape, including “the preservation of physical and testimonial evidence,” “physical examination and treatment,” and “medical testing measures for reducing the incidence of HIV transmission due to prison rape.”²⁶⁷ These measures might raise privacy concerns for prison rape victims, particularly those who contract HIV from a sexual assault;²⁶⁸ however, courts have given prisons wide discretion in testing prisoners for HIV.²⁶⁹ If a prison pursues medical testing “for reducing the incidence of HIV transmission due to prison rape,”²⁷⁰

²⁶⁵ *NIC Offers Training on Prison Rape Legislation*, 10 CORRECTIONS PROFESSIONAL 3 (Oct. 8, 2004).

²⁶⁶ 42 U.S.C. § 15604 (2005) (“The National Institute of Corrections shall conduct periodic training and education programs for Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.”). Ohio has begun conducting these trainings for its prison staff, as well as offer orientations on prison rape to its inmates. Editorial, *No Excuse for Abuse; State Takes Necessary Action to Stop Sexual Attacks in Prisons*, COLUMBUS DISPATCH, Mar. 13, 2004, at 12A.

²⁶⁷ 42 U.S.C. §§ 15606(e)(2)(C), 15606(e)(2)(F) (2005).

²⁶⁸ For discussion of testing and segregation of inmates with HIV and legal claims that those practices raise, see Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 45 (1995). A study in New York State’s prisons justified mandatory HIV testing because it “revealed that many inmates did not accept voluntary testing because they denied or underestimated the seriousness of their risk factors.” THEODORE HAMMETT, U.S. DEP’T OF JUSTICE, PUBLIC HEALTH/CORRECTIONS COLLABORATIONS: PREVENTION AND TREATMENT OF HIV/AIDS, STDs, AND TB 1 (July 1998), available at <http://www.ncjrs.org/pdffiles/169590.pdf>.

²⁶⁹ *Jailhouse Lawyer’s Manual AIDS*, *supra* note 256, at 372-75 (discussing prisoner challenges to involuntary HIV-testing programs). *Id.* at 377-80 (discussing privacy claims brought by HIV-positive inmates).

²⁷⁰ 42 U.S.C. § 15606(e)(2)(F) (2005). The Commission shall recommend national standards relating to “educational and medical testing measures for

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as the PREA states, the prison's interest will outweigh prisoners' own personal rights.²⁷¹ The Commission therefore might recommend that prison medical facilities perform thorough examinations and testing of prison rape victims, both immediately following a sexual assault and weeks or months afterward.

IV. ANALYSIS

The Attorney General's final rule adopting national standards pursuant to the PREA will be published by 2008.²⁷² Federal courts

reducing the incidence of HIV transmission due to prison rape." *Id.*

²⁷¹ A Fourth Amendment challenge was made on the grounds that HIV testing was an illegal search, in a Tenth Circuit case, *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989). The prison's interest in providing treatment for HIV outweighed the prisoners' expectation of privacy and the search was held to be constitutional. *Id.* at 1193-94. Comparing AIDS tests to drug tests the Tenth Circuit held that "[i]n light of the seriousness of the [AIDS] disease and its transmissibility, we conclude that the prison has a substantial interest in pursuing a program to treat those infected with the disease. . . . The alleged lack of a current medical response to the problem does not mandate this court's forbidding prison officials from continuing to collect information on the spread of AIDS within prison walls." *Id.* at 1196. Courts have likewise not shown concern for the violation of a constitutional right to privacy when the results of HIV tests became known to other prisoners by disclosure from prison staff. *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995). In considering a defendant's qualified immunity from suit, the Seventh Circuit considered "whether a prisoner has a constitutionally protected right to the concealment of his HIV-positive status from prison staff. We doubt that he has such a right; we are sure that right was not clearly established in 1992." *Id.* at 526. Likewise, disclosure of a prisoner's HIV-positive status is not a valid claim for relief when the disclosure comes from the segregation of HIV-positive inmates. *Tokar v. Armontrout*, 97 F.3d 1078 (8th Cir. 1996) (affirming summary judgment against plaintiff, an HIV-positive inmate who challenged his segregation).

²⁷² 42 U.S.C. § 15606(d)(3)(A) (2005).

Not later than 2 years after the date of the initial meeting of the Commission, the Commission shall submit a report on the study carried out under this subsection to— (i) the President; (ii) the Congress; (iii) the Attorney General; (iv) the Secretary of Health and Human Services; (v) the Director of the Federal Bureau of Prisons; (vi) the chief executive of each State; and (vii) the head of the department of corrections of each State.

should be secure in finding deliberate indifference on the part of prison custodians if rape persists in correctional facilities beyond that time.²⁷³ The PREA expresses Congress's intent to "increase accountability of prison officials who fail to detect, prevent, reduce and punish rape"²⁷⁴ and to protect inmates' Eighth Amendment rights.²⁷⁵ Prison administrators should be considered on notice that Congress expects them to "make the prevention of prison rape a top priority"²⁷⁶ by "establish[ing] a zero-tolerance standard for the incidence of prison rape."²⁷⁷ As greater knowledge regarding the prevention of prison rape becomes available throughout the U.S. correctional system, indifference will be the only explanation prisons officials have for not taking effective steps to prevent sexual assaults in the facilities they supervise.

Two lawsuits currently pending in the federal courts provide a lens through which to view the potential impact of the PREA on the outcome of prisoners' rights cases.²⁷⁸ The implementation of the PREA will provide inmates who are vulnerable to rape with better records of the harms suffered by victims of sexual

Id. The Attorney General's final rule will be issued the following year. 42 U.S.C. § 15607(a)(1) (2005) ("Not later than 1 year after receiving the [Commission's] report . . . the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape."). The National Prison Rape Elimination Commission met on March 31, 2005. *Expert Panel Addresses Prison Sexual Assaults*, SOUTH BEND TRIBUNE (Indiana), Mar. 25, 2004, at B2 (reporting on a meeting of the Commission held at Notre Dame University).

²⁷³ One stated purpose of the PREA is to "make the prevention of prison rape a top priority in each prison system." 42 U.S.C. § 15602(2) (2005).

²⁷⁴ *Id.* § 15602(6). "The purposes of this Act are to . . . (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape." *Id.*

²⁷⁵ *Id.* § 15602(7). "The purposes of this Act are to . . . (7) protect the Eighth Amendment rights of Federal, State, and local prisoners." *Id.*

²⁷⁶ *Id.* § 15602(2). "The purposes of this Act are to . . . (2) make the prevention of prison rape a top priority in each prison system." *Id.*

²⁷⁷ *Id.* § 15602(1). "The purposes of this Act are to . . . (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States." *Id.*

²⁷⁸ *Durrell v. Cook*, 71 Fed. Appx. 718 (9th Cir. 2003); *Brown v. Scott*, 329 F. Supp. 2d 905 (E.D. Mich. 2004).

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assaults,²⁷⁹ and with more effective administrative processes for reporting threats.²⁸⁰ Thus, for victims of preventable prison rapes, deliberate indifference of supervisors will be easier to establish in civil suits, despite the traditional deference granted to prison managers by courts.²⁸¹ Finally, the PREA and the standards that it will generate should enable plaintiffs to win meaningful remedies that will serve to prevent prison rape in the future.²⁸²

A. Two Current Litigants: Paul Durrell and Gary Brown

Prisoner Paul Durrell brought suit under Section 1983 for the violation of his Eighth Amendment rights.²⁸³ He claims that mental and physical injuries resulted from an attack by his “aggressive homosexual” cellmate.²⁸⁴ The district court hearing his claim granted summary judgment for the defendants,²⁸⁵ holding that Durrell’s injuries were not caused by the defendants’ deliberate indifference.²⁸⁶ In August 2003, the Ninth Circuit reversed this decision on the grounds that an issue of material fact existed as to whether the defendants knew of and disregarded “conditions posing a substantial risk of serious harm” to Durrell.²⁸⁷ The court’s decision was based on information about Durrell’s cellmate that

²⁷⁹ 42 U.S.C. § 15606(e)(2)(C) (2005). The Commission shall recommend national standards relating to: “the preservation of physical and testimonial evidence for use in an investigation of the circumstances relating to the rape.” *Id.*

²⁸⁰ *Id.* § 15606(e)(2)(K). The Commission shall recommend national standards relating to: “creating a system for reporting incidents of prison rape that will ensure the confidentiality of prison rape complaints, protect inmates who make prison rape complaints from retaliation, and assure the impartial resolution of prison rape complaints.” *Id.*

²⁸¹ See *infra* Part III.C.

²⁸² See *infra* Part III.D.

²⁸³ *Durrell v. Cook*, 71 Fed. Appx. 718 (9th Cir. 2003).

²⁸⁴ *Id.* at 719.

²⁸⁵ *Id.* Defendants in the case include the director of the state department of corrections, warden of the prison, “Captain of Housing Assignment” at the facility, and others. *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

was available to the defendants. Records in the prison's computer database revealed that Durrell's cellmate "had anally raped a sixteen year-old boy, and showed his assaults on other inmates, and a threat to rape another inmate."²⁸⁸ The case was remanded to the trial court, providing Durrell with the opportunity to prove that the defendant prison officials and staff had caused him to be housed "with a sexually aggressive cellmate" and that this deliberate indifference to his safety caused his injury.²⁸⁹

Gary Brown, also a state inmate, is bringing a pro se complaint under Section 1983 claiming that the supervisor of his cellblock was deliberately indifferent to his health and safety and thus deprived him of his Eighth Amendment rights.²⁹⁰ In 2004, a district court denied a motion to dismiss his case as well as a motion for summary judgment based on the supervisor's qualified immunity.²⁹¹ Brown's complaint is that the defendant denied his request for a new cell assignment, which Brown made in light of warnings by other prisoners that his newly assigned cellmate had forced other inmates into performing sexual acts.²⁹² The prison had a policy of not double-celling inmates designated as potential rapists, but the prison's file on Brown's cellmate did not indicate that he was a threat.²⁹³ Three days after Brown's request was disregarded, he was sexually assaulted by his cellmate.²⁹⁴ He brought a complaint requesting damages as well as declaratory and injunctive relief.²⁹⁵

²⁸⁸ Durrell v. Cook, 71 Fed. Appx. 718, 719 (9th Cir. 2003).

²⁸⁹ *Id.* at 720.

²⁹⁰ Brown v. Scott, 329 F. Supp. 2d 905 (E.D. Mich. 2004).

²⁹¹ *Id.* at 906.

²⁹² *Id.* at 907.

²⁹³ *Id.* For the cellmate to be classified as a "homosexual predator" who could not be double-celled, required that his file have a documented conviction, finding of guilt on a major misconduct, or other verifiable supporting documentation contained in the prisoner's file (e.g. jail reports) which establishes the use of force or threat of force to commit or attempt to commit a non-consensual sexual act with a victim of the same sex who is at least 14 years of age.

Id.

²⁹⁴ *Id.*

²⁹⁵ *Id.* "The plaintiff requests in his complaint the issuance of declaratory

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B. Prevention of Inmate-on-Inmate Sexual Assaults

As the PREA is implemented, prisoners' safety from sexual assault will become a greater priority for prison managers and staff, and inmates will find it easier to notify guards about preventable rapes. National standards will be set for reporting systems that inmates may use to notify prison staff of threats to their safety.²⁹⁶ Standards will also be established for appropriate staff responses to reports of threats of rape.²⁹⁷ If the defendant in Brown's case was acting under a national standard for the thorough "investigation and resolution of complaints,"²⁹⁸ as provided for by the PREA, Brown's assault would have been prevented. Both Brown and Durrell would also have been protected by a standard for "the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape," as prescribed by the PREA.²⁹⁹

In a few federal circuits it already appears to be the law that vulnerable prisoners should not be assigned housing with potentially threatening cellmates.³⁰⁰ The PREA will prevent rapes by making more considered inmate classifications standard practice. In Durrell's case, the prison's own records revealed that his cellmate had a history of sexual assault.³⁰¹ In accordance with a national standard on cell assignments designed to reduce inmate-on-inmate rapes, such information would be accurate and would regularly be consulted prior to a prisoner's placement in housing, rather than be consulted only in preparation for a civil trial. The

and injunctive relief, as well as compensatory and punitive damages." *Id.*

²⁹⁶ 42 U.S.C. §§ 15606(e)(2)(J), 15606(e)(2)(K) (2005).

²⁹⁷ *Id.* § 15606(e)(2)(H).

²⁹⁸ *Id.*

²⁹⁹ *Id.* § 15606(e)(2). The Commission's report on national standards "shall include recommended national standards relating to— (A) the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape" *Id.*

³⁰⁰ See *supra* Part II.C.

³⁰¹ *Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003) (noting that "the computer records indicate that [the cellmate] had anally raped a sixteen year-old boy, and showed his assaults on other inmates, and a threat to rape another inmate").

guard in Brown's case followed minimal investigative procedures and distinguished Brown's request for protection from a request for a cell reassignment.³⁰² Brown needed to rely upon the guard in his case to consider that inmate protection is related to cell assignments.³⁰³ Under the PREA's standards, the duty-to-protect prisoners from sexual assault ought to be implicit in every cell assignment.³⁰⁴

C. Liability for Failing to Protect Inmates from Preventable Sexual Assaults

The PREA's standards for improved prison management will entail more specific duties for prison supervisors to prevent inmate-on-inmate rapes, and the data generated by studies under the statute will help prisoners enforce those duties through litigation. As a result of the PREA's acknowledgement of *Farmer*

³⁰² *Brown v. Scott*, 329 F. Supp. 2d 905, 907-08 (E.D. Mich. 2004).

[T]he cellmate was eligible to be placed in a multiple occupancy setting. Under the [state prisons'] policy, a prisoner designated as a homosexual predator could not be placed in a "double-bunked" cell or room. . . . Pursuant to [state] policy, a prisoner who requests protection shall immediately be placed in a temporary segregation cell or other suitable location. . . . However, according to the defendant, the plaintiff did not seek protection, but rather he requested a change in cell assignment

Id.

³⁰³ *Id.* at 907-08.

The defendant reviewed the plaintiff's cell mate's file and found that the cell mate was not designated a homosexual predator, and pursuant to Michigan Department of Correction (MDOC) policy, the cellmate was eligible to be placed in a multiple occupancy setting. . . . The defendant states that had [Brown] requested protection, the plaintiff immediately would have been removed from his cell pursuant to MDOC policy.

Id.

³⁰⁴ 42 U.S.C. § 15606(e)(2) (2005). The Commission's report on national standards "shall include recommended national standards relating to— (A) the classification and assignment of prisoners . . . in a manner that limits the occurrence of prison rape." *Id.*

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and of the Eighth Amendment concerns that arise when prisoners are not protected against rape,³⁰⁵ supervisors will be responsible for using the newly standardized practices to prevent against sexual assault within their facilities.³⁰⁶ Those standards will be useful to prisoners as plaintiffs when prison officials claim qualified immunity, requiring inmates to show that the officials' conduct was objectively unreasonable.³⁰⁷ Information from the data collections ordered by the PREA will also assist prisoners in overcoming the Prison Litigation Reform Act's presumption against the sufficiency of inmates' claimed injuries.³⁰⁸ Inmate rape victims will bring more successful lawsuits when the new data and the new standards are used, in combination, to prove the objective and subjective prongs of the *Farmer* deliberate indifference standard.³⁰⁹

After the Attorney General issues a final rule on standards for the prevention of prison rape, prison managers will have the duty to implement practices recommended for the prevention of sexual assault within their facilities.³¹⁰ For example, in light of standards for the implementation of more thorough classification and cell-assignment systems, supervisors will have a duty to put such systems into place.³¹¹ Supervisory liability could attach if an

³⁰⁵ *Id.* § 15601(13). “In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.” *Id.* (citation omitted).

³⁰⁶ *Id.* § 15602(6) (stating that one purpose of the PREA is to “increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape”).

³⁰⁷ See *supra* text accompanying notes 54-58 (discussing qualified immunity as a defense to § 1983 suits).

³⁰⁸ See *supra* text accompanying notes 106-09 (discussing the PLRA’s injury requirements).

³⁰⁹ See *infra* text accompanying notes 325-42.

³¹⁰ 42 U.S.C. § 15602(6) (2005) (stating that one purpose of the PREA is to “increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape”).

³¹¹ *Id.* § 15606(e)(2). The Commission’s report on national standards “shall include recommended national standards relating to— (A) the classification and assignment of prisoners . . . in a manner that limits the occurrence of prison

improper housing assignment is made by an inadequately trained subordinate.³¹² Similarly, if the Attorney General's standards require improved reporting systems, supervisors will be responsible for maintaining truly effective systems for evaluating reports of sexual abuse.³¹³ This is important for prisoners as plaintiffs because the Prison Litigation Reform Act requires that use of the prisons' complaint processes be exhausted before legal redress can be sought.³¹⁴ If inmates can report fears of rape confidentially and more easily as a result of the PREA, this requirement of prison litigation will be more easily met.³¹⁵

Having stated proper legal claims, both Durrell and Brown still faced obstacles in sustaining suits against supervisors at their facilities, rather than lower-level staff.³¹⁶ Lawsuits brought by rape

rape." *Id.*

³¹² See *supra* Part II.C (discussing claims of this kind).

³¹³ 42 U.S.C. §§ 15606(e)(2)(J), 15606(e)(2)(K) (2005).

³¹⁴ *Id.* § 1997(e) (2005); see also *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004) (holding, in a prisoner-rape case, that an inmate must pursue timely grievances in accordance with the prison system's formal process in order for the court to consider administrative remedies exhausted). "As a general matter, courts typically use a standard according to which a grievance should give prison officials 'fair notice' of the problem that will form the basis of the prisoner's suit." *Id.* at 516.

³¹⁵ Compare 42 U.S.C. § 15606(e)(2)(K) (requiring recommendations for national standards for "creating a system for reporting incidents of prison rape that will ensure the confidentiality of prison rape complaints, protect inmates who make prison rape complaints from retaliation, and assure the impartial resolution of prison rape complaints"), and *id.* at § 15606(e)(2)(B) (requiring recommendations for national standards for "the investigation and resolution of rape complaints by responsible prison authorities, local and State police, and Federal and State prosecution authorities"), with 42 U.S.C. § 1997e (2005) ("No action shall be brought with respect to prison conditions under [section 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

³¹⁶ Though the Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment for all defendants in Paul Durrell's case, the reversing decision stated that "[o]n remand, the district court is not precluded from dismissing those defendants who had no personal involvement in housing Durrell." *Durrell v. Cook*, 71 Fed. Appx. 718, 720 (9th Cir. 2003). Gary Brown's original complaint named other prison officials as defendants, but all of

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victims against prison supervisors and state correctional officials are often defeated through summary judgments based on the immunity of the sued officials;³¹⁷ however, the standards that result from the PREA will prove useful in defeating the defense of qualified immunity. Prison officials are granted qualified immunity if a reasonable official in the same circumstances would not be aware that his conduct violated a clearly-established right.³¹⁸ The *Farmer* decision established that being deliberately indifferent to a prisoner's protective needs in the face of a threat of rape violates a clearly established Eighth Amendment right. Qualified immunity will be denied, however, only when this right is violated in circumstances that make an official's conduct objectively unreasonable.³¹⁹ The issue that remains to be proven by plaintiffs such as Durrell and Brown is whether prison supervisors acted unreasonably in addressing circumstances that threatened their right to be free from cruel and unusual punishment. The PREA's national standards will provide courts with criteria outlining what an objectively reasonable corrections official would do with the knowledge that prison rapes occur in the prison system they supervise.³²⁰ If the Attorney General's standards are accepted as indicia of reasonable efforts to prevent prison rape, then noncompliance with those standards could strip officials of immunity when they are deliberately indifferent to sexual assault

the defendants other than the one official to whom he reported were dismissed. *Brown v. Scott*, 329 F. Supp. 2d 905, 907 (E.D. Mich. 2004).

³¹⁷ For discussion of the pervasiveness of summary judgments in prison rape litigation, see 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).

³¹⁸ *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

³¹⁹ *Id.* at 202. When a clearly-established right is violated, defendant officials are denied qualified immunity where "it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted." *Id.*

³²⁰ 42 U.S.C. § 15606(e)(2)(B) (requiring the Commission to recommend national standards relating to "the investigation and resolution of rape complaints by responsible prison authorities"); *id.* § 15606(e)(2)(H) (requiring the Commission to recommend national standards relating to "the training of correctional staff sufficient to ensure that they understand and appreciate the significance of prison rape and the necessity of its eradication").

in the facilities that they manage.³²¹

Likewise, the PREA will make knowledge about the threat of prison rape sufficiently widespread that awareness of the information generated by the Act may be imputed to reasonable officials. The legislation calls for standards that will provide for “the training of correctional staff sufficient to ensure that they understand and appreciate the significance of prison rape and the necessity of its eradication.”³²² Under this standard, every reasonable prison guard will recognize sexual assault as a rights violation and know of his duty to prevent it. Supervisors of corrections systems will have knowledge of best practices for preventing rape in the prisons they oversee because the reports of the National Prison Rape Elimination Commission and the final rule on standards issued by the Attorney General will both be sent directly to state departments of corrections.³²³ The administrative data collection ordered by the PREA also will establish that reasonable corrections officials should know the objective indicators that prisoners are vulnerable to rape in their facilities.³²⁴

³²¹ Cf. Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 705-06 (2004) (discussing the use of a Department of Justice report as evidence rebutting the defendants’ motion of summary judgment based on qualified immunity). The Supreme Court “concluded that, although the DOJ’s views were not binding, nor were they communicated to the particular officers in question, the recommendations against the officers’ actions were enough to lead a reasonable officer to realize that [the alleged conduct] was a violation of the Eighth Amendment.” *Id.*; see also Alison Chin, *Hope v. Pelzer: Increasing the Accountability of State Actors in Prison Systems – A Necessary Enterprise in Guaranteeing the Eighth Amendment Rights of Prison Inmates*, 536 U.S. 730 (2002), 93 J. CRIM. L. & CRIMINOLOGY 913, 946 (2003) (arguing that *Hope v. Pelzer* “expanded the sources of fair notice in its inclusion of the DOJ [report]”).

³²² 42 U.S.C. § 15606(e)(2)(H) (2005).

³²³ *Id.* § 15606(d)(3)(A) (instructing the Commission to submit its “Comprehensive Study of the Impacts of Prison Rape” to “the head of the department of corrections of each state”); *id.* § 15607(a)(4) (instructing the Attorney General to submit the final rule on national standards on prison rape reduction to “the head of the department of corrections of each state”).

³²⁴ “The 2004 administrative collection will provide an understanding of what corrections officials know, what information is recorded, how allegations

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Beyond defeating claims for qualified immunity, these same reports and standards may be used to establish an official's liability for deliberate indifference.

Under the *Farmer* deliberate indifference standard, prison officials cannot be held liable for failing to prevent a violation of an inmate's rights unless they first are found to have been aware of "conditions posing a substantial risk of serious harm" to prisoners.³²⁵ The information that is generated under the PREA will buttress prisoner claims under this objective prong of the standard.³²⁶ The Commission will report on the effects of prison rape on victims generally, thus further establishing the serious harm that a risk of rape creates.³²⁷ Additionally, the increased availability of data confirming the connection between prison rape and the spread of HIV among prisoners could create a presumption that a risk of sexual assault poses a risk of serious harm.³²⁸

and confirmed incidents are handled." BJS REPORT, *supra* note 209, at 3. 42 U.S.C. § 15603(b) (2005) (mandating that the Review Panel on Prison Rape hold hearings for "the identification of common characteristics of prisons and prison systems with a high incidence of prison rape").

³²⁵ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "For a claim (like the one here) 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.* (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

³²⁶ 42 U.S.C. § 15606(d) (2005). Congress detailed matters to be included in the Commission's study:

Comprehensive Study of the Impacts of Prison Rape . . . an assessment of the extent to which the incidence of prison rape contributes to the spread of sexually transmitted diseases and to the transmission of HIV; . . . an assessment of the impacts of prison rape on individuals, families, social institutions and the economy generally, including an assessment of the extent to which the incidence of prison rape contributes to recidivism and to increased incidence of sexual assault; . . . an assessment of the general relationship between prison rape and prison violence.

Id.

³²⁷ *Id.* § 15606(d).

³²⁸ "[In 2001, t]he percentage of deaths due to AIDS was more than 2 times higher in the prison population than in the U.S. general population ages 15-54. In 2001 about 1 in every 10 prisoner deaths were attributable to AIDS-related causes compared to 1 in 22 deaths in the general population." HIV IN PRISONS

Increased information about the effects of prison rape will aid prisoners in meeting the requirements of the PLRA, which they must do or else have their claim dismissed.³²⁹ One requirement of the PLRA is that inmates claiming mental or emotional injuries must provide evidence of physical injury.³³⁰ For a plaintiff such as Brown, whose aggressor did successfully rape him, a claim of emotional distress relies not just on the existence of evidence of his physical injury but also on evidence that psychological effects generally occur from prison rape. When implemented, the PREA will provide such evidence.³³¹ In contrast, Durrell claimed that he suffered mental injuries from an attempted sexual assault.³³² A

2002, *supra* note 222, at 7. In New York's state prison system, where roughly eight percent of prisoners are known to be HIV-positive, awareness of incidents of rape should be considered knowledge of conditions posing a substantial risk of serious harm. HIV IN PRISONS 2001, *supra* note 9, at 2; HIV IN PRISONS 2002, *supra* note 222, at 2 (finding that New York, Florida and Texas "housed nearly half of all HIV-infected inmates in state prisons in 2002"). Considering whether conditions of confinement amount to a constitutional rights violation "requires that a court assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Applying this requirement to a risk of contracting AIDS, courts would be hard pressed to reason that exposure to HIV conforms with standards of decency. See Richard D. Vetstein, Note, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U.L. REV. 863, 899-900 (1997) (discussing how the Supreme Court's standards from the "'disease' line of [prison condition] cases" could be applied to prisoner rape and the threat of HIV-infection).

³²⁹ See *supra* Part I.C. (discussing the impact of the Prison Litigation Reform Act's requirements on prisoner suits for rape).

³³⁰ 42 U.S.C. § 1997e(e) (2005). "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." *Id.*

³³¹ *Id.* § 15603(c)(2)(A). The Review Panel on Prison Rape established by the PREA will issue reports "psychological data" on "the effects of prison rape." *Id.*

³³² *Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003). "Durrell claims he was subjected to 'overwhelming mental and emotional stress' from being housed with the sexually aggressive cellmate. . . . A genuine issue of material fact exists as to whether the injury suffered by Durrell was caused by

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claim like Durrell's will be easier to sustain after the implementation of the PREA, if the Attorney General's standards instruct prison officials to conduct psychological examinations following all incidents of sexual assault, whether an assault was successful or not.³³³

By providing evidence of prison conditions at specific facilities,³³⁴ the PREA also will aid prisoners in establishing supervisory liability under the subjective prong of deliberate indifference—that a defendant official was in fact aware of the risk to inmate safety and disregarded it.³³⁵ The data collections on the incidence of sexual assaults in individual prisons will provide officials at these facilities with concrete information regarding the risks faced by inmates.³³⁶ This also will be true for state corrections departments that receive grants under the PREA.³³⁷ In

deliberate indifference to his safety." *Id.*

³³³ 42 U.S.C. § 15606(e)(2)(D) (2005) (requiring recommended standards for physical and mental examinations of inmates following sexual assault).

³³⁴ *Id.* § 15603(b). The Review Panel on Prison Rape shall hold hearings for "the identification of common characteristics of prisons and prison systems with a high incidence of prison rape." *Id.* Grantees under the PREA must report "the number of incidents of prison rape, and the grantees response to such incidents." *Id.* § 15605(e). The Commission is required to recommend national standards relating to "data collection and reporting of—(i) prison rape." *Id.* § 15606(e)(2)(L).

³³⁵ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id.

³³⁶ The reports that Congress is to receive from the Attorney General under the PREA will have prisons "ranked according to the incidence of prison rape in each institution." 42 U.S.C. § 15603(c)(2)(B) (2005). "The first facility-level measures of sexual assault using victim self-reports from a national sample of federal and state prisoners, local jail inmates, persons held in juvenile facilities, and former inmates will be collected for calendar year 2006." BJS REPORT, *supra* note 209, at 5.

³³⁷ Grantees under the PREA must prepare reports for the Attorney General

addition, the national standards should make prison authorities responsible for maintaining records not only of incidents of sexual assault, but also of inmate complaints and staff responses.³³⁸ The defendant in Brown's lawsuit was denied summary judgment because "a trier of fact could reasonably find that the defendant was aware of facts from which the inference could be drawn that a substantial risk of serious harm to the plaintiff existed."³³⁹ Inferences such as these will be more probable when reliable data exists regarding the prevalence of rape in prisons. The specificity of both the Attorney General's and the Commission's standards will ultimately determine their usefulness in holding individual supervisors accountable for deliberate indifference to prison rape. The Supreme Court noted in *Bell v. Wolfish* that the recommendations of the ACA "do not establish the constitutional minima" for prison officials' duties.³⁴⁰ Courts may, however, measure the conduct of prison officials against statewide or individual facility correctional policies.³⁴¹ The Attorney General's

that include "the number of incidents of prison rape, and the grantee's response to such incidents." 42 U.S.C. § 15605(e)(1)(A) (2005).

³³⁸ *Id.* § 15606(e)(2)(B) (requiring the Commission to recommend national standards relating to "the investigation and resolution of rape complaints by responsible prison authorities"); *id.* § 15606(e)(2)(L) (requiring the Commission to recommend national standards relating to "data collection and reporting of . . . (iii) the resolution of prison rape complaints by prison officials and Federal, State, and local investigation and prosecution authorities").

³³⁹ *Brown v. Scott*, 329 F. Supp. 2d 905, 912 (E.D. Mich. 2004) (denying the defendant's motions for dismissal and for summary judgment based on qualified immunity).

³⁴⁰ *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (stating that "while the recommendations of these various groups [including the American Correctional Association] may be instructive in certain cases, they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question").

³⁴¹ *See Lopez v. LeMaster*, 172 F.3d 756, 761 (10th Cir. 1999); *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999) (using a jail's policy covering "Special Management Inmates" to reverse summary judgment granted to defendants by a lower court because "[a] juror could find that [defendant's] abdication of his responsibility, in the face of such a known danger to [plaintiff's] safety was a reckless dereliction of duty rising to the level of Eighth Amendment deliberate indifference"); *Skinner v. Uphoff*, 234 F. Supp. 2d 1208,

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prison rape standards should at least be persuasive evidence of the specific duties of prison officials to prevent inmate-on-inmate sexual assaults, because those standards will be adopted by all penal accreditation organizations.³⁴² The standards will be most meaningful—both for prevention and to victims who bring suits—if the standards are eventually incorporated into state correctional policies as well.

D. Remedies Available to Prisoner-Victims of Assault

Under *Farmer*, plaintiffs may sue for injunctions or damages, and this new federal legislation should assist inmates who seek either remedy.³⁴³ As a result of the PREA, more hard data will become available for inmate-plaintiffs to present as evidence, including evidence of practices that successfully reduce rape, such as the programs in place at prisons with low incidence.³⁴⁴ The standards of the Attorney General could soon take the place of expert testimony as a means of establishing for juries that wardens disregarded their duty to supervise or train prison staff.³⁴⁵ The specificity of those standards will determine whether juries can infer deliberate indifference based primarily on prison conditions

1214, 1218 (D. Wyo. 2002) (using a prison's own Administrative Regulation in granting summary judgment to the plaintiff class because the defendants failed to protect their safety).

³⁴² 42 U.S.C. § 15608 (2005).

³⁴³ *Krein v. Norris*, 309 F.3d 487, 492 (8th Cir. 2002). “A violation of the Eighth Amendment right recognized in *Farmer v. Brennan* may be the basis for an award of money damages as well as injunctive relief.” *Id.* (citing *Newman v. Holmes*, 122 F.3d 650 (8th Cir. 1997)).

³⁴⁴ The Review Panel on Prison Rape established by the PREA will issue reports to Congress identifying “institutions in the representative sample that appear to have been successful in deterring prison rape.” 42 U.S.C. § 15603(b)(3) (2005). Also, the Bureau of Justice Statistics will be collecting administrative records from 3,269 facilities in 2004. BJS REPORT, *supra* note 209, at 3.

³⁴⁵ *Daskalea v. District of Columbia*, 227 F.3d 433, 445 (D.C. Cir. 2000) (relying on an investigative committee report because no expert testimony was presented at trial, a jury found that “the misconduct/assault [against plaintiff] was effected due to, among other things, poorly trained supervisors”) (quotations omitted).

and the supervision, training or discipline in place at a particular facility.³⁴⁶

Compensatory damage awards for negligent supervision must be based on physical injuries demonstrated by plaintiffs,³⁴⁷ and the Act will assist plaintiffs in proving such injuries.³⁴⁸ For Durrell, who alleged physical injuries sustained while defending himself from an assault by his cellmate, the ability to present evidence of physical injury is critical to his case.³⁴⁹ Under the PREA, national standards mandating the performance of medical examinations after sexual assaults and the maintenance of better records, will work to preserve evidence of physical injuries.³⁵⁰ As investigations and administrative records become more thorough, compensatory damages will be more accurately calculated.³⁵¹

³⁴⁶ See *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) (holding in the case of an inmate subjected to repeated sexual assaults, “if a plaintiff presents evidence of very obvious and blatant circumstances indicating that the defendant knew the risk existed, the jury may properly infer that the official must have known”); *Ware v. Jackson County*, 150 F.3d 873, 881 (8th Cir. 1998) (holding that, on complaint against general conditions of female inmates being abused by prison staff, “the jury verdict is supported by substantial evidence of a continuing, widespread, and persistent pattern of unconstitutional conduct”).

³⁴⁷ See *supra* note 107.

³⁴⁸ 42 U.S.C. § 15606(e)(2)(C) (2005) (calling for national standards to have prisons undertake “the preservation of physical and testimonial evidence for use in an investigation of the circumstances relating to the rape”); *id.* § 15606(e)(2)(D) (calling for standards for the performance of physical and psychological examinations as follow-up to sexual assaults).

³⁴⁹ *Durrell v. Cook*, 71 Fed. Appx. 718, 719 (9th Cir. 2003). “[Durrell] claims that he was injured defending himself from his cellmate, and sought medical attention for his injury (though this is disputed).” *Id.* at 719.

³⁵⁰ 42 U.S.C. § 15606(e)(2) (The Commission’s recommendations to the Attorney General “shall include recommended national standards relating to . . . (D) acute-term trauma care for rape victims, including standards relating to— (i) the manner and extent of physical examination and treatment to be provided to any rape victim” as well as “(L) data collection and reporting of— (i) prison rape”).

³⁵¹ 42 U.S.C. § 15606(e)(2)(B) (requiring the Commission to recommend national standards relating to “the investigation and resolution of rape complaints by responsible prison authorities”); *id.* § 15606(e)(2)(L) (requiring the Commission to recommend national standards relating to “data collection and reporting”)

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With specific practice standards in place, punitive damages may become more readily available to plaintiffs and could be assessed relative to a prison's compliance with the PREA.³⁵² Credibility issues may present an obstacle to prison litigants seeking punitive damage awards.³⁵³ Thus, the extent to which a plaintiff such as Brown can demonstrate that his assault resulted from a prison's noncompliance with national standards for the conduct of corrections officers may determine his expectancy of a punitive damage award. If the Attorney General's standards reflect the subjects identified by Congress, thorough investigations of complaints such as Brown's will be required.³⁵⁴ If a defendant knowingly disregards a threat to a prisoner in contravention of a national standard, punitive damages could be awarded.

Injunctive relief and declaratory relief also will be easier to obtain once the PREA is implemented because a continuation of current practices would help to prove a likelihood of future harm.³⁵⁵ The Review Panel on Prison Rape will hold hearings for "the identification of common characteristics of prisons and prison systems with a high incidence of prison rape."³⁵⁶ In facilities where these characteristics are present, a risk of future inmate-on-inmate sexual assault could be proven. Brown sought declaratory relief in his suit and this may be an effective remedy for a prisoner at risk from his housing assignment. Admittedly, it is unlikely that a pro se complaint to challenge a cell assignment would be heard in time

³⁵² See *Daskalea v. District of Columbia*, 227 F.3d 433, 445 (D.C. Cir. 2000); *Stokes v. Delacambre*, 710 F.2d 1120 (5th Cir. 1983) (affirming jury awards for compensatory and punitive damages where defendants failed to protect plaintiff from sexual assault in jail).

³⁵³ *James v. Tilghman*, 194 F.R.D. 408, 419 (D. Conn. 1999) (affirming jury award of nominal damages for plaintiff, an inmate who was double-celled with a known sexual predator, because "there were legitimate credibility issues over plaintiff's behavior and claim for damages").

³⁵⁴ 42 U.S.C. § 15606(e)(2) (The Commission's recommendations to the Attorney General "shall include recommended national standards relating to . . . (B) the investigation and resolution of rape complaints by responsible prison authorities").

³⁵⁵ 42 U.S.C. § 15603(b) (2005).

³⁵⁶ *Id.*

for a prisoner to be spared from an assault.³⁵⁷ Where administrative grievances do not satisfactorily provide prisoners with a challenge to their cell assignments, however, prisoner suits for declaratory judgment should be accepted by courts.³⁵⁸ Under a national standard for “the classification and assignment of prisoners . . . in a manner that limits the occurrence of prisoner rape,”³⁵⁹ Gary Brown could have filed sooner for a declaratory judgment that prison officials were deliberately indifferent to his reported threat.

Inmates presently may bring class action suits for structural injunctive relief by challenging conditions at a facility.³⁶⁰ Where supervisors are held liable for failure to train, failure to supervise, or failure to discipline, it is within the authority of federal courts to grant injunctive relief to ensure that measures are taken to correct

³⁵⁷ David M. Adlerstein, Note, *In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1691 (2001) (stating that “the mean processing time of prisoner Section 1983 suits is 181 days”); *id.* (citing ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP’T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS & JAILS: A REPORT ON SECTION 1983 LITIGATION 21, 22 (1994)).

³⁵⁸ This argument is made in regard to prisoner suits for monetary damages under the PLRA in Branham, *supra* note 101.

Under [statutory predecessors of the PLRA], plaintiffs need not process a claim through an administrative tribunal if they cannot obtain the type of relief they are seeking from that tribunal. This interpretation of the exhaustion requirement, under which “administrative remedies” means something different than “administrative grievance procedures,” would also be in keeping with the different terminology found in subsections (a) and (b) of 42 U.S.C. 1997e(a). . . . The question raised by [the PLRA] is whether the deletion of the statutory predicates to exhaustion . . . means that a prisoner can be required to exhaust administrative remedies even when those remedies cannot repair or avert the harm of which the inmate complains.

Id. at 545-46.

³⁵⁹ 42 U.S.C. § 15606(e)(2) (2005).

³⁶⁰ *Skinner v. Uphoff*, 209 F.R.D. 484, 489 (D. Wyo. 2002) (granting conditional certification of class of prisoners pursuant to Fed. R. Civ. P. 23(c)(1) and holding that “[i]t is well established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member”) (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 n.9 (7th Cir. 1977)).

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Eighth Amendment violations.³⁶¹ The PREA should encourage courts to do so. The decision in *Farmer* requires that an inmate demonstrate deliberate indifference throughout litigation and into the future in order for an injunction to be granted.³⁶² However, the presence of HIV in the prisons makes a claim for equitable relief stronger, as a single exposure from a single incident of sexual assault can cause an inmate irreparable harm.³⁶³ If courts are to enforce the standards of the PREA, they will have to regard Congress's intent to *eliminate* sexual assaults.³⁶⁴ By focusing prison officials on prevention rather than liability, injunctive relief can prevent further harm where officials remain indifferent.³⁶⁵

³⁶¹ *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1218 (D. Wyo. 2002). In granting judgment for plaintiff inmates on claims that prison officials failed to protect them from assault, the court wrote:

Of course, the remedy ordered by this Court “shall extend no further than necessary to correct the violation of the Federal right,” [quoting the Prison Litigation Reform Act] but if it is necessary to enact systemic and prophylactic measures in order to correct the violations found to exist in this instance, the Court may do so.

Id. (citing 18 U.S.C. § 3626; *Hutto v. Finney*, 437 U.S. 678 (1978)).

³⁶² *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (“[T]o establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard [of a risk of assault] during the remainder of the litigation and into the future.”).

³⁶³ *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (“ . . . it is . . . unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy.”).

³⁶⁴ 42 U.S.C. § 15602 (2005).

The purposes of this Act are to —

- (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
- (2) make the prevention of prison rape a top priority in each prison system; . . .
- (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
- (7) protect the Eighth Amendment rights of Federal, State, and local prisoners . . .

Id.

³⁶⁵ *Farmer*, 511 U.S. at 846-47 (“If the court finds the Eighth Amendment’s subjective and objective requirements satisfied, it may grant

CONCLUSION

Under the Supreme Court's decision in *Farmer v. Brennan*, inmates who are raped in prison by fellow inmates may have their Eighth Amendment constitutional rights vindicated when they can show that prison officials acted with "deliberate indifference" to the threat those inmates faced. Obstacles in reporting and recording injuries, the deference typically afforded to prisons supervisors, the defense of immunity that is available to corrections officers, and the limited remedies available to prisoners have all hindered inmates in holding prison officials responsible for sexual assaults. In response to the pervasiveness of inmate-on-inmate sexual assault, Congress passed the Prison Rape Elimination Act of 2003 to collect data on the incidence of sexual abuse in correctional facilities and to create the National Prison Rape Elimination Commission, which will recommend national standards for the prevention of prison rape. In addition to relying on the implementation of this Act to relieve the threat of rape in prisons, inmates should be able to use the data and recommendations that are a result of the new federal law to bring stronger claims against prison officials who fail in their duty to protect prisoners against sexual assault by other prisoners.

appropriate injunctive relief. Of course, a district court should approach issuance of injunctive orders with the usual caution . . . by giving prison officials time to rectify the situation before issuing an injunction.") (citations omitted).